

NOTICE
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2011 IL App (4th) 100010-U

Filed 12/6/11

NO. 4-10-0010

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
ANTHONY GAY,)	No. 04CF24
Defendant-Appellant.)	
)	Honorable
)	Robert M. Travers,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's dismissal of the defendant's amended postconviction petition, concluding that the defendant (1) had forfeited his constitutional speedy-trial claim and (2) failed to show how he was prejudiced by his claim that his appellate counsel was ineffective by failing to assert (a) a statutory speedy-trial claim or (b) that the court erred by not instructing the jury in accordance with his affirmative defense of self-defense.

¶ 2 Following a June 2006 trial, a jury convicted defendant, Anthony Gay, of two counts of aggravated battery (720 ILCS 5/12-4(b)(6) (West 2000)). The trial court later sentenced defendant to concurrent prison terms of eight years on each count, to be served consecutively to other sentences defendant was serving in several unrelated cases.

¶ 3 In December 2008, defendant *pro se* filed an amended petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2008)). Following an October 2009 second-stage hearing, the trial court entered a written order dismissing defendant's

amended petition for postconviction relief, finding that defendant had failed to allege a substantial violation of a constitutional right.

¶ 4 Defendant appeals, arguing that the trial court erred by dismissing his amended petition for postconviction relief because he made a substantial showing of a constitutional violation. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 In February 2004, the State charged defendant, who was then an inmate at Dixon Correctional Center, with three counts of aggravated battery. Specifically, the State alleged that in February 2001, defendant "knowingly made physical contact of an insulting or provoking nature" with Francis Drnjevic (count I), Dustin McQuire (count II), and Joni Harris (count III), in that defendant threw a semisolid substance upon them, knowing that they were correctional officers who were engaged in the execution of their official duties.

¶ 7 Following a June 2006 trial, a jury (1) convicted defendant on counts I and II and (2) acquitted defendant on count III. The trial court later sentenced defendant to concurrent prison terms of eight years on each count, to be served consecutively to other sentences defendant was serving in several unrelated cases.

¶ 8 Defendant appealed, and this court affirmed, rejecting defendant's only argument, which was that the State violated his constitutional right to a speedy trial under the sixth amendment to the United States Constitution (U.S. Const., amend. VI). *People v. Gay*, 387 Ill. App. 3d 424, 903 N.E.2d 741 (2008).

¶ 9 In December 2008, defendant *pro se* filed an amended petition for postconviction relief, alleging, in pertinent part, (1) that the State intentionally violated his constitutional right

to due process under the fifth amendment to the United States Constitution (U.S. Const., amend. V), by delaying the filing of charges in multiple cases pending against him—which included the instant case—to prevent him from exercising his speedy trial right and (2) ineffective assistance of appellate counsel in that his counsel failed to assert (a) a violation of his statutory speedy-trial rights under section 103-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5 West 2008)) and (b) that the trial court erred by not instructing the jury pursuant to Illinois Pattern Jury Instruction, Criminal, No. 24-25.09X (4th ed. 2000) (hereinafter IPI Criminal 4th No. 24-25.09X), entitled, "Non-Initial Aggressor—No Duty to Retreat."

¶ 10 At an October 2009 hearing, the trial court (1) denied the State's motion to dismiss defendant's amended petition for postconviction relief as untimely but permitted the State to enter a general denial. Thereafter, the parties argued their respective positions on defendant's amended petition, and the court took the matter under advisement. In December 2009, the court entered a written order dismissing defendant's amended petition for postconviction relief, finding that defendant had failed to allege a substantial violation of a constitutional right.

¶ 11 This appeal followed.

¶ 12 II. THE TRIAL COURT'S SECOND-STAGE DISMISSAL OF
DEFENDANT'S AMENDED PETITION FOR
POSTCONVICTION RELIEF

¶ 13 A. Proceedings Under the Act

¶ 14 A defendant may proceed under the Act by alleging 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 2010). In noncapital cases, the Act establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1 through 122-7 (West 2010); *People v. Jones*, 213 Ill. 2d 498, 503, 821 N.E.2d 1093, 1096 (2004). At the first stage, "the trial court, without input from the State, examines the petition *only* to determine if [it alleges] a constitutional deprivation unrebutted by the record, rendering the petition neither frivolous nor patently without merit." (Emphasis in original.) *People v. Phyfifer*, 361 Ill. App. 3d 881, 883, 838 N.E.2d 181, 184 (2005). "Section 122-2.1 [of the Act] directs that if the defendant is sentenced to imprisonment (rather than death) and the circuit court determines that the petition is frivolous or patently without merit, it shall be dismissed in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2004)." *People v. Torres*, 228 Ill. 2d 382, 394, 888 N.E.2d 91, 99-100 (2008).

¶ 15 If a petition is not dismissed at stage one, it proceeds to stage two, where section 122-4 of the Act provides for the appointment of counsel for an indigent defendant who wishes counsel to be appointed (725 ILCS 5/122-4 (West 2010)). At the second stage, the State has the opportunity to answer or move to dismiss the petition (725 ILCS 5/122-5 (West 2010)). The relevant question raised during a second-stage postconviction hearing is whether the allegations in the petition, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which mandates a stage-three evidentiary hearing. *People v. Cheers*, 389 Ill. App. 3d 1016, 1024, 907 N.E.2d 37, 44 (2009). A trial court's second-stage dismissal of a defendant's postconviction petition under the Act presents a question of law that we review *de novo*. *Chears*, 389 Ill. App. 3d at 1024, 907 N.E.2d at 44.

¶ 16

B. Defendant's Claim That He Made a Substantial
Showing of a Constitutional Violation

¶ 17

Defendant argues that the trial court erred by dismissing his amended petition for postconviction relief because he made a substantial showing of a constitutional violation. Specifically, defendant contends that (1) the State intentionally violated his fifth-amendment right to due process by delaying the filing of charges in multiple cases pending against him—which included this instant case—to prevent him from exercising his speedy-trial right and (2) his appellate counsel was ineffective in that counsel failed to assert (a) a violation of his statutory speedy-trial rights and (b) the trial court erred by not instructing the jury pursuant to IPI Criminal 4th No. 24-25.09X. We address defendant's contentions in turn.

¶ 18

1. *Defendant's Speedy-Trial Claim*

¶ 19

Defendant contends that the State intentionally violated his fifth-amendment right to due process by delaying the filing of charges in multiple cases pending against him to prevent him from exercising his speedy-trial right in this case. The State responds that because defendant failed to raise this issue on direct appeal, he has forfeited this issue. We agree with the State.

¶ 20

Principles of *res judicata* and waiver limits the range of issues available to a postconviction petitioner " 'to constitutional matters which have not been, and could not have been, previously adjudicated.' " *People v. Scott*, 194 Ill. 2d 268, 273, 742 N.E.2d 287, 291-92 (2000) (quoting *People v. Winsett*, 153 Ill. 2d 335, 346, 606 N.E.2d 1186, 1193 (1992)). "Accordingly, rulings on issues that were previously raised at trial or on direct appeal are *res judicata*, and issues that could have been raised in the earlier proceedings, but were not, will ordinarily be deemed [forfeited]." *Scott*, 194 Ill. 2d at 274, 742 N.E.2d at 292.

¶ 21 In his reply brief to this court, defendant claims that his contention could not have been raised on direct appeal because it was premised on a conversation he had with the prosecutor during plea negotiations, which was not part of the record. See *People v. Youngblood*, 389 Ill. App. 3d 209, 214, 906 N.E.2d 720, 725 (2009) (a postconviction petition that relies on matters outside of the record is not ordinarily forfeited because matters outside the record may not be raised on direct appeal).

¶ 22 In *People v. Lawson*, 67 Ill. 2d 449, 459, 367 N.E.2d 1244, 1248 (1977), the supreme court set forth the following test to determine whether a preindictment delay results in a due-process violation:

"Where there has been a delay between an alleged crime and indictment or arrest or accusation, the defendant must come forward with a clear showing of actual *and* substantial prejudice. Mere assertion of inability to recall is insufficient. If the accused satisfies the trial court that he or she has been substantially prejudiced by the delay, then the burden shifts to the State to show the reasonableness, if not the necessity, of the delay.

If this two-step process ascertains both substantial prejudice and reasonableness of a delay, then the court must make a determination based upon a balancing of the interests of the defendant and the public. Factors the court should consider, among others, are the length of the delay and the seriousness of the crime." (Emphasis in original.)

See *People v. Delgado*, 368 Ill. App. 3d 661, 665, 858 N.E.2d 603, 606 (2006) (remanding with instructions that the trial court apply the *Lawson* test to the defendant's claim of preindictment delay).

¶ 23 According to the test the supreme court announced in *Lawson*, a defendant asserting a constitutional violation based on a preindictment delay must show (1) that a preindictment delay existed, which was part of the record at the time defendant filed his initial appeal, and (2) how he was substantially prejudiced by that delay. Therefore, despite his claim, defendant's conversation with the State during plea negotiations may, at most, show the State's rationale for the preindictment delay after defendant has met his burden. See *Lawson*, 67 Ill. 2d at 461, 367 N.E.2d at 1249 (the inquiry requires the defendant to come forward with a clear demonstration of actual and substantial prejudice before the State presents a showing of reasonableness).

¶ 24 Accordingly, because defendant failed to raise this issue at the time of his direct appeal, he has forfeited his opportunity to raise it now, and we decline to address it.

¶ 25 *2. Defendant's Ineffective-Assistance-of-Appellate-Counsel Claims*

¶ 26 a. Strickland's Two-Prong Test for Ineffective-Assistance-of-Counsel Claims

¶ 27 To establish an ineffective-assistance-of-counsel claim, a defendant must show (1) his counsel's performance was inadequate "in that it fell below an objective standard of reasonableness," and (2) a reasonable probability exists the outcome of the proceeding would have been different absent counsel's deficient performance. *People v. Moore*, 189 Ill. 2d 521, 535, 727 N.E.2d 348, 355–56 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "Because defendant must prove both prongs of *Strickland*

speedy-trial rights. As we noted in *Gay*, "[t]he record *** belies defendant's assertion that the delay was 'due to the State's failure to advance [his] case for trial' " and "[a]lthough the delay in adjudicating defendant's case was unfortunate, it (1) was not contrived to hamper defendant's defense, (2) was due, at least in part, to defendant's own conduct, (3) did not prejudice defendant, and (4) was not unreasonable under the circumstances." *Id.*

¶ 32 c. Defendant's Claim Regarding Appellate Counsel's Failure To Claim That the Trial Court Failed To Properly Instruct the Jury

¶ 33 Defendant next contends that his appellate counsel was ineffective in that his counsel failed to assert that the trial court erred by not instructing the jury pursuant to IPI Criminal 4th No. 24-25.09X. We disagree.

¶ 34 IPI Criminal 4th No. 24-25.09X, entitled, "Non-Initial Aggressor–No Duty to Retreat," provides as follows:

"A person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor."

¶ 35 At his June 2006 trial, defendant asserted the affirmative defense of self-defense. Specifically, the evidence presented showed, in pertinent part, that Drnjevic observed defendant kneeling down in a holding cell attempting to conceal something, which was later identified as a toothpaste tube containing a mixture of urine and feces. Drnjevic testified that as he approached, defendant squirted him with a substance that smelled of urine and feces. Defendant testified that Drnjevic came into the holding cell yelling "What are you doing?" Startled, defendant turned around and faced Drnjevic. Defendant then stated that Drnjevic started to choke him. Defendant admitted that he put the tube into Drnjevic's mouth and intentionally squirted him so that

Drnjevic would stop choking him. In the process, defendant acknowledged that it was possible he unintentionally squirted the substance on McQuire.

¶ 36 At a later jury instruction conference, defendant unsuccessfully petitioned the trial court to instruct the jury on IPI Criminal 4th No. 24-25.09X. Nevertheless, the court did instruct the jury on IPI Criminal 4th No. 24-25.06, entitled "Use of Force in Defense of a Person," which states, as follows:

"A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend [himself] against the imminent use of unlawful force."

¶ 37 Defendant asserts that if the trial court had instructed the jury on IPI Criminal 4th No. 24-25.06, it "would have allowed the jury to find that if Drnjevic was the aggressor ***, [defendant] had no duty to escape that danger before using force against [Drnjevic]." In this regard, defendant posits that because the trial court did not provide that instruction, the jury "did not understand that after Drnjevic began choking [him], [defendant] had no duty to retreat or submit" to the force Drnjevic applied. Thus, defendant claims that the jury was instructed about the limitations to his justified use of force, but was not adequately informed about his right to defend himself.

¶ 38 In this case, the jury was instructed that to find defendant guilty of the aggravated battery of Drnjevic, the State had to prove all the following propositions beyond a reasonable doubt: (1) that defendant knowingly made physical contact of an insulting or provoking nature with Drnjevic; (2) that defendant knew Drnjevic to be a correctional institution employee, (3) that defendant knew Drnjevic was engaged in the execution of his official duties, and (4) that

defendant was not justified in using the force which he used.

¶ 39 Here, the jury convicted defendant of the aggravated battery of Drnjevic because it determined, in part, that the State had proved beyond a reasonable doubt that defendant was not justified in using the force that he employed against Drnjevic. Thus, an instruction to the jury that defendant had no duty to attempt to escape a holding cell in a State correctional facility he was lawfully being housed in before using force against a correctional officer who, as he claimed, was choking him, would not have affected the jury's determination that the force defendant admitted he employed in that situation was unjustified.

¶ 40 Moreover, even if we were to accept defendant assertions—which we view as merely speculative and conclusory—they portend only the possibility of prejudice. See *People v. Hudson*, 195 Ill. 2d 117, 123-24, 745 N.E.2d 1246, 1251 (2001) (To establish actual prejudice, a postconviction petitioner must show that alleged errors worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions and not merely that the errors created the possibility of prejudice). Accordingly, we reject defendant's claim.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the trial court's judgment.

¶ 43 Affirmed.