

No. 1-10-3612

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 01 CR 13645
)	
ANTHONY HERNANDEZ,)	Honorable
)	Mary Colleen Roberts,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant was properly denied leave to file his postconviction petition, where the trial court properly held that the petition was successive and defendant had failed to satisfy, or even allege he could satisfy, the cause and prejudice test, relying instead on a claim that his petition should be treated as an initial postconviction petition.
- ¶ 2 Defendant Anthony Hernandez appeals from the order of the trial court denying him leave to file his postconviction petition. On appeal, defendant contends that the trial court erred when it applied the cause and prejudice standard required for filing a successive postconviction petition to his petition because although not his first collateral attack on his conviction, the petition was,

in fact, his first postconviction petition. The State contends that the trial court acted properly because defendant's prior pleading was brought under both section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)) and section 122-1 of the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2008)). Therefore, the State argues, the trial court properly applied the cause and prejudice test to defendant's subsequent pleading. We affirm.

¶ 3 Following a bench trial, defendant was found guilty of first degree murder, attempted murder, aggravated battery with a firearm, aggravated discharge of a firearm, and unlawful use of a weapon by a felon. The trial court sentenced him to 55 years' imprisonment for murder, and concurrent respective terms of 10 and 5 years' imprisonment for attempted murder and unlawful use of a weapon by a felon to be served consecutively to the murder sentence. On direct appeal, defendant contended that he had been denied the effective assistance of counsel. This court rejected defendant's contention and affirmed his convictions and sentences. *People v. Hernandez*, No. 1-04-3368 (2006) (unpublished order under Supreme Court Rule 23).

¶ 4 The facts of this offense are adequately set forth in this court's previous order, and are not relevant to the issues raised in this appeal. Therefore, they will not be repeated at length in this appeal. Briefly summarized, according to the State's theory of the case, defendant committed murder and attempted murder when he fired a handgun into an occupied car, during a gang-related altercation.

¶ 5 In 2009, defendant filed a document entitled "Petition for relief from judgement pursuant to the post-judgment act 735 ILCS 5/2-1401." The first paragraph of the petition sought relief "whether by way of the foregoing remedies or other wise," pursuant to "the post-judgement act of the code of civil procedure (735 ILCS 5/2-1401, And &25 ILCS 5/22-1 (A)." The petition alleged that various statutes under which defendant was convicted were unconstitutional because they were passed in violation of the single subject rule or violated due process. The trial court

ultimately denied to the petition under the Code of Civil Procedure and dismissed it under the Post-Conviction Hearing Act. In making its ruling, the trial court stated:

"On September 1st of 2009 [defendant] filed what he entitles, Petition for Relief from Judgment Pursuant to the, quote, he calls it, Post-Judgment Act, end quote, 735 ILCS 5/2-1401 and. In the paragraph underneath the heading, he also invokes what he cites as 25 ILCS 5/22-1.

Now my conclusion is that that's a typographical error, actually two typographical errors, and it should actually read 725 ILCS 5/122-1, which is the postconviction hearing statute. So he labels this a 2-1401 petition, but he also cites the postconviction hearing statute 122-1."

The trial court then discussed the merits of defendant's petition and determined that it had none.

The trial court concluded:

"Accordingly, his petition which is entitled 'Petition for Relief from Judgment Pursuant to the Post-Judgment Act,' 735 ILCS 5/2-1401, is hereby denied and, furthermore, dismissed as a postconviction petition, which he also cites as frivolous and patently without merit."

¶ 6 In 2010, defendant filed the postconviction petition which is at issue in this appeal. The petition alleged that trial counsel was ineffective for failing to call an alibi witness at trial, and that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on direct appeal. The trial court held that this was defendant's second postconviction petition and that, therefore, he was required to request leave to file the petition

and meet the cause and prejudice test. The trial court held that defendant had failed to do so, and "denied" the petition. Defendant timely appealed.

¶ 7 Although the parties present numerous arguments on both sides of the issue of whether defendant's first *pro se* pleading should have been treated as a postconviction petition, we find that our resolution of this issue is simple and straightforward. See *People v. Adams*, 373 Ill. App. 3d 991, 993 (2007) ("The threshold inquiry inherent in this appeal is whether the subject petition is successive.") When defendant filed his first *pro se* pleading, the trial court treated it as a postconviction petition, and made an express finding that the first paragraph of the pleading, although apparently containing typographical errors, was intended to invoke the Post-Conviction Hearing Act. Defendant did not file a motion to reconsider or an appeal challenging this ruling. Accordingly, we find that defendant has procedurally defaulted any argument he may have had that the trial court's finding that his first *pro se* pleading invoked the Act was in error. See *People v. West*, 187 Ill. 2d 418, 425 (1999) ("Any issues which could have been raised on direct appeal, but were not, are procedurally defaulted.") Therefore, we find that the trial court did not err when it treated his second *pro se* pleading as a successive postconviction petition.

¶ 8 Having determined that defendant's petition was successive, it is clear that he was required to meet the cause and prejudice test of section 122-1(f) of the Act. See *Adams*, 373 Ill. App. 3d at 995. Defendant has presented no argument that he has met those requirements, choosing instead to argue solely that he was not required to meet the cause and prejudice test. Therefore, we find that the trial court did not err when it denied defendant leave to file his successive postconviction petition.

¶ 9 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 10 Affirmed.