



Appendix C 1-40-23

SUPREME COURT OF ILLINOIS

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May 30, 2018

In re: People State of Illinois, respondent, v. Mark Johnson, petitioner.
Leave to appeal, Appellate Court, Third District.
123338

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 07/05/2018.

Very truly yours,

Carolyn Taft Gosboll

Clerk of the Supreme Court

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).

No. 3-16-0054
(Consolidated with No. 3-16-0246)

Order filed November 8, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF
ILLINOIS,

Plaintiff-Appellee,

v.

MARK JOHNSON,

Defendant-Appellant.

) Appeal from the Circuit Court
) of the 21st Judicial Circuit,
) Kankakee County, Illinois,
) No. 93-CF-792
)
) Honorable
) Gordon L. Lustfeldt,
) Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

Held: The potential issues did not warrant continuation of the appeal. Counsel is allowed to withdraw, and the judgment is affirmed.

The defendant, Mark Johnson, was convicted of armed robbery (720 ILCS 5/18-2 (West 1992)). The defendant was found to be an habitual criminal based on his previous convictions of armed robbery in 1978 and 1984. The circuit court sentenced the defendant to natural life imprisonment.

The defendant appealed, and this court affirmed, but remanded for resentencing. *People v. Johnson*, No. 3-95-0657 (1997) (unpublished order under Supreme Court Rule 23). On remand, the circuit court again sentenced the defendant to a term of natural life imprisonment, and the sentence was affirmed on appeal. *People v. Johnson*, No. 4-97-0933 (1998) (unpublished order under Supreme Court Rule 23). Thereafter, the defendant filed several collateral attacks to his conviction and sentence. We only detail those proceedings relevant to the instant appeal.

In 2005, the defendant filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2004)). The petition alleged a claim of actual innocence based on an affidavit from Gerald Johnson in which Gerald confessed to committing the crime. The circuit court dismissed the petition, and we affirmed. *People v. Johnson*, No. 3-05-0667 (2007) (unpublished order under Supreme Court Rule 23).

In 2014, the defendant filed his first motion for leave to file a successive postconviction petition. In the petition, the defendant made a claim of actual innocence based on the affidavit of Gerald in which he again averred that he committed the offense. The court denied the motion for leave to file his successive postconviction petition, and this court affirmed. *People v. Johnson*, No. 3-14-0231 (Oct. 5, 2015) (unpublished order under Supreme Court Rule 23).

Next, the defendant filed two separate motions for leave to file a successive postconviction petition, which are the subject of the instant appeal. In the first motion, the defendant alleged a claim of actual innocence based on the affidavit of Gerald in which Gerald averred that he committed the crime. The defendant also argued that his sentence as an habitual criminal was unconstitutional. The defendant argued that armed robbery did not qualify as a forcible offense as required by the habitual criminal statute. In the defendant's second motion, he argued that one of his three armed robbery convictions should have been considered a juvenile

adjudication because he was only 18 years old at the time he committed the offense. Therefore, the defendant argued that he did not qualify as an habitual criminal because he only had two prior armed robbery convictions.

Ultimately, the circuit court denied both of the defendant's motions for leave to file a successive postconviction petition. The causes were consolidated and the defendant appeals.

The State Appellate Defender's Office was appointed to represent the defendant in this appeal. The appointed counsel has now filed a motion indicating that the instant appeal presents no issues of merit upon which the defendant could expect to obtain any relief. This motion, filed in accordance with *Pennsylvania v. Finley*, 481 U.S. 551 (1987), requests that appointed counsel be permitted to withdraw. Counsel informed the defendant of his intention to withdraw. Counsel has also sent the defendant a copy of his brief. The defendant filed a response which we have considered in reaching our disposition.

First, the claim of actual innocence raised by the defendant in his successive petition, *i.e.*, that Gerald admitted to committing the offense was previously raised in his section 2-1401 petition in 2005 and again in his successive postconviction petition in 2014. Consequently, this claim is barred from our consideration by the doctrine of *res judicata*. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). Further, the evidence is not newly discovered as the content of the affidavit was the same information presented in the defendant's 2005 and 2014 collateral proceedings. See *People v. Ortiz*, 235 Ill. 2d 319, 332 (2009) (evidence in support of a postconviction actual innocence claim must be newly discovered).

The defendant's remaining claims do not involve actual innocence, and the defendant fails to establish cause for his failure to raise the claims either on direct appeal or in his first postconviction petition. See *People v. Lee*, 207 Ill. 2d 1, 5 (2003). Further, the defendant's claim

that his sentence to natural life imprisonment as an habitual criminal is unconstitutional fails on its merits. A sentence to natural life imprisonment for armed robbery under the habitual criminal statute does not violate the proportionate penalties clause. *People v. Cummings*, 351 Ill. App. 3d 343, 350-51 (2004). The defendant was convicted of armed robbery on three occasions, a Class X felony, and qualifies for sentencing as an habitual criminal—even if we assumed his first armed robbery conviction amounted to a juvenile adjudication. See 730 ILCS 5/5-4.5-95(a)(1) (West 2016); 720 ILCS 5/18-2(b) (West 1992); *People v. Bryant*, 278 Ill. App. 3d 578 (1996).

We conclude that both of the defendant's motions for leave to file a successive postconviction petition were properly denied and that there are no arguable errors to be considered on appeal. We further find that to continue with this appeal would be wholly frivolous. Accordingly, we affirm the judgment entered in the circuit court of Kankakee County and allow the State Appellate Defender to withdraw as counsel for the defendant. See *People v. Lee*, 251 Ill. App. 3d 63 (1993).

Judgment affirmed and withdrawal motion allowed.