

NOTICE  
Decision filed 04/20/18. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2018 IL App (5th) 140501-U

NO. 5-14-0501

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jefferson County.
	)	
v.	)	No. 06-CF-425
	)	
KRYSTA L. DONOHO,	)	Honorable
	)	Kevin C. Kakac,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.  
Justices Moore and Overstreet concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirm the order denying the petitioner leave to file a successive postconviction petition where she failed to satisfy the cause-and-prejudice test.

¶ 2 The petitioner-appellant, Krysta Donoho, was found guilty of felony first-degree murder and sentenced to a 45-year term of imprisonment. She appeals from the Jefferson County circuit court's dismissal of her motion for leave to file a successive postconviction petition. For the following reasons, we affirm.

¶ 3 In November 2007, a jury convicted the petitioner of felony first-degree murder and robbery for her involvement in the shooting death of Randy Farrar. At the January

18, 2008, sentencing hearing, the trial court determined that robbery was a lesser included offense of felony murder, and, therefore, the robbery verdict and conviction would be vacated. The court stated that the petitioner "will be sentenced alone for the charge of Felony Murder." It noted that:

"[T]hat sentence, of course, carries 20 to 60 years for regular term. Extended term is 60 to 100 years. Mandatory supervised release period is three years on that.

And under the Truth in Sentencing Guidelines, for whatever term you get, you will serve one hundred percent of the sentence and it's my reading of the law that there is no good conduct credit allowed for the crime of Murder."

On March 18, 2008, the trial court denied her motion for judgment notwithstanding the verdict or for a new trial and sentenced her to 45 years' imprisonment with 3 years' mandatory supervised release. The court denied a motion to reduce sentence, and she filed a direct appeal on July 3, 2008.

¶ 4 On review, this court held that the State proved the petitioner guilty of felony first-degree murder beyond a reasonable doubt, that she was not denied her right to a fair and impartial trial where the trial court adequately inquired whether prospective jurors understood the principles enunciated in Illinois Supreme Court Rule 431(b) (eff. May 2, 2007), and that the trial court did not abuse its discretion by considering the factors it did when sentencing her. *People v. Donoho*, 2011 IL App (5th) 080354-U.

¶ 5 In August 2012, the petitioner filed a motion for extension of time to file her initial postconviction petition in the circuit court, alleging that she "was unable to locate transcripts to go through until now." On September 4, 2012, she filed her initial *pro se* postconviction petition, alleging that the court should have granted a change of venue

because of the high-profile nature of her case. On November 29, 2012, the circuit court entered an order dismissing her petition, finding the claim could have been raised on direct appeal and was therefore forfeited. The court also found that the petition was frivolous and patently without merit and that it did not raise an issue of a constitutional dimension.

¶ 6 The petitioner appealed the circuit court's dismissal on March 14, 2013, but thereafter voluntarily moved to dismiss her appeal. This court entered an order dismissing her appeal in August 2014.

¶ 7 On August 11, 2014, the petitioner filed a motion for leave to file a successive postconviction petition pursuant to section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2014)). She alleged that she had cause for failing to bring the successive petition's claims in the previous petition because she was unaware that she had these claims until her postconviction appellate lawyer brought them to her attention. She also alleged that prejudice resulted from failing to bring these claims earlier.

¶ 8 In her successive petition, the petitioner claimed that her trial counsel was ineffective for failing to inform her of the potential sentence and that she rejected a plea offer from the State based on this erroneous advice. She claimed that her counsel never informed her that "there was a mandatory 15-year add-on if I was convicted of murder under accountability theory," and she was not informed that "with the mandatory 15-year add-on the mandatory minimum sentence would be 35 years." She alleged that the State offered her a plea deal to a reduced charge of simple home invasion, with no written

court order finding great bodily harm, and a 30-year sentence. She stated that her counsel did not inform her that under a simple home invasion conviction, she could receive day-for-day good time credit and possibly be out of prison in 15 years or less. She stated, "If I had known that the mandatory minimum for murder with a firearm was 35 years of actual prison-time, and that the actual prison-time for the simple home invasion might be 15 years or less, I would have accepted the State's offer \*\*\*."

¶ 9 The petitioner also alleged that trial counsel was ineffective for advising her that if she testified at trial, she could be impeached by her prior criminal record, even though she only had prior misdemeanor convictions. She claimed that she wanted to testify at trial but did not due to this erroneous advice.

¶ 10 On September 5, 2014, the trial court found that "[n]one of the issues alleged by the [petitioner] in the instant pleadings were raised on appeal," and therefore, they were not available for review. The court also determined that she neither alleged nor presented any objective factors that impeded her ability to raise any of the new alleged claims or issues in her initial postconviction relief petition. Furthermore, the court observed that she demonstrated no prejudice. The court denied the petitioner's motion for leave to file a successive postconviction petition and additionally found that "if the new filings were considered against the standard set out in 725 ILCS 5/122-2.1, the court would and does find that they are frivolous and patently without merit and should be dismissed." The petitioner appeals.

¶ 11 The Act provides a method for criminal defendants to assert that "in the proceedings which resulted in his or her conviction there was a substantial denial of his

or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2014). A proceeding under the Act is a collateral attack on the judgment of conviction. *People v. Wrice*, 2012 IL 111860, ¶ 47. Although our supreme court has made clear that the Act contemplates only one postconviction proceeding, nevertheless, the court has provided in its case law two bases upon which the bar against successive proceedings will be relaxed: (1) a showing of cause and prejudice or (2) a claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶ 22. Here, the petitioner alleges only cause and prejudice, which we discuss below.

¶ 12 When a petitioner seeks to file a successive postconviction petition, she must first obtain leave of court. 725 ILCS 5/122-1(f) (West 2014). Leave of court may be granted only if the petitioner demonstrates "cause" for her failure to bring the claim in her initial postconviction proceeding and "prejudice" resulting therefrom. See *id.* (codifying the cause-and-prejudice test articulated in *People v. Pitsonbarger*, 205 Ill. 2d 444, 458-60 (2002)); *Wrice*, 2012 IL 111860, ¶ 48. A petitioner shows cause by identifying an objective factor that impeded her ability to raise a specific claim during the initial postconviction proceedings. 725 ILCS 5/122-1(f) (West 2014); *Wrice*, 2012 IL 111860, ¶ 48. A petitioner shows prejudice by demonstrating that the claim not raised during her initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process. *Wrice*, 2012 IL 111860, ¶ 48.

¶ 13 To obtain leave to file, the petitioner need not present conclusive proof of cause and prejudice but rather must adequately allege facts demonstrating both. *People v. Smith*, 2014 IL 115946, ¶ 34. This requires the petitioner to submit enough in the way of

documentation to allow a circuit court to make that determination. *Id.* ¶ 35. We review the denial of leave to file a successive postconviction petition *de novo*. See *Wrice*, 2012 IL 111860, ¶ 50; *Smith*, 2014 IL 115946, ¶ 21.

¶ 14 The petitioner argues that she has satisfied the "cause" requirement because she could not raise her claim of ineffective assistance of trial counsel on direct appeal, and the proceedings on her first postconviction petition were deficient because she did not have counsel to help shape her petition. In support, she cites *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013).<sup>1</sup>

¶ 15 In *Martinez*, the United States Supreme Court recognized its prior ruling that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse procedural default in a *habeas corpus* proceeding. *Martinez*, 566 U.S. at 9. The Court then issued a "narrow exception" to that rule. *Id.* Addressing Arizona criminal procedure, the Court held that, when a state does not allow ineffective assistance of trial counsel claims to be raised on direct appeal and instead reserves them only for collateral proceedings, a defendant may establish cause before federal *habeas* courts for default of that claim under two circumstances: (1) where the state courts did not appoint counsel in the initial-review collateral proceeding for the claim of ineffective assistance of trial counsel, or (2) where appointed counsel in the initial-review collateral proceeding was ineffective pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). *Martinez*,

---

<sup>1</sup>This court granted the petitioner's motion to cite *Davila v. Davis*, a recent United States Supreme Court case clarifying the limitations of the *Martinez* ruling, as additional authority. *Davila v. Davis*, 582 U.S. \_\_\_, 137 S. Ct. 2058 (2017). However, we decline to discuss *Davila* as we do not find the case directly relevant to the petitioner's argument in this appeal.

566 U.S. at 14. To overcome the default, the defendant must also demonstrate that the underlying ineffective assistance of trial counsel claim is a substantial one, meaning one that has merit. *Id.* The Court emphasized that its ruling would not "provide defendants a freestanding constitutional claim" requiring the appointment of counsel in collateral proceedings; instead, the Court stated that its ruling was an equitable one. *Id.* at 16.

¶ 16 The Supreme Court extended the *Martinez* holding in *Trevino v. Thaler*, 569 U.S. 413 (2013). The Court, addressing Texas criminal procedure, found that *Martinez* applied in situations where a defendant can "in theory" raise a claim of ineffective assistance of trial counsel on direct appeal, but "as a matter of procedural design and systemic operation" is forced to raise the claim in collateral proceedings. *Trevino*, 569 U.S. at 429. Thus, a federal *habeas* court could find cause in such an instance, excusing a defendant's procedural default. *Id.*

¶ 17 Relying on these cases, the petitioner argues that her successive postconviction petition should advance because she was denied counsel during her first postconviction proceedings.

¶ 18 However, we observe that the First and Third Districts have encountered a similar argument from successive postconviction petitioners and reasonably concluded that *Martinez* and *Trevino* are not applicable because: (1) the decisions were not constitutionally-based, but rather addressed federal *habeas* law, and more specifically, Arizona and Texas criminal procedure; and (2) the decisions were limited to collateral proceedings which provided the first real chance for a petitioner to raise an ineffective assistance of trial counsel claim; whereas, under Illinois law, prisoners do not have a

constitutional right to be represented by counsel in postconviction proceedings, and ineffective assistance of counsel claims may (and sometimes must)<sup>2</sup> be raised on direct appeal, prior to collateral proceedings. See *People v. Sutherland*, 2013 IL App (1st) 113072, ¶¶ 18-19 (discussing *Martinez*, 566 U.S. 1, and *Trevino*, 569 U.S. 413); *People v. Diggins*, 2015 IL App (3d) 130315, ¶¶ 9-10 (same); *People v. Miller*, 2013 IL App (1st) 111147, ¶ 41 (discussing *Martinez*, 566 U.S. 1); *People v. Jones*, 2013 IL App (1st) 113263, ¶¶ 29-30 (same). Either reason is sufficient to preclude the application of *Martinez* and *Trevino* in this case.

¶ 19 Moreover, our supreme court has held that a successive postconviction petitioner cannot claim ignorance of the law as "cause" to justify her failure to include a claim in her initial postconviction petition. *People v. Evans*, 2013 IL 113471, ¶ 13. A petitioner's failure to recognize her current claims because she was not assisted by counsel is not an objective factor external to the defense that prevented her from bringing the claim in the initial postconviction petition. See *Jones*, 2013 IL App (1st) 113263, ¶ 25. Here, the petitioner has not pointed to any information regarding her claims that was not available to her at the time that she filed her initial postconviction petition. Indeed, the petitioner was granted a motion for extension of time to file her initial postconviction petition, alleging that she needed the extra time to locate the transcripts. She was presumably aware of the length of her sentence, her alleged plea deal, and her failure to testify on her own behalf at the time that she filed her initial postconviction petition. As the *Jones*

---

<sup>2</sup>In Illinois, petitioners are required to raise ineffective assistance of counsel claims on direct review if apparent on the record, and our reviewing courts should carefully consider each claim on a case-by-case basis. *People v. Veach*, 2017 IL 120649, ¶¶ 46, 48.



court points out, "if merely failing to recognize a claim when in full possession of the necessary facts would suffice as cause under the cause-and-prejudice test, the statutory bar would be swallowed by the exception as all one would have to do was claim ignorance to avoid it." *Id.*

¶ 20 The petitioner failed to establish cause for not raising her ineffective assistance of trial counsel claims in her first postconviction petition. Thus, she has failed to satisfy the cause-and-prejudice test. We affirm the denial of her motion for leave to file a successive postconviction petition.

¶ 21 Affirmed.