FOURTH DIVISION
May 14, 2015

No. 1-12-0962

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 93 CR 12311
	)	
SHERMAN SCULLARK,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.[*]
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Denial of leave to file successive postconviction petition affirmed where defendant failed to present evidence supporting his claim of cause and prejudice to trial court.

¶ 2 Defendant Sherman Scullark, along with five other codefendants, was convicted of the 1993 kidnapping and murder of Darren Payton. At defendant's bench trial, two witnesses—Ronald Glover and Devon Fountain—identified defendant as a member of a group of Conservative Vice Lords who held Payton captive in a house, beat him, and put him in the trunk of a car. After his trial, defendant filed a postconviction petition that included an affidavit from

[*] This case was recently reassigned to Justice Ellis.

Fountain saying that his testimony was fabricated and the result of coercive tactics by the police and prosecutors. That petition was ultimately dismissed.

¶ 3 Defendant appeals from the dismissal of his second postconviction petition, which included additional affidavits from Fountain that expanded upon his allegations that the police and prosecutors coerced him into identifying defendant as one of Payton's captors. On appeal, defendant asserts that the 2006 Report of the Special State's Attorney (the 2006 Report) on torture at the Area 2 police station would corroborate Fountain's assertion that Detective Michael McDermott coerced him into testifying against defendant. Defendant notes that McDermott was specifically identified in the 2006 Report as having been complicit in the widespread abuse and torture of suspects perpetrated by Area 2 detectives. However, defendant did not include the 2006 Report with his petition. He asks us to take judicial notice of the 2006 Report for the first time on appeal.

¶ 4 We hold that, in light of the standards applicable to successive postconviction proceedings, we may not consider the 2006 Report supporting defendant's claims for the first time on appeal. We cannot find that the trial court improperly denied defendant leave to file his successive petition based on evidence that the trial court was not presented with in the first place. Nor do the remainder of defendant's claims justify granting him leave to file a successive petition. We affirm the trial court's dismissal of defendant's second postconviction petition.

¶ 5 I. BACKGROUND

¶ 6 A. Trial and Direct Appeal

¶ 7 Because the resolution of this appeal does not require a detailed recitation of the trial evidence, we will briefly summarize that evidence only to the extent necessary to understand this appeal. We previously discussed the evidence in detail in our analysis of defendant's actual

innocence claim contained in his first postconviction petition. *People v. Scullark*, No. 1-06-3267 (2009) (unpublished order under Supreme Court Rule 23).

¶ 8 Glover and Fountain, the State's primary witnesses, were both members of the Conservative Vice Lords gang at the time of the incident. In exchange for his testimony in defendant's case, the State agreed to drop Glover's pending murder charges and to propose a 10-year sentence for Glover's aggravated kidnapping conviction. Fountain was never charged in connection with Payton's death. The Cook County State's Attorney's Office kept both Glover and Fountain in witness protection before the trial.

¶ 9 Glover and Fountain testified that, in the late afternoon and evening of April 23, 1993, they were at a house at 229 West 110th Place in Chicago, Illinois where defendant, along with codefendants Delandis Adams, Darnell Luckett, Manuel Mathews, Dwan Royal, and Marvel Scott, held Payton captive. Payton was bound and blindfolded in an upstairs room of the house. Adams told Glover that Payton was being punished for violating the gang's rules. Fountain testified that Payton was bleeding from his mouth and Glover testified that he heard "bumps" and screaming from the room where Payton was being held. At one point, they brought a piece of lumber into the room where Payton was bound, after which Glover heard more "bumping" noises.

¶ 10 Glover testified that defendant and the other codefendants eventually carried Payton, who was wrapped in a blanket, blindfolded, and had a cord wrapped around his neck, out to a white car and put him in the trunk. Glover testified that Scott drove the car away. Fountain did not see them put Payton in the white car, but he testified that he saw Adams and Royal remove speakers from the car's trunk. Fountain said he heard the car start and drive away. Fountain later saw a mop and bucket filled with what looked like blood in the room where Payton had been held.

Fountain testified that he saw defendant emptying this bucket the next morning.

¶ 11 Minnie Payton, Darren Payton's mother, testified that she received three phone calls from him in the early morning hours of April 24, 1993. Payton told Minnie to bring his car to the intersection of 71st Street and State Street and leave a package that was under the seat of the car on the passenger's side of the car. Minnie complied. While waiting at the intersection, a car pulled up and Luckett and Mathews exited. They asked her if she was looking for Payton. Minnie got out of the car but left the package on the passenger side. Eventually, her husband picked her up and brought her home. When she arrived home, she received another call from Payton saying he would be home in five minutes.

¶ 12 Around 8 a.m. on April 24, 1993, Payton's body was found in the trunk of his car. Payton was blindfolded and had a cord wrapped around his neck. He had been strangled to death.

¶ 13 Chicago police officer Darren Washington testified that he received an anonymous call regarding Payton's death on April 27, 1993. The caller directed Washington to the house at 229 West 110th Place, where he arrested defendant, Fountain, Luckett, Mathews, and Glover. Washington testified that, while he was at the house, Fountain asked to speak with him privately. Fountain told Washington that he knew why the police had come and that he was present "when they killed that boy." Fountain said he could not go to jail because he would be killed there.

¶ 14 After Fountain's arrest, Detective Michael McDermott interviewed him at the Area 2 police station. McDermott testified that Fountain said he saw Payton at the house with Adams and "several others." McDermott testified that Fountain declined to give a handwritten statement. He said that Fountain instead chose to give his statement before the grand jury.

¶ 15 Bloodstains, a gun, and cords were found in the house. Beer bottles recovered at the scene contained fingerprints that positively matched the prints of Mathews, Royal, and Glover.

Separate fires broke out at the house on May 11, 1993 and May 13, 1993, both of which were started by a hand-held open flame. The second fire caused significant damage to the building. Glover testified that Adams told him that he started the fires to destroy evidence in the house.

¶ 16 The trial court found defendant guilty of murder and aggravated kidnapping based on an accountability theory. The court sentenced defendant to natural life in prison. On direct appeal, defendant, whose appeal was consolidated with codefendant Mathews, only challenged his sentence. This court affirmed. *People v. Mathews and Scullark*, Nos. 1-95-3207 & 1-95-4010 (cons.) (1997) (unpublished order under Supreme Court Rule 23).

¶ 17 B. First Postconviction Petition

¶ 18 In 1999, defendant filed a postconviction petition that included, among other evidence, an affidavit from Fountain asserting that he had falsely identified defendant as one of the men involved in Payton's death. Fountain's affidavit said that he was pressured into testifying for the State, and that he did not know who killed Payton. After this court twice reversed the summary dismissal of defendant's first postconviction petition on procedural grounds (*People v. Scullark*, 325 Ill. App. 3d 876, 887-88 (2001); *People v. Scullark*, No. 1-04-0542 (2005) (unpublished order under Supreme Court Rule 23)), the trial court appointed counsel for defendant. The supplemental petition filed by defendant's attorney on June 8, 2006 did not contain additional evidence to support Fountain's claims of police coercion.

¶ 19 The trial court dismissed defendant's petition at the second stage of postconviction proceedings. This court affirmed that second-stage dismissal, finding that Fountain's affidavit was insufficient to establish a claim of actual innocence. *People v. Scullark*, No. 1-06-3267 (2009) (unpublished order under Supreme Court Rule 23). This court found that Fountain's recantation of his trial testimony would not likely change the result of defendant's trial because

Fountain simply attested that he did not know who killed Payton, which did not exonerate defendant or contradict Fountain's trial testimony. *Id.*

¶ 20 C. Second Postconviction Petition

¶ 21 On December 28, 2010, defendant filed a second postconviction petition, which is the subject of this appeal. Defendant attached two new affidavits from Fountain, dated May 29, 2008 and October 30, 2009, which defendant cited as support for his claim that he was actually innocent.

¶ 22 In the May 29, 2008 affidavit, Fountain attested that he was "threaten[e]d" by police detectives and Assistant State's Attorney Michael Smith. Fountain said that they told him that, if he did not testify against "the defendants," he would be charged with first-degree murder and armed robbery. They also told him that they would seek the death penalty against him for those charges. Fountain said that he lied because he was "very scared." Fountain named defendant as one of "the guys [he] lied on." Fountain asserted that he was not threatened or coerced into giving defendant his affidavit.

¶ 23 In the October 30, 2009 affidavit, Fountain again asserted that he testified falsely in defendant's trial. He said that he was "under duress" from "Detectives Boylan and McDermott." Fountain said that he never saw Payton in the house; he just saw Payton's identification and wallet. Fountain asserted that the detectives told him that if he did not "say that Scott, [defendant], Mathews, and Adams were involved," he would be charged with the murder. They told him that the charge "was carrying the death[ ]penalty." Detective Boylan told Fountain to claim that the murder involved "nation business" (*i.e.*, gang business involving the Vice Lord "nation") so that they could "tie the others into this." Again, Fountain asserted that he was not forced, threatened, or bribed into giving defendant his affidavit. Notably, defendant did not

include or cite in his petition any reference to the 2006 Report chronicling police abuse at Area 2 headquarters.

¶ 24 On January 20, 2012, the trial court denied defendant leave to file his second postconviction petition. The court found that defendant failed to meet "the cause and prejudice test" and that he failed to state a claim of actual innocence. Defendant appeals.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant has abandoned his claim of actual innocence. Instead, he argues that he should have been granted leave to file his successive postconviction petition because the attorney appointed to represent him during the proceedings on his first postconviction petition did not support Fountain's claims of police coercion with the 2006 Report. According to defendant, this failure was sufficient cause to permit him to bring his claim regarding Fountain's fabricated testimony again.

¶ 27 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) offers defendants an avenue to raise constitutional challenges to their convictions in a collateral attack. However, the Act places a limit on the number of petitions a defendant may file. Generally, a defendant may only file one postconviction petition. 725 ILCS 5/122-1(f) (West 2010). A defendant may file successive petitions only if he obtains "leave of court," which is justified when the defendant establishes cause for his failure to bring the claim in his first petition and prejudice from the failure to bring that claim. *Id.* "Cause" is shown where the defendant can identify an objective factor that impeded his ability to raise the claim in his first petition. *Id.* "Prejudice" is shown where the claimed constitutional violation "so infected the trial" that his conviction violated due process. *Id.* A defendant may also file a successive petition, without having to show cause or prejudice, if he presents a colorable claim of actual innocence.

People v. Ortiz, 235 Ill. 2d 319, 330 (2009). We review the trial court's denial of leave to file *de novo* where, as here, the trial court denied leave to file on the pleadings. See *People v. Guerrero*, 2012 IL 112020, ¶ 13.

¶ 28 Defendant claims that he established cause for the filing of a successive postconviction petition because his attorney's failure to attach the 2006 Report to support Fountain's claims during his initial postconviction proceedings rendered those proceedings "fundamentally deficient." But the focal point of defendant's argument—the 2006 Report—was not attached or even referenced in his successive petition. Instead, defendant cites it for the first time *on appeal*. We cannot conclude that the trial court erred in denying defendant leave to file a successive postconviction petition where defendant did not present the trial court with the evidence supporting that contention.

¶ 29 The pleading standards for successive postconviction petition set by our supreme court compel this result. In *People v. Smith*, 2014 IL 115946, ¶ 35, the Illinois Supreme Court recently held that a defendant must provide the trial court with " 'enough in the way of documentation to allow [the] circuit court' " to make a determination regarding cause and prejudice (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010)). The court further held that leave to file should be denied where it is clear that the defendant's claims fail as a matter of law or where the petition *and its supporting documentation* are insufficient to establish cause and prejudice. *Id*; see also 725 ILCS 5/122-2 ("The [postconviction] petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.").

¶ 30 In this case, defendant failed to supply the trial court with sufficient documentation to support his cause-and-prejudice claim. As the supreme court stressed in *Smith*, a defendant seeking leave to file a successive postconviction petition must submit sufficient evidentiary

support for his claim *to the trial court*. Here, the crucial evidence supporting defendant's argument on appeal—the 2006 Report—was not presented to the trial court. Defendant does not explain how we can reverse the trial court's judgment when the trial court was not provided with the very documentation on which he relies to support his claim of error on appeal. While defendant urges us to take judicial notice of the 2006 Report because it is publicly available, doing so would directly contradict the pleading requirements established by *Smith*. In fact, under defendant's rationale, any defendant seeking leave to file based upon publicly available evidence would be excused from the rules set in *Smith*. We cannot contravene our supreme court's precedent under the guise of judicial notice.

¶ 31 Our conclusion finds support in *People v. Anderson*, 375 Ill. App. 3d 121, 138-39 (2007), where we declined to consider the 2006 Report for the first time on appeal from the dismissal of the defendant's successive postconviction petition. In *Anderson*, the defendant filed a successive postconviction petition alleging that Detective McDermott held a gun to his head and forced him to confess. *Id.* at 130. The defendant had not raised that claim in his first postconviction petition, even though he testified to those facts in his pretrial motion to suppress his confession. *Id.* at 127, 129-30. On appeal from the dismissal of his successive postconviction petition, the defendant argued that his failure to raise his claim in his first postconviction petition did not result in forfeiture of the claim because the 2006 Report was new evidence bolstering his allegations. *Id.* at 133. The court declined to consider the 2006 Report for the first time on appeal, citing the Act's requirement that a petitioner support his allegations with evidence at the time it is filed. *Id.* at 138-39. The court did so even though the 2006 Report was not available until after the trial court had denied the defendant leave to file his successive petition. *Id.* at 139-40.

¶ 32 Here, like the defendant in *Anderson*, defendant did not provide the trial court with a copy of the 2006 Report as support for his postconviction petition. But unlike the defendant in *Anderson*, who could not have attached the 2006 Report to his petition because it did not yet exist, defendant concedes that the 2006 Report was available at the time he filed his second postconviction petition. Thus, our basis for declining to consider the 2006 Report is even stronger here than in *Anderson*.

¶ 33 Defendant cites *People v. Allen*, 222 Ill. 2d 340 (2006), in support of his claim that we should take judicial notice of the 2006 Report. *Allen* is distinct from this case, however. In *Allen*, the Illinois Supreme Court took judicial notice of published case law that noted the widespread use of electronic stun belts to restrain defendants during trials in Will County. *Id.* at 344-45. The court took judicial notice of this fact in order to establish that the defendant had been wearing a stun belt during trial, so that the court could then determine the legality of the practice. *Id.* Moreover, *Allen* contained almost no analysis of whether judicial notice was proper, as the State did not contest that the defendant had been wearing a stun belt. *Id.* at 345. Simply put, *Allen* has nothing to do with the pleading requirements for successive postconviction petitions that apply in this case.

¶ 34 Similarly, we find defendant's reliance on *People v. Mata*, 217 Ill. 2d 535 (2005), misplaced. In *Mata*, the Illinois Supreme Court took judicial notice of the defendant's petition to commute her death sentence, which was filed after the defendant appealed her sentence, in order to determine whether the defendant's appeal was moot because her death sentence had been commuted by the governor. *Id.* at 539-42. In this case, judicial notice of the 2006 Report is not necessary to determine whether defendant's appeal is justiciable. Rather, defendant urges us to take judicial notice of the 2006 Report to avoid the consequences of his failure to comply with

the pleading requirements for successive postconviction petitions. The 2006 Report's public availability does not relieve defendant of those obligations. We are compelled to hold defendant to them.

¶ 35 In the other cases cited by defendant, the defendants did not have the benefit of the 2006 Report in their initial postconviction proceedings but attached the 2006 Report to their successive postconviction petitions. *People v. Wrice*, 2012 IL 111860, ¶¶ 39-41; *People v. Mitchell*, 2012 IL App (1st) 100907, ¶¶ 28, 33. They do not support defendant's claim that we should take judicial notice of the 2006 Report for the first time on appeal.

¶ 36 Aside from the 2006 Report, nothing else in defendant's petition supports a finding of cause. Defendant identified no objective reason why he could not have obtained Fountain's affidavits during his initial postconviction proceedings. In fact, he *did* obtain an affidavit from Fountain during those proceedings, but it was insufficient to justify granting defendant relief. Accordingly, we find that the trial court did not err in denying defendant leave to file his successive petition.

¶ 37 Moreover, though defendant has abandoned the "actual innocence" claim he raised below, we would find no error in the trial court's disposition of that claim, either. In order to state a claim of actual innocence, the evidence supporting defendant's claim must be newly discovered. *Ortiz*, 235 Ill. 2d at 333. Newly discovered evidence is defined as evidence that has been discovered since the trial and that could not have been discovered earlier through due diligence. *Id.* at 334. Here, defendant included an affidavit from Fountain with his initial postconviction petition. He cannot now assert that Fountain's testimony constituted newly discovered evidence, as his due diligence actually uncovered Fountain's testimony in earlier

proceedings. And as we have already explained above, we cannot consider the 2006 Report, as it was never presented to the trial court in the successive postconviction proceeding.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated above, we affirm the trial court's judgment. We cannot consider a document—the 2006 Report—for the first time on appeal. In regard to the documents that *were* submitted below, we hold that defendant failed to establish "cause" to justify leave to file his successive petition.

¶ 40 Affirmed.