

2018 IL App (1st) 161209-U  
Order filed: June 8, 2018

FIRST DISTRICT  
FIFTH DIVISION

No. 1-16-1209

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 19701
	)	
JOSEPH TALACH,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Reyes and Justice Hall concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirmed the circuit court's denial of defendant's motion for leave to file a second successive postconviction petition because his underlying claim was procedurally barred and he did not establish a basis for relaxing the bar.

¶ 2 Defendant-appellant, Joseph Talach, appeals the circuit court's denial of his motion for leave to file a second successive postconviction petition under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, he contends that the circuit court

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erred by denying him leave to file a second successive postconviction petition because his conviction resulted from a fundamental miscarriage of justice. We affirm.

¶ 3 The evidence adduced at the 2001 jury trial established that, on July 28, 1999, defendant struck Michael Rasor multiple times in the head with a baseball bat.

¶ 4 On that date, Mr. Rasor was riding in a vehicle with friends, one of whom was Gilardo Arreola, when a blue vehicle swerved and cut in front of them. The occupants of the blue vehicle were “throwing up” gang signs toward Mr. Rasor’s vehicle. When both vehicles were at a stoplight, two men exited the blue vehicle. One of the men, whom Mr. Arreola identified as defendant, had a baseball bat. Defendant used the bat to break the back passenger window of Mr. Rasor’s vehicle. Mr. Rasor exited his vehicle and attempted to flee. Multiple witnesses testified that they saw defendant hit Mr. Rasor with the baseball bat several times, including twice in the head. Mr. Rasor suffered a skull fracture and brain damage.

¶ 5 Defendant testified that Mr. Rasor’s vehicle was following him and bumped his vehicle at a stop light. When he exited to speak with the driver of the other vehicle, a passenger tried to assault him with a baseball bat. One of the swings missed defendant and hit Mr. Rasor. Defendant successfully fended off the attack and, in the confusion of the struggle, ended up with the baseball bat.

¶ 6 The jury returned a verdict form signed by each juror that read: “We, the jury, find the defendant, Joseph Talach, guilty of attempt first degree murder.” When the clerk read this verdict aloud, he mistakenly read the verdict as “guilty of first degree murder.” After the incorrect verdict was read, the court polled the jury and all jurors acknowledged that this was their verdict.

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Following the polling, the court discharged the jury and stated that they were “now excused from further jury service.” Defense counsel moved to set aside the verdict on the grounds that the jury was polled on an offense that was not charged. When the court realized the clerk’s error, it recalled the members of the jury into the courtroom, explained the clerk’s error in reading the verdict, informed them on the record that they were still under oath, and re-polled them as to the verdict of attempted first degree murder. Every juror confirmed that they had found defendant guilty of attempted first degree murder.

¶ 7 The trial court denied defendant’s motion for a new trial, which included an argument as to the polling of the jury. Defendant was sentenced to 30 years’ imprisonment.

¶ 8 On direct appeal, defendant argued that: (1) the trial court erred by failing to conduct a hearing on the State’s reasons for its preemptory challenges and limiting cross-examination of the State’s witnesses; (2) the State made inflammatory remarks during closing arguments; (3) the State failed to prove him guilty beyond a reasonable doubt; and (4) his sentence was excessive. We affirmed defendant’s conviction and sentence. *People v. Talach*, No. 1-02-0177 (2004) (unpublished order under Supreme Court Rule 23).

¶ 9 On January 26, 2005, defendant filed a *pro se* petition for postconviction relief under the Act. He argued that: (1) his right to due process was violated when the court re-polled the jury after the clerk mistakenly read the verdict; (2) he received ineffective assistance of trial counsel; and (3) he received ineffective assistance of appellate counsel. The circuit court dismissed the petition as frivolous and patently without merit. On September 22, 2006, this court affirmed the circuit court’s decision. See *People v. Talach*, No. 1-05-1667 (2006) (unpublished order under

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Supreme Court Rule 23).

¶ 10 On May 19, 2009, defendant filed a *pro se* motion for leave to file a successive postconviction petition, arguing that newly discovered evidence established that he was actually innocent of attempted first-degree murder. The circuit court denied defendant leave to file the successive petition. Defendant appealed and this court affirmed the circuit court's decision. See *People v. Talach*, No. 1-09-1949 (2011) (unpublished order under Supreme Court Rule 23).

¶ 11 On December 14, 2015, defendant, through counsel, filed a motion for leave to file a second successive petition that is the subject of this appeal. In this second successive petition, he argued that his conviction was void because the circuit court had no jurisdiction to reconvene the jury after it had been discharged following the clerk's incorrect reading of the verdict.

¶ 12 On March 1, 2016, the circuit court entered a written order denying defendant leave to file the second successive postconviction petition. In doing so, the court found that defendant's argument was barred by *res judicata* because he had already raised this issue in his initial postconviction petition.

¶ 13 On appeal, defendant contends that the circuit court erred in denying him leave to file his second successive petition. He maintains that, as a result of the initial erroneous jury poll, his conviction is void *ab initio* and his continued incarceration constitutes a miscarriage of justice such that, notwithstanding *res judicata*, the court should have granted him leave to file the petition.

¶ 14 The Act provides a tool by which those under criminal sentence in this state can assert that their convictions resulted from a substantial denial of their constitutional rights. 725 ILCS

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5/122-1 *et seq.* (West 2014); *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction action is a collateral attack on the judgment rather than a direct appeal from the conviction. *Id.* Postconviction proceedings “focus on constitutional claims that have not and could not have been previously adjudicated.” *People v. Holman*, 2017 IL 120655, ¶ 25. “Accordingly, issues that were raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited. *Id.* (citing *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009)). However, the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires, or where the facts relating to the issue do not appear on the face of the original appellate record. *People v. English*, 2013 IL 112890, ¶ 22 (citing *People v. Williams*, 209 Ill. 2d 227, 233 (2004)).

¶ 15 The Act contemplates the filing of only one petition without leave of court. 725 ILCS 5/122-1(f) (West 2014); *People v. Sanders*, 2016 IL 118123, ¶ 24. As outlined in the Act, a court may grant leave to file a successive petition “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.” 725 ILCS 5/122-1(f) (West 2014).

¶ 16 Defendant’s claim, that the erroneous jury poll renders his conviction void, is based on the state of the original record on direct appeal. Therefore, because the issue could have been raised on direct appeal it is, thus, forfeited.

¶ 17 Further, in this court, defendant acknowledges that he raised the same claim—whether his conviction is void as a result of the first erroneous jury poll—in his initial postconviction petition. As such, defendant does not dispute that this claim is precluded by the doctrine of *res*

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*judicata*. See, e.g., *People v. Guerrero*, 2012 IL 112020, ¶ 17 (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).

¶ 18 Moreover, defendant does not argue that he satisfied the cause and prejudice test for a successive postconviction petition. Having already raised this claim, it is axiomatic that defendant cannot show “cause” for failing to raise it in an earlier proceeding. Rather, defendant argues that the circuit court should have granted him leave to file his second successive petition, notwithstanding *res judicata*, to prevent a fundamental miscarriage of justice.

¶ 19 In addition to the cause-and-prejudice test codified in the Act, our supreme court has recognized that the bar to successive petitions should be relaxed where it is necessary to prevent a fundamental miscarriage of justice. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). However, for this exception to apply, the petitioner must demonstrate actual innocence. See *id.* (“To demonstrate \*\*\* a miscarriage of justice, a petitioner *must* show actual innocence \*\*\*.”). (Emphasis added).

¶ 20 Defendant contends that he is innocent as a matter of double jeopardy because the jury had no jurisdiction to render a verdict against him after the clerk incorrectly read the verdict and the court discharged the jury. However, this is not a *per se* claim of actual innocence as contemplated by *Pitsonbarger*. See *Edwards*, 2012 IL 111711, ¶ 32 (citing *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009)) (The elements of a successful claim of actual innocence require that the evidence supporting the claim must be: (1) newly discovered; (2) material; (3) not merely cumulative; and (4) of such conclusive character that it would probably change the result on

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retrial.).

¶ 21 Here, defendant does not present any evidence that he is actually innocent of attempted first-degree murder. This is not surprising, given that, as mentioned, defendant is not raising a claim of actual innocence. Without a claim of actual innocence, defendant cannot avail himself of the fundamental miscarriage of justice exception to the bar against successive postconviction petitions. Accordingly, we find that the circuit court did not err in denying defendant's motion for leave to file a second successive postconviction petition.

¶ 22 For these reasons, we affirm the judgment of the circuit court.

¶ 23 Affirmed.