

NOTICE  
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2014 IL App (5th) 120374-U

NO. 5-12-0374

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 02-CF-77
	)	
JASMON STALLINGS,	)	Honorable
	)	Michael N. Cook,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE SCHWARM delivered the judgment of the court.  
Justices Chapman and Stewart concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court properly denied the defendant leave to file a successive petition for postconviction relief where the defendant failed to satisfy the cause-and-prejudice test.

¶ 2 The defendant, Jasmon Stallings, is serving a sentence of imprisonment for first-degree murder. His first attempt at postconviction relief was wholly unsuccessful. His second and current attempt began inauspiciously when the circuit court denied him leave to file a successive postconviction petition. The defendant now appeals from the denial of leave. This court concludes that the defendant failed to establish the requisite cause and prejudice for the filing of a successive postconviction petition, and therefore the

circuit court did not err in denying him leave to file one. The judgment of the circuit court is affirmed.

¶ 3

### BACKGROUND

¶ 4 In 2003, a jury found the defendant guilty of first-degree (felony) murder (720 ILCS 5/9-1(a)(3) (West 2002)). The trial evidence established that the defendant shot and killed John Redmond, a taxicab driver, while attempting to rob him. The circuit court sentenced the defendant to imprisonment for 35 years. On direct appeal, the defendant argued only that the sentence represented an abuse of discretion. This court disagreed with his argument and affirmed the judgment of conviction. See *People v. Stallings*, No. 5-03-0596 (2004) (unpublished order under Supreme Court Rule 23). This court's decision in the direct appeal includes a summary of the key evidence adduced at trial, a summary that need not be repeated here.

¶ 5 In 2005, the defendant filed *pro se* a petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)), wherein he claimed that counsel on direct appeal provided constitutionally ineffective assistance by failing to raise all of the claims that trial counsel had included in a posttrial motion. The posttrial motion included several disparate claims, including a claim that the defendant was deprived of a fair trial when a juror improperly contacted and spoke with a potential witness for the State, and a claim concerning the trial prosecutor's use of certain prior inconsistent statements by witness Alfred Garner. The circuit court summarily dismissed the postconviction petition as frivolous and patently without merit. See 725 ILCS 5/122-2.1(a)(2) (West 2004). The defendant appealed. His appointed counsel in that appeal,

the Office of the State Appellate Defender (OSAD), filed a *Finley* motion to withdraw as counsel on the ground that the appeal lacked merit. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court examined each of the claims included in the posttrial motion, and concluded that direct-appeal counsel was not ineffective for choosing not to raise any of the posttrial claims. Accordingly, this court granted the *Finley* motion and affirmed the judgment of the circuit court. See *People v. Stallings*, No. 5-06-0591 (2008) (unpublished order under Supreme Court Rule 23).

¶ 6 On April 17, 2012, the defendant filed *pro se* a motion for leave to file a successive petition for postconviction relief. Most of the 10-page motion was devoted to discussion of the claims the defendant wished to raise in a successive petition. (The defendant did not submit an actual successive petition.) Those claims may be summarized as follows: (1) either (a) the State committed prosecutorial misconduct by failing to turn over to the defense, in advance of trial, statements made to the police by witnesses David Washington, Delawrence Foggy, Terry Hampton, Darion Donald, John Eiland, and Dejawane Smith, or (b) the State turned over the statements but trial counsel provided ineffective assistance by failing to interview those witnesses; (2) trial counsel provided ineffective assistance by (a) failing to move for the mid-trial dismissal of juror Jessica Brady on the ground that she had improper contact with potential State's witness Derek Parker, (b) failing to "challenge[ ]" or to seek the suppression of a prior statement made by Alfred Garner to police interrogators, on the ground that the statement was inadmissible because Garner, at the time he made the statement, was only 16 years of age and no concerned adult was with him, and (c) failing to "attack[ ]" the "issue" of

codefendant Dejawane Smith's testifying against the defendant as part of a plea agreement that Smith made with the State; and (3) the trial court erred in instructing the jury on attempted armed robbery where the charge of attempted armed robbery had been dismissed prior to trial, and first-degree (felony) murder was the only charge for the jury to decide. This court notes that attempted armed robbery was the predicate felony for the charge of first-degree (felony) murder. In support of the first of these claims—the one concerning witnesses' statements to police—the defendant attached to his motion for leave to file a successive petition photocopies of the statements made to police investigators by David Washington, Delawrence Foggy, *et al.*

¶ 7 In his motion, the defendant sought to explain his failure to include these claims in his first postconviction petition. He wrote that (1) he "did not have the information or know that he needed affidavits to substantiate his claim"; (2) he "did not know at the time that he could file ineffective [*sic*] against trial counsel, or how"; and (3) due to "an accident," he was "in a coma for 3/weeks causing minor brain damage, memoryloss [*sic*], trouble concentrating, migrains [*sic*] as well as depression." Attached to the motion were copies of medical records indicating that in 1994, when the defendant was 11 years old, he was hit by a car while riding his bicycle, resulting in a closed head injury, a possible loss of consciousness, and generalized seizures.

¶ 8 On August 2, 2012, the circuit court denied the defendant's motion for leave to file a successive postconviction petition. The defendant perfected an appeal, and the circuit court appointed OSAD to represent him.

¶ 9 In this court, OSAD filed a *Finley* motion to withdraw as counsel on the ground that the instant appeal lacks merit. In December 2013, this court granted OSAD's *Finley* motion, and also granted a motion by the defendant to proceed *pro se*.

¶ 10 ANALYSIS

¶ 11 This appeal is from an order denying leave to file a successive postconviction petition. Appellate review of such an order is *de novo*. *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010). The subject of the review is the circuit court's judgment, not the reasoning that led the court to enter that judgment, and a reviewing court may affirm the judgment on any basis supported by the record. *People v. Johnson*, 208 Ill. 2d 118, 128-29 (2003).

¶ 12 In general, the Act contemplates the filing of only one petition. *People v. Guerrero*, 2012 IL 112020, ¶ 15. The Act expressly provides that any claim of the substantial denial of constitutional rights not raised in the original or amended petition is waived. See 725 ILCS 5/122-3 (West 2012). A defendant seeking to file a successive postconviction petition must first obtain leave of court. 725 ILCS 5/122-1(f) (West 2012).

¶ 13 Leave to file a successive petition may be granted where defendant demonstrates cause for his failure to bring the claim in his initial postconviction petition and prejudice as a result of that failure. 725 ILCS 5/122-1(f) (West 2012); *People v. Tidwell*, 236 Ill. 2d 150, 152 (2010). Cause may be shown by pleading some objective factor external to the defense that impeded his ability to raise the claim in his initial postconviction proceeding. 725 ILCS 5/122-1(f)(1) (West 2012); *People v. Gillespie*, 407 Ill. App. 3d

113, 123 (2010). Prejudice may be shown by demonstrating that the claim not raised so infected the trial that the resulting conviction and sentence violated due process. 725 ILCS 5/122-1(f)(2) (West 2012); *Gillespie*, 407 Ill. App. 3d at 123-24. A defendant has the burden of establishing both elements of the cause-and-prejudice test in order to prevail. *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002). The test is to be applied to individual claims, not to the petition as a whole. *Id.* at 462. Where a court concludes that the defendant failed to establish cause, it need not address prejudice, and vice versa. See *People v. Brown*, 225 Ill. 2d 188, 207 (2007).

¶ 14 The defendant has filed in this court a *pro se* brief. Most of the defendant's brief is devoted to a discussion of claims described in the *pro se* motion for leave to file a successive postconviction petition. However, the brief also includes discussion of claims that were not discussed in that motion, which the defendant is attempting to raise for the first time on appeal. Our Illinois Supreme Court has stressed that any claim that was not raised in a postconviction petition cannot be argued for the first time on appeal. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). Such a claim is procedurally defaulted, and this court should not consider it. *Pendleton*, 223 Ill. 2d at 470-71. Therefore, this court will not consider those claims that the defendant did not include in his motion for leave to file a successive petition.

¶ 15 In regard to the claim concerning witnesses David Washington, Delawrence Foggy, *et al.* it is immediately and abundantly clear that the defendant did not even begin to establish the requisite prejudice for the filing of a successive petition. None of the statements attached to the defendant's motion provided the defendant with an alibi. None

of the statements identified anyone other than the defendant as the person who shot the decedent. In short, none of the statements was exculpatory for the defendant. Indeed, Washington, Foggy, and Eiland made clear in their statements that they did not even learn of a shooting until well after the fact. In his motion for leave, the defendant did not offer any suggestion as to how any of these statements could have benefitted him at trial. Because none of the statements could possibly have altered the outcome of the defendant's trial, there can be no constitutional error in the State's failing to turn them over to the defense. See *Brady v. Maryland*, 373 U.S. 83 (1963) (defendant's constitutional right to due process is violated where prosecution withholds evidence that is favorable to the defendant and is "material either to guilt or to punishment"). Also, there cannot be any constitutional error in trial counsel's failure to use those statements. See *Strickland v. Washington*, 466 U.S. 668 (1984) (to establish a violation of the constitutional right to the effective assistance of counsel, a defendant must establish that counsel performed below an objective standard of reasonableness and that the deficient performance so prejudiced the defendant that there is a reasonable probability that, absent the errors, the outcome would have been different).

¶ 16 As for the other claims that the defendant described in his motion for leave to file a successive postconviction petition, all of them were based on facts or incidents that were revealed or that occurred during the course of the defendant's trial. Therefore, all of them clearly could have been raised in the first postconviction petition. Indeed, the defendant did in fact include in his first postconviction petition a claim concerning the juror who contacted and spoke with the potential State's witness, as well as a claim

concerning the trial prosecutor's use of Alfred Garner's prior inconsistent statements. See *supra* ¶ 5. All of these claims are either forfeited or *res judicata*.

¶ 17 In his motion for leave to file a successive petition, the defendant attempted to establish cause by stating that at the time he prepared his first postconviction petition, he was unaware that he could include in a postconviction petition claims of ineffective assistance by trial counsel. However, the defendant's ignorance of the law cannot amount to cause for failure to bring a claim in an initial postconviction proceeding. *People v. Evans*, 2013 IL 113471, ¶ 13. The defendant also attempted to establish cause by referring to his being struck by a car in 1994, when he was 11 years old, but that incident is far too remote to explain the defendant's failure to raise his claims in the initial postconviction proceeding in 2005.

¶ 18 The defendant plainly failed to satisfy the cause-and-prejudice test for the filing of a successive postconviction petition. The circuit court properly denied the defendant leave to file such a petition.

¶ 19 Affirmed.