2013 IL App (2d) 110937-U
No. 2-11-0937
Order filed March 8, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. THEODORE KNOX, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Lake County. No. 90-CF-2176 Honorable James K. Booras, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant leave to file his successive postconviction petition: although defendant asserted that the petition was not successive and thus was not subject to the requirements for such petitions, that contention was forfeited, barred by the law of the case, and without merit.

¶ 2 Defendant, Theodore Knox, appeals a judgment denying his motion for leave to file a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)) (see 725 ILCS 5/122-1(f) (West 2010)). We affirm.

¶ 3 In May and June 1991, after a jury trial, defendant was convicted of two counts of first-degree murder (Ill. Rev. Stat. 1989, ch. 38, par. 9-1(a)(3)) and sentenced to life imprisonment without parole. On direct appeal, this court affirmed the judgment. *People v. Knox*, 241 Ill. App. 3d 205 (1993). On May 6, 1993, shortly after we filed our opinion, defendant filed a pleading entitled "Pro Se Petition for Relief from Judgment, or in the Alternative, for Post-Conviction Relief" (1993 petition). The 1993 petition alleged as follows. Defendant's convictions were based on the 1988 shootings of two men in the course of a robbery in which defendant participated with several other men who were later charged. After losing his direct appeal, defendant learned that, in December 1991, Ronald Walker, a key prosecution witness, had perjured himself at defendant's trial. A proceeding under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 1992)) was a proper method to raise this claim, which was based on facts that postdated the trial and thus were outside the record. Defendant requested relief under section 2-1401.

¶ 4 Paragraph 24 of the 1993 petition noted that defendant's request for relief under section 2-1401 did not preclude a request for relief on other grounds; thus, defendant "alternatively request[ed] that his conviction be vacated on the basis of section 122-1 *et seq.* of the Code of Criminal Procedure," *i.e.*, the Act. In this regard, defendant contended that the State's misrepresentation of its plea bargain with Walker had denied defendant due process.

¶ 5 On May 14, 1993, the trial court dismissed the 1993 petition. The court's order stated, "The court finds that said Petition fails to allege facts sufficient to Grant Relief From Judgment under 735 ILCS Section 2-1401 or Section 122-1 et seq. [*sic*] and that for purposes of Section 122-1 et seq. finds that said petition is frivolous." We affirmed, holding that the 1993 petition was legally

insufficient under either section 2-1401 or the Act. *People v. Blalock*, Nos. 2-93-0709, 2-93-0763, 2-93-0819 cons. (1995) (unpublished order under Supreme Court Rule 23).[1]

¶ 6 On June 21, 2001, defendant filed a *pro se* "Motion to Vacate Unconstitutional and Void Judgements [*sic*]," claiming that his life sentences violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The trial court dismissed the "motion." On appeal, defendant contended that the trial court had erred in hearing argument from the State, because the "motion" was in substance a petition under the Act. This court affirmed, explaining that, because the "motion" had not in any way invoked the Act, the trial court had been under no obligation to treat it as a postconviction petition. *People v. Knox*, 336 Ill. App. 3d 275, 278 (2003). We noted, "Defendant had invoked the Act back in 1993, and the trial court reasonably could have found that defendant did not intend to file a second petition." *Id.* at 279.

¶ 7 On November 9, 2010, defendant filed a *pro se* "Motion for Leave to File a Successive Post-Conviction Petition" (2010 motion), requesting "an order pursuant to 122-(f) [*sic*] of the Post-Conviction hearing act [*sic*] allowing petitioner a Leave [*sic*] to file a Successive Post-Conviction Petition." Section 122-1(f) reads:

> "Only one petition may be filed by a petitioner *** without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-

[1]Our order also affirmed judgments dismissing similar petitions filed by codefendants Daniel Blalock, Sr., and Oscar Parham.

conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010).

¶ 8 The 2010 motion included a summary of the proceedings on the 1993 "post-conviction petition" (using that term no fewer than six times). It raised three claims, one alleging newly discovered evidence and the other two asserting that trial counsel and appellate counsel had been ineffective. The 2010 motion alleged that defendant had shown both cause for his failure to raise his claims in the 1993 petition and prejudice from the alleged constitutional violations. However, the 2010 motion did not attach either a proposed successive petition or any affidavits, exhibits, transcripts, or other evidence, and it did not explain why no such evidence had been attached.

¶ 9 On December 16, 2010, the trial court denied the 2010 motion. The court's written order stated as follows. Under section 122-1(f), a person may file only one petition without leave of court, which may be obtained only by showing cause and prejudice. As defendant had already filed a petition under the Act in 1993, he was required to satisfy section 122-1(f). He had not done so. Crucially, the 2010 motion, which did not include a copy of the proposed petition, neither substantiated its claims with documentation nor explained the lack of documentation. Under *People v. Tidwell*, 236 Ill. 2d 150, 152 (2010), a person requesting leave to file a successive petition under the Act need not submit a proposed petition along with the request, but, if he does not, he must provide some evidentiary basis on which to decide whether he has satisfied section 122-1(f). Defendant had not done so and his "bare allegations"showed neither cause nor prejudice.

¶ 10 On January 6, 2011, defendant moved to reconsider the denial of the 2010 motion. He alleged that, although he had mistakenly failed to attach any evidence to the motion, he did have

substantial evidence to support the claims and to establish cause and prejudice. The motion to reconsider attached a proposed successive petition under the Act along with court transcripts, court orders, other excerpts from the record in defendant's trial, and affidavits.

¶ 11 On June 23, 2011, the trial court entered an order ruling as follows. First, defendant's motion to reconsider was denied: the 2010 motion had attached no documentation, a fatal deficiency under *Tidwell*. Second, the court would consider the proposed successive petition as a new motion for leave to file a successive petition under the Act. Defendant had shown neither cause nor prejudice as to any of the three claims in the proposed successive petition. Also, the proposed successive petition did not properly allege a claim of actual innocence, so defendant could not invoke that exception to the cause-and-prejudice rule. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002).

¶ 12 On July 18, 2011, defendant moved to reconsider the June 23, 2011, order. On August 30, 2011, the trial court denied the motion. On September 15, 2011, defendant filed a notice of appeal.

¶ 13 On appeal, defendant contends that the trial court erred in requiring him to show cause and prejudice in order to be allowed to file his proposed petition. He argues that section 122-1(f) did not apply at all, because he had never previously filed a petition under the Act. Defendant asserts that the 1993 petition was not brought under the Act.

¶ 14 We must first clarify the scope of this appeal. Defendant filed his notice of appeal within 30 days after August 30, 2011, when the trial court denied his July 18, 2011, motion. However, he filed the notice of appeal more than 30 days after June 23, 2011, the date that the trial court denied his motion to reconsider the order denying his 2010 motion. A timely notice of appeal is jurisdictional. *People v. Bailey*, 2012 IL App (2d) 110209, ¶ 9. A notice of appeal must be filed within 30 days after the judgment from which the appeal is taken, but, if a timely motion attacking the judgment is

filed, the notice of appeal must be filed within 30 days after the entry of the order disposing of the motion. Ill. S. Ct. R. 651(d) (eff. Dec. 1. 1984); R. 606(b) (eff. Mar. 20, 2009). Here, defendant did not appeal within 30 days after the entry of the order disposing of his motion to reconsider the denial of his 2010 motion. Therefore, that judgment is not before us, because defendant was allowed to file only one motion against that judgment. See *People v. Green*, 375 Ill. App. 3d 1049, 1052 (2007).

¶ 15 However, when defendant moved to reconsider the judgment denying his 2010 motion, he also submitted a proposed petition. The trial court treated the proposed petition as a new motion for permission to file a successive petition under the Act. On June 23, 2011, when the court denied defendant's motion to reconsider the denial of the 2010 motion, it also entered a judgment denying defendant's "new" section 122-1(f) motion. This was a new judgment against which defendant filed one timely motion on July 18, 2011. On August 30, 2011, the court denied the postjudgment motion. On September 15, 2011, defendant filed a timely notice of appeal. Therefore, we have jurisdiction to consider defendant's challenge to the judgment of June 23, 2011, which denied his "new" section 122-1(f) motion for leave to file a successive petition under the Act.[2]

¶ 16 Defendant argues that section 122-1(f) does not apply, because the proposed petition is actually his first under the Act. Thus, he maintains, the trial court was required to treat it as duly filed and to decide, within 90 days after the filing, whether the petition should be dismissed as

[2]According to defendant's jurisdictional statement, he is appealing "the dismissal of his post-conviction petition" and "[t]he judgment being appealed was entered on August 30, 2011." Neither statement is accurate. The judgment on appeal denied defendant permission to file a successive petition under the Act, and it was entered on June 23, 2011, not August 30, 2011, which is when the trial court denied defendant's motion directed against the judgment.

frivolous and patently without merit or docketed for further proceedings including the appointment of counsel (see 725 ILCS 5/122-2.1(a) (West 2010)).

¶ 17 Defendant's contention of error is fatally defective in two respects—one procedural, one substantive. The procedural defect could not be more obvious; defendant seeks reversal on a ground that he never raised in the trial court and that contradicts what he did contend there. In the trial court, defendant never contended that his proposed petition would be his first under the Act; he consistently said the opposite and proceeded accordingly. In the 2010 motion, defendant sought permission to file a "successive" petition under the Act. The title of the 2010 motion and its prayer for relief both used the term "Successive Post-Conviction Petition." The body of the 2010 motion repeatedly referred to the 1993 petition as a "post-conviction petition.[3]

¶ 18 The trial court took defendant at his word when he repeatedly said that he sought permission to file a successive petition under the Act. Defendant now contends that the court erred in refusing to decide the case on a theory that contradicted everything that he had said and done up to the time of the judgment. A party who has urged the trial court to follow a particular course of action may not contend on appeal that the court erred reversibly by doing so. *Forest Preserve District of Du Page County v. First National Bank of Franklin Park*, 2011 IL 110759, ¶ 27. Moreover, an appellant may not obtain a reversal based on a theory that was not raised in the trial court. *Campbell v. White*, 187 Ill. App. 3d 492, 505 (1989). Thus, defendant has forfeited his argument on appeal.

[3]This characterization was consistent with what this court had stated earlier. In our 1995 order, we ruled on the merits of the 1993 petition as one under the Act (as well as one under section 2-1401). In 2003, we described the 1993 petition as defendant's first petition under the Act.

¶ 19 We note that, even if we could reach the merits of defendant's appeal, we would find it devoid of merit. Defendant's claim of error raises a question of law—whether the trial court complied with statutory procedural requirements. Therefore, our review is *de novo*. *People v. Spivey*, 377 Ill. App. 3d 146, 148 (2007). Defendant's contention that he did not need leave of court to file his proposed petition hinges on his assertion that the 1993 petition was not brought under the Act. To support that novel theory, defendant relies primarily on the fact that the 1993 petition invoked section 2-1401 and fit the criteria to do so. However, that the 1993 petition was filed under section 2-1401 does not mean that it was not also filed under the Act. It was both a section 2-1401 petition and a petition under the Act. Defendant's "breath mint-candy mint" argument to the contrary is simply specious. Not only did the 1993 petition invoke the Act and seek recovery thereunder, but the trial court considered it as a petition under both section 2-1401 and the Act and ruled on the merits of the petition under both provisions. In 1993, defendant sought to recover under the Act and failed. He may not try again without leave of the trial court.

¶ 20 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 21 Affirmed.