

No. 1-10-2685

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 Cook County, Illinois.
Respondent-Appellee,)	
)	
v.)	No. 99 CR 4956 (1)
)	
HAROLD BLALOCK,)	Honorable Vincent M. Gaughan,
)	Judge Presiding.
Petitioner-Appellant.)	

JUSTICE SIMON delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

¶ 1 *HELD*: Where defendant filed successive postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)) asserting that he was denied his right to appeal because private postconviction counsel failed to consult with him about and/or file a notice of appeal after his first postconviction petition was summarily dismissed by the trial court, trial court correctly dismissed successive petition because defendant's right to appeal was not denied where defendant was advised of the dismissal of his petition, his right to appeal, and the steps required to preserve that right, but failed to file a notice of appeal for over five years, well past the required statutory period.

¶ 2 Following a jury trial, defendant Harold Blalock was found guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 1998)) in connection with the January 22, 1999, fatal shooting of

Veronica Riley. Defendant was sentenced to 40 years' imprisonment. Defendant filed a direct appeal, arguing that the trial court committed reversible error in not granting two of defendant's proffered jury instructions. This court affirmed his conviction. *People v. Blalock*, 1-00-2769 (2002) (unpublished order under Supreme Court Rule 23).

¶ 3 Through retained counsel, defendant filed a postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)) (Act), claiming actual innocence based on newly discovered evidence. Defendant also asserted that he suffered ineffective assistance of trial counsel and the State failed to comply with *Brady v. Maryland*, 373 U.S. 83 (1963). On September 2, 2003, defendant's petition was summarily dismissed as frivolous and patently without merit. Defendant was sent notice by the court of the dismissal and his right to appeal.

¶ 4 Defendant filed the instant *pro se* successive postconviction petition on July 8, 2009, alleging he was denied his right to appeal by postconviction counsel's actions. The State moved to dismiss the successive postconviction petition as defendant did not seek leave of court as required by the Act. The State argued that defendant failed to demonstrate cause and prejudice to support the petition and dismissal was proper. The trial court agreed with the State and dismissed the State's motion on August 23, 2010. For the following reasons we affirm the judgment of the circuit court.

¶ 5 I. BACKGROUND

¶ 6 The facts underlying defendant's jury trial and conviction are considered in full in *Blalock*, 1-00-2769, and we briefly repeat the facts to explain the nature of the proceedings in this case. At trial, the evidence showed that on January 22, 1999, near the corner of West 51st Street and South

Racine Avenue, Chicago, Illinois, Veronica Riley died from the resulting injuries from a single gunshot wound to her back.

¶ 7 In a written statement given to the police, Tara Coleman averred that at approximately 6:00 p.m. on January 22, 1999, Coleman was near the corner of West 51st Street and South Racine Avenue in the Head Hoppity Barbershop with her two sons. Coleman stated that she was a friend of defendant and she engaged in a brief conversation with him after he entered the barbershop. After their conversation, defendant went to use the barbershop's telephone.

¶ 8 While defendant was talking on the telephone, three young men entered the barbershop and engaged in an argument with defendant. When the argument was over, the three men left the barbershop and defendant left soon thereafter. Coleman stated that she then heard gunshots from outside. Coleman stated that she saw defendant in the passenger seat of a car in the street with his arm out the window and firing a gun. At trial, Coleman recanted her statement, claiming that she simply signed two blank pages of paper and never initialed any changes.

¶ 9 Defendant was arrested and advised of his *Miranda* rights. Defendant maintained that he was not involved in the shooting and gave the police an alibi. However, the police could not verify defendant's alibi. After the police informed defendant that they could not verify his alibi, defendant gave the police a written statement admitting his involvement in the shooting.

¶ 10 In his written statement, defendant stated that at approximately 5:45 p.m. on January 22, 1999, he was at the barbershop with his friend, Marcus Carpenter. Defendant stopped to talk with Coleman for a minute before using the barbershop telephone to call his girlfriend. While he was on the phone, defendant saw two men he knew as Rasu and Banks enter the barbershop. Rasu approached defendant and the two men entered into an argument before Rasu and Banks left the

barbershop. Shortly thereafter, defendant and Carpenter also left the barbershop and got into Carpenter's car.

¶ 11 Defendant stated that he was in the passenger seat. Carpenter gave defendant a gun and then began to drive. Defendant stuck the gun out the window of the car and fired three shots at Rasu. Defendant also fired two shots at Banks.

¶ 12 At trial, defendant testified that he made up his written statement to the police that he had fired shots at Rasu and Banks and, instead, defendant stated that after leaving the barbershop, Carpenter took defendant to defendant's car and defendant returned to the scene of the shooting to pick up two friends, Nikki Goodman and Virginia Taylor, to take them to a Chinese restaurant. Defendant pulled over to the curb and saw Rasu approaching. Defendant started to pull away at which time Rasu fired four to seven shots at defendant. Defendant testified that he had a gun in his car that he used to fire two shots at Rasu. Defendant testified that the gun and his vehicle were subsequently destroyed when the vehicle burned in an abandoned lot.

¶ 13 Goodman testified at trial that she and Taylor saw defendant arguing with Rasu inside the barbershop. Later, when defendant left the barbershop, Goodman and Taylor asked defendant to take them to a Chinese restaurant. Goodman testified that she saw defendant and Carpenter leave and defendant return in a different vehicle approximately five minutes later. Goodman testified that at this time, Rasu, who appeared drunk, walked into the street and began firing his gun. The jury found defendant guilty of first-degree murder and defendant was sentenced to 40 years' imprisonment.

¶ 14 Defendant filed a direct appeal, arguing that the trial court should have instructed the jury as to the mitigation elements for provocation. This court found there was evidence to establish a

mitigation instruction for self-defense, but not provocation. Accordingly, defendant's argument was rejected and this court affirmed the trial court. *Blalock*, 1-00-2769, at 2.

¶ 15 Defendant retained private counsel and filed a postconviction petition on July 10, 2003. Defendant claimed that: he was actually innocent; the State violated *Brady v. Maryland*, 373 U.S. 83 (1963); and he suffered ineffective assistance of trial counsel. An affidavit from Andre Cross was attached in support as newly discovered evidence. Cross averred that he witnessed the shooting on January 22, 1999, stating that he saw a man standing on the street pull a gun from his waistband and fire several shots at defendant who was parked along West 51st Street in a red Cadillac. One of these shots hit a woman who ran into a store. Defendant fired back at the shooter and then drove away while the shooter returned additional shots.

¶ 16 Cross stated that he talked with the police at the scene and had recounted to them what he saw. The police officer took Cross's name and address and advised him that the police would contact him at a later date. However, Cross said that the police never contacted him to discuss the matter further. Cross stated that he met defendant in 2002 in the cafeteria of the Stateville Correctional Center and informed defendant that he witnessed the shooting when the two informed each other of the crimes of which they were convicted.

¶ 17 On September 2, 2003, defendant's petition was summarily dismissed by written order as frivolous and patently without merit. The court stated that defendant never denied shooting the victim and defendant's actual innocence claim was more akin to a claim of self-defense. The court found that this issue was determined at trial and on direct appeal and therefore barred by the doctrine of *res judicata*. The court noted that there was absolutely no evidence that the State was ever in possession of any evidence regarding Cross and therefore the *Brady* argument failed.

¶ 18 The court denied defendant's claim of ineffective assistance of trial counsel, finding that issue forfeited as defendant did not raise that issue on appeal. The court found the claim meritless as counsel did present argument and evidence in mitigation and defendant only received a mid-range sentence. Defendant was sent notice by the court of the dismissal of his petition. The notice informed defendant that he had a right to appeal and instructed defendant that to preserve his right to appeal "you must file a notice of appeal in the trial court within 30 days from the date the order was entered."

¶ 19 Defendant filed the instant *pro se* successive postconviction petition on July 8, 2009, alleging that he was denied his right to appeal by postconviction counsel's actions. Defendant alleged that postconviction counsel neglected his obligation to file a notice of appeal or advise defendant of his right and how to file. The trial court appointed an assistant public defender to represent defendant. Following extensions to allow the public defender the opportunity to interview postconviction counsel and investigate defendant's claims, the State moved to dismiss the successive postconviction petition as defendant did not seek leave of court and failed to demonstrate cause and prejudice to support the petition.

¶ 20 At the hearing on the motion to dismiss, counsel argued that defendant was virtually illiterate" with a comprehension level of a sixth grade child. Defendant and his grandmother engaged postconviction counsel and assumed he would take care of everything, including an appeal. However, counsel interviewed postconviction counsel who indicated that he did not file a notice of appeal and was not hired to do so. The State argued that the clerk of the court clearly provided notice and instructions to defendant of his right to appeal and how to preserve that right, that he could have counsel appointed for him and a report of proceedings furnished free of charge. The State noted that defendant did not raise any allegations that: he hired an attorney to advance an

appeal; he ever requested postconviction counsel to pursue an appeal; or he took any other steps in over five years between the two petitions to preserve his rights.

¶ 21 The trial court recounted that defendant was a high-ranking gang member and that he was mentally challenged, but fit to stand trial. The court agreed with the State that defendant failed to prove cause and prejudice to support the filing of a successive petition. Therefore, the trial court granted the State's motion and dismissed defendant's successive postconviction petition on August 23, 2010.

¶ 22 II. ANALYSIS

¶ 23 Under the Act, a defendant may file a petition that clearly identifies alleged constitutional violations in the proceedings that produced the conviction or sentence being challenged. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). Supporting affidavits, records or other evidence shall be attached to the petition, or the defendant must explain why such evidence is not attached. 725 ILCS 5/122-2 (West 2008). The Act is not an avenue for a defendant to simply rephrase an issue previously addressed on direct appeal. *People v. Simpson*, 204 Ill. 2d 536, 559 (2001). To be successful in his petition, a defendant must demonstrate his rights were substantially deprived in the proceedings against him and that his challenge has not been raised and could not have been adjudicated earlier. A petition that fails to make a substantial showing of a violation of a constitutional right may be dismissed. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). Issues that could have been raised on direct appeal or in prior proceedings, but were not, are procedurally defaulted. Previously decided issues are barred by the doctrine of *res judicata*. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005).

¶ 24 Appellate review of a trial court's dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 380-89 (1998). We review

the trial court's judgment, not the reasons cited, and we may affirm on any basis supported by the record if the judgment is correct. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003). At this stage, factual disputes not rebutted by the record must be resolved in an evidentiary hearing. *People v. Whitfield*, 217 Ill. 2d 177, 200 (2005).

¶ 25 Successive postconviction petitions are disfavored under the Act and a defendant must satisfy the cause-and-prejudice test for a successive petition to survive. 725 ILCS 5/122-1(f) (West 2006). Cause may be shown by pleading some objective factor external to the defense that impeded counsel or defendant from timely raising the claim in an earlier proceeding.

Pitsonbarger, 205 Ill. 2d at 460. Prejudice is shown when the defendant presents a claim of a constitutional error that so infected his trial that his conviction violated due process. *People v. Williams*, 392 Ill. App. 3d 359, 366 (2009).

¶ 26 Defendant makes clear in his reply brief that there is no claim of reasonableness of counsel at issue and the only claim before this court is defendant's claim that he was denied his right to appeal his initial postconviction petition. Defendant asserts that cause is present in this case because the factual and legal bases for his claim were unavailable due to counsel's failure to advise defendant of his right to appeal and to file a notice of appeal on his behalf. Therefore, he argues that he could not assert these issues until after the postconviction proceedings concluded and he was able to discover the alleged errors. Defendant cites to *People v. Frank*, 48 Ill. 2d 500, 504 (1971), for support that the Act provides a proper vehicle for review of issues where the right to appeal has been denied or where the concept of fundamental fairness dictates.

¶ 27 With respect to the prejudice prong, defendant maintains that he was deprived of his right to appeal the dismissal of his initial postconviction petition and this error so infected the proceedings that his due process rights were violated. Defendant asserts that the Illinois

Constitution (Ill. Const. 1970 art VI, sec. 6), the Act (725 ILCS 5/122-7 (West 2012)), and Illinois Supreme Court Rules (Ill. Sup. Ct. R. 651(a) (eff. Feb. 6, 2013)) support his claim that the right to appeal is fundamental in Illinois. See *People v. Ross*, 229 Ill. 2d 255, 269 (2008). Defendant points to the United States Supreme Court decision in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), followed by *People v. Torres*, 228 Ill. 2d 382 (2008), as setting forth the proper test to determine if counsel's failure to file a notice of appeal was prejudicial.

¶ 28 Defendant notes that a postconviction claim for the violation of the right to appeal is inexorably linked with a claim of ineffective counsel so, although he does not raise that issue before this court, it is relevant to this appeal especially considering the holding in *Flores-Ortega*, where the defendant pleaded guilty to second degree murder and was advised he had 60 days to file an appeal but counsel did not file an appeal. The defendant's late attempt to file such notice was rejected as untimely and the defendant subsequently sought habeas relief alleging ineffective assistance of counsel. *Flores-Ortega*, 528 U.S. at 473-74.

¶ 29 The Court considered the ineffective assistance claim under the familiar standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court noted that it had long held that disregarding a defendant's specific request to file a notice of appeal constitutes ineffective assistance, but there was no *per se* rule concerning whether counsel must consult or file a notice in other situations. *Id.* at 477. The Court held that counsel has a duty to consult "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480. For the second *Strickland* factor of prejudice, the Court held that "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal,

he would have timely appealed." *Id.* at 484. Defendant contends that this analysis must be applied in this case because his counsel did not inquire about whether an appeal was desired and did not file a notice of appeal.

¶ 30 Defendant conflates the holdings in *Flores-Ortega*, *Ross*, and *Torres*, to claim that there is a constitutionally protected right to appeal a postconviction petition that is equal to a direct appeal that invokes the protections of the sixth amendment. However, each of the cases cited by defendant involved a direct appeal, not the appeal of a postconviction petition or successive postconviction petition. The court in each of these cases also applied the reasoning that a postconviction petition is no substitute for a direct appeal, which implicates different rights and standards, such as effective assistance of counsel. *Ross*, 229 Ill. 2d at 269.

¶ 31 Defendant concurs that there is no right to effective postconviction counsel, but argues that the right to an appeal necessarily requires examination of counsel's actions. However, because the right to appeal the dismissal of a postconviction petition does not trigger the same constitutional protections or analysis, *Flores-Ortega*, *Ross*, and *Torres* are distinguishable.

While the Illinois Constitution establishes the right to appeal any decision of the trial court, as in any appeal, to invoke the right to an appeal, a party must comply with the procedures for effecting that right. *People v. Carter*, 91 Ill. App. 3d 635, 638 (1990). Illinois Supreme Court Rule 651 provides that a defendant may appeal the final judgment on a postconviction petition following the rules for criminal appeals, that the clerk must provide notice to the defendant that he must file a notice of appeal and that counsel must provide reasonable assistance. There is no requirement of counsel to file a notice of appeal. Ill. S. Ct. R. 651 (eff. Feb. 6, 2003).

¶ 32 Postconviction counsel stated that he was only hired to file a postconviction petition and he was not hired to file an appeal. The record reflects that defendant was properly notified of his

rights and responsibilities as required by Rule 651. Defendant did not detail any attempts to contact postconviction counsel or inquire as to the status of an appeal and did nothing until he filed the successive postconviction petition over five years later. Therefore, defendant failed to preserve his right to appeal the dismissal of his postconviction petition and he cannot make the threshold substantial showing of a violation of a constitutional right required by the Act by claiming that his right to appeal his postconviction petition was violated. Accordingly, the petition was properly dismissed and we affirm the judgment of the circuit court.

¶ 33

III. CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 35 Affirmed.