

NOTICE
Decision filed 11/10/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 110467-U

NO. 5-11-0467

IN THE

APPELLATE COURT OF ILLINOIS

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).

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Madison County.
)	
v.)	No. 83-CF-241
)	
JEFFREY L. WRIGHT,)	Honorable
)	Richard L. Tognarelli,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly denied the defendant's motion for leave to file a successive postconviction petition.

¶ 2 The defendant, Jeffrey L. Wright, appeals the denial of his motion for leave to file a successive postconviction petition. The State Appellate Defender has been appointed to represent him. The State Appellant Defender has filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). Wright was given proper notice and was granted an extension of time to file briefs, objections, or any other documents supporting his appeal. He has filed a response. We have considered the State

Appellate Defender's motion to withdraw as counsel on appeal, as well as Wright's response thereto. We have examined the entire record on appeal and find no error or potential grounds for appeal. For the following reasons, we now grant the State Appellate Defender's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Madison County.

¶ 3

BACKGROUND

¶ 4 Following a bench trial, Wright was found guilty of murder and armed robbery. He was sentenced to an extended term of 80 years' imprisonment for murder based on the court's finding that the murder was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty. Wright was also sentenced to a concurrent term of 30 years' imprisonment for armed robbery. This court affirmed. *People v. Wright*, 127 Ill. App. 3d 747 (1984).

¶ 5 On May 30, 1985, Wright filed *pro se* a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (Ill. Rev. Stat. 1985, ch. 38, ¶ 122-1 *et seq.*). The circuit court summarily dismissed Wright's postconviction petition and this court affirmed. *People v. Wright*, No. 5-85-0468 (1987) (unpublished order under Supreme Court Rule 23). On September 19, 1988, Wright filed a second postconviction petition. The circuit court granted the State's motion to dismiss. There is no record of an appeal. On September 18, 2000, Wright filed a petition for postjudgment relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000)), arguing, *inter alia*, that the extended-term portion of his 80-year sentence for murder was void pursuant to the rule enunciated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000),

because the brutal-and-heinous finding upon which the extended term was based had been made by the court rather than a jury. The circuit court dismissed the petition, and this court affirmed. *People v. Wright*, No. 5-03-0617 (2005) (unpublished order under Supreme Court Rule 23).

¶ 6 On August 28, 2006, Wright filed *pro se* a motion for leave to file a successive postconviction petition. Under a heading labeled "Cause," Wright alleged that his first postconviction petition had been prepared *pro se* and that he did not know how to properly frame his contentions of error. Under a heading labeled "Prejudice," Wright alleged that it was "highly probable the end results could have been different" had counsel represented him effectively at trial. Attached to the motion was a postconviction petition wherein Wright alleged that (1) trial counsel failed to advise him that by electing a bench trial he was waiving a jury for the penalty phase of his murder conviction, (2) trial counsel failed to file a second motion to suppress his confession, (3) his statements were improperly admitted into evidence because police continued to interrogate him after he had requested counsel, (4) a conflict of interest existed where trial counsel also represented him on appeal because trial counsel could not be expected to argue his own incompetence, (5) trial counsel failed to offer mitigating factors at sentencing, (6) counsel failed to raise the issue of "whether defendant intelligently waived *Miranda* rights, or the issue of the waiver of the jury to decide his sentencing as well as the innocence/guilt phase," (7) trial counsel failed to research the material witness rule, (8) he was denied his right to confront witnesses when the State failed to present all of its witnesses at trial regarding his confession, (9) he had no history of violence, (10) the trial court erred in

imposing an extended-term sentence based on the finding that the murder was accompanied by brutal and heinous behavior because all murders are brutal and heinous, (11) the trial court erred in imposing an extended-term sentence, (12) his codefendant received a much lesser sentence, and (13) the imposition of a three-year term of mandatory supervised release was unconstitutional because it improperly extended his sentence beyond the maximum prescribed by law.

¶ 7 On March 26, 2007, Wright sent a letter to the circuit court stating that more than 90 days had elapsed since he filed his postconviction petition and that he wished to have counsel appointed. On May 9, 2007, the circuit court appointed counsel to represent Wright.

¶ 8 A hearing was held on March 19, 2008. Wright argued that he had not been informed by trial counsel or the trial court that he had the right to have a jury determine whether he was eligible for an extended-term sentence. The State argued that prior to *Apprendi*, the law in Illinois was that extended-term findings were made by the court, and that Wright's *Apprendi* claim had been adjudicated in Wright's last petition for relief.

¶ 9 The matter was reset on a number of occasions. On July 27, 2011, the State filed a "Motion to Dismiss," arguing that Wright was barred from filing a successive postconviction petition because the proceedings on his first postconviction petition were not fundamentally unfair. At a hearing on September 26, 2011, Wright argued that he would not have waived his right to a jury had he known that he had a right to have a jury determine whether the murder was accompanied by brutal and heinous behavior, and that

he could not have raised this claim in his initial postconviction petition because *Apprendi* had not yet been decided.

¶ 10 On October 4, 2011, the circuit court dismissed Wright's successive postconviction petition, finding that because the proceedings on Wright's first postconviction petition were fundamentally fair, *People v. Free*, 122 Ill. 2d 367 (1988), barred him from filing any successive postconviction petitions. Wright appeals.

¶ 11 ANAYSIS

¶ 12 We begin by addressing a potential jurisdictional defect noted by the Appellate Defender. Wright's initial notice of appeal was ineffective because it was filed while a timely postjudgment motion was pending. Ill. S. Ct. R. 606(b) (eff. Mar. 20, 2009). However, Wright sought and was granted leave to file an amended notice of appeal, which he filed within 30 days of the denial of the postjudgment motion. Consequently, we have jurisdiction to consider this appeal.

¶ 13 The Act provides a mechanism by which state prisoners may collaterally challenge their convictions and/or sentences for substantial violations of their federal or state constitutional rights that occurred at their trial and that were not and could not have been previously adjudicated. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). Section 122-3 of the Act (725 ILCS 5/122-3 (West 2004)) contemplates the filing of only one postconviction petition. *People v. Evans*, 186 Ill. 2d 83, 89 (1999). All of the issues that were decided in a prior postconviction proceeding are barred by the doctrine of *res judicata*, and all the issues that could have been raised in a prior postconviction proceeding but were not are forfeited. *People v. Anderson*, 375 Ill. App. 3d 990, 1000

(2007) (citing *People v. Blair*, 215 Ill. 2d 427, 443 (2005)). The procedural bar of forfeiture is not merely a rule of judicial administration; it is an express statutory requirement under the Act. 725 ILCS 5/122-3 (West 2004). The doctrine of forfeiture will be relaxed only where the petitioner can meet the cause-and-prejudice test adopted by the supreme court in *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002), and codified in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2004)) or where the petitioner can set forth a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶¶ 22, 23. Section 122-1(f) of the Act provides that only one postconviction petition may be filed without leave of court and that leave may be granted only where the petitioner demonstrates cause for failing to raise the claims in question in the initial postconviction petition and prejudice results from that failure. 725 ILCS 5/122-1(f) (West 2004). Section 122-1(f) further provides that to demonstrate cause, a prisoner must identify an objective factor that prevented him from raising the claim in his initial postconviction proceeding and that to demonstrate prejudice, the prisoner must demonstrate that the claim so infected the proceeding that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2004). We review the denial of a motion for leave to file a successive postconviction petition *de novo*. *People v. Williams*, 392 Ill. App. 3d 359, 367 (2009).

¶ 14 We agree with the Appellate Defender that neither the appointment of counsel nor the filing of a "motion to dismiss" by the State suggests that Wright's postconviction petition was advanced to the second stage. A successive postconviction petition is not

"filed" until leave is granted. *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010). In the present case, the circuit court denied leave.

¶ 15 We also agree with the Appellate Defender that the circuit court properly denied Wright's motion for leave to file a successive postconviction petition. Wright did not raise a colorable claim of actual innocence, and except for his jury waiver claim, all of the allegations of constitutional deprivation set forth in Wright's successive postconviction petition could have been raised in his previous postconviction petitions. Thus, those claims were forfeited unless they met the cause-and-prejudice test. The only objective factor Wright alleged as having prevented him from raising these claims earlier was that his first postconviction was filed *pro se*. However, the Act specifically contemplates that a postconviction petition may initially be prepared without benefit of counsel. Section 122-2.1 of the Act provides that a postconviction petition may be dismissed at the first stage of proceedings only if it is frivolous and patently without merit. 725 ILCS 5/122-2.1 (West 2004). This is a purposely low threshold because most postconviction petitions are drafted by defendants with little legal training or knowledge. *People v. Ligon*, 239 Ill. 2d 94, 104 (2010). That a postconviction petition is initially prepared and filed without benefit of counsel does not constitute cause for purposes of the cause-and-prejudice test.

¶ 16 With respect to Wright's jury waiver claim, we agree with the Appellate Defender that Wright failed to meet the prejudice prong of the cause-and-prejudice test. Wright's claim that counsel failed to advise him that by electing a bench trial he was forfeiting his right to have a jury determine whether the murder was accompanied by brutal and

heinous behavior is merely an *Apprendi* claim recast as an ineffective-assistance-of-counsel claim. *Apprendi* does not apply retroactively to criminal cases in which direct appeals were exhausted before *Apprendi* was decided (*People v. De La Paz*, 204 Ill. 2d 426 (2003)).

¶ 17 For the foregoing reasons, we grant the State Appellate Defender's motion to withdraw as counsel on appeal, and we affirm the judgment of the circuit court of Madison County.

¶ 18 Motion granted; judgment affirmed.