

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).

2013 IL App (4th) 120524-U

NO. 4-12-0524

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 11, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
ANTHONY S. WHITE,)	No. 09CF101
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Appleton and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in summarily dismissing defendant's *pro se* petition for postconviction relief; defendant stated the gist of a constitutional claim by asserting facts, supported by affidavit, alleging the trial court was biased.

¶ 2 In February 2012, defendant, Anthony S. White, an inmate, filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-7 (West 2012)). In his petition, defendant alleged he was denied his right to a fair trial because Judge Jennifer H. Bauknecht, who presided over his trial, was biased against him. In support of his petition, defendant attached affidavits from two inmates who averred Judge Bauknecht made statements showing such bias. Judge Bauknecht found defendant's petition frivolous and patently without merit and summarily dismissed his postconviction petition after finding she did not make the statements set forth in the petition and affidavits.

¶ 3 Defendant appeals, arguing his petition set forth the gist of a constitutional claim and asking his case be remanded for a third-stage evidentiary hearing under the Act or new first-stage proceedings involving a different judge. The State concedes defendant's petition was improperly dismissed; but it argues the case should be remanded for second-stage proceedings, not an evidentiary hearing. We reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 After a jury trial, defendant was convicted of kidnapping (720 ILCS 5/10-1(a)(1) (West Supp. 2009)), attempt (escape) (720 ILCS 5/8-4(a), 31-6(a) (West Supp. 2009)), and aggravated battery (720 ILCS 512-4(b)(18) (West Supp. 2009)). At trial, the evidence established defendant attacked and subdued a correctional officer. Defendant removed the officer's clothing. While wearing the officer's uniform and attempting escape, defendant encountered other correctional officers. These officers became suspicious of defendant based on his appearance and the answers he gave when questioned. Defendant was then detained and arrested.

¶ 6 In October 2009, the trial court sentenced defendant to concurrent prison terms of 30 years each for kidnapping and aggravated battery and 10 years for attempt (escape). On appeal, this court affirmed defendant's conviction but reduced the 10-year sentence for attempt (escape) to a concurrent five-year term. *People v. White*, 2011 IL App (4th) 090880-U, ¶¶ 28, 38.

¶ 7 In February 2012, defendant filed his *pro se* postconviction petition. Defendant alleged (1) he was denied the effective assistance of counsel when trial counsel failed to call witnesses that would have testified another inmate attacked the correctional officer and other

correctional officers beat and threatened defendant into confessing; and (2) he was denied a fair trial because the trial judge, Judge Jennifer H. Bauknecht, was prejudiced against him.

¶ 8 Supporting his claim of judicial bias, defendant attached two affidavits. One was signed by Lewis Clark. Clark averred in March 2011 he was in the jury deliberation room near his courtroom awaiting a hearing. While in the room, Judge Bauknecht asked Clark if defendant was still in Tamms Correctional Center. Judge Bauknecht told Clark defendant had written her a threatening letter in December 2010 and "she knew Anthony White had been guilty since the first day [he] stepped in her courtroom."

¶ 9 The other affidavit was signed by Anthony Gay. Gay averred he was in court on October 13, 2011, when he argued with Judge Bauknecht. During the argument, "Judge Bauknecht accidentally called [Gay] Anthony White. Judge Bauknecht told Gay he was "just like Anthony White and told [him] to tell [defendant] when [he saw] him that she got his threatening letter about her mother" and "nobody threatens her mother and gets away with it." Judge Bauknecht also told Gay to tell defendant "she [was] going to make sure he does every day of that 30 years she sentenced him to."

¶ 10 In May 2012, Judge Bauknecht concluded the petition was frivolous and patently without merit and dismissed it. Judge Bauknecht determined the issue of judicial bias was forfeited as *res judicata* because defendant could have brought the claims on direct appeal. Judge Bauknecht also determined, regarding the statements made by Clark and Gay, "[n]ot only were no such statements made by this Court to this defendant or any other defendant, but defendant has failed to show how actions by [this Court] after sentencing resulted in due process violations before sentencing."

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 The Act creates a three-stage process by which a defendant may attain postconviction review of a claim his conviction led to a substantial denial of his constitutional rights. *People v. Dopson*, 2011 IL App (4th) 100014, ¶17, 958 N.E.2d 367. In the first stage, the trial court considers whether the postconviction petition is frivolous or patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010). In doing so, the court examines the petition to determine only "whether the petition alleges a constitutional deprivation that is unrebutted by the record." *People v. Couch*, 2012 IL App (4th) 100234, ¶ 11, 970 N.E.2d 1270. The threshold to survive this stage is low, "requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim." *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). A petition deemed frivolous and patently without merit must be dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2012).

¶ 14 If the postconviction petition survives the first-stage review, it advances to the second stage, where counsel is appointed and the *pro se* petition may be amended. *Andrews*, 403 Ill. App. 3d at 658, 936 N.E.2d at 653. The State may answer the petition or seek its dismissal. 725 ILCS 5/122-5 (West 2012). The proceedings advance beyond the second stage if the State answers the petition or the court denies the motion to dismiss. At the third stage, the defendant may submit additional evidence supporting his or her claim. *Andrews*, 403 Ill. App. 3d at 658-59, 936 N.E.2d at 653; 725 ILCS 5/122-6 (West 2012).

¶ 15 This case involves a first-stage dismissal of defendant's postconviction petition. Our review is *de novo*. *Couch*, 2012 IL App (4th) 100234, ¶ 13, 970 N.E.2d 1270.

¶ 16 Defendant argues his petition states the gist of a constitutional claim he was denied the effective assistance of counsel due to his trial counsel's failure to call certain witnesses and he was deprived of a fair trial due to judicial bias. The State concedes defendant stated the gist of a constitutional claim based on his allegations of judicial bias. The State concludes the trial court, in finding this claim frivolous, improperly relied on her own knowledge of matters not of record during the first stage of proceedings. See *id* ¶¶15-16, 970 N.E.2d 1270.

¶ 17 We accept the State's concession. At the first stage of proceedings under the Act, all well-pleaded allegations are to be taken as true unless those allegations are positively rebutted by the record. *Brown*, 236 Ill. 2d at 184-85, 923 N.E.2d at 754. The record does not refute the allegation in the sworn affidavit of Clark showing Judge Bauknecht stated "she knew [defendant] had been guilty since the first day [he] stepped in her courtroom." This allegation, taken as true, states the gist of a constitutional claim defendant was denied a fair trial. The trial court should not have used its own knowledge of matters not of record to dismiss defendant's petition. See *Couch*, 2012 IL App (4th) 100234, ¶¶15-16, 970 N.E.2d 1270.

¶ 18 We note the trial court's decision finding this argument barred by *res judicata* and waiver is erroneous. The court incorrectly ruled "[t]he doctrine of *res judicata* is applicable to the instant claims." Under the *res judicata* doctrine, claims brought and decided on direct appeal may not be raised again in postconviction proceedings. See *People v. Blair*, 215 Ill. 2d 427, 443, 831 N.E.2d 604, 615 (2005). These claims were not decided on direct appeal. The court also improperly concluded defendant "waived his right to proceed" by not raising the claim on direct appeal though it could have been. This doctrine of "waiver" or "forfeiture" applies only to claims that could have been raised on direct appeal but were not. *People v. Tate*, 2012 IL

