

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 09 CR 21329
)	
JOSE PESANTEZ,)	Honorable Sharon M. Sullivan,
)	Judge Presiding.
Defendant-Appellant.)	

JUSTICE GRIFFIN delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's second stage dismissal of defendant's postconviction petition affirmed where defendant failed to make a substantial showing of a constitutional violation.

¶ 2 Defendant Jose Pesantez appeals the trial court's order granting the State's motion to dismiss his postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends that the trial court erred in dismissing his petition because he made a substantial showing that he did not waive his *Miranda* rights and his subsequent statement to police was involuntary. For the following reasons, we affirm.

¶ 3 Defendant was charged with various offenses arising out of a shooting at an apartment building near the 4800 block of Ridgeway Avenue. At multiple pretrial hearings, a Spanish interpreter was used for defendant's benefit. However, at one hearing, defendant's attorney informed the court that he had conversed with defendant in English several times, defendant did not need a Spanish interpreter, and defendant understood what was happening in his case.

¶ 4 At trial, defendant used a Spanish interpreter. The victim, Leroy Roschell, testified that on November 9, 2009, at approximately 7 p.m., he met with his friends, Gabriel Claudio, Jeremy Figueroa, and Abdul Khan at Claudio's apartment near Lawrence and Ridgeway Avenues. When he was walking to Claudio's apartment, he observed a man, later identified as defendant, with a woman and a baby, kicking in a door across the street. Roschell entered the apartment and watched from a window as defendant argued with another man. Defendant and the woman entered the building, and defendant emerged approximately 10 minutes later and got into a black, older model car and "sped away."

¶ 5 After approximately 20 minutes, defendant returned to the area with some friends. Defendant and three other men were standing in front of the apartment building. Roschell was standing on a balcony, and heard defendant speaking in Spanish. Roschell did not understand what was said. Roschell then went to leave the apartment, and Claudio was already outside. Defendant asked Claudio, "Wasn't you the m*** who just told me to get out of the car?" Defendant stood in front of a gate that Roschell was trying to exit, and he asked Roschell, "[W]asn't you the m*** who told me to move my car?" Roschell said, "[W]hat?" Defendant repeated the question and pulled out a black gun. Upon seeing the gun, Roschell turned around and attempted to run up the stairs in the apartment building. Claudio fell on the stairs in front of Roschell, so he tried to pick Claudio up. Roschell turned around and saw defendant at the bottom

of the stairs in a doorway. Defendant shot Roschell in his left leg, but Roschell continued running. He made it up the stairs and ran across the balcony. Defendant shot at him again. The second shot had ricocheted and metal fragments hit Roschell's right leg.

¶ 6 It was dark outside, but the building was well lit due to street lights and hallway lights. After being shot, Roschell went inside the apartment and observed defendant fleeing the scene in the black car he had previously observed defendant drive away in. The police arrived shortly thereafter, and Roschell was transported to the hospital. He sustained an injury to his left thigh and still had a bullet in his leg. His right leg had holes from bullet fragments. Both of his legs had scars as a result of the shooting.

¶ 7 Roschell spoke with Detectives Alvarez and Torres at the hospital. He identified defendant as the man who shot him in both a photographic array and a physical lineup. On the day of the incident, Roschell was not present when someone asked defendant to move his car, and he was not in possession of a gun. His friends also did not have guns. Other than defendant, he did not see anyone with a gun.

¶ 8 On cross-examination, Roschell testified that Figueroa exited the apartment first. Defendant was leaning on a gate, which was closed. He spoke in Spanish with Claudio, who was standing on the balcony. As Roschell descended the stairs, Claudio followed behind him. Roschell was approximately two feet away from defendant. After defendant asked if Roschell asked him to move his car, he pulled a gun from his waistband. After Claudio fell, Roschell looked back and saw defendant shoot the gun. Defendant had aimed the gun at Roschell and held it with his right hand. As Roschell ran up the stairs, he looked back to see defendant standing in the threshold of the building. Roschell saw defendant fire the second shot at him.

¶ 9 Jeremy Figueroa testified that on November 9, 2009, between 7 and 7:30 p.m., he was with Roschell, Claudio, Kahn, and an individual named Heriberto at Claudio's apartment. He observed defendant across the street arguing with a 12-year-old. Figueroa went upstairs and then returned downstairs to leave the apartment with Roschell. Defendant was then near the gate, speaking in Spanish to Claudio, who was standing on the balcony. Defendant was with three people. When Figueroa got to the gate, they "started talking about the fight." Defendant stepped back and pulled out a handgun. Figueroa ran and heard defendant fire shots. He did not see defendant shoot at Roschell. After hearing two or three gunshots, Figueroa "peeked over" the wall that he hid behind. He went to someone's house for approximately three minutes, and then went back upstairs. He did not see anyone else with a gun that day. Figueroa observed defendant leave on foot towards the alley.

¶ 10 On cross-examination, Figueroa testified that as he was leaving the apartment with Roschell and Claudio, Roschell had his shirt and jacket off. Figueroa took his shirt off to prepare to fight. Figueroa believed a fight was going to start. He watched defendant take a gun from the back of his waist and he "messed with it." Figueroa did not remember whether defendant held the gun in his right or left hand, but believed it was his left hand. There was approximately three seconds between the shots fired.

¶ 11 Abdul Rahim Kahn testified he was at an apartment on November 9, 2009, around 7 p.m. with Roschell, Claudio, and Figueroa. At some point, they all went to leave the apartment. Roschell was watching defendant arguing with someone across the street from the window. Defendant then crossed the street and started talking to Roschell, who left the apartment with Claudio. Figueroa went outside and stood next to Roschell. Roschell backed up "like they were about to fight" and defendant pulled out a gun from the back of his pants. Roschell and Claudio

turned around and ran up the stairs. Defendant chased them through the doorway and fired two shots.

¶ 12 After the first shot was fired, Kahn went inside. He later testified that he went inside after defendant fired a second shot and was inside when he heard defendant fire a third shot.

¶ 13 On cross-examination, Kahn testified that Roschell, Claudio, and Figueroa were about two feet away from defendant. Kahn knew they were arguing about a parking spot, but he did not hear Roschell say anything to defendant. Defendant asked why he was told to move his car. Kahn was still on the balcony when defendant pulled out the gun. Defendant pointed the gun at Roschell, and then chased after him when Roschell ran. Defendant fired the gun from inside the stairwell and pointed at Roschell the entire time. After Kahn heard Claudio and Roschell running up the stairs and defendant fired two shots, he went inside. Defendant did not run up the stairs. He shot up towards Roschell and Claudio. Roschell went inside the apartment after he had been shot. Kahn observed one bullet wound on Roschell's leg.

¶ 14 On redirect, Kahn testified that defendant drove away in an older model black car.

¶ 15 Chicago police officer Thomas Norberg arrived at the scene of the shooting around 7:30 to 8 p.m. on November 9, 2009. His investigation lead him to Marilla Carpio, the offender's girlfriend, who agreed to go to the police station. There, she identified a photograph of defendant. That photograph was used in a photographic array, which was later shown to Roschell at the hospital. On the same night, Norberg went to defendant's home. Defendant answered the door and agreed to go to the police station. Defendant wore a jacket that matched the description of the jacket worn by the offender. A black car matching a description of a vehicle used in the shooting was parked behind defendant's apartment building.

¶ 16 On cross-examination, Norberg testified he did not observe defendant driving the black car. He did not recover a handgun from defendant or inside his apartment. He did not search defendant's apartment.

¶ 17 Chicago police sergeant Wilfredo Torres, a detective on November 9, 2009, was also assigned to this case. At the scene of the shooting, he discovered two .40-caliber shell casings near a gated fence and another shell casing near a doorway that leads to a staircase. Torres recovered a fired bullet fragment from the staircase leading to the second floor.

¶ 18 Torres compiled a photographic array with defendant's picture and interviewed Roschell at the hospital. Roschell identified defendant in the photo spread, and Torres informed Norberg of the positive identification. Roschell, Figueroa, and Kahn later identified defendant in a physical lineup.

¶ 19 At approximately 11:30 p.m., Torres interviewed defendant at the police station. He told defendant why he was in custody and advised him of his rights. On November 10, 2009 at approximately 7:30 p.m., Torres interviewed defendant again with Detective Alvarez. Torres explained to defendant that several witnesses identified him as the shooter, and again advised him of his rights. Defendant acknowledged that he understood his rights and agreed to speak with Torres.

¶ 20 Defendant told Torres that on November 9, 2009, he was dropping off his girlfriend and son at his girlfriend's house. He parked behind a building across the street. Two men approached his vehicle and asked him to move from the parking area. Defendant then stated that he relocated his vehicle and was about to enter his girlfriend's residence, but she did not have the key to get inside. Defendant was angry that she did not have the key and because the two men confronted him about the parking space. He dropped off his girlfriend and his son and drove to a park in his

car. He met two men and asked where he could get a gun. Defendant subsequently purchased a handgun for \$80 and went to his apartment. At his apartment, defendant met with two of his friends and told them he was upset about a confrontation in a parking lot. Defendant returned to the area of the confrontation with his friends and confronted some individuals who he believed asked him to move his car. One of the individuals confronted defendant, so he pulled the handgun out of his waistband and fired in the air towards the staircase. Defendant walked back to the gate area and observed someone running from one end of the building to the other, so he fired an additional shot at the individual. After shooting the gun, defendant got back into his car and went to his apartment. Defendant told Torres that he fired shots because the men “belittled” him in front of girlfriend and “took his manhood away from him.” After parking his vehicle at his apartment, defendant walked back to his girlfriend’s apartment but observed police vehicles outside so he retreated and threw the gun away in an empty parking lot.

¶ 21 On cross-examination, Torres acknowledged that in his interview with defendant on November 10, 2009, defendant told him that one of the men that confronted him about the parking space had his hand on his waistband. He further acknowledged that he never recovered a gun, and did not perform a gunshot residue test on defendant.

¶ 22 Defendant, through a Spanish interpreter, testified that he had been living in the United States for six or seven years. On November 9, 2009, around 7 p.m., he was near the 4800 block of Ridgeway where his fiancée and son lived. Defendant drove his fiancée somewhere and when they returned to where she lived, he parked near her home. Two people approached him, one had his hand by his back waistband and asked in English, “[W]hat are you doing here[?]” The man did not allow defendant to answer and instead said “move.” Then he told defendant, “[I]f you don’t leave, we are going to shoot you.” Defendant responded, “come down,” and he moved his

car. He was upset by the confrontation and went to his fiancée's apartment with his son. When they arrived, the door was locked. He was holding his son, so he pushed the door with his back and went up to the apartment. Defendant did not break any windows or doors. He put his son to bed and then left the apartment.

¶ 23 When he arrived at his house, defendant told his roommate what occurred in the parking lot. Defendant was no longer angry at that time, but he was worried about the threats the men made. He then decided to return to the parking lot to talk to the men who threatened him. His intention was to tell them he did not want problems because his fiancée lived near the parking lot and he was frequently in that area. Defendant's roommates went with him to the parking lot.

¶ 24 Defendant kept a gun in the trunk of his car. He put it in his pocket when he arrived at the parking lot. He took the gun because the men had threatened him previously, and he believed it was necessary for self-defense. At the building, defendant stood in the gate threshold with his friends. He saw the man that talked to him before and asked if they could talk about the incident. The man asked, "[W]hat is it you want with us[?]" Defendant explained that he came to that area every day, was not a "gang-banger," and did not want problems. While they were talking, another man came out from the apartment and said "[A]re you new *** oh, it's you again." The second man stood in front of him and aggressively said that they would shoot him. The man put his hand to the back of his body, and defendant said, "wait," and took his gun out. Defendant attempted to fire the gun up, but it did not work. The man ran towards the stairs and defendant "did something with the gun and that's when it fired, and it was close to the stairs and [he] fired to the wall."

¶ 25 The men continued running up the stairs and defendant fired a second shot into the air. He did not point it in the direction of the men. Following the second shot, defendant's roommate

asked “[W]hat are you doing?” and they returned to his car and drove home. Defendant denied shooting at any people at the apartment building or intending to kill anyone.

¶ 26 On cross-examination, defendant testified that he told Detective Torres that the men threatened him with a gun. He acknowledged, however, that he did not see anyone with a gun that night. He denied telling the detectives that he was upset that his girlfriend did not have her key or that he broke the glass door to get into her building. He further denied telling detectives that he bought a gun for \$80 at the park or that he shot at the men. Defendant threw the gun in a nearby parking lot. He drove a black vehicle.

¶ 27 In rebuttal, Torres testified that defendant never stated that a man threatened to shoot him when he told defendant to move his car. Defendant never stated that he kept a gun in his car. Defendant stated that he kicked in the glass to his girlfriend’s building and he was mad at her because she locked him out. Defendant did not tell Torres that a man came downstairs and threatened to shoot him when he returned to the apartment. He stated that he shot at the men because he wanted them to respect him and that he shot in the direction of the man who was running.

¶ 28 On cross-examination, Torres testified that his interview with defendant on November 10, 2009, was conducted in English. Torres originally asked defendant if he preferred English or Spanish and defendant “said he was fine and he understood English,” so Torres proceeded with the interview in English. Torres did not recall whether defendant had an accent, and defendant clarified that he understood English. He acknowledged that defendant told him that he intended only to scare the men, not hurt them.

¶ 29 Following arguments, the court found defendant guilty of aggravated battery with a firearm. Defendant, through counsel, filed a motion to reconsider the finding, which the court

denied. The court sentenced defendant to eight years' imprisonment on May 12, 2011. Defense counsel filed a motion to reconsider sentence on May 17, 2011, which the court also denied.

¶ 30 Defendant did not file a direct appeal. Approximately one year after his motion to reconsider sentence was denied, defendant filed a motion for transcripts, which the trial court denied. On August 27, 2012, defendant mailed to the trial court a "notice of appeal an consideration."

¶ 31 On October 15, 2012, defendant mailed to the trial court a *pro se* petition for postconviction relief under the Act. His petition raised 19 arguments, many of which contested the sufficiency of the evidence at trial and claimed trial counsel was ineffective. Defendant also argued, in relevant part, that he did not knowingly waive his *Miranda* rights because they were given to him in English rather than Spanish, and that he admitted to the police that he had a gun because they threatened to "beat his a*** while he was in handcuffs til he confessed." Additionally, defendant argued that trial counsel was ineffective for failing to file an appeal on his behalf and that the trial court failed to admonish him of his appellate rights.

¶ 32 In support of his petition, defendant attached six of his own notarized affidavits. In relevant part, defendant averred that he gave the following statement to Detective Torres. Defendant attempted to make peace with Claudio and Roschell after they told him to move his car because he was not a gangbanger and was in the area to visit his girlfriend and son. However, Claudio and Roschell were smoking marijuana, drinking beer, and "acting crazy an violent." Defendant noticed Claudio reached for a gun so defendant "quickly grabbed his gun" and fired into the sky to scare Claudio and Roschell. Defendant, and his roommates who were with him, ran back to his car and heard gunshots as they ran. When defendant turned around, he saw

Claudio and Roschell shooting at him and his roommates. He acknowledged he had a .38 revolver.

¶ 33 Defendant further averred he was taken to an empty room in a police station and two detectives asked him questions “about what happened around 7 p.m.” Defendant explained the statement that he gave to Torres. He did not understand “most” of what the detectives asked him and “they never said anything about *Miranda* rights.” Defendant further averred that “the 1 Detective told [him] if [he] didn’t tell [the police] the truth [they] would send [defendant’s] fiancée back to Ecuador an place [his] child with DCFS.” Defendant stated, “I told you the truth I got nothing to hide.” The officers subsequently left the room.

¶ 34 The trial court advanced defendant’s petition to the second stage and appointed the public defender’s office to represent him. On July 25, 2014, the State filed a motion to dismiss, arguing defendant’s petition attempted to re-litigate the trial, his claims were refuted by the record, and his ineffective assistance of counsel claims failed to satisfy the requisite test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 35 Following arguments, the trial court granted the State’s motion to dismiss in part and denied it in part. With the exception of his claim of ineffective assistance of counsel for failing to file an appeal on his behalf, the court dismissed all of defendant’s claims. With respect to his *Miranda* claim, the court noted that Sergeant Torres testified he spoke Spanish and English and defendant told him he understood English and that it previously found Torres credible.

¶ 36 The court held an evidentiary hearing on the sole issue of whether trial counsel was ineffective for failing to file a notice of appeal. Following the hearing, the trial court dismissed defendant’s ineffective assistance claim. Defendant now appeals the second stage dismissal of

his claims that he did not knowingly waive his *Miranda* rights and his statement to police was involuntary.

¶ 37 On appeal, defendant argues that his postconviction petition made a substantial showing that he did not knowingly waive his *Miranda* rights where his primary language was Spanish and that his statement to police was involuntary where police threatened defendant and his family to coerce him into making an incriminating statement. He does not appeal the outcome of the evidentiary hearing.

¶ 38 The Act provides for a three-stage process by which a defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). At the first stage, the trial court must review the postconviction petition and determine whether “the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2012). If the petition is not dismissed within 90 days at the first stage, counsel is appointed and it advances to the second stage. 725 ILCS 5/122-2.1(a), (b) (West 2012).

¶ 39 This case involves the second stage of postconviction proceedings. At the second stage of postconviction proceedings, the dismissal of a petition is warranted only when the allegations in the petition, liberally construed in light of the original trial record, fail to make a substantial showing of a constitutional violation. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At this stage, “all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true.” *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). The defendant “bears the burden of making a substantial showing of a constitutional violation.” *Id.* We review *de novo* the trial court’s dismissal of defendant’s postconviction petition without an evidentiary hearing. *Id.*

¶ 40 As an initial matter, we note that the State argues that defendant forfeited these claims because he failed to litigate the issues involving his *Miranda* rights and confession in the trial court. In an initial postconviction proceeding, *res judicata* and forfeiture operate to bar the raising of claims that were or could have been adjudicated previously. See *People v. Blair*, 215 Ill. 2d 427, 443 (2005). The alleged issues surrounding defendant's *Miranda* waiver and subsequent police statement were known to defendant before and at the time of trial, yet they were not litigated before the trial court. He does not allege that counsel was ineffective for failing to move to suppress his statement, and the record is devoid of any indication that he made counsel aware that he could not understand the *Miranda* warnings given or that the police coerced his statement. See *e.g.*, *People v. Sims*, 322 Ill. App. 3d 397, 409 (2001) (noting that the constitution requires effective assistance from counsel but does not require that counsel be clairvoyant and "divine the truth"). Critically, defendant actually testified as to what he told the police, and at no point testified that he did not understand what was said during the interrogation or that the police coerced his statement. As defendant has failed to explain why he could not raise these issues before the trial court, we find that defendant forfeited these claims. See *Blair*, 215 Ill. 2d at 446.

¶ 41 Forfeiture aside, however, we find that defendant failed to meet his burden of making a substantial showing of a constitutional violation. It is well established that admitting an involuntary confession into evidence violates both the federal and state constitutions. *People v. Nicholas*, 218 Ill. 2d 104, 118 (2005) (citing U.S. Const., amend. V, and Ill. Const. 1970, art. I, § 10). The voluntariness of a confession depends upon the totality of the circumstances surrounding it, including the presence of *Miranda* warnings, and the defendant's age,

intelligence, education, and experience at the time of the detention and interrogation. *People v. Willis*, 215 Ill. 2d 517, 536 (2005). No single factor is controlling. *People v. Daniel*, 238 Ill. App. 3d 19, 30 (1992).

¶ 42 A valid waiver of *Miranda* rights must be knowingly and intelligently made. *People v. Bernasco*, 138 Ill. 2d 349, 357 (1990). The defendant need not understand far-reaching legal and strategic effects of waiving his or her rights or appreciate how widely or deeply an interrogation may probe; instead, the defendant must, at a minimum, “understand basically what those rights encompass and minimally what their waiver will entail.” *Id.* at 363.

¶ 43 Defendant claims that he did not waive his *Miranda* rights because he did not receive them in Spanish and the police coerced his subsequent statement rendering it involuntary. However, the record positively rebuts those contentions. A careful review of the record reveals that, prior to trial, defendant responded to the trial court’s questions in English and without the help of an interpreter. In another pretrial hearing, defense counsel told the court that he had multiple conversations with defendant in English regarding the case and defendant understood what was going on. Roschell, the victim, testified that defendant spoke to him in English when he stated, “Wasn’t you the m*** who just told me to get out of the car?” Sergeant Torres testified that he spoke both Spanish and English and asked defendant whether he preferred to speak in Spanish, but defendant responded that he understood English. One of the character letters used as mitigation evidence at sentencing stated that defendant taught the author “how to ask or say things in English” and “helped [the author’s] son with his English.” Moreover, as previously discussed, defendant testified extensively at trial concerning his statement to the police. At no point did defendant testify that he did not understand what the police said during

the interview or that his statement was involuntary. On the contrary, defendant repeatedly clarified what he did or did not say to Torres.

¶ 44 Further, in his petition, defendant claimed the police threatened to “beat his a**” if he did not confess, but in his affidavits, he averred that police put him in an interrogation and he gave a statement and the police later threatened to have his fiancée deported if he was lying, to which defendant responded that he told the truth and had nothing to hide. He makes no further allegations of physical threats and does not explain how police coerced his statement by threatening deportation *after* his statement was made. As noted above, it is defendant’s burden to make a substantial showing of a constitutional violation. Defendant’s bare allegations, without more, are insufficient to meet his burden.

¶ 45 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 46 Affirmed.