

No. 1-14-1018

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 89 CR 1237
)	
TYRONE DANIELS,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Denial of defendant's motion for leave to file a successive postconviction petition affirmed.
- ¶ 2 Defendant, Tyrone Daniels, appeals the denial of his motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq* (West 2010). On appeal, defendant contends that the trial court erred in denying him leave to file his

petition because his claim of an unconstitutionally disparate sentence satisfied the cause and prejudice test required for successive postconviction petitions.

¶ 3 The record shows that defendant and his sister, Sheila Daniels, were involved in the 1989 shooting death of David Ray McCoy. A full recitation of the facts can be found in this court's opinion on defendant's direct appeal. *People v. Daniels*, 230 Ill. App. 3d 527, 528-31 (1992). As relevant here, the evidence adduced at trial showed that Sheila shot McCoy, her paraplegic boyfriend, in the back of the head, and defendant, who witnessed the shooting, offered to help her cover it up, shot McCoy twice in the head, and took money from his wallet. There was also evidence presented at trial that McCoy was dead after the first shot to the back of his head fired by Sheila. Following a jury trial, Sheila was convicted as the principal in McCoy's murder and sentenced to a term of 80 years' imprisonment.

¶ 4 Defendant was subsequently tried at a bench trial on the stipulated facts from Sheila's jury trial and was found guilty of the first degree murder of McCoy on a theory of accountability, armed robbery, and concealment of McCoy's death. At the sentencing hearing, the trial court stated that this was an "execution" type murder and that although there had been testimony that McCoy was medically dead after the first shot fired by Sheila, defendant did not believe him to be dead and therefore fired two more shots into his head. The court noted that defendant did not have any criminal background, but noted defendant's sentence was necessary to deter others from taking similar action. The court further stated that it was not clear that defendant helped plan the murder, but believed that he was a "ready, willing and able participant."

¶ 5 The court believed that because of defendant's conduct in this case, he was likely to commit crimes in the future, but noted that he "perhaps came under the influence of his older sister and perhaps[, that was] entitled to some consideration notwithstanding the finding of this court earlier and today that this was an extremely heinous and brutal conduct." The court finally stated that it "considered the sentence imposed on Sheila," and sentenced defendant to concurrent terms of 60 years' imprisonment for murder, 20 years for armed robbery, and 5 years for concealment. This court affirmed defendant's convictions and sentence on direct appeal over his contention that his trial counsel was ineffective. *Daniels*, 230 Ill. App. 3d at 535.

¶ 6 On November 5, 1992, defendant filed, through counsel, a postconviction petition for relief under the Act alleging, *inter alia*, ineffective assistance of trial counsel. The circuit court granted the State's motion to dismiss defendant's petition and defendant's appeal of that ruling was dismissed for want of prosecution. *People v. Daniels*, No. 1-94-1374 (1994) (Dispositional Order). On October 19, 1995, defendant filed a successive *pro se* petition for relief under the Act alleging various constitutional violations, which the trial court summarily dismissed. On appeal, this court granted the State Appellate Defender leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed the trial court's ruling. *People v. Daniels*, No. 1-97-4371 (1998) (unpublished order under Supreme Court Rule 23).

¶ 7 On August 18, 1998, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). The circuit court dismissed that petition and this court affirmed that judgment. *People v. Daniels*, No. 1-99-1268 (2001) (unpublished order under Supreme Court Rule 23). On October 27, 2003,

defendant filed a motion for leave to file his third postconviction petition, and on March 5, 2004, filed a motion for leave to file his fourth successive postconviction petition. The circuit court denied defendant leave to file in both instances and this court affirmed both of those judgments in a consolidated order. *People v. Daniels*, Nos. 1-04-0991 & 1-05-1645 (cons.).

¶ 8 Meanwhile, in 1994, this court reversed Sheila's conviction on her direct appeal on the basis that the admission of polygraph results at her trial was improper, and remanded the case for a new trial. *People v. Daniels*, 272 Ill. App. 3d 325, 347 (1994), modified upon denial of rehearing May 16, 1995. Following a second jury trial on remand, Sheila was convicted of first degree murder and sentenced to 80 years imprisonment. *People v. Daniels*, 332 Ill. App. 3d 198, 200 (2002) (portion unpublished under Supreme Court Rule 23). On appeal, this court affirmed her conviction, but remanded for resentencing, finding that her sentence was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Daniels*, 332 Ill. App. 3d at 200, 214-15. On June 4, 2003, the supreme court directed this court to vacate its judgment in *Daniels*, 332 Ill. App. 3d 198, and to reconsider the judgment in light of *People v. Crespo*, 203 Ill. 2d 335 (2001) and *People v. Thurow*, 203 Ill. 2d 352 (2003), to determine whether a different result was warranted. *People v. Daniels*, 204 Ill. 2d 667 (2003).

¶ 9 On February 19, 2004, this court vacated its decision in *Daniels*, 332 Ill. App. 3d 198, and determined that the prior decision to vacate defendant's extended-term sentence was proper. *People v. Daniels*, 346 Ill. App. 3d 350, 367 (2004) (portion unpublished under Supreme Court Rule 23). In remanding for resentencing, this court pointed out that Sheila "had no convictions prior to committing this offense *** [and that] there was credible evidence in the record that the

deceased was an abusive domestic partner, indicating the existence of mitigating factors under sections 5-5-3.1(a)(4) and (a)(8) of the Unified Code of Corrections [citation]." *Id.* Although the resolution of Sheila's cause is not in the record before us, the circuit court stated in its order denying defendant leave to file this fifth postconviction petition that on remand Sheila's sentence was reduced to 40 years' imprisonment.

¶ 10 On October 29, 2010, the circuit court dismissed defendant's petition for relief from judgment under section 2-1401 of the Code.¹ In dismissing defendant's petition, the court rejected his claim that "he has newly discovered evidence that his sister, who was his co-defendant, had her sentence vacated and a lower sentence imposed," and "therefore, that his sentence is now unconstitutionally disparate from her's [*sic*] and void." The court found that defendant failed to demonstrate that the disparity between their sentences was unreasonable and that mitigating circumstances, such as that Sheila told police that the victim beat her and threatened to kill her and that she had no criminal record, led to the reduction of her sentence. The court concluded that defendant failed to demonstrate that his sentence was unconstitutionally disparate from Sheila's given that he was not similarly situated. Defendant did not appeal that ruling.

¶ 11 On February 1, 2011, defendant filed another *pro se* section 2-1401 petition for relief from judgment contending that the defense of "strong provocation" extends to family members, and that appellate counsel was ineffective for not raising this defense on direct appeal. The State filed a motion to dismiss defendant's petition, contending that it was untimely and did not

¹ Defendant's section 2-1401 petition that was the basis for this ruling is not included in the record filed on appeal. The record does contain, however, the order of the circuit court dismissing that petition.

establish a cause of action for ineffective assistance of counsel. On September 8, 2011, the circuit court granted the State's motion and denied defendant's petition finding that it was untimely, and that "the subject matter within it is inconsistent with that envisioned under 2-1401." The court allowed defendant, through counsel, leave to file a motion to reconsider that ruling; however, no motion to reconsider that ruling, or a ruling on such a motion, is included in the record filed on appeal.

¶ 12 On December 6, 2012, defendant filed, through counsel, a motion for leave to file a successive postconviction petition. In his motion, defendant contended that he satisfied the prejudice prong of the cause-and-prejudice test because, as a result of Sheila's resentencing, she "was sentenced to 20 years fewer in prison than [defendant], despite evidence that Sheila was more culpable and the person who fired the fatal shot that killed David McCoy." Defendant also contended that there was cause for allowing him leave to file the successive postconviction petition because he did not learn of Sheila's reduced sentence until 2008. Defendant acknowledged that he raised this claim in his 2010 section 2-1401 petition, but asserted that he was not aware that the claim was not cognizable pursuant to section 2-1401 of the Code because he alleged a constitutional violation and that the denial of his 2011 section 2-1401 petition was pending before the court on the motion to reconsider. In his postconviction petition, filed along with his motion for leave to file, defendant contended that his sentence was unconstitutionally disparate from Sheila's and that they were similarly situated.

¶ 13 On May 2, 2013, the circuit court denied defendant leave to file a successive postconviction petition in a written order. The court stated that defendant failed to establish

cause to allow him to file a successive petition because he previously raised this claim in the 2010 section 2-1401 petition, and the court considered the claim and dismissed it on the merits. The court also found that defendant failed to demonstrate prejudice because if he had presented these claims in an earlier petition "there is scant probability" that he would have prevailed. The court reasoned that defendant failed to establish any facts to support his claim that he and Sheila were similarly situated because he failed to attach any supporting evidence to his petition or explain their absence. The court concluded that defendant's claim was a "bald, conclusory allegation" and that defendant's sentence was not excessive because it was within the statutory guidelines. The court subsequently denied defendant's motion to reconsider in which he contended that the fact that he raised this claim in an earlier section 2-1401 petition did not preclude him from raising it in a postconviction petition, particularly where, as here, the section 2-1401 petition was "misabeled." The court stated that defendant "has filed many post-convictions" and that "four times, he's made claims along these lines and four times they've been denied. Those claims have been upheld by—the denial of the petition has been upheld by the Appellate Court."

¶ 14 On appeal, defendant contends that the circuit court erred in denying him leave to file a successive postconviction petition because he met the cause-and-prejudice test set forth in *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). See also 725 ILCS 5/122-1(f) (West 2012). He maintains that he demonstrated cause for his failure to bring this claim earlier because he did not become aware of Shelia's reduced sentence until 2008, and he established prejudice because the record shows that the trial court found Shelia to be more culpable for the underlying offense

and that the court intended for defendant to have a shorter sentence than her. The State responds that defendant's claim is barred by *res judicata* because the trial court considered and rejected this claim in his previously filed section 2-1401 petition, and in any event, defendant has failed to demonstrate prejudice.

¶ 15 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Generally, the Act contemplates the filing of only one postconviction petition (*People v. Ortiz*, 235 Ill. 2d 319, 328 (2009)), and provides that any claim of a substantial denial of constitutional rights not raised in the original or amended petition is waived (725 ILCS 5/122-3 (West 2010)). However, the bar against successive petitions may be relaxed where defendant can establish cause and prejudice for his failure to raise the claim earlier (*Pitsonbarger*, 205 Ill. 2d at 459), or actual innocence (*Ortiz*, 235 Ill. 2d at 329). Defendant can show cause exists by demonstrating some objective factor that impeded him from raising the claim earlier. *People v. Flores*, 153 Ill. 2d 264, 279 (1992). Prejudice exists where defendant can show that the claimed constitutional error "so infected his trial that the resulting conviction violated due process." *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 20, citing *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). We review *de novo* the circuit court's denial of leave to file a successive postconviction petition. *Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 16 Here, defendant asserts that he satisfied the cause prong of the cause-and-prejudice test because he could not have raised this claim in an earlier postconviction proceeding where

Sheila's sentence was not reduced until 2007. Although defendant acknowledges that he raised this claim in his 2010 section 2-1401 petition, he claims that this does not bar him from raising the claim in a subsequent postconviction petition because a section 2-1401 petition was the improper "vehicle" for him to raise the claim. He maintains that by denying him leave to file a successive postconviction petition on the basis that the court previously considered the issue in his section 2-1401 petition, the court "penalized [him] for initially bringing the claim in the wrong procedural vehicle."

¶17 As defendant concedes, the claims raised in his 2010 section 2-1401 petition are identical to those raised in the instant postconviction petition and are based on the same facts. Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction operates to bar a subsequent suit between the same parties and involving the same cause of action. *People v. Kines*, 2015 IL App (2d) 140518, ¶ 21, citing *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 44. Thus, defendant's claim is barred by *res judicata* where the circuit court rendered a final judgment on defendant's 2010 section 2-1401 petition and defendant's instant postconviction petition involves the same cause of action as that previously decided.

¶ 18 We observe, however, that the doctrines of *res judicata* and waiver will be relaxed where fundamental fairness so requires, where the alleged waiver is attributable to the incompetence of appellate counsel, or where the facts relating to the postconviction claim do not appear on the face of the original record. *People v. Richardson*, 2015 IL App (1st) 113075, ¶ 221. Although defendant briefly mentions fundamental fairness in his reply brief, he does not argue that it should serve as an exception to *res judicata*, and we find that neither of the other exceptions

apply in this case. Therefore, we find that none of the exceptions to *res judicata* apply in this case.

¶ 19 In an attempt to avoid *res judicata*, defendant relies on *People v. Shellstrom*, 216 Ill. 2d 45 (2005) and *People v. Pearson*, 216 Ill. 2d 58 (2005) for the proposition that the circuit court improperly penalized him for initially bringing his claim in the wrong procedural vehicle, *i.e.*, as a section 2-1401 petition, rather than a postconviction petition. In *Shellstrom*, the supreme court found that a circuit court has the discretion to recharacterize a pleading as a postconviction petition, but when it does so, the court must notify defendant that it intends to recharacterize the pleading and provide defendant with an opportunity to withdraw or amend the petition.

Shellstrom, 216 Ill. 2d at 57. Similarly, in *Pearson*, the supreme court found that the circuit court erred where it reclassified defendant's section 2-1401 petition as a successive postconviction petition and then subjected the section 2-1401 petition to the "rigorous standards" of a successive postconviction petition without giving defendant notice that it was recharacterizing his petition or an opportunity to withdraw or amend it. *Pearson*, 216 Ill. 2d 58 at 68-69.

¶ 20 Defendant contends that in this case the claims raised in his 2010 pleading were not cognizable under section 2-1401 because they raised a claim of a violation of constitutional rights, which is the purpose of a postconviction petition. He, therefore, asserts that *res judicata* should not apply because the circuit court "either never addressed the constitutional claims raised in [his] post-conviction petition, since the only time it was even arguably adjudicated was under the section 2-1401 standard, or [the court] silently recharacterized the section 2-1401 petition, applied the post-conviction standard, and violated *Shellstrom* and *Pearson*."

¶ 21 These claims, however, concern the circuit court's ruling on his 2-1401 petition, and the record shows that defendant did not appeal that ruling. *Res judicata* not only bars claims that were actually raised and decided, but also bars claims that could have been raised. *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 955 (2008). Accordingly, the proper means for defendant to challenge the circuit court's dismissal of his 2010 section 2-1401 petition was to appeal from that judgment. Defendant's failure to do so means that he may not now contest that ruling because he could have raised that claim on appeal from the dismissal of his 2010 section 2-1401 petition and it is now barred by *res judicata*, and defendant has failed to identify any exceptions to avoid that result. Accordingly, the circuit court properly denied defendant leave to file this successive postconviction petition where he raised the claim in an earlier proceeding and, therefore, failed to satisfy the cause-and-prejudice test. *Edwards*, 2012 IL App (1st) 091651, ¶ 20.

¶ 22 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.