SECOND DIVISION
May 21, 2013

No. 1-11-0446

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 97 CR 13910
	)	
DAVID SARGENT,	)	Honorable
	)	Thomas Hennelly
Defendant-Appellant.	)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Simon concurred in the judgment.

O R D E R

¶ 1 *HELD*: Second-stage dismissal of post-conviction petition affirmed where trial and appellate counsel were not ineffective for failing to challenge erroneous jury instruction, and allegation that confession was fraudulent and coerced was not supported by newly discovered evidence.

¶ 2 Defendant David Sargent appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). On

appeal, he contends that he made a substantial showing that he was denied a fair trial and the effective assistance of trial and appellate counsel with respect to an erroneous jury instruction that was given; and that he was denied the right to due process by the admission of a false and involuntary confession. For the following reasons, we affirm.

¶ 3 The record shows, in relevant part, that following a 1999 jury trial, defendant was found guilty of murder, home invasion, and armed robbery. His conviction was based, in part, on a signed statement in which he admitted to participating in a home invasion at 93rd Street and Jeffrey Boulevard which ended in the shooting death of Scott Tisdale. Lori Bethany, who was with defendant and his crew on the night in question, testified at trial that she heard two gunshots coming from the area of 93rd Street and Jeffrey Boulevard and saw defendant come running from an alley. James Tisdale, the father of the shooting victim, also identified defendant in a lineup and at trial as the man who had stood over his son with a bat that night. Defendant testified that he was at Anthony Miles' house on the night in question and stayed there all weekend. He also testified that he had repeatedly told police that he knew nothing about the shooting, but that assistant State's Attorney [ASA] Rogers told him "that if he helped finger [Loracio] Jennings for conspiracy nothing would happen to him." He admitted signing a statement, but denied having read it. Defendant said an unidentified police officer told him that they could "make it harder" for him if he did not sign the statement written by ASA Rogers. He said that police make him nervous and he felt intimidated. The trial court ultimately sentenced him to 60 years' imprisonment for murder, 30 years for home invasion to run concurrently, and 30 years for armed robbery to run consecutively.

¶ 4 This court affirmed defendant's convictions and sentence for first degree murder on direct appeal, but vacated his sentences for armed robbery and home invasion, and remanded the cause to the trial court to make factual findings addressing the imposition of any consecutive sentence. *People v. Sergeant*, 326 Ill. App. 3d 974 (2001). On remand, the trial court sentenced defendant to a concurrent term of 30 years' imprisonment for home invasion and a consecutive term of 30 years for armed robbery. This court affirmed that judgment on appeal and granted the public defender leave to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967). *People v. Sargent*, No. 1-02-2895 (2003) (unpublished order under Supreme Court Rule 23).

¶ 5 On August 7, 2002, defendant filed a *pro se* petition for post-conviction relief. He alleged, as pertinent to this appeal, that appellate counsel was ineffective for failing to argue on direct appeal that his statement was involuntarily given, claiming that "the statement was obtained after incessant questioning by the A.S.A. even after the petitioner had indicated that he knew nothing about the murder investigation and as such the statement represents the fabrication of the author and not the petitioner." Defendant also alleged that he was denied a fair trial and the effective assistance of trial and appellate counsel where both the trial court and trial counsel erroneously instructed the jury with respect to IPI Criminal No. 3.15, and appellate counsel failed to raise the issue on appeal.

¶ 6 On March 28, 2003, defendant's post-conviction petition was docketed, and counsel was appointed to represent him. Defendant nonetheless filed four *pro se* supplemental post-conviction petitions on December 20, 2002, June 30, 2003, October 14, 2004, and January 9,

2006.[1] In the fourth such petition, defendant supplemented the ineffective assistance of appellate counsel claim raised in his initial post-conviction petition. He alleged that his statement to police was authored by ASA Michael Rogers, and that Area 2 detective Michael McDermott "was a participant and in actuality a co-author in the making of the alleged statement." He further claimed that ASA Rogers has a history of "causing and/or being the cause of fraudulent statements used against individuals for the chief purpose of obtaining an [un]ethical prosecution, as [was] done to [him]," and that it has also been alleged that Detective McDermott "caused statements to be made by way and method of torture and/or unethical tactics," which "gives rise to the fact that, just as ASA Rogers, McDermott as well has a history of [un]ethical patterns in the causing of fraudulent statements." (Alteration in original.) He stated:

> "Though [defendant] does not allege any physical abuse as in the above cases, he does however allege that mental abuse was sustained by threat[s] and intimidational tactic[s], etc., and that the agents of cause being that of McDermott and ASA Rogers along with Przepiora, and the mere fact and knowledge that said officials were from the 'well known Police Headquarters which carries with it a reputation and history for seriously abusing suspects and being the cause of fraudulent statements ***.' " (Alteration in original.)

Defendant claimed that absent this prosecutorial and police abuse "the outcome of the trial would

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[1] The memorandum of orders shows that defendant withdrew the post-conviction petition "filed on 6-17-03," which corresponds to the date on the notice of filing of defendant's second *pro se* supplemental post-conviction petition.

have been an acquittal," and that he suffered a "Monumental Miscarriage of Justice" in violation of the fifth, sixth, and fourteenth amendments of the United States Constitution.

¶ 7 In support of his claim, defendant attached a copy of a Chicago Tribune article from December 17, 2001, titled "Cops and Confessions: Veteran Detective's Murder Cases Unravel," which discussed ASA Rogers' role in the prosecution of Harold Hill, who was exonerated of sexually assaulting and murdering Kathy Morgan.[2] The article stated, "Hill testified at trial that he confessed only after the detectives and Assistant State's Atty[.] Michael Rogers fed him the story, including the names of Williams and Young, a charge that Rogers denied in court."[3] Defendant also cited, *inter alia*, the petition for the appointment of a special prosecutor to investigate abuse at Area 2 police headquarters.

¶ 8 On June 16, 2009, post-conviction counsel filed a Rule 651(c) certificate "as to the *pro se* pleadings of the petitioner filed on or about July 26, 2002." Counsel also filed amendments to defendant's initial post-conviction petition (amended petition) without further addressing defendant's allegation regarding the erroneous jury instruction raised in his ineffective assistance of appellate counsel claim. The amended petition stated that "[t]hese amendments do not address any pleadings beyond those initially filed by [defendant] within that initial pro *se* Petition for Post Conviction Relief which was filed by [defendant] on August 7, 2002." The amended petition also stated that "[s]ubsequent arguments as to those issues which were raised in the

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[2] See *Hill v. Coppleson*, 627 F.3d 601 (7th Cir. 2010).

[3] Defendant did not provide the full article. However, appellate counsel advises that the article was reported by Maurice Possley, Steve Mills, and Ken Armstrong.

initial pro se Petition for Post Conviction Relief are hereby incorporated by reference and not waived; however no incorporation is made within these amendments as to any issues raised by [defendant] in subsequent *pro se* pleadings that may not have been set forth in the original initial pro *se* Petition for Post Conviction Relief."

¶ 9 On September 30, 2009, defendant filed a *pro se* motion for leave to amend the amended petition asserting, *inter alia*, that counsel's "Amendment is also Incomplete and Void of Issues/Claims (Omissions) *** that has been previously filed as-and-within [defendant's] First-(1st), Third-(3rd) & Fourth-(4th) Supplement Petitions." On February 26, 2010, counsel filed a second Rule 651(c) certificate "as to the *pro se* pleadings of the petitioner filed in addition to the second successive Petition for Post Conviction Relief which was filed on or about **July 26, 2002**."[4] Counsel enumerated the issues raised in defendant's supplemental petitions and stated, "I have reviewed all of the aforesaid *pro se* filings, and offer no amendment thereto at this time. Counsel hereby reserves the right to reply to any Motion to Dismiss that may be filed thereto."

¶ 10 At a hearing on March 12, 2010, counsel informed the court that proceedings had been continued "for a ruling on Petitioner's pro se motion" without referring to the title of the motion.[5] The court ruled as follows:

"I have taken the liberty to review [counsel's] certification

pursuant to Supreme Court Rule, and the numerous pro se filings

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[4] Although counsel referred to defendant's petition as successive, there is no indication in the record that it was so.

[5] The report of proceedings appears to be missing the court date of February 26, 2010.

by [defendant] with their amendments.

As was pointed out, Counsel is correct, he is seeking appointment of counsel other than the Public Defender. I mistakenly thought it was a little more involved than that, although it does take some time to go through pages, and pages, and pages of pro se ramblings.

So with that said, I apologize, but in that sense, his motion is considered and denied. I find it to be baseless and without merit."

¶ 11 On July 29, 2010, the State filed a motion to dismiss defendant's post-conviction "petitions." The motion did not specifically address either the allegation regarding the erroneous jury instruction, or the allegation that defendant's statement was fraudulent and coerced. The parties subsequently informed the court that they had agreed to waive oral argument and to stand on the pleadings.

¶ 12 On January 28, 2011, the court granted the State's motion to dismiss "the petition." The court stated, "I agree with the State that I think his petition is barred by waiver and res judicata, and I am not going to go into anything further than that. I don't think there is any need to." This appeal follows.

¶ 13 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second stage of proceedings, defendant has the burden of

making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). In making that determination, all well-pleaded facts in the petition and affidavits are taken as true, but nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). We review *de novo* the dismissal of a petition without an evidentiary hearing. *Hall*, 217 Ill. 2d at 334.

¶ 14 Defendant first maintains that the circuit court erred in dismissing his post-conviction petition where he made a substantial showing that he was denied the right to a fair trial and to the effective assistance of trial and appellate counsel. To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. To show prejudice in the context of ineffective assistance of appellate counsel, defendant must show a reasonable probability that, but for appellate counsel's errors, the appeal would have been successful. *People v. Golden*, 229 Ill. 2d 277, 283 (2008). Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel; thus, where the ineffectiveness claim can be disposed of on the ground that defendant did not suffer prejudice, the court need not address counsel's performance. *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992).

¶ 15 In this case, defendant claims that the trial court gave an erroneous version of IPI Criminal No. 3.15 containing the word "or" between each of the factors to be considered in weighing the identification testimony of a witness. He also claims that trial counsel referred to this erroneous instruction during closing argument, and that appellate counsel was ineffective for failing to raise this meritorious issue on direct appeal.

¶ 16 The State responds that trial counsel was not ineffective for failing to raise an issue that had not been decided, and that appellate counsel was not ineffective for failing to raise an issue decided only four days prior to the decision in defendant's direct appeal. The State also responds that defendant cannot establish prejudice where this court found on direct appeal that the evidence against him was overwhelming.

¶ 17 In *People v. Gonzalez*, 326 Ill. App. 3d 629, 637-40 (2001), this court held that the defendant was denied a fair trial where the trial court presented the jury with an erroneous version of IPI Criminal No. 3.15 containing the word "or" between each of the factors to be considered in weighing the identification testimony of a witness. In *People v. Herron*, 215 Ill. 2d 167, 191 (2005), the supreme court affirmed this court's holding in *Gonzalez* "that giving IPI Criminal No. 3.15 with the 'ors' is indeed plain error." The supreme court then noted that "[t]he question becomes whether the defendant has shown prejudice." *Herron*, 215 Ill. 2d at 192. To that end, the supreme court stated:

> "We recently held that a jury instruction error rises to the level of plain error only when it 'creates a serious risk that the jurors incorrectly convicted the defendant because they did not

> understand the applicable law, so as to severely threaten the fairness of the trial.' [Citations.] *The seriousness of the risk depends upon the quantum of evidence presented by the State against the defendant*. The defendant need not prove that the error in the instruction actually misled the jury. If the defendant carries the burden of persuasion and convinces a reviewing court that there was error and that the evidence was closely balanced, the case is not cloaked with a presumption of prejudice. The error is actually prejudicial, not presumptively prejudicial. We deal with probabilities, not certainties; we deal with risks and threats to the defendant's rights. When there is error in a close case, we choose to err on the side of fairness, so as not to convict an innocent person." (Emphasis added.) *Herron*, 215 Ill. 2d at 193.

¶ 18 Here, the record shows that the trial court did, indeed, instruct the jury with the erroneous version of IPI Criminal No. 3.15 containing "ors" between the identification factors. The record also shows that trial counsel did not object to the erroneous instruction and repeated it to the jury in closing argument, and that this issue was not raised by appellate counsel on direct appeal. Nevertheless, defendant cannot establish that he suffered prejudice. In addressing the improper admission of hearsay on defendant's direct appeal, this court found that any error was harmless, noting:

> "The evidence in this case is overwhelming. Defendant confessed to his involvement in the armed robbery and home invasion in a written statement. Lori Bethany testified to being with the defendant at the address where the murder and armed robbery occurred that evening. James Tisdale identified the defendant as one of the invaders from a photograph, in a lineup and in court. Defendant's apparent alibi witness testified that defendant came to his house on October 6, 1995, but he could not remember at what time. When defendant took the stand he testified that while he signed and initialed every page of the statement he did not read any of it. *** Therefore, even if the statements were improperly admitted, their effect on the jury was minimal in light of the overwhelming evidence supporting defendant's conviction."
> *Sergeant*, 326 Ill. App. 3d at 981.

The same holds true here. The evidence against defendant was overwhelming, and any error in giving the erroneous version of IPI Criminal No. 3.15 was harmless as a result. *Herron*, 215 Ill. 2d at 192-93. We cannot say that there is a reasonable probability of a different outcome had trial or appellate counsel challenged the giving of the erroneous instruction. *Strickland*, 466 U.S. at 687, 694.

¶ 19 In reaching this conclusion, we reject defendant's argument that the evidence in this case was closely balanced, as in *People v. Piatkowski*, 225 Ill. 2d 551 (2007). In *People v. Martinez*,

389 Ill. App. 3d 413, 414, 416 (2009), a case analogous to the one at bar, defendant filed a post-conviction petition alleging that counsel was ineffective for failing to challenge the giving of IPI Criminal No. 3.15 at trial or on appeal, and this court found that defendant could not establish prejudice because the evidence was not closely balanced. In so finding, this court noted that it had held on direct appeal that the evidence against defendant was overwhelming, and that defendant was collaterally estopped from arguing otherwise. *Martinez*, 389 Ill. App. 3d at 417. Seeing as we also held on direct appeal that the evidence against defendant was overwhelming, we likewise find that defendant is collaterally estopped from arguing otherwise. *Martinez*, 389 Ill. App. 3d at 417. Defendant has thus failed to make a substantial showing that he was denied the right to a fair trial and to the effective assistance of trial and appellate counsel.

¶ 20 Defendant next contends that he made a substantial showing that his right to due process and a fair trial was violated by the admission of his allegedly coerced confession. He points to the "newly-discovered evidence" provided in his post-conviction petition linking ASA Rogers to another false confession and establishing that Detective McDermott was personally involved with Area 2 torture cases. The State responds that the evidence offered by defendant in support of his claim does not qualify as newly discovered evidence because neither the newspaper article nor the report of the special prosecutor is material.

¶ 21 The record shows that defendant alleged in his post-conviction petition that ASA Rogers and Detective McDermott obtained a fraudulent and coerced statement from him; specifically, that ASA Rogers "authored" his statement, and that Detective McDermott mentally abused him with threats, intimidation tactics, and the fact that he was from the " 'well known Police

Headquarters which carries with it a reputation and history for seriously abusing suspects and being the cause of fraudulent statements.' " During his trial testimony, the only threat alleged by defendant was that an unidentified police officer told him they could "make it harder" for him if he did not sign the statement written by ASA Rogers. As support for his claim, defendant attached to his petition a Chicago Tribune article from December 17, 2001, regarding the prosecution of Harold Hill, who allegedly confessed to ASA Rogers more than four years prior to Rogers' interview of this defendant. Hill was later exonerated of sexual assault and murder. The article stated: "Hill testified at trial that he confessed only after the detectives and Assistant State's Atty Michael Rogers fed him the story *** a charge that Rogers denied in court." He also cited, *inter alia*, the petition for the appointment of a special prosecutor to investigate abuse at Area 2 police headquarters.

¶ 22 Now, in his opening brief, defendant also cites a more recent newspaper article and advises that Harold Hill sued ASA Rogers in federal court, and that Hill settled with Cook County for Rogers' involvement with the false confession. He also cites the report of the Special State's Attorney regarding the allegations of torture by police officers under the command of Jon Burge at Area 2 and Area 3 headquarters (Report of the Special State's Attorney). He notes that the Special State's Attorney concluded that Detective McDermott tortured Alfonzo Pinex in 1986, and that there existed sufficient evidence to prove beyond a reasonable doubt that Detective McDermott was guilty of aggravated battery, perjury, and obstruction of justice.

¶ 23 We initially find that defendant cannot rely in this appeal on the petition for the appointment of a special prosecutor, the newspaper article regarding Hill's settlement with Cook

County, or the Report of the Special State's Attorney. Under the Act, defendant is required to provide, *inter alia*, affidavits, records, or other evidence in support of his allegations, or an explanation for the absence of such materials. 725 ILCS 5/122-2 (West 2010). Here, defendant did not attach the petition for the appointment of a special prosecutor to his post-conviction petition or explain why he could not do so. He also did not attach to his petition the newspaper article regarding Hill's settlement with Cook County or the Report of the Special State's Attorney, nor did he even cite to them. We find that it would be wrong to consider these materials for the first time on appeal without them "first being attached to defendant's postconviction petition for initial scrutiny and evaluation at the trial court level." *People v. Anderson*, 375 Ill. App. 3d 121, 138-39 (2007).

¶ 24 We are therefore left to determine whether the Chicago Tribune article attached to defendant's petition qualifies as newly discovered evidence. "For new evidence to be sufficient to warrant a new trial, it must be of such conclusive character that it will probably change the result upon retrial." *People v. Patterson*, 192 Ill. 2d 93, 139 (2000). The evidence must also be material and not merely cumulative, discovered since the trial, and of such character that it could not have been discovered prior to trial by the exercise of due diligence. *Patterson*, 192 Ill. 2d at 139.

¶ 25 Here, we find that the Chicago Tribune article regarding ASA Rogers' involvement in the prosecution of Hill is not of such conclusive character that it would probably change the result upon retrial. First, a Chicago Tribune article "is simply a newspaper article, and as such is essentially a collection of hearsay statements. Defendant fails to explain why this hearsay would

have been admissible for any purpose." *Patterson*, 192 Ill. 2d at 125. Second, defendant relies solely on one statement to support his claim that ASA Rogers obtained a fraudulent statement from him, that being: "Hill testified at trial that he confessed only after the detectives and Assistant State's Atty Michael Rogers fed him the story *** a charge that Rogers denied in court." Taking into account the fact that Hill was later exonerated, this single statement does not suggest that ASA Rogers was systematically engaged in obtaining false confessions so as to render defendant's statement of questionable origin. More importantly, it would not likely change the result on retrial since defendant's conviction was not based solely on his confession, but also on eyewitness testimony from Bethany and Tisdale. We therefore find that the Chicago Tribune article does not constitute newly discovered evidence of a false confession (*Patterson*, 192 Ill. 2d at 139), and that the circuit court did not err in dismissing defendant's post-conviction petition.

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.