SECOND DIVISION
March 21, 2017

No. 1-14-2716

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. RYAN HOLMES, Petitioner-Appellant,	)))))))))	Appeal from the Circuit Court of Cook County No. 04 CR 27897 Honorable Stanley J. Sacks, Judge presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment

ORDER

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

¶ 2 Defendant Ryan Holmes appeals the denial of his motion for leave to file a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that his successive postconviction petition is his initial petition, and alternatively, that his petition satisfies the cause and prejudice test under the Act.

¶ 3 Following a bench trial, defendant was convicted of aggravated criminal sexual assault and home invasion of his ex-girlfriend, S.M., and sentenced to consecutive prison terms of 10 and 6 years. We set forth the facts of the case in our affirmance of defendant's conviction on

direct appeal. *People v. Holmes*, 1-06-1944 (2007) (unpublished order under Supreme Court Rule 23). The following summarizes the evidence of the defendant's guilt.

¶ 4 At trial, defendant argued a consent theory of defense and that, due to his disabilities, he was unable to inflict the force necessary to account for S.M.'s injuries. S.M. testified that she was in an on-and-off relationship with defendant since 1999. S.M. ended their engagement in May 2004, but the two remained friends. On May 18, 2004, defendant went to her apartment to pick up some of his belongings. Defendant knew that S.M. was in a relationship with another man and asked if she was having sexual relations with him. When she replied, "yes," defendant pushed her head against the wall and choked her. S.M. did not call the police.

¶ 5 The following day at around 11 p.m., defendant again went to her apartment and was limping as if he were hurt. Another man was with S.M., and they asked defendant to return the next day. As defendant left the apartment, he pulled a gun out and cocked it. S.M. grabbed her children and called the police.

¶ 6 On September 24, 2004, S.M. asked defendant to spend the night at her apartment so he could take her daughter and little brother to daycare the next morning while she went to work. Although S.M. and defendant had engaged in sexual intercourse since their May 2004 break-up, they had not had intercourse in the two weeks prior to September 24, 2004. S.M. denied having sex with defendant on September 24, 2004.

¶ 7 In the evening on September 25, 2004, S.M. returned home from work to find her door unlocked. She called defendant upset and left a voicemail telling him not to contact her anymore. Twenty minutes after leaving him a voicemail, defendant knocked on S.M.'s door while she cooked dinner. She refused to answer the door so defendant called her cell phone and asked her to open the door. S.M. again refused and hung up the phone. Defendant called S.M. three to four

more times and asked to retrieve some of his belongings. S.M. agreed to place defendant's belongings in a bag and opened the door just enough to hand defendant the bag. Defendant then forced the door open and punched her in the face, knocking her to the ground. While S.M. was on the ground, defendant punched and kicked her. Her daughter and brother watched the incident crying and asked defendant to stop.

¶ 8 Defendant took S.M.'s daughter and brother to a bedroom, and S.M. attempted to grab a knife. However, defendant pulled her hair, dragged her into her bedroom, and ripped her underwear. S.M. attempted to push defendant off of her and repeatedly told him that she could not breathe. S.M. eventually laid her head back and pretended to stop breathing. Defendant held her down and took his penis out of his underwear and put it inside her vagina. S.M.'s daughter entered the room holding a cell phone to her ear and said, "Police, come get my daddy. He is hurting my mom." Defendant closed the cell phone and retrieved S.M.'s inhaler from the bathroom. He then left the apartment.

¶ 9 S.M. called her cousin to take her to the hospital. Her aunt, Sonya Moore, came to her apartment immediately. S.M. was distraught. Her face and shirt were bloody and her underwear was ripped. Initially she did not want to call the police, but her aunt convinced her. At the hospital, S.M. underwent a sexual assault kit. She had a bloody swollen lip, her eye was swollen shut, and she had various other cuts and bruises. Photographs taken at the hospital corroborated her injuries.

¶ 10 On cross-examination, S.M. acknowledged that she heard defendant had some paralysis on one side of his body, and she had seen bullet wound scars in his back from a previous injury. She had observed defendant walk with a limp on occasion, but stated that he only limped when he wanted sympathy. S.M. denied that defendant walked with a cane. She also denied that he had

a limp arm and never observed limitations in defendant's use of his arms or hands. S.M. denied that defendant suffered any limitations of movement. She did not consent to sexual contact with defendant on September 25, 2004.

¶ 11 Sonya Moore testified that she received a phone call at about 8 p.m. on September 25, 2004 to go to S.M.'s apartment immediately. When she arrived, S.M. told her that defendant raped her. Sonya observed that S.M.'s face was bruised, her underwear was ripped, and her shirt was bloodstained. She also observed bruises on S.M.'s inner thigh. Sonya knew defendant and acknowledged that he walked with a limp, but she was not aware of whether he suffered from paralysis. She acknowledged that S.M. and defendant had gotten in several prior altercations. When S.M. said that she was too afraid to call the police, Sonya responded, "Well look at yourself. What is it going to take for you to do something about this? *** Is he going to have to kill you first?"

¶ 12 Chicago police officer Charles Serpe and forensic scientists Natalie Morgan and Brian Schoon testified regarding S.M.'s sexual assault kit. Their collective testimony established that the vaginal and leg swabs from S.M. matched defendant's DNA profile from a buccal swab.

¶ 13 Defendant testified that he and S.M. engaged in an on-and-off relationship for approximately six years prior to September 24, 2004. On September 24, 2004 he spent the night at S.M.'s apartment. S.M. left for work the following morning and defendant stayed at her apartment until approximately 3:30 or 4 p.m. in the afternoon when he left temporarily to get food. When he left, no one was in the apartment, although he later testified that S.M. was home when he left to get food. He returned to the apartment a half hour later and found the door locked. When S.M. answered the door, she asked defendant why he left her door unlocked and an argument ensued.

¶ 14 S.M. pushed defendant down, and he punched her in the face to defend himself. He was partially paralyzed on his right side from five gunshots to his head several years prior. Defendant indicated that he walked with a limp and a brace and has bad balance.

¶ 15 Defendant and S.M. had consensual intercourse on September 25, 2004 after she returned home from work but before he left to get food. He denied forcing S.M. to have intercourse. On cross-examination, defendant denied slamming S.M.'s head into the wall and pulling a gun on her. He did not know how S.M.'s underwear ripped the night of the incident. Defendant acknowledged helping S.M. carry bags up three flights of stairs to her apartment on a prior occasion, despite previously stating he was partially paralyzed.

¶ 16 Chicago police officer Ryan Sheahan testified in rebuttal that he arrested defendant and did not observe any disabilities.

¶ 17 The court thereafter found defendant guilty of aggravated criminal sexual assault and home invasion and sentenced defendant to consecutive prison terms of 10 and 6 years. On appeal, defendant argued that 1) the State failed to prove his guilt beyond a reasonable doubt; 2) the trial court erred by admitting evidence of prior bad acts; 3) defense counsel was ineffective for failing to introduce medical evidence regarding his disability, failing to adequately prepare him for trial, and failing to impeach the victim; and 4) the trial court erred by imposing consecutive sentences. This court affirmed defendant's convictions. *People v. Holmes*, 1-06-1944 (2007) (unpublished order under Supreme Court Rule 23).

¶ 18 On October 20, 2009, a petition for postconviction relief ("2009 petition") was filed in defendant's name and purportedly signed by defendant. Although the petition was not notarized, it listed defendant's prison address as the return address. The petition alleged 1) that the trial court erred by admitting evidence of prior bad acts, 2) that defendant did not knowingly waive

his right to a jury trial, 3) that the State failed to prove his guilt beyond a reasonable doubt, and 4) various claims of ineffective assistance of counsel. The trial court summarily dismissed defendant's petition as frivolous and patently without merit. The court found that the issues relating to prior bad acts and sufficiency of the evidence were barred by *res judicata* because defendant argued them on appeal. Further, the court concluded the record belied defendant's claim that he unknowingly waived his right to a jury trial, and defendant's allegations of ineffective assistance of counsel were conclusory and failed to demonstrate prejudice. The trial court's order was sent to defendant's prison address. Defendant did not appeal or otherwise challenge this order.

¶ 19 On October 21, 2013, defendant mailed a motion for leave to file a successive postconviction petition. The motion alleged that one of defendant's family members, Cheryl Luster, filed the 2009 petition without his permission, which prevented defendant from raising an ineffective assistance of counsel claim for failure to investigate and call alibi witnesses. The motion alleged that the family member failed to attach affidavits "from the uncalled important witnesses for the petitioner with what their testimony would have been." It further alleged that defendant suffered prejudice from "the failure to bring the claims earlier because the claims so infected [defendant's] judgment of conviction that [his] conviction or sentence violated due process, in that the right of personal freedom from unlawful incarceration was not resolved."

¶ 20 In support of his motion, defendant attached his proposed successive postconviction petition ("2013 petition"). The 2013 petition contends that 1) defendant's trial counsel was ineffective for failing to call two alibi witnesses who would have testified that defendant was elsewhere during the commission of the crime, and 2) appellate counsel was ineffective for failing to "raise a meritorious issue on direct appeal, such as" a confrontation clause claim.

Defendant attached affidavits from Jacqueline Willis and JoAnne M. White. Both Willis and White averred that defendant was at Willis' home from 5:30 p.m. on September 25, 2004 until 7 a.m. the following morning. Defendant's petition asserts that both Willis and White were on defendant's list of witnesses at trial and known to defense counsel.

¶ 21 Defendant further supported his motion with Cheryl Luster's affidavit. Luster's affidavit averred that she filed defendant's first postconviction petition without legal assistance on October 20, 2009 due to defendant's mental and physical disabilities. Luster further averred that she submitted the petition without his knowledge.

¶ 22 The trial court denied defendant leave to file a successive postconviction petition on July 18, 2014. The court found defendant failed to establish cause and prejudice as required by the Act (720 ILCS 5/122-1(f) (West 2012)). This appeal follows.

¶ 23 On appeal, defendant contends the trial court erred by denying his motion for leave to file a successive postconviction petition because he did not authorize the filing of the 2009 petition, and alternatively, the 2013 petition satisfied the cause and prejudice test under the Act. The Act generally contemplates the filing of only one postconviction petition. 725 ILCS 5/122-3 (West 2012). A defendant seeking to institute a successive postconviction petition must first obtain "leave of court." See 725 ILCS 5/122-1(f) (West 2012); *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). However, the bar against successive proceedings will be relaxed in cases where the defendant can satisfy (1) the cause and prejudice test of the Act for failing to raise the claim earlier; or (2) the "fundamental miscarriage of justice" exception, set forth as a claim of actual innocence. 725 ILCS 5/122-1(f) (West 2012); *People v. Edwards*, 2012 IL 111711, ¶¶ 22, 23. We review the circuit court's denial of leave to file a successive petition *de novo*. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 24 As an initial matter, we must first determine whether the 2013 petition is successive. Defendant claims that Luster filed the 2009 petition without his knowledge so the 2013 petition is his initial postconviction petition allowed under the Act. We note, however, that the 2009 petition bears defendant's return address and signature, and Luster's affidavit does not state that she forged defendant's signature. Additionally, the trial court's order dismissing the 2009 petition indicates that at the time of filing the 2009 petition, defendant also requested assistance of counsel, which may have shed more light on who filed the 2009 petition. That motion, however, is missing from the record. Nevertheless, regardless of whether Luster actually prepared the 2009 petition, defendant was sent notice of the trial court's summary dismissal of it in 2009. Defendant did not appeal, move to reconsider, move to vacate the order, or otherwise give any indication that it was impermissibly filed without his authority. We need not determine which procedure would have been appropriate for defendant to pursue because defendant did not attempt to avail himself of any challenge to the order of the allegedly void petition. Accordingly, no court has previously been given an opportunity to vacate the order dismissing the 2009 petition. Thus, because the order dismissing the 2009 petition has never been vacated and the 2009 petition remains valid, we will treat the 2013 petition as successive. See *People v. McFadden*, 2016 IL 117424, ¶ 31 ("It is axiomatic that no judgment *** is deemed vacated until a court with reviewing authority has so declared.")

¶ 25 We therefore turn to whether defendant's claim satisfies the cause and prejudice test under the Act. To file a successive postconviction petition based on constitutional claims other than claims of actual innocence, such as defendant's ineffective assistance of counsel claim, the defendant must establish "cause and prejudice" related to the failure to raise the claim sooner. *People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002); 725 ILCS 5/122-1(f) (West 2012). "Cause"

can be shown by identifying "an objective factor external to the defense that impeded [the defendant's] efforts to raise his claim in the earlier [postconviction] proceeding." *Edwards,* 2012 IL App (1st) 091651, ¶ 20; 725 ILCS 5/122-1(f) (West 2012). "Prejudice" requires a showing that "the claim not raised during [the defendant's] initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2012).

¶ 26 Defendant argues that he satisfied the cause prong by showing that he could not raise his ineffective assistance of counsel claim in the earlier proceeding because Luster filed the 2009 petition without his knowledge. However, even if defendant's claim that he was unaware of the 2009 petition satisfies the cause prong, he cannot satisfy the prejudice requirement so as to justify the filing of a successive petition, (see *Edwards,* 2012 IL App (1st) 091651, ¶ 32 (both the "cause" and "prejudice" prongs must be met before leave to file a successive petition will be granted)) because he fails to demonstrate that counsel's decision not to investigate and call Willis and White "so infected the trial that the resulting conviction or sentence violated due process" (725 ILCS 5/122-1(f) (West 2012)). Defendant claims he demonstrated prejudice because Willis' and White's affidavits present a plausible claim of ineffective assistance of counsel for failing to investigate and call alibi witnesses who would corroborate his testimony that he left S.M.'s apartment prior to her assault.

¶ 27 To state a claim of ineffective assistance of counsel, defendant must allege that it is arguable that: (1) counsel's performance "fell below an objective standard of reasonableness;" and (2) there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). A "reasonable probability" is one that sufficiently undermines confidence in the outcome. *Id.* at 694.

¶ 28 Here, defendant's claim fails under both prongs of *Strickland*. Defendant contends that counsel's performance was unreasonable because counsel has the duty to investigate a client's alibi defense. Willis' and White's affidavits state that defendant was with them on September 25, 2004 between 5:30 p.m. and 7 a.m. the following morning, which would place defendant elsewhere when S.M. claimed he sexually assaulted her. However, defendant testified that he was at S.M.'s home, that they had intercourse, and got into a physical altercation on September 25, 2004. Based on defendant's testimony, counsel made a strategic decision to argue a consent theory of defense. Because the witnesses' testimony, stating that defendant was elsewhere during S.M.'s attack, would have been inconsistent defendant's own testimony, defendant cannot establish that counsel was deficient for failing to call them. See *People v. Barr*, 200 Ill. App. 3d 1077, 1081 (1990) (finding that counsel was not ineffective for failing to present alibi witnesses where the proposed witnesses would have contradicted the defendant's testimony).

¶ 29 Moreover, defendant cannot show that he was prejudiced by the failure to investigate and call Willis and White. Although defendant contends that the proposed witnesses' statements would show he was not present with S.M. when she was being sexually assaulted, identity was not an issue in this case given the testimonial evidence that S.M. and defendant were in an ongoing relationship. Additionally, Moore's testimony established that S.M. was bruised, bloodied, and her underwear was torn. Further, the photographic and forensic evidence corroborated S.M.'s testimony. Defendant's DNA was found on S.M.'s body and photographs of S.M.'s injuries were introduced at trial. Critically, defendant admitted to punching S.M. and having sexual intercourse with her. In light of this substantial evidence, defendant cannot demonstrate that there is a reasonable probability that the result of his trial would have been different had counsel called Willis and White to testify. Thus, defendant likewise failed to show

prejudice under the cause and prejudice test to warrant filing a successive petition. See *Edwards*, 2012 IL App (1st) 091651, ¶ 32 (prejudice prong of "cause and prejudice" test not satisfied where defendant failed to establish prejudice prong of *Strickland*). Accordingly, we conclude that the trial court properly denied defendant leave to file a successive postconviction petition.

¶ 30 Based on the foregoing, the judgment of the circuit court of Cook County is affirmed.

¶ 31 Affirmed.