

NOTICE  
Decision filed 03/29/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0305  
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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 97-CF-2278
	)	
CHESTER O'QUINN,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE STEWART delivered the judgment of the court.  
Presiding Justice Chapman and Justice Goldenhersh concurred in the judgment.

**R U L E 2 3 O R D E R**

*Held:* The trial court did not err in dismissing the defendant's postconviction petition without an evidentiary hearing, because the defendant could have raised the issue of juror bias on direct appeal. His failure to raise the issue resulted in its forfeiture.

The defendant, Chester O'Quinn, was charged with first-degree murder for the death of his girlfriend's child, Emmarld Bradley. On April 6, 2001, following a jury trial, the defendant was found guilty and was sentenced to an extended term of 70 years' imprisonment. The defendant appealed to this court, arguing five issues, including ineffective assistance of counsel, improper use of a special interrogatory, and that he was denied his right to a fair trial when the circuit court removed him from the courtroom. This court affirmed the defendant's conviction and sentence. *People v. O'Quinn*, 339 Ill. App. 3d 347 (2003). Petitions for leave to appeal and for a writ of *certiorari* were denied.

On April 2, 2004, the defendant filed a *pro se* postconviction petition. The trial court appointed counsel to represent the defendant. The State moved to dismiss, and on May 14,

2009, following a hearing, the trial court granted the State's motion on the grounds that the issues raised were barred by the doctrines of *res judicata* or forfeiture or were legally insufficient. The defendant filed a *pro se* motion to reconsider the dismissal of his postconviction petition, which the trial court denied. Notice of appeal was timely filed on June 11, 2009. We affirm.

## BACKGROUND

In August of 1997, Twuna Jackson and the defendant moved into an apartment in Wood River, Illinois. Residing in the apartment with Twuna and the defendant were Twuna's two children, Kiera and Emmarld (the victim), and the defendant's son Adontay. Emmarld was born on September 19, 1996, and was 13 months old at the time of her death. Emmarld was a healthy, thriving child prior to August of 1997, when she, her sister, and her mother moved in with the defendant.

On October 27, 1997, while Twuna was at work, the Wood River police department received a 9-1-1 call regarding a child that was not breathing. Officer Otis Steward arrived at the front door of the defendant's apartment at 5 p.m. Emmarld was lying on her back on a bed. She was wearing a diaper. Her breathing was labored, she had a large bruise on her forehead, and a purplish knot was forming on her forehead. Officer Steward carried Emmarld to the waiting ambulance and rode with her to the Wood River Township Hospital.

Officer Steward spoke with the defendant at the hospital. The defendant told him that he woke up Emmarld. He held her hand and walked with her into the kitchen, where she fell and lay on the floor. He went into the other room to get Adontay and Kiera for supper. When he walked back into the kitchen, Emmarld was still lying facedown on the kitchen floor, and he thought she was sleeping. When he picked her up, he noticed she was not breathing. He tried to "give her breaths" and then told Adontay to call 9-1-1.

On October 31, 1997, the State filed an information charging the defendant with one

count of first-degree murder for the death of Emmarld Bradley. During the course of the trial, the State presented a detailed circumstantial case leading up to Emmarld's death on October 28, 1997. Numerous doctors testified as both witnesses and experts, concluding that Emmarld had suffered from child abuse and that the cause of her death was reoccurring trauma consistent with shaken infant syndrome. The defense did not present any evidence. The record indicates that, after the People and the defendant had rested, but before closing arguments, the following event took place:

"THE COURT: Okay, for the record, out of the presence of the jury. Counsel is present, the defendant is present. The Court has been advised that the defendant attacked some of the jurors as they came into the courtroom. I wasn't here. Miss Napp [the prosecutor]?

DEFENDANT O'QUINN [interjecting]: She promised me the abuse would stop.

MRS. NAPP: Your Honor, I was in the courtroom, I heard a commotion. I turned, I saw the defendant going over the rail. I saw the defendant spitting water, it hit some of the jurors. I know it hit some of the people sitting, actually, in the gallery.

He was grabbed quickly by the sheriff's deputies and police officers and investigators who were in the courtroom. And the jury, only three of the jurors were in the room when this occurred, the rest had not quite entered the courtroom yet. And they were escorted out, the jurors were, immediately.

THE COURT: Okay, Mr. Hawkins [defense counsel]?

MR. HAWKINS: I would concur with Miss Napp, that is what I saw occur, Your Honor."

The court promptly had the defendant removed from the courtroom and transported to jail. Defense counsel moved for a mistrial, stating, "even though I know it is because of the

actions of my client." The judge questioned each of the jurors to determine if they had been in the courtroom and if they could remain fair. Of the 13 jurors, 8 said they either were in the courtroom or had seen the incident. Five jurors said they had not been in the courtroom when it occurred. All the jurors said they could be fair to the defendant. The court denied a mistrial.

The defendant's postconviction petition offers an explanation for his outburst. The defendant alleges that as the jurors were coming back into the courtroom before closing argument, one juror taunted him by saying, "you're going down," which prompted the defendant's disruptive behavior. As evidence, the defendant attached a notarized affidavit of his mother that states, "[I saw] one of the female Jurors \*\*\* turn to my son and say something that I could not quite hear \*\*\* and the next thing I knew he was spitting and throwing water." Additionally, the defendant attached two identically worded unnotarized statements of Maudie and Michael Wade.

#### ANALYSIS

On appeal, the defendant argues that the trial court erred in dismissing his postconviction petition without an evidentiary hearing to determine whether a juror made remarks that would show a denial of an impartial jury and due process of law. The Post-Conviction Hearing Act(Act)(725 ILCS 5/122-1 *et seq.* (West 2006)) provides a mechanism by which criminal defendants can assert that their convictions were the result of a substantial violation of their federal or state constitutional rights. *People v. Torres*, 228 Ill. 2d 382, 393-94 (2008). Postconviction petitions are adjudicated in a three-stage process. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court determines whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2006). If the trial court does not dismiss the defendant's postconviction petition as frivolous or patently without merit, the petition advances to the second stage, and counsel is appointed

to represent *pro se* defendants. *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001). The State may file responsive pleadings. 725 ILCS 5/122-5 (West 2006). If the State files a motion to dismiss, the trial court then determines whether the defendant's allegations and any documentation accompanying the petition make a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 246. If there is a substantial showing of a constitutional violation, the petition advances to the third stage, where the trial court conducts an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246. If the allegations of the postconviction petition, supported by accompanying affidavits and the record, do not make a substantial showing of a constitutional violation, the petition may be dismissed. *People v. Williams*, 209 Ill. 2d 227, 233 (2004).

A proceeding under the Act is not a direct attack on the underlying judgment but, rather, a collateral attack permitting inquiry into issues that were not, and could not have been, adjudicated on direct appeal; therefore, the scope of postconviction relief is limited by the doctrines of forfeiture and *res judicata*. *People v. Leason*, 352 Ill. App. 3d 450, 453 (2004). Thus, *res judicata* bars the consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Johnson*, 352 Ill. App. 3d 442, 447 (2004). While courts often use the terms "forfeit," "waive," and "procedural default" interchangeably in criminal cases, the terms have different meanings. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). The supreme court in *People v. Blair* held that the term "forfeited" should be used when referring to issues that could have been raised, but were not, and are therefore barred. *Blair*, 215 Ill. 2d at 443-44.

On appeal from the trial court's order granting the State's motion to dismiss, the petition's factual allegations are presumed to be true. *People v. Harris*, 206 Ill. 2d 1, 13 (2002). Where the petition's allegations of fact, liberally construed in favor of the petitioner

and in light of the original record, fail to make a substantial showing of imprisonment in violation of the state or federal constitutions, a dismissal is warranted. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). The standard of review for a trial court's decision to dismiss postconviction claims without conducting an evidentiary hearing, therefore, is *de novo*. *People v. Childress*, 191 Ill. 2d 168, 174 (2000).

The Act requires that a postconviction "petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2006). The affidavits "must identify with reasonable certainty the sources, character, and availability of alleged evidence supporting the petitioner's allegations." *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004). To be valid, an affidavit filed pursuant to the Act must be notarized. *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003). Maudie and Michael Wade's statements, which indicated they heard the juror say the word "down," were not notarized and were not valid under *Niezgoda*. The notarized affidavit of the defendant's mother, Barbara O'Quinn, only confirms that the defendant had an outburst in the courtroom, but it does not help to explain why.

In granting the State's motion to dismiss the defendant's postconviction petition, the trial court agreed with the State that the issues raised by the defendant are barred, because they were required to have been raised on appeal. The trial court did not find any of the defendant's claims to be legally sufficient and denied all the claims in their entirety. However, during arguments on the motion to dismiss, the parties disagreed on whether the allegation regarding what the juror said to the defendant was on the record and therefore could have been the basis for an issue on appeal.

The defendant points out that neither *res judicata* nor forfeiture applies to matters outside the record. *People v. Mahaffey*, 194 Ill. 2d 154, 171 (2000). Because the defendant alleges that one of the jurors made a statement not in the record, the defendant asserts that

the issue could not have been raised on direct appeal. To explain the omission of the issue on direct appeal, the defendant offers that his counsel was not aware of what the juror said to him and that he was removed from the courtroom after the water incident for the remainder of the trial without the court hearing his explanation.

Contrary to the defendant's claim that an explanation of what provoked the incident was not available to the court or counsel on direct appeal, this court finds that an explanation was available. While the record does not show any comments made by members of the jury prior to closing arguments, the record does indicate that, when the trial court inquired about the incident, the defendant took an opportunity to interject, stating, "She promised me the abuse would stop." While it is unclear exactly what the defendant meant, the State suggests that the defendant was recalling a juror's statement, *i.e.*, that a juror promised the defendant "the abuse would stop." Regardless of the meaning of the defendant's statement, the record shows that he had the opportunity to offer an explanation for his behavior, but he failed to mention the juror's statement on which he claims his behavior was based.

The defendant filed a posttrial motion and a *pro se* amended posttrial motion. His amended posttrial motion was seven pages and requested a new trial on 11 grounds. The defendant failed to allege that a juror made a remark showing bias. Because the juror's alleged remark was directed at the defendant and the defendant heard the remark causing him to react, the defendant was aware of the alleged juror bias and could have raised this issue.

On direct appeal the defendant alleged five separate issues, including one involving the same facts at issue now (that he was denied his right to a fair trial when the circuit court removed him from the courtroom), but he made no allegation regarding a juror's comment. It was not until three years after the original trial that the defendant raised an issue regarding an alleged comment made by a juror. The defendant could have raised the issue of juror bias on direct appeal but failed to do so.

The defendant argues that, in this case, fundamental fairness requires that the doctrine of forfeiture be relaxed. The doctrine of forfeiture is relaxed in three situations: where fundamental fairness so requires, where the alleged forfeiture stems from a claim of ineffective assistance of appellate counsel, or where the facts relating to the postconviction claim do not appear on the face of the original record. *People v. Davis*, 377 Ill. App. 3d 735, 745 (2007). Fundamental fairness requires the defendant to show a cognizable cause for his failure to raise the claim previously and actual prejudice resulting from the complained-of error. *People v. Dominguez*, 366 Ill. App. 3d 468, 475 (2006). Cause is an objective factor external to the defense that impeded the defendant's efforts to raise the claim in an earlier proceeding. *Dominguez*, 366 Ill. App. 3d at 475. In the instant case, no such factor existed. The defendant was a part of the conversation in which the juror allegedly made a statement showing bias. Because of his knowledge of the supposed bias, he could have raised the issue at the trial, in his posttrial motion, and on direct appeal.

The trial court did not err in dismissing the defendant's postconviction petition without an evidentiary hearing. The defendant could have raised the issue of juror bias on direct appeal but failed to do so; therefore, the defendant's claim is forfeited.

#### CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Madison County is hereby affirmed.

Affirmed.