2012 IL App (2d) 110691-U
No. 2-11-0691
Order filed December 21, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 03-CF-1280
JOHN H. NUCKLES,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's successive postconviction petition, which reiterated a claim of ineffective assistance of counsel, on res judicata grounds: the summary dismissal of his initial petition, though for lack of supporting evidence, was a judgment on the merits; he did not allege cause and prejudice to relax the res judicata bar; and a recent Supreme Court case relaxing the bar in some circumstances did not apply here.

¶ 2 Defendant, John H. Nuckles, appeals from an order of the circuit court of Kane County summarily dismissing his second petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) for relief from his conviction of first-degree murder (720 ILCS 5/9-

1(a)(1) (West 2002)). Because the doctrine of *res judicata* bars the petition, we affirm. However, we modify the mittimus to award defendant an additional day of credit for time served prior to sentencing.

¶ 3 Defendant's conviction arose from the death of Philip Bates. Defendant and Bates both worked for a business that operated carnival rides and attractions. On April 25, 2003, defendant and Bates became involved in a verbal altercation that took a violent turn when defendant struck Bates in the head with a rubber mallet that was intended for use in playing one of the carnival games. Bates died about a month later. At the time of his death, Bates was staying at the home of another coworker, Chad Keef. Bates, who apparently had a drinking problem, refrained from drinking while he was staying with Keef. On May 24, 2003, Keef went to work. Bates did not. When Keef returned to his home at around midnight, Bates was unresponsive.

¶ 4 The central issue at trial was whether the blow to Bates's head caused his death. Bryan Mitchell, the forensic pathologist who performed an autopsy on Bates, testified that Bates had sustained a subdural hematoma and a cortical contusion of the right temporal lobe. In Mitchell's opinion, Bates died because, while those injuries were healing, blood and tissue leaked into the temporal lobe and caused a seizure. The seizure, in turn, disrupted Bates's heart or respiratory function and caused his lungs to fill with fluid. In contrast, defendant's expert, pathologist Michael Wolfson Kaufman, opined that there was no evidence of a seizure and that, in any event, a temporal lobe seizure would not result in the lungs filling with fluid. In Kaufman's opinion, Bates's death was related to alcohol withdrawal. Kaufman testified that the stress associated with withdrawal could have caused a fatal arrhythmia or that aspiration of vomit could have caused Bates's lungs to fill with fluid.

¶ 5 The State recalled Mitchell as a witness in its case in rebuttal. During cross-examination, Mitchell testified that he was familiar with the hormone prolactin, the enzyme creatinine phosphokinase (CPK), and a protein called glutamate. Asked whether he was aware that prolactin is found in the blood when a seizure occurs, Mitchell indicated that he was unfamiliar with that phenomenon. He indicated that he was aware that abnormal blood levels of CPK are found in seizure victims, but he added that neither CPK nor glutamate blood levels can be measured postmortem. The trial court refused to permit defendant's attorney to present evidence in surrebuttal. Defendant's attorney made an offer of proof that a neurologist (whom he did not name) would testify that when a seizure occurs an abnormal level of glutamate will be found in the blood. In his motion for a new trial, defendant argued that the trial court erred in refusing to allow him to present evidence in surrebuttal. The trial court denied the motion. Defendant moved for reconsideration of the denial of the motion for a new trial. In support of the motion for reconsideration, he submitted an article from a scientific journal and abstracts of three other such articles.

¶ 6 On direct appeal, we affirmed defendant's conviction. *People v. Nuckles*, No. 2-04-1246 (2007) (unpublished order under Supreme Court Rule 23) (*Nuckles I*). Thereafter, defendant filed, *pro se*, his first postconviction petition, claiming that he was deprived of the effective assistance of counsel at trial. The trial court summarily dismissed the petition and we affirmed. *People v. Nuckles*, No. 2-08-0439 (2010) (unpublished order under Supreme Court Rule 23) (*Nuckles II*). In *Nuckles II*, defendant argued that his attorney was ineffective because he failed to arrange for testing to determine the presence of prolactin, CPK, and glutamate in Bates's blood and because he failed to present the testimony of a neurologist that prolactin, CPK, and glutamate can be detected in the blood postmortem. Defendant's petition was not accompanied by affidavits or other evidentiary

materials substantiating his claim, and we concluded that the claims lacked a basis in the trial record. We observed that the evidence in the record, including the scientific literature submitted by defendant's attorney after trial, failed to show either that the postmortem testing in question was possible or that it would help establish whether Bates suffered a seizure. We also held that defendant's incarceration did not, in itself, excuse his failure to substantiate his claim with evidence outside the record.

¶ 7 Defendant subsequently petitioned for leave to file a postconviction petition raising essentially the same ineffective-assistance claim raised in the first petition. Defendant attached scientific literature that he claimed to have received during the pendency of *Nuckles II* from the attorney who represented him in that appeal. The literature indicated, *inter alia*, that victims of mild and moderate head injuries are not at risk, or are at low risk, of developing posttraumatic epilepsy; that glutamate can be measured postmortem; that glutamic acid has been implicated in epileptic seizures; and that injuries resulting from a moving object striking a stationary head occur directly under the site of impact (not on the opposite side of the head). The trial court summarily dismissed the petition. This appeal followed.

¶ 8 The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). A petition under the Act initiates a collateral proceeding at which the inquiry is limited to constitutional issues that were not, and could not have been, adjudicated on direct appeal. *People v. Williams*, 209 Ill. 2d 227, 232-33 (2004). Accordingly, as a general rule, the doctrine of *res judicata* bars review of issues raised and decided on direct appeal, and issues that could have been raised on direct appeal, but were not, are forfeited. *Id.* at 233. The forfeiture principle is one of

administrative convenience. *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002). The Act provides for the summary dismissal of a postconviction petition if the trial court finds that the petition is "frivolous or is patently without merit" (725 ILCS 5/122-2.1(a)(2) (West 2010)). To avoid summary dismissal, the petition need present only the gist of a constitutional claim. *People v. Ligon*, 239 Ill. 2d 94, 104 (2010). A summary dismissal is reviewed *de novo*. *People v. Davis*, 377 Ill. App. 3d 735, 745 (2007).

¶ 9 It is significant here that this appeal arises from the summary dismissal of defendant's *second* postconviction petition. Section 122-1(f) of the Act provides:

> "Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010).

A defendant setting forth a claim of actual innocence in a successive postconviction petition is excused from showing cause and prejudice. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). Defendant invoked the actual-innocence exception as grounds for filing his second petition, but he did not set forth such a claim, instead asserting ineffective assistance. Nevertheless, the trial court averted the

procedural issue, summarily dismissing the petition, relying, in part, on *res judicata* principles. As the State does not contest that treatment, we review the summary dismissal on the merits.

¶ 10 As noted, *res judicata* bars consideration of issues raised and decided on direct appeal. More importantly, for present purposes, "[a] ruling on an initial post-conviction petition has *res judicata* effect with respect to all claims that were or could have been raised on the initial petition." *People v. Orange*, 195 Ill. 2d 437, 449 (2001). The forfeiture rule—*i.e.*, the branch of the doctrine of *res judicata* that precludes raising claims that could have been raised in the initial proceeding—is not only a matter of administrative convenience but also a statutory imperative. 725 ILCS 5/122-3 (West 2010) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."); see *Pitsonbarger*, 205 Ill. 2d at 458 ("In the context of a successive post-conviction petition, however, the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the statute."). "Only when fundamental fairness so requires will the strict application of this statutory bar be relaxed." *Pitsonbarger*, 205 Ill. 2d at 458.

¶ 11 Defendant argues that his postconviction petition presents the gist of a claim that trial counsel was ineffective because he did not present scientific evidence rebutting the State's evidence concerning the cause of Bates's death. Although defendant's first petition presented essentially the same claim, he contends that the bar of *res judicata* is inapplicable because: (1) the summary dismissal of his first petition was not a judgment on the merits; (2) his second petition was based on new evidence; and (3) our decision in *Nuckles II* is contrary to a more recent United States Supreme Court decision. We consider these contentions *seriatim*.

¶ 12 Stated in general terms, "[t]he doctrine of *res judicata* provides that a final judgment *on the merits* rendered by a court of competent jurisdiction bars any subsequent actions between the parties

or their privies on the same cause of action." (Emphasis added.) *People v. Carroccia*, 352 Ill. App. 3d 1114, 1123 (2004). Defendant argues that, because the summary dismissal of his first petition "turned on procedure," it was not a decision on the merits. We disagree. "A judgment is on the merits when it amounts to a decision as to the respective rights and liabilities of the parties, based on the ultimate facts or state of facts disclosed by the pleadings or evidence, or both, and on which the right of recovery depends." *Style Builders, Inc. v. Fuernstahl*, 32 Ill. App. 3d 272, 275 (1975). When a postconviction petitioner fails to substantiate the allegations of the petition, either with the trial record itself or with affidavits or other evidence outside the trial record, summary dismissal of the petition represents a decision that the facts disclosed by the evidence and the pleadings do *not* give rise to a right of recovery. It makes no difference that the bare allegations of the petition suggest a violation of the petitioner's constitutional rights;[1] unless substantiated by evidence or the record, the allegations of the petition will not be taken as true. *People v. McGinnis*, 51 Ill. App. 3d 273, 275 (1977).

¶ 13 To be sure, procedure under the Act—specifically the Act's affidavit requirement—played a role in the disposition of defendant's first postconviction petition. That role, however, was simply to regulate the manner in which the facts germane to defendant's right to postconviction relief were determined. In other words, the summary dismissal of the first petition was rooted in facts

[1]In *People v. Collins*, 202 Ill. 2d 59, 69 (2002), our supreme court held that the sufficiency of the factual allegations of a postconviction petition presents a "wholly distinct" issue from that of the sufficiency of the supporting documentation. Although defendant evidently views the distinction as corresponding to whether the summary dismissal of a postconviction petition is a decision on the merits, we find nothing in *Collins* to support that view.

determined in accordance with the Act's procedural requirements. That procedural rules affect the decision-making process at the first stage of a postconviction proceeding, does not mean that the ultimate decision is not on the merits. Rules governing application of the doctrine of *res judicata* in ordinary civil cases support our conclusion. Although proceedings under the Act are *sui generis* (*People ex rel. Daley v. Fitzgerald*, 123 Ill. 2d 175, 181 (1988)), they are essentially " 'civil in character' " (*Id.* (quoting *People v. Bernatowicz*, 413 Ill. 181, 184 (1952))). In ordinary civil cases, Illinois Supreme Court Rule 273 (eff. Jan. 1, 1967) provides that "[u]nless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." Pursuant to this rule, the dismissal of a medical malpractice action because the plaintiff has failed to submit the affidavit and the report of a health professional required by section 2-622 of the Code of Civil Procedure (735 ILCS 5/2-622 (West 1994)) is a judgment on the merits for *res judicata* purposes. *DeLuna v. Treister*, 185 Ill. 2d 565 (1999). By analogy, the summary dismissal of a postconviction petition lacking proper evidentiary support—like *any* summary dismissal, which by definition is based on lack of merit—should act as an adjudication on the merits.

¶ 14 We recognize that the supreme court rules governing ordinary civil litigation are not always appropriate in postconviction proceedings. Notably, because postconviction proceedings involve a limited range of issues, our supreme court has deemed it inappropriate to give the parties unrestricted access to the discovery methods for civil cases set forth in the supreme court rules. *Fitzgerald*, 123 Ill. 2d at 181-82. However, for purposes of determining whether an involuntary dismissal constitutes an adjudication upon the merits, we can think of no salient difference between

proceedings under the Act and civil cases (medical malpractice actions for instance) with analogous pleading requirements. *Cf. People v. Marker*, 233 Ill. 2d 158, 169 (2009) (quoting *People v. Marker*, 382 Ill. App. 3d 464, 479 (2008) (O'Malley, J., dissenting)) (endorsing holding of prior case—which adopted tolling rule in civil appeal rule for use in appeals by the State in criminal cases—because the jurisdictional question " 'pertain[ed] to the regulation of the courts, and a court's ability to correct its errors, which would not seem to vary significantly between the civil and criminal arenas.' "). The requirement that a medical malpractice plaintiff submit an affidavit and a report is designed to discourage frivolous claims. *DeLuna*, 185 Ill. 2d . at 579. The affidavit requirement set forth in section 122-2 of the Act serves a similar purpose by ensuring that a postconviction petition's allegations "are capable of objective or independent corroboration." *Collins*, 202 Ill. 2d at 67.

¶ 15 Defendant next argues that the bar of *res judicata* should be relaxed because his second petition includes evidence that was not before this court "in the previous iteration." In support of this argument, defendant relies on *People v. Milam*, 2012 IL App (1st) 100832. In that case, the court held that the disposition on *direct appeal* of the defendant's claim that his confession was involuntary did not bar the defendant from raising the issue in a postconviction petition. The court observed that, although, in broad terms, the claims on appeal and in the postconviction proceeding were the same, the precise grounds for relief set forth in the defendant's postconviction petition had not been considered on direct appeal. *Id.* ¶ 27. In this case, because defendant has previously filed a postconviction petition, the bar of *res judicata* will be relaxed only if required as a matter of fundamental fairness—*i.e.* if he satisfies the cause-and-prejudice test or demonstrates actual innocence. *Pitsonbarger*, 205 Ill. 2d at 458. In this appeal, defendant does not discuss the criteria for raising a claim of actual innocence. Indeed, he has framed his postconviction claim as one of

ineffective assistance of counsel arising from the failure to rebut the State's evidence regarding the cause of death. And as to that claim, he does not specifically argue on appeal that cause and prejudice exist.

¶ 16 Defendant also argues that our decision in *Nuckles II* is contrary to *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012). Defendant contends that *Martinez* effected a change in the law that warrants relaxing the bar of *res judicata*. See, *e.g.*, *Statler v. Catalano*, 293 Ill. App. 3d 483, 486-87 (1997). In *Nuckles II*, we held that defendant's imprisonment did not, *in itself*, excuse his failure to comply with the Act's affidavit requirement when preparing his *pro se* petition. Defendant cites the *Martinez* Court's observation that "[w]hile confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance [of counsel], which often turns on evidence outside the trial record." *Martinez*, ___ U.S. at ___, 132 S. Ct. at 1317. The actual holding of *Martinez* is quite narrow, however. The Court held that "[w]here, under state law, claims of ineffective assistance of trial counsel *must be raised in an initial-review collateral proceeding*, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." (Emphasis added.) *Id.* at ___, 132 S. Ct. at 1320. *Martinez* arose from a prosecution in Arizona, where claims of ineffective assistance of counsel may *not* be raised on direct appeal (*id.* at ___, 132 S. Ct. at 1313), so the claim must always be raised in a collateral proceeding. The *Martinez* Court used the term "initial-review collateral proceeding" to describe "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Id.* at ___, 132 S. Ct. at 1315. Because Illinois does not prohibit review on direct appeal of

ineffective-assistance-of-counsel claims, *Martinez* does not apply. See *Butler v. Hardy*, No. 11-C-4840, 2012 WL 3643924, at *3 (N.D. Ill. Aug. 22, 2012).

¶ 17 Defendant alternatively argues that the mittimus should corrected to reflect an additional day of credit for time served prior to sentencing. The miscalculation of this credit is an error that can be corrected at any time. *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008). Defendant was taken into custody on June 12, 2003, and had been in custody for 525 days before the date of sentencing (November 18, 2004). The mittimus awarded credit for only 524 days. The State agrees that the mittimus should be corrected.

¶ 18 For the foregoing reasons, we modify the mittimus to reflect 525 days' credit for time served prior to sentencing. The judgment of the circuit court of Kane County summarily dismissing defendant's postconviction petition is affirmed.

¶ 19 Affirmed; mittimus modified.