

No. 1-10-0117

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 93 CR 27560
)	
ANTONIO SEGOVIANO,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Where the supreme court discussed and rejected defendant's claim that trial counsel was ineffective in choosing not to object to the State's motion for a mistrial, *res judicata* barred the ineffectiveness claim in his post-conviction petition; the circuit court's order granting the State's motion to dismiss the petition was affirmed.

¶ 2 Defendant Anthony Segoviano appeals the dismissal of his post-conviction petition without an evidentiary hearing. On appeal, defendant contends his petition made a substantial showing of the ineffectiveness of his trial counsel by alleging counsel had a financial motive to object to the State's motion for a mistrial and counsel's actions were not motivated by trial strategy. We affirm.

¶ 3 Following a jury trial in 1995, defendant was convicted on an accountability theory of first degree murder for the shooting death of Martin Alvarez and as a principal of the attempted robbery of Onesimo Beltran. The underlying facts at trial regarding the issue in the instant appeal and in defendant's previous appeals concern the State's presentation of a purported eyewitness (Stacy Cueto) who was determined at trial to be an imposter representing himself to be his brother (Jerome John Lewis). When the defense revealed Cueto as an imposter, the State moved for a mistrial and asked the jury to disregard Cueto's stricken testimony. After the trial resumed, the actual eyewitness (Lewis) testified. Following the verdicts, the court sentenced defendant to 45 years for the murder and a concurrent term of 15 years for the attempted robbery.

¶ 4 On direct appeal, this court reversed defendant's convictions and remanded his case for a new trial, holding *inter alia* that the trial judge abused his discretion in denying the State's request for a mistrial. *People v. Segoviano*, 297 Ill. App. 3d 860, 868 (1998). However, the Illinois Supreme Court reversed that decision, holding that the trial judge's denial of a mistrial was not an abuse of discretion and, moreover, defense counsel did not provide ineffective assistance in objecting to the mistrial request. *People v. Segoviano*, 189 Ill. 2d 228, 241 (2000).

¶ 5 Although the facts of this case are set out in those two opinions, it is necessary to repeat them in large part here. At trial, Mario Rodriguez testified that at about 4:30 p.m. on November 9, 1993, he, defendant, Arnel Robinson and "J.J." had congregated near a currency exchange and were talking about buying narcotics. The seminal discussion in defendant's direct appeal and this post-conviction petition and appeal involves the testimony of "J.J." whose name is Jerome Lewis.

¶ 6 Rodriguez, who testified he knew "J.J." only by those initials, overheard defendant and Robinson agree that defendant would enter a currency exchange to find, in defendant's words,

"someone to rob." Robinson showed defendant a gun in his waistband during this conversation. Meanwhile, the victims, Alvarez and Beltran, drove up to the currency exchange. Alvarez went inside to conduct business while Beltran waited in their vehicle.

¶ 7 Steven Schoenberg, the manager of the currency exchange, testified that defendant followed Alvarez into the facility, wrote "Little Cap" on the wall while Schoenberg and Alvarez were talking, and followed Alvarez outside. A Chicago police officer testified "Little Cap" or "Little Capone" was defendant's nickname.

¶ 8 Rodriguez testified that defendant followed Alvarez into an alley out of Rodriguez's view, and he heard Robinson demand money. Rodriguez approached and saw Robinson pointing a gun at Alvarez. Rodriguez turned around and walked back toward the currency exchange, and he then heard two shots fired.

¶ 9 The State also presented evidence of statements that defendant made to police after his arrest. Defendant admitted planning the robbery with Robinson, entering the currency exchange, and following the victim into the alley, where Robinson confronted the victim. Defendant told police he and Robinson ran from the area after he heard two shots fired.

¶ 10 The State presented a witness who identified himself as Jerome John Lewis and said he also was called "J.J." This witness testified he was with defendant, Robinson and Rodriguez at the time of the shooting. During his testimony, the witness said he preferred to be called "Stacy." The witness said he heard Robinson and defendant discuss "sticking up" the victim and saw Robinson go to the alley when defendant entered the currency exchange. When the victim came out of the currency exchange, defendant followed the victim into the alley, and the witness heard two gunshots come from there.

¶ 11 On cross-examination, the witness stated his name was actually Stacy Lewis and he has a brother named Jerome. The witness said both he and his brother were known as "J.J." A few

minutes later, however, the witness testified his name was Jerome and his brother was Stacy. The witness acknowledged he had multiple felony convictions and was currently incarcerated in Minnesota. He admitted he had used his brother's name before, among other aliases.

¶ 12 The following day, after several other witnesses testified, the court held a hearing outside the presence of the jury regarding the defense's assertion that the witness presented by the State as Jerome Lewis or "J.J." was in fact his brother, Stacy Cueto. The defense called as a witness in the hearing a man who stated his name was Jerome John Lewis, he was also known as "J.J." and Cueto was his brother. Lewis said Cueto had used his name before. Lewis said he, not Cueto, was present at the shooting.

¶ 13 The next day, defendant's trial resumed. The prosecution addressed the court and said the person who testified at trial as Jerome John Lewis was Cueto, who disclosed his identity when the prosecutor confronted him. Rodriguez confirmed the identities of Cueto and Lewis for the State. According to the prosecutor, Cueto testified in place of Lewis because Lewis faced greater punishment for taking the stand compared to Cueto, who was already incarcerated in another state.

¶ 14 The prosecution moved for a mistrial based on the testimony that the jury had already heard. Defense counsel opposed the motion for a mistrial, arguing the State had the obligation to explain to the jury that the testimony should be disregarded. The court denied the State's motion for a mistrial, holding that "[a]t this time the trial in my opinion has not been reduced to a farce and a sham."

¶ 15 When the trial resumed, the prosecution told the court that the witness previously presented by the State was Cueto and not Jerome Lewis and that Cueto had not witnessed the shooting. The prosecutor asked that the jury disregard Cueto's testimony, and the court stated that testimony would be stricken and ordered the jury to disregard it completely.

¶ 16 The State then called the "real Jerome Lewis" to testify. Lewis said Cueto was his brother. Lewis said he was with defendant, Robinson and Rodriguez at the scene of the shooting but that defendant was standing next to him when the shots were fired. When asked about a statement he gave after the crime, Lewis said he did not recall speaking to police. The State then introduced a contradictory written statement of Lewis stating that defendant and Robinson entered the alley together and left together after the shooting.

¶ 17 After the State rested, the defense presented alibi testimony, some of which was impeached. The jury returned guilty verdicts, and the appeals ensued to the appellate and supreme courts. Those decisions, which we have cited earlier, will be discussed below in greater detail in considering defendant's post-conviction petition.

¶ 18 In 2001, defendant filed a *pro se* post-conviction petition asserting several claims. Counsel was appointed to represent defendant, and an amended petition was filed on July 3, 2008. The amended petition alleged, *inter alia*, that defendant's trial counsel was ineffective for allowing Cueto to testify and then objecting to the State's motion for a mistrial. The petition alleged that defense counsel, who was privately retained, opposed the State's mistrial request because a mistrial would have required counsel to represent defendant in a new trial to counsel's "fiscal detriment." Defendant said he told counsel during Cueto's testimony that Cueto was not Lewis. Defendant claimed that counsel did not immediately inform the court of that fact and instead told defendant he had to confirm the identity of the witness and would expose Cueto's identity on cross-examination, if necessary. In an affidavit attached to his petition, defendant claimed his trial counsel was concerned about the money he was owed for representing defendant and counsel did not want to be forced to try the case again should the judge declare a mistrial. Defendant also stated counsel said they had a chance to "beat" the State's case if a mistrial was not granted.

¶ 19 On December 10, 2009, after hearing argument, the circuit court granted the State's motion to dismiss defendant's petition. Defendant now appeals that ruling.

¶ 20 Defendant contends on appeal that his petition made a substantial showing of the ineffectiveness of his trial counsel so as to require an evidentiary hearing. Defendant argues his petition and affidavit raise "new questions about a conflict of interest and counsel's motives for objecting to a mistrial."

¶ 21 Defendant acknowledges the supreme court's opinion in this case rejected his argument, raised via cross-appeal, that his trial counsel was ineffective for opposing the State's motion for a mistrial. The supreme court concluded that defense counsel's decision to object to a mistrial reflected trial strategy and did not constitute ineffective assistance. *Segoviano*, 189 Ill. 2d at 247-49. However, defendant argues the precise claim of ineffective counsel raised in his post-conviction petition was not litigated on direct appeal and should be fully considered now.

¶ 22 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 (West 2008)) provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. At the second stage of a post-conviction proceeding, prior to an evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). A post-conviction petitioner is not entitled to an evidentiary hearing as of right; to proceed to an evidentiary hearing, the allegations in the post-conviction petition must be supported by the record or by accompanying affidavits. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Review of the dismissal of a post-conviction petition without an evidentiary hearing is *de novo*. *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011), citing *People v. Edwards*, 195 Ill. 2d 142, 156 (2001).

¶ 23 The purpose of the post-conviction proceeding is to permit inquiry into constitutional

issues that have not been, and could not have been, adjudicated previously upon direct review. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010). When considering a post-conviction petition, claims in the petition that were raised and decided on direct appeal are barred from post-conviction review by *res judicata*, and claims that could have been presented on direct appeal, but were not, are procedurally forfeited. *Taylor*, 237 Ill. 2d at 372. A claim of ineffective assistance of counsel requires the defendant to establish both that (1) his attorney's action or omission constituted error so serious as to fall below an objective standard of reasonableness; and (2) absent that error, a reasonable probability existed that the result of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*).

¶ 24 Defendant contends his petition stated a new claim that counsel's motive for objecting to the mistrial was rooted in counsel's desire not to continue representing defendant in a second trial. Defendant stated in his affidavit that when he and counsel discussed the State's mistrial request, counsel "was upset because my family owed him a great deal of money" and if counsel "was stuck representing me for the next trial, he would not have been paid because my family owed him a lot of money for the first trial."

¶ 25 The record establishes that the supreme court considered and rejected defendant's claim that his counsel was ineffective for opposing a mistrial. In oral argument before the supreme court, defendant argued his trial counsel was "*per se* ineffective" for opposing a mistrial on the basis that a retrial could be barred by double jeopardy. *Segoviano*, 189 Ill. 2d at 247-48. The supreme court observed that defense counsel effectively argued against an alternative that might have benefitted his client by barring a second trial, though the court ultimately concluded double jeopardy would not have prevented defendant's re-prosecution unless the State deliberately sought to cause a mistrial. *Segoviano*, 189 Ill. 2d at 247-48.

¶ 26 Nevertheless, the supreme court rejected defendant's assertion that his counsel was ineffective for opposing the State's request for a mistrial after Cueto's identity was revealed. *Segoviano*, 189 Ill. 2d at 247. The court noted that defense counsel's decision to oppose the State's request for a mistrial was a matter of trial strategy, stating:

"[Defense counsel's] strategy of opposing the mistrial instead [of] attempting to argue reasonable doubt by highlighting the State's accidental introduction of perjurious testimony can hardly be said to have constituted a lack of meaningful adversarial testing [of the State's case]. The testimony of Cueto was struck in its entirety and defense counsel effectively used the State's presentation of the impostor's testimony to cast doubt on the State's case in closing argument."

¶ 27 *Segoviano*, 189 Ill. 2d at 248-49 (quoting portions of defense counsel's closing argument in which counsel pointed out to the jury that it was the defense who brought the "real J.J." to the prosecution's attention). The supreme court concluded that defense counsel's decision to oppose the mistrial, thereby requiring the State to admit to the erroneous testimony of Cueto, and then use that error against the State was "a fairly ingenious strategy." *Segoviano*, 189 Ill. 2d at 249. The court further held that the trial judge did not abuse its discretion in rejecting the State's request for a mistrial, noting the jury was directly instructed to disregard Cueto's testimony and was immediately presented with testimony from Lewis. *Segoviano*, 189 Ill. 2d at 241-42 (also observing that Cueto's testimony was largely cumulative of other evidence at trial).

¶ 28 Although defendant attempts to re-characterize the issue before this court as involving "new questions" of counsel's conflict of interest, his essential claim is that of ineffective assistance of counsel for failing to object to the State's request for a mistrial, which is barred by

res judicata. The procedural bar of *res judicata* cannot be avoided by simply rephrasing issues that have already been raised or by adding an "additional allegation that is encompassed by a previously adjudicated issue." *People v. Kimble*, 348 Ill. App. 3d 1031, 1034 (2004). The legal claim that defendant raised in his petition, *i.e.*, that his counsel provided ineffective assistance in not objecting to a mistrial, is the same claim that was thoroughly weighed and rejected by the supreme court.

¶ 29 In conclusion, defendant's claim that his trial counsel was ineffective in objecting to the State's motion for a mistrial was adjudicated on direct appeal and is therefore barred by *res judicata*.

¶ 30 Accordingly, the circuit court's order granting the State's motion to dismiss defendant's post-conviction petition is affirmed.

¶ 31 Affirmed.