

NOTICE  
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2016 IL App (5th) 130086-U

NO. 5-13-0086

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 99-CF-1313
	)	
DAVID WARREN,	)	Honorable
	)	Michael N. Cook,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.  
Justices Goldenhersh and Moore concurred in the judgment.

**ORDER**

¶ 1 *Held:* The defendant's postconviction petition was properly dismissed at the second stage of proceedings under the Post-Conviction Hearing Act because the petition failed to make a substantial showing of a constitutional violation and the petition was untimely filed.

¶ 2 The defendant, David Warren, appeals from the second stage dismissal of his second amended petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). This appeal is the defendant's third appeal in this case. On appeal, the defendant requests this court find the circuit court erred in ruling that he was culpably negligent for filing his petition for postconviction relief one day late, and for dismissing his claim that the State violated his due process rights by knowingly

and intentionally withholding scientific reports containing exculpatory evidence. For the reasons which follow, we affirm the circuit court's rulings.

¶ 3 A jury trial was held and the defendant was found guilty of first-degree murder of Charisma Thomas. On March 11, 2002, the defendant was sentenced to serve 45 years in the Illinois Department of Corrections. On October 12, 2004, this court affirmed the defendant's conviction and sentence. *People v. Warren*, No. 5-02-0273 (2004) (unpublished order under Supreme Court Rule 23). The defendant's petition for leave to appeal to the supreme court was subsequently denied on March 30, 2005.

¶ 4 The defendant mailed a *pro se* petition for postconviction relief on December 29, 2005, which was filed by the circuit clerk on January 3, 2006. The defendant alleged that he was illegally searched and arrested, and that the State intentionally and knowingly withheld reports by experts, Dennis Aubuchon and Lisa O'Daniel. The defendant claimed that these reports would establish that the DNA found at the scene of the crime did not match his DNA, ultimately exonerating him. The petition further alleged that the defendant's appellate counsel was ineffective for failing to raise this claim on direct appeal.

¶ 5 On February 9, 2006, the defendant filed a *pro se* motion to allow DNA testing of certain items of evidence not available at trial.

¶ 6 On March 1, 2006, the circuit court reviewed the record at the first stage of review finding the "petitioner has alleged the gist of a constitutional claim in at least one of the issues he raises \*\*\*." 725 ILCS 5/122-2.1(a) (West 2004). At that time, the court

appointed counsel and ordered the filing of an amended petition no later than April 28, 2006.

¶ 7 On March 10, 2006, the State filed a motion to dismiss the defendant's February 9, 2006, motion to allow DNA testing of certain evidence.

¶ 8 The defendant was granted additional time to file an amended petition for postconviction relief on May 1, 2006, June 8, 2006, July 24, 2006, September 7, 2006, November 30, 2006, January 2, 2007, February 1, 2007, February 13, 2007, and March 30, 2007.

¶ 9 On April 30, 2007, through counsel, the defendant filed an amended motion seeking forensic DNA testing of items from a sexual assault kit used on the victim during autopsy, including oral and rectal swabs, head and pubic hair combings, and fingernail scrapings. The motion alleged that testing would reveal the DNA of an unknown individual, "thus establishing Defendant's innocence."

¶ 10 Additionally, on April 30, 2007, the defendant filed an amended postconviction petition for relief with all of the same substantive claims as the original, which included the defendant's allegation that the State withheld scientific reports containing exculpatory evidence.

¶ 11 On May 31, 2007, the State filed a motion to dismiss the defendant's motion for forensic DNA testing on the basis that further testing would not produce new, noncumulative evidence materially relevant to the defendant's claim of actual innocence and, with respect to the screwdriver which had been previously tested, the defendant had

not specified what type of testing he wished to conduct that had not been available at trial and that was generally accepted in the relevant scientific community.

¶ 12 Additionally, on May 31, 2007, the State filed a motion to dismiss the defendant's amended petition for postconviction relief, arguing, first, that the filing was not timely; trial counsel did not ineffectively counsel the defendant; and that the defendant's allegations were factually incorrect regarding his allegation that the State withheld reports. In fact, the State claimed that all requested reports were disclosed in a timely manner and in compliance with Illinois Supreme Court Rule 412 (eff. Oct. 1, 1971). Moreover, the State argued that the defendant's claims were barred by the doctrine of waiver.

¶ 13 On July 25, 2007, the defendant filed a motion for appointment of an expert to review the items of evidence secured in relation to the defendant's trial to determine whether it was possible to test the DNA using technology that was not available at the time of trial.

¶ 14 On October 4, 2007, the defendant's counsel filed a second amended petition for postconviction relief, raising the same substantive claims, but asserting that if the petition was untimely, it was not a result of the defendant's culpable negligence. The petition explained that a law library supervisor at the Menard Correctional Center had instructed the defendant that his petition would be timely if mailed on December 29, 2005, which he did.

¶ 15 On March 6, 2008, the court granted the defendant's motion for appointment of an expert for the limited purpose of inspecting the screwdriver, the swab containing DNA

from the tip of the screwdriver, and the DNA extract from the tip of the screwdriver to determine whether there was sufficient residual DNA to be tested, and to provide to the court information as to what methods of testing were available today that were not available at the time of trial.

¶ 16 On August 11, 2009, the defendant filed a motion for forensic testing. The motion sought testing of the item of evidence labeled "3A, Cloth only," believed to be the remains of the original cotton swab that was used to remove DNA from the screwdriver, the tip of the screwdriver, and the swab labeled "Blood-Tip-Screwdriver." The motion sought to test these items using "newer test kits on the market: the Identifiler and/or MiniFiler," neither of which had been available at the time of trial. These test kits were designed to work upon extremely small quantities of DNA. Although no mention was made in the motion of the items contained in the sexual assault kit, the parties agreed at the hearing on the State's motion to dismiss that this omission was inadvertent and that both parties were prepared to discuss testing of the items contained in the sexual assault kit.

¶ 17 A hearing was held on the State's motion to dismiss the defendant's motion for forensic testing on May 18, 2011. The circuit court denied the defendant's motion, finding that the defendant had failed to show that further testing had the scientific potential to produce new, noncumulative evidence that was materially relevant to his claim of actual innocence. The discovery of more unidentified DNA would be cumulative to evidence introduced at trial, and further testing of any of the items would

not aid the defendant's claim of actual innocence. On May 31, 2011, the defendant filed a timely notice of appeal.

¶ 18 On July 18, 2012, the defendant filed a supplement, attaching an affidavit, to the second amended petition for postconviction relief. The defendant claimed actual innocence, and alleged that his reliance on the law library supervisor's advice, which led to a late filing, was not due to his culpable negligence. On October 15, 2012, the defendant filed an amended affidavit, claiming that he had no formal legal training, thus the filing delay was not due to his own culpable negligence.

¶ 19 On January 17, 2013, a hearing was held on the defendant's second amended petition for postconviction relief filed on October 4, 2007, the affidavit attached on July 18, 2012, and the amended affidavit filed on October 15, 2012. The circuit court dismissed the defendant's petition for postconviction relief, finding that the petition was untimely, due to his culpable negligence, and that all claims contained in the defendant's three pleadings were barred by the doctrine of waiver or *res judicata*. The defendant filed a timely notice of appeal on February 15, 2013.

¶ 20 On November 22, 2013, this court affirmed the circuit court's denial of the defendant's motion for forensic DNA testing, finding that the results of the requested testing had no scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence. See *People v. Warren*, 2013 IL App (5th) 110243-U.

¶ 21 The current appeal concerns the circuit court's January 17, 2013, order. We first address the defendant's argument that his petition, if untimely, was not due to his

culpable negligence. The dates pertinent to the parties' arguments are as following: the defendant filed an appeal following his conviction and sentence; the appellate court affirmed the circuit court's order; his petition for leave to appeal to the supreme court was denied; the defendant did not file a petition for a writ of *certiorari*, due on June 28, 2005, so he had six months to file the petition for postconviction relief, making his petition due on or before December 28, 2005; the defendant filed his petition one day later on December 29, 2005.

¶ 22 Postconviction proceedings may not be commenced outside the time limitation period in the Act unless the defendant alleges sufficient facts to show the delay in filing was not due to his culpable negligence. See 725 ILCS 5/122-1(c) (West 2004). In fact, it is well settled that all citizens are charged with knowledge of the law, thus " 'ignorance of the law or legal rights will not excuse delay in bringing suit.' " *People v. Bocclair*, 202 Ill. 2d 89, 104-05 (2002) (quoting *Pyle v. Ferrell*, 12 Ill. 2d 547, 555 (1958)). Our review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 23 Defendant relies on *People v. Rissley*, 206 Ill. 2d 403 (2003), in arguing that the facts here show the delay in filing was not due to his culpable negligence. In *Rissley*, the defendant alleged the attorney who represented him in his direct appeal contacted him and informed him any postconviction proceeding would have to be filed within three years after the date of conviction. *Id.* at 418. In an attached affidavit, defendant's direct appeal counsel confirmed he gave defendant this advice. *Id.* The court found the defendant had no reason to question the advice he received from counsel, thus defendant reasonably believed he had timely filed the petition. *Id.*

¶ 24 Moreover, the defendant cites *People v. Wilburn*, 338 Ill. App. 3d 1075 (2003), (court found defendant's 16-month delay was not due to his culpable negligence given that a change in law provided a reasonable justification), and *People v. Hampton*, 349 Ill. App. 3d 824 (2004) (court found defendant's 56-month delay was "inherently suggestive of recklessness" and due to his culpable negligence where the amended petition never asserted defendant's attorney gave him incorrect advice on which to rely), arguing that his one-day delay pales in comparison to delays that have been excused and those that have not.

¶ 25 In the instant case, the defendant did not rely on the advice of appointed counsel, as seen in *Rissley*, nor did a change in law exist that would excuse delay, as was the case in *Wilburn*. Regardless of a short, one-day delay, the defendant's delay was the result of his reliance on a law library supervisor who, first, was not his appointed counsel, and second, had no proven specialized knowledge in postconviction matters. Consequently, we find the defendant's delay was due to his culpable negligence. We affirm.

¶ 26 We next address the defendant's argument that the circuit court improperly dismissed his claim that the State violated his due process rights by knowingly and intentionally withholding scientific reports containing exculpatory evidence, which would prove his innocence.

¶ 27 A postconviction proceeding is not an appeal of the underlying judgment but, rather, a collateral proceeding where the defendant may challenge a conviction or sentence for violations of constitutional rights. *People v. Johnson*, 183 Ill. 2d 176, 186 (1998). Any claim of substantial denial of constitutional rights that was not raised in the



original or in an amended petition is waived. 725 ILCS 5/122-3 (West 2004). It is well established that the scope of postconviction review is limited to constitutional matters which have not been, and could not have been, previously adjudicated. *People v. Coleman*, 168 Ill. 2d 509, 522 (1995). Accordingly, determinations of the reviewing court on direct appeal are *res judicata* as to issues actually decided and issues that could have been raised in the earlier proceeding, but were not, are deemed waived. *Id.* However, the forfeiture rule applies only where it was possible to raise an issue on direct appeal; thus a postconviction claim that depends on matters outside the record is not ordinarily forfeited, because matters outside the record may not be raised on direct appeal. *People v. Youngblood*, 389 Ill. App. 3d 209, 214 (2009).

¶ 28 Here, the claims advanced by the defendant's second amended petition are based on facts not contained in the record, and, important to note, not supported by affidavits. See *People v. Jones*, 364 Ill. App. 3d 1, 5 (2005). *Cf. People v. Collins*, 202 Ill. 2d 59, 66 (2002) (a petition may be summarily dismissed for failure to attach the necessary affidavits, records, or other evidence or explain their absence). When a petitioner's claims are based upon matters outside of the record, as is the case here, the dismissal of a postconviction petition is warranted only where the petition's allegations of fact—liberally construed in favor of the petitioner and in light of the original trial record—fail to make a "substantial showing" of imprisonment in violation of state and federal constitutions. *Coleman*, 183 Ill. 2d at 382.

¶ 29 In the instant case, we find that the defendant has failed to make a substantial showing that the State withheld reports containing exculpatory evidence. He has failed to

attach the reports as affidavits in support of his allegations, thus this court is unable to conclude that these reports, if in existence and disclosed at trial, would have with reasonable likelihood affected the jury's deliberative process and judgment, thus exonerating the defendant, as he claims.

¶ 30 In particular, Mr. Aubuchon's May 10, 1999, report listed the items submitted as evidence before the defendant's trial, as well as the relevant findings. Mr. Aubuchon, a seasoned forensic biologist with 26 years of experience with the Illinois State Police Crime Lab, was responsible for visually inspecting items for bodily fluids, such as blood and semen. He testified that after he swabbed or scraped human DNA from a substance, he then submitted the evidence for DNA testing for purposes of developing a human DNA profile. Given that Mr. Aubuchon never performed actual DNA testing, the defendant's allegation is unfounded as to how Mr. Aubuchon's report, if it existed, would prove his actual innocence.

¶ 31 Moreover, Lisa O'Daniel, a forensic scientist specializing in latent fingerprint examinations with the Illinois State Police, testified that she examined items for latent prints and then performed comparisons of fingerprints before generating a report of her findings. After a careful review of the record, we find that Ms. O'Daniel's involvement with the defendant's case was limited to evaluating fingerprint standards on two pieces of evidence, the screwdriver and a broken bottle, for which she failed to find either the victim's or the defendant's fingerprints.

¶ 32 We conclude that the defendant failed to make a substantial showing that the State violated his due process rights by allegedly failing to disclose two scientific reports, that

if in existence, for which no affidavits were attached attesting to this, would have afforded the defendant a fair trial. Furthermore, we find the delay in filing was the result of the defendant's culpable negligence.

¶ 33 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 34 Affirmed.