

No. 1-10-1813

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. 02 CR 10176
)	
HAROLD PHILLIPS,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defendant did not state the gist of a claim of ineffective assistance of trial or appellate counsel, the circuit court's judgment was affirmed; where the mittimus must be amended to reflect a conviction of three counts of felony murder, the judgment was modified.
- ¶ 2 Defendant Harold Phillips 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 2010). On appeal, defendant contends that he was provided ineffective assistance of appellate counsel for failing to argue that the State did not prove him guilty beyond a reasonable doubt of knowingly

setting a house fire. Defendant also contends that trial counsel was ineffective for failing to investigate evidence showing that someone else may have started the fire. Defendant finally maintains that his mittimus must be corrected to accurately reflect that he was convicted of three counts of felony murder. We affirm as modified.

¶ 3 On March 22, 2002, a residence located at 2442 West 25th Street in Chicago became engulfed in flames and the fire resulted in the death of three children, *i.e.*, Frankie Ramos, Erica Ramos, and Samantha Cruz. Defendant was arrested and charged with various crimes in connection with the fatal fire. Following a jury trial, defendant was convicted of first degree felony murder and aggravated arson and was sentenced to natural life and 30 years' imprisonment, respectively, the sentences to be served consecutively.

¶ 4 As relevant to the case at bar, the evidence at the jury trial showed that in March 2002, Elzy Ramos lived on the second floor of 2442 West 25th Street with several people, including her three children. On March 21, 2002, Elzy testified that she exited her residence at about 11:40 p.m., leaving her children in the care of her mother and sister. When she returned in the early morning of March 22, she saw that her residence had been burned and later discovered that her children had died as a result of injuries sustained in a fire.

¶ 5 David Bingenheimer, defendant's former roommate, testified that during the evening hours of March 21, 2002, he and defendant were drinking beer in their residence, which was a coach house in the rear of the property at 2448 West 24th Place. Bingenheimer admitted that he snorted cocaine that same day. After defendant and Bingenheimer got into a fight that evening, defendant left the residence carrying a container that resembled an antifreeze bottle. Bingenheimer conceded that the handwritten statement he provided to investigators did not mention this fact. Defendant returned about 20 to 30 minutes later and told Bingenheimer that he lit a garbage can on fire using gasoline. Pablo Alvarez, who lived in the building in front of the

coach house where Bingenheimer and defendant resided, also testified that defendant told him he lit a garbage can on fire. Bingenheimer walked to the scene of the fire and, following a discussion he had with Detective O'Meara, they went looking for defendant. Detective O'Meara and Bingenheimer located defendant, and O'Meara placed defendant into the squad car where he again admitted to Bingenheimer that he lit a garbage can on fire.

¶ 6 Detective Timothy O'Meara testified that he drove defendant back to the scene of the fire where defendant retraced his steps and showed him how he started the fire using a garbage can. Subsequently, O'Meara and several other officers began examining the debris at the crime scene looking for evidence to corroborate defendant's statements regarding how he set the fire. O'Meara did not find evidence of a melted garbage can, but when investigators removed the debris, he smelled an odor similar to gasoline and took a debris sample, which tested positive for the presence of gasoline.

¶ 7 Supervising Fire Marshall Timothy Corcoran testified similarly to Detective O'Meara regarding the examination of the debris at the crime scene. He further testified that based on his examination of the scene, he concluded that the fire was the result of the splashing or pouring of ignitable liquid with a smell that was similar to gasoline, and that the only logical ignition source was an open flame. Corcoran indicated that the fire was intentional, but acknowledged that no gasoline can or any other accelerant container was found at the scene. In response to questions regarding his familiarity with a report completed by bomb and arson investigators concluding that the fire originated in the second-floor rear enclosed porch, Corcoran noted that he was unfamiliar with that report and revealed that he did not agree with that conclusion.

¶ 8 Detective Greg Swiderek testified that after informing defendant of his *Miranda* rights, defendant agreed to speak with him about the fire. Defendant explained that at about 8 p.m. on March 21, 2002, he began drinking and watching movies with his roommate David

Bingenheimer and another friend. Bingenheimer and defendant had a physical confrontation, after which defendant left the residence. Defendant indicated that because he was mad at Bingenheimer he wanted to burn a garbage can. He found a garbage can behind the 2442 West 25th Street building and dragged it closer to the rear of the building. He attempted to ignite a fire in the can, but was unsuccessful because it was windy. Defendant again moved the garbage can until it was located between the 2442 and 2440 buildings and used a cigarette lighter to ignite a piece of cardboard in the garbage can. As the fire grew, defendant became scared and ran away. On his way back to his residence, he saw Alvarez and told him that he set a garbage can on fire. Alvarez ordered defendant to leave, and, after defendant complied, he saw fire engines and smoke, which he believed stemmed from the fire he started. Defendant subsequently memorialized his statement on videotape. He further specified in his videotaped statement that he did not want the residence to catch fire and indicated that it was an accident.

¶ 9 Defense counsel presented no evidence and both parties rested. The jury found defendant guilty of aggravated arson and three counts of first degree felony murder. On direct appeal, we affirmed defendant's conviction and sentence for felony murder and vacated his conviction and sentence for aggravated arson. *People v. Phillips*, 383 Ill. App. 3d 521 (2008).

¶ 10 On March 12, 2010, defendant filed a *pro se* post-conviction petition alleging, in pertinent part, that appellate counsel was ineffective for failing to argue that the State failed to prove him guilty beyond a reasonable. He also alleged that trial counsel was ineffective for failing to investigate exculpatory evidence that suggested someone else committed the arson. To support his second contention, defendant attached two articles to his petition. The article dated March 23, 2002, noted that Gloria Ramos, Elzy's sister, stated that two months prior to the incident, Elzy's minivan was set on fire after Elzy got into an argument with a man in the neighborhood. A second article, dated March 25, 2002, stated that police were exploring

possible links between defendant and a string of recent arsons in Little Village, including incidents where Elzy's van was set on fire, and a car in the alley behind the Ramos' residence was set on fire. On May 20, 2010, the trial court summarily dismissed defendant's petition finding it frivolous and patently without merit.

¶ 11 On appeal from that dismissal, defendant first contends that his appellate counsel was ineffective. He specifically maintains that it was arguable that appellate counsel was ineffective for failing to assert that the State did not prove him guilty beyond a reasonable doubt of knowingly setting the Ramos' residence on fire. The State maintains that this claim is no more than reargument of his issues on appeal, and thus asserts that defendant's claim is barred by the doctrine of *res judicata*. We review the circuit court's dismissal of defendant's petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 12 Defendant may not obtain relief under the Act by merely rephrasing a previously addressed issue in constitutional terms. *People v. Flores*, 153 Ill. 2d 264, 277-78 (1992); see also *People v. Barrow*, 195 Ill. 2d 506, 522 (2001) (commenting that a mere change in phraseology does not warrant reconsideration of the issue). We find that defendant's post-conviction allegation merely rephrases an issue already decided on direct appeal.

¶ 13 In the instant appeal, defendant claims that appellate counsel should have argued that the State failed to prove the requisite mental state for aggravated arson, which was the predicate felony for the murders. The offense of aggravated arson requires proof that defendant "knowingly" damaged a building or structure by means of fire or explosive when he knew, or reasonably should have known, that one or more persons were present therein. 720 ILCS 5/20-1.1 (West 2002).

¶ 14 On direct appeal, defendant contended that his repeated statements that he started a fire in a garbage can provided evidence of reckless conduct, and, accordingly, an instruction on the

lesser-included offense of criminal damage to property was warranted. This court, however, rejected defendant's argument and held that "defendant's confession reveals that he started the fire knowingly and deliberately, negating any contention that the fire was caused by mere recklessness." *Phillips*, 383 Ill. App. 3d at 543. We further held that the State presented evidence that defendant actually started the fire by igniting gasoline on the rear wall of the residence, "which was clearly a deliberate and knowing act." *Phillips*, 383 Ill. App. 3d at 543. Regarding the ultimate verdict, we held that "there is no basis upon which the jury rationally could have acquitted him of the charged offense of aggravated arson and convicted him of criminal damage to property because there was no evidence that defendant acted recklessly when he admitted to deliberately starting the fire." *Phillips*, 383 Ill. App. 3d at 543-44. Based on the parties' arguments and this court's findings on direct appeal, we find no appreciable differences in his ineffective assistance of appellate counsel claim for counsel's failure to seek an instruction for the offense of criminal damage to property, and the proposed reasonable doubt claim he now asserts to avoid the application of *res judicata*.

¶ 15 In his reply brief, defendant challenges that conclusion and asserts that the issue before this court now and the issue raised on direct appeal are not *identical*. However, as stated above, defendant simply rephrased his argument on direct appeal, and such action does not preclude the affects of *res judicata*. *Flores*, 153 Ill. 2d at 277; *Barrow*, 195 Ill. 2d at 522. We further reject defendant's argument in his reply brief that we should relax the rule of *res judicata* because the forfeiture stems from the ineffective assistance of appellate counsel. See *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005) (holding that the restrictions on *res judicata* and forfeiture on a post-conviction petition may be waived where the forfeiture stems from ineffective assistance of appellate counsel). Here, however, appellate counsel did in fact address the same issue, albeit in

different terms, that defendant now raises in his post-conviction petition. Therefore, the relaxation of the rule of *res judicata* does not apply.

¶ 16 Defendant next contends that his trial counsel was ineffective for failing to investigate or present evidence that someone else may have started the house fire. Defendant specifically asserts that trial counsel should have investigated Gloria Ramos' statement that her sister Elzy's minivan was set on fire two months before the house fire, and that a car was set on fire behind the Ramos' residence two weeks before the house fire.

¶ 17 The dismissal of a petition is appropriate at the first stage of post-conviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a defendant to overcome dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is a low threshold. *Hodges*, 234 Ill. 2d at 9-10. Nevertheless, a defendant is still required to support the allegations in his petition with affidavits, records or other evidence, or explain their absence. 725 ILCS 5/122-2 (West 2010); *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). The failure to attach the required documents or explain their absence justifies the summary dismissal of a *pro se* petition. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 18 Here, although defendant attached "other evidence" in support of his allegations, his petition was nevertheless deficient because he failed to support his claim with any evidence regarding the fires that predated the house fire in question. Defendant only attached two newspaper articles that stated fires were set to Elzy's minivan and a car behind the Ramos' residence prior to the house fire. Defendant's unsupported conclusory allegation that someone else set fire to the Ramos residence because an unknown individual had been setting other fires

in the area is insufficient to require further proceedings under the Act. *People v. Jackson*, 213 Ill. App. 3d 806, 811 (1991).

¶ 19 More significantly, we find defendant's petition failed to state the gist of a claim of ineffective assistance of counsel. Specifically, a defendant alleging ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 20 Strategic decisions made after thorough investigation of the law and facts relevant to plausible options are "virtually unchallengeable." *People v. Harris*, 206 Ill. 2d 1, 55-56 (2002), citing *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). Moreover, there is a strong presumption that counsel's conduct falls within the range of reasonable assistance. *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007). Here, there is no indication that counsel failed to investigate any matter pertinent to this case. The record is void of any evidence that someone other than defendant set the fire in question. In fact, defendant admitted, on several occasions, to setting the house fire. Defendant's contention now that the previous fires in the area may have been set by an unknown individual who also set the fire in question is a fanciful factual allegation that is not supported by the evidence.

¶ 21 Moreover, defendant cannot demonstrate arguable prejudice because there is no indication that an investigation into the previous fires in the area would have been exculpatory in any way. In fact, as the State points out in its brief on appeal, the articles defendant attached to his petition actually implicate himself as the person who set these previous fires in the area. The articles specifically refer to defendant as a "firebug" and "a man who police said has a reputation for setting fires in the Little Village neighborhood." The articles further stated that police were exploring possible links between defendant and a string of arsons in Little Village, including car fires set by an unknown arsonist.

¶ 22 Defendant finally contends, and the State agrees, that defendant's mittimus should be corrected to reflect the actual offenses of which he was convicted with the correct statutory citation. The record shows that defendant was convicted of three counts of felony murder predicated on aggravated arson (counts 7, 9, 11), as well as one count of aggravated arson. On direct appeal, this court vacated defendant's conviction and sentence for aggravated arson. *Phillips*, 383 Ill. App. 3d at 552-53. A new mittimus was issued, but it incorrectly showed that defendant was convicted of intentional murder under section 9-1(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(a)(1) (West 2002)), and lists the conviction as count 1. Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we correct the mittimus to accurately reflect defendant's conviction of three counts of felony murder (counts 7, 9, 11) under section 9-1(a)(3) of the Code (720 ILCS 5/9-1(a)(3) (West 2002)). *People v. Blakney*, 375 Ill. App. 3d 554, 560 (2007).

¶ 23 For the foregoing reasons, we correct defendant's mittimus to accurately reflect that he was convicted of three counts of felony murder, and affirm the judgment of the circuit court in all other respects.

¶ 24 Affirmed; mittimus corrected.