

2014 IL App (2d) 121182-U
No. 2-12-1182
Order filed August 7, 2014

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 04-CF-280
)	
RYAN KIRKPATRICK,)	Honorable
)	Val Gunnarsson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Burke and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant’s motion for leave to file a successive postconviction petition, as the claim that he sought to raise—that postconviction counsel was “ineffective” in presenting the claim in his first petition—was not a constitutional claim and thus was not viable in a postconviction petition.

¶ 2 Defendant, Ryan Kirkpatrick, appeals the denial of his motion for leave to file a successive postconviction petition alleging that his postconviction counsel unreasonably failed to retain an expert to show that defendant should not have been allowed to represent himself at trial. We determine that defendant forfeited his claim because he voluntarily dismissed previous appeals in which he could have raised the issue. Accordingly, we affirm.

¶ 3

I. BACKGROUND

¶ 4 On February 11, 2004, defendant was indicted on two counts of solicitation of murder for hire (720 ILCS 5/8-1.2(a) (West 2004)). Defendant represented himself at trial, was found guilty, and was sentenced to two 35-year terms of imprisonment. On October 22, 2004, he filed a *pro se* notice of appeal. The Office of the State Appellate Defender was appointed and, on March 7, 2006, defendant, through his appellate counsel, moved to dismiss the appeal. The motion stated that counsel advised defendant that dismissing the appeal would forgo direct appellate review of the judgment, and defendant provided a signed statement that he understood that. The motion was granted.

¶ 5 On July 17, 2007, defendant filed a *pro se* petition for postconviction relief, alleging that he was denied due process and equal protection when the trial court allowed him to represent himself. He alleged that the trial court was unaware that, at the time of trial, he suffered from various mental health problems. The trial court dismissed the petition as frivolous and patently without merit. We vacated the dismissal because it was not entered within 90 days as required by section 122-2.1(a) of the Act (725 ILCS 5/122-2.1(a) (West 2006)). *People v. Kirkpatrick*, No. 2-08-0317 (2008) (unpublished order under Supreme Court Rule 23). On remand, counsel was appointed, who filed an amended petition alleging that, under *Indiana v. Edwards*, 554 U.S. 164 (2008), the trial court was required to determine whether defendant was suffering from any mental illness that impaired his competency before allowing him to represent himself. Counsel also filed a certificate of compliance under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating that he consulted with defendant and made any necessary amendments to the *pro se* petition.

¶ 6 The State moved to dismiss, arguing that the trial court properly accepted defendant's waiver of counsel. The court ordered additional pleadings concerning the retroactive application of *Edwards* and, on March 15, 2010, it granted the State's motion and dismissed the petition. The court found that *Edwards* did not apply and that, even if it did, it would not require reversal of defendant's convictions. Defendant appealed. The Office of the State Appellate Defender was again appointed and, on March 4, 2011, defendant, through his appellate counsel, moved to dismiss the appeal. The motion stated that counsel advised defendant that dismissing the appeal would forgo appellate review of the judgment, and defendant provided a signed statement that he understood that. The motion was granted.

¶ 7 On October 24, 2011, defendant moved *pro se* for leave to file a successive postconviction petition. He alleged that his postconviction counsel was ineffective for failing to retain the services of a forensic psychologist who would have had access to his mental health records and other information that would have supported his *Edwards* claim. The trial court denied the motion, finding that there was no constitutional right to effective assistance of postconviction counsel and that defendant failed to demonstrate cause for his failure to bring the claim in the original proceedings. Defendant appealed. As with his previous appeals, the Office of the State Appellate Defender was appointed and, on June 5, 2012, defendant, through his appellate counsel, moved to dismiss the appeal. The motion stated that counsel advised defendant that dismissing the appeal would forgo appellate review of the judgment, and defendant again provided a signed statement that he understood that. The motion was granted.

¶ 8 On September 19, 2012, defendant moved *pro se* for leave to file another successive postconviction petition, again alleging that his postconviction counsel was ineffective for failing to retain a forensic psychologist. He contended that, under *Martinez v. Ryan*, 566 U.S. ___, 132

S. Ct. 1309 (2012), he was entitled to effective assistance of postconviction counsel. He also alleged that he dismissed his previous appeals on the advice of counsel. The trial court found that *Martinez* was inapplicable and that the claim was the same as the one raised in the first motion. Thus, it denied the motion. Defendant appeals.

¶ 9

II. ANALYSIS

¶ 10 Defendant contends that he has demonstrated cause and prejudice to entitle him to file a successive postconviction petition based on his postconviction counsel's failure to retain an expert in the first postconviction proceeding. He does not argue that *Martinez* requires effective assistance of postconviction counsel. Instead, he admits that he was entitled only to reasonable assistance of postconviction counsel. See *People v. Guest*, 166 Ill. 2d 381, 412 (1995). The State contends that the matter is forfeited and barred by *res judicata* because defendant voluntarily dismissed his previous appeals.

¶ 11 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 through 122-8 (West 2012)) "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). The Act provides for the summary dismissal of a postconviction petition if the trial court finds that the petition is "frivolous or is patently without merit" (725 ILCS 5/122-2.1(a)(2) (West 2012)). A summary dismissal is reviewed *de novo*. *People v. Davis*, 377 Ill. App. 3d 735, 745 (2007).

¶ 12 A petition under the Act initiates a collateral proceeding at which the inquiry is limited to constitutional issues that were not, and could not have been, previously adjudicated. See *People v. Williams*, 209 Ill. 2d 227, 232-33 (2004). Accordingly, as a general rule, the doctrine of *res judicata* bars review of issues raised and decided on appeal, and issues that could have been

raised on appeal, but were not, are forfeited. See *id.* at 233. The forfeiture rule, as the branch of the doctrine of *res judicata* that precludes raising claims that could have been raised in a previous proceeding, is not only a matter of administrative convenience but also a statutory imperative. See 725 ILCS 5/122-3 (West 2012); see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002) (in the context of a successive postconviction petition, the procedural bar of forfeiture is not merely a principle of judicial administration; it is an express requirement of the statute). “Only when fundamental fairness so requires will the strict application of this statutory bar be relaxed.” *Pitsonbarger*, 205 Ill. 2d at 458.

¶ 13 “Where, *** the defendant makes no claim of actual innocence, Illinois law prohibits the defendant from raising an issue in a successive postconviction petition unless the defendant can establish a legally cognizable cause for his or her failure to raise that issue in an earlier proceeding and actual prejudice would result if defendant were denied consideration of the claimed error.” *People v. Brown*, 225 Ill. 2d 188, 206 (2007) (citing *Pitsonbarger*, 205 Ill. 2d at 459-60); see 725 ILCS 5/122-1(f) (West 2012). Thus, “[a] narrow exception to the rule prohibiting successive post-conviction petitions holds that a claim presented in a successive petition may be given consideration when the proceedings on the initial petition were ‘deficient in some fundamental way.’ ” *People v. Britt-El*, 206 Ill. 2d 331, 339 (2002) (quoting *People v. Flores*, 153 Ill. 2d 264, 273-74 (1992)). A defendant must establish cause and prejudice as to each individual claim asserted in a successive postconviction petition to escape dismissal under principles of *res judicata* and forfeiture. *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 12.

¶ 14 “[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.” 725 ILCS 5/122-1(f) (West 2012). Prejudice is shown “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.” *Id.* Both elements of the cause-and-prejudice test must be satisfied to prevail. *Pitsonbarger*, 205 Ill. 2d at 464.

¶ 15 In his motion, defendant did not argue that he was unable to assert a “claim not raised” in his initial postconviction proceeding. Instead, he argued that postconviction counsel was “ineffective” in presenting the claim that he did raise. However, “the post-conviction process does not provide a forum by which a defendant may challenge the conduct of counsel at an earlier post-conviction proceeding.” *People v. Szabo*, 186 Ill. 2d 19, 26 (1998). Also, any “ineffectiveness” of counsel in the postconviction proceeding would not have been the denial of a constitutional right (see 725 ILCS 5/122-1(a)(1) (West 2012)). There is no constitutional right to counsel in a proceeding under the Act. *Pennsylvania v. Finley*, 481 U.S. 551, 558-59 (1987); *People v. Lee*, 251 Ill. App. 3d 63, 64-65 (1993). Thus, defendant is not entitled to file a successive postconviction petition based on “ineffective” or unreasonable assistance of counsel. That claim should have been raised on appeal from the dismissal of the initial postconviction petition, and defendant failed to do so. Instead, he voluntarily dismissed his appeal.

¶ 16 Defendant contends that fundamental fairness dictates that he be allowed to file a successive petition, arguing that he did not knowingly waive his ability to appeal the issue and suggesting that perhaps mental health issues impeded his ability to pursue the matter on appeal. But these complaints are irrelevant. Even if some “cause” prevented defendant from timely raising his claim of unreasonable assistance of postconviction counsel, he cannot raise that issue in a successive postconviction petition, as it is not a constitutional claim.

¶ 17

III. CONCLUSION

¶ 18 No error occurred when the trial court denied the motion seeking leave to file a successive postconviction petition. Accordingly, we affirm the judgment of the circuit court of Lake County.

¶ 19 Affirmed.