

NOTICE
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2017 IL App (5th) 140280-U

NO. 5-14-0280

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. 02-CF-1381
)	
MICHAEL FOSTER,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly denied the defendant's motion for leave to file a successive postconviction petition where the defendant failed to satisfy the cause prong of the cause-and-prejudice test.

¶ 2 The defendant, Michael Foster, appeals from the circuit court's judgment denying his motion for leave to file a successive postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The court denied the defendant's motion after determining that he failed to adequately explain his reasons for not raising his new claim of error in a timely fashion; and, therefore, he did not

provide a sufficient basis for the court to allow a successive postconviction petition. For reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4 In August 2004, the defendant was convicted after a jury trial in St. Clair County of two counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2002)) and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2002)). At the defendant's sentencing hearing in November 2004, the State argued that consecutive sentences were mandated by section 5-8-4(a)(i) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4(a)(i) (West 2004)).¹ The State asserted that the two Class X felony counts of aggravated battery with a firearm involved separate acts, by the defendant, of inflicting severe bodily injury. Specifically, the State asserted that the defendant was convicted of shooting the victim two times, once in the neck and once in the leg, inflicting severe bodily injury with each shot.

¶ 5 In response, trial counsel argued that the defendant's acts amounted to one course of conduct; therefore, consecutive sentences were not mandated. Trial counsel stated, "I've never heard of an instance, whether we're talking about a fight when there's multiple punches thrown and landed, whether we're talking about a stabbing, a shooting, where there was multiple wounds, I've never heard of any instance where those were each—

¹Section 5-8-4(a)(i) reads in pertinent part: "The court shall impose consecutive sentences if: (1) one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury."

each instance was run consecutively to each other." The court agreed with the State and found that each count of aggravated battery with a firearm involved separate acts; thus, the mandatory consecutive sentencing provision of section 5-8-4(a)(i) of the Code was applicable. The defendant was sentenced to a consecutive 15-year prison term on both counts of aggravated battery with a firearm, and the court determined that the one count of aggravated discharge of a firearm merged with the other counts.

¶ 6 In December 2004, the defendant filed a motion to reconsider the sentence, arguing that he should have received a concurrent sentence because there was only one victim; that the circuit court erred where it found that the victim had suffered severe bodily injury; and that his sentence was excessive. Following a hearing on the defendant's motion to reconsider, the court denied the motion. The defendant filed a timely direct appeal.

¶ 7 Direct Appeal

¶ 8 The defendant's sole claim on direct appeal was that he should have been convicted of one count of aggravated battery with a firearm because the convictions involved one physical act—the rapid fire shooting of the victim. This court affirmed the circuit court and held that the defendant was properly convicted of both counts where the victim was shot twice, resulting in two separate injuries. *People v. Foster*, No. 5-05-0089 (2006) (unpublished summary order under Supreme Court Rule 23).

¶ 9

Initial Postconviction Petitions

¶ 10 In May 2007, the defendant filed a 53-page, handwritten *pro se* postconviction petition where he raised countless claims of error. The defendant was appointed counsel and the court granted leave to file an amended postconviction petition within 90 days.

¶ 11 In May 2009, after several extensions of time, the defendant's postconviction counsel filed the amended postconviction petition. The amended petition was signed by the defendant and added several contentions of error not contained in the defendant's *pro se* postconviction petition regarding trial counsel's failure to make necessary objections at trial. The State then filed a motion to dismiss the amended postconviction petition.

¶ 12 In August 2009, the circuit court held a hearing on the State's motion to dismiss. Prior to the hearing, postconviction counsel, as required by Supreme Court Rule 651(c), filed a certificate of compliance affirming that he had "examined the entire record of the proceedings of trial" and "made any amendments *** [to the *pro se* postconviction petition] necessary for adequate presentations of defendant's contentions." In addition, postconviction counsel's 651(c) certificate also stated that he had "consulted with Defendant by correspondence to him dated 8/27/08, 11/6/08, 12/3/08, 3/10/09, 3/24/09, 4/13/09, 6/24/09, and 6/26/09 to ascertain his contentions of deprivations of constitutional rights"; and that he had "reviewed correspondence from the defendant dated 5/8/08, 6/1/08, 9/5/08, 11/11/08, and 3/9/2009." After hearing argument from both sides, the court granted the State's motion to dismiss. The defendant then appealed the court's dismissal of his amended postconviction petition.

¶ 13 Appeal From Dismissal of Amended Postconviction Petition

¶ 14 On appeal, the defendant was appointed appellate counsel to represent him on the dismissal of his postconviction petition. However, the defendant's appellate counsel filed a motion to withdraw, alleging that there was no merit to the appeal. In response, the defendant filed a *pro se* "Appellant's Brief and Response to [Appellate] Defender's Motion to Withdraw as Counsel on Appeal" alleging the same errors previously raised on direct appeal and in his amended postconviction petition. In August 2011, this court granted appellate counsel's motion to withdraw and affirmed the circuit court's dismissal of the defendant's amended postconviction petition. *People v. Foster*, 2011 IL App (5th) 090470-U. The defendant filed a petition for leave to appeal to the Illinois Supreme Court, which was later denied.

¶ 15 Request for Leave to File a Successive Postconviction Petition

¶ 16 In June 2014, the defendant filed a *pro se* request for leave to file a successive postconviction petition. A copy of his proposed petition and affidavit in support of his newly raised claim was attached to the defendant's request for leave. The defendant first claimed that trial counsel provided ineffective assistance when counsel failed to inform him that the two counts of aggravated battery with a firearm carried mandatory consecutive sentences. In support, he filed his own affidavit where he affirmed that the State's offer was 12 years' imprisonment in exchange for his guilty plea to each of the two counts of aggravated battery with a firearm. The defendant further asserted that had he been properly informed of the mandatory consecutive sentences "it's likely [he] would have accepted the State's *** [plea] offer and pleaded [g]uilty."

¶ 17 Next, the defendant alleged that he was denied a reasonable level of assistance by his postconviction counsel during the postconviction proceedings. The defendant affirmed in his affidavit that his postconviction counsel had failed to include his claim of ineffective assistance of trial counsel, despite the defendant's request that the claim be added.

¶ 18 Lastly, the defendant claimed that he was denied reasonable assistance from his appellate counsel regarding his appeal from the denial of the amended postconviction petition. The defendant asserted that his appellate counsel refused to raise both claims on appeal—trial counsel's ineffective assistance and the denial of reasonable assistance from his postconviction counsel during the postconviction proceedings—but, instead, filed a motion to withdraw where he alleged that the defendant's appeal had no merit. In June 2014, the circuit court summarily denied the defendant's request to file a successive postconviction petition. The defendant filed a timely notice of appeal.

¶ 19

ANALYSIS

¶ 20 The sole issue on appeal is whether the circuit court erred in denying the defendant leave to file his successive postconviction petition. Initially, we note that successive postconviction actions are disfavored by Illinois courts. *People v. Edwards*, 2012 IL 111711, ¶ 29. Issues raised and decided on direct appeal are barred from postconviction consideration under the doctrine of *res judicata*, and any other claims that could have been presented to the reviewing court will be deemed waived. *People v. Neal*, 142 Ill. 2d 140, 146 (1990). Consistent with these principles, section 122-1(f) of the Act permits the filing of only one petition without leave of court, and section 122-3 of the Act expressly

provides that any claim not raised in the original or an amended petition is waived. 725 ILCS 5/122-1(f), 122-3 (West 2012).

¶ 21 Nevertheless, the supreme court has provided two bases upon which the bar against successive proceedings will be relaxed. *Edwards*, 2012 IL 111711, ¶ 22. First, the bar is relaxed if necessary to prevent a fundamental miscarriage of justice; however, to demonstrate such a miscarriage of justice, a defendant must show actual innocence. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Second, the bar will be relaxed where a defendant can establish "cause and prejudice" for the failure to raise the claim earlier. *Id.* Under the cause-and-prejudice test, leave of court may be granted only if a defendant demonstrates both cause for his or her failure to bring a claim in an initial postconviction petition and prejudice resulting from that failure. *Id.* at 462.

¶ 22 The *Pitsonbarger* cause-and-prejudice exception is now codified in section 122-1(f) of the Act, which reads in pertinent part:

"(1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice 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." 725 ILCS 5/122-1(f) (West 2012).

¶ 23 To obtain leave to file, a defendant need not present conclusive proof of cause and prejudice but must merely adequately allege facts demonstrating both. *People v. Smith*, 2014 IL 115946, ¶ 34. However, a defendant must submit enough in the way of

documentation to allow a circuit court to make the cause-and-prejudice determination. *Id.* ¶ 35. As such, to prevail on a motion for leave to file a successive postconviction petition, a defendant must satisfy both prongs of the cause-and-prejudice test. *People v. Guerrero*, 2012 IL 112020, ¶ 15. The appropriate standard of review regarding a circuit court's order denying leave to file a successive postconviction petition is *de novo*, and it may be affirmed on any basis supported by the record. *People v. Jones*, 2016 IL App (1st) 123371, ¶ 74.

¶ 24 Here, the defendant contends that the bar should be relaxed because he has satisfied the cause-and-prejudice test. In support, the defendant's motion for leave to file alleged: (1) ineffective assistance of trial counsel, who failed to inform him that the charges of aggravated battery with a firearm carried mandatory consecutive sentences; (2) inadequate representation by postconviction counsel, who failed to include his claim for ineffective assistance of trial counsel in the amended postconviction petition; and (3) unreasonable assistance of appellate counsel, who refused to raise both claims—ineffective assistance of his trial counsel and the inadequate representation by his postconviction counsel.

¶ 25 The defendant claims that he adequately alleged facts to demonstrate cause and prejudice. First, the defendant claims that he demonstrated cause by asserting that he was impeded in raising those claims in the postconviction proceeding because of postconviction counsel's failure to include the claim in the amended petition, despite the defendant's request that it be added. Next, the defendant claims that he demonstrated prejudice by asserting that his right to due process has been violated because his trial

counsel was ineffective during plea negotiations. Specifically, the defendant asserts that his trial counsel failed to inform him that he was eligible for the mandatory consecutive sentencing requirement, pursuant to section 5-8-4(a)(i) of the Code (730 ILCS 5/5-8-4(a)(i)), and, had he been aware of this fact, he likely would have accepted the State's plea offer. In support of the defendant's request for leave, he attached his own affidavit, where he personally affirmed the truth of these assertions.

¶ 26 We begin by determining if the defendant adequately demonstrated cause. As previously noted, cause is demonstrated when a defendant identifies an objective factor external to the defense which impeded the defendant's ability to raise the present claim in the initial postconviction proceeding. *Pitsonbarger*, 205 Ill. 2d at 462. When cause is based upon a fundamental deficiency in the first postconviction proceeding, the defendant must show that the deficiency directly impeded his ability to raise the specific claim now asserted. *Id.* To meet this burden, a defendant must (1) adequately allege facts demonstrating cause and (2) submit enough in the way of documentation to allow the circuit court to make a determination as to whether a defendant has established cause. *Smith*, 2014 IL 115946, ¶ 35.

¶ 27 The defendant first claims that he has adequately alleged facts and submitted sufficient documentation to demonstrate cause. The defendant alleges that his postconviction counsel's failure to raise the present claim in the amended postconviction petition resulted in a fundamental deficiency in the postconviction proceeding. Specifically, the defendant alleges that he was unable to raise the present claim because of postconviction counsel's failure to include the claim in the amended postconviction

petition, even though the defendant requested him to do so. Thus, this claim was improperly omitted from consideration during the postconviction proceedings. The defendant asserts that these factual allegations, supported by his own affidavit, were adequate to demonstrate that postconviction counsel was an "objective factor external to the defense that impeded his ability to raise the present claim." *Pitsonbarger*, 205 Ill. 2d at 462. We disagree.

¶ 28 Initially, we observe that the defendant's allegation, that he was unable to raise the present claim because of postconviction counsel's failure to include the claim in the amended petition, is unsupported by the record. In fact, the record is devoid of any confirmatory evidence that the defendant requested postconviction counsel to include the present claim in the amended postconviction petition, and, instead, we find that the record reveals several instances that appear to conflict with this allegation.

¶ 29 The record reflects that the defendant's postconviction counsel filed a certificate in accordance with Supreme Court Rule 651(c) where he affirmed that he and the defendant had discussed the amended petition during an in-person meeting, and that they exchanged written correspondence on numerous dates after the meeting. Postconviction counsel also affirmed that he examined the record of the trial proceedings, consulted with the defendant to ascertain his contentions of deprivations of constitutional rights, and made any necessary amendments to reflect the defendant's contentions. Additionally, postconviction counsel, after reviewing the trial transcript, amended the defendant's *pro se* postconviction petition by including several additional claims of error.

¶ 30 Also, we observe that the defendant had knowledge of the facts necessary to raise the present claim after he received mandatory consecutive sentences. Despite this knowledge, the defendant failed to raise the present claim on direct appeal or in any of the *pro se* pleadings he filed after his sentencing hearing, including his 53-page, handwritten *pro se* postconviction petition and his *pro se* "Appellant's Brief and Response to [Appellate] Defender's Motion to Withdraw as Counsel on Appeal." Moreover, we find it significant that the defendant signed the amended postconviction petition, even though it did not contain the present claim he now raises in this appeal. Thus, in contradiction to the defendant's allegation, postconviction counsel's 651(c) certificate coupled with the defendant's signature affixed to the amended petition affirms that the defendant discussed the amended petition with his postconviction counsel, read the allegations contained therein, and was satisfied with its contents. Therefore, the defendant's allegation that he was impeded from raising the claim, based on his previous counsels' failures to raise the claim, is without merit.

¶ 31 Additionally, we observe that the only documentation included in the defendant's request for leave was his own self-serving affidavit. The defendant failed to include other documentation, such as any relevant correspondence, in support of his allegation that postconviction counsel failed to include the present claim. The defendant's request for leave to file a successive postconviction petition also did not include any explanation for his signature on the amended postconviction petition, which did not contain the present claim on appeal. The defendant also failed to explain his reasons for not raising the present claim after his sentencing hearing, either on direct appeal or in his earlier *pro se*

pleadings. Therefore, based on the record, we conclude that the defendant has failed to provide sufficient documentation to support the factual allegations contained in his request for leave to file a successive postconviction.

¶ 32 Based on the foregoing, we find that the defendant has failed to demonstrate cause for his failure to raise the present claim in the initial postconviction proceeding. Because the defendant failed to demonstrate cause, we need not reach whether he has demonstrated prejudice. See *People v. Brown*, 225 Ill. 2d 188, 207 (2007) (court held that "it is not necessary" to consider one prong if it determines the other prong is lacking). Accordingly, we hold that the defendant has no right to a successive postconviction petition under the Act.

¶ 33 CONCLUSION

¶ 34 For the reasons stated, we affirm the circuit court's order denying the defendant's motion for leave to file a successive postconviction petition.

¶ 35 Affirmed.