

NOTICE
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2013 IL App (4th) 120318-U

NO. 4-12-0318

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 29, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
JOSEPH HERMAN,)	No. 06CF200
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant failed to establish cause and prejudice, the trial court did not err in denying his motion for leave to file a successive postconviction petition.

¶ 2 In January 2007, the trial court found defendant, Joseph Herman, guilty of two counts of threatening a public official (subsequent offense) and one count of aggravated intimidation. In March 2007, the court sentenced him to consecutive terms of 14 years, 14 years, and 15 years on the convictions, respectively. On direct appeal, this court affirmed his convictions and sentences. In May 2010, defendant filed a *pro se* petition for postconviction relief, which the trial court summarily dismissed. In February 2012, defendant filed a motion for leave to file a successive postconviction petition, which the court denied.

¶ 3 On appeal, defendant argues the trial court erred in denying his motion for leave to file a successive postconviction petition. We affirm.

¶ 4

I. BACKGROUND

¶ 5 In November 2006, the State charged defendant by information with four counts of threatening a public official (720 ILCS 5/12-9(a)(1)(i), (a)(2) (West 2006)), including then-Governor Rod Blagojevich, Attorney General Lisa Madigan, and Judge Kathryn Zenoff. The State alleged defendant knowingly and willfully conveyed to those public officials communications containing a threat that would place Judge Zenoff (count I), Governor Blagojevich (counts II and IV), and Attorney General Madigan (count III) in a reasonable apprehension of future bodily harm by mailing letters stating the public officials would be tortured and killed.

The State also charged defendant with one count of intimidation (count V) (720 ILCS 5/12-6(a)(1) (West 2006)), alleging he communicated by mail a written threat to Governor Blagojevich to inflict physical harm on him, and one count of aggravated intimidation (count VI) (720 ILCS 5/12-6.2(a)(1) (West 2006)), alleging defendant, in his allegiance to an organized gang and in committing the offense of intimidation with the intent to cause Governor Blagojevich to gather for delivery a large sum of money, communicated by mail a written threat to inflict physical harm on the Governor and his family. Defendant pleaded not guilty.

¶ 6 In January 2007, defendant's bench trial commenced, and he represented himself. Jay Brown, the deputy director of correspondence in the Governor's office, testified the office received letters addressed to Governor Blagojevich in August 2005 and May 2006. Brown turned the letters over to the Illinois State Police. Mark Delia, the deputy chief of police for the Attorney General's office, testified a threatening letter addressed to Attorney General Madigan was turned over to him in August 2005.

¶ 7 Patricia Erickson testified she worked for Judge Zenoff in Rockford. In August

2005, she opened a letter from defendant that she deemed "very serious and threatening."

Erickson was familiar with defendant's name because the office had received mail from him on a previous occasion. Erickson showed the letter to Judge Zenoff and then contacted the police.

¶ 8 Judge Zenoff testified she had previously presided over defendant's fully negotiated guilty plea to aggravated battery in September 2000. He received a 10-year prison sentence. Judge Zenoff stated Erickson showed her defendant's 2005 letter, which caused her alarm. The police were notified thereafter.

¶ 9 Illinois State Police trooper Eric Morgan testified he met with defendant at the Pontiac Correctional Center in August 2005 in reference to the threatening letters. Defendant denied writing the letters. When asked if defendant intended to harm the Governor, defendant kept repeating, "If that's what the letter says."

¶ 10 Illinois State Police special agent Casey Payne testified she met with defendant at the prison. When asked about the letter to the Governor, defendant claimed he did not know anything about it. Defendant also claimed he had someone outside of the prison that he could contact to kill Governor Blagojevich if defendant was unable to escape.

¶ 11 Lindell Moore, a forensic scientist with the Illinois State Police, testified he specializes in document examination. He examined known samples of defendant's handwriting with unknown documents. He opined the letters sent to Judge Zenoff and the Attorney General's office in August 2005 as well as the letter to Governor Blagojevich in May 2006 were written by defendant. Moore stated the August 2005 letter to the Governor contained "excellent similarities" but he could not positively identify defendant as the writer.

¶ 12 Pontiac correctional officer Jack Libby testified he interviewed defendant about

the letter to Attorney General Madigan. Defendant stated he wrote the letters because he had been having some difficulties in dealing with his incarceration at Pontiac. Defendant also indicated he sent letters to Judge Zenoff and Governor Blagojevich.

¶ 13 The trial court found defendant guilty of counts I, III, IV, V, and VI and not guilty of count II. In March 2007, the court conducted the sentencing hearing. In the presentence reports, the court indicated defendant was 32 years old and had two prior arson convictions. The court also noted defendant was convicted of aggravated battery in 2000, where he stabbed his girlfriend in the eye. He also had a 2004 conviction for threatening a public official. Defendant told the court he had been in segregation at Pontiac for the previous 15 months. The court continued the hearing to allow a psychiatrist to examine defendant.

¶ 14 In July 2007, the trial court resumed the sentencing hearing. The report from Dr. Robert Chapman indicated defendant had behavioral problems since grade school. When he was seven years old, he was placed in a mental hospital after trying to kill his sisters by setting fire to their room while they slept. He had attended special education classes because of his behavior disorder. He was sentenced to juvenile prison when he was 13 years old, and he has been in prison for most of his adult life.

¶ 15 Dr. Chapman opined defendant's risk of violence was "moderately high for the foreseeable future." The risk stemmed from his bipolar disorder and violent role models when he was young. Dr. Chapman stated defendant's behavior could reasonably be expected to continue for the foreseeable future and not be altered by punishment or threat of punishment because violence and the threat of violence had "become so ingrained and integral to his personality and how he views himself that he will be reluctant to give it up entirely even if it would seem in his

best interest to do so."

¶ 16 The trial court found defendant to be "a very dangerous man." Because defendant would likely continue to be "extremely dangerous," the court found society needed to be protected from him. The court concluded concurrent sentences were not appropriate and consecutive sentences were required to protect the public from defendant's criminal conduct. The court sentenced defendant to 14 years on count I, 14 years on count III, and 15 years on count VI. All three sentences were to run consecutive to each other and consecutive to the sentence he was then serving. In August 2007, defendant filed a motion to reconsider sentence, which the court denied. This court affirmed his convictions and sentences. *People v. Herman*, No. 4-07-0627 (Oct. 20, 2008) (unpublished order under Supreme Court Rule 23).

¶ 17 In May 2010, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). Defendant alleged he was not "in [his] right state of mind" during the trial and sentencing hearing and he was deprived of a fair trial when he was deprived of an attorney. In June 2010, the trial court summarily dismissed the petition, finding it frivolous and patently without merit. Defendant did not appeal the court's decision.

¶ 18 In February 2012, defendant filed a motion for leave to file a successive postconviction petition. Defendant claimed the trial court dismissed his previous petition at the initial stage, which prevented him from amending it and adding claims. Defendant also claimed his conviction and sentence were void.

¶ 19 Defendant also filed the successive petition, alleging (1) that where aggravated intimidation is a Class 1 felony and no physical harm comes to the victim, the penalty is

disproportionate to the Class 3 felony of aggravated battery; (2) his extended-term sentences for threatening a public official were void because they are Class 2 felonies and they were not the greatest class felony for which he was convicted; (3) his 43-year sentence for conduct that resulted from his mental illness constituted cruel and unusual punishment; (4) his appellate counsel was ineffective for not arguing his sentence was cruel and unusual punishment; and (5) his due-process rights were violated when the trial court allowed him to represent himself despite suffering from a serious mental illness.

¶ 20 In March 2012, the trial court denied defendant's motion, finding he failed to set forth any facts required under the cause-and-prejudice test. This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Defendant argues the trial court erred in denying his motion to file a successive postconviction petition where central to his claim was his lack of mental competence to represent himself at trial and how it affected his ability to previously raise the issue. We disagree.

¶ 23 The Act "provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials." *People v. Taylor*, 237 Ill. 2d 356, 371-72, 930 N.E.2d 959, 969 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, __ N.E.2d __. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008). However, "issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited." *People v. Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100.

¶ 24 The Act "generally contemplates the filing of only one postconviction petition." *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009). A successive postconviction petition may only be filed if leave of court is granted. 725 ILCS 5/122-1(f) (West 2010). "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 postconviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2010).

¶ 25 "[A] successive petition 'is not considered "filed" for purposes of section 122-1(f), and further proceedings will not follow, until leave is granted, a determination dependent upon a defendant's satisfaction of the cause-and-prejudice test.' " *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 19, 966 N.E.2d 417 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161, 923 N.E.2d 728, 734 (2010)). "While the test for initial petitions to survive summary dismissal is that the petition state the gist of a meritorious claim—that is, a claim of arguable merit—the cause and prejudice test for successive petitions is more exacting than the gist or arguable merit standard." *People v. Miller*, 2013 IL App (1st) 111147, ¶ 26, __ N.E.2d __. "Where a defendant fails to first satisfy the requirements under section 122-1(f), a reviewing court does not reach the merits or consider whether his successive postconviction petition states the gist of a constitutional claim." *People v. Welch*, 392 Ill. App. 3d 948, 955, 912 N.E.2d 756, 762 (2009).

¶ 26 In the case *sub judice*, the allegations in defendant's motion for leave to file a successive postconviction petition stated (1) the trial court summarily dismissed his initial petition, which prevented him from amending his petition and adding claims, and (2) he was attacking his conviction and sentence as void. Defendant did not allege any deficiencies in the proceedings or offer any specifics on how he was prejudiced. He also did not allege how his

conviction and sentence were void. Defendant's bare allegations failed to meet the "more exacting" standard needed to satisfy the cause-and-prejudice test. The trial court denied defendant's motion for leave to file, finding he failed to set forth any facts that would establish cause and prejudice. We agree, and find no error. As such, we will not consider the merits of defendant's successive postconviction petition. See *People v. Spivey*, 377 Ill. App. 3d 146, 150, 879 N.E.2d 391, 395-96 (2007).

¶ 27

III. CONCLUSION

¶ 28 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed.