

NOTICE

Decision filed 11/26/18. 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.

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 (5th) 150503-U
NO. 5-15-0503
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 08-CF-774
)	
MARK SMITH,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Presiding Justice Barberis and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in denying the defendant leave to file a successive postconviction petition where the defendant failed to establish the “cause” prong of the cause-and-prejudice test.

¶ 2 This appeal concerns the denial of leave to file a successive postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). In May 2009, the defendant, Mark Smith, entered into a fully negotiated plea in which he pled guilty to criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)). He was sentenced to 15 years in the Department of Corrections. He did not appeal from his conviction and sentence. Almost five years later, he filed his first petition

under the Act claiming ineffective assistance of counsel stemming from his counsel's advice concerning whether his sentence was subject to day-to-day credit for good time served (730 ILCS 5/3-6-3 (West 2008)). The circuit court summarily dismissed this petition, and the defendant did not appeal from this dismissal.

¶ 3 Nineteen months later, in November 2015, the defendant filed a successive petition under the Act raising new allegations of ineffective assistance of counsel, this time stemming from his counsel's advice concerning the period of mandatory supervised release that he must serve following his prison sentence. The circuit court, however, concluded that the defendant did not allege sufficient facts to establish "cause" under the "cause and prejudice" test set forth in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2014)). The court, therefore, entered a judgment denying the defendant leave to file the successive postconviction petition. The defendant now appeals the circuit court's judgment. For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 The issues the defendant seeks to raise in his successive postconviction petition concern the period of mandatory supervised release that he must serve as a result of his plea. Specifically, the defendant alleged that, prior to pleading guilty, his attorney incorrectly told him that he would have to serve a definitive two-year period of mandatory supervised release, but the actual required period is an indeterminate period of three years to natural life. The defendant also noted in his petition that the circuit court improperly admonished him that he would have to serve a two-year period of mandatory supervised release as a result of his plea.

¶ 6 The defendant was originally indicted on one count of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)) and one count of aggravated criminal sexual assault (*id.* § 12-14(a)(2)). On May 5, 2009, the defendant appeared in court and entered into the fully negotiated plea of guilty on the charge of criminal sexual assault. As the factual basis for the plea, the prosecutor told the court that the defendant grabbed the victim as the victim walked in a parking lot, drug her into a nearby storage shed, hit her in the head, choked her, told her to stop screaming or he would kill her, and sexually assaulted her.

¶ 7 In exchange for the guilty plea, the State agreed to dismiss the charge of aggravated criminal sexual assault. In explaining the terms of the plea agreement, the prosecutor told the court that the defendant would be sentenced to 15 years in the Department of Corrections and that the “charge carries with it a mandatory supervised release period of three years to natural life.” The prosecutor also stated that the defendant would have to register as a sexual predator for the rest of his life and that he would have to serve at least 85% of his sentence.

¶ 8 Before accepting the defendant’s plea, the circuit court admonished the defendant that, among other things, the offense to which he was pleading guilty was a Class 1 felony and that he “could receive a minimum of 4 to a maximum of 15 years in prison.” Contrary to what the prosecutor stated about the period of mandatory supervised release, the court added, “It is not a probationable offense, *mandatory supervised release period of two years*, as well as a possibility for a substantial fine.” (Emphasis added.) In response to the court’s questioning, the defendant stated that he understood the maximum

sentence that he could receive. The court accepted the defendant's plea and stated in open court that it was sentencing the defendant to 15 years in the Department of Corrections and that the defendant "would serve 85 percent of that sentence." In handing down the actual sentence, the circuit court did not say anything about the required period of mandatory supervised release.

¶ 9 On the day of the defendant's plea, the circuit court entered a mittimus that directed the defendant to serve a three-year period of mandatory supervised release. On May 11, 2009, however, the court entered an amended mittimus that changed the defendant's mandatory supervised release from a definitive three-year period to a indeterminate period of three years to natural life.

¶ 10 The defendant never appealed from his conviction and sentence. Instead, on April 4, 2014, the defendant filed his first *pro se* postconviction petition under the Act. In this petition, the defendant did not raise any issues with respect to the period of his mandatory supervised release. Instead, the defendant alleged that his attorney incorrectly told him that he would receive good time credit and did not tell him that he would have to serve 85% of his sentence. On April 9, 2014, the circuit court summarily dismissed the defendant's postconviction petition because the defendant had not verified the petition with an affidavit. The defendant did not appeal from the dismissal of this postconviction petition.

¶ 11 On November 5, 2015, the defendant filed a successive *pro se* postconviction petition. The defendant filed this successive petition without a motion requesting leave to file it. In his successive petition, the defendant claimed that his counsel was

constitutionally ineffective because his counsel gave him incorrect information concerning the required mandatory supervised release period. He alleged that his attorney told him that he would have to serve a two-year period of mandatory supervised release and that the circuit court also admonished him that he would have to serve a two-year period of supervised release. He alleged that his mittimus was modified to provide for the three-year to natural-life period of mandatory supervised release. The defendant alleged that he did not find out about this amended mittimus until July 1, 2015, “when his IDOC counselor advised that his Mittimus Order had been amended to reflect the 3 to Life [mandatory supervised release].”

¶ 12 On November 6, 2015, the circuit court entered an order denying the defendant leave to file a successive postconviction petition. The circuit court noted that the defendant failed to file a motion to allow a successive petition and that the petition “merits a denial for that reason.” The court also stated, “Should the petition be characterized as a motion to allow a successive petition, it also fails.” The circuit court noted that the defendant failed to raise an issue with respect to his mandatory supervised release in his first petition. The circuit court also noted that the defendant “acknowledge[d] that he was aware of the facts he relie[d] on here as of [May 11, 2009] and only claime[d] his lack of knowledge of the law for the delay.” The court concluded, “That is not enough to grant relief. He had years to seek assistance and did not.”

¶ 13 The defendant now appeals the circuit court’s denial of leave to file his successive postconviction petition.

¶ 15 The Act provides a method for a criminal defendant 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). The Act contemplates the filing of only one petition, but there are two exceptions under which the courts can relax the bar against successive postconviction petitions. *People v. Edwards*, 2012 IL 111711, ¶ 10. One exception is known as the “fundamental miscarriage of justice exception,” and this exception requires an actual showing of innocence. *Id.* ¶ 23. This exception is not at issue in this case.

¶ 16 The other exception, which is at issue in this case, is known as the “cause and prejudice” exception. The supreme court adopted the cause and prejudice exception in *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002), and the legislature codified the exception in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2014)). *People v. Tidwell*, 236 Ill. 2d 150, 156 (2010). Section 122-1(f) of the Act sets out the exception with the following language:

“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.” 725 ILCS 5/122-1(f) (West 2014).

¶ 17 “Cause” is shown by establishing an objective factor external to the defense that impeded the defendant’s ability to raise a specific claim during his or her initial postconviction proceedings. *Id.*; *Pitsonbarger*, 205 Ill. 2d at 464. “Prejudice” is shown by demonstrating that the claim not raised during the initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2014); *Pitsonbarger*, 205 Ill. 2d at 464. The purpose of section 122-1(f) is to “limit the filing of both successive and frivolous postconviction petitions.” *Tidwell*, 236 Ill. 2d at 156. The defendant seeking to file a successive postconviction petition under this test must establish both prongs, cause and prejudice. *People v. Lee*, 207 Ill. 2d 1, 5 (2003).

¶ 18 Also, a defendant must obtain leave of the circuit court in order to file a successive postconviction petition. *Tidwell*, 236 Ill. 2d at 157. When the defendant does not file a motion requesting leave to file a successive petition, the circuit court may *sua sponte* grant leave upon finding that the defendant has established the “cause and prejudice” standard for filing a successive petition. *Id.* at 158. However, until the circuit court grants leave, the petition is not considered “filed” for purposes of further proceedings under the Act even though the successive petition was received and accepted by the circuit clerk. *Id.*

¶ 19 In the present case, the defendant did not file a motion requesting leave to file the successive postconviction petition. In its order denying the defendant’s petition, the circuit court noted the defendant’s failure to file a motion and concluded that the petition “merits a denial for that reason.” Nonetheless, the circuit court went on to evaluate the

petition under the cause-and-prejudice test and ultimately concluded that the defendant failed to establish the cause prong of the test. The court, therefore, denied the defendant leave to file the successive petition.

¶ 20 Under these facts, we will also review the allegations in the petition in light of the cause-and-prejudice test and determine whether the court erred in denying leave to file the petition. In doing so, we note that the supreme court has emphasized that “a defendant faces immense procedural default hurdles when bringing a successive post-conviction petition.” *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). The hurdles are lowered in very limited circumstances “[b]ecause successive petitions plague the finality of criminal litigation.” *Id.* They are “disfavored by Illinois courts.” *Edwards*, 2012 IL 111711, ¶ 29. “[T]he circuit court should deny leave when it is clear upon reviewing the successive petition and attached documentation that the defendant’s claims fail as a matter of law or the petition and documentation are insufficient to justify further proceedings.” *People v. Johnson*, 2018 IL App (1st) 153266, ¶ 13. We review the denial of leave to file a successive postconviction petition *de novo*. *Id.*

¶ 21 In the present case, we agree with the circuit court that the defendant’s petition failed to establish the cause prong of the cause-and-prejudice test. For cause, the defendant alleged in his motion that he was “not trained in the law” and that he did not “understand most legal advice given to him.” In an affidavit attached to the petition, he presented testimony that his attorney advised him that he would serve a two-year period of mandatory supervised release if he pled guilty. The defendant testified that he did not discover the amended mittimus until he talked to his “IDOC counselor” on July 1, 2015,

who informed him of the amended mittimus and that he was required to serve an indeterminate three-year to natural-life period of mandatory supervised release. The defendant testified in his affidavit that no one had notified him of the amended mittimus prior to that time.

¶ 22 In denying the defendant leave to file the successive petition, the circuit court stated that the defendant “acknowledge[d] that he was aware of the facts he relies on here as of [May 11, 2009] and only claims his lack of knowledge of the law for the delay.” The court concluded that the defendant had “years to seek assistance and did not.” The substance of the circuit court’s ruling was that the defendant failed to establish “cause” for the filing of the successive petition under the Act. Therefore, the circuit court did not address the merits of his claim.

¶ 23 We agree with the circuit court’s judgment denying the defendant leave to file the petition. A defendant’s ignorance of the law at the time he filed his initial postconviction petition cannot be considered “cause” for the filing of a successive postconviction petition. Therefore, the issue the defendant seeks to raise in the successive postconviction petition is procedurally defaulted and cannot be raised in a successive petition under the Act.

¶ 24 For example, in *People v. Evans*, 2013 IL 113471, ¶ 1, the supreme court considered whether a trial court erred in denying a defendant leave to file a successive postconviction petition. The supreme court affirmed the lower court, concluding that the defendant failed to establish cause for the filing of the successive petition. *Id.* ¶ 12. The

facts in *Evans* are comparable to the facts of the present case; therefore, we are obligated to follow the supreme court's analysis in *Evans*.

¶ 25 In *Evans*, the defendant was convicted of aggravated battery with a firearm and was sentenced to 12 years in prison. *Id.* ¶ 3. At the sentencing hearing, the trial court did not mention any period of mandatory supervised release. *Id.* ¶ 5. Nonetheless, the defendant was required to serve a three-year period of mandatory supervised release. *Id.* The defendant appealed his conviction and sentence and did not raise any issue with respect to the required period of mandatory supervised release. *Id.* ¶ 4. The appellate court affirmed his conviction and sentence. *Id.* Approximately three years after his conviction, he filed his first postconviction petition. *Id.* ¶ 5. Again, the defendant did not raise any issue with respect to his mandatory supervised release in his petition. The trial court summarily dismissed the petition, and the appellate court affirmed the dismissal. *Id.*

¶ 26 Approximately 10 months later, the defendant filed a motion for leave to file a successive postconviction petition, alleging, for the first time, that when the trial court imposed his 12-year prison sentence, it did not mention or impose an additional term of mandatory supervised release. *Id.* The defendant argued that the enforcement of a 3-year term of mandatory supervised release was improper because it would result in a sentence longer than the 15-year sentence handed down by the trial court. *Id.* With respect to “cause” for failing to raise this issue in his first postconviction petition, the defendant alleged as follows:

“ ‘The information about the M.S.R. was not yet discovered to me yet. And when I did learn about it more research need to be done. Also it was still being decided in

appeals court, so no case were able to be used as evidence. Basically I Petitioner just discovered this.’ ” (Emphasis added.)

¶ 27 The supreme court held that this was insufficient to establish cause for the filing of a successive postconviction petition under the Act. The supreme court concluded that the defendant’s allegation of cause was merely an allegation of his ignorance of the law which, as a matter of law, could never be cause for the filing of a successive postconviction petition. *Id.* ¶¶ 12-13. The court explained that the defendant’s only excuse was that he had “just discovered” that he would be subject to a three-year term of mandatory supervised release, but at the time he was sentenced, as well as the time of his direct appeal and his initial postconviction petition, the Unified Code of Corrections (Code) expressly provided that, by operation of law, every Class X sentence must include a three-year term of mandatory supervised release. *Id.* ¶ 13. The court concluded, “Defendant is presumptively charged with knowledge of this provision, and, as a matter of law, his subjective ignorance of it is not ‘an objective factor that impeded’ his ability to raise the MSR claim sooner.” *Id.*

¶ 28 Likewise, in the present case, the defendant failed to establish “cause” for filing a successive postconviction petition. As noted by the supreme court in *Evans*, the period of mandatory supervised release is automatically added to a sentence by operation of law. *Id.* The mandatory supervised release terms are statutorily mandated, and courts have no authority to withhold such terms when imposing a sentence. *People v. Porm*, 365 Ill. App. 3d 791, 794 (2006). Accordingly, the defendant and the State had nothing to negotiate regarding the mandatory supervised release term. If they had agreed to reduce

the statutorily required mandatory supervised release period to two years, the court would have lacked authority to act in accordance with their agreement. *People v. Lee*, 2012 IL App (4th) 110403, ¶ 21.

¶ 29 At the time the defendant pled guilty and, more importantly, when he filed his first postconviction petition, section 5-8-1(d)(4) of the Code expressly required that his sentence include a indeterminate period of mandatory supervised release from three years to natural life. 730 ILCS 5/5-8-1(d)(4) (West 2012). In his successive postconviction petition, the only cause he alleged as justification for failing to claim ineffective assistance of counsel in his first postconviction petition was that he did not discover the actual term of his mandatory supervised release until his “IDOC counselor” advised him of the amended mittimus which set out the required terms of his supervised release. However, *Evans* establishes that when the defendant filed his first postconviction petition, he was presumptively charged with knowledge of the requirements of section 5-8-1(d)(4) of the Code. As a matter of law, his subjective ignorance of section 5-8-1(d)(4) was not an “objective factor that impeded” his ability to bring his ineffective assistance of counsel claim when he filed his first postconviction petition. *Evans*, 2013 IL 113471, ¶ 13.

¶ 30 We note that at the sentencing hearing, the prosecutor specifically told the court that the charge to which the defendant agreed to plead guilty “carrie[d] with it a mandatory supervised release period of three years to natural life.” Also, in reaching our conclusion, we are guided by the supreme court’s emphasis that the standard for granting leave to file a successive postconviction petition is high because successive petitions

under the Act are disfavored. In order to file a successive postconviction petition, the defendant must meet a “more exacting” or “substantial” showing of cause and prejudice. *People v. Nicholas*, 2013 IL App (1st) 103202, ¶ 32. A “gist” of a claim of cause and prejudice is insufficient. *Id.* Because the defendant cannot establish the “cause” prong of the cause-and-prejudice test, we need not address the prejudice prong of the test.

¶ 31

CONCLUSION

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court that denied the defendant leave to file a successive postconviction petition.

¶ 33 Affirmed.