

No. 1-12-1435

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).

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. 98 CR 6599(01)
)	
ANTHONY HAYES,)	Honorable
)	Arthur F. Hill,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

ORDER

Held: Defendant is procedurally defaulted under the Post-Conviction Hearing Act (725 ILCS 5/122-3 (West 2000)), from raising the ineffectiveness of his trial counsel for eliciting a hearsay statement from a witness during cross-examination because he failed to raise the issue in his postconviction petition. Defendant's second contention, that his trial counsel was ineffective for failing to suppress inculpatory statements he made to the police, is barred by the doctrine of *res judicata* as the issue was addressed on direct appeal.

¶ 1 A jury convicted defendant Anthony Hayes under an accountability theory of first degree murder, attempted first degree murder, and aggravated discharge of a firearm for his actions as the driver of the car involved in a 1997 drive-by shooting. This court affirmed defendant's conviction, but modified his sentence on direct appeal. *People v. Hayes*, 1-99-2211 (2001) (unpublished order under Supreme Court Rule 23).

¶ 2 Prior to trial, the court granted defense counsel's motion to bar the State from introducing a statement from a passenger in the car, Donearl Glover, but allowed the State to elicit testimony that Glover had made the statement and that he had been confronted with the statement. During cross-examination of the State's witness, defense counsel elicited testimony regarding Glover's statement.

¶ 3 In November of 2001, defendant filed a postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*(West 2000)), alleging his constitutional rights were substantially violated when his trial counsel failed to file a motion to suppress the statement he made to the police.¹ The circuit court advanced defendant's petition to second stage proceedings under the Act, and appointed counsel for defendant. 725 ILCS 5/122-4,122-5 (West 2000). After numerous continuances and delays, defense counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c). Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The State filed a motion to dismiss defendant's petition, which the circuit court granted.

¶ 4 Defendant raises two issues for our review. Defendant argues his postconviction counsel failed to "shape" his claim into appropriate legal form to assert that his trial counsel was ineffective for eliciting, during cross-examination, Glover's statement; and that his appellate counsel, in turn, was ineffective for not arguing as much on direct appeal. We hold defendant is

¹ Defendant raised several other claims in his petition that he did not raise in his brief before this court.

procedurally defaulted from raising this issue because he did not raise it in his postconviction petition. Defendant's second issue is that his postconviction counsel failed to amend his claim to argue that his appellate counsel was ineffective for not arguing that his trial counsel was ineffective for failing to suppress his inculpatory statement to the police. This contention is barred by *res judicata* because this court, on direct appeal, held that trial counsel's failure to file a motion to suppress defendant's statement to the police did not constitute ineffective assistance of counsel. Accordingly, we affirm the circuit court's dismissal of defendant's postconviction petition.

¶ 5 JURISDICTION

¶ 6 On April 25, 2012, the circuit court granted the State's motion to dismiss defendant's postconviction petition. Defendant timely appealed on that same day. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 651. Ill. S. Ct. R. 651 (eff. Feb. 6, 2013).

¶ 7 BACKGROUND

¶ 8 A detailed account of defendant's trial and initial appeal is well stated in this court's 2001 order. *People v. Hayes*, 1-99-2211 (2001) (unpublished order under Supreme Court Rule 23). Below we will discuss those details from defendant's trial and initial appeal as they pertain to his postconviction petition. On May 24, 1997, Antoine Gibson was fatally shot while walking with three friends during a gang-related drive-by shooting. Both before and during trial, two of the victim's friends identified defendant as the driver of the car, and codefendant Charles Brown as the shooter. Another passenger in defendant's car, Donearl Glover, made a statement to the police, which defense counsel moved to bar the State from introducing. The circuit court barred the State from revealing the contents of Glover's statement, but allowed the State to elicit

testimony that Glover had made a statement and that it confronted defendant with Glover's statement.

¶ 9 Detective John Murray testified defendant told him that he and Glover were driving when rival gang members threw rocks and bottles at his car. They drove away and picked up Brown. Brown at one point left the car to get a gun, returned and directed defendant to drive a certain route. When they saw the victim and his friends, Brown jumped from the car and fired the gun at the victim and his friends. After driving Brown home, defendant returned to the scene and confirmed that the victim was lying on the ground. He then went into hiding for two weeks. Defendant recanted this story, but later signed a written statement which contained a similar version of the incident after being confronted with Glover's statement.

¶ 10 During Detective Murray's cross-examination, defense counsel asked: "[d]id you ask [defendant] if Mr. Glover had any weapon that was visible," to which Detective Murray responded "[w]e asked Mr. Glover himself. He stated he didn't have a gun." The State immediately objected, which the circuit court sustained.

¶ 11 Defendant admitted at trial that he signed the statement, but denied that: (i) he, Glover, or Brown were gang members; (ii) he saw Brown's gun prior to the shooting, (iii) he and Brown were looking for the victim; and (iv) he knew Brown planned on shooting at the victim and his friends. Defendant testified he did not ask to make changes to his statement because he was too tired.

¶ 12 The jury convicted defendant under an accountability theory of first degree murder, attempted first degree murder, and aggravated discharge of a firearm. The alleged shooter, codefendant Charles Brown, was acquitted of all charges against him in a simultaneous severed bench trial.

¶ 13 On direct appeal, defendant argued that a conflict of interest existed between him and his counsel because counsel, at the hearing on his posttrial motion, requested another chance to investigate whether sufficient grounds existed to file a motion to suppress defendant's statement. *People v. Hayes*, 1-99-2211 (2001) (unpublished order under Supreme Court Rule 23).² This court characterized defendant's argument as an ineffective assistance of counsel argument, and held defendant failed to argue or persuade that a motion to suppress would have been granted. Additionally, this court held that the record did not support defendant's contention. *Id.* This court affirmed defendant's conviction, but modified his sentence. *Id.*

¶ 14 On November 14, 2001, defendant filed a *pro se* petition for postconviction relief. Relevant to this appeal, defendant argued he was denied the effective assistance of counsel because trial counsel failed to file a motion to suppress his statements to the police. According to defendant, the police coerced his statement which was later utilized against him at trial. Defendant mentions Glover's statement to police twice in his petition. First, defendant states the circuit court abused its discretion by "allowing the State to go into *** Glover's statement, when in fact that witness didn't testify [at] trial." Second, defendant contends the State committed prosecutorial misconduct by referencing Glover's statement during rebuttal closing argument.

¶ 15 The circuit court initially denied defendant's petition finding it untimely, but allowed him the opportunity to amend. Defendant filed a motion for reconsideration, which the circuit court granted. On January 24, 2003, the circuit court docketed the petition and appointed the public defender to represent defendant. After numerous continuances and delays, on November 17, 2011, postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c),

² Defendant raised several other issues on direct appeal that are not relevant here.

certifying that he had examined defendant's petition and found it "adequately states [defendant's] contention of a denial of his constitutional rights." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). As such, defendant's counsel stated that an amended petition would not be filed.

¶ 16 On February 2, 2012, the State filed a motion to dismiss defendant's petition, arguing, in relevant part, that defendant's claims are barred by the doctrine of *res judicata*. Defendant did not file a written response to the State's motion to dismiss. On April 25, 2012, the circuit court granted the State's motion to dismiss defendant's postconviction petition. Defendant filed his notice of appeal on that same day.

¶ 17 ANALYSIS

¶ 18 Defendant raises two issues for our review, both alleging his postconviction counsel violated Illinois Supreme Court Rule 651(c) for failing to provide him with the reasonable assistance of counsel. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 19 The Act allows a criminal defendant to challenge his or her sentence or conviction based on violations of his or her constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). Its purpose "is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, nor could have been, adjudicated previously on direct appeal." *People v. Peebles*, 205 Ill. 2d 480, 510 (2002). A petition under the Act is a collateral proceeding, not an appeal. *People v. Williams*, 209 Ill. 2d 227, 232 (2004). Therefore, *res judicata* bars issues previously decided on appeal. *Id.* at 233. Similarly, issues not raised, even though they could have been raised on appeal, are waived. *Id.* Furthermore, the Act provides that claims not actually in the petition are waived. 725 ILCS 5/122-3 (West 2000) ("Any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived."). This court is not free to excuse an appellate waiver due to a

defendant's failure to raise an issue in a postconviction petition. *People v. Jones*, 213 Ill. 2d 498, 507-08 (2005).

¶ 20 There is a three-step process for adjudicating petitions under the Act. *People v. Hommerson*, 2014 IL 115638, ¶7. The Act provides that in the second stage of proceedings, at issue here, the court may appoint counsel for an indigent defendant. *Id.* ¶8. Pursuant to Illinois Supreme Court Rule 651(c), appointed counsel's duties "include consultation with the defendant to ascertain his contentions of deprivation of constitutional right, examination of the record of the proceedings at the trial, and amendment of the petition, if necessary, to ensure that defendant's contentions are adequately presented." *Pendleton*, 223 Ill. 2d at 472; Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Postconviction counsel's performance cannot, however, be considered deficient under Rule 651(c) for failing to raise an issue not contained in a defendant's petition because Rule 651(c) only requires the adequate presentation and support of claims raised by the defendant. *Id.* at 475-76. "While postconviction counsel *may* conduct a broader examination of the record [citation], and may raise additional issues if her or she so chooses, there is no obligation to do so." (Emphasis in original). *Id.* at 476. It is defendant's burden to make a substantial showing of a constitutional violation at this stage of the proceedings. *Id.* at 473. The State may move to dismiss the defendant's petition at the second stage of proceedings. *Hommerson*, 2014 IL 115638, ¶7. Our review of the dismissal of a petition at the second stage of proceedings is *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 21 We hold that defendant is procedurally defaulted from raising his first contention, that his postconviction counsel failed to "shape" his claim into an appropriate legal form to assert that his trial counsel was ineffective for eliciting Glover's statement during cross-examination, and that his appellate counsel was also ineffective for failing to raise the issue on direct appeal, because

he did not actually raise the issue in his petition. 725 ILCS 5/122-3 (West 2000) ("Any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived."). Our review of the record shows that defendant mentioned Glover's statement to the police two times in his petition. First, defendant stated the circuit court abused its discretion "[f]or allowing the *State* to go into *** Glover's statement." (Emphasis added.) Second, defendant alleged the State committed prosecutorial misconduct by referencing Glover's statement during rebuttal closing argument. Missing from defendant's petition is any mention or argument that his trial counsel was ineffective for improperly eliciting testimony concerning the substance of Glover's statement during the cross-examination of Detective Murray in violation of counsel's own motion. Our supreme court has repeatedly stressed that this court does not have the power to excuse a procedural default based on a defendant's failure to raise an issue in a postconviction petition. See *Jones*, 213 Ill. 2d at 508 ("Our detailed discussion of this issue is intended to stress that our appellate court is not free, as this court is under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition."); *Pendleton*, 223 Ill. 2d at 475. Accordingly, defendant is procedurally defaulted from raising this contention for the first time before this court for failing to raise it in his petition.

¶ 22 Defendant's second contention, that his postconviction counsel failed to amend his claim to argue that his appellate counsel was ineffective for not arguing that his trial counsel was ineffective for failing to suppress his inculpatory statement to the police, is barred by the doctrine of *res judicata*. On direct appeal, a panel of this court held that trial counsel's failure to file a motion to suppress defendant's statements to the police did not constitute ineffective assistance of counsel. Although defendant framed the issue as a conflict of interest, it is clear that a panel of

this court analyzed the issue as a claim of ineffective assistance of counsel. As a collateral proceeding under the Act, the doctrine of *res judicata* bars issues previously decided on appeal from being raised in a postconviction petition. *Williams*, 209 Ill. 2d at 232-33. Our review of this court's decision on defendant's direct appeal shows this issue had already been decided. As such, defendant's claim is barred by the doctrine of *res judicata*.

¶ 23 Accordingly, defendant is procedurally defaulted from raising his first argument as he did not include it in his postconviction petition; and defendant's second contention is barred by the doctrine of *res judicata*. Defendant has not raised any arguments before this court addressing the remaining allegations in his petition. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, oral argument, or on petition for rehearing."); Ill. S. Ct. R. 612 (i) (eff. Feb. 6, 2013) ("The following civil appeals rules apply to criminal appeals insofar as appropriate: *** Content, form,*** of briefs: Rule 341.); Ill. S. Ct. R. 651 (d) (eff. Feb. 6, 2013) ("The Procedure for an appeal in a post-conviction proceeding shall be in accordance with the rules governing criminal appeals, as near as may be."). Therefore, the circuit court did not err when it granted the State's motion to dismiss defendant's postconviction petition.

¶ 24 CONCLUSION

¶ 25 The judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.