

Nos. 1-14-3838 and 1-15-1016, cons.

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 09 CR 13323
)	
ISAIAH JOHNSON,)	Honorable
)	Paula M. Daleo,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's denial of the petitioner's motion for leave to file his successive postconviction petition is affirmed where he failed to demonstrate cause for not raising his alleged due process violation in a prior petition.

¶ 2 Pursuant to a negotiated guilty plea, the petitioner, Isaiah Johnson, was convicted of aggravated battery with a firearm and sentenced to 21 years' imprisonment. The petitioner appeals from the circuit court's order denying his motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On

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appeal, he contends that his successive postconviction petition demonstrated cause for his failure to present his claim that he was unfit to plead guilty in his initial petition, and that he was prejudiced because his conviction violated his constitutional rights to due process. For the reasons that follow, we affirm.

¶ 3 We set forth only the background necessary to understand the issue raised by the petitioner in this appeal.

¶ 4 The petitioner was charged with attempted first-degree murder, aggravated battery with a firearm, and aggravated discharge of a firearm for shooting and injuring Daniel Martinez on June 9, 2009. On April 14, 2010, the circuit court conducted a plea conference pursuant to Supreme Court Rule 402(d) (eff. July 1, 1997), with the petitioner represented by counsel. Following the conference, the petitioner entered a negotiated plea of guilty to aggravated battery with a firearm in exchange for a sentence of 21 years' imprisonment. The court delivered the requisite admonishments and waivers, heard the factual basis for the plea, and continued the case for sentencing.

¶ 5 Prior to sentencing, while he was still represented by counsel, the petitioner filed a *pro se* motion to withdraw his guilty plea, claiming that plea counsel failed to suppress evidence and misled him regarding the amount of good-conduct credit available. The petitioner then moved *pro se* to amend the motion, adding claims that he was "diagnosed with a [m]ental [i]llness in the past and was prescribed certain psychotropic medication, [a]nd has a psychiatric history," and that he was not taking his medication when he pleaded guilty. The amended motion also contended that because the petitioner "was diagnosed with ADHD, and given medication for mood swings, [d]epression, and other [m]ental [i]llness," he was incapable of "making [a] reasonable plea ***." The petitioner alleged that his guilty plea was not intelligently made and

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that his public defender was ineffective for not researching his mental health history and obtaining a fitness hearing.

¶ 6 The circuit court heard the amended motion on July 1, 2010, and stated that it would order a behavioral clinical examination (BCX) to evaluate the petitioner's fitness at the time he pleaded guilty. The BCX report, which the court received in August 2010, stated that the petitioner was fit for sentencing but did not address his fitness at the time he pleaded guilty. On September 22, 2010, the court denied the petitioner's motion to withdraw his guilty plea and imposed sentence.

¶ 7 On direct appeal, this court remanded due to the absence of a Supreme Court Rule 604(d) (eff. July 1, 2006) certification by plea counsel. *People v. Johnson*, 2012 IL App (1st) 102887-U, ¶ 17. While the petitioner's direct appeal was pending, he also filed a *pro se* postconviction petition alleging that the circuit court misled him regarding the amount of good-conduct credit available. The circuit court summarily dismissed the petition and the petitioner did not appeal.

¶ 8 On May 4, 2012, the petitioner filed a new *pro se* motion to withdraw his guilty plea, alleging, *inter alia*, that the circuit court misled him regarding good-conduct credit; that plea counsel was ineffective for not investigating his mental health history; and that he was unfit when he pleaded guilty. Additionally, the petitioner claimed that he had "a history of taking psychotropic medicine for moodswings, depression, and ADHD," and had been prescribed various medications.

¶ 9 After filing his new *pro se* motion, the petitioner received a new attorney (post-plea counsel), who filed a Rule 604(d) certificate averring that he had consulted with the petitioner and determined that his motion adequately presented his claims with no amendments necessary. The circuit court denied the petitioner's motion to withdraw his guilty plea. On direct appeal, he

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only argued the issue of good-conduct credit and this court affirmed. *People v. Johnson*, 2014 IL App (1st) 122088-U, ¶¶ 14, 19.

¶ 10 On July 24, 2014, the petitioner mailed to the circuit court the instant successive postconviction petition along with a motion for leave to file. As grounds for relief, the petitioner argued, in relevant part, that "the [t]rial [c]ourt erred when it failed to order that [he] be tested for fitness at the time he entered his guilty plea," and that the BCX report addressed his fitness at the time of sentencing but not at the time he pleaded guilty. According to the motion for leave, he did not raise this issue in his initial petition because he only obtained relevant information "about [his] mental illness at the time of [his] guilty plea" in November 2013, when he "came into" a Department of Children and Family Services Risk Assessment Summary (DCFS assessment).

¶ 11 A copy of the DCFS assessment, dated April 23, 2010, was attached to the successive petition, along with an affidavit from the petitioner and a letter from the Office of the Cook County Public Guardian regarding the release of "mental health information[.]" The DCFS assessment stated that the petitioner had been diagnosed with severe "Conduct Disorder—Adolescent Onset Type"; "ADHD, Predominantly Hyperactive-Impulsive [*sic*] Type"; "Dysthymic Disorder—Early Onset Type"; "Cannabis Dependence"; "Oppositional Defiant Disorder"; and a learning disorder. The assessment also stated that the petitioner refused to take any medication while incarcerated and "has a street mentality and tends to try the get over method of interacting with people [by] telling them what they want to hear." No explanation for why the petitioner did not previously obtain the DCFS assessment appeared in the motion for leave, the petitioner's affidavit, or the letter from the Office of the Cook County Public Guardian.

¶ 12 The circuit court denied the motion for leave to file, finding, in relevant part, that the petitioner "failed to identify any objective factor that impeded his effort to raise the fitness claim

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in an earlier proceeding," and that he had, in fact, challenged the "failure to order a fitness examination by the trial court *** in earlier petitions, motions[,] and the appeals therefrom." The circuit court also found that the doctrine of *res judicata* barred the petitioner's claim because "[t]he ability to understand the nature of the proceedings against you is the cornerstone of a fitness determination," and this court, in affirming the petitioner's conviction on direct appeal (*Johnson*, 2014 IL App (1st) 122088-U, ¶ 17), found that his "*pro se* motions thoroughly demonstrate [his] understanding of the plea he accepted." This appeal followed.¹

¶ 13 On appeal, the petitioner contends that the circuit court erred in denying him leave to file his successive postconviction petition where he established both cause and prejudice for failing to allege in his initial petition that he was unfit to plead guilty. Regarding cause, the petitioner maintains that post-plea counsel rendered ineffective assistance by neither investigating his history of mental illness nor amending his *pro se* motion to withdraw his guilty plea to incorporate the DCFS assessment. Consequently, the petitioner submits that his unfitness claim relied on facts outside the record and could only be raised in a postconviction petition. As his initial petition was dismissed before he obtained a copy of the DCFS assessment, however, he maintains that the successive petition was his first opportunity to challenge his fitness to plead guilty. Because he was unfit to plead guilty, the petitioner argues that his conviction violated his due process rights and, as a result, the dismissal of his successive petition caused prejudice.

¶ 14 The State, in response, argues that the petitioner repeatedly raised his fitness claim in prior proceedings and, therefore, the absence of the DCFS assessment did not impede his ability to raise this issue in his initial postconviction petition. In reply, the petitioner submits that none

¹ This court allowed the petitioner's late notice of appeal and granted his motion to consolidate the instant appeal (No. 1-15-1016) with a pending appeal (No. 1-14-3838). The petitioner's notices of appeal indicate that both appeals were taken from the same judgment of the circuit court.

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of the earlier proceedings "squarely presented" his claim that he was unfit for the reasons specified in the DCFS assessment, specifically, that he had been diagnosed with mental health conditions and tended to tell people "what they want to hear."

¶ 15 The Act permits a petitioner to assert that, in the proceedings which resulted in his conviction, a substantial denial of his rights under the federal or state constitutions occurred. 725 ILCS 5/122-1(a)(1) (West 2014); *People v. Smith*, 2014 IL 115946, ¶ 22. In general, the Act "contemplates the filing of only one petition without leave of court" and "any claim not presented in an original or amended petition is waived." *People v. Sanders*, 2016 IL 118123, ¶ 24 (citing 725 ILCS 5/122-1(f), 122-3 (West 2014)); see also *People v. Guerrero*, 2012 IL 112020, ¶ 17 ("a ruling on an initial postconviction petition has *res judicata* effect with regard to all claims that were raised or could have been raised in the initial petition").

¶ 16 Leave to file a successive petition may be granted if the petitioner establishes cause for failing to bring the claim in the initial postconviction proceedings and prejudice results from that failure. 725 ILCS 5/122-1(f) (West 2014). "Cause" denotes an "objective factor external to the defense" that impaired the petitioner's ability to raise the claim in an earlier proceeding. *People v. Davis*, 2014 IL 115595, ¶ 14. "Prejudice" describes "a claimed constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process." *Id.* (citing 725 ILCS 5/122-1(f) (West 2014)). Both elements of the test must be satisfied to justify relief under the Act. *Id.* We review *de novo* the circuit court's denial of a motion for leave to file a successive postconviction petition without an evidentiary hearing, and may affirm the judgment on any basis supported by the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 17 As an initial matter, we observe that the petitioner's appellate brief alleges that he established the element of "cause" on grounds not asserted in his motion for leave to file his

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successive postconviction petition. In his motion for leave to file, the petitioner alleged only that he could not have raised his fitness claim prior to obtaining the DCFS assessment. On appeal, however, the petitioner contends that he did not previously obtain the DCFS assessment due to ineffective assistance of post-plea counsel. As our Supreme Court has explained, "our appellate court is not free *** to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition." *People v. Jones*, 213 Ill. 2d 498, 508 (2004). Because the petitioner did not raise the issue of ineffective assistance of post-plea counsel in the circuit court, he has forfeited this argument on appeal.

¶ 18 Even if the petitioner's ineffective assistance argument had not been forfeited, however, we would still find that he failed to establish cause for not previously raising the instant fitness claim. That is, he has not demonstrated that counsel's failure to obtain the DCFS assessment during post-plea proceedings prevented him from accessing the assessment prior to filing his initial *pro se* petition. See *People v. Wideman*, 2016 IL App (1st) 123092, ¶ 72 (finding that the petitioner failed to establish cause where he neither "identified any specific, objective reason" for not including a claim in prior petitions nor "articulated why the claim could not be discovered earlier with due diligence"). Moreover, neither the petitioner's affidavit nor the letter from the Office of the Cook County Public Guardian suggests that the DCFS assessment would not have been available to the petitioner had he sought his mental health records before filing his initial *pro se* petition; to the contrary, the assessment appears to have been made available to the petitioner without obstacle. See *Davis*, 2014 IL 115595, ¶ 56 (holding that the petitioner failed to establish cause where the evidence was "not of such character that it could not have been discovered earlier by the exercise of due diligence"). As the petitioner has not shown that post-

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plea counsel deterred or prevented him from accessing the DCFS assessment prior to filing his initial petition, he has not demonstrated cause for failing to raise the instant fitness claim.

¶ 19 Nonetheless, the petitioner contends that he established cause because he was not afforded appointed counsel in his initial postconviction proceeding. Thus, according to the petitioner, he lacked a "meaningful opportunity" to argue that he was unfit to plead guilty.

¶ 20 This argument is not well-taken, as the decisions on which the petitioner relies, *Martinez v. Ryan*, 566 U.S. —, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 569 U.S. —, 133 S. Ct. 1911 (2013), are inapposite to the instant appeal. *Martinez* held that, where state law does not permit claims for ineffective assistance on direct appeal, a defendant may establish cause before a federal *habeas* court if he or she was not afforded appointed counsel at the initial stage of collateral proceedings. *Martinez*, 566 U.S. at —, 132 S. Ct. at 1318. *Trevino* extended the holding in *Martinez* to situations where state law does not expressly prevent defendants from alleging ineffective assistance on direct appeal, but "as a matter of procedural design and systemic operation" compels defendants to raise such claims only on collateral review. *Trevino*, 569 U.S. at —, 133 S. Ct. at 1921. Neither *Martinez* nor *Trevino* control the case at bar, as those decisions apply to relief in federal *habeas* court and addressed state laws that are not analogous to criminal procedure in Illinois. See *People v. Sutherland*, 2013 IL App (1st) 113072, ¶¶ 18-19 (distinguishing *Martinez* and *Trevino*).

¶ 21 Based on the foregoing, the petitioner has not demonstrated cause and we may dispose of the instant appeal without addressing the issue of prejudice. *Davis*, 2014 IL 115595, ¶ 14; see also *People v. Williams*, 394 Ill. App. 3d 236, 246 (2009) (declining to examine prejudice where the petitioner failed to establish cause). As the petitioner did not meet his burden for filing a successive postconviction petition, the circuit court properly denied his motion for leave to file.

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¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court denying the petitioner leave to file his successive postconviction petition.

¶ 23 Affirmed.