

No. 1-17-1177

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)
) Appeal from the
) Circuit Court of
 Plaintiff-Appellee,) Cook County.
)
 v.) No. 97 CR 5351
)
 KAFELA PARKER,) Honorable
) Stanley J. Sacks,
 Defendant-Appellant.) Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Pierce and Walker concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant failed to attach necessary supporting documentation to his successive postconviction petition, denial of leave to file was proper. Defendant’s claim of ineffective assistance of counsel based on the failure to request fingerprint testing of shell casings found at the scene of the crime is barred by *res judicata*. Defendant’s sentence is not void.

¶ 2 Defendant Kafela Parker appeals from the denial of his motion for leave to file a second successive *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). In this *pro se* appeal, Mr. Parker contends that he is actually innocent, that trial counsel was ineffective for failing to investigate alibi witnesses, and that his

sentence is void because he was sentenced pursuant to a statute that was later found to be unconstitutional. For the reasons that follow, we affirm.

¶ 3

I. BACKGROUND

¶ 4 Following a bench trial, Mr. Parker, along with codefendant Walter Cage, was found guilty of first-degree murder for the shooting death of Booker Flowers III and attempted first-degree murder for the shooting of Antoine Mims. Mr. Parker was sentenced to consecutive terms of 60 and 30 years in prison. On direct appeal, we affirmed Mr. Parker's convictions. *People v. Parker*, No. 1-98-1586 (2000) (unpublished order under Supreme Court Rule 23). We will summarize the evidence at trial here, in order to put Mr. Parker's current claims in context.

¶ 5 On the morning of January 21, 1997, Mr. Flowers and Mr. Mims, who were both members of the Traveling Vice Lords street gang, were selling drugs at the northwest corner of the intersection of Kildare Avenue and Madison Street in Chicago. This intersection contained adjacent "drug spots" controlled by two "enemy" street gangs: the Gangster Disciples controlled the southern corners and the Traveling Vice Lords controlled the northern corners. Mr. Flowers and Mr. Mims were on a Vice Lords-controlled corner when three members of the Gangster Disciples drove up and approached Mr. Flowers, telling him to not sell drugs on that corner, but to sell them in the alley. Mr. Flowers responded with laughter and the Gangster Disciples also laughed and then drove away.

¶ 6 The next morning, Mr. Flowers and Mr. Mims were again standing at the northwest corner of this intersection, along with other fellow gang members, including Quentin McCaster. A vehicle owned by a member of the Gangster Disciples pulled up to the southeast corner of the intersection. The vehicle's occupants talked with members of that gang who were standing on the southeast corner. The vehicle then drove toward the northwest corner of the intersection.

¶ 7 Mr. Mims testified that Mr. Parker exited the rear driver-side door of the vehicle and ran toward the group of Traveling Vice Lords members. Mr. Parker, dressed in a black leather jacket and a mask that covered the lower portion of his face, began shooting toward the group. Mr. Parker shot Mr. Flowers, who immediately fell to the ground screaming. Mr. Cage also exited the vehicle and began shooting, hitting Mr. Mims twice in the chest and arm. Mr. Mims ran and was able to escape to his uncle's nearby store while Mr. Parker and Mr. Cage stood over Mr. Flowers and shot him repeatedly.

¶ 8 An ambulance and the police reported to Mr. Mims's uncle's store soon after. Mr. Mims testified that he had known Mr. Parker for many years, but initially did not identify him as the shooter, telling the police only that members of the Gangster Disciples had shot him. At the hospital, Mr. Mims again spoke to a police officer and then he identified Mr. Parker as one of the shooters. On January 24, 1997, while still in the hospital, Mr. Mims identified Mr. Parker in a photo array, and on January 26, 1997, he identified Mr. Parker in a lineup at the police station. On a later date, Mr. Mims returned to the police station and identified Mr. Cage in a lineup as the second shooter and identified a mask that the police showed him as the one worn by Mr. Parker.

¶ 9 Quentin McCaster testified consistently with Mr. Mims, stating that when the shooting started he ran away, looking back to see Mr. Parker and Mr. Cage standing over Mr. Flowers and shooting repeatedly. He did not identify Mr. Parker as a shooter when interviewed by the police on the day of the shooting because he was "terrified." Days later, he identified Mr. Parker and Mr. Cage in separate lineups. He testified that he had known Mr. Parker for approximately three months prior to the shooting.

¶ 10 Kevin McCaster, Quentin's brother, testified that he had been walking toward the group of Traveling Vice Lords when he observed Mr. Parker exit the rear driver-side of the car and

begin shooting at the group. Mr. Parker was dressed in black and wearing a half-top mask. He saw Mr. Parker shoot Mr. Mims twice and repeatedly shoot Mr. Flowers. He further testified that he regularly saw Mr. Parker and Mr. Cage together and knew Mr. Parker was a member of the Gangster Disciples because he saw him hanging out with members of that gang and handshaking with them.

¶ 11 Chicago police detective John Roberts, who was assigned to investigate the shooting, testified to the identifications made by Mr. Mims and Kevin McCaster. Detective David March testified that he placed Mr. Parker into custody on January 25, 1997, and transported him to the police station. When Mr. Parker was searched, a black ski mask was recovered from his jacket. Stipulated testimony established that Mr. Flowers suffered 12 gunshot wounds from two different firearms, a .380-caliber gun and a 9-millimeter gun.

¶ 12 Mr. Parker presented the testimony of his wife, Katina Johnson, and a hospital employee, Calvin Ridgell, as alibi witnesses. Ms. Johnson testified that at approximately 10:30 or 10:45 a.m. on January 22, 1997, Mr. Parker and Mr. Cage walked with her to Bethany Hospital for her doctor's appointment. The three remained at the hospital until after 1 p.m. Hospital employee Mr. Ridgell testified that he saw Ms. Johnson and a man who looked like Mr. Parker at the hospital on January 22, 1997, at approximately 11:30 to 11:40 a.m. Mr. Ridgell testified to a check-in sheet from the hospital that showed that Ms. Johnson checked in at the hospital at 11:41 a.m.

¶ 13 The trial court found Mr. Parker guilty of first-degree murder and attempted first-degree murder and sentenced him to consecutive terms of 60 and 30 years in prison. On direct appeal, Mr. Parker challenged the sufficiency of the evidence and claimed that the court erred in denying him a continuance to secure a mitigation witness. We rejected Mr. Parker's contentions and

affirmed. *People v. Parker*, No. 1-98-1586 (2000) (unpublished order under Supreme Court Rule 23).

¶ 14 Later in 2000, Mr. Parker filed a *pro se* postconviction petition, claiming that he was denied effective assistance of trial counsel relating to counsel's alleged failure to investigate and present mitigation evidence. Mr. Parker's petition was summarily dismissed and we affirmed. *People v. Parker*, No. 1-01-1204 (2002) (unpublished order under Supreme Court Rule 23).

¶ 15 Mr. Parker attempted to file a successive postconviction petition in 2004, alleging ineffective assistance of trial counsel for the failure to request forensic testing on shell casings recovered from the crime scene. Mr. Parker was denied leave to file the petition. On appeal, we granted counsel's motion to withdraw and affirmed. *People v. Parker*, No. 1-04-2444 (2005) (unpublished order under Supreme Court Rule 23).

¶ 16 Mr. Parker subsequently filed a *pro se* motion for fingerprint testing. The trial court denied Mr. Parker's motion, finding that while identity was at issue at trial, three eyewitnesses identified Mr. Parker as one of the shooters and fingerprint testing of the shell casings would not provide evidence that would exonerate Mr. Parker. We affirmed, observing that at best, fingerprint evidence could show that someone else handled the bullets in Mr. Parker's gun. *People v. Parker*, 2011 IL App (1st) 091724-U.

¶ 17 The appeal before us now began with Mr. Parker's *pro se* motion for leave to file a second successive postconviction petition, alleging that he had obtained newly discovered evidence of actual innocence in the form of affidavits from Marvin West, Harvey Johnson, and Phevis Johnson. According to Mr. Parker, Mr. West witnessed the shooting, recognized the shooters, and knew Mr. Parker was not one of them; Harvey Johnson was with Mr. Parker and Mr. Cage at Ms. Johnson's apartment during the time of the shooting; and Phevis Johnson was at

the apartment with Mr. Parker and Mr. Cage until about 11 a.m. on the morning of the shooting. Mr. Parker asserted that he did not know Mr. West was a witness to the shooting until they met in prison, and that he obtained Mr. West's affidavit in 2008. As for Harvey Johnson and Phevis Johnson, Mr. Parker stated that he had lost contact with them following his arrest, but was able to locate them and obtain their affidavits in 2010. Mr. Parker further alleged that his trial counsel did not investigate and interview Harvey Johnson and Phevis Johnson, or an alibi witness named Dorothy McDowell, even though he gave counsel their names and last known addresses and related to counsel the substance of their potential testimony. Mr. Parker attached a verification affidavit to his petition, but did not attach affidavits from Mr. West, Harvey Johnson, Phevis Johnson, or Ms. McDowell.

¶ 18 The trial court denied Mr. Parker leave to file this second successive petition on March 17, 2017. The court reasoned that Mr. Parker's failure to attach affidavits from Mr. West, Harvey Johnson, or Phevis Johnson to his petition was fatal to his claim of actual innocence. Similarly, the court found that Mr. Parker's failure to attach affidavits from Harvey Johnson, Phevis Johnson, or Ms. McDowell was fatal to his claim of ineffective assistance of counsel.

¶ 19 Mr. Parker filed a *pro se* motion to reconsider. He argued that the trial court failed to analyze his petition or consider "the fact that the evidence in this case dictates that [Mr. Parker] was not even at the scene of the crime," and that his actual innocence claim was "well-supported" by the lack of fingerprint evidence. The trial court denied the motion to reconsider and Mr. Parker filed a timely notice of appeal.

¶ 20

II. ANALYSIS

¶ 21 On appeal, Mr. Parker presents three issues. First, he contends that the evidence proves he is actually innocent. He argues that he obtained affidavits from Mr. West, Harvey Johnson,

and Phevis Johnson, that each of the affidavits satisfies the standard for newly-discovered evidence, and that contrary to the trial court's finding, he did actually attach those affidavits to his petition. In support of this argument, Mr. Parker has attached copies of the three affidavits to his appellate brief. Second, Mr. Parker contends that trial counsel was ineffective for failing to investigate, contact, or interview Harvey Johnson, Phevis Johnson, and Ms. McDowell as alibi witnesses. Finally, Mr. Parker contends he was sentenced pursuant to a statute that was later found to be unconstitutional, and that therefore, his sentence is void.

¶ 22 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) contemplates the filing of only one postconviction petition. *People v. Edwards*, 2012 IL 111711, ¶ 22. Any issues that were decided on direct appeal or in an earlier postconviction proceeding are barred by the doctrine of *res judicata*, and issues that could have been, but were not, raised in an earlier proceeding are forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). However, our supreme court has provided two bases upon which the bar against successive proceedings may be relaxed. *Edwards*, 2012 IL 111711, ¶ 22.

¶ 23 The first basis is when a defendant establishes “cause and prejudice” for failing to raise a claim earlier. *Id.* Under this test, a claim in a successive postconviction petition is barred unless the defendant can show cause for failing to raise the claim in earlier proceedings and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2016). Specifically, a defendant shows cause by identifying an objective factor that impeded his ability to raise a specific claim in earlier proceedings, and shows prejudice by demonstrating that the claim not raised in earlier proceedings so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2016); *People v. Davis*, 2014 IL 115595, ¶ 14. Both elements of the test must be satisfied to justify granting leave to file. *Davis*, 2014 IL 115595, ¶ 14.

¶ 24 The second basis is the “fundamental miscarriage of justice” exception, under which the defendant must show actual innocence. *Edwards*, 2012 IL 111711, ¶ 23. When a defendant claims actual innocence, the question is whether his petition and supporting documentation set forth a colorable claim; that is, whether they raise the probability that it is more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence. *Id.* ¶¶ 24, 31, 33. The evidence supporting the claim of actual innocence must be (1) newly discovered; (2) material and not merely cumulative; and (3) of such conclusive character that it would probably change the result on retrial. *Id.* ¶ 32. The conclusiveness of the evidence is the most important element of an actual innocence claim. *People v. Sanders*, 2016 IL 118123, ¶ 47.

¶ 25 A petitioner who seeks to initiate successive postconviction proceedings must first obtain leave of court. *Edwards*, 2012 IL 111711, ¶ 24. It is the petitioner’s burden to obtain this leave before any further proceedings on his claims can follow. *Id.* Our supreme court has held that the petitioner “must submit enough in the way of documentation” to allow a circuit court to make a determination that leave should be granted, and that this “documentation” requirement applies under either exception: cause and prejudice or actual innocence. *Id.* Section 122-2 of the Act also requires a defendant to support the allegations in his petition by attaching “affidavits, records, or other evidence” or by explaining the absence of such evidence. 725 ILCS 5/122-2 (West 2016); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). By following this requirement, the defendant shows that the allegations in the petition are capable of independent corroboration and identifies the “sources, character, and availability” of evidence alleged to support the petition’s allegations. *People v. Allen*, 2015 IL 113135, ¶ 34; *Delton*, 227 Ill. 2d at 254. A defendant’s failure to attach the affidavits or documentation required by section 122-2, or otherwise explain their absence, is “fatal” to his postconviction petition. *Delton*, 227 Ill. 2d at 255 (citing *People v. Collins*, 202 Ill.

2d 59, 66 (2002)). We review a trial court's denial of leave to file a successive petition *de novo*. *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 32 (claims subject to cause and prejudice test); *People v. Jones*, 2016 IL App (1st) 123371, ¶ 71 (actual innocence claims).

¶ 26 In this case, we find that the trial court's denial of leave to file was proper because Mr. Parker failed to attach any supporting documentation to corroborate his claims of actual innocence and ineffective assistance of counsel, in contravention of the requirements of section 122-2 and the holding of *Edwards*. We are mindful that our supreme court recently held that when a postconviction petitioner raises a claim of ineffective assistance of counsel for failing to call a particular witness, an affidavit from the proposed witness is not necessarily required. See *People v. Dupree*, 2018 IL 122307, ¶ 34. However, the *Dupree* court explained at length in its decision that an affidavit is not necessary only where the proposed witness's testimony may be discerned from evidence that already existed in the record. *Id.* ¶¶ 34-42. In contrast, where the proposed witness is the only source of the new evidence, an affidavit from that witness is necessary to provide proof that such evidence actually existed and that it would have been helpful to the defense. *Id.* ¶ 40.

¶ 27 Mr. Parker did not attach affidavits from Mr. West, Harvey Johnson, Phevis Johnson, or Ms. McDowell to his successive petition, or to his motion to reconsider the denial of leave to file. As such, the trial court was never presented with evidence that those potential witnesses actually existed or that their proposed testimony would have helped Mr. Parker's case. In turn, this court cannot ascertain what testimony, if any, these four people could provide in support of Mr. Parker's claims, or even that their potential testimony actually exists. Although Mr. Parker has attached affidavits executed by Mr. West, Harvey Johnson, and Phevis Johnson to his appellate brief, it is well-established that a reviewing court may only consider matters that are a

part of the record on appeal, and that attachments to the briefs cannot be used to supplement the record. *People v. Benson*, 256 Ill. App. 3d 560, 563 (1994); see also *People v. Montgomery*, 327 Ill. App. 3d 180, 186 (2001) (striking affidavit that was attached to brief but not to postconviction petition because “[a]ppellate review is generally restricted to what has been properly presented and preserved of record in the trial court”). Moreover, as the State observes, the affidavits attached to Mr. Parker’s brief do not bear any file stamps, which belies Mr. Parker’s assertion that he filed them with the trial court.

¶ 28 Mr. Parker’s successive petition alleged that he had obtained newly discovered evidence of actual innocence and that trial counsel was ineffective for failing to investigate alibi witnesses. However, Mr. Parker did not attach affidavits from the witnesses he asserted would support either or both of those claims. This failure was fatal to Mr. Parker’s petition. See *Edwards*, 2012 IL 111711, ¶ 24; *Delton*, 227 Ill. 2d at 255. In these circumstances, the trial court’s denial of leave to file the successive petition was proper.

¶ 29 We note that in the section of his brief discussing counsel’s ineffectiveness for failing to investigate alibi witnesses, Mr. Parker states, in passing, that “[a]nother significant factor was that the evidence through fingerprints and shell casings was never really challenged by the defense counsel.” To the extent that this statement constitutes an argument that counsel was ineffective for failing to request fingerprint testing on shell casings recovered from the crime scene, it is barred by *res judicata*. Mr. Parker raised this exact issue in his first successive postconviction petition, which he was denied leave to file, and we affirmed that judgment on appeal. See *Parker*, No. 1-04-2444 (2005) (unpublished order under Supreme Court Rule 23). Mr. Parker also filed a *pro se* motion for fingerprint testing, which the trial court denied, and we affirmed that judgment. See *Parker*, 2011 IL App (1st) 091724-U. Having been thoroughly

litigated previously, we cannot consider the fingerprint issue again in this appeal. See *Blair*, 215 Ill. 2d at 443-44 (issues decided in earlier proceedings are barred in new postconviction proceedings by the doctrine of *res judicata*).

¶ 30 Mr. Parker's other argument on appeal is that he was sentenced under a statute that was later found to be unconstitutional, and that therefore his sentence is void. Mr. Parker did not raise this contention in his successive postconviction petition. Instead, he is raising it for the first time in this court. Our supreme court has repeatedly held that claims not raised in a postconviction petition are forfeited and may not be raised for the first time on appeal. See, e.g., *People v. Jones*, 213 Ill. 2d 498, 505 (2004); *People v. Jones*, 211 Ill. 2d 140, 148 (2004). Nevertheless, a void judgment may be challenged at any time, either directly or collaterally, and such a challenge is not subject to forfeiture or other procedural restraints. *People v. Price*, 2016 IL 118613, ¶ 30. A judgment will be deemed void in only two circumstances: (1) where it was entered by a court that lacked personal or subject-matter jurisdiction, or (2) where it was based on a statute that is facially unconstitutional and void *ab initio*. *Id.* ¶ 31.

¶ 31 Mr. Parker claims that his consecutive sentences are void because they were imposed upon him pursuant to an unconstitutional statute, namely, section 5-5-3.2 of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.2 (West 1998)). Section 5-5-3.2 was amended in part by Public Act 88-680, also known as the "Safe Neighborhoods Law." See Pub. Act 88-680 (eff. Jan. 1, 1995). The Safe Neighborhoods Law was found unconstitutional by our supreme court in *People v. Cervantes*, 189 Ill. 2d 80 (1999), for violating the single subject clause of the Illinois Constitution.

¶ 32 Mr. Parker is mistaken in his assertion that his sentences were ordered to run consecutively pursuant to section 5-5-3.2 of the Code. His sentences were ordered to run

consecutively pursuant to a completely different statutory provision, section 5-8-4 of the Code. See 730 ILCS 5/5-8-4 (West 1998). As noted by the State in its brief, section 5-8-4 was not created or amended by the Safe Neighborhoods Law (see Pub. Act 88-680 (eff. Jan. 1, 1995)), and therefore, was not implicated by the Safe Neighborhood Law's invalidation by our supreme court (see *Cervantes*, 189 Ill. 2d at 80). Accordingly, Mr. Parker's argument fails.

¶ 33

III. CONCLUSION

¶ 34 In summary, because Mr. Parker failed to attach necessary supporting affidavits to his successive postconviction petition, the trial court's denial of leave to file the petition was proper. The issue of fingerprint testing of shell casings found at the scene of the crime is barred by *res judicata*. Mr. Parker's sentence is not void.

¶ 35 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 36 Affirmed.