2014 IL App (1st) 121003-U

Sixth Division
Order filed: January 9, 2015

No. 1-12-1003

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEVIN WILLIAMS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 91 CR 18800 Honorable Diane Cannon, Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court dismissing second-stage postconviction petition was affirmed where the defendant's actual innocence, ineffective assistance of counsel, and unconstitutional sentencing claims failed.

¶ 2 The defendant, Kevin Williams, appeals from the circuit court order which dismissed his second-stage postconviction petition filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq.* (West 2002)). On appeal, he contends that the circuit court erred in dismissing his petition where he made a substantial showing that he was actually innocent and where he received unreasonable assistance of postconviction counsel when counsel failed to amend his petition to present his claims in appropriate legal form. Further, the defendant

contends that fundamental fairness requires that he receive a new sentencing hearing. For the reasons that follow, we affirm.

¶ 3 Following a joint bench trial with co-defendants Ira Hines and Reginald Lee[1], the defendant was convicted of first-degree murder, attempted murder, aggravated battery with a firearm, aggravated battery, aggravated discharge of a firearm and aggravated unlawful restraint. These convictions arose from the February 18, 1991, shooting incident which resulted in injury to Marsha Robertson and the death of Harry Sain. A detailed summary of the facts adduced at the defendant's trial is contained in our previous opinion, which resolved the issues he raised in his direct appeal. *People v. Williams*, 262 Ill. App. 3d 808 (1994). Thus, we restate only those facts necessary to address the present appeal.

¶ 4 Marsha Robertson testified that, on February 18, 1991, she and Harry Sain left the home of Camilla Dickens on Lytle Street and began walking toward Sain's apartment on Racine Street. While walking, Robertson saw four men whom she recognized as "Thunder," "Fruitie," co-defendant Lee, and "West." *Id.* at 810. In court, Robertson identified the defendant as the man she knew as Fruitie and co-defendant Hines as the man she knew as Thunder. She testified that the men were armed and told Sain to open his apartment door. The defendant pushed Robertson against the wall inside the apartment entryway while Hines went upstairs with Sain. Robertson testified that she heard Sain pleading with Hines not to hurt him. Hines then came downstairs and asked Robertson the whereabouts of her cousin, "Mark," and former boyfriend, "A.K.," who were members of the El Rukn street gang. She did not tell Hines or the defendant, both members of the Gangster Disciples street gang, where Mark or A.K. (identified as Richard Smith) could be found. *Id.* at 810-11. The defendant then repeatedly asked Hines whether he should "do it now."

[1] Hines and Lee are not parties to this appeal.

While Hines was in the stairwell, Sain left the apartment and walked downstairs to the entryway. Hines then answered the defendant's question by stating "yes," and the defendant shot Sain seven or eight times. Robertson also stated that Hines shot Sain twice, even though he was already on the ground. After shooting Sain, the defendant asked Hines whether he should shoot Robertson, and Hines said yes. Robertson testified that the defendant then turned toward her and fired at her head twice. *Id.* at 811. She was not sure whether she had been shot, but she felt a burning sensation on the left side of her forehead. She blacked out and, when she awoke, she saw Lee running down the stairs with a gun in his hand. *Id.* According to Robertson, the shooting incident lasted about 30 to 45 minutes from the time she saw the defendant and co-defendants until it was over. *Id.* at 814.

¶ 5 Robertson testified that she ran upstairs and told Sain's mother that the defendant and Hines had shot Sain, and the police were called. When the police arrived at the scene, Robertson told the officers that the defendant, Hines, "Gus" (Lee's brother), and West had shot Sain. *Id.* at 812. Robertson testified that she mistakenly gave the police the name of "Gus" instead of "Reggie" because she was shaken up and speaking fast. She later corrected herself when she went to the police station shortly thereafter. *Id.* At the police station, about two hours after the shooting, Robertson identified the defendant from photographs and she signed a written statement describing her account of events for an assistant State's attorney. *Id.* at 812. She testified that, in May 1991, she admitted before a grand jury that she had been living in hotels paid for by the State because she was afraid. *Id.* Robertson's written statement and transcripts of her grand jury testimony were admitted into evidence.

¶ 6 According to Robertson, on the morning of June 25, 1991, two men approached her, threatened her with physical harm, and drove her downtown to the office of Hines's attorney,

Peter Vilkelis. The men told her that they wanted her to tell Vilkelis that the offenders wore ski masks, that she was high on heroin at the time of the shooting, and that she named Hines because she was mad that he had previously kidnapped Smith ("A.K.") a few months before the murder. *Id.* at 812-13. Robertson admitted that she provided Vilkelis with a recorded statement consistent with this information. *Id.* She further admitted that, on August 28, 1991, the same men picked her up and again took her to Vilkelis's office, where she reviewed her statement, made no changes, and signed it. Robertson testified that the facts in the statement were untrue and that she gave Vilkelis the statement and signed it out of fear. *Id.*

¶ 7 On cross-examination, Robertson admitted that she had received between five hundred and six hundred dollars from the State for living expenses. She also admitted to having used heroin for the past year and a half and had last used the drug two days before testifying. *Id.* at 813. She stated that she had used heroin the day before the shooting, but not the day of or the day after the shooting. Robertson further admitted that, on May 8, 1991, she was arrested for bringing drugs into the jail on a visit to see Smith. After her eighth day in jail, she testified before the grand jury, but she denied that the State had offered her any deal in exchange for her testimony. According to Robertson, her drug case had been dismissed after she provided her grand jury testimony, but explained that the dismissal was due to the failure of the arresting police officers to appear in court. *Id.* at 813-14. She further denied telling Camilla Dickens that she knew her grand jury testimony helped Smith, although she acknowledged that Smith was released from jail about one month after she testified.

¶ 8 Chicago Police Officers John Butler and David Kozek testified that, at the crime scene, Robertson told them that the defendant had shot her and Sain. The officers also stated that she identified the defendant from photos a few hours after the shooting, and three days later from

another photo array. Other witnesses at the scene, Mary Hoard and Ronald Wilson, saw the offenders leave the apartment building and neither stated that the men wore ski masks. *Id.* at 815-16.

¶ 9 Sain's mother and sister both testified that they were inside the apartment at the time Robertson and Sain were shot in the entryway. Both testified that Robertson came upstairs screaming that they had been shot and that she named the defendant and the co-defendants as the offenders. *Id.* at 816.

¶ 10 The defense presented several witnesses. Relevant to this appeal, attorney Marvin Bloom testified that his office was in the same suite as Vilkelis's and that he witnessed Robertson's statement on June 25, 1991. According to Bloom, Robertson did not appear nervous or under any stress at the time and he did not notice anyone unusual or suspicious in the office. However, he admitted that he did not see Robertson arrive or leave the office and did not see if anyone accompanied her. Terry Cornell, a private investigator, testified that he saw Robertson review and sign her statement in Vilkelis's office on August 25, 1991, but he did not see anyone else around or in the suite. He admitted, however, that he did not observe Robertson arrive and did not know how she got home. *Id.* at 818.

¶ 11 The parties stipulated that Robertson moved on three occasions after the shooting and that the State paid approximately $6,800 for her living expenses during that time. Those funds were paid directly to the parties Robertson owed for her moving expenses. The parties also stipulated that the State paid $500 directly to Robertson for personal expenses. *Id.* at 818.

¶ 12 The court found the defendant guilty of all charges and denied his motion for a new trial. The court then proceeded to the defendant's sentencing hearing at which he was sentenced to

natural life imprisonment for the murder conviction, with concurrent terms of 30 years and 10 years for the lesser offenses.

¶ 13 The defendant directly appealed his convictions and sentences, raising issues of improper admission of evidence, violation of discovery rules, and ineffective assistance of trial counsel for failing to move for a mistrial after Robertson implicated Vilkelis in an intimidation scheme. This court rejected his arguments and affirmed the judgment of the circuit court. *Williams*, 262 Ill. App. 3d at 819-26.

¶ 14 On March 30, 1995, the defendant filed a *pro se* postconviction petition, alleging various claims of trial errors and instances of ineffective assistance of counsel. In part, the defendant alleged that his trial counsel had failed to adequately impeach Robertson, and he included an affidavit from Camilla Dickens. The State moved to dismiss that petition at the second stage of those proceedings. On December 29, 1995, the circuit court granted that motion on the grounds that many of the defendant's claims were barred by the doctrine of *res judicata* or forfeiture. The court also rejected the defendant's ineffective assistance of trial counsel claims on the ground that the defendant failed to satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). On appeal, the Cook County Public Defender was appointed to represent the defendant and moved to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court granted the public defender's motion and affirmed the judgment of the circuit court. *People v. Williams*, No. 1-96-1142 (unpublished order under Supreme Court Rule 23)[2].

[2] In 1998, the defendant filed a *pro se* federal habeas corpus petition, alleging various claims of ineffective assistance of counsel, evidentiary errors, and discovery violations. The federal district court determined that his claims were procedurally defaulted because he failed to file a petition for leave to appeal with the Illinois Supreme Court and that he failed to demonstrate that

¶ 15 On February 28, 2003, the defendant filed a petition to correct his mittimus and a petition for relief from judgment. In his petition to correct the mittimus, the defendant alleged that, in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), he was not given proper notice of the aggravating factors that the State used to seek the death penalty or life sentence and that the mittimus did not reflect the accurate number of days of presentencing credit to which he was entitled. In his petition for relief from the judgment, the defendant argued that his sentence was grossly disparate to the sentences of his co-defendants and that his life sentence violated the proportionate penalties clause. He further argued that he was actually innocent based on the affidavits of Camilla Dickens and Richard Smith, which he attached to his petition, and that trial counsel was ineffective for failing to adequately impeach Robertson. The Dickens affidavit was the same one that the defendant attached to the 1995 petition. The defendant also stated in his petition that he told the police that he had been with his girlfriend, Janice Denson, at the time of the murder.

¶ 16 In her affidavit, Dickens stated that Robertson told her that she only agreed to testify against the defendant in exchange for payments by the State and the State's agreement to drop pending weapons charges against her boyfriend, Richard Smith (a/k/a A.K.). Dickens further averred that her sister, Patricia Dickens, had cashed the checks the State issued to their father, who owned the home where Robertson was living, and gave the cash to Robertson. She also stated that, in January 1991, she "had knowledge" that Smith had threatened to kill Sain if he did not stay away from Robertson. Dickens asserted that she provided these facts to the defendant's trial counsel before the trial, but she was never contacted to testify.

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he was denied a fair trial. *People v. Williams*, No. 98-C-3204 (N.D. Ill. June 1, 2001); *People v. Williams*, No. 98-C-3204 (N.D. Ill. July 12, 2001) (denial of motion for reconsideration).

¶ 17 Smith stated in his affidavit that he was known as "A.K.," had been dating Robertson at the time of the crime, and that Robertson informed him that she "really did not know who the shooters were that shot and kill[ed] [Sain]." According to Smith, Robertson named the defendant and codefendants as an act of revenge for "what they had done to [him]." Smith averred that he was never called to testify but had been in court during portions of Robertson's testimony. He stated that, if called to testify "in this matter," his testimony would be consistent with the statements contained in his affidavit.

¶ 18 Regarding ineffective assistance of counsel, the defendant alleged that his trial counsel was ineffective for failing to impeach Robertson's testimony by calling Dickens to testify.

¶ 19 The circuit court docketed the defendant's petitions as "postconviction petitions" on March 13, 2003.

¶ 20 On April 7, 2004, the defendant filed an additional pleading entitled "Judicial Notice for Ruling on a Post Conviction Petition," seeking a ruling by the court on his petitions filed in February 2003 and seeking the appointment of counsel. He attached a copy of his earlier petitions to this motion and included an additional motion seeking the correction of his mittimus. On May 28, 2004, the court dismissed the defendant's petitions as "frivolous and patently without merit."

¶ 21 The defendant appealed, and we remanded his petition for relief from judgment for second-stage postconviction proceedings, finding that the circuit court had treated the initial 2003 filing as a postconviction petition but had failed to dismiss it within 90 days as required by the Act. *People v. Williams*, No. 1-04-2999 (unpublished order under Supreme Court Rule 23). In our order, we stated that the labels assigned by a defendant are not dispositive and that we would not treat the defendant's 2004 filing "as defendant's third post-conviction petition," but

rather as simply a request for the court to rule on the 2003 petitions. *Williams*, No. 1-04-2999, slip order p. 5. We further ordered that the defendant's mittimus be corrected to reflect one first-degree murder conviction and pretrial credit for 972 days. *Id.*

¶ 22 Upon remand, postconviction counsel was appointed to represent the defendant. Counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) and a supplemental procedural history of his case, but otherwise she did not amend the defendant's petition or file any additional supporting affidavits.

¶ 23 On December 15, 2011, the State filed a motion to dismiss the defendant's petition, arguing that Dickens's affidavit did not constitute newly discovered evidence and only impeached Robertson but did not exonerate the defendant. Regardless, the State asserted that the defendant's claims were barred by the doctrine of *res judicata* because he made these claims in his 1995 petition, and that this successive petition should be dismissed because he failed to show actual innocence or satisfy the cause-and-prejudice standard. In response, postconviction counsel made an oral motion for leave to file a successive petition to which the State objected, stating that no written motion for leave had been filed. The court did not make a ruling on this motion and the parties proceeded to argue the general merits of the defendant's claims. The court took the matter under advisement.

¶ 24 On March 19, 2012, the circuit court granted the State's motion to dismiss, rejecting the defendant's actual innocence, ineffective assistance of trial counsel, and *Apprendi* violation claims. Specifically, the court found that Smith's affidavit did not amount to newly discovered evidence and his statements did not exonerate the defendant. The court further found that the record established that trial counsel did not provide deficient performance as to the impeachment of Robertson as counsel thoroughly cross-examined her and pointed out the various

inconsistencies in an attempt to cast doubt upon her credibility. Finally, the court determined that the defendant's sentence was justified and that he failed to demonstrate that the disparity between his sentence and the sentences of his codefendants was unreasonable. This appeal followed.

¶ 25 The Act provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). A postconviction proceeding is not a substitute for a direct appeal, but rather is a collateral attack on a prior conviction and sentence. *People v. Davis*, 2014 IL 115595, ¶ 13. The purpose of the proceeding is to allow inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal. *Id.* "Accordingly, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered forfeited." *Id.*

¶ 26 The Act contemplates the filing of only one postconviction petition (725 ILCS 5/122-1(f) (West 2012)); *Davis*, 2014 IL 115595, ¶ 14. "Consequently, a defendant faces immense procedural default hurdles when bringing a successive postconviction petition." *Id.* Because successive petitions impede the finality of criminal litigation, such a petition may be considered where the defendant (1) can establish "cause and prejudice" for the failure to raise the claim earlier or (2) can make a claim of actual innocence. *Id.*; *People v. Ortiz*, 235 Ill. 2d 319, 331 (2009). For an actual innocence claim to succeed, the defendant must put forth evidence which is "newly discovered; material and not merely cumulative; and 'of such conclusive character that it would probably change the result on retrial.' " *Ortiz*, 235 Ill. 2d at 333 (quoting *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). Generally, the standard of review for the dismissal of a

postconviction petition without an evidentiary hearing is *de novo*, whereas the dismissal of a postconviction petition after an evidentiary hearing is reviewed for manifest error. *People v. Brown*, 2013 IL App (1st) 091009, ¶ 52.

¶ 27 As the State points out, the postconviction petition at issue in this case was successive as an initial petition had been filed and denied in 1995. However, based on this court's order remanding this petition for second stage proceedings, it is clear that the circuit court treated the petition as one that had been filed, meaning it had met the cause-and-prejudice test or raised an actual innocence claim. The circuit court also seemingly treated the petition as an initial one as it never addressed whether the issues were raised in the defendant's 1995 petition. Regardless, because we review a dismissal at the second stage *de novo,* we may consider the claims raised in the 1995 initial petition.

¶ 28 The defendant first argues that the circuit court erred when it dismissed his actual innocence claim based on the affidavit of Richard Smith. He maintains that the testimony of Smith was new, material and noncumulative evidence because his testimony directly contradicted the testimony of Robertson, the State's sole eyewitness. The defendant argues any amount of due diligence would not have led him to discover Smith's testimony because he had reason not to come forward at the time of trial; namely, his relationship with Roberston and the kidnapping event by Hines. He further contends that had the court heard Smith's testimony at trial, the outcome of the proceeding would have likely been different. The circuit court rejected these arguments, finding that Smith's proposed testimony was not new and did not exonerate the defendant.

¶ 29 We agree with the circuit court that Smith's testimony does not exonerate the defendant, but merely serves to attack the credibility of Robertson. Smith does not claim that either he or

Robertson knew that the defendant did not shoot or participate in the crime, but only that Robertson said that she did not know who shot Sain. See *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40 (stating that the "hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' "). Moreover, we find the evidence cumulative as counsel impeached Robertson as to her motives in implicating the defendant and codefendants. Robertson specifically testified about her relationship with Smith and his kidnapping by Hines. She was also impeached with the prior inconsistent statement she provided to Vilkelis, which contained the information provided in Smith's affidavit; namely that she did not know the shooters' identities but blamed the defendants in retaliation for Smith's kidnapping. Accordingly, we agree that the defendant's actual innocence claim fails where the evidence was neither noncumulative nor exonerating.[3]

¶ 30 Next, the defendant contends that he was denied reasonable assistance of postconviction counsel where counsel failed to amend his petition to present his ineffective assistance of trial counsel claims in appropriate legal form. Specifically, he argues that counsel failed to include claims of ineffective assistance of appellate counsel in order to avoid procedural default on the grounds of forfeiture or *res judicata.* According to the defendant, "[t]o the extent he did raise a claim relying on Dickens' affidavit in his first petition, *** the public defender's office did nothing to amend his first petition." He claims the error was compounded by the fact the public defender's office moved to withdraw as counsel on his appeal from the dismissal of his initial petition. He also complains that counsel did not seek to obtain an affidavit to support his claim

[3] The defendant makes no argument regarding the court's decision on his actual innocence claim based on the affidavit of Camilla Dickens, and even concedes that the Dickens affidavit does not support an actual innocence claim. Therefore, we do not address the issue.

that he was with his girlfriend, Janice Denson, at the time of the crime. We reject the defendant's contentions.

¶ 31 At the second stage of postconviction proceedings, the relevant question is whether the allegations in the defendant's petition, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which mandates an evidentiary hearing. *People v. Chears*, 389 Ill. App. 3d 1016, 1024 (2009). All well-pleaded facts in the petition and affidavits are taken as true, but assertions that amount to conclusions add nothing to the required showing to trigger an evidentiary hearing under the Act. *Id.*

¶ 32 During the second-stage, an indigent defendant is entitled to appointed counsel. 725 ILCS 5/122-4 (West 2006); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007), *as modified on denial of reh'g* (May 27, 2008). The defendant's right to postconviction counsel is wholly statutory in nature and the Act provides for only a "reasonable" level of assistance. *Perkins*, 229 Ill. 2d at 42. To assure the reasonable assistance required by the Act, Rule 651(c) imposes specific duties on postconviction counsel, including: (1) consultation with the defendant to ascertain his contentions of a deprivation of a constitutional right, (2) examination of the record of the proceedings at the trial, and (3) amendment of the petition, if necessary, to ensure that defendant's contentions are adequately presented. Ill. S.Ct. R. 651(c); *Pendleton*, 223 Ill. 2d at 472; *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 40 (applying Rule 651(c) duties to private counsel during second-stage proceedings where initial petition was filed *pro se*). It is well-established that postconviction counsel's duties include the duty to attempt to overcome procedural bars to the defendant's claims, including alleging facts or claims that may avoid forfeiture. *People v. Turner*, 187 Ill. 2d 406, 413(1999). "Our review of an attorney's

compliance with a supreme court rule, as well as the dismissal of a postconviction petition on motion of the State, is *de novo*. *Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 33 In this case, postconviction counsel filed a Rule 651(c) certification, thus, giving rise to the presumption that the defendant received the representation required by the rule. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. It is the defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c). *Id*. The defendant complains only that postconviction counsel failed to amend his petition to avoid procedural default of his ineffective assistance claims, failed to allege facts to satisfy the cause-and-prejudice test, failed to understand the required standard for successive petitions, and failed to include a supporting affidavit from Janice Denson. Yet, the circuit court did not dismiss the defendant's petition on *res judicata* or forfeiture grounds. Nor did the court deny the filing of the petition on the basis the cause-and-prejudice test was not met. Rather, the court dismissed the petition based upon the merits of his underlying claims, having determined that the record did not support the defendant's claims that trial counsel provided deficient performance. Thus, we do not find that he was prejudiced by postconviction counsel's failure to amend his petition to include facts or claims to avoid procedural default or to satisfy the cause-and-prejudice standard. Further, to the extent the defendant argues that he received unreasonable assistance for counsel's failure to otherwise amend the petition to avoid dismissal on the merits, including filing a supporting affidavit from Denson, we reject the argument as his claims would not have advanced.

¶ 34 Ineffective assistance of counsel claims are judged under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326-27 (2011); see *People v. Childress*, 191 Ill. 2d 168, 175 (2000) (noting that claims of ineffective

assistance of appellate counsel are measured against the same standard and that, unless the underlying issue is meritorious, the defendant suffered no prejudice from counsel's failure to raise it on direct appeal).

¶ 35 Under *Strickland*, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and that (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Manning*, 241 Ill. 2d at 326-27 (citing *Strickland*, 466 U.S. at 688, 694). In order to satisfy the deficient-performance prong of *Strickland*, a defendant must show that his counsel's performance was so inadequate that he did not receive the "counsel" guaranteed by the sixth amendment. *Id.* at 327. "Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which cannot support a claim of ineffective assistance of counsel." *People v. Smith*, 177 Ill. 2d 53, 92 (1997). However, the complete failure to impeach a witness where the evidence is closely balanced and the matter is significant may support an ineffective assistance claim. *People v. Salgado*, 263 Ill. App. 3d 238, 246-47 (1994).

¶ 36 To satisfy the prejudice prong, a defendant must show a reasonable probability that the result of the proceeding would have been different or show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.* (citing *People v. Jackson*, 205 Ill. 2d 247, 259 (2001)). An ineffective-assistance-of-counsel claim fails if either prong of *Strickland* is not met. *People v. Nitz*, 143 Ill. 2d 82, 109 (1991).

¶ 37 Regarding the claim that counsel failed to adequately impeach Robertson, we find the issue is barred by *res judicata* as the defendant raised this claim in his 1995 petition, the circuit court ruled on the merits of it, determining that his claim failed under the prejudice prong of *Strickland*, and we affirmed (*Williams*, No. 1-96-1142 (unpublished order under Supreme Court

Rule 23)). Accordingly, the record demonstrates that no amendments could have been made to avoid the effect of that earlier decision. See *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008) (stating that Rule 651(c) does not require counsel to amend the *pro se* petition and that counsel may stand on the petition where, after completing his or investigation, counsel determines that the defendant's claims are frivolous or without merit).

¶ 38 We note that the circuit court made no mention in its written memorandum of the defendant's one-sentence claim that he was with Janice Denson at the time of the murder. The petition states that "petitioner also gave the police an alibi stating he was with a girlfr[ie]nd Janice Denson at the time of the murder." On appeal, the defendant claims that postconviction counsel rendered unreasonable assistance by failing to submit any supporting documentation for this claim of actual innocence. We disagree as defendant's petition did not indicate that Denson was available or willing to testify to support his alibi, but merely stated that he provided the police with this alibi. Even if it did, the defendant does not establish that Denson's testimony was newly discovered—a requirement for an actual innocence claim to advance. *Pace*, 386 Ill. App. 3d at 1062.

¶ 39 Finally, the defendant argues that he is entitled to a new sentencing hearing because he made a substantial showing that his life sentence was grossly disparate to the 50-year sentence Hines received. He also argues that his sentencing hearing was fundamentally flawed because the State did not prove that he was eligible for the death penalty and because the State used his prior murder conviction obtained when he was 15 years old to trigger the mandatory life sentencing statute. According to the defendant, using a prior conviction obtained when he was a minor violates *Miller v. Alabama*, 132 S.Ct. 2455 (2012) and the eighth amendment (U.S. Const., amend. VIII). We reject the defendant's arguments in turn.

¶ 40 "One who seeks relief under the Act for disparity of sentence must allege facts which, if proven, indicate that his constitutional rights were violated in that regard." *People v. Caballero*, 179 Ill. 2d 205, 216 (1987). Arbitrary and unreasonable disparity between the sentences of similarly situated codefendants is impermissible, but the mere disparity of sentences alone does not establish a violation of fundamental fairness. *Id.* A disparity of sentences will not be disturbed where it is warranted by differences in the nature and extent of the concerned defendants' participation in the offense. *Id.;* see also, *People v. Wren*, 223 Ill. App. 3d 722, 729 (1992).

¶ 41 Here, Hines was sentenced to 50 years' imprisonment for his first-degree murder conviction and Lee was convicted only of unlawful restraint and sentenced to 10 years' imprisonment for that offense. The disparity between the sentences of Hines and the defendant is not arbitrary or unreasonable where the circuit court determined that the defendant had a prior murder conviction[4] and was more culpable than Hines in that Robertson testified that the defendant fired seven or eight shots at Sain and two at her; whereas, Hines shot at Sain twice after he was already on the ground. Moreover, because the defendant had a prior murder conviction, the sentencing statute mandated that he receive a life sentence. Thus, the defendant's disparate sentence claim is without merit.

¶ 42 The defendant raises for the first time on appeal that the State did not prove that he was eligible for the death penalty and that the use of his prior juvenile murder conviction to impose a mandatory life sentence violated *Miller* and the eighth amendment (U.S. Const., amend. VIII).

[4] We note that, in the transcripts of the circuit court's oral findings, the court noted that Hines had no violent convictions in his background. However, the Illinois Department of Corrections lists prior convictions for armed robbery and burglary.

Arguments not raised in the defendant's petition may not be argued for the first time on appeal (*People v. Pendleton*, 223 Ill. 2d 458, 470 (2006)), rendering the former argument forfeited. However, the *Miller* decision was filed in 2012 and applies retroactively (*People v. Davis*, 2014 IL 115595, ¶ 39). Forfeiture aside, both claims are without merit.

¶ 43 At the defendant's sentencing hearing, the State submitted a certified copy of his prior murder conviction, which resulted from his 1980 guilty plea to "murder," with no reference to felony murder, and aggravated battery. The defendant and another man attempted to rob a gas station, but after the attendant pulled out a weapon, the defendant began firing his gun. Defense counsel argued that the conviction did not establish that the defendant committed the murder with the required mental state, but the circuit court disagreed, finding that there was no evidence that the defendant pled guilty to felony murder. Indeed, Chicago Police Officer Louis Amari had testified during the sentencing hearing that, on November 25, 1979, he saw the defendant standing by the door of a gas station and firing his weapon until its chamber emptied. Officer Amari stated that he ordered the defendant to put down his weapon and arrested him, noting that one gas station employee had been killed. He then spoke to a surviving gas station employee who told him that "these two guys just came in the station and said, 'give us your money,' and started firing." Thus, the record supports the circuit court's finding that the defendant was eligible to receive the death penalty based on his prior murder conviction.

¶ 44 As to the Supreme Court's 2012 decision in *Miller*, there is nothing in the holding which disallows the use of a prior murder conviction obtained when the adult defendant was a minor to trigger the mandatory life sentencing statute when being sentenced for the crime committed as an adult. See *People v. Sims*, 167 Ill. 2d 483, 522, 658 N.E.2d 413, 431 (1995) (allowing use of conviction obtained while of minor age as basis for adult's eligibility for the death penalty).

Here, the parties stipulated that the defendant was over the age of 18 at the time he murdered Sain and the defendant was not being punished for his prior conduct as a minor. Although *Sims* predated the *Miller* decision, there is no language in *Miller* indicating that a prior conviction obtained while under the age of 18 may not be used in aggravation when sentencing an adult. The statute under which the defendant was sentenced also does not place any limitations on the use of previous murder convictions. See Ill. Rev. St. 1991, ch. 38, ¶ 1005-8-1; 730 ILCS 5/5-8-1 (West 2014) (current and former statute provide that the court shall sentence the defendant to natural life imprisonment if the defendant has "previously been convicted of first degree murder under any state or federal law").

¶ 45 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 46 Affirmed.