

eighth amendment (U.S. Const., amend. VIII), (4) the MSR statute violates the separation of powers provision of the Illinois Constitution (Ill. Const. 1970, art. II, § 1), (5) requiring the sentences for only certain offenses to be served at 85% and 100% of the sentence violates the equal protection clause (U.S. Const., amend. XIV), and (6) section 3-6-3(a)(4.6) of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(4.6) (West 2018)) is facially void due to vagueness. We affirm.

¶ 4

I. BACKGROUND

¶ 5 In October 2007, the State charged defendant with two counts of criminal sexual assault (counts I and II) (720 ILCS 5/12-13(a)(2) (West 2006)), one count of predatory criminal sexual assault of a child (count III) (720 ILCS 5/12-14.1(a)(1) (West 2006)), and one count of criminal sexual abuse (count IV) (720 ILCS 5/12-15(c) (West 2006)). At a January 2008 hearing, defendant pleaded guilty to the offense of criminal sexual assault in count II as part of an open plea agreement. In February 2008, the circuit court sentenced defendant to 10 years in prison with a 2-year MSR term. Defendant filed a *pro se* motion for a reduction of his sentence. At the hearing on the motion, defendant argued his sentence should be reduced because he had been advised at the guilty plea hearing he would receive day-for-day good-time credit in prison and later discovered he was required to serve 85% of his 10-year sentence. The circuit court granted the motion and reduced defendant's sentence to five years and three months with a two-year MSR term.

¶ 6

In September 2008, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), claiming (1) MSR violates the fourteenth amendment to the United States Constitution (U.S. Const., amend. XIV) and (2) he was unaware of the two-year MSR term at the time of

sentencing. The circuit court dismissed the petition, finding it frivolous and patently without merit.

¶ 7 In February 2009, defendant filed a *pro se* successive petition for postconviction relief, claiming his guilty plea was involuntary because he had been advised at the plea hearing he would receive a two-year MSR term and prison records indicated he had received a mandatory MSR term of three years to life. The next month, the circuit court granted defendant's request to withdraw his guilty plea and vacated defendant's sentence. In June 2009, pursuant to a negotiated plea agreement, defendant pleaded guilty to the offense of criminal sexual assault in count II. The circuit court sentenced him to five years and three months in prison with an MSR term of three years to life.

¶ 8 In June 2010, defendant filed a motion for leave to file a successive postconviction petition, raising a claim of ineffective assistance of counsel. The following month, the circuit court denied defendant's request.

¶ 9 On July 24, 2014, defendant filed a *pro se* petition for relief from judgment, claiming he was not told at the time of his guilty plea "that if I could not find a 'host site' I would not have an out date" from prison. Defendant asked to withdraw his plea. He also filed a *pro se* motion for the judge to recuse himself from hearing the petition for relief from judgment. On July 31, 2014, the circuit court denied both defendant's petition for relief from judgment and his motion for recusal. Defendant filed a *pro se* motion to reconsider the denial of his petition for relief from judgment, arguing he was not receiving the benefit of his plea bargain because he does not have an out date and has served almost seven years in prison. The court denied the motion to reconsider, stating the MSR term is controlled by the Department of Corrections and not by the court. Defendant appealed, and this court affirmed the circuit court's denial of the

motion for recusal but reversed the circuit court's denial of defendant's petition for relief from judgment because the petition was not ripe for adjudication. *People v. Parker*, 2016 IL App (4th) 140777-U, ¶¶ 19, 27. On remand, the State filed an answer to defendant's petition for relief from judgment, and the circuit court denied the petition in January 2017.

¶ 10 On October 6, 2017, defendant filed the motion for leave to file a successive postconviction petition at issue in this appeal. On October 24, 2017, the circuit court denied the motion in a written order. The court found defendant failed to show cause by identifying an objective factor that impeded his ability to raise a specific claim in prior postconviction proceedings and failed to show prejudice. It also noted defendant's motion was the sixteenth collateral petition he had filed since his June 2009 conviction.

¶ 11 On November 17, 2017, defendant filed a timely *pro se* notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. July 1, 2017). See Ill. S. Ct. R. 651(d) (eff. July 1, 2017) (providing the procedure for appeals in postconviction proceedings is in accordance with the rules governing criminal appeals). Thus, we have jurisdiction of defendant's appeal under Illinois Supreme Court Rule 651(a) (eff. July 1, 2017). On appeal, defendant requested to proceed *pro se*, and this court granted the Office of the State Appellate Defender's motion to withdraw as counsel.

¶ 12 II. ANALYSIS

¶ 13 A. Forfeiture

¶ 14 Defendant raises six arguments on appeal. The State notes the only argument defendant raised in his proposed successive postconviction petition was his guilty plea was void due to fraud. It argues defendant's other issues are forfeited for failing to raise them in the circuit court. Our supreme court has emphasized a claim not raised in the postconviction petition

cannot be argued for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505-06, 821 N.E.2d 1093, 1097 (2004). Further, the appellate court lacks the supervisory authority to excuse a defendant's appellate forfeiture caused by the defendant's failure to include issues in his postconviction petition. *Jones*, 213 Ill. 2d at 508, 821 N.E.2d at 1099. Additionally, our supreme court has held issues not raised in the circuit court are forfeited on appeal. *People v. Lang*, 113 Ill. 2d 407, 469, 498 N.E.2d 1105, 1134 (1986). Thus, we agree with the State defendant forfeited all of his arguments except for the first one regarding fraud.

¶ 15 B. Denial of Leave to File a Successive Postconviction Petition

¶ 16 The only argument defendant has not forfeited is his claim his guilty plea is void because it was procured by fraud. The State argues defendant's claim is meritless and he did not establish cause and prejudice. When the circuit court has not held an evidentiary hearing, this court reviews *de novo* the denial of a defendant's motion for leave to file a successive postconviction petition. See *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 17 Section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2016)) provides the following:

“Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his

or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.”

Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *People v. Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909.

¶ 18 With a motion for leave to file a successive postconviction petition, the court is just conducting “a preliminary screening to determine whether defendant’s *pro se* motion for leave to file a successive postconviction petition adequately alleges facts demonstrating cause and prejudice.” *People v. Bailey*, 2017 IL 121450, ¶ 24, 102 N.E.3d 114. The court is only to ascertain “whether defendant has made a *prima facie* showing of cause and prejudice.” *Bailey*, 2017 IL 121450, ¶ 24. If the defendant did so, the court grants the defendant leave to file the successive postconviction petition. *Bailey*, 2017 IL 121450, ¶ 24.

¶ 19 On appeal, defendant fails to address the cause-and-prejudice test. A review of his pleadings in the circuit court indicates he did not identify an objective factor that impeded his ability to raise his fraud claim in his original postconviction petition. Moreover, defendant cannot establish prejudice because the circuit court has already allowed defendant to withdraw his guilty plea that was the basis of the February 2008 guilty finding. Defendant again pleaded guilty in June 2009. Accordingly, we find the circuit court did not err by denying defendant’s October 2017 motion for leave to file a successive postconviction petition.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm the Jersey County circuit court’s judgment.

¶ 22

Affirmed.