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2011 IL App (3d) 090672-U

Order filed October 5, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3--09--0672
v.	)	Circuit No. 93--CF--912
	)	
RENE MARTINEZ,	)	Honorable
	)	Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices Lytton and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court's order summarily dismissing the defendant's post-conviction petition at the first stage was correct. The petition failed to sufficiently state the gist of a constitutional claim where the issues raised in the petition were barred by the doctrines of waiver and *res judicata*.

¶ 2 The defendant, Rene Martinez, was found guilty of first degree murder and sentenced to a 60-year term of imprisonment. This court reversed his conviction and granted him a new trial. *People v. Martinez*, 347 Ill. App. 3d 1001 (2004). On retrial, he was again found guilty of first degree murder and sentenced to 60 years in prison. This court affirmed the conviction and

sentence. *People v. Martinez*, No. 3--06--0323 (October 21, 2008) (unpublished decision pursuant to Supreme Court Rule 23). On April 23, 2009, the defendant filed a *pro se* post-conviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-2.1 *et seq.* (West 2008)). On July 13, 2009, the circuit court summarily dismissed the defendant's petition as being frivolous and patently without merit. On appeal, the defendant contends that the circuit court erred in summarily dismissing his petition where he set forth the gist of meritorious claims that: (1) his right to due process was violated where the State offered perjured testimony by a key witness and affirmed the false testimony in closing argument; and (2) he received ineffective assistance of counsel based upon counsel's failure to call witnesses who would have contradicted the State's evidence and corroborated his testimony.

¶ 3 On appeal, a trial court's summary dismissal of a post-conviction petition is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998). At the first stage of the post-conviction process, the defendant's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A *pro se* post-conviction petition may only be summarily dismissed as the first stage if the trial court determines that the petition is frivolous and patently without merit. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). A petition is frivolous and patently without merit only if it has no arguable basis either in law or fact. *People v. Hodges*, 234 Ill. 2d. 1, 11-12 (2009). A petition lacks an arguable basis either in law or fact when it is based upon an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations include those which are fantastic or delusional, while an example of an indisputably meritless legal theory is one which is completely contradicted by the record. *Id.*

¶ 4 The State contends that the defendant's petition was properly dismissed because it was barred by the doctrines of waiver and *res judicata*. We agree. It is well settled that all issues actually decided on direct appeal are barred from being raised in a post-conviction petition by the doctrine of *res judicata*, and all issues that could have been raised in the direct appeal, but were not, are waived. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). Where *res judicata* and waiver preclude a defendant from obtaining relief, such a claim will necessarily be frivolous and patently without merit. *People v. Anderson*, 375 Ill. App. 3d 990, 1000 (2007). In the instant matter, the issues raised in the post-conviction petition either were raised or could have been raised in the direct appeal.

¶ 5 At defendant's trial, Manuel Garcia, testifying for the State, told the jury that he, the defendant, and another individual, were together when the defendant shot and killed Leonard Myers during a gang-related car chase in November 1992. Garcia admitted that he was testifying against the defendant in exchange for the State's agreement to reduce the charge against him regarding Myers's death from first degree murder to aggravated discharge of a firearm. Garcia stated that, pursuant to the agreement, he received a 21-year sentence for the reduced charge of aggravated discharge of a firearm. He further testified that, at the time he was sentenced on this charge, he was serving a prison sentence on a different conviction. He then testified that the 21-year sentence would be served in such a way that his "out date" from prison would be the same as for the previous conviction.

¶ 6 On cross-examination, defense counsel elicited testimony clarifying Garcia's agreement with the State: The offense for which the defendant was on trial, Myers's death, occurred in 1992. Garcia and the defendant were arrested for Myers's death and charged with first degree

murder in March 1993. The charges were subsequently dropped against both Garcia and the defendant. In 1995, Garcia was convicted of aggravated battery with a firearm in an unrelated shooting and sentenced to 21 years in prison. In 2002, while Garcia was still serving the sentence on the unrelated conviction, he was approached by prosecutors with a proposed agreement to testify against the defendant regarding Myers's death. In exchange for truthful testimony, Garcia would plead guilty to aggravated discharge of a firearm in Myers's death and receive a sentence that would not result in him serving any additional time beyond the 21-year sentence he was already serving. In addition, the prosecutors agreed to recommend to the U.S. Immigration Service that Garcia not be deported to Mexico when he was released from prison. Garcia testified that he agreed to those terms in exchange for his testimony against the defendant. Garcia was paroled in early 2005.

¶ 7 The record reflects that the defendant was indicted in 2003 for Myers's murder, but was not arrested on the indictment until sometime in 2005, when he was about to be released from prison after serving sentence for an unrelated conviction.

¶ 8 The defendant maintains in his post-conviction petition that Garcia's testimony that he received a 21-year sentence for his part in Myers's death was perjured testimony which denied him his constitutional right to a fair trial. The defendant calculates that Garcia served no more than four years for the conviction related to Myers's death. He maintains, therefore, that Garcia

lied when he testified that he received a 31-year sentence for his part in Myers's death.<sup>1</sup> We find that the defendant has waived this argument by failing to raise it in his direct appeal.

¶ 9 In the direct appeal, the defendant maintained that the evidence was insufficient to support his conviction beyond a reasonable doubt, relying heavily upon the lack of credibility of Garcia's testimony and the generosity of his deal with the State. Although the defendant did not characterize his attack on Garcia's testimony in terms of perjury, it is clear from the record that such a claim could have been raised in the direct appeal. This claim could have been raised in the direct appeal following the trial, and the failure to raise it in the direct appeal constitutes waiver of the claim and properly warrants summary dismissal of the post-conviction petition. *Anderson*, 375 Ill. App. 3d at 1001.

¶ 10 The defendant also maintains in his post-conviction petition that his trial counsel was ineffective for not calling Fred Stepney and Willie DeLira to testify. This claim is also frivolous and patently without merit. In the direct appeal, the defendant claimed ineffective assistance of counsel based upon the failure of his trial counsel to call Stepney as a witness. This court rejected that argument in the direct appeal and, thus, the claim is barred from a post-conviction

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<sup>1</sup> The State maintains that Garcia did not commit perjury in his testimony since it was quite clear to the jury from the testimony elicited during cross-examination that Garcia actually served only approximately four years for his role in Myers's death, and it was also clear that he received no additional time over the time served for the unrelated crime. Thus, the State maintains, the post-conviction claim of a constitutional deprivation has no arguable basis in either law or fact. If we did not find the claim frivolous and patently without merit on the basis of waiver, we would find the State's argument compelling.

petition based upon the doctrine of *res judicata*. *Blair*, 215 Ill. 2d at 433. As to the alleged ineffectiveness in failing to call DeLira as witness, although this claim was not raised in the direct appeal, the defendant makes no argument as to why it could not have been raised in the direct appeal. As we find that the defendant could have raised this claim in the direct appeal, his failure to do so constitutes a waiver of this claim and properly warrants summary dismissal of his post-conviction petition. *Anderson*, 375 Ill. App. 3d at 1001.

¶ 11 For the foregoing reasons, we find that the defendant's post-conviction petition was properly dismissed for failure to state the gist of a meritorious claim. Accordingly, we affirm the order of the circuit court of Will County.

¶ 12 Affirmed.