

NOTICE

Decision filed 11/20/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 100558-U
NO. 5-10-0558
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County
)	
v.)	No. 97-CF-1232
)	
JAMES R. BEAN,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE DONOVAN delivered the judgment of the court.
Justices Goldenhersh and Spomer concurred in the judgment.

ORDER

- ¶ 1 *Held*: The circuit court properly denied defendant's motion to file a successive postconviction petition where the claims contained therein were either barred by *res judicata* or forfeited.
- ¶ 2 Defendant, James R. Bean, appeals an order by the circuit court denying him leave to file a successive petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2010)). The State Appellate Defender has been appointed to represent him. The State Appellate Defender has filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenny*, 255 Ill. App. 3d 644 (1994). Defendant was given proper notice and was granted an extension of time to file briefs, objections, or any other documents to support his appeal. Defendant filed a response. We have considered the State Appellate Defender's motion to withdraw as counsel on appeal as well as defendant's response thereto. We have examined the entire record on appeal and find no error or potential grounds for appeal. For the

following reasons, we now grant the State Appellate Defender's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of St. Clair County.

¶ 3

BACKGROUND

¶ 4 The facts underlying the slayings of which defendant was convicted are discussed at length in this court's order affirming his conviction and sentence following his direct appeal, and we see no need to repeat most of those facts here. *People v. Bean*, No. 5-00-0674 (2002) (unpublished order pursuant to Supreme Court Rule 23). Accordingly, we will recite only those facts necessary to our disposition of this appeal, which are as follows. Following a jury trial, defendant was convicted of two counts of first-degree murder for the deaths of Gerald Little and Christopher Price. The murders took place while defendant and his codefendants were attempting to commit an armed robbery. Defendant was sentenced to natural life imprisonment.

¶ 5 On direct appeal, defendant argued that the State's improper closing argument deprived him of a fair trial. Defendant's conviction was affirmed by this court. *People v. Bean*, No. 5-00-0674 (2002) (unpublished order under Supreme Court Rule 23). On August 8, 2003, defendant filed a *pro se* postconviction petition. In that petition, defendant argued that he had received ineffective assistance of both trial and appellate counsel. He alleged that his trial counsel had failed to call a potential alibi witness, failed to investigate the existence of a surveillance video from a store that defendant was accused of visiting on the day of the murders, and failed to object to jury instructions. The petition alleged that his appellate counsel had failed to raise the issue of trial counsel's ineffectiveness. The circuit court determined that defendant had presented the gist of a constitutional claim and appointed defendant counsel to file an amended postconviction petition. In his amended petition, defendant argued that trial counsel was ineffective for (1) failing to call a potential alibi witness, (2) failing to review and admit the surveillance tapes, (3) being unprepared for

trial, (4) not advising defendant about possible impeachment if he took the stand, (5) failing to attack defendant's allegedly improper arrest, (6) failing to object to jury instructions that included felony murder, and (7) failing to present evidence of defendant's mental incapacity. The amended petition also alleged prosecutorial misconduct, arguing that the State had failed to disclose a potential alibi witness and submitted improper jury instructions. After defendant filed the amended postconviction petition, the State filed a motion to dismiss. The circuit court held a hearing on the motion to dismiss, and the motion was subsequently granted. The dismissal of defendant's postconviction petition was affirmed on appeal. *People v. Bean*, No. 5-09-0038 (2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 6 On October 28, 2010, defendant filed a motion for leave to file a successive postconviction petition. The circuit court denied the motion in a written order, stating that defendant failed to demonstrate cause for his failure to bring the claim in his initial postconviction proceeding and failed to show that prejudice resulted. Defendant filed a timely notice of appeal.

¶ 7 ANALYSIS

¶ 8 The scope of a postconviction proceeding is limited to constitutional matters that have not been, nor could have been, previously adjudicated (*People v. Harris*, 224 Ill. 2d 115, 124 (2007)), and the Act contemplates the filing of only one postconviction petition (*People v. Evans*, 186 Ill. 2d 83, 89 (1999)). Consequently, all issues that were raised and decided on direct appeal are barred from further consideration by the doctrine of *res judicata*, and all issues that could have been raised but were not are forfeited. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). Likewise, all issues that were decided in the original postconviction proceedings are barred by the doctrine of *res judicata*, and all issues that could have been raised in the original postconviction proceedings but were not are forfeited. *People v.*

Anderson, 375 Ill. App. 3d 990, 1000 (2007). Strict application of the doctrine of forfeiture will be relaxed, however, where fundamental fairness so requires. *People v. Newman*, 365 Ill. App. 3d 285, 288 (2006). For a defendant to trigger the fundamental-fairness exception, he must demonstrate cause for his failure to raise the claim on direct appeal and actual prejudice resulting from the alleged error. *People v. Dominguez*, 366 Ill. App. 3d 468, 475 (2006). "Cause" refers to an objective factor that prevented defendant from raising the claim in a previous proceeding, and "actual prejudice" is a real and substantial disadvantage that so infected the entire trial that defendant's conviction violates due process. *People v. Jackson*, 205 Ill. 2d 247, 275 (2001).

¶9 The cause-and-prejudice test adopted by the supreme court in *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002), is the analytical tool used to determine whether fundamental fairness requires an exception to the statutory procedural bar of forfeiture. This cause-and-prejudice test must be applied to each claim of the successive petition. *Id.* at 462. Other than meeting the requirements of the cause-and-prejudice test, a defendant may be excused for failing to raise a claim in an earlier petition only if necessary to prevent a fundamental miscarriage of justice. *People v. McDonald*, 364 Ill. App. 3d 390, 393 (2006). To show a fundamental miscarriage of justice, a defendant must show actual innocence. *People v. Smith*, 341 Ill. App. 3d 530, 536 (2003).

¶10 Motions for leave to file a successive postconviction petition pursuant to section 122-1(f) need only state the gist of a meritorious claim of cause and prejudice. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). This is a low threshold, and a defendant's factual allegations are taken as true and are liberally construed. *Id.*

¶11 In his motion for leave to file a successive postconviction petition, defendant argued that cause was shown where trial counsel was ineffective for failing to present videographic evidence and appellate counsel was ineffective for failing to raise the claim of ineffective

assistance of trial counsel. Further, defendant alleged as "cause" that the State suppressed "favorable" evidence. Defendant argued in his motion that Detective Gerald W. Owens viewed a surveillance video from the store where defendant was alleged to have purchased items for the armed robbery on the day of the murders and that defendant was not actually in the video. He argues that his trial counsel was ineffective for not locating and reviewing the video. However, this is not the first time defendant has raised this argument. He raised it in his *pro se* supplemental motion for a new trial, at his sentencing hearing, and in his first postconviction petition—both in his original *pro se* petition and in the amended petition. We find that this claim is barred by *res judicata* because defendant presented the argument in his amended postconviction petition and the court dismissed the petition.

¶ 12 Defendant also argues that he was not in the surveillance video, that the State knew that defendant was not in the video, and that the State failed to disclose this information to defense counsel. Defendant argues that the video surveillance establishes his "actual innocence." Evidence of actual innocence must be of such a conclusive nature that it would probably change the result on retrial. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Further, evidence of actual innocence requires that the evidence must be "newly discovered," which means that the evidence was not available at a defendant's trial and he could not have discovered it sooner through due diligence. *Id.* In this case, the surveillance video is not newly discovered because defendant argued of its existence such that he raised the issue in previous proceedings. The video is not of such a conclusive nature that it would change the result of defendant's trial. This was not a close case. Even if defendant was not in the video, as he argues, there was a multitude of other evidence and testimony that pointed to defendant's guilt, including his own confession. Defendant admitted that he had been to the store in question to buy clothing used in the attempted armed robbery and murders. Therefore, defendant does not show that this evidence demonstrates "actual innocence."

¶ 13 Defendant's unfiled successive postconviction petition includes arguments about the surveillance video. Here, as before, defendant cannot show "cause" for his failure to raise this issue because defendant *did* raise this issue in prior proceedings.

¶ 14 The only issue in his unfiled successive postconviction petition that defendant has not raised previously is found in an affidavit by Emmanuel Garrett, whom defendant presents as an alibi witness. In the affidavit, dated October 23, 2010, Garrett stated that he was with defendant from around 4:45 p.m. to 8 p.m. on the night of the murders, which would place defendant elsewhere when the crimes were committed. However, this affidavit is contradicted by the record. Defendant testified, on the stand, that he was with his girlfriend the entire evening. At his sentencing hearing, defendant also named two other individuals, not Garrett, who he said would provide an alibi for him. Defendant fails to establish cause as to why he is just now presenting this information and fails to show how Garrett's affidavit could satisfy the cause-and-prejudice test. If Garrett was with defendant on the night of the crimes, defendant should have always known that he could present Garrett as an alibi witness. Defendant does not state why he did not do so. As defendant's own testimony both at trial and at his sentencing hearing contradicts Garrett's affidavit, defendant cannot satisfy the cause-and-prejudice test or show "actual innocence" through newly discovered evidence. Therefore, this argument is barred by forfeiture.

¶ 15 Finally, defendant requests that we dismiss the State Appellate Defender as counsel and appoint a new attorney. For the reasons stated above, we deny defendant's motion.

¶ 16 CONCLUSION

¶ 17 For the foregoing reasons, the motion of the State Appellate Defender to withdraw as counsel on appeal is granted, and the judgment of the circuit court of St. Clair County is affirmed.

¶ 18 Motion granted; judgment affirmed.