

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).

2013 IL App (4th) 110839-U
NO. 4-11-0839
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
March 18, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
TROY A. MEYERS,)	No. 02CF525
Defendant-Appellant.)	
)	Honorable
)	John R. Kennedy,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing defendant’s successive postconviction petition.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). For the following reasons, we grant OSAD's motion and affirm the trial court.

¶ 3 I. BACKGROUND

¶ 4 In March 2002, the State charged defendant, Troy A. Meyers, with possession of a controlled substance with the intent to deliver. In August 2002, the State charged defendant with unlawful possession of a controlled substance.

¶ 5 Prior to defendant’s trial, counsel for Sherri Johnson, in whose residence the drugs were found, stated Johnson would assert her fifth-amendment rights if called to testify at

defendant's trial. Defendant's attorney, Brian Silverman, told the court Johnson had been charged similarly to defendant, had entered a guilty plea, and received probation for marijuana found in another room of the house.

¶ 6 A jury found defendant guilty of unlawful possession of a controlled substance with the intent to deliver. After his trial, defendant filed several *pro se* posttrial motions. In September 2002, defendant filed a motion for a new trial, arguing his trial counsel had a conflict of interest unknown to defendant during his trial. According to defendant's motion, Silverman was relaying confidential information to and taking money from Johnson, who was listed as a State's witness. Defendant also alleged Silverman was attempting to become intimate with Johnson. Further, defendant stated Silverman was advising Johnson as to her involvement and upcoming testimony in defendant's criminal case.

¶ 7 In a memorandum of law in support of his *pro se* motions, defendant argued Silverman represented both he and Johnson. According to the memorandum of law, his "entire defense was based on the proposition that Sherr[i] Johnson was the sole party guilty of the offenses charged to both co-defendants." Defendant stated:

"Silverman represented Johnson and advised Johnson that she 'could not tell the truth' if called to testify at [defendant's] trial. Silverman advised Johnson that, unless granted immunity from prosecution, she 'would take the fifth.' Silverman and [attorney] Dedman discussed [defendant's] case with Johnson at length. Johnson made statements to Silverman and Dedman[, Silverman's colleague,] in confidence. The statements made by Johnson, if

introduced as evidence by the defense in [defendant's] case, were such that the result of [defendant's] trial may well have been different.

Silverman was defendant's lawyer, a role that carried a duty to advance defendant's interests with unwavering allegiance. His professional undertaking required the confrontation of Sherr[i] Johnson, a witness for the prosecution who had been given a plea agreement for a lesser charge and probation in exchange for a tape-recorded statement falsely implicating [defendant]."

¶ 8 In October 2002, the trial court held a hearing on defendant's *pro se* motions. At the hearing, attorney Silverman testified Johnson told him some of the statements she made to the police were untrue. Silverman testified he advised her to hire an attorney of her own to advise her what to do if the State called her to testify against defendant. According to Silverman, he never took any money from Johnson or anyone on her behalf for any purpose other than attorney fees for representing defendant. He testified he never considered himself as representing Johnson. Silverman also testified another lawyer from his office (Dedman) was present during every meeting he had with Johnson. He denied speaking to Johnson in a sexually inappropriate way and denied touching her anywhere but her hand.

¶ 9 Johnson testified she obtained Silverman's representation after she pleaded guilty because the State was going to call her as a witness. She stated she did not want to testify the way the State wanted. Johnson testified she gave Silverman \$1300 or \$1400 to represent her.

¶ 10 In ruling on defendant's motions, the trial court did not find Johnson's testimony

credible. The court found Johnson gave Silverman money to represent defendant. The court further found Johnson was not Silverman's client. The court denied defendant's posttrial motions.

¶ 11 Defendant filed a direct appeal. With regard to the lack of an attorney/client relationship between Johnson and Silverman, this court held the trial court's findings were not against the manifest weight of the evidence. *People v. Meyers*, No. 4-03-0077, slip order at 9-10 (Sept. 25, 2003) (unpublished order under Supreme Court Rule 23).

¶ 12 In November 2005, defendant filed a postconviction petition. Defendant did not raise the issue of attorney Silverman's alleged conflict of interest. In January 2006, the trial court denied defendant's postconviction petition. The circuit clerk filed a notice of appeal on defendant's behalf on February 16, 2006. On February 22, 2007, defendant's motion to dismiss his appeal was allowed.

¶ 13 In January 2009, defendant filed a petition for postjudgment relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In the background section of the petition, defendant stated he argued in a posttrial motion attorney Silverman was pursuing a sexual relationship with Johnson, a State witness. He also pointed to his allegation Silverman was representing both Johnson and defendant at the same time. Defendant pointed to Silverman's testimony before the Attorney Registration and Disciplinary Commission (ARDC), which defendant claimed contradicted Silverman's posttrial testimony, as newly discovered evidence in this case.

¶ 14 On April 24, 2009, the trial court filed an order dismissing defendant's petition for relief of judgment. The order stated:

"The Petitioner's 2-1401 motion fails in two respects. First, the Petition sets forth no specific facts that if known to the trial court would have prevented judgment ***. The Petitioner complains at great length that his *post[]trial proceedings* were unfair and even corrupt. His claim centers on the conduct of the trial court during his hearing on post[]trial motions. However, the Petitioner alleges no fact about his trial or any defense he had which would have prevented judgment. The Petitioner does not claim innocence. He does not claim that he was barred from presenting exculpatory evidence. He does not claim the existence of witnesses who were not heard at trial who would present helpful evidence. He alleges no claim or theory that would have led to a different result. In sum, this Petition sets forth no claim which if it had been brought forth would have prevented the original judgment. Therefore, the Petition fails to state a claim for relief.

Secondly, the Petitioner set forth no facts which show due diligence in filing this 2-1401 petition. The litany of claims asserted by the Petitioner in his 2009 Petition centers on a post[]trial hearing occurring in October 2002. Petitioner makes no allegation that would justify delay in bringing these matters to the Court's attention until 2009."

Defendant appealed the dismissal, arguing the trial court erred in denying his *pro se* petition

when it failed to recharacterize the petition as a successive postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)). *People v. Meyers*, No. 4-09-0345, slip order at 1 (Oct. 18, 2010) (unpublished order under Supreme Court Rule 23).

¶ 15 This court affirmed, stating the trial court did not abuse its discretion by failing to recharacterize defendant's section 2-1401 petition as a successive postconviction petition under the Act. *Meyers*, No. 4-09-0345, slip order at 8. Further, this court noted:

"[T]he Act permits a defendant to file one postconviction petition. 725 ILCS 5/122-1(f) (West 2006). To file a successive petition, a defendant must obtain leave from the trial court by 'demonstrat[ing] cause for his *** failure to bring the claim in his *** initial post[.]conviction proceedings and prejudice result[ing] from that failure.' 725 ILCS 5/122-1(f) (West 2006). The supreme court defines 'cause' under the cause-and-prejudice test as ' " " "some objective factor external to the defense [that] impeded counsel's efforts" to raise the claim' " in an earlier proceeding. [Citations.] *People v. Pitsonbarger*, 205 Ill. 2d 444, 560, 793 N.E.2d 609, 621 (2002). A defendant may establish 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 2006)." *Meyers*, No. 4-09-0345, slip order at 8.

This court found defendant could establish neither cause nor prejudice. In doing so, this court

noted defendant initially raised the conflict of interest issue in his September 2002 motion for a new trial

"in which he alleged Silverman acted under a *per se* conflict of interest in that Silverman (1) engaged in simultaneous representation of defendant and Johnson, a potential witness for the State; (2) had a sexual interest in Johnson; and (3) accepted money from Johnson. At the October 2002 hearing on defendant's motion, defendant presented testimony from Johnson attesting to the same inappropriate conduct by Silverman as later raised at Silverman's ARDC hearing. Moreover, defendant filed his initial postconviction petition in November 2005, three months after the ARDC hearing. Nowhere in defendant's initial petition did defendant raise any argument pertaining to Silverman operating under a conflict of interest, despite the fact he clearly was aware of the alleged conflict. As such, defendant cannot satisfy the cause prong of the cause-and-prejudice test. Because defendant failed to show cause for failing to raise the conflict-of-interest issue in his first postconviction petition, he did not satisfy section 122-1(f) of the Act, and we need not decide whether he failed to demonstrate 'prejudice' as well." *Meyers*, No. 4-09-0345, slip order at 9.

¶ 16 On June 14, 2011, defendant filed the successive postconviction petition at issue in this appeal. According to defendant, he possessed new evidence unobtainable at the time of

trial, direct appeal, or during initial postconviction proceedings. Defendant made an actual innocence claim and alleged his attorney labored under an actual conflict of interest, failing to depose and/or have Johnson provide exculpatory testimony vital to his defense.

¶ 17 Defendant relied on transcripts from attorney Silverman's ARDC hearing in case No. 04-SH-120. According to defendant, these transcripts were not made available to him until the fall of 2008. Defendant argued the ARDC hearing transcript showed Silverman labored under an actual conflict of interest because he advised Johnson. Defendant argued this contradicted Silverman's testimony during posttrial proceedings in 2002 when he testified he had not represented or advised Johnson. Defendant argues Silverman admitted during the ARDC proceedings he spoke with Johnson numerous times. During their first meeting, Johnson told Silverman she lied to the police with regard to the drugs found in her home for which defendant was charged. Silverman testified Johnson refused to testify as to her false statements. Silverman told the ARDC he explained the legal issues Johnson could face and referred her to another attorney. Johnson had already hired Silverman to represent defendant when she told Silverman she had lied to the police.

¶ 18 Defendant also referenced the fact Silverman only said "probably" when asked whether he would have used information he learned from Johnson that would be helpful to defendant. According to defendant's petition, Johnson was a vital witness because only she could have proved ownership of the drugs and denied defendant lived at her residence. Defendant also points to Silverman's reply to the ARDC in which Silverman indicated he had no intention of calling Johnson once her attorney indicated she intended to invoke her fifth-amendment right not to testify against herself. In addition, defendant points to Silverman's

statement it was clear the statement Johnson gave the police was true. According to defendant, Silverman was more interested in protecting Johnson than defendant. Defendant also alleged Silverman made sexual advances on Johnson.

¶ 19 On August 31, 2011, the trial court dismissed defendant's successive petition for postconviction relief. The court found defendant had not asked for leave of court to file a successive postconviction petition. Further, the court stated defendant had neither shown any cause for failing to bring these claims in his initial postconviction petition nor any prejudice resulting from the failure to raise the claims in the initial petition. The court found defendant could not show cause for failing to raise these issues because defendant was aware of the conflict of interest issue in 2002 as evidenced by him raising the issue during posttrial proceedings in September 2002. The court also found defendant could not show prejudice because the appellate court had already ruled in defendant's direct appeal Johnson was not Silverman's attorney and no conflict of interest could exist.

¶ 20 This appeal followed.

¶ 21 On September 19, 2012, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). OSAD's motion and brief show service on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by October 22, 2012. Defendant did not do so.

¶ 22 II. ANALYSIS

¶ 23 OSAD moves to withdraw pursuant to *Finley*, arguing no meritorious arguments can be raised on appeal. The standard of review applied to the dismissal of a postconviction

petition prior to an evidentiary hearing is *de novo*. *People v. Ivy*, 313 Ill. App. 3d 1011, 1014, 730 N.E.2d 628, 633 (2000). However, we may affirm a trial court's decision on any ground contained in the record, regardless of the trial court's reasoning. *People v. Caballero*, 179 Ill. 2d 205, 211, 688 N.E.2d 658, 661 (1997).

¶ 24 "The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *People v. Harris*, 206 Ill. 2d 1, 12, 794 N.E.2d 314, 323 (2002). "Issues that were raised and decided on direct appeal are barred by the doctrine of *res judicata*. [Citations.] Issues that could have been presented on direct appeal, but were not, are waived." *Harris*, 206 Ill. 2d at 13, 794 N.E.2d at 323. " '[W]here *res judicata* and forfeiture preclude a defendant from obtaining relief, such a claim is necessarily "frivolous" or "patently without merit." ' " *People v. Alcozer*, 241 Ill. 2d 248, 258-59, 948 N.E.2d 70, 77 (2011) (quoting *People v. Blair*, 215 Ill. 2d 427, 445, 831 N.E.2d 604, 616 (2005)).

¶ 25 Further, because this was not defendant's first postconviction petition, defendant's petition must also meet the requirements for granting leave to file a successive postconviction petition. Our supreme court has stated "the plain language of section 122[-]1(f) prohibits the filing of a successive post-conviction petition without first obtaining leave of court." *People v. LaPointe*, 227 Ill. 2d 39, 44, 879 N.E.2d 275, 278 (2007). Section 122-1(f) of the Act states:

"Only one petition may be filed by a petitioner under this Article 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-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).

However, "even if the petitioner cannot show cause and prejudice, his failure to raise a claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice." *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621. For example, "the due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *People v. Ortiz*, 235 Ill. 2d 319, 331, 919 N.E.2d 941, 948-49 (2009). "Substantively, the evidence in support of the claim must be newly discovered; material and not merely cumulative; and 'of such conclusive character that it would probably change the result on retrial.'" *Ortiz*, 235 Ill. 2d at 333, 919 N.E.2d at 950 (quoting *People v. Morgan*, 212 Ill.2d 148, 154, 817 N.E.2d 524, 527 (2004)).

¶ 26 We first note defendant did not seek leave to file the successive petition, and the trial court's order did not explicitly grant leave to file the petition. However, our analysis does not end there as a trial court may choose to consider the merits of a successive petition despite a defendant not specifically asking for leave to file a successive petition. *People v. Tidwell*, 236 Ill. 2d 150, 161, 923 N.E.2d 728, 735 (2010).

¶ 27 That being said, the conflict of interest claim defendant raised in his successive petition was raised by defendant *pro se* during posttrial proceedings and also in his direct appeal. As OSAD explains, defendant is essentially "rephrasing a factual claim" already litigated during his direct appeal. We agree. "A post-conviction petitioner may not avoid the bar of *res judicata* simply by rephrasing *** issues previously addressed on direct appeal." *People v. Simpson*, 204 Ill. 2d 536, 559, 792 N.E.2d 265, 282 (2001).

¶ 28 However, based on the "new" evidence he acquired from Silverman's ARDC hearing, defendant makes an "actual innocence" argument. According to the petition, his trial attorney "labored under an actual conflict of interest" and failed to either depose or call Sherri Johnson as a witness at his trial. According to defendant's successive petition, Johnson's exculpatory testimony was vital to his defense and would have caused any reasonable jury to find him not guilty.

¶ 29 OSAD argues defendant's actual-innocence claim is meritless because defendant has no new, noncumulative evidence. According to OSAD:

"Succinctly put, the actual[-]innocence claim thus asserts that the new facts from the ARDC hearing showed that [attorney] Silverman gave Johnson legal advice while he was representing [defendant] and, motivated to protect her at [defendant's] expense, he did not call Johnson to testify. And, had Silverman not been conflicted, Johnson would have testified [defendant] did not live at Johnson's residence, was never involved in any controlled buys, he was not at her home on the morning of March 12, 2002, and the

cocaine and underwear in the bedroom drawer together all belonged to her or another lover. Thus, according to the petition's allegations, '[i]t becomes obvious that any reasonable trier of fact would or could have reached a different conclusion [as to guilt].' "

We agree with OSAD the record shows the "new" facts upon which defendant builds his argument are not new and non-cumulative. As a result, defendant's actual innocence claim cannot succeed based on these allegedly "new" facts.

¶ 30 Further, we agree with OSAD defendant cannot satisfy the cause and prejudice test because the underlying claim has no merit. Therefore, defendant cannot establish he was prejudiced. As OSAD explains:

“Even if an argument can be made that attached/and or supplemented documents not available during the section 2-1401 proceedings prove that [defendant] did not have full access to the ARDC transcripts until 2011, if the underlying claim has no merit, no prejudice resulted, and the cause and prejudice test is not met. For all intents and purposes, there was no difference between Silverman’s testimony in 2002 and in 2005. In both, Silverman claimed the monies he received from Johnson were a partial payment for [defendant's] fee, not to represent Johnson. In both proceedings, Silverman stated that when Johnson told him she did not want to testify for the [S]tate against [defendant], claiming she had lied to the police about [defendant's] involvement, Silverman

suggested she hire counsel to represent her to avoid possible criminal charges being lodged against her. In fact, he did refer her to another attorney. [Citation.] Moreover, on those facts no tribunal has concluded that Silverman ever represented Sherri Johnson or that Silverman labored under a conflict of interest by holding Johnson's interests above [defendant's] interests."

We agree with OSAD defendant's petition "did not meet the rigors of the prejudice prong" of the cause and prejudice test.

¶ 31

III. CONCLUSION

¶ 32 After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD no meritorious issues can be raised on appeal, grant OSAD's motion to withdraw as counsel for defendant, and affirm the trial court's judgment.

¶ 33 Affirmed.