FIRST DIVISION
April 18, 2016

No. 1-14-1370

**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. 04 CR 1517
	)	
JAMES LENOIR,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Justice Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's denial of defendant's motion for leave to file a successive postconviction petition should be affirmed where defendant's petition and supporting documents do not allege facts sufficient to show cause and prejudice.

¶ 2 Defendant, James Lenoir, appeals the order of the circuit court denying him leave to file a successive postconviction petition. On appeal, defendant contends that the court erred in denying him leave because he established cause and prejudice by presenting newly discovered

evidence, the 2006 *Report of the Special State's Attorney*, No. 2001 MISC. 4 (Egan report) regarding police brutality, supporting his allegations that his confession was the result of physical coercion. Defendant also alleges that Detective Michael McDermott committed perjury when he denied that physical coercion occurred under his command. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court denied defendant leave to file a successive post-conviction petition on December 4, 2013. This court allowed defendant's motion to file a late notice of appeal on May 30, 2014. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6) and Illinois Supreme Court Rule 651 (eff. Feb. 6, 2013), governing appeals in post-conviction proceedings.

¶ 5 BACKGROUND

¶ 6 Defendant and three codefendants were charged with first degree murder, attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm, and aggravated battery in connection with the September 2006 shootings of Deonte Wright and Jose Perez. Defendant was alleged to be the driver of a car carrying gang members seeking revenge for an earlier shooting. The following are facts relevant to the issues in this appeal.

¶ 7 Prior to his trial, defendant filed a motion to suppress his statements. In his motion, defendant alleged that after he was arrested he was interrogated by assistant State's attorney (ASA) Catherine Gregorovic, Detective Mike McDermott, Detective Flaherty, Detective O'Connor, Sergeant Gorman, and other unknown detectives and officers, at the Area 4 police station. He further alleged that his statements "were obtained as a result of physical, psychological and mental coercion." Defendant claimed that McDermott brought him into the

interrogation room, and McDermott and another officer who was tall and white cuffed him. Defendant was handcuffed so tightly to a wall that his circulation was cut off. The handcuffs were removed when detectives came in to interrogate him and then replaced when defendant was alone in the room. Defendant remained in the interrogation room for 24 hours, and during that time two detectives entered. One of the detectives was "short, heavy-set and balding," in his 50's, and wore big frame glasses. He told defendant to remove his pants and shirt and then left defendant in the room for several hours, cuffed and wearing no clothes. Early in the morning another officer came in and allowed defendant to put on his clothes. Also during the time he was in the room a "tall heavy set detective in his late 30's to early 40's" entered and "hit the defendant repeatedly with a book." Defendant alleged that he was allowed to use the bathroom only once while he was in the room, remained in the room almost 24 hours before being fed a slice of pizza, and was told by ASA Gregorovic that if he made a videotaped statement she would "get a deal for him."

¶ 8 At the hearing on defendant's motion to suppress, Detective Thomas Flaherty testified that he was investigating the murder of Deonte Wright when he received a call from Detective McDermott, who was in Lake County investigating a codefendant. Detective Flaherty learned that defendant was one of four suspects in the murder. He and other officers arrested defendant, brought him to Area 4, and placed him without handcuffs into an interrogation room. A few hours later Detective Flaherty went into the room and advised defendant of his *Miranda* rights. After defendant indicated that he understood his rights and agreed to speak, Detective Flaherty interviewed defendant alone for 30 minutes. No other detectives were in the room. Detective Flaherty testified that defendant did not request a lawyer, was not handcuffed, and was allowed to use the bathroom. He did not hit defendant with a telephone book, nor did he witness a tall,

heavy-set detective hit defendant with a telephone book. He was present when ASA Gregorovic interviewed defendant later that morning. She identified herself as a lawyer working for the State's Attorney's office and advised defendant of his *Miranda* rights. Furthermore, Detective Flaherty did not hear ASA Gregorovic tell defendant that she would get him a deal if he videotaped a statement. When he conducted a lineup including defendant as a subject later that evening, Detective Flaherty reviewed the photographs and did not notice any marks or injuries on defendant.

¶ 9 ASA Gregorovic testified that when she met with defendant in the interrogation room he was not handcuffed. She advised him that she was a State's Attorney and advised him of his rights which he indicated he understood. They spoke for 10 to 15 minutes. ASA Gregorovic did not notice any injuries to defendant's wrists and he never informed her that he was handcuffed so tightly that his circulation was cut off. She left the room but later returned and spoke to defendant in the presence of Detective McDermott. Defendant did not tell her that he had been hit with a telephone book or that he was not allowed to use the bathroom or eat. He did not tell her that a heavy-set, balding detective came in and took his clothes for hours. ASA Gregorovic did not promise defendant she would get him a deal in exchange for a videotaped statement. Defendant then was taken into a room at Area 4 to view a video tape from Lake County. Detective McDermott was present for the viewing, but ASA Gregorovic was not. When defendant came out of the room with Detective McDermott, he told ASA Gregorovic that he wanted to speak with her. After talking with ASA Gregorovic, defendant agreed to give a videotaped statement. Defendant, ASA Gregorovic, and Detective McDermott signed the consent to videotape defendant's statement. Outside of the officers' presence, ASA Gregorovic and another assistant State's Attorney asked defendant how he had been treated by police and he

responded that he had been treated fine, was allowed to use the bathroom, and was given food and drink.

¶ 10 Detective McDermott testified at the hearing that he spent approximately 16 hours from September 18, 2003 to September 19, 2003, in Waukegan, Illinois investigating a codefendant's involvement in the murder. After obtaining a videotaped statement from the codefendant, Detective McDermott told Area 4 officers to arrest defendant. McDermott stated that he was not present when defendant was arrested, nor did he handcuff defendant in the interrogation room. He first came into contact with defendant in the afternoon on September 19, 2003, when he was present for ASA Gregorovic's conversation with defendant. ASA Gregorovic gave defendant his *Miranda* warnings and defendant stated that he understood and agreed to speak with her. After the conversation, defendant agreed to view the codefendant's videotaped statement. Detective McDermott took defendant to a room outside the presence of ASA Gregorovic, and they watched the videotape for about 15 to 20 minutes. Detective McDermott then left the room and told ASA Gregorovic that defendant wanted to talk to her. He was present when ASA Gregorovic spoke again with defendant and she advised defendant of his *Miranda* rights. Defendant agreed to give a videotaped statement. Detective McDermott did not hear ASA Gregorovic promise to get defendant a better deal in exchange for the statement.

¶ 11 Detective McDermott testified that defendant was given food and allowed to use the bathroom. At no point did an officer take away defendant's clothes and defendant was not handcuffed when Detective McDermott was with him. He testified that they showed defendant his codefendant's statement because defendant was not forthcoming and hesitant to implicate his codefendants. After watching his codefendant's statement, defendant felt "comfortable" talking because someone else was also talking. He denied that he or another officer struck defendant

with a telephone book, and he was not aware of a short, heavy-set, balding detective in his 50's wearing large glasses, who worked with defendant. Detective McDermott stated that he was 50 years old, 5'9" tall, and 170 pounds. The trial court denied defendant's motion to suppress his statement.

¶ 12 Defendant's trial began in August 2006. Prior to opening statements, the trial court addressed the State's motion *in limine* requesting that the defense not mention at trial "any detective, particularly Detective McDermott, who is anticipated to be a witness" regarding the "recently released Burge report" *i.e.*, the Egan report. Defense counsel stated she did not intend to present the report at trial and the trial court ruled that although the report would not be mentioned, defendant could present his theories of the involuntariness of his statement and coercion.

¶ 13 At defendant's trial, the testimony of ASA Gregorovic and Detective McDermott was substantially the same as their testimony in the hearing on defendant's motion to suppress. Defendant's videotaped statement was shown in which he talked about the shooting of Robert McClellan and how his codefendants wanted to retaliate for the shooting. Defendant told them that he wanted to go to the hospital to check on McClellan, but his codefendants told him to first drop them off where some of the rival gangs were hanging around. When they spotted a rival gang member, defendant stopped the car and his codefendants jumped out. One of them started firing and defendant saw a person fall after getting shot. Defendant sped away from the scene because he was scared. When his codefendants ran back toward the car he did not stop. He saw his codefendants three to four hours later and they told defendant not to say anything and "everything will be cool." He agreed because he saw that one of the codefendants had a gun in his back pocket, the same gun used in the shooting earlier that day. The codefendant walked

out of the building and gave the gun to a man named Frank. Defendant stated that he was not handcuffed during his interview with ASA Gregorovic, that the officers treated him fine and he was allowed to use the bathroom and was given food and drink. He stated that his statement was voluntary.

¶ 14 The jury found defendant guilty of first-degree murder and attempted first-degree murder, and he was sentenced to consecutive terms of 30 years' and 18 years' imprisonment, respectively.

¶ 15 On direct appeal, defendant alleged that the trial court (1) erred in denying his motion to quash arrest and suppress evidence; (2) erred in precluding defense counsel from inquiring into potential juror's prejudices about the use of guns; (3) failed to instruct the jury to disregard certain evidence introduced through improperly worded questions; (4) erred in instructing the jury on the defense of withdrawal; and (5) improperly communicated with the jury outside the presence of defendant. This court affirmed defendant's convictions and sentence but ordered a correction of the mittimus to show one conviction for first degree murder. *People v. Lenoir*, No. 1-07-1854 (2010) (unpublished Rule 23 order). Defendant's petition for leave to appeal was denied. *People v. Lenoir*, 949 N.E. 2d 662 (2011).

¶ 16 On December 15, 2011, defendant filed a petition for post-conviction relief and filed an addendum on February 27, 2011. Defendant made numerous allegations including that his trial counsel was ineffective for failing to call witnesses at the suppression hearing to testify that they did not consent to entry of the home, for presenting his motion to suppress without properly investigating or reading police reports after he advised counsel that he was beaten by officers, and for depriving defendant of his right to testify at trial. He also alleged that appellate counsel was ineffective for failing to argue trial counsel's ineffective assistance, failing to argue that officers violated the knock and announce rule, failed to argue that the prosecution inflamed the

prejudices of the jury, and that his codefendant's testimony was inconsistent with prior statements and was changed to blame defendant. The trial court summarily dismissed defendant's petition on March 8, 2012, and denied his motion to reconsider. On appeal, counsel filed a motion for leave to withdraw which this court allowed after finding no issues of arguable merit. Defendant's petition for leave to appeal to the Supreme Court was denied. *People v. Lenoir*, 996 N.E. 2d 19 (2013).

¶ 17 Defendant filed a *pro se* motion for leave to file a successive post-conviction petition on August 5, 2013, which is the subject of this appeal. In the petition defendant alleged that he was handcuffed by Detective Flaherty and that Detective McDermott did not let him call his mother to get an attorney for him. He also alleged that police officers physically coerced him into giving his statement, stating that "[a] short balding, heavy set guy" in his 50's wearing "wire frame glasses" made defendant remove his pants and shirt. He was left cuffed and wearing no clothes "for several hours." Defendant also alleged that "a tall heavy set detective in his late 30's to early 40's came in the interrogation room and hit petitioner repeatedly with a phone book." He further alleged that Detective McDermott committed perjury when he stated that no physical coercion occurred, and that trial counsel was ineffective for advising him not to accept a plea offer. Defendant alleged that he now had the Egan report which investigated police misconduct, including that of officers he claimed physically coerced him, which was not previously available. He argued that the report included facts about the "lead detective" that were identical to his claims of coercion and that if he had accepted the plea offer, his sentence would be "totally different."

¶ 18 Defendant attached to his petition (1) an affidavit stating that on May 22, 2013, he first saw the Egan report when law library staff informed him that they had a copy; (2) excerpts from

the Egan report; (3) an affidavit stating that his trial counsel told him the prosecution offered a sentence of 20 years for first degree murder and 6 years for attempted first degree murder in exchange for a guilty plea, but told defendant not to accept the offer because there was "no way" he would lose; and (4) excerpts from the pre-trial proceedings. The trial court denied the petition, finding that the report was not newly discovered evidence and in any event, defendant was not prejudiced because he never claimed that Detective McDermott physically abused him. The trial court further found that defendant did not establish a valid claim of actual innocence, and that he failed to establish cause and prejudice for his claims of perjury and ineffective assistance of trial counsel. This court allowed defendant's late notice of appeal.

¶ 19 ANALYSIS

¶ 20 Defendant argues that the trial court improperly denied him leave to file a successive postconviction petition pursuant to section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2012)). The Act provides a criminal defendant with a method in which to assert that his constitutional rights were violated in his original trial or sentencing hearing. *People v. Towns*, 182 Ill. 2d 491, 502 (1998). A proceeding under the Act is a collateral one rather than an appeal of the underlying judgment, and allows only for consideration of issues that were not, and could not have been, adjudicated on direct appeal. *Id*. Issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not, are waived. *Id*. at 502-03.

¶ 21 Although the Act contemplates the filing of only one postconviction petition, section 122-1(f) allows for the filing of a successive petition after obtaining leave of court. 725 ILCS 5/122-1(f) (West 2012). For a successive postconviction petition, however, "the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the

statute." *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002). In the context of a successive postconviction petition, there is less interest in providing a forum for vindicating defendant's constitutional rights and "waiver, which would be a procedural affirmative defense for purposes of the first petition, becomes a substantive consideration going to the merits of a successive postconviction petition." *People v Smith*, 341 Ill. App. 3d 530, 539 (2003). Therefore, leave to file a successive postconviction petition "may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2012).[1] As to the applicable standard of review, there is some confusion whether an abuse of discretion or *de novo* standard applies. See *People v. Edwards*, 2012 IL 111711, ¶ 30. As our supreme court determined in *Edwards*, we need not decide this question here because our determination is the same under either standard of review.

¶ 22 The "cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard that is set forth in section 122-2.1(a)(2) of the Act." *People v. Smith*, 2014 IL 115946, ¶ 35. Our supreme court likened this cause-and-prejudice test to the one used in the context of ineffective assistance of counsel claims and determined that, "[s]imilarly, a defendant's *pro se* motion for leave to file a successive postconviction petition will meet the section 122-1(f) cause and prejudice requirement if the motion adequately alleges facts demonstrating cause and prejudice." *Id.* ¶ 34. Therefore, leave to file a successive postconviction petition "should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the

[1] Leave to file a successive petition may also be granted if defendant shows actual innocence. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). However, defendant here did not raise the issue of actual innocence on appeal and consideration of the issue is therefore waived. *Id.* at 460.

claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Id.* ¶ 35.

¶ 23 For the trial court to grant leave, defendant must show both cause and prejudice. *Pitsonbarger*, 205 Ill. 2d at 464. In *Pitsonbarger*, our supreme court defined "cause" in this context as "any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding." *Id.* at 462. Defendant argues that he has sufficiently shown cause because his affidavit states that he did not discover the Egan report detailing Detective McDermott's misconduct until May of 2013, well after he filed his initial petition for postconviction relief. The State responds that the parties were aware of the Egan report during defendant's trial proceedings in 2006 and with due diligence defendant should have been aware of its contents before he filed his initial petition in 2011. However, even if we take as true defendant's factual allegation that he did not come into possession of the Egan report until 2013, constituting an objective factor which impeded him from raising the claim in his initial petition, we find that defendant has not alleged sufficient facts to show prejudice.

¶ 24 In order to satisfy the prejudice prong, defendant must show that the claim not raised in his initial postconviction petition "so infected the entire trial that the resulting conviction or sentence violates due process." *Pitsonbarger*, 205 Ill. 2d at 464. In *People v. Wrice*, 2012 IL 111860, ¶ 84, our supreme court held that "use of a defendant's physically coerced confession as substantive evidence of his guilt is never harmless error" and found that the defendant's claim of physical coercion "satisfied the prejudice prong of the cause-and-prejudice test" with support from the Egan report. The court, however, never indicated that a bare assertion that defendant's confession was physically coerced, accompanied by excerpts from the Egan report, satisfied the cause-and-prejudice requirement. Rather, it had noted this court's finding that the defendant

satisfied the prejudice prong of the test where the defendant: (1) consistently claimed throughout the proceedings that he was tortured; (2) his torture claims are strikingly similar to those of other prisoners in Areas 2 and 3; (3) the officers named are also identified in other allegations of torture; and (4) the allegations are consistent with the findings of torture in the Egan report. *Id.* ¶ 43. Nothing in *Wrice* contradicts the Supreme Court's subsequent determination in *Smith* that a successive postconviction petition must adequately allege facts showing cause and prejudice, and leave to file a successive petition should be denied "where the successive petition with supporting documentation is insufficient to justify further proceedings." *Smith*, 2014 IL 115946, ¶¶ 34, 35.

¶ 25 Defendant argues that the Egan report constitutes new evidence corroborating his consistent allegations of abuse because Detective McDermott was specifically named in the report as having engaged in the torture of suspects and committing perjury about the torture. He contends that his case is similar to *Wrice*, where the court held that the defendant therein satisfied the cause-and-prejudice test. In *Wrice*, the defendant's successive petition alleged that while he was in custody at Area 2, he was beaten by Sergeant Byrne and Detective Dignan until he confessed. *Wrice*, 2012 IL 111860, ¶40. He also consistently maintained that he was abused throughout the proceedings at trial and posttrial, and his claims were strikingly similar to other cases of abuse at Areas 2 and 3. *Id.* ¶ 43. The defendant attached the Egan report to his petition, and the report specifically named Byrne and Dignan as "players" in the systemic abuse at Area 2. *Id.* ¶ 40. This court found that the defendant sufficiently established prejudice. *Id.* ¶ 43.

¶ 26 Similarly, defendant points to the case of Alfonzo Pinex in the Egan report and argues that it supports the claims of physical coercion in his petition. In the *Pinex* case, Detective

McDermott was accused of beating Pinex in the ribs and holding him down while another officer beat him on the head and face. Detective McDermott and the other officer also denied Pinex's requests for counsel and beat him until he soiled himself, before obtaining his confession. Pinex reported the abuse to his attorney right away, and his injuries were documented in medical records. The Egan report determined that there was sufficient evidence to potentially support an indictment of Detective McDermott for aggravated battery, perjury, and obstruction of justice in the Pinex case.

¶ 27 Defendant argues that, similar to *Wrice*, the Egan report supports his allegation that he suffered physical coercion at the hands of detectives acting under Detective McDermott, an officer specifically named in the report as engaging in physical coercion and perjury. Defendant's petition, however, does not allege that Detective McDermott was the person who physically abused him. Although in his motion to suppress defendant alleged that Detective Flaherty and Detective McDermott arrested him and handcuffed him, in his successive postconviction petition he only alleges that it was Detective Flaherty who handcuffed him tightly while "[a] short balding, heavy set guy" in his 50's wearing "wire frame glasses" made defendant remove his pants and shirt, and "a tall heavy set detective in his late 30's to early 40's came in the interrogation room and hit petitioner repeatedly with a phone book." Defendant does not name these officers nor do their descriptions fit any of the officers who came in contact with defendant while he was in custody at Area 4, and his allegations of coercion are not strikingly similar to the abuse suffered by Pinex in the Egan report. Defendant does not allege other incidents of abuse occurring at Area 4 that were strikingly similar to the abuse he suffered. Also, although defendant refers to Detective McDermott as the "lead detective" who was "more involved" in his case, a review of the portion of the transcript defendant cites to for this argument shows that it

was actually Detective Flaherty who testified that he was one of the "more involved" detectives in the case. Although defendant did allege physical coercion in his motion to suppress, he did not make such allegations in his direct appeal or in his initial postconviction petition. There is no evidence that defendant informed anyone of the abuse after it occurred, nor did he provide medical records to support his claim. *Wrice* is inapposite.

¶ 28 Defense counsel also filed a motion in this court to cite *People v. Weathers*, 2015 IL App (1st) 133264 as additional authority, which we allowed. In *Weathers*, the defendant attached as new evidence the 2012 Illinois Torture Inquiry and Relief Commission (TIRC) report which named Detective O'Brien as one of the detectives engaged in physical coercion. The defendant alleged that Detective O'Brien physically coerced him during his interrogation. *Id*., ¶¶ 1, 3. In *Weathers*, it was undisputed that the 2012 TIRC report was not available to the defendant when he filed his initial postconviction petition in 2009. *Id*., ¶ 36. In contrast, defendant here attached as new supporting evidence the 2006 Egan report, which was available when he filed his initial postconviction in 2011. Additionally, although the Egan report named Detective McDermott as one of the officers who engaged in abusive interrogation, defendant does not allege that Detective McDermott physically coerced him. Rather, defendant argues that Detective McDermott was the lead detective over other officers who did physically abuse defendant. *Weathers* is distinguishable and does not support defendant's contentions here.

¶ 29 We find that the Egan report does not provide new evidence to corroborate defendant's claim that physical coercion was used by officers to obtain his confession. Without evidence corroborating defendant's allegations of coercion, or "some similarity between the type of misconduct alleged by defendant and that presented by" other cases of abuse, the Egan report fails to provide sufficient support for defendant's claim. *People v. Anderson*, 375 Ill. App. 3d

121, 138 (2007). Likewise, since there is no evidence that Detective McDermott engaged in physical coercion in defendant's case, or knew about any acts of coercion that may have occurred, defendant's claim that Detective McDermott committed perjury in denying the use of physical coercion is not supported by the Egan report. Since defendant did not allege sufficient facts to establish prejudice as required by the cause-and-prejudice test, the trial court properly denied his motion for leave to file a successive postconviction petition. *Smith*, 2014 IL 115946, ¶¶ 34, 35.

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

¶ 31 Affirmed.