

No. 1-10-1650

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 04 CR 3039
)	
VICTOR VELEZ,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Presiding Justice Steele and Justice Neville concurred in the judgment.

ORDER

- ¶ 1 *HELD:* The circuit court's summary dismissal of defendant's *pro se* post-conviction petition is affirmed where the allegations raised in his petition are barred by the doctrine of *res judicata* or otherwise without arguable merit.
- ¶ 2 Defendant Victor Velez appeals from an order of the circuit court summarily dismissing his *pro se* post-conviction petition as frivolous and patently without merit after finding that the allegations raised therein were barred by the doctrine of *res judicata*. On appeal, defendant contends that the circuit court erred in finding the issues barred because the allegations in his petition were not raised on direct appeal. Defendant also contends that the court applied the incorrect legal standard, and that his petition included enough facts, details and supporting

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documentation to establish the gist of a constitutional claim. We affirm.

¶ 3 Following a 2005 jury trial, defendant was convicted of first degree murder based on a theory of accountability for his role in the shooting death of a fellow gang member. The trial court sentenced defendant to 45 years' imprisonment.

¶ 4 On direct appeal, defendant raised six issues. First, he argued that his trial counsel rendered ineffective assistance when he withdrew a motion to suppress defendant's inculpatory statement and failed to file a motion to quash defendant's arrest. Second, defendant argued that he was denied his right to a fair trial when the State impermissibly introduced evidence that he invoked his right to remain silent and his right to an attorney after being advised of his *Miranda* rights. Defendant further argued that his trial counsel was ineffective for allowing admission of this evidence. Third, defendant argued that the trial court erred when it allowed admission of gang-related evidence. Fourth, defendant claimed that he was denied a fair trial due to cumulative errors related to his trial counsel's performance. Defendant argued that counsel failed to effectively cross-examine the State's witnesses, failed to develop a coherent theory of defense, and failed to call codefendant's witnesses. He further asserted that counsel was ignorant of the law as demonstrated by counsel's failure to provide the correct mental state for accountability, and counsel's rendering of incorrect and inconsistent opening and closing remarks. Fifth, defendant argued that the State failed to prove him guilty beyond a reasonable doubt of first degree murder under a theory of accountability because the evidence showed that he did not do anything to aid or abet codefendant in committing the murder, but instead, was merely present at the scene. Finally, defendant argued that his sentence was excessive in light of his limited involvement in the offense, his minor criminal record and his potential for rehabilitation.

¶ 5 This court gave thorough consideration to defendant's arguments and found that they were without merit. Accordingly, we affirmed defendant's conviction and sentence. *People v. Velez*, 388 Ill. App. 3d 493 (2009). The Illinois Supreme Court denied defendant's petition for

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leave to appeal. *People v. Velez*, 232 Ill. 2d 594 (2009). The United States Supreme Court denied defendant's petition for writ of *certiorari*. *Velez v. Illinois*, 130 S. Ct. 418 (2009).

¶ 6 On April 13, 2010, defendant filed the instant *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) raising four allegations. First, defendant alleged that he was denied his rights to effective assistance from his trial counsel, freedom from unlawful seizure, due process and equal protection because trial counsel failed to file a motion to quash his arrest and suppress evidence. Defendant argued that he was under arrest when he was brought to the police station, and that the police had no warrant or probable cause to arrest him at that time. He also claimed that he did not go with the police voluntarily. In support of that claim, defendant attached to his petition his own signed "Declaration" stating that he did not go with them voluntarily. Defendant argued that counsel should have challenged his "illegal arrest" and moved to suppress the evidence obtained therefrom. Defendant noted that on direct appeal, this court prohibited him from using a detective's police report and a police "Investigative Alert" to prove that his arrest was illegal. He argued that as a consequence, his claim on direct appeal that counsel was ineffective for failing to challenge his arrest was decided without the evidentiary record being fully developed, and thus, he is entitled to an evidentiary hearing to prove that he was illegally arrested. In addition, defendant asserted that a motion to quash his arrest and suppress evidence was entirely different from the motion to suppress his statement, which counsel filed then withdrew, and therefore, defendant did not have an opportunity to testify on his own behalf.

¶ 7 In the second claim in his petition, defendant alleged that he was denied his rights to effective assistance of counsel, a fair trial, due process and equal protection because trial counsel failed to object to the introduction and admissibility of his written statement, which was handwritten by Assistant State's Attorney (ASA) Jeanne Bischoff, on the grounds that it was inadmissible under the "completeness doctrine." Defendant noted that Bischoff testified that she

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always writes out statements herself, and that the statement was not a verbatim recitation of what defendant told her. Defendant argued that, under the completeness doctrine, everything he said should have been included in the statement prior to it being published to the jury. Defendant alleged that all exculpatory information was knowingly, deliberately and intentionally excised from the statement through ASA Bischoff's own choice of words. He further claimed that it was the State's burden to bring forth the remainder of the statement which Bischoff chose not to include. In addition, defendant argued that appellate counsel was ineffective for not challenging trial counsel's ineffectiveness regarding this claim on direct appeal.

¶ 8 In his third claim, defendant alleged that he was denied his rights to effective assistance of counsel, a fair trial, freedom from cruel and unusual punishment, due process and equal protection because he was convicted and sentenced under a statute that is unconstitutional as applied to the facts in this case. Defendant did not cite to a statute, but instead, argued that the testimony from two witnesses that they did not see defendant at the crime scene impeached the handwritten statement which said defendant was at the scene acting as a lookout. On that basis, defendant argued that the evidence was insufficient to prove him guilty under a theory of accountability. In addition, defendant claimed that appellate counsel was ineffective for not raising this claim on direct appeal.

¶ 9 In his final claim, defendant alleged that he was denied his rights to effective assistance of counsel, freedom from cruel and unusual punishment, due process and equal protection because his 45-year sentence was greater than sentences imposed upon actual shooters in homicide cases, thereby resulting in an inconsistent application of the law. Defendant did not provide any further information or argument, and requested "a reasonable time period to provide proof to substantiate this claim." In addition to his "Declaration" referenced above, defendant attached to his petition a copy of a police document he refers to as the "Investigative Alert," and two pages of ASA Bischoff's trial testimony where she stated that she always writes out the

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statements herself, and acknowledges that the statement she wrote was not a verbatim recitation of defendant's words.

¶ 10 The circuit court found that all of the allegations in defendant's *pro se* post-conviction petition were barred by the doctrine of *res judicata* because the issues were previously raised on direct appeal. On that basis, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit.

¶ 11 On appeal, defendant contends that the circuit court erred in finding the allegations in his petition barred by *res judicata* because the issues were not raised on direct appeal. Defendant also contends that the court applied the incorrect legal standard, and that his petition included enough facts, details and supporting documentation to establish the gist of a constitutional claim.

¶ 12 We review the circuit court's summary dismissal of defendant's post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *Coleman*, 183 Ill. 2d at 378-79. A *pro se* post-conviction petition need only state the gist of a constitutional claim to survive summary dismissal. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Our supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory. *Id.* A legal theory that is completely contradicted by the record is indisputably meritless. *Id.*

¶ 13 Under plenary review, this court is required to make our own independent assessment of the allegations raised in the post-conviction petition, and we are "free to substitute [our] judgment for that of the circuit court in order to formulate the legally correct answer." *Coleman*, 183 Ill. 2d at 388. This court may affirm the circuit court's dismissal of a post-conviction

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petition on any basis shown in the record. *People v. Davis*, 382 Ill. App. 3d 701, 706 (2008).

¶ 14 A post-conviction petition is not a substitute for a direct appeal, but instead, is a collateral attack upon the conviction that allows only limited review of constitutional claims that could not be raised on direct appeal. *People v. Harris*, 224 Ill. 2d 115, 128 (2007). The doctrine of *res judicata* bars consideration of any issues that were determined on direct appeal, while any issues that could have been raised, but were not, are deemed forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005).

¶ 15 We find that the circuit court's summary dismissal of defendant's *pro se* post-conviction petition was proper because the issues raised in his petition were previously raised on direct appeal, or otherwise have no arguable basis in law or fact. Defendant's first allegation is that his trial counsel rendered ineffective assistance when he failed to file a motion to quash arrest and suppress evidence where the police lacked probable cause to arrest him. He acknowledges that this issue was raised and considered on direct appeal, but contends that his claim has now "dramatically changed" because he included the investigative alert as an exhibit with his petition, which he was prohibited from appending to his brief on direct appeal. See *Velez*, 388 Ill. App. 3d at 504-05, n. 3. Defendant asserts that because he presented additional evidence with his petition in support of his claim, the preclusion doctrines do not apply. We disagree.

¶ 16 As defendant concedes, this exact issue was raised, thoroughly considered and rejected by this court on direct appeal. *Velez*, 388 Ill. App. 3d at 504-05. Then, as now, defendant maintained that he was under arrest at the time he was brought to the police station. This court found that the record showed that defendant voluntarily went to the police station and was not under arrest until after he made an inculpatory statement to the detectives, at which point they had probable cause to arrest him. *Id.* Thus, defendant's allegation is completely contradicted by the record. Contrary to defendant's claim, the investigative alert he attached to his post-conviction petition does not change that determination. An investigative alert, or stop order, is

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merely an internal notification to fellow police officers that an individual is wanted for questioning. *People v. Simpson*, 129 Ill. App. 3d 822, 829 (1984). This court has previously found that the fact that the police relied upon an investigative alert to bring a defendant to the police station is not dispositive of whether probable cause existed to support the defendant's arrest. *Id.* at 830-31.

¶ 17 Moreover, when a defendant claims that he has additional evidence in support of his claim which prevents application of the preclusion doctrines, such evidence must be newly discovered. *People v. Gilliam*, 172 Ill. 2d 484, 506 (1996). Newly discovered evidence is evidence that was not available at the time of the initial proceeding and that defendant could not have discovered any sooner through due diligence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Such evidence must also be material, noncumulative, and of such conclusive character that it would likely change the prior judgment. *Id.* The police department's internal investigative alert is not newly discovered evidence; therefore, it does not preclude the application of *res judicata*. Accordingly, we find that the circuit court was correct when it concluded that this allegation was barred by the doctrine of *res judicata* as it was previously raised on direct appeal.

¶ 18 Defendant's second allegation is that his trial counsel rendered ineffective assistance when he failed to object to the introduction and admissibility of defendant's written statement on the grounds that it was inadmissible under the "completeness doctrine." Defendant argues that this issue was not raised on direct appeal, and thus, the circuit court erred in finding it bared by *res judicata*. Defendant maintains that when ASA Bischoff wrote his statement in her own words, she excluded "all exculpatory matter," which his trial counsel should have brought forth. Defendant has not identified any exculpatory matter that he claims was omitted from his statement. Defendant further asserts that appellate counsel was ineffective because he did not raise this issue on direct appeal.

¶ 19 We find that defendant's allegation is without merit because it is conclusory and lacks

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any factual support. To obtain post-conviction relief, the Act dictates that defendant's petition must "clearly set forth the respects in which petitioner's constitutional rights were violated." 722 ILCS 5/122-2 (West 2010). Thus, nonspecific and nonfactual assertions that amount to mere conclusions are insufficient to require an evidentiary hearing under the Act. *Coleman*, 183 Ill. 2d at 381. Here, the record shows that defendant's entire written statement was published to the jury. Defendant's failure to identify any exculpatory information that was omitted from his statement renders his claim insufficient for relief as it lacks an arguable factual basis. It therefore follows that defendant's conclusory assertion that his appellate counsel rendered ineffective assistance when he failed to raise this issue on direct appeal also fails because defendant has not shown that the underlying issue was meritorious. *People v. Barrow*, 195 Ill. 2d 506, 523 (2001).

¶ 20 Defendant's third allegation in his post-conviction petition is that his trial counsel rendered ineffective assistance because defendant was convicted and sentenced under a statute that is unconstitutional as applied to the facts in this case. He then argued that the evidence was insufficient to prove him guilty beyond a reasonable doubt under a theory of accountability because the witnesses' testimony that they did not see him at the crime scene impeached his written statement which said he was there acting as a lookout. Defendant concedes that this issue was raised, considered and rejected on direct appeal, but argues that the issue was not considered in light of his allegedly incomplete statement, as argued above. Defendant also claims that his appellate counsel was ineffective for not raising this issue on direct appeal.

¶ 21 We find absolutely no merit in defendant's claim. The issue of the sufficiency of the evidence was thoroughly addressed by this court on direct appeal. *Velez*, 388 Ill. App. 3d at 511-14. Consequently, his claim is barred by the doctrine of *res judicata*. Moreover, the Act is not a forum for the redetermination of defendant's guilt or innocence. *People v. Rogers*, 197 Ill. 2d 216, 221 (2001). It has long been established that a challenge to the sufficiency of the evidence

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does not pose a constitutional question, and thus, is not proper in a post-conviction proceeding. *People v. Dunn*, 52 Ill. 2d 400, 402 (1972). Defendant's attempt to rephrase this as an ineffective assistance of trial counsel claim is not persuasive. In addition, his challenge to appellate counsel's effectiveness is belied by the record which shows that this issue was raised on appeal. Accordingly, the circuit court's dismissal of this claim as barred by *res judicata* was proper.

¶ 22 Finally, defendant alleged in his post-conviction petition that he was denied his rights to effective assistance of counsel, freedom from cruel and unusual punishment, due process and equal protection because his 45-year sentence was greater than sentences imposed upon actual shooters in homicide cases, thereby resulting in an inconsistent application of the law.

Defendant did not provide any further information or argument, and requested "a reasonable time period to provide proof to substantiate this claim." Defendant now argues that the circuit court erred in finding this claim barred by *res judicata* because it is different than the excessive sentence issue he raised on direct appeal.

¶ 23 We acknowledge that the allegation raised in his petition differs from the issue addressed on direct appeal. Nevertheless, under our *de novo* review, we find that the circuit court's dismissal of this allegation was proper. Again, defendant's allegation is conclusory, speculative, and lacks any factual support. Accordingly, we find that this allegation fails to meet the pleading requirements of the Act because it lacks any arguable basis in law or fact.

¶ 24 For these reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's *pro se* post-conviction petition as frivolous and patently without merit.

¶ 25 Affirmed.