

No. 1-10-1811

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 3807
)	
DAVID SAPP,)	Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Murphy concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant was barred by the doctrine of *res judicata* from relitigating his claim that the evidence was insufficient to prove that he was guilty of murder under a theory of accountability, the circuit court's dismissal of his *pro se* postconviction petition was affirmed.

¶ 2 David Sapp, the defendant, 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). On appeal, defendant contends that his trial and appellate counsel were ineffective for failing to argue that the evidence was insufficient to support a finding of guilt based on a theory of accountability. He also contends that his rights to procedural and substantive due process were violated. We affirm.

¶ 3 Following simultaneous but severed bench trials, defendant and codefendant Warren Hardy, along with codefendant Halik Williams, were found guilty of first degree murder based on the theory of accountability in connection with an incident on September 5, 1999, where the victim, Anthony King, died from being electrocuted on the Morse Street "L" tracks in Chicago.

¶ 4 As relevant to this appeal, the evidence at trial revealed that the victim's death occurred during a confrontation between two rival gangs: the Vice Lords and the Gangster Disciples (GDs). The victim was with fellow Vice Lords, Jonathan Lejman (a.k.a "White C"), Dennis Myles, and Dwayne Johnson, at the Morse L stop. Defendant and two other GD friends, Williams and Lawrence Brooks, were driving around the area when Williams noticed the Vice Lords on the L platform. Defendant and Williams got out of the car, and, when they reached the platform, they approached the Vice Lords. Defendant stated that they were Vice Lord killers, and, when the confrontation escalated, defendant called down to Hardy, a GD member who was on the street, and yelled, "[w]e got us one on the platform." When Hardy reached the platform, the victim was running toward him and defendant yelled "grab him, get him." Hardy grabbed the victim and they both fell onto the L tracks. Once on the tracks, Hardy punched the victim and pushed him into the tracks resulting in the victim's electrocution. Defendant and his fellow Gds fled the scene. The trial court found defendant accountable for the murder of the victim based on the common design rule. He was subsequently convicted of first degree murder and sentenced to 25 years' imprisonment.

¶ 5 On appeal from that conviction, defendant contended that he was improperly convicted of first degree murder under a theory of accountability. He specifically alleged that the accountability statute cannot be used to hold a defendant criminally liable for the unsolicited criminal acts of others, that the evidence was insufficient to prove that he either knew or appreciated the danger of electrocution, and that death by electrocution from the third rail, which was unique to the Chicago Transit Authority, is not a natural and probable consequence of an intended battery. Defendant also

argued that an intended battery cannot serve as a common design for murder. *People v. Hardy and Sapp*, Nos. 1-02-3675, 1-03-0944 cons., order at 5 (2004) (unpublished order under Supreme Court Rule 23).

¶ 6 This court rejected defendant's contentions and affirmed the judgment of the trial court. In doing so, this court held that defendant shared a common criminal design with the group that engaged in violence in that he not only was present during the crime, but actively devised and initiated the encounter with the victim and his friends. *Sapp*, Nos. 1-02-3675, 1-03-0944 cons., order at 8. The court further held that although defendant's common design may have been to commit a battery on the victim, he is accountable for the resulting murder of the victim under the common design rule which provides that any act committed by one party in furtherance of the common design is considered to be the act of all parties. *Sapp*, Nos. 1-02-3675, 1-03-0944 cons., order at 9.

¶ 7 On July 28, 2008, defendant filed a *pro se* postconviction petition alleging that trial counsel was ineffective for failing to argue to the court that convicting him of first degree murder under a theory of accountability would be improper because he did not intend to kill the victim, and that death by electrocution from the third rail is not a natural and probable consequence of an intended battery. Defendant further argued that appellate counsel was ineffective for not raising these claims on appeal. On October 8, 2008, the circuit court summarily dismissed the petition as frivolous and patently without merit. In doing so, the circuit court stated that defendant's allegations were raised by his attorney on direct appeal, and the appellate court rejected them finding that his murder conviction based on a theory of accountability was proper.

¶ 8 In this appeal from the order dismissing defendant's postconviction petition, the defendant contends that his trial and appellate counsel were ineffective for failing to argue that the evidence was insufficient to support a finding of guilt based on a theory of accountability. He specifically maintains that the evidence was insufficient to convict him of first degree murder because he did not

have the intent to promote or facilitate the murder. Defendant asks this court to find, as a matter of law, that he is innocent and to order his immediate release from custody.

¶ 9 In response, the State asserts that defendant's claim is barred by *res judicata*. An appeal from a first-stage dismissal, as in this case, is reviewed *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 10 A postconviction proceeding is a collateral attack on the prior conviction or sentence that does not relitigate a defendant's innocence or guilt. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). Therefore, any issues considered by the court on direct appeal are barred by the doctrine of *res judicata*. *Ligon*, 239 Ill. 2d at 103.

¶ 11 Here, defendant, on direct appeal, expressly contested the sufficiency of the evidence, asserting that he was improperly convicted of first degree murder under a theory of accountability. *Sapp*, Nos. 1-02-3675, 1-03-0944 cons., order at 5. This court already decided that the evidence presented at defendant's trial was more than sufficient to support a finding of guilt based on a theory of accountability. *Sapp*, Nos. 1-02-3675, 1-03-0944 cons., order at 8-10. Defendant now argues in his postconviction petition that trial and appellate counsel were ineffective for failing to argue that the evidence was insufficient to support a finding of guilt based on a theory of accountability. We find no appreciable difference between the postconviction petition claim, and the claim raised on direct appeal; and, accordingly, find that his present claim is barred by *res judicata*. See *People v. Flores*, 153 Ill. 2d 264, 277-78 (1992) (holding that a petitioner cannot obtain relief under the Act by rephrasing issues which were previously addressed, in constitutional terms, such as ineffective assistance of counsel); see also *People v. Barrow*, 195 Ill. 2d 506, 522 (2001) (a mere change in phraseology does not warrant reconsideration of the issue). Accordingly, we find that the trial court did not err in dismissing his first-stage postconviction proceeding.

¶ 12 We also note that in the "Issues Presented" section of defendant's brief, he stated a second issue for our review, *i.e.*, that his Fifth Amendment right to procedural and substantive due process

was violated. Defendant, however, has provided no argument for that issue. Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008), specifically states that "[p]oints not argued are waived." Defendant has thus forfeited our review of this argument. See *People v. Lacy*, 407 Ill. App. 3d 442, 459 (2011) (defendant forfeited his claim where he offered no support for it and did not develop his argument further than a one-sentence statement).

¶ 13 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 14 Affirmed.