

2018 IL App (1st) 160489-U

No. 1-16-0489

Order filed March 23, 2018

Sixth 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

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 01 CR 30570
)	
WARREN SHAFFORD,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in denying defendant leave to file a successive postconviction petition. The petition is barred by *res judicata* as it raises the same claim defendant raised in his initial postconviction petition.

¶ 2 Defendant Warren Shafford appeals from the circuit court's denial of leave to file a successive petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/ 122-1 et seq. (West 2014)). We affirm.

¶ 3 The evidence at defendant's jury trial established that on November 14, 2001, defendant fatally shot the victim, Charles Burns, after an argument about money. Alex Chatman testified that although a "tussle" took place, the victim did not "take it serious," did not appear to be angry, and did not threaten defendant. Terrence Bell testified that when the victim asked defendant about the money, he did not use a "real aggressive tone" and the argument "at first *** wasn't really like a big issue." Bell further testified that defendant was "very aggressive," put his hand "all in" the victim's face, and stated he would not pay the victim "anything." The defense presented, *inter alia*, the testimony of defendant's mother Katherine Shafford. Katherine testified that she was sitting in the driver's seat of her car when she heard the victim threaten to shoot defendant if he did not pay a debt. Katherine further testified that defendant asked her for money and the "next thing" she knew, the victim was on top of her trying to get the keys to her car. Defendant was found guilty of first degree murder and sentenced to 22 years in prison. This court affirmed defendant's conviction and sentence on appeal. See *People v. Shafford*, No. 1-03-3744 (2005) (unpublished order under Supreme Court Rule 23).

¶ 4 In June 2006, defendant filed a *pro se* postconviction petition alleging that he was denied the effective assistance of counsel because trial counsel failed to bring to the court's attention the victim's history of assaulting and verbally abusing defendant when police records detailing this abuse were available. Attached to the petition in support were defendant's affidavit and a letter from defendant's mother Katherine Shafford.

¶ 5 In his affidavit, defendant stated that trial counsel "did not raise" the fact that prior to the victim's death, the victim came to defendant's property and struck him with a lead pipe causing him to go Roseland Community Hospital for treatment. He further stated that two days after the

first incident, the victim and his associates surrounded defendant and tried to take money from him, chased him to his apartment, and broke the windows in the back of the apartment complex. Defendant noted that police reports were made in each instance.

¶ 6 In her letter, Katherine stated that in October 2001, defendant was hit in the head with a crowbar and subsequently taken to Roseland Hospital, and that on another occasion defendant was hit with a “two by four board.” Katherine also stated that on November 14, 2001, “they,” that is, certain gang members, “bust the door down” and “busted out window screens and windows,” however, defendant was “saved” by his dog. Katherine stated that this incident was reported to the police. The circuit court summarily dismissed the petition as frivolous and patently without merit.

¶ 7 On appeal, defendant contended that the court erred in dismissing his *pro se* postconviction petition because it stated the gist of a constitutional claim that he was denied the effective assistance of counsel when trial counsel failed to investigate and introduce evidence of the victim’s violent prior acts against defendant to support the defense’s self-defense theory.

¶ 8 This court, however, determined that defendant failed to provide “documentation to independently corroborate his claim.” *People v. Shafford*, No. 1-06-2616, at 9 (2007) (unpublished order under Supreme Court Rule 23). We noted that defendant’s affidavit was “conclusory and self-serving, as he merely averred that prior to the instant offense, he had two confrontations with the victim and that police reports were filed as a result of both.” *Id.* However, defendant did not aver that he informed trial counsel of these alleged occurrences. *Id.* Moreover, defendant neither attached hospital records or police reports to support his claim nor explained the absence of those documents. *Id.* at 10. This court further noted that Katherine’s

letter failed to corroborate defendant's claims that counsel failed to investigate the prior acts of violence when the letter did not specify who was involved in those acts or the source of her information, and did not indicate that she informed trial counsel of these incidents. *Id.* at 10-11. Therefore, because defendant failed to support his claim of ineffective assistance of counsel as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2004)), we determined that the petition was properly dismissed at the first stage of proceedings under the Act. *Id.* at 11.

Defendant filed a petition for leave to appeal to our supreme court, which was denied. *People v. Shafford*, No. 106254 (May 29, 2008).

¶ 9 In August 2014, defendant filed a *pro se* motion for leave to file a successive postconviction petition along with a proposed successive postconviction petition. He filed a *pro se* motion to supplement the petition in December 2015. The motion alleged that the State failed to disclose evidence that the victim had previously had an altercation with defendant and that there was a police report "written on this issue," and that trial counsel was ineffective because counsel failed "to bring information about this prior altercation to the jury." Attached to the motion in support were the affidavits of defendant and his mother, Katherine Shafford, and a police report dated November 14, 2001.

¶ 10 The police report indicated that defendant owed \$20 to an unnamed drug dealer and that because defendant had not paid the debt, this person broke defendant's back door window and battered defendant "in the past week." In his affidavit, defendant contended that there was evidence that the victim was the aggressor, rather than he. Defendant further stated that although the police report omitted the names of the persons unknown to him at the time, the men involved were the victim, Alex Chatman, and Terrence Bell. Defendant also stated that he told officers

about the fact that the victim had previously struck him on the head with a lead pipe causing him to go to the Roseland Community Hospital emergency room for treatment. Defendant finally stated that he tried to obtain “that emergency room report” but was not successful. In her affidavit, Katherine stated that trial counsel told her that he was going to have his investigator obtain the October 2001 medical records from Roseland Hospital and the police reports relating to prior “harm” that the victim did to defendant. She stated that trial counsel never supplied those documents.

¶ 11 The circuit court denied defendant leave to file a successive postconviction petition. Defendant now appeals.

¶ 12 The Act contemplates the filing of only one petition without leave of court (725 ILCS 5/122-1(f) (West 2014)), and “any claim not presented in an original or amended petition is waived.” *People v. Sanders*, 2016 IL 118123, ¶ 24. See also *People v. Evans*, 186 Ill. 2d 83, 91-92 (1999) (the judgment of the reviewing court on a previous appeal is *res judicata* as to the issues actually decided, and any claim that could have been presented in the direct appeal is, if not raised, thereafter barred under the doctrine of waiver). A defendant must overcome “immense procedural default hurdles” in order to file a successive postconviction petition. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). These hurdles are only lowered in limited circumstances because successive postconviction proceedings “plague the finality of criminal litigation.” *Id.*

¶ 13 The court may grant leave to file a successive postconviction petition when a defendant demonstrates cause for failing to raise the claim in his earlier petition and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2014). “Cause” is established when the defendant

shows that “some objective factor external to the defense impeded his ability to raise the claim” in his original postconviction proceeding. *Tenner*, 206 Ill. 2d at 393. “Prejudice” is established when the defendant shows that the “claimed constitutional error so infected his trial that the resulting conviction violated due process.” *Id.* A defendant must establish both cause and prejudice. *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002).

¶ 14 “[T]he cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard.” *People v. Smith*, 2014 IL 115946, ¶ 35. A circuit court should deny a defendant leave to file a successive postconviction petition when it is clear, based upon a review of the successive petition and the attached documentation, that the defendant’s claims fail as a matter of law or when the petition and its supporting documents are insufficient to justify further proceedings. *Id.* We review the denial of a defendant’s motion for leave to file a successive postconviction petition *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13 (Oct. 5, 2017).

¶ 15 Defendant acknowledges that he raised the same issue—whether he was denied the effective assistance of counsel when trial counsel failed to investigate and present evidence to establish the victim’s prior threats and acts of violence against defendant—in his initial postconviction petition. However, defendant contends that this claim is not barred by the doctrine of *res judicata* because his initial postconviction proceedings were “deficient.” He argues that pursuant to *People v. Allen*, 2015 IL 113135, the “failure to attach independent corroborating documentation or to explain its absence did not justify summary dismissal of his initial petition.” Defendant therefore concludes that this court’s determination that the petition

was properly summarily dismissed was “contrary” to the holding of *Allen*, rendered that proceeding deficient, and constituted “cause.”

¶ 16 The State responds that the doctrine of *res judicata* bars defendant from raising an identical claim in a successive postconviction petition that was raised and decided in an initial postconviction petition. The State further argues, relying on *People v. Davis*, 2014 IL 115595 that a defendant cannot “develop the evidentiary basis for a claim in a piece-meal fashion.”

¶ 17 Defendant argues that his initial postconviction proceeding was rendered “deficient” by our supreme court’s decision in *People v. Allen*, 2015 IL 113135. In *Allen*, the defendant was convicted of murder and armed robbery after a shooting. The defendant filed a *pro se* postconviction petition alleging actual innocence and attached an unnotarized statement from a person who claimed to be responsible for the shooting and said that the defendant was not involved. The circuit court dismissed the petition as frivolous and patently without merit, noting, *inter alia*, that the statement was unnotarized.

¶ 18 Our supreme court reversed, holding that the lack of notarization did “not prevent the court from reviewing the petition’s ‘substantive virtue,’ as to whether it ‘set[s] forth a constitutional claim for relief.’ [Citation.]” *Id.* ¶ 34. The court therefore concluded that “[w]hile not an admissible affidavit in its present form, the *** statement properly qualifies as ‘other evidence.’ ” *Id.* (quoting 725 ILCS 5/122-6 (West 2008)). The court also stated:

“the circuit court may not dismiss at the first stage solely for failure to notarize a statement styled as an evidentiary affidavit. Instead, the circuit court at the first stage must look to whether the evidentiary attachments *** show[] that the petition’s

allegations are capable of corroboration and identify[] the sources, character, and availability of evidence alleged to support the petition’s allegations.” *Id.*

¶ 19 Determining that the statement met this standard, our supreme court reversed and remanded for additional proceedings. *Id.* ¶ 48. Thus, under *Allen*, the lack of notarization of an “affidavit” in support does not, in and of itself, solely justify the first stage dismissal of a defendant’s petition. See *Id.* ¶ 34.

¶ 20 We are unpersuaded by defendant’s reliance on *Allen*. First, *Allen* did not eliminate the requirement that a defendant comply with section 122-2 of the Act. See *id.* ¶ 24 (quoting *People v. Collins*, 202 Ill. 2d 59, 67 (2002) (a *pro se* petition “must supply sufficient factual basis to show the allegations in the petition are ‘capable of objective or independent corroboration’ ”)). Second, and most importantly, the record reveals that defendant’s *pro se* postconviction petition was not summarily dismissed on a technicality due to lack of notarization, but on the substantive basis that he failed to meet the evidentiary and pleading requirements of section 122-2 of the Act.

¶ 21 In defendant’s prior appeal, this court noted that defendant’s affidavit was “conclusory and self-serving,” and that defendant did not maintain that he told trial counsel of the alleged prior acts of violence by the victim. This court further noted that no hospital records or police reports were attached to the petition in support and that defendant did not explain the absence of those documents. This court did not disregard Katherine’s letter because it was not notarized, but based on its substantive weakness. Katherine did not state that she told trial counsel about the prior acts of violence and did not identify the victim as the perpetrator of those acts. Therefore,

this court affirmed the summary dismissal of defendant's *pro se* postconviction petition because the petition failed to meet the evidentiary and pleading requirements of section 122-2 of the Act.

¶ 22 Having determined that the proceedings on defendant's initial postconviction petition were not deficient, and that defendant raised the same issue in that petition as he does in his successive postconviction petition, we conclude that the doctrine of *res judicata* bars defendant from raising the issue of ineffective assistance of counsel in this successive postconviction proceeding. “ ‘[A] ruling on a post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition.’ ” (Emphasis omitted.) *People v. Flores*, 153 Ill. 2d 264, 274 (1992) (quoting *People v. Free*, 122 Ill. 2d 367, 376 (1989)).

¶ 23 Even if we were to relax the doctrine of *res judicata*, however, defendant still cannot establish cause because he has failed to identify an objective factor external to the defense that impeded his efforts to present this claim in an earlier proceeding. See *Tenner*, 206 Ill. 2d at 393. Defendant acknowledges that he “apparently was able to obtain the police report.” However, he provides no authority for the proposition that “cause” includes those situations where a defendant can, eventually, obtain the supporting documents that his initial postconviction lacked. Defendant could have explained the absence of the police report and detailed his efforts to obtain it in his initial postconviction petition. See *People v. Williams*, 394 Ill. App. 3d 236, 245-46 (2009) (defendant could not show cause for his failure to include his claim in his initial postconviction petition when, although trial counsel did not provide him with documents to support his claims, he was aware of the claims and the supporting facts prior to his initial petition).

¶ 24 *People v. Davis*, 2014 IL 115595, is instructive on this point. There, after filing three unsuccessful postconviction petitions, defendant's fourth postconviction petition contained allegedly new evidence that his counsel was ineffective. *Id.* ¶¶ 54-55. However, our supreme court found that the evidence he presented in the fourth petition was "not of such character that it could not have been discovered earlier by the exercise of due diligence." *Id.* ¶¶ 55-56. The court further stated that "[a] defendant is not permitted to develop the evidentiary basis for a claim in a piecemeal fashion in successive postconviction petitions." *Id.* ¶ 55.

¶ 25 We acknowledge that defendant has now certainly provided more information in support of his claim than he had before. But a defendant is not permitted to develop a claim over the course of several postconviction proceedings. See *id.* As defendant has not established cause for his failure to obtain to the police report in his initial postconviction conviction proceeding, we affirm the circuit court's denial of defendant's motion for leave to file a successive postconviction petition.

¶ 26 Affirmed.