

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).

2019 IL App (4th) 170396-U

NO. 4-17-0396

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 10, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Brown County
MICHAEL E. CRENSHAW,)	No. 09CF5
Defendant-Appellant.)	
)	Honorable
)	Diane M. Lagoski,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* (1) The circuit court erred by allowing the State to move for the court to deny defendant’s motion for leave to file a successive postconviction petition and argue in support of its own motion.

(2) Defendant is not entitled to reversal, as he has failed to allege facts demonstrating cause to file a successive postconviction petition.

¶ 2 In November 2016, defendant, Michael E. Crenshaw, filed his *pro se* motion for leave to file a successive postconviction petition, a motion he later supplemented. The State, in response, filed a motion to deny defendant leave to file his successive postconviction petition and argued, during a hearing before the circuit court, defendant should be denied leave to file his successive postconviction petition. Defendant’s motion was denied. Defendant appeals, arguing the court erred by allowing the State to respond to his motion for leave to file a successive

postconviction petition. We agree but affirm.

¶ 3

I. BACKGROUND

¶ 4

In February 2009, the State charged defendant with criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2008)), alleging defendant committed an act of sexual penetration on H.H., who was 15 years old.

¶ 5

At defendant's bench trial, H.H. testified defendant entered her bedroom in the early morning hours of February 9, 2009, and forced her to have sex with him. Because defendant had entered H.H.'s bedroom and demanded sex from her at other times, H.H. developed a plan to implement if it were to occur again. She held her cell phone and audio recorded defendant's sexual assault of her. At school later that day, H.H. played the recording for friends. She also played the recording for her stepmother, Stephanie Crenshaw. Stephanie confronted defendant about the recording. Defendant told Stephanie he went to H.H.'s room for a massage. Jason Garthaus of the Illinois State Police testified he interviewed defendant on February 10, 2009. During the interview, defendant reported going to H.H.'s room to get a back rub. Defendant reported, during the massage, H.H. "touched his penis a couple of times." The audio recording was played for the circuit court. Both H.H. and Stephanie identified defendant as the individual whispering in the recording.

¶ 6

Defendant was found guilty and sentenced to eight years' imprisonment. On direct appeal, defendant argued his confession to police should have been suppressed, the audio recording was improperly admitted, and his sentence was excessive. *People v. Crenshaw*, 2011 IL App (4th) 090908, ¶ 13, 959 N.E.2d 703. We affirmed defendant's conviction and sentence. *Id.* ¶ 27.

¶ 7 In March 2010, while his direct appeal was pending, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-8 (West 2008)). In this petition, defendant alleged multiple errors, including (1) he was denied due process when Judge Lagoski failed to recuse herself due to a conflict of interest, (2) the circuit court improperly admitted hearsay testimony, and (3) trial counsel was ineffective for failing to admonish him he would be ineligible for probation if found guilty of criminal sexual assault. Counsel was appointed to represent defendant. In October 2010, appointed counsel filed an amended postconviction petition, asserting, in part, the judge should have recused herself as one of the State's witnesses was a family friend and defendant was not advised of the maximum penalties for the charged offense. Defendant averred this failure affected his position in plea negotiations. An evidentiary hearing was held on defendant's claim. After the hearing, the court rejected defendant's ineffective-assistance claim and denied the postconviction petition. The court concluded defendant was not prejudiced because defendant would have rejected any plea offer that required him to admit guilt. Defendant appealed the denial of his postconviction petition. This court affirmed. *People v. Crenshaw*, 2012 IL App (4th) 110202, ¶ 18, 974 N.E.2d 1002.

¶ 8 In December 2012, defendant filed a *pro se* petition for leave to file a successive postconviction petition, a *pro se* successive postconviction petition, and a *pro se* motion for substitution of judge. Defendant asserted appointed postconviction counsel provided ineffective assistance by not making the necessary amendments to his postconviction petition. A separate trial judge considered the motion for substitution of judge and denied it. *People v. Crenshaw*, 2015 IL App (4th) 131035, 38 N.E.3d 1256.

¶ 9 The State filed a motion to dismiss the successive postconviction petition, stating defendant failed to obtain leave of court before filing it. The circuit court granted the State's motion. After repeated motions filed by defendant, the court granted a motion to reconsider and set the matter for a hearing on whether the successive postconviction petition could be filed. Defendant filed a *pro se* petition for leave of court to file an amended successive postconviction petition. Attached to the petition for leave to file was an amended successive postconviction petition. Among the issues raised, defendant asserted postconviction counsel was ineffective for failing to review the record or amend the initial postconviction petition to include a claim trial counsel misled defendant on whether he could seek substitution of the judge and a claim appellate counsel was ineffective for not arguing insufficiency of the evidence. *Id.* ¶ 17. This court affirmed. *Id.* ¶¶ 18, 47. We concluded defendant's claims in his second postconviction petition failed to meet the cause-and-prejudice test of section 122-1(f) (725 ILCS 5/122-1(f) (West 2010)).

¶ 10 In January 2016, defendant filed a second *pro se* motion for leave to file a successive postconviction petition. Defendant alleged: (1) he had previously alleged innocence and the circuit court committed plain error by dismissing exculpatory evidence at trial; (2) trial counsel was ineffective for failing to call expert witnesses to refute the State's theory and establish a conspiracy against defendant; (3) the trial judge had a conflict of interest and was not impartial; and (4) appointed postconviction counsel provided inadequate representation by failing to amend defendant's postconviction petition to include issues of ineffective assistance of appellate counsel. In March 2016, the court held a hearing on the request for leave. At the hearing, the State argued against granting leave, asserting most of the allegations had already

been made and there were no new allegations in the petition.

¶ 11 The circuit court denied defendant's petition. Defendant appealed, arguing the court improperly allowed the State to argue against his motion for leave to file a successive postconviction petition. We affirmed on two grounds. First, we concluded, although the State participated in the hearing, its participation was minimal. *People v. Crenshaw*, 2018 IL App (4th) 160376-U, ¶ 41. We noted the State did not argue the merits of defendant's claims but simply summarized defendant's arguments in previous filings, the holdings of this court, and circuit-court findings. *Id.* We further found because defendant's claims in his third postconviction petition were the same as those in his second amended petition and those second-amended-petition claims failed to satisfy the cause-and-prejudice test, leave to file a third successive postconviction petition was properly denied. *Id.* ¶ 47. We further observed: "Defendant already raised issues regarding judicial bias, conflict of interest, plain error, ineffective assistance of counsel, the Rule 651(c) [(Ill. S. Ct. Rule 651(c) (eff. Apr. 26, 2012))] certificate, and defendant's actual innocence, which are barred by *res judicata*." *Id.* ¶ 48.

¶ 12 On November 23, 2016, defendant filed a successive postconviction petition, a motion for substitution of judge, and a petition for leave to file the successive petition; only the denial of the motion for leave to file the successive postconviction petition has been appealed. The petition for leave to file the successive petition includes the following allegations: (1) trial counsel provided ineffective assistance by failing to (a) call a medical expert to testify at trial regarding the validity of the rape kit, (b) examine crime-lab evidence thoroughly, and (c) call witnesses to bolster defendant's theory; (2) appellate counsel was ineffective for not raising trial counsel's failures on direct appeal; (3) appointed counsel provided inadequate representation by

not including trial counsel's ineffectiveness on these matters in the amended initial postconviction petition; (4) the circuit court committed plain error by dismissing lab reports that contradicted the complainant; and (5) appointed counsel's representation was inadequate in that counsel failed to review the record properly and failed to argue the trial judge's bias.

¶ 13 On March 22, 2017, defendant filed a supplement to his motion for leave of court. Defendant asserted he was adding a claim of "actual innocence." Defendant charged the circuit court improperly allowed an enhanced compact disc containing the audio recording to be played multiple times in open court over objection, failed to exclude the audio recording under the fruit-of-the-poisonous-tree doctrine, and improperly acted as an advocate for the State during the hearing on the motion to suppress. Defendant further argued the State made improper statements during closing argument.

¶ 14 On May 8, 2017, the State filed a motion to deny defendant leave to file his successive postconviction petition. The State alleged all of defendant's claims had been raised before. At the hearing on the motions, the circuit court allowed the State to argue against defendant's motion. The court found the petition alleged the same allegations made in previous pleadings and denied leave.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant argues this court must reverse the circuit court's order. Defendant maintains under *People v. Bailey*, 2017 IL 121450, 102 N.E.3d 114, the State is not allowed to provide input at the leave-to-file stage. When no evidentiary hearing has been held on the matter, we review *de novo* the denial of a defendant's motion for leave to file a successive

postconviction petition. *People v. Ames*, 2019 IL App (4th) 170569, ¶ 11.

¶ 18 The Postconviction Act contemplates the filing of one postconviction petition. *Id.*

¶ 12. Claims of a substantial denial of constitutional rights not raised in the initial or amended postconviction petition are waived. 725 ILCS 5/122-3 (West 2016). An exception to this waiver rule is provided for in section 122-1(f) of the Postconviction Act, which permits the filing of a successive petition if the petitioner can satisfy the cause-and-prejudice test:

“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. For purposes of this subsection (f): (1) a prisoner shows 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; and (2) a prisoner shows prejudice by demonstrating that 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) (West 2016).

¶ 19 Our supreme court has held the State is not permitted to participate in the preliminary screening to determine whether a *pro se* motion for leave to file a successive postconviction petition alleges facts to sufficiently demonstrate cause and prejudice. *Bailey*, 2017 IL 121450, ¶ 24. Here, the State plainly participated in the preliminary screening. The State argues, however, its participation was *de minimis* and urges this court to affirm the circuit court’s judgment. In support, the State cites our decision on the appeal of the denial of defendant’s

January 2016 *pro se* motion for leave to file a successive postconviction petition. *Crenshaw*, 2018 IL App (4th) 160376-U, ¶ 41.

¶ 20 In our previous decision, defendant raised the same argument: The State improperly participated in the preliminary screening of his motion for leave to file a successive postconviction petition. *Id.* ¶ 33. In the 2018 decision, the State’s participation was a brief argument at the hearing, quoted in one paragraph of our decision, pointing out the arguments had been raised in earlier motions and defendant failed to establish the cause-and-prejudice test. *Id.* ¶ 26. We found no reversible error upon concluding the State’s participation was minimal. *Id.* ¶ 41.

¶ 21 Here, the State’s participation was more significant. As defendant argues, the State filed a motion to deny defendant’s motion for leave. The State also provided a lengthier argument, approximately four pages in the transcript of the hearing. Thus, even if minimal input would be acceptable, the State’s participation here cannot be deemed *de minimis*.

¶ 22 The question remains whether defendant is entitled to remand for a new preliminary screening on his motion due to the State’s participation or, before remanding, whether the court of review may perform the preliminary screening of the defendant’s motion for leave to file a successive postconviction petition. In *Ames*, this court recently addressed this issue. While recognizing this State’s appellate districts were split on the issue of whether a court of review may consider the motion itself and not remand the cause (*Ames*, 2019 IL App (4th) 170569, ¶ 15), this court concluded, like the Second District, “an appellate court may choose for the sake of judicial economy to review a circuit court’s denial of a motion for leave to file a successive postconviction petition when the State has been involved.” *Id.* ¶ 23.

¶ 23 Defendant urges this court, if we do not remand the case, to not address the matter but hold our decision in abeyance until the Illinois Supreme Court decides *People v. Lusby*, 2018 IL App (3d) 150189, 117 N.E.3d 527, *pet. for leave to appeal allowed*, No. 124046 (Jan. 31, 2019), or his appeal of the 2018 *Crenshaw* decision. *Lusby* involves an appeal from the denial of a motion for leave to file a successive postconviction petition seeking relief from a *de facto* life sentence imposed on a 16-year-old offender. See *Lusby*, 2018 IL App (3d) 150189, ¶ 1. The Third District found error after considering the cause-and-prejudice test (*id.* ¶¶ 22-25) and before finding the circuit court erred in allowing the State to participate in the preliminary screening of defendant’s motion (*id.* ¶¶ 32-33). The court addressed the latter issue not as a dispositive matter, but only as it “may occur on rehearing.” *Id.* ¶ 29. In addition, the Third District did not remand for a new preliminary screening nor affirm the denial but remanded for resentencing. *Id.* ¶ 29. The appeal of *Lusby*, which may not address or resolve the question at hand here, remains in the briefing phase. As we found in *Ames*, an abeyance to wait for the supreme court to speak on *Lusby* is unwarranted. See *Ames*, 2019 IL App (4th) 170569, ¶ 23. Similarly, as for the appeal of the 2018 *Crenshaw* order, the supreme court has denied leave to appeal. See *People v. Crenshaw*, No. 123993, 111 N.E.3d 986 (Nov. 18, 2018).

¶ 24 Having found abeyance is not warranted, we choose, for the sake of judicial economy, to review the circuit court’s denial of defendant’s motion for leave to file a successive postconviction petition, and we find defendant failed to make a *prima facie* showing of cause. In this motion for leave, defendant failed to identify an objective factor that impeded his ability to raise his claims during his initial postconviction proceedings (see 725 ILCS 5/122-1(f) (West 2016)). Defendant makes no argument on appeal such an objective factor exists. We find none.

In addition, defendant raises the same arguments of judicial bias and conflict of interest, ineffective assistance, and a violation of Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012).

Those issues are barred by *res judicata*. See *Crenshaw*, 2018 IL App (4th) 160376-U, ¶ 41.

¶ 25

III. CONCLUSION

¶ 26

We affirm the trial court's judgment.

¶ 27

Affirmed.