2016 IL App (1st) 142322-U

FIFTH DIVISION
August 12, 2016

No. 1-14-2322

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 85 C 7903
	)	
ERWIN DANIEL,	)	Honorable
	)	Charles P. Burns,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

Held: The trial court's judgment is affirmed where the court did not err by (1) denying defendant leave to file a successive postconviction petition or (2) imposing costs and fees after finding defendant's filing was frivolous.

¶ 1 Defendant, Erwin Daniel, appeals the trial court's denial of his motion for leave to file a successive postconviction petition. On appeal, defendant argues (1) he satisfied the cause-and-prejudice test for a due process claim by producing evidence that was unavailable for his previous postconviction petitions in support of his allegation that Chicago Police Commander

Jon Burge physically coerced his statement, and (2) the trial court erred by assessing fees and costs because his petition was meritorious. For the following reasons, we affirm the trial court.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged with murder, attempted murder, and aggravated battery based on the 1985 shootings of Roger Tate and Darren Cooper. Defendant's first trial ended in a mistrial. Evidence at defendant's second trial showed that Tate and Cooper were passengers in Phillip Potter's car when Potter drove past defendant, Ricky Calloway, and Andre Mosley. After a verbal altercation took place, defendant fired twice into Potter's car. Cooper sustained a gunshot wound to his elbow, and Tate died from a gunshot wound to his back.

¶ 4 Prior to trial, defendant filed a motion to suppress statements he made, arguing, *inter alia*, that they were the product of "physical, psychological, and mental coercion." The motion made no mention of defendant having been hit with a flashlight or threatened with a gun, nor did it mention Area 2 Police Commander Jon Burge. The parties agree that the motion was never ruled upon.

¶ 5 During defendant's first trial, Diane Romza testified that she was employed as an assistant State's Attorney (ASA) and she and her partner, Jim Andreou, were called to Area Two Violent Crimes (Area 2) on June 15, 1985. Romza took a statement from defendant in the presence of Andreou and Detective Phelan. The statement was introduced into evidence and published for the jury. In it, defendant said he never observed anyone in the car display a gun. Defendant testified and denied stating that the car's occupant did not have a gun. He said that he stated the person reached down and when he sat back up, he had something in his hand that appeared to be a gun. He voluntarily went to the police station to give a statement after finding out the police were looking for him. He agreed that he told the police "everything that

happened." On cross-examination, defendant was asked "You never saw a gun, did you, isn't that what you told [Romza]?" Defendant responded, "Yes."

¶ 6 Area 2 Detective Joseph Danzl testified that defendant told him that one of the car's occupants pointed something black out of the window, at which point defendant fired into the car. Area 2 Detective Michael Baker also testified that defendant told him that the man in the back seat of the car pointed something black out of the window.

¶ 7 Defendant's first trial resulted in a mistrial after the jury indicated it could not reach a unanimous verdict. Thereafter, a second trial commenced.

¶ 8 Cooper and Potter testified for the State. Their testimony established that Potter was driving his automobile on the evening of June 13, 1985. Cooper sat in the backseat while Tate sat in the front passenger seat. As Potter's car approached an alley, Cooper observed a "couple of guys," including defendant. Defendant asked Tate, who was leaning out of the window, "what the fuck are you looking at." Tate responded, "I can look anywhere I want to." Potter pulled his vehicle over at Cooper's urging, and Cooper spoke to defendant. Thereafter, defendant pulled a gun from his pocket, said "Insane Vice Lords," and fired twice into Potter's car.

¶ 9 Cooper and Potter denied that anyone in the car had a gun. Cooper denied that he reached under the front seat of the car and pointed something black out of the window or that anyone else pointed anything out of the car. Potter also denied that he stuck anything out of the window or that anybody else in the automobile did.

¶ 10 The day after the shooting, Chicago police department gang crimes specialist Robert Schaefer recovered two handguns in the basement of Calloway's home.

¶ 11 Romza testified regarding the statement she took from defendant in the presence of Detective Phelan and ASA Andreou on June 15. The statement was admitted in evidence and

published for the jury. In it, defendant said that the person in the back seat of the car said "GD, meaning Gangster Disciple." Whenever defendant heard "Gangster Disciples," he became scared and angry because he had previously been shot at by other members of the Gangster Disciples. Defendant thought that because the occupant of the car was a Gangster Disciple, he would have a gun; however, defendant said he never observed a gun. Romza testified that defendant never told her the person in the back seat reached under the seat, pulled out something black, and pointed it out the window.

¶ 12 Detective Barry Costello testified that he conducted a lineup on June 15, during which Potter identified defendant as the person who shot Tate. Detective Dignan took a photograph of the lineup. However, that photograph did not "turn out." Costello and Phelan also took a photograph of defendant. They brought defendant's photograph, along with photographs of four other subjects, to the hospital for Cooper to view. Cooper identified defendant as the shooter.

¶ 13 Calloway testified for defendant that just prior to the shooting, he heard defendant say "he got something." Calloway acknowledged that he signed a statement in which he did not say anything about defendant "telling [him] anything about something black in the car." Calloway denied that the statement contained everything that he told Romza; he also said the statement included things he did not tell Romza. Calloway never observed a gun in the automobile because he was not close enough.

¶ 14 Defendant sought to introduce the testimony of Detective Baker and Detective Danzl that defendant told them the man in the back seat of the vehicle reached under the front seat and pointed something black out of the window. The court refused to allow the testimony on the basis that it was hearsay. Defendant did not testify.

¶ 15 During closing arguments, the State noted defendant's statement to Romza and encouraged the jurors to "read the statements."

¶ 16 The jury found defendant guilty of the murder of Tate, the attempted murder of Cooper, and the aggravated battery of Cooper.

¶ 17 Defendant filed a posttrial motion for new trial in which he argued, *inter alia*, that he should have been allowed to present the testimony of certain officers who "took an initial statement from" him in which he told them that Cooper reached under the front seat and pointed something black out of the window. Defendant did not claim that his statement was the product of coercion or torture.

¶ 18 In July 1986, the trial court sentenced defendant to natural life in prison.

¶ 19 Defendant filed a direct appeal in which he did not raise any issues concerning his statement. Our court affirmed the trial court's judgment (*People v. Daniel*, 191 Ill. App. 3d 837, 850 (1989)) and the supreme court denied defendant's petition for leave to appeal (*People v. Daniel*, 129 Ill. 2d 567 (1990)).

¶ 20 In 1997, defendant filed a *pro se* postconviction petition. Defendant challenged the admissibility of his statement on the grounds that police ignored his request for a lawyer. He cited language in *New York v. Quarles*, 467 U.S. 649, 654 (1984), that police interrogation of suspects in custody threatens the Fifth Amendment by exposing suspects to the "inherently coercive" environment created by custodial interrogation. Defendant argued the trial court erred by refusing to allow Detective Danzl and Detective Baker to testify as to defendant's statements that the passenger in the back seat of the car reached under the seat and grabbed something black that appeared to be a gun. The trial court dismissed defendant's petition, and our court affirmed

the trial court's dismissal. *People v. Daniel*, 1-97-3433 (1998) (unpublished order under Supreme Court Rule 23).

¶ 21 In 2000, defendant filed a motion to reduce his sentence, but did not challenge his statement. The trial court found that defendant's motion was untimely and that waiver and *res judicata* barred his claims. Defendant appealed, and the public defender of Cook County, who represented defendant on appeal, filed a motion for leave to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Our court granted counsel's motion and affirmed the court's dismissal of defendant's motion. *People v. Daniel*, 1-00-2957 (2002) (unpublished order under Supreme Court Rule 23.

¶ 22 In 2002, defendant filed a second *pro se* postconviction petition and did not raise any challenge to his statement. The trial court dismissed defendant's petition as frivolous and patently without merit, and our court affirmed the court's dismissal. *People v. Daniel*, 1-02-3084 (2003) (unpublished order under Supreme Court Rule 23).

¶ 23 In 2014, defendant sought leave to file the *pro se* successive postconviction petition at issue, alleging that newly discovered evidence showed he was tortured into providing a statement. In his motion, defendant argued that he could present evidence that the detectives who interrogated him systematically tortured him and other suspects to obtain confessions at or near the time he was questioned. Defendant attached a copy of the Report of Special State's Attorney Edward J. Egan (Egan Report), which described the use of physical torture to coerce confessions by police under the supervision of Area 2 Commander Jon Burge. Defendant also argued that appellate counsel was ineffective for failing to study the trial transcripts and raise the issue of trial counsel's failure to argue defendant's pretrial motion to suppress the statement. Defendant

alleged that he suffered prejudice because his conviction was based primarily on his confession and the detectives' credibility, and his confession was a result of torture and coercion.

¶ 24 In his accompanying petition, defendant alleged that he told trial counsel that the detectives who interrogated him used excessive force, threats, and intimidation to overcome his will and cause him to provide a false statement. He argued that although his attorney filed a motion to suppress his statement, a hearing was never held and his attorney ignored his claim. Defendant alleged he could provide newly discovered evidence that the police who obtained his confession regularly used torture techniques to obtain confessions.

¶ 25 Defendant also alleged that police raided his home, without a warrant, and used excessive force. In support of this allegation, defendant attached affidavits from his family members as well as documents reflecting that a settlement was reached between defendant's father and the City of Chicago in a lawsuit filed by defendant's father against Burge and unknown Chicago police officers.

¶ 26 Defendant further alleged that he surrendered himself to police custody at Area 2. There, he was handcuffed in an interrogation room and was not read his *Miranda* rights or allowed to talk to an attorney or his mother, who was in the waiting room. Defendant initially admitted to Detectives Danzl and Baker that he shot the victims in self-defense, explaining that he was afraid because the victims were shouting gang slogans, wearing gang colors, and "had stuck a black object out of the window," which defendant believed to be a gun. Defendant attached Danzl's and Baker's testimony from the first trial to his petition.

¶ 27 According to defendant's petition, after defendant provided this statement, Danzl and Baker left the room and Burge entered. Burge asked defendant about somebody named "Andre," and defendant denied knowing him. Thereafter, Burge struck defendant in the ribs with a

flashlight. Burge eventually left the room and another unnamed detective entered and asked defendant about somebody named "Ricky." Defendant denied knowing Ricky, and the detective threatened to send Burge back into the room. Defendant than admitted knowing Ricky to avoid another encounter with Burge. The unnamed detective left the room and returned with a gun, which he pointed at defendant, "scaring him greatly." The detective told defendant he had obtained the gun from "Ricky." Defendant alleged that he was "struck by Lt. Burge with a flashlight, [t]hreatened by Burge and the unnamed detective, and questioned by numerous detectives until his will was overcome and he gave an entirely different falsified account of the event." According to defendant, the new version of the shooting he provided "eliminated any possibility of charges of manslaughter, second-degree murder or being acquitted of self defense."

¶ 28 In addition to the Egan Report and his family member's affidavits, defendant also attached his own 2005 affidavit to his petition.

¶ 29 In June 2014, the trial court denied defendant leave to file the petition. The court found that defendant had established cause, as the Egan Report was issued in 2006 and was unavailable to support defendant's prior postconviction petition. However, the court found defendant failed to establish prejudice because the Egan Report did not indicate that Burge and those under his command committed the acts of torture to defendant and defendant's allegations of torture lacked consistency where he never previously contended he was tortured. The court further observed that defendant offered no corroborating evidence to support his allegation that he was tortured and forced to confess. It noted that in December 2005, defendant wrote to Robert Boyle regarding his allegations of torture. Boyle was investigating torture allegations with Egan. Investigator Patrick J. Calihan reported to Boyle in a closing memo that defendant's allegations could not be supported due to a lack of physical and medical corroboration, and a lack of

documentation consistent with the allegations. In addition, the court noted, Calihan indicated that petitioner stated he was not hurt and did not complain to any medical personnel about the incident and no documentation existed of a complaint by defendant or any family members, nor did defendant's attorney seek to suppress the written statement. The court further observed that Calihan's report indicated the alleged abuse suffered by defendant was apparently an afterthought and not of a serious nature, and Calihan recommended the file be closed.

¶ 30 In sum, the trial court found that defendant's claim was unlikely to succeed even if was presented earlier because the Report gave no indication that defendant was tortured, defendant's allegations of torture lacked consistency, Calihan's memo indicated defendant's claim lacked corroborating evidence, and defendant failed to provide any explanation or evidence for the lack of corroborating evidence. The court also assessed $105 in fees and costs against defendant for filing a frivolous petition, finding the allegations lacked an arguable basis in law and fact, the allegations and factual contentions lacked evidentiary support, and the filings "were presented to hinder, cause unnecessary delay, and needless increase in the cost of litigation."

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 On appeal, defendant argues that (1) he satisfied the cause-and-prejudice test for a due process claim by producing evidence that was unavailable for his previous postconviction petitions in support of his allegation that Burge physically coerced his statement, and (2) the trial court erred by assessing fees and costs because his petition was meritorious. We address defendant's arguments in turn.

¶ 34 A. Whether The Trial Court Erred by Denying Defendant Leave To File His Successive Postconviction Petition

¶ 35 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et. seq.* (West 2014)) provides a method through which criminal defendants can challenge their convictions based on constitutional violations. *People v. Domagala*, 2013 IL 113688, ¶ 32. The Act contemplates the filing of only one postconviction petition, and claims not presented in an original or amended petition are waived. *People v. Sanders*, 2016 IL 118123, ¶ 24 (citing 725 ILCS 5/122-1(f), 5/122-3 (West 2014)).

¶ 36 To file a successive postconviction petition, a defendant must first seek leave of court. 725 ILCS 5/122-1(f) (West 2014); *People v. Wrice*, 2012 IL 111860, ¶ 47. Leave of court may be granted where the defendant demonstrates "cause" for his failure to bring the claim in his initial postconviction petition and "prejudice" resulting therefrom. 725 ILCS 5/122-1(f) (West 2014). A defendant demonstrates "cause" by identifying an objective factor that impeded his ability to raise a specific claim during the initial postconviction proceedings. 725 ILCS 5/122-1(f) (West 2014); *People v. Smith*, 2014 IL 115946, ¶ 33. A defendant establishes "prejudice" by showing a claimed error "so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2014).

¶ 37 The "cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard." *Smith*, 2014 IL 115946, ¶ 35. A court should deny leave to file a successive postconviction petition "when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the 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.* We review a court's

denial of a motion for leave to file a successive petition *de novo*. *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 59.

¶ 38 At the outset, we agree with defendant that although he styled his claim as one of ineffective assistance of counsel, we may review his allegations to determine whether they adequately set forth a due process claim. In *People v. Weathers*, 2015 IL App (1st) 133264, ¶ 20, the defendant framed the issue in his *pro se* successive postconviction petition as a claim of ineffective assistance of counsel instead of a due process violation. However, our court concluded that the defendant had not forfeited his due process claim because, although "inartful," defendant's petition alleged "a due process violation in the use of his allegedly coerced confession." *Id.* ¶ 22. In his *pro se* petition, the defendant alleged his confession was physically coerced by detectives and that newly discovered evidence corroborated his claims, and he attached to his petition the 2012 Torture Inquiry and Relief Commission (TIRC) report and a detective's testimony in another case as support. *Id.*

¶ 39 Here, as in *Weathers*, defendant argued in his *pro se s*uccessive postconviction petition that he was tortured into providing a statement and that he could provide evidence that the detectives who interrogated him systematically tortured him and other suspects into providing confessions. In support of his claims, defendant attached a copy of the Egan Report. Thus, as in *Weathers*, a liberal construction of defendant's petition shows he substantively raised the same claim that he now does on appeal; accordingly, we will consider defendant's due process argument.

¶ 40 As another initial matter, the State argues that certain affidavits that defendant attached to his petition were not newly discovered and should be disregarded. In particular, the State challenges the affidavits from defendant's brothers, mother, and aunt, arguing that where they

related to the circumstances of defendant's arrest, they were not newly discovered as no objective factor impeded defendant's ability to raise the circumstances surrounding his arrest at trial or in his prior postconviction petitions. The State also argues that defendant's own affidavit is not newly discovered and is contradicted by the record because defendant testified at his first trial that he voluntarily spoke to the police and he did not testify he was coerced into confessing. In response, defendant argues that many of the facts in the challenged affidavits are newly available and the unavailability of the Egan Report suffices to establish cause for his failure to previously raise a claim of abuse.

¶ 41 We need not consider the State's argument because, even assuming petitioner has demonstrated "cause" for his failure to bring his claim earlier, he has failed to show "prejudice."

¶ 42 The supreme court in *People v. Patterson*, 192 Ill. 2d 93, 145 (2000), held the defendant presented sufficient evidence at the pleading stage to warrant an evidentiary hearing where (1) he consistently claimed he was tortured, (2) his claims were "strikingly similar" to other claims of torture, (3) the officers allegedly involved in the defendant's case were identified in other allegations of torture, and (4) the defendant's allegations were consistent with the findings of the police department's office of professional standards that torture was systemic and methodical at Area 2 under Burge. Applying the *Patterson* court's analysis, the appellate court in *People v. Wrice*, 406 Ill. App. 3d 43, 53 (2010), found the defendant had established "prejudice" under the cause-and-prejudice test because (1) he consistently claimed he was tortured during his motion to suppress, at trial, and on postconviction review; (2) the defendant's claims of being beaten were "strikingly similar" to those of other prisoners at Areas 2 and 3; (3) the officers involved in the defendant's case were identified in other allegations of torture; and (4) the defendant's allegations were consistent with the findings of torture in the Egan Report and report of the Office of

Professional Standards. *Wrice*, 406 Ill. App. 3d at 53. The *Wrice* court also noted that, pursuant to *People v. Wilson*, 116 Ill. 2d 29, 41 (1987), " '[t]he use of a defendant's coerced confession is *never* harmless error.' (Emphasis added.)" *Wrice*, 406 Ill. App. 3d at 53. Subsequent to our decision, the supreme court modified the *Wilson* rule, finding that the "use of a defendant's *physically* coerced confession as substantive evidence of his guilt is never harmless error." (Emphasis added.) *Wrice*, 2012 IL 111860, ¶ 49.

¶ 43 Applying the aforementioned factors to the present case shows defendant has not established prejudice. Most notably, defendant has not consistently claimed that he was tortured. In fact, at no point during the pretrial proceedings, during defendant's first or second trials, in his motion for new trial, in his direct appeal, or in his first or second postconviction petitions did defendant raise a claim that Burge hit him with a flashlight, threatened him with a gun, or was in any way involved in the taking of his statement. The sole allegation defendant ever made as to physical coercion was the generic statement in his motion to suppress that his statement was the product of physical coercion. That motion did not allege defendant was hit with a flashlight or threatened with a gun, nor did it name Burge. Further, the testimony at defendant's first and second trials established that the detectives who questioned defendant were detectives Phelan, Danzl, and Baker. Defendant has not mentioned Burge in any prior proceedings.

¶ 44 Nonetheless, defendant argues that Burge's name appeared in connection with his case as early as 1987. In support of this argument, defendant relies on a settlement agreement reached between his father and the City of Chicago. Defendant also points to the testimony during his second trial that Detective Dignan, who was named in the Egan Report, took a photograph of the lineup in which defendant was identified. Defendant argues Dignan's involvement in defendant's case "corroborates Burge's presence and adds to the air of misconduct," especially where the

photograph Dignan took of the lineup did not "turn out," which, according to defendant, suggests the officers had something to hide as to their interrogation of him.

¶ 45 We are not persuaded by defendant's arguments. First, the settlement agreement between defendant's father and the City of Chicago related to defendant's father's claims that Chicago police officers damaged his home while searching for defendant. Further, in the settlement, the parties stipulated that Burge was not present during the search. Thus, the settlement agreement in no way serves as support for defendant's claims that he was abused by Burge during questioning. Likewise, the fact that Dignan's photograph of the lineup did not "turn out" and that Dignan photographed the lineup does not corroborate defendant's allegation that Burge questioned him or abused him. Further, as the State notes, defendant claimed that Burge hit him with a flashlight in the ribs—an injury that would not have been visible in a lineup photograph.

¶ 46 Defendant also relies on the differences between his statement to Detectives Danzl and Baker and his statement to ASA Romza. During the first trial, Danzl and Baker testified that defendant said he observed somebody in the automobile had a gun. Defendant notes that such a detail would have supported his self-defense claim. Defendant alleges that his subsequent statement to Romza, in which he omitted the detail of the gun, lends credence to his contention that Burge abused him while in custody; otherwise, defendant posits, it is "difficult to explain this extreme about-face" between his statement to Danzl and Baker and his statement to Romza. However, contrary to defendant's assertion, his second statement to Romza was not an "about-face" from his initial statement to Danzl and Baker. Defendant still provided details to Romza that would support a self-defense claim, as he said (1) he heard somebody say GD, (2) he was scared of the Gangster Disciples because he had previously been shot, and (3) he thought somebody in the car had a gun because the people in the car were Gangster Disciples. The fact

that defendant did not tell Romza he observed a gun is insufficient, without more, to corroborate his claim that he was abused by Burge.

¶ 47 Defendant argues that by questioning the "consistency" of his allegations, the trial court made a credibility determination, which is inappropriate at this stage of the proceedings where his petition is to be taken as true. However, as detailed, our court's decision in *Wrice* makes clear that the consistency of a defendant's allegations is one of the factors to be considered in determining whether a showing of prejudice has been made. See *Wrice*, 406 Ill. App. 3d at 53. Notwithstanding, defendant claims that in *Weathers*, the court resolved the "prejudice" prong of the cause-and-prejudice test merely by finding that the defendant's successive postconviction petition contained facts that he was physically abused prior to giving his confession and that the court was required to take those facts as true. Defendant urges us to apply the same analysis in his case.

¶ 48 In *Weathers*, the defendant, while represented by the public defender's office, filed a motion to suppress statements. *Weathers*, 2015 IL App (1st) 133264, ¶ 3. The defendant alleged he did not receive *Miranda* warnings and that his confession was a result of physical coercion. *Id*. The defendant specially claimed that one detective, possibly Detective O'Brien, jabbed him with what he believed was a flashlight. *Id.* He also claimed, *inter alia*, that during his interrogation by two detectives the following day, O'Brien "shoved, grabbed, and otherwise made violent contact with" him. *Id.* Private counsel subsequently filed an appearance on the defendant's behalf and withdrew the motion to suppress. *Id.* The motion was never litigated. *Id.*

¶ 49 At trial, the defendant's videotaped statement was admitted into evidence and played for the jury. *Id.* ¶ 9. The defendant did not testify. *Id.* ¶ 11. On direct appeal, the defendant challenged only the trial court's sentencing decision. *Id.* ¶ 12. In his initial *pro se* postconviction

petition, the defendant alleged trial counsel was ineffective for withdrawing his motion to suppress because the videotaped statement was obtained without defendant having received *Miranda* warnings. *Id.* ¶ 13. The court summarily dismissed the petition as frivolous and patently without merit. *Id.*

¶ 50 Defendant subsequently filed a motion for leave to file a successive postconviction petition, asserting newly discovered evidence supported his claim of ineffective assistance because it showed Detectives O'Brien and Halloran were involved in a pattern of abuse. *Weathers*, 2015 IL App (1st) 133264, ¶ 14. Defendant attached to his petition, *inter alia*, portions of the 2012 TIRC report relating to the detectives that interrogated him. *Id.* ¶ 1. The trial court denied the defendant's motion for leave to file a successive postconviction petition, finding the defendant failed to satisfy the cause-and-prejudice test. *Id.* ¶ 14.

¶ 51 The *Weathers* court reversed the trial court's decision, concluding the defendant had satisfied the cause-and-prejudice test. *Id.* ¶¶ 36-38. As to prejudice, the *Weathers* court quoted the *Wrice* court's statement that the use of a defendant's physically coerced confession as substantive evidence of guilt is never harmless error. *Id.* ¶ 37. The court then stated as follows.

> "At this stage of the proceedings, we must accept all well-pled facts as true. [Citation.] Defendant's successive postconviction petition contains facts that he was physically abused prior to giving his confession, and at this stage, we must accept those facts as true. Defendant's confession was introduced as substantive evidence at trial, and defendant has set forth claims that this confession was the result of physical coercion, including being struck with a flashlight, and stripped of his clothing and placed in a cold room.

> These allegations considered along with the newly discovered evidence from the TIRC report establish that defendant has satisfied the prejudice requirement such that his allegations of a physically coerced confession should proceed to the next stage of proceedings." *Id.*

¶ 52 We cannot agree with defendant's contention that we should resolve the prejudice prong simply by taking as true the facts alleged in his petition that he was physically abused, without considering the factors outlined by our court in *Wrice*. To adopt defendant's position would enable every defendant who was held at Area 2 to be able to satisfy the "prejudice" prong of the cause-and-prejudice test by simply asserting that he was abused by Burge or another detective named in the Egan Report, without ever having made such a claim in prior proceedings, and attaching the Egan Report to his petition as support. This cannot have been what the *Weathers* court intended. Further, nothing in the *Weathers* decision indicates it meant to abandon the factors set out in *Wrice*. Indeed, in a recent decision issued subsequent to *Weathers*, our court continued to cite to and apply the *Wrice* factors when determining whether the defendant had established prejudice. See *People v. Terry*, 2016 IL App (1st) 140555, ¶¶ 37-38. Further, we note that in *Weathers*, the defendant *had* previously raised his claim of abuse in his pretrial motion to suppress, specifically alleging that O'Brien and others beat him. *Weathers*, 2015 IL App (1st) 133264, ¶ 3. Even though the defendant's second attorney withdrew the motion to suppress (*id.*), that motion still demonstrated some consistency in the *Weather* defendant's allegations. By contrast, defendant has never raised a claim regarding Burge.

¶ 53 Defendant also argues that he has established prejudice because his claims that Burge struck him with a flashlight while he was at Area 2 in 1985, and that a second officer threatened

him with a gun, are "strikingly similar" to the abuse documented in the Egan Report. In this regard, defendant relies on *People v. Nicholas*, 2013 IL App (1st) 103202. However, *Nicholas* did not find that the defendant established prejudice simply by making allegations that were "strikingly similar" to the allegations in the Egan Report. Instead, in concluding the defendant had established prejudice, the *Nicholas* court also noted the defendant consistently claimed that he was tortured. *Id.* ¶ 40. Indeed, in *Nicholas*, the defendant filed a motion to suppress his statement to police based on alleged physical and psychological coercion and testified at a hearing on the motion that Detective O'Brien "smacked" him and punched him in the chest and that other detectives hit and kicked him while he was on the ground. *Id.* ¶ 4. Further, the defendant testified at trial that the police hit and kicked him and coerced him into giving a statement. *Id.* ¶ 21. In his *pro se* postconviction petition, the defendant alleged the Egan Report corroborated his claim that his confession was coerced. *Id.* ¶ 24. Specifically, the defendant claimed the Egan Report established numerous arrestees had complained of being beaten and/or tortured by O'Brien and other detectives at Area 3. *Id.* He also filed a *pro se* petition for a *writ of habeas corpus* in the federal court, alleging he was beaten by Chicago police officers prior to giving his statement and that the Egan Report corroborated his allegations. *Id.* ¶ 26.

¶ 54 Thus, the *Nicholas* defendant consistently alleged that his confession was coerced by police officers and that Detective O'Brien, who was identified in the 2006 Report, was one of the officers who tortured him. Here, by contrast, no mention of Burge appears in the prior proceedings and defendant has never alleged that Burge abused him. Thus, *Nicholas* is clearly distinguishable.

¶ 55 We note that the parties also dispute the significance of the closing memo, which was apparently attached to the Egan Report. The trial court observed that the memo contained the

findings of Investigator Calihan that defendant's allegations of abuse lacked physical and medical corroboration and documentation. Defendant posits that notwithstanding the closing memo, he has established prejudice, because those investigating and compiling the Egan Report were looking for sufficient admissible evidence to support a conviction, which is a standard "far beyond" what he was required to show to be given leave to file his petition.

¶ 56 The record clearly demonstrates that the trial court considered the closing memo and the parties do not dispute that it was before the trial court; however, the memo is not contained in the record on appeal. The State has appended the memo to its brief, and defendant has made no argument in his reply brief regarding the authenticity of the State's attachment. However, "attachments to briefs not included in the record are not properly before the reviewing court and cannot be used to supplement the record." *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 23; *People v. Benson*, 256 Ill. App. 3d 560 (1994). Here, we decline to consider the closing memo based on its absence from the record.

¶ 57 B. Whether The Trial Court Erred by Imposing Fees

¶ 58 Defendant next claims that the trial court erred by assessing fees and costs against him under section 22-105(a) of the Code of Civil Procedure (Code) (735 ILCS 5/122-105(a) (West 2014). We review the propriety of an order imposing fines and fees *de novo*. *People v. Moody*, 2015 IL App (1st) 130071, ¶ 85; see also *People v. Alcozer*, 241 Ill. 2d 248, 254 (2011) (applying a *de novo* standard where the defendant's argument required the court to construe section 22-105 to ascertain the meaning of "frivolous").

¶ 59 Section 22-105 of the Code of Civil Procedure (Code) allows the trial court to assess filing fees and court costs against a prisoner where he files a pleading in a case seeking postconviction relief and the court makes a finding that the pleading is frivolous. 735 ILCS 5/22-

105(a) (West 2014). "Frivolous" is defined as a pleading that meets any or all of the following criteria: (1) it lacks an arguable basis in law or in fact; (2) it is presented for an improper purpose, such as to harass, cause unnecessary delay, or needless increase in the cost of litigation; (3) the claims, defenses, and legal contentions therein are not warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (4) the allegations and other factual contentions lack evidentiary support or are unlikely to have evidentiary support after further investigation or discovery; or (5) the denials of factual contentions are unwarranted by the evidence or are not reasonably based on a lack of information or belief. 735 ILCS 5/22-105(b) (West 2014). Our supreme court has held that the definition of "frivolous or patently without merit" under section 122-2.1 of the Postconviction Hearing Act is included in the statutory definition of a "frivolous" lawsuit in section 22-105(b) of the Code. *Alcozer*, 241 Ill. 2d at 258.

¶ 60 Here, the trial court found defendant's filings lacked an arguable basis in law and fact, his allegations lacked evidentiary support, and the filings were presented to hinder, cause unnecessary delay, and needless increase in the cost of litigation.

¶ 61 In his opening brief, defendant challenges the trial court's imposition of fees solely on the basis that his petition was meritorious and thus not frivolous. However, as we have explained, we find no error in the court's determination that defendant failed to meet the cause-and-prejudice test.

¶ 62 In his reply brief, defendant also claims that even if we affirm the trial court's denial of his motion for leave to file his successive postconviction petition, we should nonetheless vacate the monetary penalties because the standards under the Act and the Code differ. Defendant maintains that a petition may fall short of meeting the threshold to be filed as a successive

petition yet not be so frivolous as to warrant punishment. However, because defendant has raised this argument for the first time in his reply brief, it is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"); see also *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010) ("the failure to argue a point in the appellant's opening brief results in forfeiture of the issue"). Accordingly, we affirm the court's imposition of fees and costs.

¶ 63 III. CONCLUSION

¶ 64 For the reasons stated, we affirm the trial court's judgment.

¶ 65 Affirmed.