

NOTICE

This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2023 IL App (4th) 221024-U

NO. 4-22-1024

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 19, 2023
Carla Bender
4th District Appellate
Court, IL

| | | |
|--------------------------------------|---|--------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Rock Island County |
| FINIS E. LEONARD, |) | No. 06CF313 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Daniel P. Dalton, |
| |) | Judge Presiding. |

PRESIDING JUSTICE DeARMOND delivered the judgment of the court.
Justices Zenoff and Doherty concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court’s dismissal of defendant’s motion for leave to file a successive postconviction petition where he failed to show prejudice as required to obtain leave.

¶ 2 Defendant, Finis E. Lenoard, appeals from the trial court’s November 2022 denial of his motion for leave to file a successive postconviction petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Sentencing

¶ 5 In August 2007, a jury found defendant guilty of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2006)) (count I) and unlawful possession of a weapon by a felon (UPWF) (720 ILCS 5/24-1.1(a) (West 2006)) (count II).

¶ 6 At the September 2007 sentencing hearing, the presentence investigation report (PSI) was admitted with corrections. The State offered to correct count II of defendant’s

conviction to be sentenced as a Class 3 felony because the State failed to allege a previous UPWF conviction in the information. Additionally, a previous UPWF conviction in Rock Island County case No. 98-CF-854 was incorrectly identified as a Class X felony, although the record is not clear if it was corrected. Defendant's remaining traffic citations were dismissed without objection from the State. Neither party presented any evidence.

¶ 7 Defendant's statement in allocution criticized the State, challenged the credibility of trial witnesses, and professed his innocence.

¶ 8 In imposing sentence, the trial court emphasized defendant's prior juvenile and criminal record. The court found defendant was a "dangerous person" and that a prison sentence was necessary to deter others and protect the public. Specifically, the court stated:

"[T]his is one of the worst criminal records that I have seen. I mean it is just continual, continual. And two previous convictions having to do with guns. The '96 felony conviction, four years in the Department of Corrections, unlawful use of weapons. And then a 14 year[] sentence to the Department of Corrections, for aggravated discharge of a firearm two counts and unlawful use or possession of a weapon. And here we are again with the same charge. [Defendant] is a hazard to society. He just can't be permitted to be free."

The court sentenced defendant to 30 years' imprisonment on count I, to be served concurrently with a 10-year prison sentence on count II.

¶ 9 B. Direct Appeal

¶ 10 On direct appeal, defendant argued (1) his conviction for being an armed habitual criminal violated the constitutional prohibition against *ex post facto* laws, (2) he was denied a fair trial, and (3) the State committed plain error when it cross-examined him. *People v. Leonard*,

391 Ill. App. 3d 926, 930, 911 N.E.2d 403, 408 (2009). The appellate court affirmed. *Leonard*, 391 Ill. App. 3d at 937.

¶ 11 C. Defendant's Prior Postconviction Filings

¶ 12 In August 2010, defendant filed a postconviction petition, arguing his appellate counsel on direct appeal was ineffective for failing to argue ineffective assistance of trial counsel because defendant did not have his preliminary hearing within 48 hours of his arrest. The trial court dismissed the petition as frivolous and without merit because Illinois law does not require a preliminary hearing within 48 hours. Defendant appealed, and the appellate court affirmed. *People v. Leonard*, No. 3-10-0776 (Feb. 7, 2012) (unpublished order under Illinois Supreme Court Rule 23).

¶ 13 In December 2011, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), seeking to void his conviction because (1) a material witness was coerced into providing false testimony, and (2) the prosecuting attorney was disciplined in an unrelated matter by the Attorney Registration and Disciplinary Commission and later resigned. The trial court dismissed defendant's petition. Defendant appealed but later moved to withdraw his appeal. Defendant's appeal was dismissed on defendant's motion. *People v. Leonard*, No. 3-12-0211 (Aug. 2, 2012) (unpublished order). Thereafter, defendant filed a petition for rehearing from the dismissal of the section 2-1401 petition. The court dismissed the petition for rehearing, defendant appealed, and the matter was remanded. *People v. Leonard*, No. 3-12-0870 (Apr. 8, 2014) (unpublished order). In May 2015, the trial court denied defendant's petition. Defendant appealed, and the appellate court affirmed. *People v. Leonard*, No. 3-15-0363 (Apr. 25, 2017) (unpublished order under Illinois Supreme Court Rule 23).

¶ 14 In January 2018, defendant filed another petition for relief from judgment, arguing the judge presiding over his trial was biased and a conflict existed between the trial judge and his trial counsel. The trial court denied the petition, and the appellate court affirmed. *People v. Leonard*, No. 3-18-0591 (Apr. 30, 2020) (unpublished order under Illinois Supreme Court Rule 23).

¶ 15 D. Defendant's Postconviction Filing at Issue on Appeal

¶ 16 In November 2020, defendant filed a postconviction petition, requesting it be treated as his first postconviction petition or, alternatively, he be granted leave to file it as a successive postconviction petition. Defendant argues his initial 2010 postconviction petition was filed by a fellow inmate, Eric Caine, without defendant's knowledge or consent. At the time, Caine worked as a clerk in the prison law library and had access to defendant's legal paperwork. Caine was eventually released from prison. Defendant stated it took him nearly 10 years to locate Caine and obtain an affidavit from him. Caine's affidavit states he was assisting defendant in preparing his initial postconviction petition when defendant's housing unit was put into lockdown. Caine was aware defendant wanted to raise other issues in his petition, but due to the lockdown, he filed the petition so defendant would not miss the filing deadline.

¶ 17 The 2020 petition argues (1) the jury was biased during *voir dire*, (2) various ineffective assistance of trial counsel claims, (3) a speedy trial violation, (4) prosecutorial misconduct, (5) cumulative trial court errors, and (6) various ineffective assistance of appellate counsel claims, including that appellate counsel was ineffective for failing to challenge his 30-year sentence as excessive on direct appeal.

¶ 18 Defendant retained private counsel, who submitted a memorandum in support of treating the 2020 petition as an initial postconviction filing. The trial court rejected the argument,

finding defendant had knowledge his initial postconviction petition had been filed and that it appeared to have been signed and filed by defendant himself. Treating the postconviction petition as successive, the court denied defendant leave for failing to show cause for why he did not raise his new claims in his initial petition.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues the trial court erred in denying his motion for leave to file a successive postconviction petition. We note defendant does not challenge the court's decision to construe the petition as a successive rather than an initial petition. Specifically, defendant contends he should be granted leave because Caine filed an incomplete initial postconviction petition on defendant's behalf, omitting the following sentencing error claims: (1) his trial counsel was ineffective for failing to file a motion to reconsider defendant's sentence, and (2) appellate counsel on direct appeal was ineffective for failing to challenge his sentence as excessive and an improper double enhancement. Defendant requests reversal of the court's denial and remand for further proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)).

¶ 22 A. The Act

¶ 23 “The Act itself contemplates the filing of a single petition ***.” *People v. Lusby*, 2020 IL 124046, ¶ 27, 182 N.E.3d 563. However, there are two bases upon which the bar against successive proceedings will be relaxed. *People v. Edwards*, 2012 IL 111711, ¶ 22, 969 N.E.2d 829. “The first basis for relaxing the bar is when a petitioner can establish ‘cause and prejudice’ for the failure to raise the claim earlier.” *Edwards*, 2012 IL 111711, ¶ 22. “The second basis by which the bar to successive postconviction proceedings may be relaxed is what is known as the

‘fundamental miscarriage of justice’ exception.” *Edwards*, 2012 IL 111711, ¶ 23. However, “[t]o demonstrate such a miscarriage of justice, a petitioner must show actual innocence.” *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621 (2002). Here, defendant does not make a claim of actual innocence.

¶ 24 Section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2020)) requires a defendant to show (1) cause for failing to raise a claim in the defendant’s initial postconviction petition, and (2) prejudice resulting from the defendant’s failure to raise the claim. *People v. Moore*, 2023 IL App (4th) 210245, ¶ 45. Showing cause requires identifying an objective factor that impeded the defendant’s ability to raise the claim in the initial postconviction petition. *Moore*, 2023 IL App (4th) 210245, ¶ 45. Showing prejudice requires the defendant to articulate how a “claim not raised during the initial proceeding so infected the trial that the resulting conviction or sentence violated due process.” *Moore*, 2023 IL App (4th) 210245, ¶ 45. “[F]or a defendant to obtain leave to file a successive postconviction petition, *both* prongs of the cause-and-prejudice test must be satisfied.” (Emphasis added.) *People v. Ryburn*, 2019 IL App (4th) 170779, ¶ 19, 134 N.E.3d 348. The failure to establish either prong is fatal to the claim. *People v. Howard*, 2021 IL App (2d) 190695, ¶ 21, 187 N.E.3d 819. “A trial court’s denial of leave to file a successive petition is reviewed *de novo*.” *Moore*, 2023 IL App (4th) 210245, ¶ 46.

¶ 25 B. This Case

¶ 26 While defendant makes various arguments that he established cause, we need not address them because we conclude he cannot show prejudice.

¶ 27 Defendant argues (1) his trial counsel was ineffective for failing to file a motion to reconsider defendant’s sentence, and (2) appellate counsel on direct appeal was ineffective for failing to challenge his sentence as excessive and an improper double enhancement. The State

argues defendant has forfeited these issues on appeal because they were not raised in his successive postconviction petition.

¶ 28 Our supreme court has held claims not raised in a defendant's postconviction petition cannot be argued for the first time on appeal. *People v. Pendleton*, 223 Ill. 2d 458, 475, 861 N.E.2d 999, 1009 (2006). Because defendant's petition references ineffective assistance of both trial counsel and appellate counsel, we review whether his petition's claims correspond with the arguments he now makes on appeal.

¶ 29 Defendant's successive postconviction petition alleges trial counsel was ineffective for (1) failing to investigate his case prior to trial, (2) failing to object to the State's treatment of a witness as hostile, (3) failing to object to hearsay, (4) failing to move to dismiss the case, (5) being asleep, (6) failing to move to dismiss the information for a technical defect, and (7) failing to object or preserve errors related to a variety of issues. However, none of the claims raised regarding trial counsel pertain to sentencing. Therefore, we find defendant has forfeited any claims related to his sentence and the ineffective assistance of trial counsel. See *People v. Reed*, 2014 IL App (1st) 122610, ¶ 43, 25 N.E.3d 10 (stating the appellate court "lacks the authority to excuse an appellate forfeiture caused by the failure of a litigant to include issues in his or her postconviction petition"). The petition, however, does allege appellate counsel was ineffective for failing to raise the issue of his 30-year sentence as excessive—an issue we can address.

¶ 30 Claims of ineffective assistance of appellate counsel are governed by the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Johnson*, 206 Ill. 2d 348, 377-78, 794 N.E.2d 294, 312 (2002). To succeed on an ineffective-assistance-of-appellate-counsel claim during the first stage of a postconviction proceeding, a defendant must

show it is arguable (1) his appellate counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability, but for appellate counsel's errors, the appeal would have been successful. *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009). Appellate counsel's decision regarding which issues to pursue is generally entitled to substantial deference. *People v. Johnson*, 205 Ill. 2d 381, 406, 793 N.E.2d 591, 606 (2002). Appellate counsel is not required to “ ‘brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit.’ ” *Johnson*, 206 Ill. 2d at 378 (quoting *People v. Easley*, 192 Ill. 2d 307, 329, 736 N.E.2d 975, 991 (2000)). Where the underlying issue is nonmeritorious, a defendant suffers no prejudice; therefore, the reviewing court is required to examine the merits of the claims not raised by appellate counsel. *People v. Simms*, 192 Ill. 2d 348, 362, 736 N.E.2d 1092, 1107 (2000).

¶ 31 “The appellate court will not reverse a sentence unless it is evident that the trial court relied upon an improper factor.” *People v. Hibbler*, 2019 IL App (4th) 160897, ¶ 65, 129 N.E.3d 755. “A double enhancement occurs when (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence *** or (2) the same factor is used twice to elevate the severity of the offense itself.” (Internal quotation marks omitted.) *Hibbler*, 2019 IL App (4th) 160897, ¶ 66. “Whether the trial court relied upon an improper factor at sentencing is a question of law reviewed *de novo*.” *Hibbler*, 2019 IL App (4th) 160897, ¶ 65.

¶ 32 Defendant contends the trial court's reference to his previous convictions for UPWF and aggravated discharge of a firearm were factors inherent in his offense as an armed habitual criminal and amounted to an improper factor on which to base defendant's maximum prison sentence. We disagree.

¶ 33 The trial court noted defendant's prior juvenile and adult criminal record and found him to be a "dangerous person." The court also found defendant's prison sentence was necessary to both deter others and protect the public. The court did reference defendant's previous convictions that were elements of the armed habitual criminal offense. However, the court was required to consider defendant's PSI, which contained his prior UPWF and aggravated discharge of a firearm convictions. 730 ILCS 5/5-4-1(a)(2) (West 2006); *People v. Brown*, 2018 IL App (1st) 160924, ¶ 21, 129 N.E.3d 150. The context of the court's references to defendant's previous convictions pertains to what the court deemed the "worst criminal record[]" it had seen. When "announcing its sentencing decision, [the court] is not required to refrain from any mention of the factors that constitute elements of an offense, and the mere reference to the existence of such a factor is not reversible error." *Brown*, 2018 IL App (1st) 160924, ¶ 22. "Sentencing hearings do not occur in a vacuum, and the duty to impose a fair sentence entails an explanation of the court's reasoning in the context of the offenses of which a defendant has been convicted." *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 15, 50 N.E.3d 723 (stating a trial judge's commentary on the nature and circumstances of a defendant's crime does not necessarily result in improperly using elements of the offense as factors in aggravation).

¶ 34 Defendant has only pointed to the trial court's reference of his prior gun-related offenses, which were elements of his armed habitual criminal offense. Defendant carries an affirmative burden to establish his sentence was based on improper considerations. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49, 38 N.E.3d 98. Because defendant has not met his burden, he has not shown any reasonable probability of a different outcome on appeal. Thus, defendant has not shown prejudice.

¶ 35 Defendant is required to show both cause and prejudice to obtain leave to file a successive postconviction petition. *Ryburn*, 2019 IL App (4th) 170779, ¶ 19. While the trial court dismissed defendant’s petition on cause grounds, we are not obligated to follow suit. See *Tillman v. Pritzker*, 2021 IL 126387, ¶ 24, 183 N.E.3d 94 (stating the appellate court may sustain any judgment by the trial court “on any ground supported by the record, even a ground not relied on by that court”). Because defendant failed to show prejudice, we need not address his cause claim. *People v. Smith*, 2014 IL 115946, ¶ 37, 21 N.E.3d 1172 (“Having concluded that defendant cannot show prejudice, we need not address defendant’s claim of cause.”).

¶ 36

III. CONCLUSION

¶ 37

For the reasons stated, we affirm the trial court’s judgment.

¶ 38

Affirmed.