Nos. 1-08-1874 & 1-08-1890
Consolidated

**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).

**SIXTH DIVISION**
January 28, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | Nos. 04 CR 23123 |
| | ) | 05 CR 16624 |
| | ) | |
| RONALD MANGAYAO, | ) | Honorable |
| | ) | Thomas Tucker, & |
| | ) | Marjorie C. Laws, |
| Defendant-Appellant. | ) | Judges Presiding. |

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PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justices Cahill and McBride concurred in the judgment.

**O R D E R**

*HELD:* When the ineffective assistance of counsel claims raised in defendant's postconviction petitions were barred by *res judicata* and lacked factual support, the circuit court properly dismissed the petitions. Additionally, a defendant may not raise an issue on appeal that was not raised in the postconviction petition filed in the circuit court.

Defendant Ronald Mangayao appeals from the summary dismissal of his petitions for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)). He contends the circuit court erred in dismissing his petitions when his right to effective assistance of counsel was violated by defense counsel's failure to advise him that his sentences would be served consecutively and to investigate mitigating evidence. Defendant also contends that the trial court failed to sufficiently admonish him regarding the terms of mandatory supervised release (MSR) he would be required to serve upon his release from prison. We affirm.

In April 2006, defendant pleaded guilty in Case 04-CR-23123 to four counts of the delivery of a controlled substance and to one count of the delivery of cannabis in exchange for concurrent sentences of seven years for each delivery of a controlled substance conviction and five years for the delivery of cannabis.

During the plea hearing, defense counsel stated that the instant plea agreement was contingent on acceptance of the plea agreement in Case 05-CR-16624. Counsel indicated that the other agreement was "for a consecutive seven-year term on a Class 1 felony." The assistant State's Attorney stated that any sentence imposed in that case would be consecutive to the sentence imposed in Case 04-CR-23123. The court then sentenced defendant and admonished him that upon his release from prison, he would "be

placed on a period of three years of mandatory supervised release, which is a form of parole."

In Case 05-CR-16624, defendant pleaded guilty to four counts of the delivery of a controlled substance and to one count of the delivery of cannabis in exchange for concurrent sentences of seven years for each delivery of a controlled substance conviction and five years for the delivery of cannabis.

Before accepting defendant's plea, the trial court asked defendant whether he understood English. Defendant answered in the affirmative. The assistant State's Attorney then explained that the sentence imposed in the instant case would be consecutive to the seven-year sentence imposed in Case 04-CR-23123. The court then asked defense counsel and defendant if that was their understanding. Both men agreed that it was.

The court then admonished defendant regarding the possible prison terms related to each charge and the term of MSR he would serve upon his release from prison. Defendant indicated that he understood the possible penalties and wished to enter a guilty plea. The following colloquy occurred:

> THE COURT: "because you plead guilty on Monday before another court, this sentence will run consecutive to that sentence. The reason is for cause. When you were arrested on that other

> case you were not supposed to be re-arrested on a second case. *** Do you understand?
>
> DEFENDANT: Yes, your Honor.
>
> THE COURT: So, therefore, you will serve the sentence on the '04 case, finish it, and then you have to serve the sentence on this case. It's what we call a consecutive sentence. Do you understand?
>
> DEFENDANT: Yes, your Honor."

After sentencing defendant, the court reiterated that the sentences imposed the instant case would be served concurrent to each other and consecutive to the sentence imposed in Case 04-CR-23123.

The record reflects that the trial court subsequently denied defendant's *pro se* motion to withdraw his plea and vacate the judgment in Case 04-CR-23123 as untimely. Defendant also filed a *pro se* motion requesting that counsel be appointed in order to file a motion to withdraw the guilty plea and vacate the judgment in Case 05-CR-16624. The motion was granted and appointed counsel subsequently filed a motion to withdraw the guilty plea. The motion argued that defendant should be allowed to withdraw his plea because he erroneously believed that his sentence in

Case 05-CR-16624 was to be served concurrently with the sentence imposed in Case 04-CR-23123. The motion further argued that because defendant was not a native English speaker, and an interpreter was never utilized during the case, his plea was unknowing.

Attached to the motion was defendant's affidavit, in English, in which he averred that he informed defense counsel that he would only plead guilty if his sentences were concurrent. Counsel responded that the sentences would be concurrent to each other. Defendant further averred that he had an identical conversation with defense counsel's associate on the day that he entered his plea in Case 05-CR-16624, and was again assured that his sentences would be concurrent. Defendant finally averred that had he known that the sentences were consecutive, he would not have entered a plea in Case 05-CR-16624.

A hearing was held on the motion. Defendant testified that he was born in the Philippines, his native language was Tagalog, and he had lived in the United States for 14-and-a-half years. When he moved to America, he attended courses in English as a Second Language (ESL), then graduated from high school and completed two years of college. When he discussed possible sentences in his case with defense counsel and counsel's associate, he understood that the two sentences were to be

"simultaneous." The record reflects that defendant testified in English, although a Tagalog interpreter was present in court.

At this point, the court continued the hearing in order for appointed counsel to amend the motion to include defendant's claim of ineffective assistance of counsel.

When the hearing reconvened, defendant testified that defense counsel told him to accept the plea bargain, otherwise he might receive a more severe sentence. Defense counsel also told defendant that the sentences in his two cases would be "concurrently served." Defendant asserted that he told both defense counsel and counsel's associate that he would not make a plea bargain in either case unless the sentences were concurrent.

Defense counsel testified that he communicated with defendant in English, and defendant never requested an interpreter. He denied telling defendant that the sentences in the two cases would be served concurrently. When explaining the sentences to defendant, he drew a chart to clarify that defendant would serve the sentence on the first case and then serve the sentence on the second.

The court denied the motion to withdraw the plea and vacate the judgment. The court held that it did not believe that defendant had a problem communicating, such that an interpreter was warranted. The court also noted that defendant had appeared before it numerous times without ever requesting an interpreter.

The court then highlighted the transcript of defendant's plea when the court made it "as elementary as possible" when explaining to defendant what consecutive meant. The court finally indicated that it did not believe that defense counsel or his associate told defendant that the sentences were to be served concurrently, and, even had that occurred, defendant was afforded the opportunity to ask about the nature of the sentences during each plea hearing, and did not do so. Defendant did not appeal the denial of the motion.

In March 2008, defendant filed postconviction petitions alleging that he received ineffective assistance of counsel in each case when defense counsel failed to investigate mitigating evidence and advised defendant that his sentences would be concurrent with each other. The petition further alleged that defendant would not have pleaded guilty if counsel had advised him that the sentences in the two cases would be served consecutive to each other.

Attached to each petition were identical copies of defendant's affidavit which averred that defendant did not question defense counsel's ability to represent him because of his limited understanding of the English language. Defendant also averred that defense counsel investigated the case "half heartedly." He finally averred that he told defense counsel he would only plead guilty if his two sentences would be served at

the same time and that defense counsel assured him that they would be.

Both petitions were summarily dismissed as frivolous and patently without merit.

This court first notes that the State argues defendant has violated Supreme Court Rule 341(h)(6) (eff. July 1, 2008), in each of these consolidated cases by providing two statements of fact without any citations to the record on appeal, including facts not of record, and making arguments in the statements of fact. Accordingly, the State moves this court to strike those portions of defendant's briefs. Although defendant's statements of fact do not contain any citations, this deficiency did not hamper our review of merits of this case, as the State provided a statement of fact that properly cited to the record on appeal and this court reviewed the record on appeal. Accordingly, we decline to strike defendant's statements of fact in their entirety. We will, however, disregard any statements of fact not supported by the record and any improper argument.

Defendant contends that the trial court erred in summarily dismissing his postconviction petitions because defense counsel's erroneous advice that his sentences would be concurrent and failure to investigate mitigating evidence constituted ineffective assistance of counsel.

The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2008). The scope of a postconviction proceeding is limited to constitutional matters that have not been, and could not have been, previously adjudicated; issues that could have been raised on direct appeal, but were not, are procedurally defaulted and issues that were previously decided by a reviewing court are barred by the doctrine of *res judicata*. *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007); see also *People v. Scott*, 194 Ill. 2d 268, 274 (2000) (rulings on issues that were raised before the trial court or on direct appeal are *res judicata*, and issues that could have been raised in an earlier proceeding but were not are generally waived).

At the first stage of a postconviction proceeding, a defendant files a petition and the circuit court determines whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). "Unless positively rebutted by the record, all well-pled facts [in the petition] are taken as true at this stage. *People v. Montgomery*, 327 Ill. App. 3d 180, 183-84 (2001).

To survive summary dismissal, a defendant need only present a limited amount of detail in the petition (*People v. Delton*, 227 Ill. 2d 247, 254 (2008)), but the allegations must be supported

by affidavits, records, or other evidence, or the defendant must explain why such corroborating evidence is not attached. 725 ILCS 5/122-2 (West 2008). The purpose of this requirement is to show that the defendant's allegations are capable of being independently or objectively corroborated. *Delton*, 227 Ill. 2d at 254. Accordingly, the affidavits or other documents that accompany the petition must identify "with reasonable certainty the sources, character, and availability of the alleged evidence" supporting the petition. *Delton*, 227 Ill. 2d at 254. The failure to attach supporting documentation or explain its absence is fatal to the petition and warrants summary dismissal. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). We review the summary dismissal of a postconviction petition *de novo*. *Delton*, 227 Ill. 2d at 255.

Here, the record reveals that defendant's motion to withdraw the guilty plea and vacate the judgment in Case 05-CR-16624 alleged that defense counsel was ineffective when counsel informed defendant that his sentences in the two cases were to be served concurrently rather than consecutive to each other. After hearing the testimony of both defendant and defense counsel, the trial court indicated that it did not believe that defense counsel told defendant that the sentences were to be served concurrently and denied the motion. Defendant did not appeal. As this issue was raised before the trial court, the trial

court's ruling on this issue is *res judicata* for the purposes of the instant proceeding. *Scott*, 194 Ill. 2d at 274.

Defendant also contends that defense counsel's failure to investigate mitigating evidence constituted ineffective assistance. However, defendant provided no affidavits or other documentation which identified or explained the mitigating evidence that counsel allegedly failed to investigate.

This court finds *Delton* instructive. There, the defendant alleged his counsel's failure to interview all possible witnesses constituted ineffective assistance of counsel when someone living near the crime scene could have seen or heard what had happened. *Delton*, 227 Ill. 2d at 258. The defendant did not, however, allege that such a person actually existed. *Delton*, 227 Ill. 2d at 258. Our supreme court affirmed the summary dismissal of that defendant's *pro se* postconviction petition, finding, among other things, that the defendant's allegation was too broad and conclusory to support an ineffective assistance claim under the Act. *Delton*, 227 Ill. 2d at 258.

In the case at bar, defendant has provided no factual support for his claim that counsel's alleged failure to investigate mitigating evidence constituted ineffective assistance. Summary dismissal was proper when defendant failed to support his petitions with an affidavit or other evidence showing that, had trial counsel investigated further, counsel

would have discovered actual mitigating evidence. *Delton*, 227 Ill. 2d at 258. As in *Delton*, here, defendant's claim is a "broad conclusory allegation" and cannot support an ineffective assistance claim under the Act. *Delton*, 227 Ill. 2d at 258.

Defendant finally contends that the trial court failed to sufficiently admonish him regarding the MSR terms that he will be required to serve upon his release from prison. However, as the State highlights, defendant did not raise this issue in either of his postconviction petitions. Therefore, he cannot raise it for the first time on appeal. See *People v. Petrenko*, 237 Ill. 2d 490, 502 (2010) (any issues to be reviewed on appeal must be raised in the petition that is filed in the circuit court; a defendant may not raise an issue for the first time when the matter is on review).

Accordingly, the judgment of the circuit court of Cook County is Affirmed.

Affirmed.