

NOTICE

Decision filed 11/08/13. 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.

2013 IL App (5th) 120338-U

NO. 5-12-0338

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,

Plaintiff-Appellee,

v.

RYAN M. GREENMAN,

Defendant-Appellant.

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Appeal from the
Circuit Court of
Fayette County.

No. 04-CF-146

Honorable
Allan F. Lolie,
Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in denying the defendant's second successive postconviction petition where the defendant failed to satisfy the cause-and-prejudice test or to establish actual innocence.

¶ 2 Ryan M. Greenman (the defendant) appeals from the denial, by the circuit court of Fayette County, of his *pro se* motion for leave to file a "Subsequent Petition for Post Conviction Relief and Motion to Vacate Judgment" (his third petition brought pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2010))). The petition alleged the ineffective assistance of the defendant's trial and appellate counsel with regard to his statutory speedy trial right, certain trial errors, and an unlawful search and seizure.

¶ 3 The court denied the motion. The court held that all of the claims of error raised therein had previously been decided on direct appeal or in a previous postconviction proceeding. The defendant had presented no viable claim of actual innocence, nor had he satisfied the "cause and prejudice" test for the filing of a successive postconviction petition.

¶ 4 On appeal, the defendant argues that he was denied the opportunity to properly raise ineffective assistance of his trial and appellate counsel regarding a statutory right to speedy trial, certain enumerated trial errors, and an unlawful search of, and seizure of evidence from, his vehicle. We note that the defendant proceeds *pro se* in this court. For reasons which follow, we affirm.

¶ 5 At the conclusion of a jury trial, the defendant was found guilty of possession with intent to manufacture more than 900 grams of a substance containing methamphetamine, unlawful possession of between 15 and 100 grams of methamphetamine found in his vehicle, and unlawful possession of a substance containing methamphetamine found in his wallet. On July 12, 2007, he was sentenced to serve concurrent sentences of imprisonment of 15 years, 4 years, and 1 year, respectively.

¶ 6 The defendant filed a direct appeal from his conviction in which he raised two arguments: that he was denied the effective assistance of counsel when his counsel failed to recall a witness to testify that he had planted evidence of methamphetamine manufacturing in the defendant's vehicle, and that he was denied a fair trial because the State presented irrelevant and misleading evidence to the jury. The defendant's conviction was affirmed on appeal. See *People v. Greenman*, No. 5-07-0389 (Dec. 4, 2008) (unpublished order under Supreme Court Rule 23).

¶ 7 On September 11, 2008, the defendant filed an application to proceed as a poor person and for appointment of counsel and a *pro se* motion to vacate judgment. Shortly thereafter he filed a *pro se* petition for postconviction relief. Counsel was appointed to represent him, and on May 4, 2009, counsel filed an amended petition for postconviction relief. A second amended petition was filed by the defendant's counsel on September 25, 2009. The amended and second amended petitions filed by the defendant's counsel were filed after the decision in the defendant's direct appeal.

¶ 8 The second amended postconviction petition alleged that the defendant's constitutional right to a speedy trial had been violated; that his trial counsel had been ineffective in certain enumerated ways, including their failure to move for dismissal based on the violation of the defendant's right to a speedy trial and their failure to raise the violation of the defendant's constitutional right to be free of the unlawful search of, and seizure of evidence from, his vehicle; and the unconstitutional search of, and seizure of evidence from, his vehicle.

¶ 9 On December 17, 2009, following an evidentiary hearing, the defendant's second amended postconviction petition was denied. With respect to the speedy trial issue, the circuit court found that it was waived because it could have been, but was not, raised at trial or on direct appeal. The court further held that even if not waived, the defendant's constitutional right to a speedy trial was not violated. With respect to the defendant's claim that his trial counsel was ineffective, the circuit court held that this issue had been raised on direct appeal and rejected and was therefore *res judicata* and that, in any event, the defendant's counsel had not been ineffective. With respect to the defendant's claim of a violation of his fourth amendment rights, the circuit court found that this issue had been raised at trial and rejected by the trial court.

¶ 10 The defendant appealed from the denial of his second amended postconviction petition, and on December 21, 2010, this court affirmed the circuit court. This court rejected the defendant's speedy trial argument, holding that the issue could have been raised on direct appeal but was not, and the defendant had not raised as an issue the ineffective assistance of his appellate counsel for failing to raise it. It was therefore forfeited. The court further found that, in any event, the defendant had failed to establish a violation of his constitutional right to a speedy trial. Most if not all of the delay was attributable to the defendant, and the defendant had not established any prejudice as a result of the delay.

¶ 11 With respect to the defendant's claim of ineffective assistance of counsel, this court

found that most of the enumerated claims could have been raised on direct appeal but were not. They were therefore forfeited. Furthermore, the defendant failed to present either in his petition or at the evidentiary hearing sufficient evidence of his counsels' deficiencies or how they prejudiced him. Finally, this court rejected the defendant's claim that his right to be free from unreasonable searches and seizures was violated because the circuit court had found prior to trial that the search was based on probable cause and was reasonable, a finding which the defendant had not challenged on direct appeal.

¶ 12 Thereafter, on January 18, 2011, the defendant filed a *pro se* motion for leave to file a successive postconviction petition. This motion is not included in the record on appeal. On March 7, 2011, the circuit court entered an order denying the motion. According to that order, the defendant sought to raise in his proposed successive petition the ineffectiveness of his postconviction counsel for failing to raise as an issue in the postconviction proceeding the ineffectiveness of his appellate counsel for failing to raise issues on direct appeal. The court denied leave to file the successive petition because the defendant could not establish cause for his failure to raise the claim earlier and the proposed petition failed to state a claim cognizable under the Post-Conviction Hearing Act: there is no constitutional right to effective postconviction counsel.

¶ 13 On April 25, 2012, the defendant filed a *pro se* motion seeking leave to file a "Subsequent Petition for Post Conviction Relief and Motion to Vacate Judgment." In the proposed petition, the defendant seeks to raise the following issues: the ineffective assistance of his trial and appellate counsels for failing to raise the violation of his *statutory* right to a speedy trial; the ineffective assistance of his trial counsel regarding certain enumerated "trial errors" and the ineffective assistance of his appellate counsel for failing to raise this issue on appeal; the ineffective assistance of his trial and appellate counsels for failing to challenge the violation of his right to be free from the unreasonable search of, and seizure of evidence

from, his vehicle.

¶ 14 As we have already stated, on June 28, 2012, the circuit court denied the motion. The court held that all of the claims of error raised therein had previously been decided on direct appeal or in a previous postconviction proceeding. The defendant had presented no viable claim of actual innocence, nor had he satisfied the "cause and prejudice" test for the filing of a successive postconviction petition. The defendant appeals.

¶ 15 The Post-Conviction Hearing Act provides that only one petition may be filed without leave of court. 725 ILCS 5/122-1(f) (West 2010). Leave of court may only be granted if a petitioner demonstrates cause for his failure to bring the claim in his initial postconviction proceeding and that prejudice results from that failure. 725 ILCS 5/122-1(f) (West 2010). A petitioner shows cause by identifying an objective factor that impeded his ability to raise a specific claim during his initial postconviction proceeding; a petitioner shows prejudice by demonstrating that the claim not raised during his initial postconviction proceeding so infected the trial that the resulting conviction violated due process. 725 ILCS 5/122-1(f) (West 2010).

¶ 16 In addition to the cause-and-prejudice test set forth in the statute, there is a second basis, established by the courts, on which a defendant can seek leave to file a successive postconviction petition: where there has been a fundamental miscarriage of justice, which can only be established where the defendant makes a showing of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶ 23. A showing of actual innocence can only be made by the presentation of newly discovered evidence of such conclusive character that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32. A postconviction petitioner must submit with his motion for leave to file a successive postconviction petition sufficient documentation to allow the circuit court to determine whether such a showing has been made. *Edwards*, 2012 IL 111711, ¶ 24. Thus, leave to file a successive postconviction

petition on the basis of a claim of actual innocence should be granted only when the supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted the defendant in the light of the new evidence. *Edwards*, 2012 IL 111711, ¶ 24.

¶ 17 In *People v. Edwards*, 2012 IL 111711, ¶ 30, our supreme court discussed the appropriate standard of review to use in reviewing a circuit court's determination on a motion for leave to file a successive postconviction petition. The court pointed out that generally, decisions granting or denying "leave of court" are reviewed for an abuse of discretion. *Edwards*, 2012 IL 111711, ¶ 30. But, the court pointed out, when reviewing a claim of actual innocence, *de novo* review seems more appropriate. *Edwards*, 2012 IL 111711, ¶ 30. The court found it unnecessary in *Edwards* to make any decision because under either standard of review, the defendant's claim failed.

¶ 18 In *People v. Guerrero*, 2012 IL 112020, ¶ 13, decided just two months before *Edwards*, our supreme court also discussed the appropriate standard of review of a circuit court's decision on a motion for leave to file a successive postconviction petition. The court pointed out that in *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006), the court had applied a *de novo* standard of review where the court had not made any factual findings, but had decided only that the motion itself was legally insufficient. *Guerrero*, 2012 IL 112020, ¶ 13. However, the court decided that, because in the case before it an evidentiary hearing had been held on the motion for leave at which both parties presented evidence, the circuit court necessarily had to base its ruling on the specific circumstances of the case and not on a broadly applicable rule of law. *Guerrero*, 2012 IL 112020, ¶ 13. Accordingly, the court reviewed the circuit court's decision for manifest error, which it defined as error which is clearly plain, evident, and indisputable. *Guerrero*, 2012 IL 112020, ¶ 13.

¶ 19 In the case at bar, no evidentiary hearing was held on the defendant's motion for leave

to file his subsequent postconviction petition. The court did not make any factual determinations, but decided only that the motion was legally insufficient. Accordingly, we apply *de novo* review.

¶ 20 We note initially that, although the defendant did state in his motion for leave to file a successive postconviction petition that he was making a claim of actual innocence, he submitted no supporting documentation to support such a claim. His motion contains no allegations of fact relating to newly discovered evidence. Accordingly, we can quickly dispose of the question whether the circuit court erred in denying the defendant's motion for his failure to establish actual innocence. It did not.

¶ 21 We turn then to a determination of whether the defendant has established cause for his failure to raise any of the issues in his prior postconviction petitions and if so, whether that failure prejudiced him. The defendant must show both cause and prejudice to prevail. *People v. Guerrero*, 2012 IL 112020, ¶ 15.

¶ 22 We conclude that the defendant has not identified any objective factor that impeded his ability to raise any of the claims during his initial postconviction proceeding, nor has he shown that any of the claims of error not raised during his initial postconviction proceeding so infected the trial that the resulting conviction violated due process. All of the claims of ineffective assistance of trial counsel could have been raised in the defendant's first postconviction petition. The defendant points to no objective factor that impeded his ability to raise those claims in his first petition. Furthermore, the defendant points to no objective factor that impeded his ability to raise the claims of ineffective assistance of appellate counsel in his first postconviction petition. His second amended initial postconviction petition was filed after the decision was rendered on the defendant's direct appeal and could have included claims of ineffective assistance of appellate counsel. The defendant fails to point to any objective factor that impeded his ability to do so.

¶ 23 In any event, none of the alleged claims of error so infected the defendant's trial that the resulting conviction violated due process. While we have not previously addressed the issue raised in the proposed subsequent postconviction petition as to whether the defendant's *statutory* right to a speedy trial was violated (which in the proposed subsequent postconviction petition he casts as an error of constitutional magnitude by couching it within the argument of ineffective assistance of appellate counsel), we find no prejudice as a result of the defendant's failure to raise it in his first postconviction petition. As this court found on appeal from the denial of the defendant's first postconviction petition, the defendant suffered no prejudice as a result of any delay in his trial. See *People v. Greenman*, No. 5-09-0701 (Dec. 21, 2010) (unpublished order under Supreme Court Rule 23). Accordingly, no violation of his statutory right to a speedy trial could have so infected his trial that the resulting conviction violated due process. The defendant can show no prejudice as a result of his failure to raise in his first postconviction petition any error relating to a violation of his statutory right to a speedy trial.

¶ 24 Again, with respect to the defendant's claim that his trial and appellate counsel were ineffective for failing to raise as error the violation of the defendant's right to be free of an unreasonable search of his vehicle, the defendant has failed to establish any prejudice as a result of his failure to raise the claim in his initial postconviction petition. This court has already rejected the defendant's argument that his fourth amendment right to be free of unreasonable search and seizure was violated. See *People v. Greenman*, No. 5-09-0701 (Dec. 21, 2010) (unpublished order under Supreme Court Rule 23). Accordingly, no error so infected his trial that the resulting conviction violated due process.

¶ 25 The circuit court did not err in denying the defendant's motion for leave to file a successive postconviction petition.

¶ 26 For the foregoing reasons, the judgment of the circuit court of Fayette County is hereby affirmed.

¶ 27 Affirmed.