

2019 IL App (1st) 170036-U

No. 1-17-0036

Order filed August 9, 2019

Fifth Division

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
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 96 CR 29589
)	
COREY TRAINER,)	Honorable
)	Brian K. Flaherty,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defendant’s *pro se* “motion for leave to file a successive postconviction petition,” despite its label, was not a successive petition for purposes of the Post-Conviction Hearing Act and because the court denied the motion, his petition was not officially docketed, we remand defendant’s case for first-stage postconviction proceedings.
- ¶ 2 Defendant Corey Trainer appeals the denial of his *pro se* motion for leave to file a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*

(West 2016)).¹ He contends that the trial court wrongly construed his petition as a successive rather than an initial petition under the Act. For the following reasons, we vacate the order denying defendant leave to file a successive petition and remand for first stage postconviction proceedings.

¶ 3 Following a 1997 jury trial, defendant was found guilty of felony murder, attempt murder, and aggravated discharge of a firearm and sentenced to concurrent, respective terms of 60, 30, and 15 years' imprisonment. We affirmed defendant's convictions on direct appeal. *People v. Trainor*, 2014 IL App (1st) 111699-U. Because we set forth the facts in defendant's direct appeal, we recount them here to the extent necessary to our disposition.

¶ 4 The evidence at trial established that on April 20, 1996, defendant and three codefendants not parties to this appeal were members of the Gangster Disciple gang. On that date, defendant was driving near a store on 22nd Street and Butler Street in Chicago Heights when three members of a rival gang, the Latin Kings, approached his car and flashed gang signs. Defendant drove away to pick up four other Gangster Disciple members. Once in the car, one of the men pulled out two guns. Defendant drove back to the store, where he and the other men observed several Latin Kings in the alley behind the store. The men in the car yelled "get those Kings," and one of the men fired several gunshots toward the rival gang members. One of the shots killed the victim, Isidro Arce, who was seated on the couch in his home on 23rd Street.

¶ 5 The jury found defendant guilty of felony murder, attempted murder, and aggravated discharge of a firearm. The trial court sentenced defendant to concurrent, respective terms of 60,

¹ Defendant's name is spelled "Trainer" on his notice of appeal and *pro se* motion for leave to file a successive petition but "Trainor" in earlier proceedings. We use the spelling from defendant's *pro se* motion and notice of appeal.

30, and 15 years' imprisonment. Defendant filed a notice of appeal, but eventually withdrew it based on appellate counsel's advice that his concurrent sentences were unlawful and would be replaced with consecutive sentences if he were to appeal.

¶ 6 On July 18, 2000, defendant filed a petition for postconviction relief under the Act, alleging appellate counsel's erroneous advice constituted ineffective assistance of counsel and deprived him of his right to a direct appeal. The trial court granted defendant's petition and allowed him to file a late notice of appeal. We affirmed defendant's convictions on direct appeal. *Trainor*, 2014 IL App (1st) 111699-U.

¶ 7 On November 14, 2016, defendant filed a *pro se* "Motion for Leave to File Successive Post-Conviction Petition." In support of his motion, he attached a proposed successive postconviction petition, raising various trial errors and alleging that his failure to raise such errors earlier was due to trial, appellate, and postconviction counsels' ineffectiveness. Defendant acknowledged that generally only one postconviction petition is allowed under the Act, but argued that his claims satisfied the cause and prejudice test.

¶ 8 On December 9, 2016, the trial court denied defendant's motion for leave to file a successive postconviction petition. The court found defendant failed to satisfy the cause and prejudice test, noting the issues defendant raised could have been raised in his earlier postconviction proceeding. This appeal followed.

¶ 9 On appeal, defendant contends that the trial court wrongly construed his petition as successive, rather than evaluating it under the "frivolous and patently without merit" standard that governs first-stage proceedings. Defendant argues that because his initial postconviction petition, filed in 2000, resulted in his direct appeal, the instant petition, despite its label, was not

successive. Defendant also contends that because the 90-day time period under which a trial court must rule on a first stage petition has passed, his petition should be automatically advanced to second-stage proceedings under the Act. Therefore, defendant asks that this court remand his cause for second stage proceedings.

¶ 10 The Act provides for a three-stage process by which a defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). The Act generally contemplates the filing of only one petition. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009); 725 ILCS 5/122-3 (West 2016). In order to file a successive postconviction petition, a defendant must first obtain “leave of court.” See 725 ILCS 5/122-1(f) (West 2016); *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). However, we have found that “where a defendant files an initial postconviction petition seeking only to reinstate the right to a direct appeal that was lost due to counsel’s ineffectiveness, a subsequent petition is not a successive petition for purposes of section 122-1(f).” *People v. Little*, 2012 IL App (5th) 100547, ¶ 19.

¶ 11 Here, it is undisputed that defendant’s initial postconviction petition sought only to reinstate his right to a direct appeal that was lost due to counsel’s ineffectiveness. Thus, the parties agree that the instant petition, despite its label, was not successive for purposes of the Act. However, they disagree about what type of relief defendant is entitled to going forward. Defendant, as previously noted, argues that his petition should be remanded for second-stage proceedings due to the lapse of the 90-day time period governing first-stage proceedings. We note that defendant has developed no argument that his claims satisfy the standard governing first-stage proceedings.

¶ 12 On the other hand, the State, relying on *People v. Wilson*, 2014 IL App (1st) 113570, responds that because this court may affirm on any basis supported by the record, we should affirm the court's order, address the claims raised in defendant's proposed successive petition on the merits, and find them to be frivolous and patently without merit. Alternatively, relying on *People v. Anderson*, 2015 IL App (2d) 140444, the State argues that we should remand defendant's proposed petition for first-stage proceedings. We agree with the State's latter argument, and find that defendant's case should be remanded for first-stage proceedings under the Act.

¶ 13 The Act provides in relevant part that, "[w]ithin 90 days after the filing and docketing of each petition," the trial court must review the petition and determine whether it "is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). If the petition is not dismissed within 90 days at the first stage, counsel is appointed and it advances to the second stage. 725 ILCS 5/122-2.1(a), (b) (West 2016). Significantly, in this case, the court did not evaluate defendant's petition under the first-stage standard because, despite the fact that defendant was not required to obtain leave of court, he filed a motion for leave to file a successive petition. Although defendant contends the 90-day deadline to rule on his petition has passed, we find that defendant's proposed successive postconviction petition was never filed within the meaning of the Act, and therefore, the 90-day time period never began.

¶ 14 In *Anderson*, 2015 IL App (2d) 140444, ¶¶ 34-35, this court found that where a defendant seeks leave of court to file a successive postconviction petition and the court denies the motion, the proposed petition attached to the motion is not considered "filed" and therefore does not trigger the 90-day period. In so finding, this court relied on *Tidwell*, where our supreme court

noted, “ ‘a successive postconviction petition will not be considered ‘filed,’ as that term is used in the statute, until leave is granted; notwithstanding the circuit clerk’s reception and acceptance of the petition.’ ” *Anderson*, 2015 IL App (2d) 140444, ¶ 34 (quoting *Tidwell*, 236 Ill. 2d at 159). This is the case even where, as here, the defendant was not required to seek leave to file a postconviction petition. *Anderson*, 2015 IL App (2d) 140444, ¶ 35 (finding the defendant’s petition was “not officially docketed” where, “as per [the] *defendant’s own request*,” he filed a motion for leave to file a successive petition and the court denied the request) (Emphasis added.).

¶ 15 Likewise, in this case, despite defendant not being required to obtain leave of court to file his proposed petition, he nevertheless sought leave from the trial court. The trial court then ruled on the motion for leave to file a successive petition, per defendant’s own request. Defendant’s proposed petition, therefore, was never filed within the meaning of the Act, and the 90-day time period never began. Thus, advancement to the second stage of proceedings is not warranted. Contrary to defendant’s argument that his petition should be advanced to second-stage proceedings, remand for such review “would encourage future defendants to improperly seek leave to file mislabeled initial postconviction petitions as a means to evade first-stage review, for if the trial courts denied leave on such motions, applying [the] defendant’s logic would automatically require these cases to be remanded for second-stage proceedings.” *Id.* Accordingly, we vacate the order denying defendant leave to file a successive petition and remand defendant’s case for first-stage proceedings under the Act.

¶ 16 Remanded.