

No. 1-09-3340

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. 00 CR 15501 |
| |) | |
| ANTHONY DONELSON, |) | Honorable |
| |) | Kevin M. Sheehan, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

HELD: The trial court properly dismissed defendant's *pro se* postconviction petition as frivolous and patently without merit because his claim was barred by *res judicata*.

Defendant Anthony Donelson appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He contends the trial court erred in dismissing his petition because his allegation that he was denied effective assistance of counsel because counsel failed to impeach a police officer with the testimony of defendant's mother had an arguable basis in fact and law. We affirm.

The evidence at defendant's jury trial established that defendant repeatedly stabbed the victim, Maynard Speed, during a struggle and that the victim died as a result of his wounds. Defendant's theory at trial was that he was coerced into confessing and that Detective Ron Lewis told him what to say in his videotaped statement. Defendant testified that Lewis had assisted his mother when she was the victim of a robbery, but denied that Lewis brought his mother food. Lewis then testified in rebuttal that he did not tell defendant what to say and that he had previously assisted defendant's mother and other senior citizens when they were the victims of crimes by obtaining food for them. The jury ultimately convicted defendant of first degree murder.

At the sentencing hearing, defendant's mother Linda Colquitt testified that Lewis investigated an incident where she was robbed at a currency exchange, but denied that Lewis provided her with food. The trial court ultimately sentenced defendant to 45 years in prison.

On appeal, this court affirmed defendant's conviction and sentence. See *People v. Donelson*, No. 1-06-1380 (2008) (unpublished order under Supreme Court Rule 23). In so doing, this court rejected defendant's claim that his trial counsel was ineffective because of a failure to present the testimony of Colquitt in order to impeach Lewis. This court determined that because the record reflected that defendant admitted that Lewis helped his mother when she was the victim of robbery, but denied that Lewis brought her food, Colquitt's testimony would only have impeached Lewis on a collateral point. *Donelson*, No. 1-06-1380, Order at 11.

In September 2009 defendant filed the instant *pro se* postconviction petition alleging, *inter alia*, that he was denied effective assistance of counsel because counsel failed to call Colquitt to testify at trial. Defendant argued that Colquitt would testify that Lewis did not bring her food after she was the victim of a crime, thereby impeaching Lewis and causing the court to view the evidence differently. He acknowledged that this claim was raised on direct appeal, but

contended that rules of waiver and *res judicata* should be relaxed because this allegation was supported by an item, Colquitt's affidavit, not included in the original trial record.

Attached to the petition was the affidavit of Colquitt, in which she averred that Lewis did not provide her with food after she was the victim of a robbery, and, if she had been allowed to testify at trial the court would have viewed the evidence in a "completely different light"

The trial court subsequently dismissed the petition as frivolous and patently without merit. The court noted that defendant raised the claim that his trial counsel was ineffective for a failure to call Colquitt to testify in order to impeach Lewis on direct appeal, and, as a consequence, the doctrine of *res judicata* barred defendant from raising this issue again in a postconviction proceeding.

On appeal, defendant contends that the trial court erroneously dismissed his petition as barred by *res judicata* when Colquitt's affidavit was not included in the record on direct appeal and claims that rest on matters *de hors* the record are best suited to a collateral proceeding. The State admits that Colquitt's affidavit was not part of the record on direct appeal but contends that this claim is nonetheless barred by *res judicata* because the affidavit simply restated Colquitt's testimony from the sentencing hearing.

The scope of a postconviction proceeding is limited to constitutional matters that have not been, and could not have been, previously adjudicated. *People v. Harris*, 224 Ill. 2d 115, 124 (2007). Issues that were considered by the court on direct appeal are barred by the doctrine of *res judicata* and issues that could have been considered on direct appeal are procedurally defaulted. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). A trial court may summarily dismiss a petition as frivolous and patently without merit at the first stage of a proceeding under the Act based upon both *res judicata* and procedural default. *People v. Blair*, 215 Ill. 2d 427, 442 (2005).

On direct appeal, defendant contended that trial counsel was ineffective when counsel did not use Colquitt to impeach Lewis on the issue of whether he provided her with food after she was the victim of a crime. This court determined that because defendant admitted that Lewis assisted his mother testimony which stated this assistance did not include food would have only collaterally impeached Lewis, thus, counsel's decision not to present this testimony did not constitute ineffective assistance. *Donelson*, No. 1-06-1380, Order at 11-12. This determination is *res judicata*. *Ligon*, 239 Ill. 2d at 103. Accordingly, the trial court properly dismissed defendant's *pro se* postconviction petition as frivolous and patently without merit. *Blair*, 215 Ill. 2d at 442.

Although defendant highlights the fact that Colquitt's affidavit was not included in the record on direct appeal, he ignores the fact that the content of said affidavit, the assertion that Lewis did not provide Colquitt with food after she was the victim of a crime, was included in that record. At defendant's sentencing hearing, Colquitt testified that Lewis investigated after she had been the victim of a robbery and denied that he had provided her with food. Because the content of the affidavit restated Colquitt's testimony from the sentencing hearing, the information supporting this claim was not, contrary to defendant's assertion, *de hors* the record. See, e.g., *People v. Richardson*, 401 Ill. App. 3d 45, 48 (2010) (when information not of record is critical to a defendant's claim, that claim must be raised in a collateral proceeding).

Accordingly, because this court considered this issue on direct appeal defendant is barred by the doctrine of *res judicata* from raising it the instant postconviction proceeding. *Harris*, 224 Ill. 2d at 124-25. The trial court properly dismissed his petition as frivolous and patently without merit.

The judgment of the trial court is affirmed.

Affirmed.