THIRD DIVISION
February 24, 2016

No. 1-13-3725

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 93 CR 7368
	)	
FABIAN SANTIAGO,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Second-stage dismissal of defendant's successive postconviction petition affirmed.

¶ 2 Defendant, Fabian Santiago, appeals from the second-stage dismissal of his successive petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq* (West 2010). He contends that his petition should be remanded for further proceedings because the trial court failed to admonish him that his jury trial could take place in his absence. He further contends that his constitutional rights were violated because his inculpatory statement to an

assistant State's Attorney was made under duress of a police detective and that he is actually innocent.

¶ 3 The record shows that following a 1994 jury trial held *in absentia*, defendant was convicted of first degree murder, attempted murder, and aggravated battery with a firearm. The trial court then sentenced defendant, *in absentia*, to 60 years' imprisonment for first degree murder, and two 30-year terms for attempted murder and aggravated battery with a firearm to be served concurrently with each other, but consecutive to the 60-year sentence. This court affirmed that judgment on direct appeal. *People v. Santiago*, No. 1-96-3900 (1998) (unpublished order under Illinois Supreme Court Rule 23). This court also affirmed the October 14, 1999, summary dismissal of defendant's initial postconviction petition, where he had claimed that his consecutive sentences were unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *People v. Santiago*, No. 1-99-4013 (2001) (unpublished order under Illinois Supreme Court Rule 23).

¶ 4 On April 13, 2010, defendant filed, through counsel, the successive postconviction petition at bar alleging, *inter alia*, that his jury trial *in absentia* violated his constitutional rights, that newly discovered evidence corroborated his claim that his inculpatory statement to police and an ASA was involuntary, and that he was actually innocent. On June 25, 2010, the trial court advanced defendant's petition to the second stage of proceedings, and on December 21, 2010, the State informed that the court that it was "prepared to file a motion to dismiss *** [for] failure to obtain leave of court to file the petition" under the Act. The court denied the State's motion finding that "we're this far down."

¶ 5 On May 31, 2011, the State filed a motion to dismiss defendant's petition. The State contended that the record showed that defendant was properly admonished in regard to trial *in absentia*, that his claim of a coerced confession was barred by *res judicata*, that he failed to meet

the cause and prejudice test for successive postconviction petitions, and that his claim of actual innocence was not based on newly discovered evidence. In response, defendant asserted that the State's arguments were based on speculation or were otherwise suited for third-stage proceedings.

¶ 6 On October 17, 2013, the circuit court entered a written order granting the State's motion and dismissed defendant's petition. In addressing defendant's claim that his trial *in absentia* violated his constitutional rights, the court found that he had waived this claim for postconviction review because it was entirely within the trial record and could have been raised on direct appeal. As to defendant's claim that newly discovered evidence corroborated his claim that his confession was coerced and involuntary, the court found that it was unclear whether some of the documents attached to his petition were newly discovered and, in any event, none of them supported his claim. Finally, the court found that defendant's claim of actual innocence was not cognizable because it was not "free-standing," in that it relied on the same material he used to support other claims of a constitutional violation in his petition. Accordingly, the court concluded, defendant failed to make a substantial showing that his constitutional rights were violated in the trial proceedings, and was not entitled to an evidentiary hearing.

¶ 7 In this court, defendant contends that waiver does not bar his claim that his trial *in absentia* violated his constitutional rights because the trial court's failure to properly admonish him regarding this possibility was plain error concerning a fundamental right. He further asserts that his claim that his statement was coerced satisfies the cause and prejudice test and relies on newly discovered evidence, and that his petition should have proceeded to a hearing on his claim of actual innocence.

¶ 8 The State responds that the record shows that defendant was given proper admonishments prior to trial, and he has provided no independent, corroborating evidence showing that he was not so admonished. The State also contends that defendant has forfeited this issue for postconviction review because it could have been raised on direct appeal, and there is no plain error on the record. Similarly, the State asserts that defendant's claim of a coerced confession is barred by *res judicata* because he raised that claim on direct appeal, and, moreover, the documents attached to his petition do not support his claim. Finally, the State contends that defendant's actual innocence claim must fail because he did not make a substantial showing of actual innocence, and the material attached in support of that claim was also used to support a claim of a constitutional violation with respect to the trial in contravention of the rule that a claim of actual innocence must be "free-standing."

¶ 9 The Act provides a means for a criminal defendant to assert that, in the proceedings resulting in his conviction, there was a substantial denial of his constitutional rights. *People v. Sutherland*, 2013 IL App (1st) 113072, ¶ 16, citing *People v. Evans*, 2013 IL 113471, ¶ 10. Section 122-2 of the Act specifically provides that "the petition shall *** clearly set forth the respects in which petitioner's constitutional rights were violated," and section 122-3 provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or amended petition is waived" (725 ILCS 5/122-2 (West 2010); 725 ILCS 5/122-3 (West 2010)). *People v. Jones*, 213 Ill. 2d 498, 503-04 (2004). Generally, the Act contemplates the filing of only one postconviction petition (*People v. Ortiz*, 235 Ill. 2d 319, 328 (2009)); however, leave of court may be granted to file a successive petition where defendant demonstrates cause for his failure to raise the claim earlier and prejudice resulting therefrom (*People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002)), or actual innocence (*Ortiz*, 235 Ill. 2d at 329).

¶ 10 We initially observe that our review of the record shows that defendant failed to seek leave to file his successive postconviction petition as required by section 122-1(f) of the Act. 725 ILCS 5/122-1(f) (West 2010). The supreme court has held, however, that defendant is not required to first file a motion seeking leaving to file a successive petition if the trial court is satisfied that he has submitted sufficient documentation to allow the court to make a determination under section 122-(f). *People v. Green*, 2012 IL App (4th) 101034, ¶ 25, citing *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010). In *Tidwell*, the supreme court found that no separate motion seeking leave is mandated by section 122-1(f), nor is an explicit request for leave to file required if the circuit court sees fit to consider the matter and rule of its own accord. *Tidwell*, 236 Ill. 2d at 161. The circuit court may then set the petition for second-stage proceedings and rule on the petition even in the absence of a request for leave to file. *People v. Sanders*, 2016 IL 118123, ¶ 27. In such a case, as here, our review of the trial court's dismissal of defendant's successive petition is not limited. *Green*, 2012 IL App (4th) 101034, ¶ 26.

¶ 11 At the second stage of proceedings, the circuit court may appoint counsel for an indigent defendant (*People v. Harper*, 2013 IL App (1st) 102181, ¶ 33), and all well-pleaded facts in the petition that are not positively rebutted by the record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Counsel is given the opportunity to amend the petition, and if the State moves to dismiss it, the court may hold a dismissal hearing. *People v. Wheeler*, 392 Ill. App. 3d 303, 307-08 (2009). A full evidentiary hearing is warranted only if the allegations in the petition, considered in conjunction with the trial record and accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Makiel*, 358 Ill. App. 3d 102, 105 (2005), citing *People v. Hobley*, 182 Ill. 2d 404, 427-28 (1998). We review the dismissal of a postconviction

petition at the second stage of proceedings *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 12 In this case, we observe that throughout his brief, defendant cites to pages in the report of proceedings from his jury trial in support of his argument that the court erred in conducting his jury trial *in absentia*. However, he has not included in the record filed on appeal the reports of proceedings related to his trial. The common law record reflects that the offense occurred on January 16, 1993, and the supplemental record filed by the State reflects that defendant had two indictments stemming from that incident, both before the same trial court judge. The docket sheet for indictment No. 93 CR 2888 indicates that on March 3, 1993, the parties were present, defendant pleaded not guilty, and he was "admonished as to trial *in absentia*." Similarly, the memorandum of orders for the matter now before us reflects that on April 16, 1993, defendant was "admonished as to trial *in absentia*." The State filed a supplemental report of proceedings from April 16, 1993, in which defense counsel informed the court that the case was in the discovery stage, and the court stated: "[A]ll right. Both cases, May 14th. All right. The admonishments were given on 2-8, as well." The memorandum of orders in the common law record also shows that defendant was before the court on 18 separate court dates before his jury trial began on May 17, 1994, the date he failed to appear.

¶ 13 In his brief, defendant acknowledges that the report of proceedings from certain court dates are missing from the record, and in his reply brief asserts that over a period of over two years after he filed his petition, the State made no attempt to obtain a transcript of any proceeding in this case, much less a transcript revealing that he was properly admonished. It is well-settled, however, that it is the responsibility of defendant, as appellant, to provide an adequately complete record of the proceedings that is sufficient for reviewing the issues raised

on appeal. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of a sufficiently complete record of the proceedings at trial, we will presume that the trial court acted in conformity with the law, and any doubts which arise from the incompleteness of the record will be resolved against the appellant. *Id.* at 392.

¶ 14 Notwithstanding, the supreme court has held that the purpose of the postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction that have not already been adjudicated or could have been. *People v. Silagy*, 116 Ill. 2d 357, 365 (1987). "The judgment of the reviewing court on a previous appeal is *res judicata* as to all issues actually decided, and any claim that could have been presented to the reviewing court in the direct appeal is, if not presented, thereafter barred under the doctrine of waiver." *Id.* Here, it is clear from the record before us that defendant's claim that he was not properly admonished as to trial *in absentia* does not rely on anything outside of the trial record. As such, defendant could have raised this claim on direct appeal, but failed to do so, and we thus find that he has waived it for postconviction review. *People v. Stewart*, 121 Ill. 2d 93, 104 (1988); *People v. Hayes*, 279 Ill. App. 3d 575, 580 (1996).

¶ 15 In an attempt to avoid this result, defendant contends that we can review his claim under the doctrine of plain error. He asserts that the trial court's failure to properly admonish him was a structural error that warrants plain error review. We disagree.

¶ 16 In the context of a successive post-conviction petition, the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the statute. 725 ILCS 5/122-3 (West 2010); *Pitsonbarger*, 205 Ill. 2d at 458. Section 122-3 of the Act expressly provides that any claim of a substantial denial of constitutional rights not raised in the original or amended petition is waived. 725 ILCS 5/122-3 (West 2010). Consistent with the application of

that section, the supreme court has long held that in postconviction proceedings, the plain error rule may not be invoked to save procedurally defaulted claims. *People v. Davis*, 156 Ill. 2d 149, 159 (1993), and cases cited therein. Thus, we may not, as defendant urges, consider his claim on that basis. *Id.*

¶ 17 Defendant next claims that his allegations of a coerced statement are sufficient to warrant an evidentiary hearing. He maintains that he showed cause for his failure to bring this claim in his initial postconviction petition because the information concerning the detective became available after the summary dismissal of his initial petition, and that he showed prejudice because the detective's "conduct drove the entire prosecution." In support of his contention, defendant attached various documents to his petition, including an affidavit from a forensic consultant, two appellate court decisions (*People v. Flores*, 315 Ill. App. 3d 387 (2000) and *People v. Reyes*, 369 Ill. App. 3d 1 (2006)), an excerpt from the transcript of a case involving Daniel Rodriguez,[1] and two affidavits from witnesses in an unrelated case with an accompanying Chicago police line-up form.[2] He claims that these attachments show that Chicago police detective Halvorsen "regularly obtained confessions and admissions in derogation of fundamental fairness." The State responds that defendant's claim of a coerced confession is barred by *res judicata* and his successive postconviction petition was properly dismissed for failure to make a substantial showing of a constitutional violation.

¶ 18 We initially observe that, in their briefs, both parties refer to the cause-and-prejudice test with regard defendant's burden to substantiate this claim. However, as this an appeal from the second-stage dismissal of defendant's petition, the relevant inquiry is whether the allegations in

[1] We observe that the portion of the transcript from this case included in defendant's petition is inserted without context and without a trial court case citation.

[2] These documents are likewise included in defendant's petition without context or citation.

the petition, considered in conjunction with the trial record and accompanying affidavits, make a substantial showing of a constitutional violation. *Makiel*, 358 Ill. App. 3d at 105. We also observe, as the State correctly points out, that defendant raised a challenge to the voluntariness of his confession on direct appeal. Issues that were raised and decided on direct appeal are barred from consideration on postconviction review under the doctrine of *res judicata*. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). In response to defendant's contention on direct appeal that his confession should have been suppressed, this court found that "defendant's statement was voluntary and admissible." Order at 7-8.

¶ 19 Defendant does not address the issue of *res judicata* in his brief, but contends that "the reliability and integrity of [his] trial was destroyed by police misconduct, [and that] his allegations of a coerced statement should be ordered to evidentiary hearing." In support of his claim that Detective Halvorsen repeatedly hit him until he agreed to give a fabricated inculpatory statement to an ASA, defendant attached to his petition a portion of the report of proceedings from a different case involving defendant Daniel Rodriguez who testified on a motion to suppress his statement to police. Rodriguez testified that Chicago police detectives Guevara and Halvorsen questioned him and used physical force and threats to coerce him into giving a false incriminating statement to an ASA. Defendant also attached affidavits from Julio Sanchez and Efrain Sanchez in which they stated that in a case involving defendant David Colon, they were coerced by officers to choose Colon out of a police line-up even though he was not the offender. Defendant also attached a Chicago police line-up form that shows that Detectives Halvorsen and Guevara conducted the line-up in Colon's case. Defendant claims that these attachments show that Detective Halvorsen "consistently followed the same pattern of misconduct of his regular partner, Detective Guerra [*sic*.]"

¶ 20 Initially, we observe that the attached portion of Rodriguez's testimony does not indicate the date it was given, whether the trial court granted or denied the motion to suppress, or, in fact, whether it found Rodriguez credible. Moreover, the affidavits and testimony fail to demonstrate any consistent misconduct alleged by defendant as to Detective Halvorsen. In addition, Erfrain's affidavit is dated October 1993, Julio's affidavit is dated June 1998, and the police line-up form is dated September 1991. Therefore, it is apparent that defendant could have raised this claim based on these documents in his initial postconviction petition filed on August 9, 1999, but did not. A ruling on an initial postconviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the petition. *Flores*, 153 Ill. 2d at 274. As such, these attachments do not constitute newly discovered evidence, and any claim based on their contents is procedurally barred. *People v. Tenner*, 206 Ill. 2d 381, 398 (2002).

¶ 21 Defendant also attached to his petition an affidavit from a forensic consultant. In that affidavit, the consultant stated that he conducted an inquiry into the practices of Chicago police detective Reynaldo Guevara in two investigations, and the conclusions in that affidavit refer only to Detective Guevara, not Detective Halvorsen. Although defendant contends that Detectives Halvorsen and Guevara were often partners, there is nothing in the affidavit to suggest Detective Halvorsen elicited a coerced confession from defendant or "regularly obtained confessions and admissions in derogation of fundamental fairness." In addition, as the circuit court noted, there is no indication of the year the affidavit was prepared, and it is thus unclear whether the affidavit is "newly discovered."

¶ 22 Finally, defendant cited *People v. Flores*, 315 Ill. App. 3d 387 (2000) and *People v. Reyes*, 369 Ill. App. 3d 1 (2006) to support his claim. However, we find that neither case advances his cause. In *Flores*, there were no allegations that Detective Halvorsen coerced a

confession from defendant, and the court in that case suppressed defendant's statement because of a *Miranda* violation. *Flores*, 315 Ill. App. 3d at 394. In *Reyes*, defendants claimed that their confessions were the result of improper physical coercion by Detective Guevara. *Reyes*, 369 Ill. App. 3d at 2. The only time Detective Halvorsen is mentioned in the decision is when the court identifies him as Detective Guevara's partner (*id.* at 16); however, no allegations of coercion were levied against Detective Halvorsen in that case. We therefore find that defendant has failed to make a substantial showing of a constitutional violation (*Sutherland*, 2013 IL App (1st) 113072, ¶ 16) based on the affidavit of the forensic consultant and the two appellate court cases cited.

¶ 23 Finally, defendant contends that his claim of actual innocence was sufficient to warrant an evidentiary hearing. A cognizable claim of actual innocence must rely on newly discovered evidence that is material and noncumulative and be of such a conclusive character that it would probably change the result on retrial. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). The evidence being used to support the claim of actual innocence must be "freestanding," *i.e.*, it is not being used to supplement an assertion of a constitutional violation with respect to defendant's trial. *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007), citing *People v. Hobley*, 182 Ill. 2d 505, 443-44 (1998).

¶ 24 In his petition, and in his brief, defendant interweaves his claim of actual innocence with his claim of a coerced confession, and uses the same affidavits and evidence in support of both claims. His claim of actual innocence, as found by the circuit court, is not cognizable because it is not a freestanding claim (*Brown*, 371 Ill. App. 3d at 984), and he is thus not entitled to an evidentiary hearing based on it.

¶ 25 For the reasons stated, we affirm the second-stage dismissal of defendant's successive postconviction petition by the circuit court of Cook County.

¶ 26 Affirmed.