

NOTICE
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2019 IL App (5th) 150381-U

NO. 5-15-0381

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,)	St. Clair County.
)	
v.)	No. 03-CF-69
)	
NATHANIEL JOHNSON,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Overstreet and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* Where the circuit court plainly did not err in denying the defendant's motion for leave to file a successive postconviction petition, and where this appeal does not present any other issue of arguable merit, the defendant's appointed attorney on appeal is granted leave to withdraw, and the judgment of the circuit court is affirmed.

¶ 2 The defendant, Nathaniel Johnson, appeals from two orders entered by the circuit court, *viz.*: (1) an order denying his motion for leave to file a successive petition for postconviction relief pursuant to section 122-1(f) of the Post-Conviction Hearing Act (725 ILCS 5/122-1(f) (West 2014)) and (2) an order denying his amended motion to reduce sentence. The Office of the State Appellate Defender (OSAD) was appointed to

represent the defendant in this appeal. However, OSAD has concluded that this appeal lacks merit and, accordingly, has filed a motion to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The defendant has filed an objection to OSAD's motion. This court has examined OSAD's *Finley* motion, the defendant's objection, and the entire record on appeal. This court also has examined the dispositional orders that it entered in the defendant's six prior appeals in this cause. This court has concluded that the instant appeal does indeed lack merit. Therefore, OSAD is granted leave to withdraw as the defendant's attorney on appeal, and the orders of the circuit court are affirmed.

¶ 3

BACKGROUND

¶ 4 In April 2003, the defendant was charged with the first-degree murder of his 10-year-old stepson, Trayveon A. Barnes, on a theory of felony murder. The defendant was accused of setting fire to a house and thereby causing the death of Trayveon, who was inside.

¶ 5 On December 16, 2004, the defendant, his private attorney, and an assistant state's attorney appeared in open court and announced the terms of a plea agreement, *viz.*: the State would file an amended information charging the defendant with aggravated arson (720 ILCS 5/20-1.1(a)(2) (West 2002)), a Class X felony; the defendant would plead guilty to that charge; and both parties would recommend that the defendant be sentenced to imprisonment for a term of 30 years.

¶ 6 The circuit court began its admonishments and queries by informing the defendant that the first-degree-murder charge against him was punishable by imprisonment for "as

little as twenty or a maximum of sixty but can also be natural life without parole, depending on the factors that are presented in the case." The court asked the defendant whether he understood this admonition, and the defendant answered in the affirmative. At that point, an off-the-record discussion was held. Back on the record, the court informed the defendant that the prosecutor had asked him to "emphasize that if the State proves every allegation in their original complaint that the Court is required to sentence you to natural life." The court asked the defendant whether he understood this admonition, and the defendant answered in the affirmative.

¶ 7 The court admonished the defendant as to the nature of the aggravated-arson charge, informed him that aggravated arson was punishable by a prison sentence of 6 to 30 years, to be followed by mandatory supervised release (MSR) for a term of 3 years, and informed him of his right to a trial and his rights at trial. The defendant indicated his understanding of all these matters. Also, the court determined through its queries and the defendant's answers that the plea was voluntary. The defendant indicated that his stepson's death was not intended, and that he was pleading guilty in order to "bring closure" to the dead boy's loved ones and to his own family.

¶ 8 The court concurred in the plea agreement, imposed the agreed-upon 30-year sentence, with credit for time served in jail, and entered judgment on the plea and sentence. Subsequently, the court dismissed the first-degree-murder charge.

¶ 9 In January 2005, within 30 days after the plea and sentence, the defendant placed in the prison mail system a *pro se* motion to reduce sentence. Five months later, in June 2005, the circuit court denied the motion to reduce sentence. In July 2005, the defendant

filed a timely notice of appeal from the order denying his motion to reduce sentence, thus perfecting a direct appeal in No. 5-05-0444. It was the first appeal in this cause. This court granted the defendant leave to file a motion for summary relief, and the defendant filed one.

¶ 10 In April 2006, while the direct appeal in No. 5-05-0444 was pending in this court, the defendant filed in the circuit court a *pro se* petition for postconviction relief. He thus began the initial postconviction proceedings in this cause. In that petition, the defendant claimed, *inter alia*, that plea counsel had been constitutionally ineffective for failing to inform him that he could enter a "conditional plea" of guilty and for failing to call witnesses during the "sentencing stage" of the plea hearing, and that the circuit court had erred in accepting his guilty plea. The circuit court dismissed the initial postconviction petition, stating in a written order that it lacked jurisdiction over the petition because a direct appeal in the case was pending. The defendant filed a timely notice of appeal from the order dismissing his initial postconviction petition, thus perfecting the appeal in No. 5-06-0252. It was the second appeal to this court in this cause.

¶ 11 In May 2006, this court granted the defendant's motion for summary relief in the direct appeal, having concluded that the circuit court erred in denying the defendant's *pro se* postplea motion without first considering whether the defendant was eligible for the appointment of postplea counsel. This court remanded the cause for a determination of defendant's eligibility and desire for appointed postplea counsel and an opportunity for defendant to file an amended postplea motion. *People v. Johnson*, No. 5-05-0444, order

at 5 (May 24, 2006) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 12 In December 2006, this court reversed the judgment denying the defendant's *pro se* initial postconviction petition. This court concluded—after the defendant argued the point, and after the State confessed error—that the circuit court had erred in finding that it lacked jurisdiction over the petition because a direct appeal was pending. This court remanded the cause for further postconviction proceedings. *People v. Johnson*, No. 5-06-0252 (Dec. 22, 2006) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 13 On remand from the direct appeal in No. 5-05-0444, the court appointed counsel for the defendant in the postplea proceedings. In July 2007, the defendant, by appointed postplea counsel, filed a motion to withdraw the guilty plea, on the ground that plea counsel had provided the defendant with ineffective assistance. However, postplea counsel did not file a certificate of compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). In July 2007, the circuit court held a hearing on the motion to withdraw the guilty plea, reviewed the transcript of the plea hearing, and denied the motion. (The *pro se* motion to reduce sentence, filed in January 2005, was abandoned.) The defendant filed a notice of appeal from the denial order, thus perfecting the appeal in No. 5-07-0428, the third appeal in this cause. In that appeal, the defendant argued, and the State conceded, that postplea counsel's failure to file a Rule 604(d) certificate required remand. This court agreed, granted the motion for summary relief, and remanded this cause to the circuit court for new postplea proceedings, including the filing of a Rule

604(d) certificate by postplea counsel. *People v. Johnson*, No. 5-07-0428 (Sept. 16, 2008) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 14 In April 2009, the defendant filed a *pro se* petition for postjudgment relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). He claimed that the circuit court had erred in adding a 3-year MSR term to his 30-year prison sentence because (1) the court had failed to inform him, at the time of the guilty plea, that an MSR term would be added to the prison sentence and (2) addition of the 3-year MSR term extended his total sentence to 33 years, 3 years longer than the 30-year maximum sentence for a Class X felony. He sought a 3-year reduction in his 30-year prison sentence. In May 2009, the State filed a motion to dismiss the section 2-1401 petition.

¶ 15 On remand from No. 5-07-0428, in May 2009, the cause was called for a new hearing on the defendant's motion to withdraw his guilty plea. The defendant and his new postplea attorney informed the court that the defendant wanted to withdraw that motion to withdraw his guilty plea. The court questioned the defendant, determined that his decision to withdraw the motion was knowing and voluntary, and entered an order allowing him to withdraw the motion. The court informed the defendant that his withdrawal of the motion to withdraw the guilty plea did not affect his section 2-1401 petition, and that further proceedings on that petition would be scheduled by a different judge. In June 2009, the defendant filed a timely *pro se* notice of appeal, wherein he requested "the right to [a]ppel or [r]einstate" his motion to withdraw the guilty plea and his section 2-1401 petition. The notice of appeal was not a model of clarity, but the

defendant appeared to be under the impression that the court had disposed of his section 2-1401 petition at the May 6, 2009, hearing. The defendant thus perfected the appeal in No. 5-09-0297. It was the fourth appeal in this cause.

¶ 16 In August 2009, the circuit court entered an order dismissing the defendant's section 2-1401 petition for relief from judgment. In September 2009, the defendant filed a *pro se* notice of appeal from that dismissal order. He thus perfected the appeal in No. 5-09-0516, the fifth appeal in this cause.

¶ 17 Also on September 14, 2009, on remand from No. 5-06-0252, the circuit court appointed counsel to represent the defendant in further postconviction proceedings.

¶ 18 On December 28, 2009, this court dismissed, for want of prosecution, the appeal in No. 5-09-0516, *i.e.*, the defendant's appeal from the August 2009 order dismissing the section 2-1401 petition for relief from judgment. A petition for rehearing was denied as untimely. *People v. Johnson*, No. 5-09-0516 (Dec. 28, 2009) (order entered under Illinois Supreme Court Rule 326 (eff. Feb. 1, 1994)).

¶ 19 In June 2010, on remand from No. 5-06-0252, appointed postconviction counsel filed, on behalf of the defendant, an amended petition for postconviction relief. (The *pro se* postconviction petition, as noted *supra*, had been filed in April 2006.) The amended petition asserted that the circuit court had failed to admonish the defendant adequately before accepting his guilty plea, that the defendant did not understand his constitutional rights at the time he pleaded guilty, that plea counsel had provided ineffective assistance by failing to investigate the case and possible defenses and by coercing the defendant into pleading guilty, that the plea was unknowing and involuntary,

and that the defendant received a sentence more onerous than the agreed-upon 30-year sentence, since a 3-year term of MSR was tacked onto it. The State moved to dismiss the June 2010 amended postconviction petition.

¶ 20 In December 2010, in No. 5-09-0297, this court noted that the record established that the circuit court, at the May 2009 hearing, had not made any ruling concerning the defendant's section 2-1401 petition, contrary to the defendant's apparent belief. In addition, this court stated that if the defendant was implying that the circuit court had erred when it allowed him to withdraw his guilty plea, the doctrine of invited error precluded him from challenging that decision on appeal; after all, the defendant had voluntarily withdrawn his motion to withdraw the guilty plea. Accordingly, this court affirmed the judgment entered by the circuit court in May 2009. *People v. Johnson*, No. 5-09-0297 (Dec. 8, 2010) (unpublished order under Illinois Supreme Court Rule 23).

¶ 21 In February 2012, the circuit court held a hearing on the State's motion to dismiss the amended postconviction petition that had been filed by defendant, through appointed postconviction counsel, in June 2010. After hearing both parties' arguments, the court granted the State's motion, dismissing the defendant's amended postconviction petition. Thus ended the initial postconviction proceedings in the circuit court. The defendant filed a notice of appeal, thus perfecting the appeal in No. 5-12-0131, the sixth appeal in this cause.

¶ 22 In No. 5-12-0131, the defendant asserted that the circuit court had erred in dismissing his amended postconviction petition. Through appointed appellate counsel (OSAD), he argued that (1) he had made a substantial showing that he did not understand

the constitutional rights he was waiving when he pleaded guilty, and (2) his appointed postconviction counsel had provided unreasonable assistance by failing to present in the amended petition a claim that the defendant's guilty plea was unknowing and involuntary due to the defendant's being misinformed that the first-degree-murder charge carried a mandatory sentence of natural life imprisonment as a consequence of the young age of the victim, where in fact, by virtue of the decision in *People v. Wooters*, 188 Ill. 2d 500, 520 (1999), there was no such mandatory life sentence for the murder charge. This court disagreed with the first argument, concluding that the defendant had failed to make the requisite substantial showing. As to the second argument, this court noted that the defendant's original *pro se* petition did not include a claim (or factual allegations that would support a claim) that his plea was unknowing and involuntary due to his being misinformed that the first-degree-murder charge carried a mandatory sentence of natural life imprisonment, and this court further noted (citing *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006)) that appointed postconviction counsel is under no obligation to present a claim that was not included in the *pro se* petition. *People v. Johnson*, 2014 IL App (5th) 120131-U (May 7, 2014).

¶ 23 On December 12, 2014, the defendant filed a *pro se* motion to reduce sentence. He claimed that an MSR term was not part of his plea agreement with the State, and that the circuit court neither admonished him about MSR nor sentenced him to MSR, and he further claimed that the addition of an MSR term deprived him of the benefit of his bargain with the State.

¶ 24 On June 3, 2015, the circuit court denied the defendant's motion to reduce sentence, which he had filed on December 12, 2014, on the ground that the court had lost jurisdiction over the cause due to the passage of more than 30 days since the sentencing. On July 29, 2015, the defendant filed a *pro se* amended motion to reduce sentence, which was substantially like the original.

¶ 25 On August 12, 2015, the defendant filed *pro se* (1) a "petition for leave to file secondary post-conviction relief" and (2) a "secondary petition for post-conviction relief." Hereinafter, these two *pro se* documents will be referred to by their correct names, *viz.*: (1) a motion for leave to file a successive postconviction petition and (2) a successive petition for postconviction relief. Neither document is a model of clarity.

¶ 26 The motion for leave to file a successive postconviction petition stated that "due to newly discovered evidence unavailable previously to [the defendant] fundamental fairness declares defendant should be allowed to file. The act of prosecutorial [*sic*] misconduct, putting you under duress to accept plea bargain." One section of the motion for leave to file—a section labeled "evidence"—consisted of three short quotes on the topic of newly-discovered evidence, culled from three different decisions by Illinois courts of review. The motion for leave to file might have created the impression that the defendant was seeking leave to file a second postconviction petition on the ground that he was actually innocent based on newly-discovered evidence. See, *e.g.*, *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). However, the motion for leave to file did not discuss, describe, or even hint at, any piece of evidence (newly-discovered or otherwise) that could support or might possibly relate to a claim of actual innocence. Also, the motion

for leave to file did not specify any instance of "prosecutorial [*sic*] misconduct." The motion for leave to file suffered from a distinct lack of specifics.

¶ 27 As for the successive postconviction petition itself, no claim of actual innocence was presented. Indeed, the successive petition did not mention actual innocence. Instead, the successive petition presented a claim that the defendant's plea agreement was unknowing and involuntary. The defendant alleged that he had accepted the State's plea offer, and had pleaded guilty to aggravated arson, because his attorney, the State, and the circuit court all had infixed in him the false belief that the first-degree-murder charge against him carried a mandatory sentence of natural life imprisonment, and he fervently wished to avoid the mandatory life sentence, where in truth the first-degree-murder charge did not carry a mandatory sentence of natural life imprisonment, by virtue of the decision in *People v. Wooters*, 188 Ill. 2d 500, 520 (1999) (statutory provision mandating natural life imprisonment for adults found guilty of murdering children under the age of 12 years was void, due to violation of the Illinois Constitution's single-subject rule). In other words, he claimed that his guilty plea resulted from a misunderstanding of the law, a misunderstanding engendered by his attorney, the State, and the circuit court.

¶ 28 On August 13, 2015, the circuit court entered an order denying the defendant leave to file a successive postconviction petition. The court explained that the defendant had failed to present "any sufficient reason" for his failure to raise that claim in the initial postconviction proceedings.

¶ 29 On August 17, 2015, the court entered an order denying the defendant's July 29, 2015, amended motion to reduce sentence, on the ground that it had lost jurisdiction over

the cause due to the passage of more than 30 days since the final judgment was entered in 2004.

¶ 30 The defendant now appeals from both the August 13, 2015, order denying his motion for leave to file a successive postconviction petition and the August 17, 2015, order denying his amended motion to reduce sentence.

¶ 31 ANALYSIS

¶ 32 The instant appeal—the defendant's seventh appeal in this cause—is from (1) an order denying the defendant's motion for leave to file a successive postconviction petition and (2) an order denying an amended motion to reduce sentence. As previously mentioned, OSAD has filed a *Finley* motion to withdraw as counsel for the defendant. In a brief filed in support of the *Finley* motion, OSAD has raised one potential issue on appeal—whether the circuit court erred in denying the defendant's motion for leave to file a successive postconviction petition. OSAD has concluded that the circuit court did not err in denying leave to file, and that any argument to the contrary would lack merit. For the reasons that follow, this court agrees.

¶ 33 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2018)) contemplates the filing of only one petition for postconviction relief. A convicted criminal defendant is generally restricted to filing only one postconviction petition; he may file a successive postconviction petition only if he first obtains the circuit court's leave to file one. 725 ILCS 5/122-1(f) (West 2018). See also *People v. Wrice*, 2012 IL 111860, ¶ 47.

¶ 34 "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 2018). Cause is shown "by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings." *Id.* Prejudice is shown "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." *Id.* See also *Wrice*, 2012 IL 111860, ¶ 48. A petitioner must satisfy each of the two elements of the cause-and-prejudice test in order to obtain leave to file a successive petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002) (having concluded that defendant failed to meet the "prejudice" element, court did not consider whether he had met the "cause" element).

¶ 35 A would-be successive petitioner need not present "conclusive proof" of cause and prejudice, but he must "adequately allege facts" that demonstrate cause and prejudice. *People v. Smith*, 2014 IL 115946, ¶ 34. The circuit court, when deciding whether to grant or deny leave to file a successive postconviction petition, considers only the pleadings, including any supporting documentation, and therefore appellate review of a circuit court's denial of leave to file is *de novo*. *Wrice*, 2012 IL 111860, ¶ 50.

¶ 36 Here, the defendant essentially claimed in his successive postconviction petition that his guilty plea was unknowing and involuntary. He alleged that his attorney, the State, and the circuit court had misinformed him that the first-degree-murder charge against him carried a mandatory sentence of natural life imprisonment, while in truth it

did not carry a mandatory life sentence, by virtue of our Illinois Supreme Court's *Wooters* decision. Believing the faulty legal advice he had received, and with the goal of avoiding a mandatory life sentence, the defendant accepted the State's plea offer and pleaded guilty to aggravated arson, in exchange for, *inter alia*, dismissal of the murder charge, the defendant alleged.

¶ 37 In deciding whether to grant the defendant leave to file his successive postconviction petition, the circuit court needed to decide whether the defendant had satisfied both the "cause" element and the "prejudice" element of the cause-and-prejudice test. Now, the same question is before this court. The circuit court concluded that the defendant had failed to present "any sufficient reason" for his failure to include the claim in his initial postconviction petition. In other words, the circuit court concluded that the defendant had failed to identify an objective factor that impeded his ability to raise his specific claim during his initial postconviction proceedings (see 725 ILCS 5/122-1(f) (West 2018)), *i.e.*, that he had failed to demonstrate cause. This court agrees with the circuit court's assessment.

¶ 38 *Wooters* was decided in November 1999. The defendant pleaded guilty in this case in December 2004. As OSAD points out, the defendant filed his initial *pro se* postconviction petition in April 2006, and the amended petition was filed in June 2010. Given the nature of the defendant's claim—which depended entirely on the record and clear Illinois law—there is no good reason for his failure to raise the claim in his initial postconviction proceedings. It could have been raised just as easily in the initial proceedings as in successive proceedings.

¶ 39 In his successive petition, the defendant intimated that he did not raise this claim in the initial postconviction proceedings for the simple reason that he did not learn of the claim's legal basis until the time of his appeal in No. 5-12-0131 (his sixth appeal in this cause), when his appellate attorney presented a *Wooters*-related issue (see *supra*). However, a defendant's mere failure to recognize, at the time of his initial postconviction proceedings, that he had a particular claim cannot qualify as an objective factor external to the defense that prevented him from bringing the claim in the initial postconviction proceeding. *People v. Evans*, 2013 IL 113471, ¶ 13; *People v. Jones*, 2013 IL App (1st) 113263, ¶ 25.

¶ 40 The defendant clearly failed to establish cause for not raising his claim in the initial postconviction proceedings. Therefore, the circuit court properly denied the defendant's motion for leave to file his successive postconviction petition. Any argument to the contrary would lack merit.

¶ 41 CONCLUSION

¶ 42 A thorough examination of the record on appeal does not reveal any arguably meritorious issue that can be raised in this appeal. Accordingly, OSAD is granted leave to withdraw as the defendant's counsel on appeal, and the judgment of the circuit court is affirmed.

¶ 43 Motion granted; judgment affirmed.