

NOTICE

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FILED
June 5, 2019
Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 170167-U

NOS. 4-17-0167, 4-17-0168 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Logan County
JOSEPH P. HICKEY,)	Nos. 05CF107
Defendant-Appellant.)	05CF113
)	
)	Honorable
)	William G. Workman,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The appellate court granted the Office of the State Appellate Defender’s motion to withdraw as appellate counsel and affirmed as no meritorious issue could be raised on appeal.

¶ 2 Defendant, Joseph P. Hickey, appeals from the trial court’s denial of his motion for leave to file a successive postconviction petition in Logan County case Nos. 05-CF-107 and 05-CF-113. On appeal, the Office of the State Appellate Defender (OSAD) moves to withdraw as appellate counsel on the ground no meritorious issue can be raised on appeal. Defendant has not filed a response to OSAD’s motion. We grant OSAD’s motion and affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2005, the State charged defendant with two counts of intimidation (720 ILCS 5/12-6(a)(1) (West 2004)) in case No. 05-CF-107 and one count of unlawful possession of contraband in a penal institution (720 ILCS 5/31A-1.1(b) (West 2004)) in case No. 05-CF-113. Following separate jury trials, defendant was convicted of the charged offenses and sentenced to two concurrently imposed terms of 10 years' imprisonment for intimidation and 15 years' imprisonment for possession of contraband in a penal institution. The 15-year term was imposed consecutive to the 10-year terms. Defendant appealed from his convictions and sentences, and this court affirmed. *People v. Hickey*, No. 4-06-0070 (Dec. 31, 2007) (unpublished order under Illinois Supreme Court Rule 23).

¶ 5 In 2007, defendant filed a *pro se* postconviction petition in case Nos. 05-CF-107 and 05-CF-113. The trial court appointed counsel to represent defendant. Defendant's appointed counsel filed an amended postconviction petition, and the State filed a motion to dismiss. The court granted the State's motion, and defendant appealed. On appeal, OSAD moved to withdraw as counsel on the ground the appeal so clearly lacked merit that any argument made in support of the appeal would be frivolous. *People v. Hickey*, 2011 IL App (4th) 100019-U, ¶ 7. Defendant opposed OSAD's motion and responded to it with additional points and authorities and then filed a brief in opposition to a brief filed by the State. *Id.* After considering all of the arguments presented, including defendant's *pro se* arguments, we agreed with OSAD's assessment of the merits of the appeal, granted the motion to withdraw, and affirmed the dismissal of defendant's postconviction petition. *Id.*

¶ 6 In 2014, defendant filed a *pro se* motion for leave to file a successive postconviction petition in case Nos. 05-CF-107 and 05-CF-113. Attached to the motion was a

45-page successive postconviction petition. In a written order, the trial court denied leave to file the successive postconviction petition, finding defendant failed to demonstrate cause for failing to raise his claims in earlier proceedings and any claim of actual innocence failed as he did not include material, newly discovered, and noncumulative evidence.

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, OSAD asserts no colorable argument can be made suggesting the trial court erred in denying defendant’s motion for leave to file a successive postconviction petition in either of his cases. We agree.

¶ 10 The Post-Conviction Hearing Act (Act) “provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions.” *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). The Act contemplates the filing of only a single postconviction petition, and any claim not raised in the original postconviction petition is deemed forfeited. *People v. Holman*, 2017 IL 120655, ¶ 25, 91 N.E.3d 849. To obtain leave to file a successive postconviction petition, a defendant must either (1) show cause and prejudice for the failure to raise a claim in his or her earlier petition or (2) set forth a colorable claim of actual innocence. *Id.* ¶ 26.

¶ 11 Under the cause-and-prejudice test, a defendant demonstrates cause by identifying “an objective factor that impeded his or her ability to raise a specific claim during his or her initial post[conviction] proceedings[.]” 725 ILCS 5/122-1(f)(1) (West 2012). A defendant demonstrates prejudice by showing the “claim not raised during his or her initial post[conviction]

proceedings so infected the trial that the resulting conviction or sentence violated due process.” 725 ILCS 5/122-1(f)(2) (West 2012). To support a claim of actual innocence, “the evidence in support of the claim must be ‘newly discovered’; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial.” *People v. Edwards*, 2012 IL 111711, ¶ 32, 969 N.E.2d 829.

¶ 12 OSAD has identified 20 possible claims in defendant’s successive postconviction petition. All of defendant’s claims are forfeited as they could have been raised previously. In an attempt to excuse his forfeiture, defendant invokes the cause-and-prejudice test. OSAD asserts defendant failed to show cause under this test. In his motion, defendant broadly asserted the cause for failing to raise his claims on direct appeal or in his initial postconviction petition was the ineffective, unreasonable, and inadequate representation provided by prior counsel. Defendant failed, however, to explain why he could not have raised his claims in either his initial *pro se* postconviction petition or in his *pro se* responses on appeal from the dismissal of his initial postconviction petition. We agree defendant failed to show cause under the cause-and-prejudice test. Defendant further failed to set forth a viable claim of actual innocence or any valid basis on which the trial court’s judgment could be considered void. We agree with OSAD’s assessment that no colorable argument can be made suggesting the trial court erred in denying defendant’s motion for leave to file a successive postconviction petition in either of his cases.

¶ 13 In reaching this decision, we emphasize the need for OSAD’s memorandum in support of its motion to withdraw as counsel to *clearly* set forth the reasons why counsel believes an appeal would be without arguable merit. In this case, we found OSAD’s memorandum was difficult to understand and at times conflated the issues to be considered. For example, in its

analysis of whether defendant showed cause under the cause-and-prejudice test, OSAD also addresses whether certain claims have merit. That inquiry, however, is irrelevant as it relates to whether a defendant has shown cause for his or her failure to raise a claim.

¶ 14

III. CONCLUSION

¶ 15

We grant OSAD's motion to withdraw as counsel and affirm.

¶ 16

Affirmed.