

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).

2014 IL App (4th) 121092-U

NO. 4-12-1092

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 28, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
DWIGHT A. HILL,)	No. 05CF225
Defendant-Appellant.)	
)	Honorable
)	Michael Q. Jones,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the office of the State Appellate Defender's motion to withdraw and affirm the trial court's denial of defendant's motion for leave to file a successive petition for postconviction relief where defendant failed to show cause for his failure to include his claim in his original postconviction petition.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground no meritorious issues can be raised in this case. For the reasons that follow, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 Following a September 2005 trial, a jury found defendant, Dwight A. Hill, guilty of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2004)). In October 2005, the trial court sentenced defendant to 30 years' imprisonment.

¶ 5 On direct appeal, defendant argued (1) defense counsel was ineffective for failing to file a motion to suppress evidence, and (2) his 30-year prison sentence was excessive. This court affirmed his conviction and sentence. *People v. Hill*, No. 4-06-0205 (Nov. 16, 2007) (unpublished order under Supreme Court Rule 23).

¶ 6 On May 15, 2008, defendant filed his first *pro se* petition for postconviction relief pursuant to section 122-1 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)). The petition again raised the issue of trial counsel's ineffectiveness for failure to file a motion to suppress evidence. On May 28, 2008, the trial court dismissed defendant's petition, finding it frivolous and patently without merit. Defendant appealed the summary dismissal of his petition, and OSAD was appointed to represent defendant. OSAD thereafter filed a motion to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court allowed OSAD's motion to withdraw and affirmed the trial court's summary dismissal of defendant's petition, as the issue raised therein was *res judicata*. *People v. Hill*, No. 4-08-0520 (May 28, 2009) (unpublished order under Supreme Court Rule 23).

¶ 7 In September 2010, defendant filed a second *pro se* petition for postconviction relief. Therein, he argued appellate counsel on direct appeal was ineffective because although counsel argued no exigent circumstances justified a seizure of evidence without a warrant, counsel failed to challenge the unlawful entry into defendant's hotel room without a warrant. In October 2010, the trial court dismissed the petition because defendant failed to obtain leave of the court before filing the petition.

¶ 8 On November 17, 2010, defendant filed a motion for leave to file his successive postconviction petition pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)). In his motion, defendant argued he became aware of appellate counsel's omission only

after the trial court denied his petition for *habeas corpus* relief. On November 29, 2010, the court denied defendant leave to file his successive postconviction petition. Defendant appealed, and the trial court appointed OSAD to represent defendant. Thereafter, OSAD filed a motion to withdraw pursuant to *Finley*. This court granted OSAD's motion to withdraw as appellate counsel and affirmed the trial court's denial of leave to file a successive postconviction petition, finding defendant had not shown cause why he failed to include his claims in his original postconviction petition. *People v. Hill*, 2012 IL App (4th) 110023-U (Aug. 22, 2012) (unpublished order under Supreme Court Rule 23).

¶ 9 In September 2012, defendant filed a petition for writ of *habeas corpus* (735 ILCS 5/10-103 (West 2012)), arguing for the first time he was not eligible to be sentenced as a Class X offender pursuant to section 5-5-3(c)(8) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3(c)(8) (West 2004)). Defendant further asserted he had "just recently made the discovery by looking at a copy of his criminal record and trial transcripts." In October 2012, the trial court dismissed with prejudice defendant's petition for writ of *habeas corpus*.

¶ 10 On November 5, 2012, defendant filed another motion for leave to file a successive postconviction petition and attached his proposed successive petition. Defendant asserted he received ineffective assistance of trial counsel based on counsel's failure to challenge whether defendant was eligible to be sentenced as a Class X offender. He asserted he is not eligible for such a sentence. Defendant contended he had cause for failing to present the claim in his original postconviction petition—he "was *ignorantia facti excusat*." A November 16, 2012, docket entry shows the trial court denied defendant's motion for leave to file a successive postconviction petition. The docket entry reflects the trial court determined (1) defendant did not

show cause for his failure to include the claim in his original postconviction petition, and (2) even if defendant could have shown cause, defendant's claim would have failed on the merits.

¶ 11 This appeal followed. The trial court appointed OSAD to represent defendant on appeal. In October 2013, OSAD filed a motion to withdraw as appellate counsel, including in its motion a brief in conformity with the requirements of *Finley*. The record shows service on defendant. On its own motion, this court granted defendant leave to file additional points and authorities on or before November 25, 2013. Defendant filed none.

¶ 12 II. ANALYSIS

¶ 13 On appeal, OSAD contends (1) no colorable argument the trial court erred in denying defendant leave to file his successive petition for postconviction relief can be made, and (2) even if the trial court erred by denying defendant leave to file his petition, the claim defendant was not eligible to be sentenced as a Class X offender lacks arguable merit. We agree.

¶ 14 A. Standard of Review

¶ 15 We review *de novo* the trial court's denial of defendant's motion for leave to file a successive petition for postconviction relief. *People v. Green*, 2012 IL App (4th) 101034, ¶ 30, 970 N.E.2d 101; *cf. People v. Guerrero*, 2012 IL 112020, ¶ 13, 963 N.E.2d 909 (supreme court reviewed for manifest error the trial court's denial of defendant's motion for leave to file a successive postconviction petition where "the trial court actually held a hearing on the motion for leave to file a successive petition, wherein defendant elicited testimony purporting to establish cause and prejudice within the meaning of section 122-1(f), and the State elicited testimony purporting to show that the statutory requirements had not been met"). This court may affirm the trial court's decision on "any basis supported by the record if the judgment is correct." (Internal

quotation marks omitted.) *Green*, 2012 IL App (4th) 101034, ¶ 30, 970 N.E.2d 101 (quoting *People v. Anderson*, 401 Ill. App. 3d 134, 138, 929 N.E.2d 1206, 1210 (2010)).

¶ 16 B. The Trial Court Properly Denied Defendant's Motion for Leave

¶ 17 The Act contemplates the filing of only one postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002). "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2012). The procedural bar of forfeiture will be relaxed only where fundamental fairness requires. *People v. Tenner*, 206 Ill. 2d 381, 392, 794 N.E.2d 238, 245 (2002). Fundamental fairness requires a court to make an exception to the forfeiture provision of section 122-3 of the Act and grant defendant leave to file a successive postconviction petition where defendant can meet the cause-and-prejudice test. *Id.* at 392-93, 794 N.E.2d at 245. "Under this test, claims in a successive post-conviction petition are barred unless the defendant can establish good cause for failing to raise the claimed error in prior proceedings and actual prejudice resulting from the error." *Id.* at 393, 794 N.E.2d at 245. "Cause" is established when the defendant shows some objective factor impeded his ability to raise the claim in the original postconviction proceedings. *Id.*, 794 N.E.2d at 246. "Prejudice" is established when a defendant shows the claimed error so infected his trial that the resulting conviction violated due process. *Id.*

¶ 18 In this case, defendant contends he was not eligible to be sentenced as a Class X offender pursuant to section 5-5-3(c)(8) of the Unified Code. Defendant asserts he was "*ignorantia facti excusat*," which justifies his failure to bring this claim in his original postconviction petition. He asserts his new claim "is newly discovered evidence." Defendant does not indicate the fact of which he was ignorant that would excuse his failure to bring the

claim in his original petition. See Black's Law Dictionary 762 (8th ed. 2004) ("*ignorantia facti excusat*" means "[i]gnorance of fact is an excuse"). We disagree.

¶ 19 Defendant cannot show an objective factor impeded his ability to raise the claim in his original postconviction petition. Here, defendant's claim for relief balances on his criminal history. Defendant was well aware of his criminal history at the time he filed his initial postconviction petition in May 2008. If somehow defendant was not aware of his own criminal history, his prior convictions were of public record at that time as well. Defendant cannot show cause for his failure to present this claim in his original petition and, as such, the trial court properly denied defendant's motion for leave to file a successive postconviction petition.

¶ 20 OSAD contends even if the trial court erred by denying defendant's motion for leave to file a successive postconviction petition, no colorable argument defendant was not eligible for Class X sentencing can be made. We agree.

¶ 21 Section 5-5-3(c)(8) of the Unified Code provides, in pertinent part:
"When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now classified in Illinois as a Class 2 or greater Class felony and such charges are separately brought and tried and arise out of different series of acts, such defendant shall be sentenced as a Class X offender. This paragraph shall not apply unless (1) the first felony was committed after the effective date of this amendatory Act of 1977; and (2) the second felony was committed after conviction on the first; and (3) the third felony was

committed after conviction on the second." 730 ILCS 5/5-5-3(c)(8) (West 2004).

The amendment adding this provision was enacted by Public Act 80-1099, which became effective on February 1, 1978. Pub. Act 80-1099, § 3 (eff. Feb. 1, 1978).

¶ 22 In this case, the record clearly shows defendant was eligible to be sentenced as a Class X offender. Defendant was 30 years old when he was convicted of the offense in question. The offense in question, unlawful delivery of a controlled substance, is a Class 2 felony. In September 1993, defendant was charged in Cook County case No. 1993-CF-22975 with manufacture and delivery of a controlled substance at a public high school, a Class X felony. In November 1994, defendant was sentenced to six years' imprisonment for that offense. In February 1999, defendant was charged in Cook County case No. 1999-CR-664102 with manufacture and delivery of a controlled substance, a Class 1 felony. In April 1999, defendant was sentenced to six years' imprisonment for that offense. The record clearly shows (1) defendant was over 21 years old at the time of this offense; (2) the offense in question is a Class 2 offense; (3) defendant's first qualifying conviction occurred in November 1994, after the effective date of the Act; (4) defendant's second qualifying conviction occurred in April 1999, five years after his first qualifying conviction; and (5) defendant's current conviction occurred in October 2005, six years after his second qualifying conviction. We agree with OSAD no colorable argument defendant was not eligible for Class X sentencing can be made.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 25 Affirmed.