

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).

FILED

October 18, 2018
Carla Bender
4th District Appellate
Court, IL

2018 IL App (4th) 160600-U
NO. 4-16-0600

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

| | | |
|----------------------------------|---|------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Champaign County |
| STEVEN D. SUMMERS, |) | No. 95CF312 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Jeffrey B. Ford, |
| |) | Judge Presiding. |

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

ORDER

¶ 1 *Held:* We grant the office of the State Appellate Defender’s motion to withdraw and affirm the trial court’s denial of defendant’s motion for leave to file a successive postconviction petition.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on the ground no meritorious issue can be raised on appeal. We grant OSAD’s motion and affirm the trial court’s judgment.

¶ 3 I. BACKGROUND

¶ 4 On August 31, 1995, the State charged defendant, Steven D. Summers, by indictment with one count of aggravated vehicular hijacking, a Class X felony (720 ILCS 5/18-4(a)(3), (b) (West 1994)), when defendant took a 1993 Pontiac Grand Prix from Megan Mahoney (Megan) while armed with a handgun and threatening to use imminent force, two counts of aggravated kidnapping of Megan while armed with a handgun, a Class 1 felony (720 ILCS 5/10-

2(a)(5), (b)(2) (West 1994)), and one count of armed robbery, a Class X felony (720 ILCS 5/18-2(a), (b) (West 1994)), when defendant took Megan's 1993 Pontiac Grand Prix and money while armed with a handgun.

¶ 5 Defendant's case proceeded to jury trial. At trial, the following evidence came to light.

¶ 6 On March 3, 1995, Megan drove to pick up her cousin Ellen Bradford (Ellen) in Champaign, Illinois to get something to eat. After Megan and Ellen unlocked Megan's father's 1993 Pontiac Grand Prix, defendant and Jermaine Crossland (Jermaine) approached. Defendant and Jermaine stood approximately one foot away from and pointed guns at Megan and Ellen. Defendant and Jermaine commanded Megan and Ellen to get in the car. Defendant drove while Megan was in the front passenger seat, Ellen was in the back seat behind defendant, and Jermaine was in the back seat behind Megan.

¶ 7 At a stoplight, defendant demanded Megan and Ellen give him their money. Megan gave defendant approximately \$24. Ellen had no money. Defendant drove for 30 minutes, and then pulled over and allowed Megan and Ellen to leave.

¶ 8 On March 7, 1995, St. Louis police officers stopped three men in a stolen Cadillac. The three men attempted to flee, but the police officers apprehended the men. The St. Louis police officers identified defendant as one of the men.

¶ 9 Defendant provided a written statement, which was published to the jury. Defendant stated on March 3, 1995, defendant and Jermaine took a maroon Grand Prix from two women in Champaign. Defendant and Jermaine went to McDonald's. Afterward, defendant and Jermaine drove to St. Louis. Defendant and Jermaine then went to Centralia, Illinois, stole a Cadillac, and returned to Champaign. Defendant and Jermaine drove to St. Louis in the Cadillac.

On March 7, 1995, St. Louis police officers arrested defendant and Jermaine in the Cadillac.

¶ 10 The jury found defendant guilty of aggravated vehicular hijacking and armed robbery.

¶ 11 The trial court sentenced defendant to two concurrent 30-year sentences. To protect the public, the trial court ordered defendant's sentences to run consecutive with his sentences in Clinton County case No. 95CF328.

¶ 12 On direct appeal, defendant argued his conviction for aggravated vehicular hijacking should have been vacated because aggravated vehicular hijacking was an included offense of armed robbery. This court affirmed defendant's convictions and sentences. *People v. Summers*, No. 4-96-0136 (May 30, 1997) (unpublished order under Illinois Supreme Court Rule 23).

¶ 13 On April 24, 1996, defendant filed a motion for postconviction hearing, pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 1996)). The trial court denied the motion as frivolous and patently without merit.

¶ 14 On June 17, 1996, defendant filed a second *pro se* postconviction petition claiming his confession was coerced, ineffective assistance of counsel, the jury was unconstitutionally selected and impaneled, defendant's conviction violated the prohibition on double jeopardy, and the State failed to disclose exculpatory evidence. On June 19, 1996, the trial court dismissed defendant's petition as conclusory with no references to the record or evidence. Defendant did not appeal.

¶ 15 On September 25, 1996, defendant filed a *pro se* motion to reduce sentence, which the trial court dismissed as untimely.

¶ 16 On October 14, 1997, defendant filed a third postconviction petition. Defendant

alleged he: (1) was denied a fair trial because evidence of his Clinton County offenses was introduced, (2) was not proven guilty beyond a reasonable doubt, (3) was denied a fair trial because the prosecution introduced evidence without providing defense counsel time to prepare, used leading questions, and had an inflammatory closing argument, and (4) was denied the right to effective assistance of appellate counsel because appellate counsel failed to (a) mention defendant's motion for a new trial in defendant's appellant brief, (b) argue the State did not prove the case beyond a reasonable doubt, and (c) argue the trial court erred by not granting the motion for a directed verdict.

¶ 17 On November 25, 1997, the trial court dismissed defendant's petition, holding every issue except for ineffective assistance of appellate counsel could have been raised on direct appeal but since the issues other than ineffective assistance of appellate counsel were not raised, *res judicata* precluded those issues from being raised in a postconviction petition. The trial court added defendant's petition was deficient because his allegations were general and did not refer to the record or evidence. The trial court held defendant failed to show his ineffective assistance of appellate counsel claim had merit. Defendant did not appeal.

¶ 18 On August 23, 2003, defendant filed a fourth postconviction petition. Defendant repeated many of the allegations in his third postconviction petition. Defendant added the trial court should have granted his motion to suppress his confession and his motion for a mistrial, the trial court erred in giving three jury instructions over defendant's objections, and his conviction for aggravated vehicular hijacking should have been vacated as a lesser included offense of armed robbery, which defendant argued on direct appeal.

¶ 19 On September 22, 2003, the trial court dismissed defendant's petition finding defendant could not establish cause for not raising the errors earlier or prejudice by showing the

errors affected his trial and his conviction violated due process.

¶ 20 Defendant appealed the trial court's dismissal of his fourth postconviction petition. This court affirmed the dismissal of defendant's petition, finding defendant did not establish cause for not raising these issues earlier or prejudice by the alleged errors. *People v. Summers*, No. 4-03-0896 (May 9, 2005) (unpublished order under Illinois Supreme Court Rule 23).

¶ 21 On September 29, 2009, defendant filed a section 2-1401 petition for relief from judgment pursuant to the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). Defendant argued he agreed to plead guilty in Champaign County and Clinton County in exchange for concurrent sentences but the State's Attorney in this case violated the agreement by wrongfully taking defendant to trial where defendant was unfairly sentenced to consecutive sentences. Defendant alleged his trial counsel was ineffective for proceeding to trial knowing defendant's plea agreement was in place. Defendant contended his sentence was void.

¶ 22 On October 30, 2009, the trial court denied defendant's petition for relief from judgment. The trial court held because defendant was present at his June 28, 1995, guilty-plea hearing, which occurred prior to his trial in this case, defendant's knowledge of what happened at the hearing and the hearing transcripts were not newly discovered evidence. The trial court added defendant's conviction was not void because the trial court had jurisdiction over the parties. As part of the written order, the court specifically stated defendant could not file any further postconviction petitions without first obtaining permission from the court. See 725 ILCS 5/122-1(f) (West 2008).

¶ 23 On February 4, 2010, defendant filed his fifth postconviction petition. Defendant attached: (1) a copy of the June 28, 1995, plea-offer letter from the Champaign County State's

Attorney, (2) a copy of defendant's guilty plea and jury waiver from the Clinton County case, (3) the Clinton County guilty-plea transcript, (4) the Champaign county case sentencing order, (5) defendant's affidavit, and (6) a receipt for the transcript copies. Defendant repeated many of the allegations in his September 29, 2009, petition for relief from judgment. For example, defendant argued the Champaign County State's Attorney breached the plea agreement by taking defendant to trial and imposing a higher sentence than in the plea agreement.

¶ 24 On February 11, 2010, the trial court denied defendant's fifth postconviction petition, holding defendant failed to comply with the court's prior order requiring defendant first seek leave of the court before filing further pleadings and attach proposed filings to the motion. The trial court held defendant's postconviction petition repeated the same arguments from his previously dismissed postconviction petition. In the order denying defendant's postconviction petition, the trial court assessed costs and prohibited defendant from filing further pleadings without first obtaining leave of court. On appeal, this court affirmed the trial court's judgment. *People v. Summers*, 2011 IL App (4th) 100195-U (unpublished order under Illinois Supreme Court Rule 23).

¶ 25 On May 29, 2012, defendant filed a motion seeking leave to file another section 2-1401 petition. Defendant repeated his allegation his sentence was void because he had a plea agreement in place where his sentence in Champaign County should have been concurrent to his sentences in the Clinton County case. The trial court denied defendant's motion.

¶ 26 On October 22, 2015, defendant filed his third petition for relief from judgment, arguing his conviction for aggravated vehicular hijacking should have been vacated because the conviction was an included offense of armed robbery. On October 26, 2015, the trial court dismissed defendant's third petition for relief from judgment.

¶ 27 On May 13, 2016, defendant filed a petition for leave to file a sixth postconviction petition and attached the petition. Defendant repeated his allegation his sentence was void because his sentence violated the plea agreement in the Clinton County case where defendant agreed to plead guilty in this case and the Clinton County case in exchange for concurrent sentences. Defendant claimed he had cause for not raising this issue earlier because his trial counsel in this case was ineffective for proceeding to trial with defendant's plea agreement in place. The trial court denied leave to file.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 OSAD asserts it thoroughly reviewed the record and concluded no meritorious issue can be raised on appeal.

¶ 31 Defendant appeals the trial court's denial of his leave to file his sixth postconviction petition. Only one postconviction petition may be filed without leave of court. 725 ILCS 5/122-1(f) (West 2016). Defendant has the burden to prompt the trial court to consider whether leave should be granted and obtain a ruling as to whether defendant showed cause and prejudice. *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). In most cases, obtaining leave of court requires defendant filing a motion or request and articulating an argument to initiate court action. *Id.*

¶ 32 There are two bases to relax the bar against successive postconviction proceedings. *People v. Edwards*, 2012 IL 111711, ¶ 22. The first basis to relax the bar against successive postconviction petitions is when petitioner demonstrates cause and prejudice for failure to raise the claim in the initial postconviction proceedings. 725 ILCS 5/122-1(f) (West 2016). The second basis to relax the bar against successive postconviction petitions is the

fundamental miscarriage of justice exception where petitioner must show actual innocence. *Edwards*, 2012 IL 111711, ¶ 23. Defendant must submit enough documentation for the trial court to determine whether to relax the bar against successive postconviction proceedings. *Id.* ¶ 24.

¶ 33 Leave of court to file a successive postconviction petition should be denied when a review of the successive petition and the documentation petitioner submitted clearly shows petitioner's claims fail as a matter of law or where the successive petition and supporting documentation do not justify further proceedings. *People v. Smith*, 2014 IL 115946, ¶ 35. "[T]he Post-Conviction Hearing Act was not intended to be used as a device to obtain another hearing upon a claim of denial of constitutional rights where there has already been a full review of the issues raised." *People v. Cox*, 34 Ill. 2d 66, 67 (1966). Nor can this policy be defeated by rephrasing previously addressed issues in constitutional terms when raising the issues in the postconviction petition. *People v. Gaines*, 105 Ill. 2d 79, 90 (1984).

¶ 34 *Res judicata* bars claims raised and adjudicated in an earlier proceeding. *People v. Towns*, 182 Ill. 2d 491, 502 (1998). Issues which could have been raised in an earlier proceeding but were not, are waived. *Id.* at 503.

¶ 35 A. Standard of Review

¶ 36 The standard of review for the dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-89 (1998). A reviewing court may affirm a trial court's decision on any grounds warranted by the record, regardless of the reasons relied on by the trial court. *People v. Nash*, 173 Ill. 2d 423, 432 (1996).

¶ 37 B. *Res Judicata* and Waiver Bar Defendant's Void Sentence Allegation

¶ 38 In this postconviction petition, defendant alleges his sentence is void because he agreed to plead guilty in the Clinton County case with the understanding he would plead guilty in

this case and receive a concurrent sentence. Defendant first raised this allegation in a petition for relief from judgment filed September 9, 2009. The trial court dismissed defendant's petition and held defendant was present at his June 28, 1995, guilty-plea hearing and the plea terms were not newly discovered evidence.

¶ 39 Defendant raised this issue a second time in a successive postconviction petition filed February 4, 2010, which the trial court dismissed. Defendant raised this issue a third time in a petition for relief from judgment filed May 29, 2012, which the trial court dismissed.

¶ 40 Defendant appealed the dismissal of his February 4, 2010 postconviction petition, which this court affirmed. *Summers*, 2011 IL App (4th) 100195-U, ¶¶ 18-21. *Res judicata* bars defendant's void sentence allegation, which was raised and adjudicated in several earlier proceedings. *Towns*, 182 Ill. 2d at 502.

¶ 41 Defendant waived rephrasing his void sentence allegation. *Id.* at 503. This court held defendant could have raised a rephrased void sentence allegation in any of his petitions prior to February 4, 2010. *Summers*, 2011 IL App (4th) 100195-U, ¶ 18. We hold *res judicata* and waiver bar defendant's void sentence allegation.

¶ 42 C. Defendant Cannot Show Cause and Prejudice or Actual Innocence to Relax the Bar Against Successive Postconviction Proceedings

¶ 43 Where fundamental fairness so requires, strict application of procedural bars against successive postconviction proceedings may be relaxed. *People v. Flores*, 153 Ill. 2d 264, 274 (1992); *Gaines*, 105 Ill. 2d at 91; *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968). The cause-and-prejudice test determines whether fundamental fairness requires relaxation of the statutory bar to a successive postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002).

¶ 44 If the petitioner cannot show cause and prejudice, petitioner's failure to raise a

claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice. *Id.* To demonstrate a fundamental miscarriage of justice, petitioner must show actual innocence. *Id.*

¶ 45 Defendant makes no claim of actual innocence because during trial defendant admitted his crimes in his written statement published to the jury. Therefore, defendant's claims must be considered barred by *res judicata* and waiver unless the cause-and-prejudice test dictates otherwise.

¶ 46 Cause is an objective factor external to the defense which impeded counsel's efforts to raise the claim in an earlier proceeding. *Flores*, 153 Ill. 2d at 279; 725 ILCS 5/122-1(f) (West 2016). Prejudice is an error which infected the entire trial and resulted in a conviction which violates due process. *Flores*, 153 Ill. 2d at 279; 725 ILCS 5/122-1(f) (West 2016). For a court to grant leave to file and consider the merits of a successive postconviction petition, petitioner must move for leave to file and show cause for failure to raise the claim earlier and prejudice from the failure. 725 ILCS 5/122-1(f) (West 2016).

¶ 47 Defendant cannot show cause for not raising his void sentence allegation earlier because defendant was present at his June 28, 1995, guilty-plea hearing in the Clinton County case. Defendant cannot demonstrate an objective factor preventing him from raising his allegation in prior postconviction petitions. Defendant was not prejudiced because there was no error which infected defendant's entire trial and resulted in a conviction which violates due process.

¶ 48 Defendant's allegation fails the cause-and-prejudice test. We hold no meritorious issue can be raised on appeal and grant OSAD's motion to withdraw.

¶ 49

III. CONCLUSION

¶ 50 We grant OSAD's motion to withdraw and affirm the trial court's denial of defendant's motion for leave to file a successive postconviction petition.

¶ 51 Affirmed.