

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).

2018 IL App (4th) 160193-U

NO. 4-16-0193

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 28, 2018

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
MARSHALL KING JR.,)	No. 09CF207
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the circuit court’s dismissal of defendant’s motion for leave to file a successive postconviction petition where defendant did not meet the cause-and-prejudice test.

¶ 2 Defendant, Marshall King Jr., filed a motion for leave of the court to file a successive *pro se* postconviction petition after unsuccessfully challenging his armed habitual criminal conviction on direct appeal and in his first postconviction petition. The circuit court denied the defendant leave for failure to meet the cause-and-prejudice test necessary to allow successive petitions to be filed. Defendant appeals, arguing his evidence demonstrates the traffic stop, which led officers to discover his unlawful possession of a weapon, was unnecessarily prolonged, violating his fourth amendment right to be free from unreasonable searches and seizures. U.S. Const., amend. IV. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In August 2009, the State charged defendant with armed habitual criminal (720 ILCS 5/24-1.7 (West 2008)) (count I) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)) (count II). In April 2010, following a bench trial, the trial court found defendant guilty of counts I and II. In June 2010, the trial court sentenced defendant to 22 years' imprisonment on count I to be served concurrently with a 7-year sentence on count II.

¶ 5 The charges originated from a traffic stop. On August 13, 2009, defendant's girlfriend drove southbound on Interstate 55 in a sedan. Defendant rode in the passenger's seat. When the sedan reached Pontiac, Illinois, Officers Casey Kohlmeier and Sam Fitzpatrick from the Livingston County Proactive Unit observed the sedan traveling 55 miles per hour in the left passing lane and began following it. Officer Kohlmeier checked the sedan's registration and noted it was expired. The registration indicated Charles Leach owned the sedan. The officers initiated a traffic stop based on expired registration.

¶ 6 Office Kohlmeier approached the driver's side of the sedan and Officer Fitzpatrick walked to the passenger's side. Officer Kohlmeier obtained the driver's and defendant's drivers' licenses. Officer Kohlmeier ran the license information through "the Liv Com dispatch center." The information indicated the driver had an outstanding warrant for vehicle theft. No warrant information came back on a search of defendant's information.

¶ 7 Officer Fitzpatrick approached the driver's side of the sedan, asked the driver to step out, and placed her under arrest. At this point, Officer Kohlmeier approached the passenger's side of the vehicle to speak with defendant.

¶ 8 In November 2009, the State and the defense presented conflicting evidence at a suppression hearing as to the rest of the events. Defendant testified he knew his girlfriend, the driver, had an outstanding warrant for vehicle theft. Defendant testified Officer Kohlmeier asked

him to step out of the vehicle. Defendant said Officer Kohlmeier asked for consent to search defendant multiple times, and defendant refused each time. He said Officer Kohlmeier searched him despite his refusal to give consent and found a gun on defendant's person. Defendant denied discussing ownership of the sedan with the officers. Defendant testified he did not know Charles Leach.

¶ 9 Officer Kohlmeier testified the audio on the video of the traffic stop was not working during the traffic stop. Officer Kohlmeier testified he questioned defendant because the driver had an outstanding warrant for vehicle theft, and they had not established ownership of the sedan. He said defendant claimed the sedan belonged to his sister. Officer Kohlmeier testified he asked defendant to step out of the vehicle to perform a search to establish ownership. Officer Kohlmeier requested permission to search defendant to ensure the officer's safety during the search. He testified defendant gave his consent. Officer Kohlmeier found the gun and placed defendant under arrest.

¶ 10 The trial court denied the motion to suppress for several reasons. It found the nature of the stop, while initially a routine stop for expired license plates, changed when the officers discovered the driver had an outstanding warrant for vehicle theft. The trial court also noted uncertain ownership of the vehicle and defendant's claim the sedan belonged to his sister when the car was registered to a man further supported the possibility of vehicle theft. The open question of ownership gave officers justification to continue the stop past the point of arresting the driver. The trial court noted, "the officers have more than enough information to justify a pat-down of the defendant and his removal from the vehicle."

¶ 11 Following the trial court's denial of the motion to suppress, defense counsel filed a motion to reconsider, which the trial court denied. In March 2010, defendant waived his right

to a jury trial and filed a motion *in limine* to prevent the prosecution from presenting information at trial regarding the search and the gun found incident to the search. The trial court denied the motion. On April 13, 2010, the trial court tried defendant in a bench trial. The trial court found defendant guilty. In June 2010, the court sentenced defendant as stated.

¶ 12 Defendant, on direct appeal, challenged his conviction under the one-act, one-crime rule. He also argued he was entitled to *per diem* credit against court-assessed fines. This court vacated defendant's conviction on count II, finding the conviction on count II was based on the same physical act as count I and violated the one-act, one-crime rule. *People v. King*, 2011 IL App (4th) 100588-U, ¶ 12 (Nov. 14, 2011) (unpublished order under Supreme Court Rule 23). This court found defendant was not entitled to *per diem* credit against his fines. *Id.* ¶ 15. This court remanded the case with directions to issue an amended sentence reflecting a conviction and sentence on count I only. *Id.* ¶ 17.

¶ 13 In April 2012, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). In May 2012, defendant amended his petition, alleging appellate counsel denied him effective assistance of counsel because appellate counsel did not argue the trial court improperly denied defendant's motion to suppress. Defendant alleged appellate counsel's failure to argue such amounted to prejudice because had appellate counsel raised the issue of the trial court's denial of the motion to suppress, this court would have reversed and remanded defendant's case. In June 2012, the trial court dismissed defendant's amended *pro se* postconviction petition at the first stage as frivolous and patently without merit.

¶ 14 Defendant appealed the dismissal of his postconviction petition. The trial court appointed the office of the State Appellate Defender (OSAD) to represent defendant. In August

2013, OSAD filed a motion to withdraw as appellate counsel, contending no colorable argument could be made regarding the trial court's dismissal of defendant's motion to suppress. Defendant was served with notice of appellate counsel's motion to withdraw. On September 10, 2013, defendant responded to OSAD's motion to withdraw.

¶ 15 This court granted OSAD's motion to withdraw and affirmed the trial court's dismissal of defendant's *pro se* postconviction petition at the first stage of the proceedings. This court also remanded the case for an amended judgment reflecting a conviction on count I only. This court discussed the great weight given to a trial court's factual findings and stated "[h]ad defendant's appellate counsel raised the trial court's denial of his motion to suppress on direct appeal, the trial court's decision to deny his motion would not have been reversed unless this court found the decision to be against the manifest weight of the evidence." *People v. King*, 2014 IL App (4th) 120621-U, ¶ 29 (Jan. 16, 2014) (unpublished order under Supreme Court Rule 23). It noted the trial court made a credibility determination and accepted the police officers' testimony. Regarding the determination, this court said "the record shows no indication this finding was against the manifest weight of the evidence." *Id.* ¶ 29.

¶ 16 Defendant argued, as he does here, although the initial traffic stop was valid, the officers unreasonably prolonged the stop after they arrested the driver. Defendant relied on a fact he believed he established in his petition for leave to file a successive postconviction petition—namely, a report immediately available to officer's during their computer check indicating no one had reported the vehicle stolen. Defendant provided no evidence to this point in his initial or amended postconviction petition. Other factors like uncertain ownership of the sedan gave rise to a reasonable suspicion of vehicle theft. Therefore, this court found no arguable basis in law or fact to support defendant's allegation of ineffective assistance of counsel. *Id.* ¶ 31.

¶ 17 Following his most recent appeal, defendant sent many letters under the Illinois Freedom of Information Act (FOIA) (5 ILCS 140/1 to 11.5 (West 2014)) requesting to know whether a computer check would show if a vehicle had been reported stolen. The Pontiac Police Department responded to defendant's letter asking whether a vehicle registration check or a Law Enforcement Agencies Data System (LEADS) check would indicate if a vehicle had been reported stolen. The information officer wrote on the bottom of defendant's letter "[t]he answer to both of your questions is yes" and returned the letter to defendant.

¶ 18 On January 20, 2016, defendant filed a *pro se* successive postconviction petition and a motion for leave to file. Defendant alleged the response to his FOIA request is conclusive in establishing the officer knew the vehicle had not been reported stolen when he asked defendant to step out of the car and consent to a search. Defendant further argued this evidence shows the officers detained him beyond what is reasonable under the fourth amendment. U.S. Const., amend. IV. Further, defendant believed had this information been presented at the hearing for his motion to suppress, the trial court would have granted his motion as he was being "unlawfully detain[ed]." Defendant requested a hearing to further establish the arresting officers knew the car had not been reported stolen. Defendant, in his motion, also conceded he raised the same claim in his initial postconviction petition.

¶ 19 On February 25, 2016, the circuit court denied defendant leave to file a successive postconviction petition. In denying defendant's motion, the circuit court held "whether the vehicle was stolen is not dispositive in regards to the basis for the stop and overall detention of the driver and defendant." It also found "defendant failed to show cause or otherwise explain why these matters were not raised in his initial post-conviction petition, except that it took him time to gather."

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant maintains the circuit court's denial of leave to file a successive postconviction petition was improper. In defendant's view, the FOIA officer's response to his inquiry concerning whether the officers could have known no one reported the sedan stolen is so fundamental to his case as to change the outcome of the suppression hearing. The State disagrees. It is their position defendant does not meet the cause-and-prejudice test required for leave to file a successive postconviction petition. The State argues even if the officers knew the sedan had not been reported stolen, the driver had an outstanding warrant for vehicle theft, the sedan was registered to a man not in the vehicle who no one in the vehicle knew, defendant told the police the sedan belonged to his sister, and ownership of the vehicle could not be ascertained. The State argues these facts amounted to a reasonable suspicion based on articulable facts per the standard set forth in *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

¶ 23 A. The Post-Conviction Hearing Act and Standard of Review

¶ 24 The Act provides for a collateral attack on a conviction if "in the proceedings which resulted in his *** conviction there was a substantial denial of his *** rights under the Constitution of the United States or of the State of Illinois or both[.]" 725 ILCS 5/122-1(a)(1) (West 2016). The Act provides for the filing of only the initial postconviction petition without leave of the court. 725 ILCS 5/122(f) (West 2016).

¶ 25 To seek leave of the court, a petitioner must either argue actual innocence or show cause for failing to bring the claim in his initial petition as well as prejudice resulting from the failure. *People v. Coleman*, 2013 IL 113307, ¶¶ 82-83. Under the Act, a petitioner is required to:

“(1) *** show[] cause by identifying an objective factor that impeded his *** ability to raise a specific claim during his *** initial post[]conviction proceedings; and (2) *** show[] prejudice by demonstrating that the claim not raised during his *** initial post[]conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.” 725 ILCS 5/122(f) (West 2016)

This section does not provide for a hearing. It is clear the cause-and-prejudice determination must be made by looking at the pleadings. *People v. Smith*, 2014 IL 115946 ¶ 33.

¶ 26 The standard for leave to file a successive postconviction petition is higher than the frivolous or patently without merit standard the court applies to first-stage initial postconviction petitions. *People v. Edwards*, 2012 IL 111711, ¶ 26-27. Defendant must “submit enough in the way of documentation to allow a circuit court to make that determination.” *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010). Accordingly, “leave of court *** should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where *** supporting documentation is insufficient to justify further proceedings.” *Smith*, 2014 IL 115946, ¶ 35. Our review of a circuit court’s denial of leave to file a successive postconviction petition is *de novo*. See *People v. Guerrero*, 2012 IL 112020, ¶ 13 (discussing the appropriate standard of review where the court made no fact finding in its determination and instead determined the motion was legally insufficient).

¶ 27 B. Cause-and-Prejudice Test

¶ 28 Defendant does not raise a claim of actual innocence. Therefore we will analyze this appeal under the cause-and-prejudice test.

¶ 29 The State argues defendant cannot meet his burden under the cause-and-prejudice test because the statutory language provides for leave to file a successive postconviction petition when defendant raises a new claim not raised in the initial petition. 725 ILCS 5/122(f) (West 2016).

¶ 30 In support of this contention, the State relies on *People v. Green*, 2012 IL App (4th) 101034. In *Green*, the defendant was convicted of sexual assault and first degree murder of his child. *Id.* ¶ 1. At trial, the prosecution elicited testimony from the defendant's cellmate who claimed the defendant confessed his crimes. *Id.* ¶ 11. At trial, the cellmate denied receiving a plea deal in exchange for his testimony. *Id.* The defendant filed an initial and successive postconviction petition both based on the improper admission of his cellmate's testimony. *Id.* ¶¶ 15-16. This court affirmed the circuit court's dismissal of both petitions. Then the defendant, like defendant here, received information from a FOIA request he believed conclusively proved his cellmate received a plea deal for testifying against him, thereby tainting the defendant's trial. *Id.* ¶ 18. This court rejected the defendant's claim under the cause-and-prejudice test because "the Act contemplates the filing of only one postconviction petition and allows a successive petition as an exception to that rule when new evidence comes to light, giving rise to a new *claim*." (Emphasis in original.) *Id.* ¶ 40. This court found the defendant, like defendant here, argued the same issue throughout his appeals and therefore the claim was not new. This court discussed the defendant's newly gained information saying it "may arguably be additional evidence to support that claim, but that does not make that claim new." (Emphasis omitted.) *Id.*

¶ 31 We follow our previous analysis in rejecting defendant's claim under the cause-and-prejudice test. Defendant, in his motion for leave to file a successive petition, concedes he raised this issue in his first posconviction petition. Defendant, in the initial petition, argued

appellate counsel was ineffective for failing to raise the denial of his motion to suppress on direct appeal. *King*, 2014 IL App (4th) 120621-U, ¶ 22. In order to argue ineffective assistance of counsel, the standard required defendant to argue his appeal would have been successful if counsel had presented the issue of the trial court's denial of his motion to suppress. *Id.* ¶ 22. This issue has already been addressed.

¶ 32 Defendant appears to rely on this court's finding defendant's initial petition "relied on facts not established in the record." *Id.* ¶ 31. While the absence of proof was a factor in this court's holding, it was not dispositive. This court found "the initial purpose of the stop, which was to investigate the expired registration, was immediately transformed into an investigation of vehicle theft once the officers learned the driver had a warrant in Indiana for vehicle theft." *Id.* The officers were not seeking to determine whether the sedan had been reported stolen but whether a vehicle theft occurred.

¶ 33 Illinois courts analyze the legitimacy of traffic stops using the principles outlined in *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), within the circumstances of a traffic stop. Under *Terry*, the reasonableness of police action is determined by (1) whether the officer was justified in seizing the person and (2) whether the officer acted within the scope of circumstances that gave way to the interference. *Id.* In this context, an expired registration is a traffic violation for which an officer may pull over a vehicle, satisfying the first prong. *People v. Baldwin*, 388 Ill. App. 3d 1028, 1032 (2009). Under the second prong, and per our supreme court's holding, if the officer did not unreasonably extend the duration of the stop, the stop and the officer's actions were legitimate. *People v. Harris*, 228 Ill. 2d 222, 237 (2008).

¶ 34 Defendant does not attempt to minimize any of the attendant circumstances that gave way to the continued traffic stop. The officers were justified in pulling over a vehicle with

an expired registration. The officers, after checking the driver's identification and seeing the outstanding warrant for vehicle theft, arrested the driver. This initially gave rise to a suspicion the sedan could have been a stolen vehicle. Neither defendant nor the driver owned the vehicle. Neither defendant nor the driver could identify the owner of the sedan, and neither of them knew the owner. In fact, defendant told officers his sister owned the vehicle when the vehicle was registered to a man. Despite these facts, defendant contends the reply to his FOIA request dispels any possibility the officers reasonably extended the traffic stop past the point of the driver's arrest. We do not agree. The single fact a computer check of the vehicle might have indicated to officers no one had reported the vehicle stolen does not negate the other factors supporting the possibility of vehicle theft.

¶ 35 The FOIA officer's reply to defendant's inquiry was an insufficient basis for the circuit court to grant further proceedings. See *Smith*, 2014 IL 115946 ¶ 35. The possibility of a computer check returning negative results as to reports of a stolen vehicle is insufficient when weighing the other factors relied on by the trial court and this court in upholding the reasonableness of the prolonged traffic stop.

¶ 36 III. CONCLUSION

¶ 37 We affirm the circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 38 Affirmed.