

**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).

**FILED**

November 30, 2017  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

2017 IL App (4th) 150806-U  
NO. 4-15-0806

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
ROBERT AKERS,	)	No. 05CF322
Defendant-Appellant.	)	
	)	Honorable
	)	Derek Girton,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.  
Justices Knecht and Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) Defendant was barred from relitigating a claim included in his initial postconviction petition, which was dismissed by the trial court, in a successive postconviction petition.

(2) The circuit clerk improperly imposed certain fines on defendant.

¶ 2 In June 2015, defendant, Robert Akers, filed a *pro se* motion for leave to file a successive postconviction petition. That same month, in a written order, the trial court dismissed defendant’s successive petition. Defendant argues the court should have given him leave to file his successive postconviction petition because he established “cause” and “prejudice” with regard to his claim his trial counsel was ineffective for not retaining a pathologist for the defense. Defendant also argues the circuit clerk improperly imposed fines against him. We conclude the trial court did not err in not allowing defendant to proceed on this claim in a successive postconviction petition because the claim was included in defendant’s initial postconviction

petition, which the trial court dismissed. However, we vacate fines improperly imposed on defendant by the circuit clerk.

¶ 3

### I. BACKGROUND

¶ 4

In July 2006, a jury found defendant guilty of first degree murder (720 ILCS 5/9-1 (West 2004)) and escape (720 ILCS 5/31-6(c) (West 2004)). In October 2006, the trial court sentenced defendant to a term of 30 years' imprisonment for first degree murder and a concurrent term of 5 years' imprisonment for escape. Defendant filed a direct appeal, arguing the trial court erred by failing to give the jury an instruction on the lesser-included offense of aggravated battery. In March 2008, this court affirmed, stating:

“Since the evidence at defendant’s trial was uncontroverted in showing defendant caused [the victim’s] death, a rational jury could not have found defendant guilty of aggravated battery and not guilty of murder. Accordingly, the trial court properly denied defendant’s request for an aggravated-battery instruction.” *People v. Akers*, No. 4-06-0926, slip order at 12 (Mar. 18, 2008) (unpublished order pursuant to Supreme Court Rule 23).

¶ 5

In August 2009, defendant filed a postconviction petition, arguing he was denied his right to effective assistance of counsel at trial and on appeal for a wide range of reasons. In December 2009, because 90 days passed without the trial court summarily dismissing the petition, the court directed the State to file a written response. In February 2010, the State filed a motion to dismiss defendant’s petition. In March 2012, defendant’s court-appointed counsel filed a motion requesting appointment of a forensic pathologist. That same month, appointed counsel filed an amended petition for postconviction relief. The amended petition again alleged

defendant's trial and appellate counsel were ineffective. In May 2012, the State filed an amended motion to dismiss defendant's amended petition for postconviction relief.

¶ 6 On August 30, 2012, defendant's appointed counsel, Roy Wilcox, filed a motion to withdraw because he was retiring from the practice of law. The trial court allowed the motion the same day. The trial court appointed Leon Parker to represent defendant. In September 2012, the court granted the State's motion to dismiss the amended postconviction petition.

¶ 7 Defendant appealed the dismissal of his amended postconviction petition. The office of the State Appellate Defender (OSAD) was appointed to represent him on appeal. After OSAD filed a brief on defendant's behalf and the State filed its appellee brief, defendant filed a *pro se* motion in the appellate court seeking the right to represent himself and an order striking the briefs filed by OSAD and the State. This court denied the motion on April 25, 2014. In May 2014, defendant filed a motion in the circuit court, requesting the court vacate its order appointing OSAD to represent him on appeal. According to the motion, "A dispute has arisen between the defendant and the attorney from OSAD as to the issues to be addressed on appeal." In a docket entry, the trial court instructed defendant he would need to file his motion with the appellate court.

¶ 8 On appeal, defendant's appellate counsel argued the trial court violated defendant's due process rights by dismissing his amended petition before attorney Parker had notice of the pending dismissal and had complied with the requirements of Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). This court affirmed the dismissal of defendant's postconviction petition. *People v. Akers*, 2014 IL App (4th) 120939-U, ¶ 23.

¶ 9 On June 17, 2015, defendant filed a request for leave to file a successive postconviction petition, arguing his postconviction appellate counsel failed to argue the issues

defendant raised in his postconviction petition. According to defendant, appellate counsel's "error" in not raising the issues defendant alleged in his initial postconviction petition constitutes a new fact arising after the initial postconviction proceeding. He argued he was entitled to file a successive petition pursuant to section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2014)).

¶ 10 According to defendant, his postconviction appellate counsel's ineffectiveness constitutes "cause" for filing the successive petition. Defendant argues he was prejudiced because his postconviction appellate counsel foreclosed his ability to proceed on the merits of the claims in his initial postconviction petition. According to defendant's request for leave, "If [he] is not permitted leave to file this successive petition he will be deprived of the chance to have the merits of this claim reviewed. He is entitled to relief because [appellate counsel] raised claims that were in effect 'weaker' than the claims Petitioner originally preserved."

¶ 11 Defendant attached his successive postconviction petition to his petition for leave to file. In the successive petition, defendant claimed his postconviction appellate counsel was ineffective because he failed to raise the issues included in defendant's postconviction petition, including trial counsel's ineffectiveness for failing (1) to obtain a medical expert or pathologist to testify, (2) to use medical records to examine Dr. Rak, and (3) to cross-examine a mitigating witness with the statement of a prosecuting witness instead of the witness's own statement. Defendant argued these claims were stronger than the issues argued by appellate counsel. According to the successive petition, "These issues should have been briefed under cumulative error, but [postconviction appellate counsel] refused and consequently deprived [defendant] of a full and fair appeal."

¶ 12 On September 11, 2015, the trial court dismissed the successive petition for postconviction relief because it failed to allege a proper cause of action.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 We note defendant was never given leave to file his successive petition for postconviction relief. While the trial court's order states it "dismissed" defendant's successive petition, the petition itself was never formally filed. Defendant argues the trial court should have granted his request for leave to file a successive petition, claiming he satisfied the "cause" and "prejudice" test specified in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2016)) with regard to his claim his trial counsel was ineffective for failing to retain a pathologist. Defendant also argues certain assessments improperly imposed by the circuit clerk should be vacated.

¶ 16 A. Successive Postconviction Petition

¶ 17 We first address whether the trial court should have granted defendant leave to file his successive postconviction petition. Defendant argues his motion for leave to file a successive postconviction petition adequately alleged "cause" and "prejudice" with regard to his claim his trial counsel was ineffective for failing to retain a forensic pathologist to testify as to the victim's cause of death.

¶ 18 Defendant concedes he raised this issue in his initial postconviction petition. Defendant's initial petition was dismissed during the second stage of his initial postconviction proceeding. Our supreme court has stated:

"The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. *People v. Flores*, 153 Ill. 2d 264, 273 (1992); *People v. Free*, 122 Ill. 2d 367, 375 (1988). Moreover, section 122-3 of the Act provides

that ‘[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.’ 725 ILCS 5/122-3 (West 1998); *Flores*, 153 Ill. 2d at 274; *Free*, 122 Ill. 2d at 375-76. A ruling on an initial post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition. *Flores*, 153 Ill. 2d at 274; *Free*, 122 Ill. 2d at 376. Consequently, defendant faces a daunting procedural hurdle when bringing a successive post-conviction petition.” *People v. Jones*, 191 Ill. 2d 194, 198, 730 N.E.2d 26, 28-29 (2000).

Defendant argues *res judicata* does not apply to his claim his trial counsel was ineffective for failing to retain a pathologist—even though this claim was raised in his initial postconviction petition, which was dismissed by the trial court—because his postconviction appellate counsel did not raise the issue when appealing the dismissal of his initial postconviction petition. We disagree. Defendant’s reliance on *People v. Anderson*, 402 Ill. App. 3d 1017, 931 N.E.2d 715 (2010), *People v. Easley*, 192 Ill. 2d 307, 736 N.E.2d 975 (2000), and *People v. Blair*, 215 Ill. 2d 427, 831 N.E.2d 604 (2005), is misplaced. None of these cases support his argument.

¶ 19 Section 1(f) of the Post-Conviction Hearing Act (725 ILCS 5/122-1(f) (West 2016)), states:

“Only one petition may be filed by a petitioner under this Article without leave of the court. *Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure.* For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-

conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.”

(Emphasis added.)

Defendant cannot demonstrate “cause” for his failure to raise a claim his trial counsel was ineffective for not retaining a pathologist when he, in fact, did raise the claim in his initial postconviction petition.

¶ 20

#### B. Fines

¶ 21 Defendant also argues the circuit clerk improperly imposed the following fines against him: (1) \$50 court finance assessment (55 ILCS 5/5-1101(c) (West 2004)); (2) \$25 violent crime assessment (725 ILCS 240/10(b) (West 2004)); (3) \$2 anti-crime assessment (730 ILCS 5/5-6-3(b)(13) (West 2004)); and (4) \$4 youth diversion assessment (55 ILCS 5/5-1101(e) (West 2004)). Petitioner also argues a \$70.80 State’s Attorney’s Collections assessment (730 ILCS 5/5-9-3(e) (West 2008)) was improperly calculated based on the total assessments issued against defendant. The trial court did not impose any fines in this case.

¶ 22 The State argues we should not address this issue. According to the State, defendant should be barred from raising this issue for the first time when appealing the denial of his request for leave to file a successive postconviction petition. The State also argues this court does not have jurisdiction over this issue. Finally, the State argues an “actual controversy” does not exist because defendant does not claim any effort has been made to collect the assessed fines.

¶ 23 The State relies on the Third District’s recent opinion in *People v. Warren*, 2017 IL App (3d) 150085. In *Warren*, the majority expressed “serious concerns” whether it had jurisdiction over the defendant’s claim the circuit clerk improperly imposed fines against him

because the defendant's notice of appeal focused on the trial court's judgment dated January 27, 2015. The assessments at issue on appeal were imposed by the circuit clerk on March 27, 2015. *Warren*, 2017 IL App (3d) 150085, ¶ 13.

¶ 24 The Third District also stated "an actual controversy is a necessary prerequisite for the exercise of [its] appellate jurisdiction." *Warren*, 2017 IL App (3d) 150085, ¶ 14. The court found no actual controversy existed because both sides agreed defendant owed \$115 less than the unpaid balance of court costs contained in the circuit clerk's records. *Warren*, 2017 IL App (3d) 150085, ¶ 14. The majority also found the issue was not ripe, stating:

"[N]o one is attempting to collect any portion of the monetary component of the sentence announced by the trial court \*\*\*. When this defendant wins the lottery or inherits a large sum of money, the correct amount of defendant's unpaid balance may become an issue that is ripe for our review once defendant has the ability to pay something toward the judgment. At this point, it is entirely a matter of speculation whether defendant may develop the ability to pay and whether the State will pursue collections efforts at that time." *Warren*, 2017 IL App (3d) 150085, ¶ 18.

The majority also found it could not conclude the clerk's action constituted an order, void or otherwise. *Warren*, 2017 IL App (3d) 150085, ¶ 21. The Third District then dismissed the entire appeal because it found no justiciable issue was before it.

¶ 25 Justice McDade dissented, noting settled law allows a void order to be attacked at any time in any court, either directly or collaterally as long as the court has jurisdiction. *Warren*, 2017 IL App (3d) 150085, ¶ 36. According to the dissent, the majority's "ripeness-based jurisdictional conclusion is directly contradicted by our supreme court's conclusion in [*People v.*



] *Gutierrez*, 2012 IL 111590, 962 N.E.2d 437,” where the supreme court held a reviewing court has jurisdiction to address monetary assessments improperly imposed by a circuit clerk. *Warren*, 2017 IL App (3d) 150085, ¶ 40 (McDade J., dissenting). Justice McDade wrote, “*Gutierrez* stands for the proposition that, as a general matter, a defendant may challenge on appeal assessments imposed by a circuit clerk, regardless of whether they have been adopted in an order of the circuit court.” *Warren*, 2017 IL App (3d) 150085, ¶ 42 (McDade J., dissenting). In addition, the dissenting justice noted she would have found defendant’s notice of appeal provided the appellate court with “jurisdiction to vacate the circuit clerk’s void assessments.” *Warren*, 2017 IL App (3d) 150085, ¶ 48 (McDade J., dissenting). We agree with Justice McDade’s interpretation of the current state of the law.

¶ 26 In the instant case, this court has jurisdiction pursuant to defendant’s notice of appeal filed after the trial court “dismissed” defendant’s successive postconviction petition. Because this case is properly before this court, we have the authority to address the circuit clerk’s imposition of fines, which are void orders and may be attacked at any time and in any court. *People v. Gutierrez*, 2012 IL 111590, ¶¶ 13-14, 962 N.E.2d 437.

¶ 27 Imposing fines on a defendant is a judicial act. *People v. Smith*, 2014 IL App (4th) 121118, ¶ 18, 18 N.E.3d 912. The circuit clerk has no authority to impose fines on a defendant. *Smith*, 2014 IL App (4th) 121118, ¶ 18, 18 N.E.3d 912. As a result, fines imposed by the circuit clerk are void.

¶ 28 The State makes no argument on the merits of this issue. We find the circuit clerk had no authority to impose the following fines: court finance assessment (*Smith*, 2014 IL App (4th) 121118, ¶ 54, 18 N.E.3d 912); violent crime victim’s assistance assessment (*Smith*, 2014 IL App (4th) 121118, ¶ 63, 18 N.E.3d 912); anti-crime assessment (*People v. Jernigan*, 2014 IL

App (4th) 130524, ¶ 48, 23 N.E.2d 650); and youth-diversion assessment (*People v. Price*, 375 Ill. App. 3d 684, 701, 873 N.E.2d 453, 468 (2007)). We remand this case and direct the trial court to vacate these fines.

¶ 29 With regard to the State's Attorney's collections assessment imposed by the circuit clerk (730 ILCS 5/5-9-3(e) (West 2008)), we note the circuit clerk determined the amount of the assessment based on the total of all the assessments imposed by the circuit clerk, including the improperly imposed fines, which we have vacated. As a result, we direct the trial court to also vacate this assessment.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated above, the trial court did not err in not allowing defendant to proceed on a claim in a successive postconviction petition which defendant raised in his initial postconviction petition, which was dismissed by the trial court. We remand this case and direct the trial court to vacate the following assessments imposed by the circuit clerk: (1) \$50 court finance assessment; (2) \$25 violent crimes assessment; (3) \$2 anti-crime assessment; (4) \$4 youth diversion assessment; and (5) \$70.80 State's Attorney's collections assessment. Because it successfully defended a portion of the appeal, as part of our judgment, the State is awarded its \$50 statutory assessment against defendant as costs of this appeal.

¶ 32 Affirmed as modified; cause remanded with directions.