2021 IL App (1st) 180071

FIRST DISTRICT
FOURTH DIVISION
September 30, 2021

No. 1-18-0071

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	
LINORD THAMES,	)	No. 99 CR 1037504
Defendant-Appellant.	)	Honorable Angela M. Petrone, Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court, with opinion.
Justices Lampkin and Martin concurred in the judgment and opinion.

OPINION

¶ 1 Defendant Linord Thames[1] appeals the circuit court of Cook County's second-stage dismissal of his second successive postconviction petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, defendant argues the circuit court erred where (1) it dismissed the successive petition without rendering a determination on his motion for leave to file the successive postconviction petition and (2) he

[1]We note that defendant's name is also spelled "Linard" in the record.

met the cause-and-prejudice test. For the following reasons, we reverse and remand for the circuit court to rule on defendant's motion for leave to file a successive petition in accordance with section 122-1(f) of the Act (*id.* § 122-1(f)).

¶ 2 I. BACKGROUND

¶ 3 Following a jury trial, defendant was convicted of first degree murder, aggravated kidnapping, and attempted armed robbery. He was sentenced to serve 28 years for first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) and 14 years for aggravated kidnapping (*id.* § 10-2(a)(1)) in the Illinois Department of Corrections (IDOC), with the sentences to run concurrently. The evidence at trial established that on March 26, 1999, the victim Quinton Kirkwood had been playing dice with defendant and others in an apartment located on South Homan Avenue in Chicago. During the game, the victim had won several thousand dollars, while James Williams (Williams) had lost to the victim. The next day following the game, the victim's body was discovered in a rear basement stairwell of a building located on Christiana Avenue in Chicago. The victim had been shot to death. Thereafter, on April 30, 1999, defendant and his codefendants Williams, Antonio Thomas (Antonio), Duel Thomas (Duel), and Jeff Henderson (Henderson) were charged by indictment with first degree murder, aggravated kidnapping, kidnapping, and attempted armed robbery for the shooting death of the victim.[2] The State proceeded to prosecute defendant on a theory of accountability.

¶ 4 A. Pretrial Proceedings

¶ 5 Pertinent to this appeal is the testimony of Detective Patrick Foley, which was provided during a hearing on defendant's motion to quash and suppress evidence. Detective Foley testified that defendant was questioned as a possible witness on March 27, 1999. Detective Foley

[2]Antonio Thomas and Duel Thomas are referred to by their first names in this opinion due to the fact they share the same last name.

informed defendant that if he submitted to a polygraph examination and passed he would be released. On the following day, defendant took and passed the polygraph examination and was released in the early afternoon. On March 29, 1999, defendant returned to the police station voluntarily to retrieve his cellular telephone. Following his release, defendant had been implicated by others as being involved in the victim's murder. Accordingly, Detective Foley read defendant his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)), which defendant waived, and questioned him again regarding the murder. Defendant, with the assistance of an assistant state's attorney (ASA), then issued a written statement. Prior to trial, defendant's motion was ultimately denied.

¶ 6 B. Trial Proceedings

¶ 7 The matter then proceeded to a jury trial, which resulted in a mistrial. At defendant's second trial, the State presented the testimony of the following eight witnesses.

¶ 8 1. Testimony of Detective Foley

¶ 9 Detective Foley testified that on March 27, 1999, he was assigned to investigate the homicide of the victim. During the investigation, the victim's mother, Katie Kirkwood (Kirkwood) provided the police with defendant's name. In their respective interviews with the police, codefendant Henderson and witness Maurice Thomas (Maurice) implicated defendant as being involved in the incident.

¶ 10 Thereafter, on March 29, 1999, Detective Foley interviewed defendant. At the beginning of the interview, Detective Foley advised defendant of his *Miranda* rights, as defendant "had been implicated by others" as being involved in the incident. During the interview, defendant stated that on March 25, 1999, the victim, Williams, Duel, and Frederick Laws had participated in a dice game in an apartment located on South Homan Avenue in Chicago. The victim was "the

big winner" of the game. Defendant lost $150 at the game. After the game ended, the victim left the apartment. Williams then directed defendant to "go find Duel" and "get the money back from [the victim]." Defendant followed Williams's instructions and went to find Duel. When he found Duel, defendant informed him that the victim had "a lot of money" and "[Williams] wants you to get the money back."

¶ 11 2. Testimony of ASA Kelli Husemann

¶ 12 ASA Kelli Husemann testified that on March 30, 1999, she prepared a handwritten statement based on the oral statements made by defendant in the presence of Detective Foley. The entire text of the written statement was admitted into evidence and published to the jury.

¶ 13 In the written statement, defendant indicated that on the day of the shooting, March 26, 1999, he had participated in a dice game with the victim, Williams, Duel, Antonio, Henderson, Laws, Keith Walker and other individuals in an apartment located on South Homan Avenue. During the course of the game, Duel left and went to where Laws's uncle lived, which was located near the apartment. Near the end of the game, the victim won approximately $2500, while Williams had lost approximately $1500. Williams then stared at defendant until they made eye contact and pointed to the victim. The victim, at the time, was bent over, looking downwards to roll the dice. Williams mouthed to defendant to "go get Duel" so they could "get the money off of [the victim]."

¶ 14 Following Williams's instructions, defendant went to locate Duel. Upon finding Duel, defendant informed him that the victim had won $2500, while Williams had lost approximately $1000 to $1500 at the dice game. Defendant also stated to Duel that Williams wanted Duel to rob the victim and retrieve his money. Duel responded he could send another individual to the dice game "to kick in the door and take the money." Defendant indicated that was unnecessary and

that Duel should wait outside until the victim left the apartment.

¶ 15 After their conversation, defendant returned to the apartment where the dice game was still taking place. Shortly thereafter, Duel followed him into the apartment. When the victim noticed Duel, he "got jittery." He then passed out some money to the participants of the game, placed the rest of the money in his pocket, and left the apartment. Duel made eye contact with defendant, gave him the "yes sign," and left. Defendant and Williams then waited in the apartment for Duel to return with the victim's money.

¶ 16 Thereafter, approximately five minutes later, Duel returned to the apartment and stated he did not have the money, as the victim "took off." Duel also informed defendant and Williams that he "wasn't going to do it like that," meaning rob the victim, as the people in the neighborhood knew Duel's face and would observe him chasing the victim. After another five minutes had passed, the victim returned to the apartment. As soon as the victim arrived, Duel left so that the victim would not recognize him as the individual who had just chased him. Shortly thereafter, Ronnie Wheatley arrived and asked for Williams. Arrangements were made for Wheatley to drive the victim to his home in Williams's vehicle. The victim then proceeded to leave the apartment with Wheatley.

¶ 17 About a minute later, defendant heard a strange sound outside of the apartment. He looked out the side window and observed Antonio grabbing the victim on the stairway. The victim was struggling to get away. Defendant informed Williams what he had observed, but Williams said, "[b]e quiet." When defendant looked out the window again, he did not notice anyone outside. After defendant and Williams exited the apartment, Wheatley informed defendant, "[s]ome m*** pulled a gun in people's faces. I don't play that s***." Defendant instructed Wheatley to "keep his mouth closed." Thereafter, defendant and Williams met Duel,

who informed them that Antonio had taken the victim to the victim's house to get the money.

¶ 18 Sometime later, defendant heard approximately nine gunshots. About a minute later, he observed Henderson driving a black vehicle at a high rate of speed out of an alley. Walker then approached defendant and indicated that defendant would be "in trouble," as Antonio had shot the victim. Defendant called Williams on the phone and informed him "things went bad" and related to Williams that Antonio had shot the victim. Williams then picked defendant up in his automobile, and they spoke for approximately four minutes. Later, defendant met Duel and Antonio and confirmed that Antonio had shot the victim to death. Antonio indicated that Williams should not say anything about the incident. Defendant responded, "I ain't going to say nothing about this." In the written statement, defendant stated that he knew "things didn't go as they should have," "he was caught up in the middle," and he "knows now the whole idea of robbing the victim was a stupid idea."

¶ 19 ASA Husemann further testified that, after defendant provided the statement, she read the entire written statement out loud, "line by line," with defendant. Defendant was also provided an opportunity to review and make changes to the written statement. In addition, ASA Husemann, Detective Foley, and defendant each signed every page of the written statement and initialed the changes made to the statement.

¶ 20 3. Testimony of Ronnie Wheatley

¶ 21 Wheatley testified he often ran errands for people in his neighborhood on South Homan Avenue. On March 26, 1999, he ran several errands for Williams and defendant while they were at a dice game in an apartment located on South Homan Avenue. When Wheatley returned to the apartment at approximately 9 p.m. that day, Williams, defendant, and the victim were there. Williams asked Wheatley to take the victim home, but he refused because he had not been paid

for his errands. Wheatley suggested that Williams drive the victim home himself. Williams, however, indicated he had to do something else and added, "[c]ome on, I got you." Wheatley left the apartment and started walking down the stairway with the victim. Then Antonio suddenly approached Wheatley, stuck a handgun in his face, grabbed him by his jacket, and directed him to "get out" and "not say nothing." Antonio also grabbed the victim by his jacket and pushed him up against the wall. At that point, Wheatley ran away. When he returned to the apartment approximately 40 minutes later, he informed Williams that he did not appreciate having a firearm in his face. Williams "smirked." Wheatley then went home.

¶ 22 The next morning, Wheatley and defendant spoke in front of a tire shop located in the neighborhood. Wheatley was crying as he said the victim had been killed. In response, defendant stated, "Dam [*sic*], they wasn't supposed to kill him, *** they was just supposed to have stuck him up." He also said, "you see these guys ain't playing, man, watch watch [*sic*] yourself." Wheatley left the neighborhood for a week because he thought his life was threatened.

¶ 23 Wheatley further testified he is a recovering addict with two prior drug convictions, although he did not use drugs on March 25 or 26, 1999. In November 1999, he spoke with the police about the incident for the first time. He was in custody when he provided a written statement to an assistant state's attorney about the incident, which he signed but did not read. He denied, however, that he received anything in exchange for his trial testimony, as he had already received Treatment Alternatives to Street Crime (TASC) probation.

¶ 24 4. Testimony of Frederick Laws

¶ 25 Laws testified he had been defendant's friend for 20 years. On March 26, 1999, he attended Antonio's birthday party at his uncle's apartment located on South Homan Avenue. Duel, Antonio, Henderson, and Pena were also at the party. At approximately 8 p.m., defendant

arrived and briefly stepped into a bathroom with Duel. When they came out, Laws heard defendant inform Antonio and Duel that the victim had won approximately $8000 in a dice game and that Williams "had a lick for them," meaning Williams wanted them to rob the victim. Defendant also asked Duel and Antonio if they wanted to "get [the victim]." Shortly thereafter, defendant, Duel, and Antonio left the party. Laws acknowledged he had been convicted of controlled substance violations in 1989 and 1992.

¶ 26 5. Testimony of ASA Fabio Valentini

¶ 27 ASA Fabio Valentini testified he prepared a written statement based on information provided to him by Walter Pena. The entire text of Pena's written statement was admitted into evidence and published to the jury.

¶ 28 Pena's written statement indicated he had known defendant for two years prior to the incident. On March 26, 1999, Pena was attending Antonio's birthday party in an apartment located on South Homan Avenue. Defendant arrived later. Pena stepped out into the hallway with Duel for a few minutes and informed him the victim had won a lot of money from Williams in a dice game. Defendant then left. Thereafter, Duel informed Antonio and Henderson that the victim had won $7000 from Williams. Duel, Antonio, and Henderson then discussed "sticking up" the victim and returning Williams his money. Duel, Antonio, and Henderson subsequently left the party. Thereafter, Pena discussed with Laws that defendant, Duel, Antonio, and Henderson "were going to rob the [victim]" and whether "they were really going to do it." Pena then left the party. Shortly thereafter, while standing at the corner of South Homan Avenue and 16th Street, he heard gunshots and observed a black vehicle speeding out of an alley between South Homan Avenue and Christiana Avenue going through 16th Street.

¶ 29 ASA Valentini further testified that, after he finished handwriting Pena's statement, Pena

read the first paragraph aloud. ASA Valentini then read the rest of the statement aloud as Pena read along. Pena was allowed to make changes or additions to the written statement.

¶ 30 6. Testimony of Walter Pena

¶ 31 Pena later testified at trial and recanted what was contained in his written statement. In court, Pena stated that, near the end of March 1999, he attended Antonio's birthday party in an apartment located on South Homan Avenue. At the party, he observed Duel, Antonio, and Henderson, but he did not recall observing defendant there. Thereafter, on January 15, 2000, Pena provided a written statement to ASA Valentini regarding the incident. Pena, however, claimed that everything he had said regarding defendant in his written statement was "incorrect and untrue." He had made up the entire statement, as the police threatened him and he wanted to leave the police station.

¶ 32 7. Testimony of ASA Margaret Wood

¶ 33 ASA Margaret Wood testified that on November 23, 1999, she obtained a written statement from Walker. The entire text of Walker's written statement was admitted into evidence and published to the jury.

¶ 34 In the written statement, Walker stated that at approximately 5:30 p.m. on March 26, 1999, he drove a black vehicle to South Homan Avenue. After playing dice with defendant and Williams, he attended Antonio's birthday party and briefly left to visit a girlfriend. He drove Antonio's vehicle and left the black vehicle he had arrived in. When he returned to South Homan Avenue at approximately 10 p.m. that day, he found defendant, Duel, Antonio, Henderson, and Laws at the corner of the street. Walker learned that Antonio had thrown someone in the trunk of the black vehicle. Antonio informed Walker that "[Williams] put me on a lick and I had to off him." Walker knew this to mean that Antonio had committed a robbery and had killed the victim.

Later, Kirkwood pulled up and asked defendant if he had seen her son, the victim. Defendant responded "no," and Kirkwood left. Walker then retrieved the black vehicle and drove home.

¶ 35 ASA Wood further testified that she read the statement aloud after it was written. She also made corrections to the statement per Walker's request. ASA Wood, a police detective, and defendant signed each page of the written statement and initialed the changes made to the statement.

¶ 36 8. Testimony of Keith Walker

¶ 37 Walker testified that at approximately 5 p.m. on March 26, 1999, he drove a vehicle to South Homan Avenue, where he observed Williams and the victim playing dice in an automobile. Thereafter, on November 23, 1999, he gave a written statement to ASA Wood regarding the incident, but he disavowed portions of the statement at trial. He only admitted that he had observed defendant and had borrowed Antonio's vehicle on the night of the incident.

¶ 38 The State then rested. Defendant filed a motion for a directed verdict, which was denied.

¶ 39 9. Defendant's Evidence

¶ 40 Defendant testified on his own behalf. On March 26, 1999, he supervised a dice game in an apartment on South Homan Avenue. The victim and Williams participated in the game. Thereafter, defendant left to attend Antonio's birthday party, which was taking place in the home of Laws's uncle located on South Homan Avenue. At the party, defendant informed Duel that Williams had requested he return to the dice game. Defendant then left the party and went back to the dice game. When he arrived, the victim left the apartment but returned five minutes later. Defendant then heard someone "hollering." He pulled the window curtains and observed Antonio holding the victim by his collar and pushing him against a wall. Defendant informed Williams, but Williams instructed him to "be quiet." The next day, on March 27, 1999, defendant

met Wheatley and indicated it was a "sad situation" and that he wanted to find out who killed the victim. Defendant also mentioned to Wheatley that he should be careful.

¶ 41 Defendant further disavowed portions of the written statement he had provided to ASA Husemann. Specifically, defendant claimed he did not know Duel and Antonio were planning to rob the victim. He denied informing Wheatley that the victim should not have been killed. In addition, defendant testified that he did not implicate himself in the planning of the robbery during his interviews with the police or ASA Husemann. Defendant initially testified he did not recall that ASA Husemann allowed him to read the written statement. He, however, acknowledged that she had read the statement out loud to him and provided him with an opportunity to make corrections.

¶ 42 10. The Verdict and Posttrial Proceedings

¶ 43 After hearing closing arguments and deliberating, the jury found defendant guilty of first degree murder, aggravated kidnapping, and attempted armed robbery. Thereafter, defendant filed a motion for a new trial. At the hearing on the motion, Frank Askew (Askew) testified he was Wheatley's friend and former coworker. According to Askew, Wheatley had informed him before trial that, if defendant did not give him any money, he would "take care of business." Wheatley also indicated to Askew that he was tired of being in jail, that he did not have any cigarettes, and that defendant had visited other people in jail but not him. The circuit court denied defendant's motion. Defendant was then sentenced to serve concurrently 28 years for first degree murder and 14 years for aggravated kidnapping.

¶ 44 C. Direct Appeal

¶ 45 Following his conviction, defendant appealed, contending (1) his second jury trial violated double jeopardy because he was retried after the first trial had ended in a mistrial and,

alternatively, (2) he should be granted a new trial because the circuit court erred in allowing Wheatley's testimony to be admitted into evidence. This court affirmed the circuit court's judgment. *People v. Thames*, No. 1-02-0324 (2004) (unpublished order under Illinois Supreme Court Rule 23). Defendant filed a petition for leave to appeal to the Illinois Supreme Court, which was denied. *People v. Thames*, 213 Ill. 2d 573 (2005) (supervisory order).

¶ 46 D. Postconviction Proceedings

¶ 47 1. Defendant's Initial Postconviction Petition

¶ 48 On January 30, 2008, defendant filed his initial petition for postconviction relief. Defendant alleged, *inter alia*, that he was denied due process by (1) the State's failure to disclose alleged benefits that were provided to Wheatley and Laws in exchange for their testimonies and Wheatley's alleged pending violation of his probation and (2) the State's presentation of false testimony from Wheatley and Laws. In support of his claims, defendant attached an affidavit to his petition from Laws. Laws averred that his trial testimony, in which he stated defendant had asked Antonio to help Williams get his money back from the victim, was "totally false." He attested he did not observe defendant enter a bathroom with Duel or Antonio. Laws also did not hear defendant discuss robbing the victim with the two men at the party because it was "very loud." He claimed he had testified against defendant at trial because the prosecutors had informed him it was the only way for him to get out of jail.

¶ 49 On December 3, 2008, the State moved to dismiss defendant's petition, arguing (1) the petition was untimely, (2) defendant's claims were barred by *res judicata* and waiver, (3) defendant failed to raise a claim of actual innocence, and (4) defendant's petition failed to demonstrate a constitutional violation.

¶ 50 Thereafter, on June 25, 2009, the circuit court granted the State's motion and dismissed

defendant's petition at the second stage of the postconviction proceedings. In granting the motion, the circuit court found (1) defendant's petition was untimely because it was filed over two years beyond the time frame established in the Act, (2) defendant failed to demonstrate a lack of culpable negligence for the untimely filing, and (3) even if defendant's petition was not time-barred, the petition was contradicted by the record and barred by waiver and *res judicata*. On appeal, this court affirmed the circuit court's dismissal. *People v. Thames*, No. 1-09-2054 (2011) (unpublished order under Illinois Supreme Court Rule 23(c)).

¶ 51 2. Defendant's First Successive Postconviction Petition

¶ 52 On September 15, 2010, defendant filed a successive postconviction petition in which he alleged that (1) an affidavit provided by Wheatley presented newly discovered evidence that would support his claim of actual innocence and (2) the State failed to disclose that Wheatley had received leniency in his pending violation of probation case in exchange for his trial testimony.

¶ 53 In support of his claims, defendant attached two new affidavits to his petition, from Wheatley and his initial postconviction counsel, Jennifer Bonjean. Wheatley attested his trial testimony, in which he stated defendant had informed him "they wasn't supposed to kill him *** they was just supposed to stuck [*sic*] him up," was inaccurate and misleading. At trial, Wheatley had not meant to suggest or imply that defendant admitted he was involved in the crimes. Wheatley further averred he had initially provided a written statement to the ASA because the State had promised him leniency in his pending drug case. He received TASC probation after he provided the statement. The State also paid for him to stay in a witness protection program, paid for room service, and bought him clothes to wear. Wheatley further stated he had testified against defendant at trial to get out of jail as he was afraid the State would charge him with the

victim's murder if he did not testify. The State had promised to release him from jail after he testified against defendant. He was released almost immediately after he gave his trial testimony. Wheatley stated he "felt terrible," as he knew that defendant did not have anything to do with the victim's murder. He had previously not come forward, as he feared being charged with the victim's murder or perjury.

¶ 54 Bonjean averred that she learned Wheatley had provided false testimony while she was preparing defendant's initial postconviction petition. Wheatley had refused to speak with her, but she was later contacted by defendant's mother and was informed that Wheatley wanted to "come clean" about his false testimony at trial. On June 15, 2010, Bonjean interviewed Wheatley and obtained his affidavit. Wheatley reviewed the affidavit, which was subsequently notarized.

¶ 55 Thereafter, defendant's successive postconviction petition reached the second stage, and the State filed a motion to dismiss the successive petition. After the matter was briefed and argued, the circuit court dismissed defendant's petition, finding that Wheatley's affidavit did not substantially demonstrate defendant's actual innocence. The circuit court noted that Wheatley's affidavit was an attempt to interpret the meaning of his trial testimony and that, if Wheatley's affidavit were to be interpreted as a recantation, it was inherently unreliable. The circuit court also stated the evidence against defendant was "not scant" and that Wheatley's affidavit contradicted his trial testimony and the testimonies of other witnesses at trial. The circuit court held that, accordingly, Wheatley's affidavit was not material and would probably not change the result on retrial. Additionally, the circuit court noted that the remainder of defendant's allegations had already been ruled upon and, thus, were cumulative and barred by the doctrine of *res judicata*.

¶ 56 This court affirmed the dismissal of defendant's successive postconviction petition in

People v. Thames, 2017 IL App (1st) 152018-U, ¶ 72, finding that Wheatley's affidavit was not of such a conclusive character that it would probably change the result on retrial. Regarding defendant's additional claims of errors at trial, this court found they were readily apparent on the record but were not raised on direct appeal, so they were forfeited. *Id.* ¶ 73.

¶ 57 3. Defendant's *Pro Se* Section 2-1401 Petition

¶ 58 On June 5, 2014, while the appeal of the dismissal of his successive postconviction petition was pending, defendant filed a *pro se* petition for relief from judgment (735 ILCS 5/2-1401 (West 2014)) alleging his conviction was void, as he had an agreement with Detective Foley that if defendant took and passed a polygraph examination he would not be charged and would be released. The petition stated that on March 27, 1999, he entered into the agreement with Detective Foley and the following morning took the polygraph examination, passed, and was released as promised. On March 29, 1999, defendant went back to the police station to retrieve his cellular telephone, and he was taken into an interview room where he was thereafter interviewed by an assistant state's attorney. Defendant later added an amendment to this petition.

¶ 59 In December 2015, Bonjean was granted leave to file her appearance on defendant's behalf. Defense counsel withdrew the section 2-1401 petition and indicated she would seek leave to file a successive petition instead.

¶ 60 4. Defendant's Second Successive Postconviction Petition

¶ 61 On June 6, 2016, defendant filed his motion for leave to file his second successive postconviction petition. The motion requested leave to file a single claim: that his due process rights were denied when Detective Foley reneged on his promise to treat defendant as a witness and not arrest him if he cooperated and passed a polygraph examination. Defendant, however, was arrested the next day and charged with the offense.

¶ 62 Attached to defendant's motion were two affidavits. In the first affidavit, defendant averred that "Officer Foley told me that I did not need a lawyer, I would be allowed to go home and that I would not be charged in this case, if I take a polygraph test and passed it." In the second affidavit, defendant's mother, Diane Williams, attested that Detective Foley informed her that defendant was free to go after he passed a polygraph examination and that defendant was not being charged. Also attached to the motion was a copy of the polygraph examination results indicating "no deception" was detected.[3] The circuit court stated it would rule on this motion for leave to file on the next court date.

¶ 63 The matter was continued four additional times until January 5, 2017, when the circuit court stated it had "read all of the *pleadings* in this matter" (emphasis added) and ordered a third-stage evidentiary hearing be held so the court could hear the testimony of Wheatley. The State asked, "Actually the second stage because this is a successive petition that was filed? Am I correct that you are granting leave now to file that petition for the State to go to the second stage?" The circuit court responded in the affirmative. The circuit court did not speak to the polygraph examination issue, nor did it render a determination on whether the motion for leave to file the successive postconviction petition set forth cause and prejudice.

¶ 64 On the following court date, the State set forth the procedural history of the case and indicated, "On the last court date, Your Honor advanced the successive petition to the second stage" but stated this was as to the Wheatley issue only. The circuit court then clarified that it "did advance [to] the second stage the issue of Ronnie Wheatley and his possible recantation."

¶ 65 The State then filed a "Combined Motion to Reconsider and Motion to Dismiss

[3]The record also contains a document titled "successive postconviction petition" with a partially handwritten date of September 15, 2016. This petition is identical to the petition filed on September 15, 2010, and alleged the same claims regarding Wheatley's affidavit.

Petitioner's Successive Post Conviction Petition" in which it argued (1) the Wheatley affidavit is not at issue, as defendant's 2016 successive postconviction petition set forth only the polygraph examination claim, (2) the Wheatley affidavit issue was currently before the appellate court and therefore it would be improper for the circuit court to proceed without the benefit of the appellate court's ruling, and (3) Detective Foley's alleged promise is not newly discovered evidence.

¶ 66 In response, defendant argued the circuit court appropriately ruled that he is entitled to an evidentiary hearing on the Wheatley affidavit issue. In one sentence, defendant addressed the polygraph examination claim by requesting that the circuit court grant him leave to file this 2016 successive postconviction petition.

¶ 67 On June 7, 2017, the circuit court heard argument from both parties on the State's "Combined Motion to Reconsider and Motion to Dismiss Petitioner's Successive Post Conviction Petition." Regarding Detective Foley's alleged promise, the State maintained that defendant could have raised this issue before the trial court, in his direct appeal, or in his initial postconviction petition but that he did not do so and therefore the issue was forfeited. The State further recognized that defendant engaged in pretrial motions involving Detective Foley and the polygraph examination. Defendant maintained that he could not have raised the polygraph examination claim prior to 2015, when the appellate court in *People v. Marion*, 2015 IL App (1st) 131011, ¶ 39, established that a police officer had the authority to agree not to arrest a defendant in exchange for his cooperation with police work and that breaking such a promise amounted to a due process violation. Both parties expressly acknowledged that the Wheatley issue was not included in defendant's successive postconviction petition, and the State requested that the circuit court reconsider its decision to consider the Wheatley issue at the second stage.[4]

[4]Indeed, when defense counsel stated that the circuit court "*sua sponte*" raised the Wheatley issue, the circuit court agreed on the record.

¶ 68 On August 31, 2017, the circuit court stated that it granted leave to file a successive postconviction petition based on Wheatley's affidavit. The circuit court acknowledged that, subsequent to granting leave, the appellate court affirmed its prior decision and therefore the Wheatley affidavit issue was *res judicata* and the State's motion to reconsider was moot.

¶ 69 Defense counsel then raised the "separate issue" regarding the polygraph examination and requested a ruling from the court on leave to file that claim. The State responded that leave had already been granted and that second-stage argument had already been conducted and so requested the court issue a second-stage ruling. The circuit court asked if defense counsel agreed. Defense counsel responded, "Yeah. I mean I think I do." The circuit court then stated, "I kind of heard arguments as if leave to file had been granted, correct? Although I didn't technically say leave to file granted. But then I heard arguments." The circuit court indicated it would incorporate the issue of leave to file in its ruling.

¶ 70 At the following court date on October 12, 2017, defense counsel expressed concern that the circuit court "never formally entered an order granting [the] motion to leave," at which point it would have prompted defendant to "actually file a post-conviction petition raising this issue." The circuit court stated it "agree[d] with everything you said so far" and acknowledged that it had not ruled on the polygraph examination claim, stating:

> "THE COURT: All right. I'm comfortable with it being in the position of motion for leave to file as well because I do agree that somehow it became a bit disjointed and scattered.
>
> [DEFENSE COUNSEL]: So perhaps on the next court date the judge would want to rule on the motion for leave and if that were to be granted, then we could go through the process as the Post-Conviction Hearing Act sets out; if the court were to deny it, then

there would be a notice of appeal.

THE COURT: I agree."

¶ 71 The circuit court issued its extensive written ruling on November 8, 2017. Its discussion of the motion for leave to file the successive petition was as follows:

> "After review, this Court stated from the bench an evidentiary hearing may be warranted, but allowed the State to file a responsive motion to reconsider and dismiss. The State's motion framed the issues in terms of whether [defendant] satisfied either the cause-and-prejudice test or actual innocence standards to allow a successive petition, and urged the Court to deny leave and dismiss the petition. However, in *People v. Bailey*, 2017 IL 121450, our [Illinois Supreme Court] clarified that circuit courts must make an independent determination to either grant or deny leave to file a successive petition. Thus, it would be improper for this Court to return to the issue of leave because the matter has proceeded by adversarial participation from [defendant] and the State. This Court cannot reconsider its oral ruling, as it amounted to granting leave to file."

The court went on to find that defendant's claims regarding Wheatley were *res judicata* because they had already been decided by the appellate court. See *Thames*, 2017 IL App (1st) 152018-U. Regarding the alleged promise relating to the polygraph examination, the circuit court concluded that defendant's allegations failed to make a substantial showing of a constitutional violation to invoke relief under the Act and dismissed the petition. Thereafter, defendant filed a motion to reconsider, which was denied. This appeal followed.

¶ 72 II. ANALYSIS

¶ 73 On appeal, defendant argues the circuit court erred in dismissing his motion for leave to file a second successive postconviction petition where (1) the court dismissed the motion as a

second-stage petition instead of a motion for leave to file and (2) he sufficiently pled that he had an enforceable agreement with Detective Foley to not be charged in exchange for giving up his fifth amendment right and passing a polygraph examination.

¶ 74 A. The Principles of the Act

¶ 75 We begin by noting the familiar principles regarding postconviction proceedings. The Act provides a method for criminal defendants to assert that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2016). "A proceeding under the Act is a collateral attack on the judgment of conviction." (Internal quotation marks omitted.) *People v. Smith*, 2014 IL 115946, ¶ 22.

¶ 76 The Act contains a three-stage procedure for relief. *People v. Allen*, 2015 IL 113135, ¶ 21. At the first stage, a circuit court must independently review the defendant's petition within 90 days of its filing and shall dismiss the petition summarily if it determines that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the petition is not summarily dismissed as being frivolous or patently without merit, the petition advances to the second stage. *Hodges*, 234 Ill. 2d at 10. At the second stage, counsel may be appointed to an indigent defendant. 725 ILCS 5/122-4 (West 2016); *Hodges*, 234 Ill. 2d at 10. The State must either file a motion to dismiss or file an answer within 30 days of the court's order to docket the petition. 725 ILCS 5/122-5 (West 2016); *Allen*, 2015 IL 113135, ¶ 21. To avoid dismissal, the defendant bears the burden of making a substantial showing of a constitutional violation to warrant a third-stage evidentiary hearing. *People v. English*, 403 Ill. App. 3d 121, 129 (2010). To proceed to a third-stage evidentiary hearing, allegations in the petition must be supported by the record or by its accompanying

affidavits. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the circuit court determines the defendant made a substantial showing of a constitutional violation, the petition advances to the third stage. 725 ILCS 5/122-6 (West 2016); *Allen*, 2015 IL 113135, ¶ 22. At a third-stage evidentiary hearing, the circuit court determines the credibility of the witnesses, decides the weight to be given the testimony and evidence, and resolves any evidentiary conflicts. *People v. Domagala*, 2013 IL 113688, ¶ 34.

¶ 77 The Act itself contemplates the filing of a single petition: "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2016); see *People v. Daniel*, 379 Ill. App. 3d 748, 749 (2008) (noting that waiver in the context of postconviction petitions is "better referred to as 'forfeiture' "). Accordingly, a defendant must obtain leave of court to file a successive petition. 725 ILCS 5/122-1(f) (West 2016) ("Only one petition may be filed by a petitioner under this Article without leave of the court."). To do so, a defendant must demonstrate cause for the failure to raise the claim in the initial petition and prejudice from that failure. *Id.* Section 122-1(f) of the Act explains that a defendant demonstrates "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 "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." *Id.*; see *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). This standard is higher than the normal first-stage "frivolous or patently without merit" standard applied to initial petitions. See *People v. Edwards*, 2012 IL 111711, ¶¶ 25-29; *Smith*, 2014 IL 115946, ¶ 35 ("the cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard that is set forth in section 122-2.1(a)(2) of the Act").

Section 122-1(f) does not provide for an evidentiary hearing on the cause-and-prejudice issues, and therefore, it is clear the legislature intended that the cause-and-prejudice determination be made on the pleadings prior to the first stage of postconviction proceedings. *Smith*, 2014 IL 115946, ¶ 33.

¶ 78 If the court determines that cause and prejudice have been adequately alleged and allows the successive petition to be filed, it advances to the three-stage process for evaluating postconviction petitions. *People v. Bailey*, 2017 IL 121450, ¶ 26. At that point, since the filed successive petition has already satisfied a higher standard, the first stage is rendered unnecessary, and the successive petition is docketed directly for second-stage proceedings. See *People v. Sanders*, 2016 IL 118123, ¶¶ 25, 28 (with a successive petition, the initial issue before the trial court is whether it "should be docketed for second-stage proceedings"). At the second stage, the State can seek dismissal of the petition on any grounds, including the defendant's failure to prove cause and prejudice for not having raised the claims in the initial postconviction petition. *Bailey*, 2017 IL 121450, ¶ 26.

¶ 79 B. Standard of Review

¶ 80 In the case at bar, the circuit court granted the State's motion to dismiss defendant's second successive postconviction petition at the second stage. The dismissal of a successive postconviction petition without a third-stage evidentiary hearing is reviewed *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Under *de novo* review, we perform the same analysis that a trial judge would perform. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 151.

¶ 81 C. Whether the Circuit Court Followed the Procedures Set Forth in the Act

¶ 82 As a threshold issue, we must consider whether the circuit court followed the proper procedure set forth in the Act. Defendant contends that, despite agreeing to rule on the motion

for leave to file the successive postconviction petition, the circuit court treated the motion for leave to file as a second-stage petition in its dismissal order. Defendant maintains that, by applying the second-stage standard to the motion for leave to file, the circuit court circumvented the procedures set forth in the Act and thus denied him due process.

¶ 83 The State disagrees with defendant and asserts that the circuit court granted defendant leave to file his petition and then properly dismissed defendant's successive petition at the second stage. The State observes that defense counsel urged the court during the June 7, 2017, hearing to consider whether his constitutional rights were violated based on the agreement with Detective Foley. According to the State, defendant thus acquiesced to second-stage proceedings. The State further notes that the circuit court stated it was granting leave to file multiple times and therefore defendant could have filed an amended successive postconviction petition at any time. The State concludes that the circuit court was within its authority to rule on the merits of defendant's successive postconviction claims, including the polygraph examination claim.

¶ 84 We agree with defendant that the circuit court did not follow the procedure set forth under the Act. While the circuit court has the authority to consider a motion for leave to file a successive postconviction petition without a motion or request from defendant (see *Sanders*, 2016 IL 118123, ¶ 28), the Act and our case law are clear that the circuit court must render a determination based on whether each individual claim contained within that petition meets the cause-and-prejudice test. As explained by our supreme court, section 122-3 of the Act does not forbid the filing of a successive petition. *Pitsonbarger*, 205 Ill. 2d at 462. "Rather, it provides that '[a]ny claim' not raised in the original or an amended petition is waived. [Citation.] Thus, the fundamental fairness exception applies to claims, not to petitions, and the cause-and-prejudice test must be applied *to individual claims*, not to the petition as a whole." (Emphasis

added.) *Id.* (quoting 725 ILCS 5/122-3 (West 1996)). Accordingly, our supreme court held that "a petitioner must establish cause and prejudice *as to each individual claim* asserted in a successive petition, even if he demonstrates that his initial post-conviction proceeding was deficient in some fundamental way." (Emphasis added.) *Id.* at 463.

¶ 85 It is evident from the record that the circuit court did not render a determination based on whether defendant's polygraph examination claim met the cause-and-prejudice test. Indeed, the circuit court itself acknowledged it did not expressly make a cause-and-prejudice determination. Without an express determination, the successive petition cannot be deemed "filed" under the Act. See *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007) (observing that "express leave of court" to file a successive postconviction petition is "mandated by section 122-1(f) of the Act"); see also *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010) (noting that a successive petition will not be considered "filed," and further proceedings will not follow, unless leave is granted). As this determination is a statutory requirement, we find the circuit court erred when it advanced the petition in its entirety to second-stage proceedings without making a cause-and-prejudice determination. See 725 ILCS 5/122-1(f) (West 2016); *Pitsonbarger*, 205 Ill. 2d at 463.

¶ 86 At oral argument before this court, the State agreed that no express determination was made but was steadfast in its argument that the circuit court implicitly granted leave to file and therefore its consideration of the polygraph examination claim at the second stage was warranted. We disagree. First, had the circuit court granted leave to file the second successive postconviction petition, then a second successive postconviction petition would have been filed. It was not. In fact, up to the October 12, 2017, hearing, defendant renewed his request for leave to file the petition and stated that granting such a request would prompt him to "actually file a post-conviction petition" and the circuit court acknowledged this fact. No second successive

postconviction petition was ever filed.

¶ 87 Second, the State's argument that the circuit court implicitly granted leave to file is belied by the circuit court's own finding in its order dismissing the second successive postconviction petition. In its ruling, the circuit court found "it would be improper for this Court to return to the issue of leave because the matter has proceeded by adversarial participation from [defendant] and the State. This Court cannot reconsider its oral ruling, as it amounted to granting leave to file." This statement by the court is inaccurate where (1) a circuit court can reconsider its rulings (see *People v. Mink*, 141 Ill. 2d 163, 171 (1990) ("So long as the case was pending before it, the trial court had jurisdiction to reconsider any order which had previously been entered.")) and (2) as discussed below, the adversarial participation of the parties does not itself serve to advance a successive postconviction claim to the second stage (see *People v. Gaultney*, 174 Ill. 2d 410, 419 (1996)). Thus, the record reflects there was no implicit ruling as the State suggests but, rather, the circuit court advanced the petition to the second stage because it was under the mistaken impression that it could not revisit its ruling and that the adversarial nature of the case prevented it from considering cause and prejudice.

¶ 88 In reaching the conclusion that the circuit court did not follow the procedure required by the Act, we have taken into consideration *Bailey* and *Sanders*, the cases relied on by the circuit court when it decided that "it would be improper for this Court to return to the issue of leave because the matter has proceeded by adversarial participation from [defendant] and the State." In *Bailey*, our supreme court observed that under section 122-1(f) the circuit court must conduct a preliminary and independent screening of the defendant's motion for leave to file a successive postconviction petition for facts demonstrating cause and prejudice. *Bailey*, 2017 IL 121450, ¶ 24. The circuit court is capable of determining whether the motion made a *prima facie*

showing, so there is "no reason for the State to be involved." *Id.* ¶ 25. Accordingly, the supreme court held that "the State should not be permitted to participate at the cause and prejudice stage of successive postconviction proceedings." *Id.* ¶ 24.

¶ 89 The present case, however, is distinguishable, as the circuit court here made no independent assessment of whether the polygraph examination claim met the cause-and-prejudice test. In addition, *Bailey* does not offer any justification for the circuit court to bypass the procedures set forth in the Act and thus provides no support for the circuit court's conclusion that, just because the parties "proceeded by way of adversarial participation," the polygraph examination claim must be considered at the second stage. To allow the parties to dictate the filing of successive postconviction claims would render section 122-1(f), and the circuit court's independent assessment of cause and prejudice, to be superfluous. Indeed, our supreme court, albeit in reference to a first-stage initial petition, has previously held that the mere early filing of a motion or responsive pleading by the State "does not *per se* contaminate the circuit court's determination" and that "[t]he premature filing of a motion to dismiss does not prevent the circuit court from independently evaluating whether a post-conviction petition is frivolous or patently without merit." *Gaultney*, 174 Ill. 2d at 419. Such a statement by our supreme court supports our conclusion herein—that the circuit court must render an express cause-and-prejudice determination—and that this statutory requirement cannot be set aside due to the "adversarial participation" of the parties. See *LaPointe*, 227 Ill. 2d at 44 ("express leave of court" to file a successive postconviction petition is "mandated by section 122-1(f) of the Act").

¶ 90 The circuit court also relied on *Sanders* to support its statement that a circuit court has the authority to consider *sua sponte* whether a successive petition should be docketed for second-stage proceedings. The circuit court went on to explain that "[t]hat is essentially what this court

did from the bench when it indicated a hearing may be warranted but permitted the State to respond." This, however, does not cure the fact that the circuit court failed to make a determination as to whether the polygraph examination claim met the cause-and-prejudice test. Moreover, the facts of *Sanders* are distinguishable, as (1) the *Sanders* successive postconviction petition alleged a claim of actual innocence based on newly discovered evidence and (2) the circuit court in *Sanders* made an oral ruling on the claim in that case. *Sanders*, 2016 IL 118123, ¶¶ 14, 18. Ultimately, our supreme court reiterated what it stated in *Tidwell*, that where no motion or request to file the successive petition is made, the circuit court may nonetheless rule on the petition. *Id.* ¶ 27.

¶ 91 Relevant to this case, the *Sanders* court observed that "it is incumbent upon the postconviction petitioner to prompt the trial court to consider whether leave should be granted and to obtain a ruling on whether the petitioner has demonstrated cause and prejudice." *Id.* (citing *Tidwell*, 236 Ill. 2d at 156-57). Defendant here prompted the circuit court numerous times to consider whether leave should be granted on the polygraph examination claim and requested the circuit court provide a ruling on that specific claim. Despite this request, the circuit court did not issue an express determination on whether the polygraph examination claim met the cause-and-prejudice test as required by section 122-1(f) of the Act. In sum, bypassing section 122-1(f) of the Act in this way was error. See *LaPointe*, 227 Ill. 2d at 44. Without a ruling on the claim in accordance with the Act, the successive postconviction petition is not deemed to be filed, and second-stage proceedings cannot commence. See *Tidwell*, 236 Ill. 2d at 161; 725 ILCS 5/122-2.1(b) (West 2016). Thus, the circuit court's ruling dismissing the polygraph examination claim was improper.

¶ 92 A question remains as to whether this court should remand the matter to the circuit court

to analyze the polygraph examination claim under section 122-1(f) or whether we, under our *de novo* standard of review, should entertain the issue ourselves. Our supreme court recently addressed a similar question in *People v. Lusby*, 2020 IL 124046. In that case, the defendant was convicted of first degree murder, aggravated criminal sexual assault, and home invasion and sentenced to 130 years' imprisonment for an offense he committed at the age of 16. *Id.* ¶ 1. After an unsuccessful direct appeal and postconviction proceedings, the defendant filed a motion for leave to file a successive postconviction petition, asserting that his sentencing hearing was constitutionally inadequate under *Miller v. Alabama*, 567 U.S. 460 (2012). *Lusby*, 2020 IL 124046, ¶ 1. The circuit court denied the motion, but the appellate court found the defendant's petition met the cause-and-prejudice test and reversed and remanded for a new sentencing hearing. *Id.* ¶¶ 1, 23.

¶ 93 Pertinent to this appeal, the State argued before our supreme court that the appellate court erred in considering whether the defendant demonstrated cause and prejudice, rather than remanding the case so the circuit court could decide that issue without input from the State. *Id.* ¶ 28. The State expressly requested that the court "hold that the appellate court must reverse and remand for further leave-to-file proceedings when the trial court commits a '*Bailey* error.' " *Id.* Our supreme court chose to reach the merits of the defendant's motion for leave to file his successive postconviction petition in the interest of judicial economy, noting that "[t]he State helped to create the error of which it complains, and it should not benefit from that by forcing the defendant to restart the process of adjudicating his *Miller* claim." *Id.* ¶ 29. The court advised the State "to refrain from inserting itself into proceedings where we have clearly stated that it has no role." *Id.*

¶ 94 The case at bar, however, is distinguishable. Here, it was the circuit court that erred when

it declined to make a determination regarding cause and prejudice, bypassing section 122-1(f) of the Act, moving "the petition" to second-stage proceedings, and entering a second-stage dismissal on "the petition." As the circuit court did not rule on the motion for leave to file as required by the statute, *Lusby* is not applicable.

¶ 95 Instead, we find the case of *Goodrich v. Sprague*, 376 Ill. 80 (1941), to be instructive. While no court has had the opportunity to address this specific issue in a criminal case, *Goodrich* is widely cited for the proposition that the appellate court's jurisdiction extends only to those matters which have been ruled upon by the trial court. In *Goodrich*, our supreme court held that the appellate court lacked jurisdiction to rule upon the defendant's motion for a new trial, insofar as that motion had not been ruled upon by the trial court. *Id.* at 86. It was in this context that the *Goodrich* court explained:

> "The office of [the] Appellate Court is to review rulings, orders, or judgments of the court below, contained in the record, and matters not ruled upon by the inferior court are not subject to the consideration of the Appellate Court unless the lower court's failure to rule is made the subject of an assignment of error, in which case the propriety of such failure is the question presented to the Appellate Court and not the merits of the matter upon which the trial court refuses to act. In other words, the Appellate Court's jurisdiction is appellate, and extends only to those matters in controversy which have been ruled upon by the trial court." *Id.*

As the circuit court issued no ruling on whether the polygraph examination claim met the cause-and-prejudice test, we conclude that we do not have jurisdiction to determine whether defendant's motion for leave to file a successive postconviction petition should be granted. See *Canel & Hale, Ltd. v. Tobin*, 304 Ill. App. 3d 906, 921 (1999). Accordingly, we reverse the

judgment of the circuit court of Cook County and remand the matter for the circuit court to conduct an independent analysis of whether the motion for leave to file a successive postconviction petition meets the cause-and-prejudice test as set forth in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2016)).

¶ 96 III. CONCLUSION

¶ 97 For the reasons stated above, the judgment of the circuit court is reversed, and the matter is remanded for proceedings consistent with this opinion.

¶ 98 Reversed and remanded.

No. 1-18-0071

Cite as:	*People v. Thames*, 2021 IL App (1st) 180071
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 99-CR-1037504; the Hon. Angela M. Petrone, Judge, presiding.
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