

NOTICE
Decision filed 10/11/24. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2024 IL App (5th) 230653-U

NO. 5-23-0653

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Champaign County.
)	
v.)	No. 07-CF-968
)	
BOBBY TATUM,)	Honorable
)	Randall B. Rosenbaum,
Defendant-Appellant.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Barberis and McHaney concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err when it denied the defendant leave to file a successive postconviction petition, and since any argument to the contrary would have no merit, the defendant’s attorney in the instant appeal is granted leave to withdraw, and the judgment of the circuit court is affirmed.

¶ 2 In 2007, the defendant, Bobby Tatum, was found guilty of aggravated battery of a child, and he was sentenced to imprisonment for 24 years. His direct appeal was unsuccessful. His petition for postconviction relief was unsuccessful. His first, second, and third motions for leave to file successive postconviction petitions were all unsuccessful. (The defendant initiated other forms of collateral attack on his conviction, all of which were unsuccessful and need not be mentioned again.) The defendant continues to serve his prison sentence. The instant appeal is from the circuit court’s denial of the defendant’s fourth motion for leave to file a successive

postconviction petition. His appointed appellate attorney, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit and, on that basis, has filed with this court a motion to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), along with a memorandum of law in support thereof. OSAD properly gave notice to the defendant. This court gave the defendant ample opportunity to file a *pro se* brief, memorandum, or other document explaining why OSAD should not be allowed to withdraw as counsel, or why this appeal has merit. The defendant has not filed any type of response. This court has examined OSAD's *Finley* motion and memorandum of law, as well as the entire record on appeal, and has concluded that this appeal does indeed lack merit. Accordingly, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 3

BACKGROUND

¶ 4 This criminal case has been before the appellate court on a few occasions. Here follows a summary of the pleadings and events relevant to the instant appeal.

¶ 5 In 2007, the defendant was charged with aggravated battery of a child. See 720 ILCS 5/12-4.3(a) (West 2006). The child-victim was S.D., who was the seven-year-old son of the defendant's girlfriend. The court appointed the Champaign County public defender to represent the defendant. In August 2007, the cause proceeded to trial by jury. An assistant public defender, Janie Miller-Jones, represented the defendant at that trial. The State's evidence, which featured the testimony of S.D. and photographs of S.D.'s injuries, indicated that the defendant had repeatedly struck S.D. on the lower back with an electrical cord, causing the skin to split open. Of all the State's witnesses, S.D. was the only eyewitness to his beating, and he testified that the perpetrator was the defendant. The State's other witnesses included Latasha Seets, the sister of the defendant's girlfriend, and therefore S.D.'s maternal aunt. (Latasha Seets had been criminally charged with S.D.'s beating in

No. 07-CF-967, but the State dismissed the charge against her prior to the defendant's trial.) When cross-examining Seets, and during other aspects of the trial, Miller-Jones sought to pin the blame for S.D.'s beating on Seets. After deliberations lasting about 40 minutes, the jury returned a verdict of guilty.

¶ 6 Miller-Jones filed, on behalf of the defendant, a posttrial motion. Miller-Jones alleged that she had provided the defendant with ineffective assistance by not "properly impeaching" Seets with information from a psychiatrist's report filed in her criminal case (No. 07-CF-967). The circuit court vacated the public defender's appointment, and it substituted different counsel for the defendant. Substitute counsel filed, on behalf of the defendant, an amended posttrial motion, which, *inter alia*, claimed that Miller-Jones had "failed to properly investigate" Seets's criminal case and her psychiatric history, resulting in her failure to properly impeach Seets.

¶ 7 On November 15 and December 20, 2007, the court held a hearing on the posttrial motions. The defendant, along with his substitute counsel, were present. Before hearing testimony, the court took judicial notice of the court file in *People v. Latasha Seets*, No. 07-CF-967. One of the witnesses called by the defense was the defendant's trial attorney, Miller-Jones. Miller-Jones described how she would have impeached Latasha Seets if she, before trial, had read the psychiatrist's report on Seets in Seets's criminal case. At the close of the hearing, the circuit court denied the defendant's posttrial motions, thus allowing the jury's verdict to stand. "Given the evidence against the defendant which was overwhelming," the court stated, "even if you remove the testimony of Ms. Seets, *** the result [of the trial] would have been the same."

¶ 8 On December 28, 2007, the circuit court sentenced the defendant to 24 years of imprisonment.

¶ 9 On direct appeal, the defendant argued that he had received ineffective assistance from his trial attorney, Miller-Jones. The defendant faulted trial counsel for two alleged omissions, including her failure to impeach Latasha Seets with the psychiatrist's report. The Appellate Court, Fourth District, rejected the defendant's arguments and affirmed the judgment of conviction. *People v. Tatum*, No. 4-08-0078 (Aug. 20, 2009) (unpublished order under Illinois Supreme Court Rule 23).

¶ 10 In 2010, the defendant filed a 60-page *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). This petition was the defendant's initial postconviction petition. The circuit court found the petition frivolous and patently without merit, and it summarily dismissed the petition. The Appellate Court, Fourth District, affirmed. *People v. Tatum*, 2011 IL App (4th) 100562-U.

¶ 11 In 2014, the defendant filed his first *pro se* motion for leave to file a successive postconviction petition. See 725 ILCS 5/122-1(f) (West 2014) ("Only one petition may be filed by a petitioner *** without leave of the court."). The circuit court denied leave. On appeal from the denial of leave, the defendant's appointed counsel, OSAD, filed a *Finley* motion to withdraw as counsel. The Appellate Court, Fourth District, granted OSAD's *Finley* motion and affirmed the denial of leave. *People v. Tatum*, No. 4-14-0579 (Apr. 18, 2016) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 12 On November 4, 2019, the defendant filed his second *pro se* motion for leave to file a successive postconviction petition. This second motion for leave consisted of 12 neatly-typed, single-spaced pages. The defendant sought to present a postconviction claim that his trial attorney, Miller-Jones, had labored under a *per se* conflict of interest because she, a few weeks before the defendant's trial, had served as the appointed counsel for Latasha Seets in her criminal case. In

connection with this issue, the defendant argued cause and prejudice; this portion of the motion for leave was spread across three pages. As to cause, the defendant stated that nobody, including counsel, ever had told the defendant about the *per se* conflict involving Seets, and that he did not learn of the conflict until April 2016. As to prejudice, the defendant noted that the conflict was *per se* in nature, which “is exactly the kind of error that so infects a trial that the resulting conviction violates due process.”

¶ 13 (The record in *People v. Latasha Seets*, No. 07-CF-967, showed that on July 13, 2007, the circuit court arraigned Latasha Seets on the charge of aggravated battery of a child and appointed the public defender to represent her, and that Miller-Jones appeared *instanter*, waived preliminary hearing on Seets’s behalf, entered a plea of not guilty on Seets’s behalf, and requested a trial date. Six days later, on July 19, 2007, Miller-Jones represented to the court that a conflict existed. The court immediately vacated the public defender’s appointment and appointed substitute counsel for Seets. Therefore, Miller-Jones was Seets’s trial attorney for a week.)

¶ 14 On March 30, 2020, the circuit court entered a written order that denied the defendant’s second motion for leave. The court explained that the defendant had shown neither cause for his failure to bring the claim in his initial postconviction petition nor prejudice resulting from that failure. According to the court, the defendant “was fully aware” of Seets’s case, and the records in her court file, in late 2007, “when those matters were the subject of his post-trial motion and appeal.” Furthermore, the court stated, Seets’s testimony at the defendant’s trial was not determinative of guilt.

¶ 15 The defendant appealed the denial of his second motion for leave. The Appellate Court, Fourth District, found that the defendant had failed to make a *prima facie* showing of cause for his

failure to raise trial counsel's *per se* conflict of interest in an earlier proceeding, and it affirmed the circuit court's judgment. *People v. Tatum*, 2021 IL App (4th) 200206-U.

¶ 16 Also in 2020, the defendant filed his third *pro se* motion for leave to file a successive postconviction petition. The circuit court again denied leave. The defendant appealed, but once the case was in the appellate court, he moved for a voluntary dismissal of the appeal. The Appellate Court, Fourth District, granted his motion for voluntary dismissal. *People v. Tatum*, No. 4-20-0346 (June 16, 2021) (unpublished order).

¶ 17 On July 31, 2023, the defendant filed the motion that is the subject of the instant appeal—the defendant's fourth *pro se* motion for leave to file a successive postconviction petition. This fourth motion for leave consisted of 11 pages—a single hand-written page, which was page one of the motion, followed by copies of 10 of the 12 neatly-typed, single-spaced pages that had constituted the defendant's second *pro se* motion for leave, which the defendant had filed on November 4, 2019 (see *supra*). In the first page of the motion—*i.e.*, the hand-written page—the defendant requested that the circuit court, under *Teague v. Lane*, 489 U.S. 288 (1989), reverse his judgment of conviction “and release him from prison with sufficient funds.” To establish the element of cause for not raising the issue earlier, the defendant stated that “when the ruling came down there was no access to law library because of cov[id]-19 lockdown, so no case law into [*sic*] a couple of weeks ago.” (The element of prejudice was not addressed in the first, hand-written page.) In the remaining pages of the defendant's fourth motion for leave—*i.e.*, in the 10 neatly-typed, single-spaced pages that had been copied from the defendant's November 4, 2019, second motion for leave—the defendant sought to present a claim that Miller-Jones had labored under a *per se* conflict of interest because she, a few weeks before the defendant's trial, had served as the

appointed counsel for Latasha Seets. These 10 pages also included the three pages across which were spread the defendant's arguments on cause and prejudice.

¶ 18 On August 3, 2023, the circuit court entered an order that denied the defendant's latest motion for leave to file a successive postconviction petition. The court noted, *inter alia*, that the defendant did not raise "any new facts justifying the delay in raising the claim until now." Furthermore, in November 2019 (see *supra*), the defendant had sought to raise "the exact issue" that he sought to raise in his latest motion for leave.

¶ 19 The defendant filed a combined motion to reconsider the order of August 3, 2023, and a motion for leave to amend the defendant's July 31, 2023, motion for leave. The court denied the combined motion. The court also directed its clerk to file, on the defendant's behalf, a notice of appeal from the August 3, 2023, denial of leave.

¶ 20 ANALYSIS

¶ 21 This appeal is from the circuit court's August 3, 2023, order that denied the defendant's fourth motion for leave to file a successive postconviction petition. The circuit court's denial of leave is reviewed *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13. This court may affirm on any basis supported by the record, regardless of the reasoning employed by the circuit court. *People v. Dorsey*, 2021 IL 123010, ¶ 33.

¶ 22 As previously mentioned, OSAD has filed a *Finley* motion to withdraw as the defendant's counsel in this appeal. In its supporting memorandum, OSAD presents one potential issue in this appeal, namely, whether the defendant's motion for leave "make[s] a *prima facie* showing of cause and prejudice, such that he should be granted leave to file a successive post-conviction petition alleging his trial counsel had a *per se* conflict of interest." This court agrees with OSAD that this potential issue, and the instant appeal as a whole, lacks merit.

¶ 23 The Act provides a method by which a defendant imprisoned in the penitentiary may assert that his conviction resulted from a substantial denial of his federal or state constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2022). A postconviction proceeding commences with the filing of a petition in the circuit court. 725 ILCS 5/122-1(b) (West 2022). Generally, the Act contemplates the filing of only one petition, though he can file more than one if he first obtains leave of the circuit court. 725 ILCS 5/122-1(f) (West 2022).

¶ 24 One way to obtain leave of court is for the defendant to meet the cause-and-prejudice test. *People v. Edwards*, 2012 IL 111711, ¶ 22; *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Section 122-1(f) of the Act addresses and defines the two elements of the cause-and-prejudice test. A defendant shows the element of 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 a defendant shows the element of 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 2022). The defendant must satisfy both elements of the cause-and-prejudice test—that is, he must show both the element of cause and the element of prejudice—in order to win the right to file a successive postconviction petition. *Pitsonbarger*, 205 Ill. 2d at 464. He needs to present only a *prima facie* case. *Bailey*, 2017 IL 121450, ¶ 24.

¶ 25 On the first page—that is, the hand-written page—of his fourth motion for leave, the defendant seemed to address the cause of his failure to raise his proposed postconviction claim in his initial postconviction proceeding. He stated that “when the ruling came down there was no access to law library because of cov[id]-19 lockdown, so no case law into [*sic*] a couple of weeks ago.” The defendant does not specify the “ruling” to which he refers, but this lack of specificity is

of no consequence, for a defendant is not expected to include in his motion for leave any reference to any court decision or other legal authority. *Cf.* 725 ILCS 5/122-2 (West 2022) (“Argument and citations and discussion of authorities shall be omitted from the [postconviction] petition.”). Furthermore, the alleged lack of access to a law library, absent something more, cannot satisfy the element of cause. *Cf. People v. Van Hee*, 305 Ill. App. 3d 333, 336-37 (1999) (where defendant failed to include “specific dates” of the lockdown that allegedly made the prison law library unavailable to him, the lockdown “did not excuse defendant’s delay” in filing his postconviction petition). The first, hand-written page of the defendant’s fourth motion for leave did nothing to satisfy the cause-and-prejudice test.

¶ 26 Beyond the first, hand-written page of the defendant’s fourth motion for leave, there followed 10 of the 12 neatly-typed, single-spaced pages that had constituted the defendant’s second motion for leave (filed by the defendant on November 4, 2019). In other words, except for its first page, the defendant’s fourth motion for leave was identical to his second motion for leave. Accordingly, the circuit court did not err in denying the defendant’s fourth motion for leave, for his second motion for leave had already failed to meet the cause-and-prejudice test, as decided by the circuit court on March 30, 2020, and affirmed by the Appellate Court, Fourth District, in *People v. Tatum*, 2021 IL App (4th) 200206-U. The elements of cause and prejudice were therefore *res judicata*.

¶ 27 “The doctrine of *res judicata* bars consideration of issues that were previously raised and definitively settled by judicial decision.” *People v. Montanez*, 2023 IL 128740, ¶ 103. *Res judicata* results from “the practical necessity that there be an end to litigation and that controversies once decided on their merits shall remain in repose.” *Hughey v. Industrial Comm’n*, 76 Ill. 2d 577, 582 (1979).

¶ 28 Here, the circuit court and the Appellate Court, Fourth District, decided the merits of the defendant's second motion for leave. Both courts decided that the cause-and-prejudice test had not been met in the second motion for leave. In other words, those issues of cause and prejudice were definitively settled by judicial decision. Because the merits of the defendant's fourth motion for leave were identical to those of his second motion for leave, reconsidering the issues of cause and prejudice in the fourth motion would reawaken old controversies that had ended with the decision in *People v. Tatum*, 2021 IL App (4th) 200206-U. Under *res judicata*, those controversies should remain in repose.

¶ 29 CONCLUSION

¶ 30 The circuit court did not err in denying the defendant's fourth motion for leave to file a successive postconviction petition. No argument to the contrary would have merit. Accordingly, OSAD is granted leave to withdraw as the defendant's counsel on appeal, and the judgment of the circuit court, denying leave, is affirmed.

¶ 31 Motion granted; judgment affirmed.