2017 IL App (1st) 142707-U
Order filed: March 31, 2017

SIXTH DIVISION

No. 1-14-2707

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 95 CR 34976
	)	
DORCUS WITHERS,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellee,	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's order denying defendant leave to file a successive postconviction petition, where the circuit court properly concluded that defendant failed to satisfy the cause-and-prejudice test. In addition, we reject defendant's contention that the automatic transfer provision of the Juvenile Court Act of 1987 is unconstitutional. Finally, we reverse the fees and costs imposed upon defendant, as it was error to have characterized his *pro se* petition as frivolous and patently without merit.

¶ 2 Defendant, Dorcus Withers, appeals from orders of the circuit court denying his *pro se* request for leave to file a successive postconviction petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1, *et seq.* (West 2012)), and imposing fees and costs upon him for filing a frivolous petition. On appeal, defendant alleges he satisfied the cause-and-prejudice test such that the circuit court's orders were improper. He also contends for the first

time on appeal that the automatic transfer provision of the Juvenile Court Act of 1987 is unconstitutional. Finally, he argues that the circuit court improperly imposed $105 in filing fees and costs against him. For the following reasons, we affirm the circuit court's order denying leave to file this successive petition, reject defendant's challenge to the automatic transfer provision, and vacate the order imposing fees and cost upon defendant.[1]

¶ 3 I. BACKGROUND

¶ 4 Defendant, a 16-year old juvenile at the time of the offenses, was tried and convicted as an adult for the 1995 first degree murder of Christopher Rodgers and attempted first degree murder of William Glass. Defendant received consecutive sentences for those convictions, including a 55-year term of imprisonment for murder and a 25-year term of imprisonment for attempted murder.

¶ 5 In his direct appeal, defendant argued solely that his sentences were excessive and that they should not have been ordered to be served consecutively. This court rejected defendant's contention that his sentences were excessive, but agreed that his sentences should have been ordered to be served concurrently. *People v. Withers*, Nos. 1-98-1153 and 1-98-1808 (cons.) (1999) (unpublished order under Supreme Court Rule 23). Upon remand, a modified mittimus reflecting concurrent sentences was entered in August 2000.

¶ 6 Thereafter, in late 2000 and in 2001, defendant filed two, separate postconviction petitions. Each petition was summarily dismissed by the circuit court, and each summary dismissal was subsequently affirmed on appeal. *People v. Withers*, No. 1-01-0771 (2002)

[1] This order was originally filed on February 3, 2017. On February 24, 2017, the defendant filed a petition for rehearing. After considering the State's answer and the defendant's reply, we granted rehearing and now issue this modified order.

(unpublished order under Supreme Court Rule 23); *People v. Withers*, No. 1-02-0670 (2002) (unpublished order under Supreme Court Rule 23).

¶ 7 On June 3, 2014, defendant filed the *pro se* successive postconviction petition at issue in this appeal. Therein, defendant argued that, because he was a 16-year old juvenile at the time of the offenses, his 55-year sentence should be vacated because it amounted to a *de facto* life sentence in violation of the requirements of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and its progeny.

¶ 8 On July 18, 2014, the circuit court entered a written order denying defendant leave to file this successive postconviction petition. The circuit court first noted that, while defendant was required to satisfy the so-called "cause-and-prejudice test"[2] before leave to file such a successive postconviction petition would be granted, defendant had "failed to request leave to file the instant petition." Nevertheless, after "[a]ssuming" that defendant satisfied the "cause" prong of the test because the case law supporting his petition (including the *Miller* decision) was issued well after defendant's initial postconviction petition was filed, the circuit court concluded that defendant had "failed to demonstrate that any prejudice inured from his failure to assert this claim earlier." The circuit court specifically concluded that the concerns outlined in *Miller* and its progeny were not triggered in this case, where defendant "was not sentenced to the death penalty or to a life sentence, and the [circuit] court considered petitioner's age and other circumstances in determining the range of sentence to impose." The circuit court, thus, denied petitioner leave to file this second successive postconviction petition.

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[2] As discussed below, under this test any claims made in a successive postconviction petition are barred unless defendant shows cause for failing to raise the claims in his initial postconviction petition and prejudice resulting from that failure. *People v. Jones*, 2013 IL App (1st) 113263, ¶ 12.

¶ 9 In a separate order entered the same day, the circuit court found that defendant's petition was "entirely frivolous" in that it lacked an arguable basis in law or in fact, did not have evidentiary support, and was presented to hinder, cause unnecessary delay and needlessly increase the cost of litigation. The circuit court, therefore, assessed $105 in filing fees and costs against defendant, pursuant to section 22-105 of the Code of Civil Procedure (Code). 735 ILCS 5/22-105 (West 2014).

¶ 10 On August 5, 2014, defendant filed a *pro se* notice of appeal.

¶ 11 II. ANALYSIS

¶ 12 As noted above, defendant contends that the circuit court improperly denied him leave to file this successive petition for postconviction relief, and improperly imposed fees and costs upon him for filing a frivolous petition.

¶ 13 A postconviction proceeding is a collateral proceeding, rather than an appeal of the underlying judgment, and allows review of constitutional issues that were not, and could not have been, adjudicated on direct appeal. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). Issues raised and decided on direct appeal are barred from further consideration by *res judicata*; issues that could have been raised, but were not, are considered forfeited. *Id.* Consistent with these principles, section 5/122-1(f) of the Post-Conviction Hearing Act (Act) permits the filing of only one petition without leave of court and expressly provides that any claim not raised in the original or an amended petition is forfeited. 725 ILCS 5/122-1(f) (West 2012).

¶ 14 Nevertheless, the statutory bar against a second or successive petition may be relaxed under two circumstances. First, the bar is relaxed where a defendant establishes cause and prejudice for the failure to previously raise a claim under the Act. *People v. Edwards*, 2012 IL 111711, ¶ 22. Second, it is relaxed under "what is known as the 'fundamental miscarriage of

justice' exception." *Id*. ¶ 23 (quoting *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002)). "In order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a [defendant] must show actual innocence." *Id*. ¶ 23 (citing *Pitsonbarger*, 205 Ill. 2d at 459). As noted above, defendant contends he satisfied the cause-and-prejudice test.

¶ 15 Under this test, claims in a successive postconviction petition are barred unless defendant shows cause for failing to raise the claims in his initial postconviction petition and prejudice resulting from that failure. *Jones*, 2013 IL App (1st) 113263, ¶ 12. To show cause, defendant must identify an objective factor external to the defense that impeded his ability to raise a specific claim during his initial postconviction proceedings. *People v. Sutherland*, 2013 IL App (1st) 113072, ¶ 16. To show prejudice, defendant must demonstrate that the claim not raised so infected the trial that the resulting conviction or sentence violated due process. *Id*. The cause-and-prejudice test has been codified in section 5/122-1(f) of the Act. See 725 ILCS 5/122-1(f) (West 2012).

¶ 16 Both prongs must be met to satisfy the cause-and-prejudice test and allow for the filing of a successive postconviction petition. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 32. We review the circuit court's ruling on whether a defendant has satisfied the cause-and-prejudice test of section 122-1(f) pursuant to a *de novo* standard of review. See *People v. Williams*, 394 Ill. App. 3d 236, 242 (2009). As such, we need not defer to the circuit court's reasoning in our independent review of this issue. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 34.

¶ 17 We first consider the State's assertion that "[b]ecause defendant failed to even allege cause and prejudice, and never sought leave to file this successive petition, the lower court's ruling should be affirmed." As defendant notes in his reply brief, while the State's exact argument is unclear, the State appears to suggest that appellate review of the circuit court's

decision to deny defendant leave to file this successive petition for postconviction relief is foreclosed by defendant failure to file a formal request for leave below. To the extent that the State makes such an argument, we reject it. In *People v. Tidwell*, 236 Ill. 2d 150 (2010), our supreme court recognized:

> "[A] successive postconviction petition is not considered 'filed' for purposes of section 122-1(f), and further proceedings will not follow, until leave is granted, a determination dependent upon a defendant's satisfaction of the cause-and-prejudice test. There is also a commonsense acknowledgment that a defendant who submits a successive postconviction petition wants to 'file' it and institute proceedings thereon. However, it is still defendant's burden to obtain leave, and he must submit enough in the way of documentation to allow a circuit court to make that determination. Certainly, no separate motion seeking leave is mandated by section 122-1(f) in its current form, nor, as we have demonstrated, is an explicit request even required if the circuit court sees fit to consider the matter and rule of its own accord. We find that circuit courts have that authority under the statute." *Id.* at 161.

As such, despite the fact that defendant never filed a formal request for leave to file this successive postconviction petition below, the circuit court had authority to consider whether defendant satisfied the cause-and-prejudice test. Furthermore, we have authority to review the circuit court's ruling on this issue. *Id*. at 162 (finding no impediment to appellate court's review of circuit court's *sua sponte* ruling on a defendant's satisfaction of the cause-and-prejudice test); *People v. Jarrett*, 399 Ill. App. 3d 715, 722 (2010) (coming to same conclusion in similar circumstances, in light of the *Tidwell* decision).

¶ 18 Before turning to a consideration of the merits of defendant's contention that he satisfied the cause-and-prejudice test, however, we find it expedient to provide some background on the legal principles underlying defendant's substantive claim that his 55-year sentence should be vacated because it amounted to a *de facto* life sentence in violation of the requirements of *Miller*, and its progeny.

¶ 19 Among the constitutional limitations on the legislature's discretion to provide specific penalties for specific criminal offenses are the provisions of the eighth amendment of the United States Constitution (U.S. Const., amend. VIII), and article I, section 11, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 11). The eighth amendment, applicable to the states by virtue of the fourteenth amendment (see *Robinson v. California*, 370 U.S. 660, 666 (1962)), provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. In turn, article I, section 11, of the Illinois Constitution of 1970 provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. Our supreme court had recognized that our state constitution's "proportionate penalties clause is coextensive with the [federal] cruel and unusual punishment clause." *In re Rodney H.*, 223 Ill. 2d 510, 518 (2006) (citing *People v. Sharpe*, 216 Ill. 2d 481, 517 (2005)).

¶ 20 In *Miller*, the Supreme Court determined that the eighth amendment prohibits the mandatory sentencing of a juvenile to life in prison without parole, even if the juvenile defendant was convicted of murder. *Miller*, 132 S. Ct. at 2475. In *People v. Davis*, 2014 IL 115595, our supreme court reasoned that *Miller* declared a new substantive rule that applied retroactively, and "[i]n terms of the requisite cause and prejudice of the Post-Conviction Hearing Act, *Miller's* new

substantive rule constitutes 'cause' because it was not available earlier to counsel ***, and constitutes prejudice because it retroactively applies to defendant's sentencing hearing." *Id.* at ¶¶ 39, 42. This conclusion was validated in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), where the Supreme Court determined that *Miller* announced a new substantive rule that must be given retroactive application. *Id*. at 735-36.

¶ 21 The Supreme Court further elaborated on *Miller*, noting that the "central substantive guarantee" of the eighth amendment is protection against disproportionate punishment, and that *Miller* was based on a "line of precedent holding certain punishments disproportionate when applied to juveniles." *Id*. at 732. The Supreme Court further found that this eighth amendment protection "goes far beyond the manner of determining a defendant's sentence." *Id*. at 732-33. Rather, the sentencing of a juvenile to life without parole was "excessive for all but the rare juvenile offender whose crime reflects irreparable corruption." *Id*. (Internal quotation marks omitted.) Therefore, "[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects the unfortunate yet transient immaturity " of youth rather than "irreparable corruption." *Id*. at 734. (Internal quotation marks omitted.) In order to comply with the eighth amendment's prohibitions, the judge at a sentencing hearing must consider "youth and its attendant characteristics" so that juveniles who may be sentenced to life without parole can be separated from those who may not. *Id*. at 735.

¶ 22 In addition, courts in Illinois have recognized that the requirements of *Miller* are applicable to sentences that, due to their length, amount to *de facto* life sentences. As our supreme court has stated, a "mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory

sentence of life without parole—in either situation, the juvenile will die in prison. *Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation." *People v. Reyes*, 2016 IL 119271, ¶ 9. While our supreme court has, thus far, limited its extension of *Miller* to *de facto* life sentences without parole that are *mandatory*, at least some appellate courts in this state have also applied *Miller* to *discretionary* sentences that amount to *de facto* life sentences without the possibility of parole. See, e.g., *People v. Sanders*, 2016 IL App (1st) 121732-B, ¶¶ 25-27; *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 42.

¶ 23 Regardless of this potentially open question, we note numerous Illinois courts have considered the availability and amount of sentence credit applicable to a given sentence to determine the actual length of the sentence, before determining whether it actually amounts to a *de facto* life sentence without the possibility of parole. See, *e.g.*, *Reyes*, 2016 IL 119271, ¶ 10; *People v. Patterson*, 2014 IL 115102, ¶ 108; *Nieto*, 2016 IL App (1st) 121604, ¶ 13; *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 66; *People v. Harris*, 2016 IL App (1st) 141744, ¶ 54; *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 24. At least two courts have also concluded that it is appropriate to take judicial notice of a defendant's projected discharge date, as reflected on the Illinois Department of Corrections website, in making this determination. *Gipson*, 2015 IL App (1st) 122451, ¶ 66; *Nieto*, 2016 IL App (1st) 121604, ¶ 14, n. 1. While no bright line rule has been established with respect to how long a sentence must be to qualify as a *de facto* life sentence without the possibility of parole imposed upon a juvenile, we do note that our supreme court has explicitly concluded that a mandatory minimum 32-year sentence applicable to a defendant who was 16 at the time he committed murder and attempted murder "is not a *de facto* life sentence." *Reyes*, 2016 IL 119271, ¶ 12.

¶ 24 Here, the written decision entered by the circuit court denying leave to file this successive postconviction petition indicated that it would assume that defendant had satisfied the "cause" prong of the test, because *Miller* and its progeny were decided well after the filing of defendant's first postconviction petition. The State does not assert otherwise on appeal and, as we noted above, Illinois courts have recognized that cause is indeed established in circumstances such as those presented here. *Davis*, 2014 IL 115595, ¶ 42; *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 48.

¶ 25 Thus, we turn to the issue of prejudice. What is evident from the decisions discussed above is that the principles outlined in *Miller* apply only where a juvenile is sentenced to an actual or *de facto* sentence of life without the possibility of parole. It is also clear that any sentencing credit available to a defendant should be accounted for in making this decision.

¶ 26 Because in this case defendant was sentenced for offenses that occurred in 1995, he was entitled to receive one day of good behavior credit for each day of his sentence, such that "each day of sentence credit shall reduce by one day the prisoner's period of imprisonment." 730 ILCS 5/3-6-3(a)(2.1) (West 2014). As such, despite defendant's 55-year sentence, he is actually eligible for release in 27.5 years. A review of the website of the Illinois Department of Corrections reflects that defendant is presently scheduled to be released on August 21, 2024. At that time, defendant will be 45 years old and will have served less than 29 years in prison. Whatever else it may be, and regardless of where the dividing line is between sentences that are *de facto* life sentences without the possibility of parole and those that are not, defendant—who was 16 at the time he committed murder and attempted murder—was, therefore, effectively sentenced to less than 32-years' imprisonment without the possibility of parole. Our supreme

court has explicitly recognized that such a punishment "is not a *de facto* life sentence." *Reyes*, 2016 IL 119271, ¶ 12.

¶ 27 Therefore, the requirements of *Miller* are simply inapplicable to this matter. In light of this conclusion, we find that leave of court to file a successive postconviction petition was properly denied, as "it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law." *People v. Smith*, 2014 IL 115946, ¶ 35.

¶ 28 We next address defendant's contention that the automatic transfer statute is unconstitutional. The automatic transfer provision of the Juvenile Court Act of 1987 excludes juveniles over 15 years of age who are charged with particular enumerated crimes, including first degree murder, from juvenile court jurisdiction. 705 ILCS 405/5-130 (West 2014). Defendant asserts that the automatic transfer provision violates due process.

¶ 29 However, this issue is forfeited because defendant did not raise the issue in his *pro se* petition and it may not be raised for the first time on appeal. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). Moreover, in his opening brief, defendant acknowledged that this exact argument has been twice rejected by our supreme court, but suggested that those decisions should be reconsidered. See *Patterson*, 2014 IL 115102, ¶ 2; *People v. Fiveash*, 2015 IL 117669, ¶ 45. In his reply brief, defendant acknowledged that these decisions are binding on this court. Indeed, "[t]he appellate court lacks authority to overrule decisions of [the supreme] court, which are binding on all lower courts." *People v. Artis*, 232 Ill.2 d 156, 164 (2009). Thus, we decline defendant's invitation to find that *Patterson* and *Fiveash* were wrongly decided and conclude that the automatic transfer statute is unconstitutional.

¶ 30 Finally, we consider defendant's contention that the circuit court improperly imposed $105 in filing fees and costs against him, pursuant to section 22-105 of the Code. (735 ILCS 5/22-105 (West 2014). We review the propriety of such an order *de novo*. *People v. Moody*, 2015 IL App (1st) 130071, ¶ 85.

¶ 31 Section 22–105 of the Code allows the trial court to assess filing fees and court costs against a prisoner where he files a pleading in a case seeking postconviction relief and the court makes a finding that the pleading is frivolous. 735 ILCS 5/22–105(a) (West 2014). "Frivolous" is defined as a pleading that meets any or all of the following criteria: (1) it lacks an arguable basis in law or in fact; (2) it is presented for an improper purpose, such as to harass, cause unnecessary delay, or needless increase in the cost of litigation; (3) the claims, defenses, and legal contentions therein are not warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (4) the allegations and other factual contentions lack evidentiary support or are unlikely to have evidentiary support after further investigation or discovery; or (5) the denials of factual contentions are unwarranted by the evidence or are not reasonably based on a lack of information or belief. 735 ILCS 5/22–105(b) (West 2014).

¶ 32 Here, the circuit court found that defendant's petition was entirely frivolous because it lacked an arguable basis in law or in fact, did not have evidentiary support, and was presented to hinder, cause unnecessary delay and needlessly increase the cost of litigation. We disagree.

¶ 33 First, we disagree with the circuit court's conclusion that the petition lacked an arguable basis in law or in fact. As we have explained, we find no error in the court's determination that defendant failed to meet the cause-and-prejudice test. Nevertheless, our review of defendant's petition was guided in significant part on decisions issued well after defendant filed the petition

at issue here. In determining whether defendant filed a frivolous petition, however, we must look to the state of the law at the time the petition was filed (*People v. Chacon*, 2016 IL App (1st) 141221, ¶ 18), and a petition lacks an arguable basis either in law or in fact only where it is "based on an indisputably meritless legal theory or a fanciful factual allegation" (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). At the time defendant filed his petition, there was authority—albeit merely persuasive authority—supporting his arguments. See *State v. Null*, 836 N.W. 2d 41, 71 (Iowa 2013); *People v. Pacheco*, 2013 IL App (4th) 110409, ¶¶ 95-102 (Appelton, J., dissenting). Under these circumstances, we find that defendant's petition did not lack an arguable basis in law and fact at the time it was filed.

¶ 34 Second, we reject the notion that the petition did not have evidentiary support. It is clear that the issues raised in defendant's petition were primarily legal in nature, and were premised upon a factual background that was essentially undisputed with respect to the defendant's age at the time of the offense and the time of sentencing and the length of his sentence. We fail to see how defendant's petition lacks evidentiary support for his arguments.

¶ 35 Finally, we do not agree that defendant's petition was presented to hinder, cause unnecessary delay and needlessly increase the cost of litigation. Clearly, the petition was not intended to hinder or cause delay any litigation. The petition constituted an effort to initiate a new, collateral proceeding, and there were no other proceedings pending at that time. As to whether it was intended to increase the cost of litigation, there is simply no evidence in the record to support such a finding, and without any such evidence we cannot affirm the imposition of fees and costs. See *Chacon*, 2016 IL App (1st) 141221, ¶ 19.

¶ 36 In sum, we conclude that it was error to have characterized defendant's *pro se* petition as frivolous. Consequently, under our authority pursuant to Ill. S. Ct. R. 615(b) (eff. Jan. 1, 1970),

we vacate the trial court's order imposing $105 in filing fees and costs pursuant to section 22–105.

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, we affirm the order of the circuit court which denied leave to file this successive petition, and vacate the order imposing fees and cost upon defendant.

¶ 39 Affirmed in part and vacated in part.