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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 96-CF-1249
)	
CARLOS ARROYO,)	Honorable
)	George Bridges,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed the trial court’s dismissal of defendant’s postconviction petition at the second stage, because the claims in the petition either (1) were forfeited on appeal, (2) had been raised on direct appeal and were barred under the doctrine of *res judicata*, or (3) could have been raised on direct appeal and were procedurally defaulted.

¶ 2 Defendant, Carlos Arroyo, appeals from the second-stage dismissal of his petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). The trial court determined that defendant’s petition was untimely and that, even if it were timely, defendant’s postconviction claims either had been raised on direct appeal and were barred under the doctrine of

res judicata or were procedurally defaulted because they could have been raised on direct appeal but were not. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of first-degree murder (720 ILCS 5/9-1 (West 1996)) for the shooting death of rival gang member Jose Soto. The evidence presented at defendant's trial, as well as the procedural history of defendant's direct appeals, is set forth in detail in *People v. Arroyo*, 339 Ill. App. 3d 137 (2003), and we need only briefly summarize it here.

¶ 5 On May 7, 1996, around 6:00 p.m., Juan Salgado, Diana Zuniga, and defendant were driving in Salgado's purple Chevrolet Cavalier when they observed Soto walking along Washington Street in Waukegan. Salgado handed defendant a gun and told him to shoot Soto. At defendant's first trial, Zuniga testified that defendant exited the car with a gun, wearing a red hooded sweatshirt, and that she and Salgado then drove to a nearby location where they picked up defendant. Zuniga testified that defendant then gave Salgado the sweatshirt and the gun, whereupon Salgado exited the car, ran up to Soto, and shot him. According to Zuniga, Salgado then ran through an apartment complex, and Zuniga, who was then driving the car, picked him up. Defendant testified to the same course of events, explaining that he had been too scared to shoot Soto. Christopher Truax, who also was called as a defense witness at defendant's first trial, testified that he had been grilling on his second-story balcony when he heard two gunshots. Within approximately 15 to 20 minutes, Truax observed a man wearing a red hooded sweatshirt running westbound through the grassy area behind his apartment. According to Truax, the person he saw was much bigger and taller than defendant. The State presented testimony from an eyewitness to the shooting who identified defendant as the

shooter. The jury convicted defendant of first-degree murder, and defendant was sentenced to 60 years' imprisonment.

¶ 6 On direct appeal, this court reversed defendant's conviction and remanded for a new trial, for reasons not relevant to this appeal. *People v. Arroyo*, No. 2-97-0158 (1998) (unpublished order under Supreme Court Rule 23). At defendant's second trial, he again testified that Salgado had shot Soto after defendant had refused to do so. Defense counsel did not call Zuniga or Truax as witnesses at defendant's second trial, however. One of defendant's attorneys stated on the record that the defense had decided not to call Zuniga to testify because the prosecution during opening statements had improperly commented that Zuniga was serving a 20-year prison sentence and that she had been convicted of being the getaway driver in Soto's murder. Although defense counsel did not call Zuniga or Truax, defense counsel did call Louise Battinus (who did not testify at defendant's first trial), who was an eyewitness to the shooting and testified that defendant was "absolutely not" the shooter. Once again, the State presented testimony from an eyewitness to the shooting who identified defendant as the shooter. The jury convicted defendant of first-degree murder,¹ and defendant was sentenced to 54 years' imprisonment.

¶ 7 This court again reversed defendant's conviction on direct appeal, concluding that the prosecutor's comments during opening statements had been improper and prejudiced defendant. *People v. Arroyo*, 328 Ill. App. 3d 861 (2002). Our supreme court denied the State's petition for leave to appeal but, under its supervisory authority, directed this court to vacate its opinion and reconsider its judgment in light of the substantial prejudice standard set forth in *People v. Williams*,

¹The jury received both an accountability jury instruction and verdict form, but returned the verdict form finding that defendant had been the shooter.

192 Ill. 2d 548 (2000). *People v. Arroyo*, 201 Ill. 2d 576 (2002). On reconsideration, this court affirmed defendant's conviction. *Arroyo*, 339 Ill. App. 3d at 157. Relevant to the current appeal, this court rejected defendant's argument that he had received ineffective assistance of counsel when his attorneys failed to call Zuniga as a witness at his second trial. *Arroyo*, 339 Ill. App. 3d at 154-57. We reasoned that it was not outside the realm of reasonable defense strategy to conclude that Zuniga, who was impeachable with a first-degree murder conviction, was too incredible to be an effective witness, especially considering that defendant had been found guilty despite Zuniga's testimony at defendant's first trial. *Arroyo*, 339 Ill. App. 3d at 156-57. We further reasoned that defendant had not established that he had been prejudiced by defense counsel's failure to call Zuniga as a witness. *Arroyo*, 339 Ill. App. 3d at 157.

¶ 8 Defendant subsequently filed, through privately retained counsel, his first postconviction petition. The sole claim in the one-page petition was "[t]hat the Defendant's Constitutional Rights were violated." The trial court summarily dismissed the petition at the first-stage, and defendant appealed. On appeal, defendant did not challenge the dismissal of his postconviction petition; rather, he asked this court to order the trial court to permit defendant to file a new postconviction petition and to order that it be treated as his initial petition, rather than as a successive petition. This court dismissed defendant's appeal for lack of jurisdiction, reasoning that a reviewing court lacks jurisdiction to render advisory opinions or to decide moot or abstract questions. *People v. Arroyo*, No. 2-04-0776 (2006) (unpublished order under Supreme Court Rule 23).

¶ 9 On January 17, 2007, defendant filed a *pro se* postconviction petition. In the petition, he argued that his initial postconviction proceedings were "fundamentally flawed" and that his petition should not be subject to the stringent cause-and-prejudice test normally applicable to successive

postconviction petitions. At a hearing on January 18, 2007, the court stated that it agreed with defendant that the attorney who filed defendant's first postconviction petition had been ineffective. The court stated that it would "allow the Defendant to file this as a First Post-Conviction Petition." The court then appointed the public defender. At a subsequent hearing, the court clarified that the postconviction proceedings had advanced to the second stage and also granted defendant's court-appointed attorney leave to file an amended postconviction petition.

¶ 10 On August 26, 2011, defendant's court-appointed counsel filed an amended postconviction petition.² The three-page petition contained two claims, only one of which defendant addresses on appeal. In that claim, defendant alleged that trial counsel was ineffective for failing to call Zuniga and Truax as witnesses at his second trial. Attached to the petition was Zuniga's affidavit, in which she stated that Salgado had shot Soto. Also attached to the petition were the transcripts of a sworn statement that Zuniga gave in October 1996 and of her testimony at defendant's first trial.

¶ 11 The State moved to dismiss defendant's amended postconviction petition. The State argued that defendant's postconviction petition was untimely and that, overlooking the untimeliness, the claims either were barred under the doctrine of *res judicata* or were procedurally defaulted.

¶ 12 On November 15, 2011, the trial court entered a memorandum opinion and order granting the State's motion to dismiss. Defendant timely appealed.

¶ 13 ANALYSIS

¶ 14 The Act provides a method by which a criminal defendant can assert that a conviction was the result of "a substantial denial of his or her rights under the Constitution of the United States or

²The record contains no explanation for the 4 ½ year delay in the filing of the amended postconviction petition.

of the State of Illinois or both.” 725 ILCS 5/122-1(a)(1) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Proceedings in noncapital cases are divided into three stages. *Hodges*, 234 Ill. 2d at 9; *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, if the trial court determines that a petition “is frivolous or is patently without merit,” it can summarily dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10. If a petition survives to the second stage, counsel may be appointed to an indigent defendant, and the State will be allowed to file responsive pleadings. 725 ILCS 5/122-4, 122-5 (West 2010); *Hodges*, 234 Ill. 2d at 10-11. To advance beyond the second stage, the petition and any accompanying documentation must make a “substantial showing” of a constitutional violation. *Edwards*, 197 Ill. 2d at 246. If the petition advances to the third stage, the court conducts an evidentiary hearing. 725 ILCS 122-6 (West 2010); *Edwards*, 197 Ill. 2d at 246. Our review of the dismissal of a postconviction petition at the second stage is *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 15 A postconviction proceeding “ ‘is not a substitute for, or an addendum to, direct appeal,’ ” and, accordingly, the scope ordinarily “is limited to constitutional matters that have not been, nor could have been, previously adjudicated.” *People v. Rissley*, 206 Ill. 2d 403, 412 (2003) (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)). Any issues that could have been raised on direct appeal but were not are considered procedurally defaulted, and any issues that were adjudicated on direct appeal are barred by the doctrine of *res judicata*. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). The procedural default rule may be relaxed where either (1) the facts relating to counsel’s alleged ineffectiveness do not appear on the face of the original appellate record, (2) a defendant can establish that appellate counsel was ineffective for failing to raise an issue on direct appeal, or (3) fundamental fairness so requires. *People v. Williams*, 209 Ill. 2d 227, 233 (2004).

¶ 16 Defendant contends that his postconviction claim that counsel was ineffective for failing to call Zuniga as a witness at his second trial is not barred under the doctrine of *res judicata* because our resolution of that issue on direct appeal “cannot pre-empt a distinct analysis, not limited to the record from [defendant’s] second trial.” He asserts that his postconviction claim concerning counsel’s failure to call Zuniga is based on evidence outside of the original appellate record, because he attached Zuniga’s affidavit and the transcript of her October 1996 sworn statement (deposition) to his postconviction petition.

¶ 17 Defendant’s attempts to evade the *res judicata* doctrine fall short. While defendant is correct that *res judicata* will not always bar consideration of a postconviction claim of ineffective assistance of counsel where that claim previously was addressed on direct appeal, the unique circumstances of this case simply do not warrant relaxation of the *res judicata* procedural bar. In *People v. Orange*, 168 Ill. 2d 138 (1995), the defendant included in his postconviction petition a claim of ineffective assistance of counsel for failure to present evidence in mitigation at the defendant’s sentencing hearing. *Orange*, 168 Ill. 2d at 166-67. The defendant previously had raised the same issue on direct appeal. *Orange*, 168 Ill. 2d at 167. In rejecting the claim on direct appeal, the court had noted that the record did not indicate what mitigating evidence trial counsel could have presented. *Orange*, 168 Ill. 2d at 167. By contrast, defendant attached to his postconviction petition the affidavits of 18 relatives, friends, and employers who, if contacted, would have testified to defendant’s positive character traits. *Orange*, 168 Ill. 2d at 167. The court concluded that, because the original appellate record did not contain the evidence presented by the defendant in support of his postconviction petition, his postconviction claim of ineffective assistance was not barred by *res judicata*. *Orange*, 168 Ill. 2d at 167.

¶ 18 In the present case, because Zuniga testified at defendant's first trial, the original appellate record did contain the evidence that defendant now offers in support of his postconviction claim of ineffective assistance of counsel. While defendant contends that he presented new evidence in the form of Zuniga's sworn statement and affidavit, defendant's contention misses the mark. As the State points out, the transcript of Zuniga's sworn statement was contained in the original appellate record. Regarding Zuniga's 1 ¼ page affidavit, it contains no attestations that do not also appear in either her sworn statement or in her testimony from defendant's first trial.

¶ 19 We also fail to see, and defendant does not explain, what "distinct analysis" we would use to resolve defendant's postconviction claim if it were not barred by *res judicata*. As we explained above, in resolving the issue on direct appeal, we concluded that it was not outside the realm of reasonable defense strategy to conclude that Zuniga, who was impeachable with a first-degree murder conviction, was too incredible to be an effective witness, especially considering that defendant had been found guilty despite Zuniga's testimony at his first trial. *Arroyo*, 339 Ill. App. 3d at 156-57. We emphasized that defense counsel had offered other evidence to corroborate defendant's testimony that Salgado was the shooter, so that the decision not to call Zuniga in light of her conviction reasonably could have been considered trial strategy. *Arroyo*, 339 Ill. App. 3d at 156-57. We further reasoned that defendant had not established that he had been prejudiced by defense counsel's failure to call Zuniga as a witness. *Arroyo*, 339 Ill. App. 3d at 157. This exact analysis is equally applicable to defendant's reassertion of this claim in his postconviction petition. Therefore, we conclude that defendant's postconviction claim of ineffective assistance of counsel for failure to call Zuniga to testify at his second trial is barred under the doctrine of *res judicata*.

¶ 20 Turning to defendant's postconviction claim of ineffective assistance as it relates to counsel's failure to call Truax as a witness at his second trial, defendant has forfeited this argument on appeal. Defendant's entire argument on appeal relating to the failure to call Truax consists of one paragraph of defendant's opening brief. Defendant simply states that "[t]he same arguments apply in the context of Mr. Truax" and cites no legal authority. However, the "same arguments" to which defendant refers apparently are the immediately preceding arguments addressing the merits of the issue of trial counsel's alleged ineffectiveness for failing to call Zuniga at the second trial. Defendant fails to offer any argument at all concerning whether the trial court erred when it determined that the issue of counsel's failure to call Truax at the second trial was procedurally defaulted because defendant could have raised it on direct appeal. Even after the State argued in its brief that defendant had procedurally defaulted the issue, defendant still did not address the matter in his reply brief. Therefore, defendant has forfeited this argument. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (requiring an appellant's brief to contain argument supported by citation to authority).

¶ 21 Even if defendant had not forfeited on appeal the issue of counsel's failure to call Truax, however, the claim would be procedurally defaulted. Truax's testimony from the first trial was contained in the original appellate record, so defendant could have raised the issue on direct appeal following the second trial but failed to do so. Furthermore, defendant did not allege in his postconviction petition that appellate counsel was ineffective for failing to raise the issue on direct appeal.

¶ 22 Finally, defendant contends that, because the trial court granted him leave to file his successive postconviction petition and agreed to treat it as his first postconviction petition, any procedural bars should be disregarded. Defendant's argument falls short. The trial court's rationale

for treating defendant's successive postconviction petition as a first postconviction petition was that defendant's initial postconviction counsel was ineffective. However, the ineffectiveness of defendant's initial postconviction counsel does not alter the fact that the issue of trial counsel's failure to call Zuniga as a witness at defendant's second trial was fully litigated on direct appeal. Nor does it excuse defendant's failure to raise on direct appeal the issue of trial counsel's failure to call Truax as a witness. In other words, the trial court's decision to treat defendant's successive postconviction petition as his first postconviction petition has no bearing on whether defendant's postconviction claims were procedurally defaulted or barred by *res judicata*.

¶ 23 Because we have concluded that defendant's postconviction claims either were raised on direct appeal and are barred under the doctrine of *res judicata* or could have been raised on direct appeal and are procedurally defaulted, we need not address defendant's arguments that (1) his postconviction petition was timely and (2) his postconviction petition made a substantial showing of a constitutional violation.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 26 Affirmed.