2022 IL App (5th) 180201-U

NO. 5-18-0201

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

~~Plaintiff-Appellee,~~ RA

v.

BRANDON L. JOHNSON

~~Defendant-Appellant.~~ PA

Appeal from the Circuit Court of Madison County.

No. 07-CF-211

Honorable Neil T. Schroeder, Judge, presiding.

JUSTICE VAUGHAN delivered the judgment of the court.
Justices Welch and Wharton concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's denial of defendant's motion to file a successive postconviction petition is affirmed where defendant failed to show cause as to why some claims were not raised in earlier postconviction proceedings, one claim was barred by *res judicata*, and his actual innocence claim failed to meet criteria required to warrant a new trial.

¶ 2 Defendant, Brandon L. Johnson, appeals the circuit court's denial of his motion for leave to file a subsequent postconviction petition. The Office of the State Appellate Defender (OSAD) was appointed to represent defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Defendant was given proper notice and an extension of time to file briefs, objections, or any other document supporting his appeal. Defendant filed a response and a motion to supplement the record, which

we ordered taken with the case. For the following reasons, we deny the defendant's motion to supplement the record, grant OSAD's motion to withdraw as counsel on appeal, and affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of aggravated battery of a child and sentenced to 29 years in prison. His conviction and sentence were affirmed on direct appeal. *People v. Johnson*, No. 5-09-0661 (2010) (unpublished order under Illinois Supreme Court Rule 23). We later affirmed the denial of his petition for postconviction relief. *People v. Johnson*, 2016 IL App (5th) 130554, ¶¶ 40-41. Defendant subsequently filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)) and a motion for leave to file a successive postconviction petition, both of which were dismissed. Defendant appealed those dismissals, but this court granted defendant's motion to voluntarily dismiss the consolidated appeal.

¶ 5 Thereafter, defendant again moved for leave to file a successive postconviction petition. The motion asserted there was cause because defendant was not an attorney and did not have adequate access to the law library to research rules and procedures of the law. The accompanying successive postconviction petition raised six issues: (1) defendant's fourth amendment rights were violated during his interrogations by the police; (2) the prosecutor misstated the law during closing arguments; (3) the trial court erred in failing to instruct the jury on the definition of knowing conduct; (4) it was improper to receive a 29-year sentence after rejecting a 12-year sentence during plea negotiations; (5) a juror was employed as a public defender and defendant was previously represented by an attorney in that juror's office but not by the juror himself; and (6) defendant was actually innocent, as demonstrated by hospital records showing that one of the victim's injuries

could not have happened on the date alleged by the State. The circuit court denied leave, and defendant now appeals.

¶ 6 ANALYSIS

¶ 7 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) provides a mechanism by which state prisoners may collaterally challenge their convictions and/or sentences for substantial violations of their federal or state constitutional rights that occurred at their trial and could not have been previously adjudicated. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). "[T]he Act contemplates the filing of only one postconviction petition." *People v. Anderson*, 375 Ill. App. 3d 990, 1000 (2007). All issues that were decided on direct appeal or in prior postconviction proceedings are barred by the doctrine of *res judicata*. *Id.* Here, defendant's claim that the State misstated the applicable law during closing argument was raised and rejected on direct appeal. *People v. Johnson*, No. 5-09-0661 (2010) (unpublished order under Illinois Supreme Court Rule 23). "The doctrine of *res judicata* bars the consideration of issues that were previously raised and decided on direct appeal." *People v. Newbolds*, 364 Ill. App. 3d 672, 675 (2006). As such, this issue is barred.

¶ 8 Further, all issues that could have been raised in the original proceeding or prior postconviction proceedings, but were not, are forfeited. *Anderson*, 375 Ill. App. 3d at 1000 (citing *People v. Blair*, 215 Ill. 2d 427, 443 (2005)). The procedural bar of forfeiture is not merely a rule of judicial administration; it is an express statutory requirement under the Act. *Id.* at 1001. Only where fundamental fairness so requires will the doctrine of forfeiture be relaxed. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004).

¶ 9 The cause-and-prejudice test adopted by the supreme court in *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002), and codified in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West

2016)) is the analytical tool used to determine whether fundamental fairness requires an exception to the statutory procedural bar of forfeiture. *People v. Edwards*, 2012 IL 111711, ¶ 22. To show cause, defendant must identify "an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings." 725 ILCS 5/122-1(f)(1) (West 2016). To show prejudice, defendant must demonstrate 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.* § 122-1(f)(2). Defendant must satisfy both prongs of this test to obtain leave to file his successive postconviction petition. *People v. Guerrero*, 2012 IL 112020, ¶ 15.

¶ 10 The only reason defendant provided for failing to raise his claims on direct appeal or in his prior postconviction petitions was that he is not an attorney, did not have "adequate and/or consistent access to the law library/material resources," and that "some of the necessary information was just recently made available." However, defendant was represented by counsel on direct appeal and during his first postconviction petition proceedings. Further, inadequate access to a law library is insufficient, in and of itself, to establish cause. See *People v. LaPointe*, 365 Ill. App. 3d 914, 924 (2006). Therefore, we find that defendant failed to provide a sufficient explanation as to why these claims could not have been raised before. We agree with OSAD that no meritorious argument can be made to support a claim that the circuit court erred in finding that defendant failed to meet the cause prong of the cause-and-prejudice test. As such, we need not consider the issue of prejudice. See *People v. Brown*, 225 Ill. 2d 188, 207 (2007) (if one prong of the cause-and-prejudice test has not been established, the other prong need not be considered).

¶ 11 Defendant also raised a claim of actual innocence. A freestanding claim of actual innocence may be asserted in a successive postconviction petition without meeting the cause-and-prejudice test. *People v. Ortiz*, 235 Ill. 2d 319, 332 (2009). To raise a colorable claim of actual innocence, a

defendant must show that the new evidence: (1) was not available at the original trial and could not have been discovered sooner through due diligence, (2) is material and noncumulative, and (3) is of such conclusive character that it would probably change the result on retrial. *Id.* at 333-34. Here, defendant claimed that one of the child's injuries could not have happened on January 22, 2007, as alleged by the State. However, defendant did not allege that the hospital records supporting his claim were unavailable at trial. Consequently, this allegation fails to raise a colorable claim of actual innocence.

¶ 12 As a final matter, we address the defendant's motion to supplement the record with what appear to be copies of medical records. Illinois Supreme Court Rule 329 (eff. Jun. 1, 2017) permits a party to supplement the record on appeal to supply omissions, to correct errors, and to settle any controversy about whether the record accurately reflects what occurred at trial. However, it allows supplementation "only with documents which were actually before the trial court." *Deason v. Gutzler*, 251 Ill. App. 3d 630, 631 (1993). Defendant's "motion" does not allege that the documents attached thereto were before the trial court. Defendant's "motion" also fails to make any assertions of fact or arguments and consists of nothing more than a caption and the copies of the documents in question. Defendant's motion is denied.

¶ 13 CONCLUSION

¶ 14 For the foregoing reasons, we deny defendant's motion to supplement the record, grant OSAD's motion to withdraw, and affirm the judgment of the circuit court.

¶ 15 Motion to supplement denied; motion to withdraw granted; judgment affirmed.

5-18-0201

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRANDON L. JOHNSON, Defendant-Appellant.	Madison County Trial Court/Agency No.: 07CF211

ORDER

This cause coming on to be heard on defendant-appellant's petition for rehearing and the court being advised in the premises:

IT IS THEREFORE ORDERED that the petition for rehearing is denied.

SUPREME COURT OF ILLINOIS

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November 30, 2022

In re: People State of Illinois, respondent, v. Brandon L. Johnson, petitioner. Leave to appeal, Appellate Court, Fifth District. 128807

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 01/04/2023.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

Additional material from this filing is available in the Clerk's Office.