

2014 IL App (1st) 111911-U

Nos. 1-11-1911, 1-12-3131 cons.

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SIXTH DIVISION  
March 28, 2014

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 26668
	)	
JOSEPH MARTINEZ,	)	The Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Justices Hall and Reyes concurred in the judgment.

**ORDER**

¶1 *HELD:* The trial court did not err by considering defendant's *pro se* motion for leave to file a successive postconviction petition as it was labeled instead of *sua sponte* recharacterizing the pleading as an amendment to the original postconviction petition. Moreover, leave to file a successive postconviction petition was properly denied where defendant failed to satisfy the requisite cause and prejudice test.

¶2 Defendant, Joseph Martinez, appeals the denial of his *pro se* motion for leave to file a successive petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*

(West 2010)). Defendant contends the trial court erred in denying his *pro se* pleading and failing to recharacterize it as an amendment to his original postconviction petition where the pleading stated a cognizable claim that his custodial statements were a product of police coercion. Based on the following, we affirm.

### ¶3 FACTS

¶4 On August 25, 2006, a jury convicted defendant of the first-degree murder of his girlfriend's five-year-old son. Defendant was sentenced to 75 years' imprisonment. This court affirmed defendant's conviction and sentence on direct appeal. *People v. Martinez*, 1-07-0059 (Dec. 23 2009) (unpublished pursuant to Supreme Court Rule 23).

¶5 Defendant later filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)), as well as a *pro se* postconviction petition. The timing of the postconviction proceedings overlapped.

¶6 On May 5, 2010, defendant filed his section 2-1401 petition, alleging the trial court lacked subject matter jurisdiction to consider his case because the case was improperly transferred pursuant to his codefendant's motion for substitution of judge. The petition was denied on May 28, 2010. Meanwhile, one day before the denial of the section 2-1401 petition, on May 27, 2010, defendant filed his postconviction petition, alleging he was denied a fair trial due to the substitution of judge at his codefendant's request. On June 16, 2010, defendant filed a motion to reconsider the trial court's denial of his section 2-1401 petition. The trial court denied defendant's motion to reconsider his section 2-1401 petition on July 16, 2010. On the same date, July 16, 2010, the trial court summarily dismissed defendant's postconviction petition.

¶7 Defendant appealed the denial of his section 2-1401 petition. On appeal, this court vacated the trial court's May 28, 2010, judgment because the court *sua sponte* dismissed

defendant's section 2-1401 petition less than 30 days after it was filed. We remanded the cause for further proceedings. *People v. Martinez*, 1-10-2471 (Jan. 25, 2012) (unpublished order pursuant Supreme Court Rule 23).<sup>1</sup>

¶18 On August 4, 2010, defendant mailed a *pro se* motion to reconsider the summary dismissal of his postconviction petition, again asserting that the substitution of judge violated his right to a fair trial. The motion was stamped "received" by the clerk's office. Although the stamp is barely legible, it appears the motion was received on August 12, 2010.

¶19 Then, on April 13, 2011, defendant filed a *pro se* notice of motion seeking "leave to file a successive petition for post conviction relief and motion for appointment of counsel," along with motions entitled "motion to file and proceed as a poor person and appointment of counsel" and "Petition for Leave to File a Successive Petition for Post-Conviction [*sic*] Relief, Instanter." The petition for leave to file a successive postconviction petition presented four new claims for postconviction relief. Primarily, defendant sought "leave to file a successive post-conviction petition based primarily on new evidence that came to light during the litigation in *Dunn et al. v. City of Chicago*, Case No. 04-C-6804, U.S. District Court." In relevant part, defendant raised a claim that he was denied his "14th amendment right to a prompt probable cause determination." Attached to the motion was a notice defendant had received related to a class action settlement between the City of Chicago and qualified individual arrestees. The notice indicated that defendant may be eligible for inclusion in the settlement, subject to review, if he was "(1) held in

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<sup>1</sup> On remand, defendant's section 2-1401 petition was dismissed. Defendant again appealed. On June 28, 2013, this court entered an order granting defendant's counsel leave to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), finding the cause was without arguable merit. *People v. Martinez*, 1-12-2102 (June 28, 2013) (unpublished order pursuant to Supreme Court Rule 23).

a Chicago Police Department Interrogation or 'interview' room for more than 16 hours in a 24-hour period at any time from October 21, 2002 to May 14, 2010; or (2) detained in a Chicago Police Department lock-up or detective facility overnight at any time from October 21, 2002 to May 14, 2010; or (3) arrested by the Chicago Police Department on suspicion of a felony without an arrest warrant and detained in excess of 48 hours without a judicial probable cause hearing, at any time from March 15, 1999 to February 10, 2008."

¶10 On May 20, 2011, the trial court denied defendant's motion for leave to file a successive postconviction petition, finding defendant failed to satisfy the requisite cause and prejudice test. In its written order, the trial court stated:

"In making [his] claims, [defendant] fails to demonstrate that the rule prohibiting successive petitions should be relaxed. The factual assertions relied upon by [defendant] in the instant petition were available to him when he filed his initial petition, and he has failed to identify any objective factor which impeded his efforts to raise these claims in the earlier proceedings. Although [defendant] claims that he did not become aware of the class action settlement until October 2010, he was in fact aware of the information before the case was settled. \*\*\*.

Furthermore, [defendant] fails to demonstrate that he suffered any prejudice from his failure to assert these claims in his previous petition. Had these claims been presented, there is little probability that [defendant] would have prevailed. The class action settlement would have had no legal effect on [defendant's] criminal case. \*\*\*. Therefore, [defendant] makes no showing that absence of the claim now presented violated due process rights."

Defendant appealed.

¶11 On September 25, 2012,<sup>2</sup> the trial court denied defendant's motion to reconsider the summary dismissal of his postconviction petition. Defendant appealed.

¶12 We review the trial court's May 20, 2011, and September 25, 2012, orders, which were consolidated for our consideration.

### ¶13 DECISION

¶14 Defendant contends that the trial court erred in denying and failing to recharacterize his motion for leave to file a successive postconviction petition as an amendment to his original postconviction petition. Defendant further contends that his "amended postconviction petition" raised a sufficient constitutional claim that his custodial statements were a product of police coercion.

¶15 The Act provides a means by which individuals serving sentences may challenge their convictions as being the result of a substantial denial of constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2010). To survive first stage summary dismissal, a *pro se* petition seeking postconviction relief under the Act must not be frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A postconviction petition is considered frivolous and patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the "gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (2002). More recently, the supreme court explained that a petition is frivolous or patently without merit only if the petition has no arguable basis either in law or fact. *Hodges*, 234 Ill. 2d at 16. "A petition which lacks an arguable basis either in law or in fact is one which is based on an

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<sup>2</sup> It appears from the record that this motion was never docketed and brought to the trial court's attention prior to this date.

indisputably meritless legal theory or a fanciful allegation." *Id.* We review the dismissal of a postconviction petition *de novo.* *Id.* at 9.

¶16 The Act contemplates the filing of one postconviction petition. *People v. Holman*, 191 Ill. 2d 204, 210 (2000). "Successive postconviction petitions are disfavored under the Act[,] and a defendant attempting to institute a successive postconviction proceeding, through the filing of a second or subsequent postconviction petition, must first obtain leave of court." " *People v. Smith*, 2013 IL App (4th) 110220, ¶20 (quoting *People v. Gillespie*, 407 Ill. App. 3d 113, 123 (2010)). A court may grant leave to file a successive petition "only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2010). Cause is "an objective factor that impeded [the petitioner's] ability to raise a specific claim during his or her initial postconviction proceedings." 725 ILCS 5/122-1(f) (West 2010). Prejudice exists when "the claim not raised during [the petitioner's] initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010).

¶17 The Act, however, provides that the court "may *in its discretion* make such order as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in civil cases." (Emphasis added.) 725 ILCS 5/122-5 (West 2010). In *People v. Watson*, 187 Ill. 2d 448 (1999), the supreme court held that, when a defendant files an amended postconviction petition during the 90 days allotted for first stage review, the 90-day period restarts for the trial court to determine if the amended petition is frivolous or patently without merit. *Id.* at 450. The majority did not determine

explicitly whether an original postconviction petition could be amended during first stage review; however, the supreme court has since referred to *Watson* in stating that section 122-5 of the Act does apply to first-stage review. *People v. Harris*, 224 Ill. 2d 115, 131 (2007); see also *People v. Chester*, 2014 IL App (4th) 120564, ¶¶20-21. In other words, the supreme court has determined that the trial court has the discretion at the first stage to allow amendments to postconviction petitions. *Harris*, 224 Ill. 2d at 131. The trial court abuses its discretion if it refuses to allow a plaintiff to amend his petition when a cause of action can be stated through the amendment. *People v. Brown*, 336 Ill. App. 3d 711, 716 (2002).

¶18 Defendant argues that the trial court should have treated his motion for leave to file a successive postconviction petition as an amendment to his original postconviction petition because it was submitted before final judgment was entered on the original petition, *i.e.*, before the trial court entered its order on defendant's motion to reconsider the summary dismissal of his original postconviction petition. The State responds that the trial court was not obligated to recharacterize defendant's motion for leave to file a successive postconviction petition.

¶19 There is no dispute that defendant did not, at any time, request leave to amend his original postconviction petition. In fact, defendant filed a notice and a motion both entitled "Petition for Leave to File a Successive Petition for [Postconviction] Relief." Substantively, the pleading acknowledged the procedural posture of his case, namely, that his original postconviction petition, alleging his due process rights were violated when his case was transferred to a substitute judge, had been dismissed. Although seemingly mistaken, defendant asserted that he had appealed that decision to this court, along with his appeal of the trial court's

denial of his section 2-1401 petition for relief from judgment.<sup>3</sup> Defendant then asserted four new causes of action, essentially arguing that he met the cause and prejudice test. Defendant never requested that the successive pleading be considered an amendment or substitute for the original postconviction petition. Instead, by all accounts, defendant acknowledged that his original postconviction petition and the request for leave to file the successive postconviction petition were unique pleadings. While true that a trial court *may, in its discretion*, grant amendments that are "appropriate, just and reasonable" to a postconviction petition during first stage review, the basic assumption is that the court was asked to exercise its discretion. 725 ILCS 5/122-5 (West 2010). In this case, the trial court was not asked to exercise its discretion; therefore, we cannot find any abuse thereof. Defendant points to no case law, and we know of none, that requires a trial court to *sua sponte* recharacterize a successive postconviction petition as an amended postconviction petition.

¶20 We recognize that defendant's motion to reconsider the summary dismissal of his original postconviction petition remained pending at the time he filed his request for leave to file his successive postconviction petition. The procedural posture of that pleading, however, did not require a different result related to defendant's request for leave to file a successive postconviction petition where defendant expressly titled his pleading as a successive postconviction petition and made no request that such pleading be considered anything other than a successive postconviction petition.

¶21 In *Smith*, the defendant similarly argued on appeal that the trial court erred when it treated his "Successive Post-Conviction Petition" and "Amended Petition for Successive Post-

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<sup>3</sup> Our review of defendant's notice of appeal lists only the trial court's denial of his section 2-1401 petition as the basis for appeal.

Conviction Relief" as successive postconviction petitions and not a motion to amend and reconsider the summary dismissal of his original postconviction petition. *Smith*, 2013 IL App (4th) 110220, ¶17. The Fourth District ultimately concluded that the defendant did not have a statutory right to amend pursuant to section 122-5 of the Act because the trial court entered an order summarily dismissing his original postconviction petition as frivolous and patently without merit and that order was a final judgment. *Id.* at ¶23. Unlike our defendant, the *Smith* defendant did not file a motion to reconsider his original postconviction petition and did not appeal. *Id.* at ¶28. However, the Fourth District noted, in *dicta*, that a motion to reconsider had not been filed as a means to distinguish the circumstances from those in *People v. Scullark*, 325 Ill. App. 3d 876 (2001). *Id.*

¶22 In *Scullark*, the defendant filed a deficient postconviction petition that was summarily dismissed based on untimeliness. The defendant did not seek leave to file an amended petition or file an amended pleading. *Id.* at 881-82. The defendant, however, filed a timely motion to reconsider the summary dismissal in which he alleged facts necessary to amend the original petition demonstrating he was not culpably negligent for the delinquent filing. *Id.* On appeal, we concluded that the trial court should have considered the motion to reconsider as a motion to amend. *Id.* at 882. The supreme court has since instructed that the Act does not authorize the first-stage dismissal of a postconviction petition based on untimeliness. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). The unique facts in *Scullark* do not apply to the instant case.

Notwithstanding, *Scullark* is distinguishable where defendant did not include his current allegation in his motion to reconsider. In fact, the allegation was not raised until 8 months after defendant filed his motion to reconsider the summary dismissal of his original postconviction petition.

¶23 Defendant cites *People v. Brown*, 336 Ill. App. 3d 711 (2002), to support his position. *Brown*, however, also is limited to its unique fact pattern and is distinguishable from the instant case. In *Brown*, the defendant filed a *pro se* postconviction petition along with two affidavits acknowledging that the deadline for filing his petition was approaching and that his petition was unsupported, but that he was receiving assistance in the preparation of a forthcoming supported petition from a paralegal. Prior to obtaining a ruling on that petition, the defendant filed an amended petition with four supporting affidavits. The trial court summarily dismissed the petition as frivolous and patently without merit, addressing each of the defendant's allegations in the original petition but making no reference to the allegations in the amended petition. *Id.* at 714-15. On appeal, this court found that, although the defendant failed to seek leave to amend his petition or to obtain a ruling from the trial court on his amended petition, his amended petition was properly supported and sufficiently presented the gist of a constitutional claim uncontradicted by the record. *Id.* at 720. As a result, this court held that, "given the rather unique circumstances" of the case, the trial court abused its discretion in implicitly denying the defendant's request to amend or refusing to address the request, "particularly in light of the fact that the amended petition raised the gist of a constitutional claim." *Id.* at 720-21.

¶24 In the instant case, there was no timeliness issue. Rather, defendant attempts to substitute his original postconviction petition with an entirely new petition with four new allegations. The substitute pleading was filed nearly 11 months after his original postconviction petition and over 8 months after his motion to reconsider the summary dismissal of his original postconviction petition. Unlike the defendant in *Brown*, neither his original postconviction petition nor his motion to reconsider acted merely as a place-holder to preserve his right to file the supported petition.

¶25 Because we have concluded that defendant's petition for leave to file a successive postconviction petition was properly treated as titled, we turn to the question of whether defendant satisfied the requisite cause and prejudice test.

¶26 As stated, leave to file a successive petition may be granted "only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2010). Cause is "an objective factor that impeded [the petitioner's] ability to raise a specific claim during his or her initial postconviction proceedings." 725 ILCS 5/122-1(f) (West 2010). Prejudice exists when "the claim not raised during [the petitioner's] initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010). "[A] defendant faces immense procedural default hurdles when bringing a successive post-conviction petition." *People v. Tenner*, 206 Ill. 2d 381, 392 (2002).

¶27 Section 122-2 of the Act instructs that a postconviction petition shall have attached thereto affidavits, records, or other supporting evidence, or shall state why the same are not attached. 725 ILCS 5/122-2 (West 2010). The purpose of section 122-2 of the Act is to establish that the verified allegations in the petition are capable of objective or independent corroboration. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). A postconviction petition that is not supported by affidavits or other evidence will be dismissed without a second stage evidentiary hearing. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). Moreover, any claims that were decided on direct appeal are barred by the doctrine of *res judicata*, and any issues that could have been raised on direct appeal, but were not, are forfeited. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶28 Defendant argues that the information provided in the class action settlement demonstrates a "systematic pattern of detaining individuals [for] over 48 hours without a warrant

and without a probable cause hearing." According to defendant, this new evidence corroborates his pretrial claim that his custodial statements were coerced where he was held in custody without a probable cause hearing for over 48 hours. The State argues that defendant's contention is barred by the doctrine of *res judicata* and/or has been forfeited on numerous occasions. In the alternative, the State responds that defendant failed to satisfy the cause and prejudice test; therefore, leave to file his successive petition was properly denied.

¶29 Defendant's allegation that he was denied a probable cause hearing within 48 hours of being held in custody was litigated prior to trial. Defendant, however, did not challenge the trial court's ruling that his statement was voluntary on direct appeal, in any of his section 2-1401 petition for relief of judgment proceedings, in his original postconviction petition, or in his motion to reconsider the dismissal of his original postconviction petition. Defendant, therefore, forfeited review of the allegation. However, in the interests of fundamental fairness, the supreme court has relaxed the doctrine of *res judicata* if the defendant presents substantial new evidence. See *People v. Patterson*, 192 Ill. 2d 93, 139 (2000). Accordingly, in the interests of fundamental fairness, we will review defendant's allegation to the extent the "new" evidence was not available until October 2010 when defendant learned of the class action settlement.

¶30 For new evidence to warrant an evidentiary hearing on a successive postconviction petition, a defendant must satisfy the cause and prejudice test. *People v. Mitchell*, 2012 IL App (1st) 100907, ¶58.

¶31 Based on our review of defendant's petition for leave to file a successive postconviction petition and the record before us, we conclude that defendant cannot satisfy the cause and prejudice test. In terms of cause, defendant failed to demonstrate any objective factor which impeded his ability to raise the allegation in his original postconviction petition. Contrary to

defendant's argument, the information in the class action settlement notification was not "new." Specifically, the notice stated that "[y]ou may be entitled to a payment for a class action settlement. \*\*\*. Filing a claim does not automatically entitle you to a payment. Your eligibility for payment will be determined by a claims administrator based on the available data and on Defendant's records." The class eligibility consisted of individuals that were "(1) held in a Chicago Police Department Interrogation or 'interview' room for more than 16 hours in a 24-hour period at any time from October 21, 2002 to May 14, 2010; or (2) detained in a Chicago Police Department lock-up or detective facility overnight at any time from October 21, 2002 to May 14, 2010; or (3) arrested by the Chicago Police Department on suspicion of a felony without an arrest warrant and detained in excess of 48 hours without a judicial probable cause hearing, at any time from March 15, 1999 to February 10, 2008." Therefore, even taken as true, the notice did not present any new facts to substantiate defendant's allegation that he was held in custody for more than 48 hours without a probable cause hearing. *Cf. People v. Wrice*, 2012 IL 111860 (where the State did not contest the defendant's ability to satisfy the cause prong of the cause and prejudice test for successive postconviction petitions because the police department released a report detailing "widespread and systematic" abuse of prisoners and coerced confessions, specifically naming the officers that allegedly coerced the defendant's confession). All of the so-called "facts" in the class action settlement were known to defendant at the time of filing his original postconviction petition. The class action settlement simply alerted defendant that, if qualified, he may be entitled to proceeds from the settlement. The class action settlement notice did nothing to substantiate *his* claim that *his* rights were violated.

¶32 Turning to the prejudice requirement, we further conclude that defendant failed to satisfy his obligations for obtaining leave to file a successive postconviction petition. "For new

evidence to show prejudice that warrants a new trial, 'the evidence (1) must be of such conclusive character that it will probably change the result of retrial; (2) must be material to the issue, not merely cumulative; and (3) must have been discovered since trial and be of such character that the defendant in the exercise of due diligence could not have discovered it earlier.' " *Mitchell*, 2012 IL App (1st) 100907, ¶63. There is no doubt that the information contained in the class action settlement notice was not of such conclusive character that the result of defendant's trial would have been different. As stated, there was no new evidence contained in the notice to substantiate defendant's allegation that he was held in custody for more than 48 hours without a probable cause hearing. Defendant concedes that the pretrial suppression hearing was a credibility contest between himself and the officers. It is well-established that the trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony, and resolves conflicts or inconsistencies in the evidence. *People v. Williams*, 388 Ill. App. 3d 422, 429 (2009). The trial court made credibility determinations in favor of the police. Accordingly, defendant could not satisfy the prejudice requirement of the test.

¶33 In sum, we conclude that the trial court did not err in denying defendant's petition for leave to file a successive postconviction petition where defendant failed to satisfy the cause and prejudice test.

#### ¶34 CONCLUSION

¶35 We affirm the judgment of the trial court in denying defendant's petition for leave to file a successive postconviction petition.

¶36 Affirmed.