

2018 IL App (1st) 153347-U

No. 1-15-3347

Order filed March 30, 2018

First Division

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. 94 CR 29937
)	
EFRAIN MORALES,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying defendant leave to file a third postconviction petition where his underlying claim is barred by *res judicata*, and he therefore failed to satisfy the “cause and prejudice” test for filing a successive petition.

¶ 2 Defendant Efrain Morales appeals from the denial of his motion to file a successive petition for postconviction relief. On appeal, defendant contends that he has established cause and prejudice to file his third petition. He argues that cause is satisfied because he raised his underlying claim at the earliest possible opportunity, *i.e.*, in his second postconviction petition,

but the trial court summarily dismissed that petition without addressing the claim. He further argues that he has shown prejudice because his underlying claim – that the trial court improperly imposed consecutive sentences based on a finding that severe bodily injury had been inflicted on a murder victim – has merit.

¶ 3 We find that because defendant’s underlying claim is barred by *res judicata*, he has not fulfilled the “cause and prejudice” test for the filing of a successive postconviction petition and accordingly affirm.

¶ 4 In 1994, defendant was charged with, *inter alia*, the first degree murder of Billy Bradford and the attempted first degree murders and aggravated batteries of Charles Crawford and Jose Nevarro. At a 1996 jury trial, the State presented evidence that on the night of October 24, 1994, Bradford, Crawford, and Nevarro were working on a car in front of Bradford’s house when a group of men, including two men later identified as defendant and codefendant Mario Gonzalez,¹ approached and fired guns. Bradford was fatally wounded. Crawford testified that he was shot in the knee, fell to the ground, and hit his face on the concrete. At the hospital, where Crawford stayed for “a couple of days,” a .9 millimeter bullet was removed from his leg. Nevarro testified that when he was shot, the bullet entered the back of his leg and came out the left front of his kneecap. At the hospital, the bullet wound was cleaned and Nevarro was given crutches. The jury found defendant guilty of the first degree murder of Bradford and the attempted first degree murders and aggravated batteries of Crawford and Nevarro.

¹ Codefendant Mario Gonzalez pled guilty to one count of first degree murder and two counts of attempted murder, and was sentenced to concurrent terms of 44 and 30 years in prison, respectively. See *People v. Gonzalez*, No. 1-13-3099 (2015) (unpublished summary order under Supreme Court Rule 23(c)).

¶ 5 At sentencing, the trial court reviewed the facts of the case and indicated it would not impose an extended-term sentence. It then sentenced defendant to an aggregate prison term of 90 years, a sentence which included a term of 60 years for first degree murder and a consecutive term of 30 years for attempted murder. In imposing sentence, the trial court stated as follows:

“For the first degree murder of Billy Bradford, I sentence you, sir, to 60 years in the Illinois Department of Corrections. Under Illinois law this court finds that although the defendant’s motives were not substantially changed during the course of this street violence, the defendant inflicted severe bodily injury obviously to Billy Bradford.

The defendant has also been convicted of other class X felonies. Under the case of People versus Washington especially, the case that I tried, the defendant was convicted of murder and attempt murder of two youths. The mandatory consecutive sentences will be imposed. For the two separate acts of attempt murder to which the jury announced verdicts of guilty, Mr. Jose Nevarro and Charles Crawford also known as Vega, the defendant is sentenced consecutively to 30 years in the Illinois Department of Corrections. Under Illinois law I can’t control consecutive sentences with each of those acts because of the aggregate maximum sentence.

You have received the maximum term of incarceration of 90 years, [defendant]. I can only say your acts, your conduct, your life tell me that you earned that sentence. Justice has been accomplished.”

¶ 6 On direct appeal, defendant was represented by a private attorney who raised two claims: (1) a jury instruction error and (2) ineffective assistance of trial counsel. We rejected those claims, finding that defendant was not prejudiced by the alleged errors and that the evidence in the case, strengthened by the unimpeached testimony of Crawford and Nevarro and the physical evidence, was not closely balanced. *People v. Morales*, No. 1-96-2582 (1997) (unpublished order under Supreme Court Rule 23).

¶ 7 In 1998, defendant filed his first postconviction petition, which was drafted by the same attorney who represented him on direct appeal. Defendant again claimed ineffective assistance of trial counsel, citing different reasons from those raised on direct appeal. The trial court allowed defense counsel to make an oral statement supporting the petition, and then denied the petition.

¶ 8 The same attorney continued to represent defendant on appeal of the dismissal of the first postconviction petition. Defendant alleged on appeal (1) that the trial court did not issue a proper written order, (2) ineffective assistance of trial counsel, and (3) new evidence that a State witness, Katrina Scimone, had lied at trial. At trial, Katrina testified that defendant asked her to lie to the police by saying she and her father, Thomas Scimone, were with defendant at the time of the shooting. Attached to the appeal was Katrina's affidavit. In it, Katrina stated that, although she testified at trial that she was not with defendant on the night of the shooting, she now could not recall if she was with him or not. Defendant also attached the affidavit of Thomas Scimone, who stated that he and defendant were together, "cooking up" cocaine, when the victims were shot. We affirmed the trial court's summary dismissal of the first postconviction petition. *People v. Morales*, No. 1-98-2749 (1999) (unpublished order under Supreme Court Rule 23).

¶ 9 In 2001, defendant filed a second postconviction petition, this time *pro se*, claiming that the trial court's consideration of his first petition was fundamentally flawed. He contended that the trial court erred in allowing defense counsel to present an oral argument because the Act precludes input from either the State or the defense during the first stage of postconviction review. Defendant also alleged 11 violations of his constitutional rights: (1) his first postconviction petition stated meritorious claims and was wrongfully dismissed; (2) he suffered ineffective assistance of appellate counsel on his first postconviction petition and his appeal of its denial; (3) prosecutors withheld evidence favorable to his defense; (4) his consecutive sentences were unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (5) his sentences were unfairly disparate from those of his codefendant; (6) the State presented perjured testimony by the codefendants, victims, Katrina, and the medical examiner; (7) newly discovered evidence revealed in his attached affidavits proved his innocence; (8) the photo array in which he was identified was impermissibly suggestive; (9) ineffective assistance of trial counsel; (10) ineffective assistance of appellate counsel on direct appeal; and (11) the evidence did not support his convictions.

¶ 10 Among the many specific allegations of ineffective assistance of appellate counsel, defendant asserted the following:

“Appellate counsel on direct review did not raise the issue of the excessiveness of the (90) year sentence and the disparity to the co-defendant's sentence. In viewing the evidence, and the inconsistencies in the evidence, [counsel] must have seen that the consecutive sentence of (90) years was excessive. No issue was raised concerning the consecutive sentence particularly

where the injuries of the attempt murder victims was not so severe as to require extensive treatment. In fact, both victims were released very shortly after minor medical attention, this is evidence[d] by Nevarro being able to go to the police station only some hours after his release to view a line-up to I.D. Gonzalez. There existed Illinois caselaw which could challenge the excessive consecutive sentence. Next the issue of the gross disparity between petitioner and Gonzalez, as presented in claim (5), also had merit. If [counsel] would have raised these issues on appeal, the sentence might have been reduced, modified, or reversed and remanded for a new sentencing hearing.”

¶ 11 In an accompanying memorandum of law in support of his petition, defendant expanded on his claim of ineffective assistance of appellate counsel for failing to challenge his sentence as follows:

“The issue that the (90) year consecutive sentences were excessive was one of merit. Appellate counsel was ineffective for failing to raise this issue on appeal. A simple reading of the record shows that the judge imposed an excessive penalty not supported by the facts of the case. Appellate counsel did not make any argument concerning the sentence; had he done so the sentences may have been either vacated or reduced. The issue as presented in *People v. Whitney*, 188 Ill. 2d 91, 720 N.E. 2d 225, 229 (1999), was available to counsel and his failure to raise it denied petitioner any chance of relief from his sentence.”

¶ 12 Defendant attached affidavits from five individuals who either identified another man as having admitted being the gunman, stated that Nevarro admitted to falsely identifying defendant, or averred that defendant did not commit the crimes of which he was convicted.

¶ 13 The trial court summarily dismissed the second petition as “frivolous and patently without merit” in a written order. While the court specifically addressed a number of defendant’s claims in its written order, it did not expressly address the issue involving *Whitney*, 188 Ill. 2d at 96, 100, which held that under the relevant statutory provision in effect at that time, consecutive sentencing for crimes committed as part of a single course of conduct was allowed only where the defendant inflicted severe bodily injury to the victim of either a Class X or a Class 1 felony, but not to the victim of a murder. Defendant filed a *pro se* motion to reconsider, in which he generally asserted, among other things, that the trial court failed to consider or address his claim of ineffectiveness of appellate counsel. The trial court denied the motion to reconsider.

¶ 14 On appeal, defendant abandoned 9 of his 11 postconviction claims and challenged the summary dismissal on just 2 grounds: (1) he stated the gist of meritorious constitutional claim of ineffective assistance of appellate counsel; and (2) his attached affidavits were newly discovered evidence of actual innocence that probably would have changed the outcome on retrial. With regard to the first of these claims, defendant asserted that he suffered ineffective assistance of appellate counsel because counsel did not raise three meritorious claims on direct appeal: (1) the disparity in the sentences of defendant and his more culpable codefendant is unfair; (2) trial counsel was ineffective for failing to suppress an overly suggestive photo identification; and (3) trial counsel was ineffective for failing to investigate, interview and present material witnesses.

¶ 15 We rejected defendant's arguments and affirmed the trial court's judgment. *People v. Morales*, 339 Ill. App. 3d 554 (2003).

¶ 16 More than 12 years later, on July 8, 2015, defendant mailed to the court a *pro se* motion for leave to file a third postconviction petition, accompanied by a pleading titled "Successive Petition for Post-Conviction Relief and Relief from a Void Judgment." In the motion, defendant contended that the trial court erred in imposing consecutive sentences based on a finding of severe bodily injury to the murder victim, Bradford. Defendant asserted that "a violation of 730 ILCS 5/5-8-4 is an exception" to the rule that he must show cause for not raising the claim in his initial petition. He further asserted that he had shown prejudice, as a trial judge's reliance on an improper factor in sentencing impinges on a defendant's fundamental right to liberty.

¶ 17 In the attached successive motion, defendant, relying on *Whitney*, 188 Ill. 2d at 91, argued that the trial court erroneously imposed consecutive sentences based on "what was a non-triggering offense at the time." Specifically, defendant alleged that under the version of the statute in effect when he was sentenced in 1996, consecutive sentences could only be imposed if severe bodily injury was caused by a Class X or Class 1 felony, and the trial court incorrectly based its decision to impose consecutive sentences on a finding of severe bodily injury to the victim of a murder, which was not a Class X or Class 1 felony. Defendant further argued that "severe bodily injury" was not inflicted on either of the attempted murder victims, Crawford or Nevarro, as they only "received moderate / or less than severe wounds as a result of the gunshot wound / shooting," there "was never any serious damage, physical impairment of the functioning of any body part or organ, no disfigurement, no loss of limbs, nor any substantial risk of death sustained," neither victim required emergency surgery, and both victims could have been

discharged from the hospital within hours of being admitted and treated. As relief, defendant sought to have the consecutive sentences vacated and modified to run concurrently.

¶ 18 The trial court denied defendant leave to file his third petition for postconviction relief, finding that he had not met the cause and prejudice test for filing a successive postconviction petition. This appeal followed.

¶ 19 On appeal, defendant contends that the trial court erred in denying him leave to file his third petition where the sentencing court, in violation of the holding of *Whitney*, 188 Ill. 2d at 91, imposed consecutive sentences based on a finding of severe bodily injury to the murder victim. As noted above, in *Whitney*, 188 Ill. 2d at 96, 100, our supreme court held that under the version of section 5-8-4(a) of the Unified Code of Corrections in effect at that time (730 ILCS 5/5-8-4(a) (West 1994)), consecutive sentencing for crimes committed as part of a single course of conduct was allowed where the defendant inflicted severe bodily injury to the victim of either a Class X or a Class 1 felony, but not to the victim of a murder.

¶ 20 As an initial matter, we note the State's argument that defendant's consecutive sentencing claim is not cognizable under the Post-Conviction Hearing Act (Act) because it is a "statutory" claim, stemming from the *Whitney* court's interpretation of section 5-8-4(a). It is true that because statutes do not confer constitutional rights, an allegation of a deprivation of a statutory right is not a proper claim under the Act. *People v. Mitchell*, 189 Ill. 2d 312, 329 (2000). However, the improper imposition of consecutive sentences might violate a defendant's fundamental rights (*People v. Alvarez*, 2016 IL App (2d) 140364, ¶ 17) and reliance on improper sentencing factors affects a defendant's "fundamental right to liberty" (*People v. Romero*, 2015 IL App (1st) 140205, ¶¶ 32-34 (reversing summary dismissal of a postconviction petition where

the defendant presented an arguable claim that trial and appellate counsel were ineffective for failing to argue that the circuit court considered an improper sentencing factor)). Here, defendant has alleged that the trial court relied on an improper factor in order to impose consecutive sentences. As such, he has raised a claim implicating his fundamental rights, and we find that his claim is cognizable under the Act. See *People v. Richardson*, 2015 IL App (1st) 113075, ¶ 49 (under the Act, a petitioner may challenge his conviction or sentence where he can allege that a violation of the federal or state constitution has denied him a fundamental right).

¶ 21 A trial court's decision whether to grant leave to file a successive postconviction petition is controlled by statute. 725 ILCS 5/122-1(f) (West 2014). Because a trial court's compliance with statutory procedure is a question of law, our review is *de novo*. *People v. Spivey*, 377 Ill. App. 3d 146, 148 (2007).

¶ 22 The Post-Conviction Hearing Act contemplates the filing of only one postconviction petition. 725 ILCS 5/122-3 (West 2014). Any issues that were decided on direct appeal or in an earlier postconviction proceeding are barred by the doctrine of *res judicata*, and issues that could have been, but were not, raised in an earlier proceeding are forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). However, a defendant may overcome these procedural hurdles if fundamental fairness so requires. *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2001).

¶ 23 Whether this fundamental fairness exception applies is determined by employing the "cause and prejudice" test contained in section 122-1(f) of the Act. 725 ILCS 5/122-1(f) (West 2014); *Pitsonbarger*, 205 Ill. 2d at 459. Under this test, a claim in a successive postconviction petition is barred unless the defendant can show cause for failing to raise the claim in earlier proceedings and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2014).

Specifically, a defendant shows cause by identifying an objective factor that impeded his ability to raise a specific claim in earlier proceedings, and shows prejudice by demonstrating that the claim not raised in earlier proceedings so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2014); *People v. Davis*, 2014 IL 115595, ¶ 14. Both elements of the test must be satisfied to justify granting leave to file. *Davis*, 2014 IL 115595, ¶ 14.

¶ 24 On appeal, defendant contends that the trial court erred in determining that he did not satisfy the cause and prejudice test for filing his third postconviction petition. With regard to cause, defendant asserts that he raised his *Whitney* claim at the first opportunity available to him: his second postconviction petition, which he filed *pro se*. Noting that he was represented by the same attorney on direct appeal and on the initial postconviction petition, defendant argues that his failure to raise the *Whitney* issue in either of those proceedings was attributable to the incompetence of that attorney. Citing *People v. Flores*, 153 Ill. 2d 264, 281-82 (1992), defendant observes that where claims of ineffectiveness (1) concern error which allegedly occurred on direct appeal and in a first postconviction proceeding, and (2) are asserted against the attorney who represented the defendant in those proceedings, such claims are not barred by waiver or *res judicata*. Defendant further asserts that his *Whitney* claim, though raised in his second postconviction petition, is not subject to *res judicata* because when the trial court disposed of the second petition, it did not address the *Whitney* issue. According to defendant, absent an express prior ruling on the merits of the issue, *res judicata* cannot preclude his raising of the claim in this appeal.

¶ 25 We agree with defendant’s assessment that his representation by the same attorney on direct appeal and the first postconviction petition “excuse[s] procedural default through the filing of the initial petition.” However, we cannot agree with his position regarding his second postconviction petition.

¶ 26 Our supreme court has repeatedly held that a ruling on a postconviction petition has *res judicata* effect with regard to all claims that were raised or could have been raised in that petition. See, e.g., *People v. Guerrero*, 2012 IL 112020, ¶ 17; *People v. Jones*, 191 Ill. 2d 194, 198 (2000); *People v. Flores*, 153 Ill. 2d 264, 274 (1992). Here, there is no dispute that defendant raised the *Whitney* issue in his second postconviction petition. Moreover, it is undisputed that the trial court found that petition to be frivolous and patently without merit. Although the trial court did not specifically address the *Whitney* claim in its written dismissal order, that circumstance does not mean the trial court did not rule on the issue. There is no requirement that a trial court address every claim in writing when entering a summary dismissal. See *People v. Lee*, 344 Ill. App. 3d 851, 855 (2003) (finding that the trial court dismissed the defendant’s entire postconviction petition, even though it gave no reason for dismissing one of the claims). Moreover, while our supreme court has stated that it is “advisable” for a trial court to state its reasons for dismissing a postconviction petition, it is not mandatory that the trial court do so. *People v. Porter*, 122 Ill. 2d 64, 82 (1988); see also *People v. Leason*, 352 Ill. App. 3d 450, 452 (2004) (rejecting contention that because the trial court failed to state the facts and law it relied upon, it erred in summarily dismissing the defendant’s successive petition). Here, where defendant previously raised his *Whitney* claim and the trial court dismissed the pleading in which the claim was raised on its merits, we find that *res judicata* bars reconsideration of the issue.

¶ 27 We are not persuaded to find otherwise based on the three cases cited by defendant for the proposition that his *Whitney* claim is not subject to *res judicata* because the trial court, in disposing of his second postconviction petition, did not “decide” or “rule upon” that particular claim, and that “[t]here is no *res judicata* effect in the absence of an earlier ruling.”

¶ 28 In *People v. Newbolds*, 364 Ill. App. 3d 672, 674 (2006), the trial court summarily dismissed the defendant’s initial postconviction petition, finding that the issues raised in the petition either had been raised and decided in the defendant’s direct appeal, and were therefore *res judicata*, or could have been raised in the direct appeal but were not, and were therefore waived. On appeal, we found, *inter alia*, that contrary to the trial court’s finding, none of the postconviction claims had been raised on direct appeal. *Id.* at 676. We concluded that “[a]ccordingly, they have not been ruled upon and are not *res judicata*,” and that to the extent the trial court found the claims were barred by *res judicata*, the trial court erred. *Id.* In *Emerson Electric Co. v. Sherman*, 150 Ill. App. 3d 832, 839 (1986), this court dismissed the defendants’ appeal as moot. Having done so, we then noted, “Because we have made no ruling on the merits the dismissal of the appeal would have no adverse effect on the parties by way of *res judicata*.” *Id.* Finally, in *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 385 (2001), the plaintiff asserted a contract tenure claim in a federal action, which the federal district court dismissed for lack of jurisdiction. The plaintiff then filed a complaint in the circuit court of Cook County, stating the same claim. *Id.* at 382. The circuit court dismissed some of the counts of the complaint and entered summary judgment for the defendant on the others. *Id.* When the case eventually reached our supreme court, the defendant argued, among other things, that *res judicata* barred assertion of the plaintiff’s contract tenure claim. *Id.* at 389. Our supreme court rejected that argument,

observing that because the federal action was dismissed for lack of jurisdiction, there was no adjudication on the merits of the claims raised in that action, and, therefore, *res judicata* did not apply. *Id.* at 392.

¶ 29 In the instant case, unlike *Newbolds*, defendant did in fact raise his underlying issue in an earlier action. Additionally, in contrast to *Emerson Electric* and *Nowak*, the action that initially raised the underlying issue was not dismissed as moot or dismissed for lack of jurisdiction. In *Newbolds*, *Emerson Electric*, and *Nowak*, the merits of the underlying issue had never before been reached, so *res judicata* did not apply. Here, however, defendant raised the *Whitney* issue in his second postconviction petition and the trial court dismissed that petition on its merits. Thus, the cases relied upon by defendant are distinguishable, and their reasoning does not apply here.

¶ 30 *Res judicata* bars reconsideration of defendant's *Whitney* claim. Where defendant raised the *Whitney* claim in his second postconviction petition, that petition was dismissed as frivolous and patently without merit, and this court affirmed that dismissal, we are unable to find that defendant has shown "cause" for failing to raise the claim in earlier proceeding. Having determined that defendant has not demonstrated cause, we may dispose of the instant appeal without addressing the issue of prejudice. *People v. Davis*, 2014 IL 115595, ¶ 14; *People v. Williams*, 394 Ill. App. 3d 236, 246 (2009). Defendant did not meet his burden for filing a successive postconviction petition. Accordingly, we find that the trial court properly denied his motion for leave to file.

¶ 31 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 32 Affirmed.