

2018 IL App (2d) 150768-U
No. 2-15-0768
Order filed January 23, 2018

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Respondent-Appellee,)	
)	
v.)	No. 99-CF-1675
)	
DEWAYNE L. WESTER,)	Honorable
)	George Bridges,
Petitioner-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's motion for leave to file a successive postconviction petition. However, we remand for enforcement of an earlier order to vacate a \$750 fee.

¶ 2 Defendant, Dewayne L. Wester, convicted of first-degree murder and sentenced to 45 years' imprisonment in 2001, now appeals the trial court's denial of leave to file a successive postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He also seeks enforcement of this court's earlier order to vacate his \$750 public defender reimbursement fee. *People v. Wester*, 2013 IL App (2d) 111085-U, ¶ 39; 725 ILCS

5/113/3.1(a) (West 2010). The State concedes that enforcement of our earlier order is proper. We affirm the denial of leave to file a successive postconviction petition but remand for enforcement of our earlier order to vacate the \$750 fee.

¶ 3

I. BACKGROUND

¶ 4 A more thorough recitation of the facts can be found in our prior dispositions. See *People v. Wester*, 2015 IL App (2d) 140732-U (affirming the denial of defendant's *pro se* petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)) as untimely and unmeritorious); *Wester*, 2013 IL App (2d) 111085-U (third-stage denial of the postconviction petition, which had challenged the State's presentation of rebuttal witnesses, affirmed; \$750 public defender reimbursement fee vacated); *People v. Wester*, 2-06-0097 (2007) (unpublished order under Illinois Supreme Court Rule 23(c)) (second-stage dismissal vacated based on postconviction counsel's failure to comply with Supreme Court Rule 651(c) (eff. Dec. 1, 1984)); cause remanded for the trial court to hear defendant's motion for substitution of counsel); *People v. Wester*, No. 2-03-0864 (2004) (unpublished summary order under Supreme Court Rule 23(c)) (first-stage dismissal reversed and remanded); *People v. Wester*, No. 2-01-0204 (2002) (unpublished order under Supreme Court Rule 23(c)) (on direct appeal, the court held that the evidence was sufficient to convict for first-degree murder, trial counsel was not ineffective for failing to tender a second-degree murder instruction, and the trial court did not consider improper sentencing factors).

¶ 5 In 2000, defendant was tried before a jury for first-degree murder (720 ILCS 5/9-1-(a)(1), (a)(2) (West 1998)) and, alternatively, involuntary manslaughter (720 ILCS 5/9-3 (West 1998)). At trial, the State's theory of the case was that defendant shot the victim, Brian Blanchard,

several times after initiating a confrontation with Blanchard over a drug debt. Eyewitnesses saw defendant initiate the confrontation and shoot Blanchard.

¶ 6 Defendant testified, claiming self defense following a confrontation with Blanchard over stolen gambling money. Defendant alleged that he, Blanchard, and several men from the neighborhood were gambling with dice when Blanchard stole his winnings. When he tried to take back the money, Blanchard began punching him. The punches disoriented defendant, and Blanchard continued to attack. Defendant shot his gun multiple times at the ground to stop Blanchard's attack, and he did not intend to hit Blanchard. (The witnesses with whom defendant claimed to have been playing dice denied that they were playing dice that day. In balance, toxicology reports later showed Blanchard had cocaine in his system.)

¶ 7 As is relevant to the instant appeal, the jury was instructed prior to deliberation that a person: (1) commits *first-degree murder* when he acts with intent to kill or do great bodily harm or knowledge that his acts create a strong probability of the same; (2) acts with *knowledge* of the result of his conduct "when he is consciously aware that the result is practically certain to be caused by his conduct" (Illinois Pattern Jury Instructions, Criminal, No. 5.01B, paragraph [2] (4th ed. 2000) (IPI Criminal No. 5.01B)); and (3) commits *involuntary manslaughter* when he unintentionally causes the death of another person by acts that are reckless and likely to cause death or great bodily harm.

¶ 8 During deliberation, the jury sent a note with a two-part question:

"What is the definition of 'likely' in the [third] proposition of involuntary manslaughter?"

And,

What is the definition of ‘strong probability’ in the [second] proposition of [first]-degree murder?”

¶ 9 The trial court discussed the note with trial counsel and the State off the record. The parties returned to the record, tentatively agreeing to inform the jury that the terms did not have legal definitions and to continue to deliberate. However, trial counsel also wanted defendant’s approval. Defendant was brought up from the holding cell. The court indicated that trial counsel and defendant engaged in discussion. Trial counsel informed the court that he discussed the question and the proposed response with defendant, and defendant approved (“he does not have any problems with that”). The court instructed the jury that there was “no unique legal definition” for the terms “strong probability” and “likely” and to continue deliberating.

¶ 10 The jury found defendant guilty of first-degree murder. The trial court sentenced defendant to 45 years’ imprisonment and entered a judgment of \$160 in costs for the State. This court affirmed the conviction on direct appeal. Defendant pursued postconviction proceedings. This court twice remanded for further proceedings.

¶ 11 On remand, defendant retained private counsel, Gregory C. Nikitas. At the State’s request, the trial court imposed a \$750 public defender reimbursement fee based on representation during earlier postconviction proceedings. The court did not hold a hearing before imposing the fee.

¶ 12 Nikitas amended the postconviction petition, adding paragraph 29: “[Trial counsel] should have requested the court provide legal definitions for mental states when the jurors raised that question during their deliberations. This was the central inquiry for the jurors and undoubtedly it affected [its] verdict.” At the start of the evidentiary hearing, Nikitas stated that he was withdrawing paragraph 29. Then, he clarified that he was withdrawing only that portion

that alleged that trial counsel did not provide legal definitions for mental states. He acknowledged that trial counsel introduced instructions on mental states, such as knowingly and (un)intentionally. Rather, he challenged that, after the jury asked the question about the definitions of “strong probability” and “likely,” a more substantive response should have been given. (“[T]here was no further information provided to them.”)

¶ 13 Trial counsel testified at the evidentiary hearing. According to trial counsel, in general, defendant participated in his defense and participated in five to six separate conversations about jury instructions in the days leading up to deliberation. Specifically, trial counsel explained the jury question now at issue to defendant before the court issued its response. During that conversation, defendant seemed nervous and excited. Trial counsel thought defendant seemed worried that a verdict was imminent.

¶ 14 The trial court denied the postconviction petition. It did not specifically comment on trial counsel’s handling of the jury question about the definitions of “strong probability” and “likely.” It did comment on other claims, such as the propriety of rebuttal testimony, and the admission of autopsy photos.

¶ 15 On appeal, defendant argued that postconviction counsel provided unreasonable assistance in presenting the rebuttal argument. Defendant also sought to have the \$750 fee vacated, because it had been imposed without holding a hearing. This court found no unreasonable assistance, but we vacated the fee. *Wester*, 2013 IL App (2d) 111085-U, ¶¶ 34, 39.

¶ 16 Defendant next filed a *pro se* petition under section 2-1401 of the Code. Defendant again challenged aspects of the rebuttal testimony and certain jury instructions. Defendant’s petition complained of the trial court’s failure to define “strong probability” and “likely.”¹ The

¹ Defendant now denies that he formally raised the challenge. We choose not to address

trial court dismissed the petition, and this court affirmed. *Wester*, 2015 IL App (2d) 140732-U, ¶¶ 29-32.

¶ 17 In December 2014, defendant filed the instant *pro se* motion for leave to file a successive postconviction petition. He alleged ineffective assistance based on trial counsel's handling of the jury's request to define "strong probability" and "likely" and unreasonable assistance of postconviction counsel based on counsel's handling of the issue.² Specifically, defendant argued that, after the jury asked about the difference between the phrases "strong probability" in the first-degree-murder instruction and "likely" in the involuntary-manslaughter instruction, trial counsel should have requested that the jury be provided with a *second* definition of "knowledge."

¶ 18 Again, the jury had been instructed that a person commits first-degree murder when he acts with intent to kill or do great bodily harm or knowledge that his acts create a strong probability of the same, and that a person commits involuntary manslaughter when he unintentionally causes the death of another person by acts that are reckless and likely to cause death or great bodily harm. Additionally, the jury had been instructed that a person acts with knowledge of the result of his conduct "when he is consciously aware that the result is practically certain to be caused by his conduct." The provided definition of knowledge, contained in IPI Criminal No. 5.01B, paragraph [2], is defined in terms of a prohibited *result* and is one of several

this obstacle for defendant, as there are other bases upon which to affirm.

² Defendant did not argue in his 2013 postconviction appeal that postconviction counsel provided unreasonable assistance based on his handling of the jury-question argument. Again, we choose not to address this obstacle for defendant, as there are other bases upon which to affirm.

acceptable definitions. A second acceptable definition, contained in IPI Criminal No. 5.01B, paragraph [1], is defined in terms of prohibited *conduct* and states that a person acts with knowledge of the nature or attendant circumstances of his conduct “when he is consciously aware that his conduct is of that nature or that those circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that the fact exists.” The jury was not given this definition.

¶ 19 Defendant notes that the paragraph given depends upon how the offense is defined to the jury, and he does not appear to dispute that the proper definition of knowledge, paragraph [2], was given to start. (Nikitas expressly conceded that point in the initial postconviction proceedings.) Defendant contends, however, that the jury’s question regarding the difference between “strong probability” and “likely” indicated that it did not understand the definition of “knowledge,” and, therefore, trial counsel provided ineffective assistance when he failed to request that the jury be provided with a second definition of knowledge, paragraph [1], based on prohibited conduct.

¶ 20 The trial court denied defendant leave to file, finding that defendant could not establish cause or prejudice. It further noted that defendant did not allege actual innocence. Defendant moved to reconsider and the court denied the motion. This appeal followed.

¶ 21 **II. ANALYSIS**

¶ 22 Defendant argues that the trial court erred in denying leave to file a successive postconviction petition, which would have alleged ineffective assistance based on trial counsel’s handling of the jury’s request for the definitions of “strong probability” and “likely.” For the reasons that follow, we disagree with defendant. However, as defendant requests and the State concedes, we remand for enforcement of our earlier order vacating the \$750 fee.

¶ 23 Postconviction proceedings are collateral in nature and allow for review of constitutional issues that were not, and could not have been, decided on direct appeal. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). As such, issues that were raised and decided on direct appeal are barred by *res judicata*. *Id.* Issues that could have been raised on direct appeal, but were not, are forfeited. *Id.* The Act contemplates the filing of only one postconviction petition. *Id.*; 725 ILCS 5/122-3 (West 2014).

¶ 24 The statutory bar to a successive postconviction petition can be overcome by satisfying either: (1) the cause-and-prejudice test (*People v. Pistonbarger*, 205 Ill. 2d 444, 460 (2002)); or (2) the actual-innocence test (*Ortiz*, 235 Ill. 2d at 330). Here, only the cause-and-prejudice test is at issue. We review *de novo* the trial court's determination that defendant failed to satisfy the cause-and-prejudice test. *People v. Williams*, 394 Ill. App. 3d 236, 242 (2009).

¶ 25 The cause-and-prejudice test was set forth in *Pistonbarger*, and the legislature codified it in section 122-1(f) of the Act. *Ortiz*, 235 Ill. 2d 319. That section provides:

“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]: (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.” 725 ILCS 5/122-1(f) (West 2014).

¶ 26 This case does not present a traditional cause-and-prejudice analysis. A cause-and-prejudice analysis presumes that a defendant has *not* yet raised the issue he seeks to raise in the successive postconviction petition. That is not true here.

¶ 27 Here, as defendant concedes, defendant “in fact raised the claim [concerning trial counsel’s handling of the jury question] in his initial postconviction proceedings.” Defendant recounts that, “at the evidentiary hearing, postconviction counsel clarified that the original instructions [concerning the definition of knowledge, etc.] were not being challenged, but that [defendant] was still challenging the [response] to the jury note.” At the evidentiary hearing, trial counsel testified that he had explained the jury note to defendant before agreeing to the response. The trial court denied the petition. Even though the trial court did not specifically mention the handling of the jury note in denying the petition, we infer that it rejected the claim.

¶ 28 Defendant argues that he satisfied the cause element and is entitled to raise the issue a second time, because there was no “full and final” resolution of the issue at the initial postconviction proceeding. As discussed in previous paragraphs, we disagree with that premise. Moreover, the case upon which defendant relies to establish cause, *People v. Britt-El*, 206 Ill. 2d 331 (2002), is wholly inapposite.

¶ 29 In *Britt-El*, the defendant unsuccessfully argued that he satisfied the cause element where the trial court improperly impeded his ability to bring his claims of ineffective assistance in the initial postconviction petition. The trial court had *sua sponte* dismissed the initial petition as untimely. The law at the time permitted the trial court to *sua sponte* dismiss the petition as untimely, so the court did not improperly impede the defendant’s initial postconviction claim. *Id.* at 342. Moreover, the trial court considered and rejected the defendant’s argument, raised in the motion to reconsider the dismissal, that his tardiness should be excused where he was not

culpably negligent. Similarly, the appellate court considered and rejected the defendant's argument that his tardiness should be excused. As such, the issue was "fully and finally litigated." *Id.*

¶ 30 Here, there is no claim that the trial court improperly impeded defendant from alleging ineffective assistance based on trial counsel's handling of the jury question. To the contrary, defendant raised the argument, and trial counsel testified to it at the evidentiary hearing. If defendant felt that the trial court failed to consider the issue or ruled in error on the issue, he could have filed a motion to reconsider the denial of his initial postconviction petition and raised the issue on appeal of the denial. *Even if* we were to assume that the issue was not specifically ruled on, again, defendant could have brought the matter to the court's attention and sought clarification. Defendant's failure to do so resulted in forfeiture and precluded his ability to establish cause here. Because defendant has not established cause, we need not address the prejudice. Nevertheless, we briefly do so.

¶ 31 Defendant cannot establish prejudice. The alleged constitutional error cannot be said to have violated due process. We agree with defendant that his mental state was a central issue. Defendant does not explain, however, why failing to provide a *second* definition of "knowledge" in response to the jury's request for the definitions of "strong probability" and "likely" impeded the jury's understanding of the requisite mental states for the charged offenses. To the contrary, answering the jury's question in such a manner would have been non-responsive to its question, causing confusion. (The jury showed no indication that it was confused over the intent-or-knowledge mental state for first-degree murder *vis a vis* the unintentional mental state for involuntary manslaughter. And, if defendant really is arguing that the second definition of

knowledge was necessary to understand the first-degree murder charge, independent of the jury question over probabilities and likelihoods, his chance to raise that claim has long passed.)

¶ 32 The cases cited by defendant finding error based on a failure to provide a definition upon request are distinguishable. See *People v. Lowry*, 354 Ill. App. 3d 760, 762 (2004) (failure to define knowingly); *People v. Lovelace*, 251 Ill. App. 3d 607, 619 (1993) (failure to provide a second definition of knowingly); *People v. Brouder*, 168 Ill. App. 3d 938, 948 (1988) (failure to define knowingly). In those cases, the jury *asked* for the definition of “knowingly” and expressed confusion over the term. In *Lowry*, the jury indicated by its question that, without clarification, it would decide the case based on a fundamental misunderstanding of the law: “Does ‘knowingly’ impl[y] that it wasn’t an accident, or *can it be accidental and knowing?*” (Emphasis added.) See *Lowry*, 354 Ill. App. 3d at 762. Thus, in the cases cited by defendant, the issue was whether the jury should receive the definition for which it asked. In contrast, defendant contends that the jury should have received a definition for which it did *not* ask and for which it expressed *no* confusion.

¶ 33 As to the question the jury *actually* asked, defendant does not now suggest what definitions of “strong probability” and “likely” could have been given. Defendant provides no legal definitions for those terms, let alone legal definitions that could have been more helpful to the jury than their commonly-understood definitions. Defendant gives trial counsel no credit for having him be brought to the courtroom to be involved in the discussion and for giving him an opportunity to approve the response to be given to the jury. There is no hint of a due-process violation.

¶ 34 Finally, we reject defendant’s *res judicata* argument. Defendant argues that the court should not have evaluated his motion for leave to file a successive postconviction petition under

the cause-and-prejudice test. Rather, because he *raised* the issue in his initial postconviction petition, defendant urges that the correct rubric was *res judicata*. And, because, in his view, the trial court never *ruled on* the issue in the initial postconviction, *res judicata* does not bar the issue now.

¶ 35 Defendant does not cite authority for the proposition that he can file a successive postconviction petition based on the absence of a *res judicata* bar. See *People v. Ward*, 215 Ill. 2d 317, 332 (2005) (points not supported by citation to relevant authority are forfeited). In any event, applying a *res judicata* rubric does not help defendant. If *res judicata* bars defendant's claim, defendant loses. If *res judicata* does not bar defendant's claim, then defendant still must proceed to a cause-and-prejudice analysis to show that he should be granted leave to file a successive postconviction petition. And, as we have established, defendant cannot satisfy that test.

¶ 36 As the State concedes, we remand for enforcement of our earlier order vacating the \$750 fee.

¶ 37 **III. CONCLUSION**

¶ 38 For the reasons stated, we affirm the trial court's denial for leave to file a successive postconviction petition. However, we remand for enforcement of our earlier order vacating the \$750 fee.

¶ 39 Affirmed and remanded with directions.