

No. 1-11-0657

**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).

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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.	)	
	)	No. 03 CR 2090
DAMON GOODLOE,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Dennis J. Porter,
	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice McBride and Justice Taylor concurred in the judgment.

**ORDER**

**HELD:** Trial court's summary dismissal of defendant's *pro se* post-conviction petition was proper when the issue of ineffective assistance of trial counsel was barred by *res judicata* and waiver; ineffective assistance of post-trial

counsel raised for first time on appeal is waived.

¶ 1 Following a jury trial, defendant Damon Goodloe was convicted of first degree murder and was subsequently sentenced to a 30-year prison term. Defendant's conviction and sentence was affirmed on direct appeal. *People v. Goodloe*, No. 1-07-1095 (2009) (unpublished order under Supreme Court Rule 23). On appeal, he contends the trial court erred in summarily dismissing his *pro se* post-conviction petition because it included an "arguable" claim of ineffective assistance of trial counsel for failure to investigate and call three witnesses whose testimony would have provided an "innocent alternative" to the State's theory of the case. For the following reasons, we affirm.

## ¶ 2 BACKGROUND

¶ 3 Briefly stated, the evidence presented at trial established that on December 24, 2002, Pierre Jones was shot in the early morning hours near the 11300 block of South Edbrooke Avenue in Chicago. When police arrived at the scene, they were directed to an alley where the victim was lying on the ground. Chicago Police Officer Bialota asked the victim who shot him and he replied "Damon shot me." The victim further stated that the shooter was wearing a "black hoodie." Police searched the area and less than two minutes later, stopped defendant at 114th Street and Prairie Avenue. Defendant was wearing a black hoodie under a jacket when he was stopped. Defendant initially told the police that his name was "Mario," but showed identification bearing the name Damon Goodloe. Defendant was taken back to the scene where the victim identified him as the shooter. The victim subsequently died as a result of his wounds. Gunshot residue tests performed three hours after defendant's arrest revealed that defendant had

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discharged a firearm, contacted an item with gunshot residue or had been in the environment of a discharging weapon. The jury subsequently convicted defendant of first degree murder but found him not guilty of personally discharging a firearm.

¶ 4 During defendant's allocution, he made an oral motion alleging ineffective assistance of trial counsel and a hearing was held on defendant's *pro se* claims. The trial court held a *Krankel* hearing, inquiring as to the nature of defendant's claims and allowing trial counsel the opportunity to respond. Trial counsel also filed a verbal motion to withdraw. The trial court allowed trial counsel to withdraw and appointed counsel at that time so that defendant's allegations could be investigated and developed more fully. Appointed counsel filed a new written motion alleging that trial counsel was ineffective for failing to sufficiently investigate the case, namely investigate certain witnesses: Maceo Lee, McKinley and Aunt Becky, and for failure to properly impeach one of the State's witnesses, Lovett. The trial court held a hearing on defendant's motion for new trial, where both defendant and his trial counsel testified. Defendant admitted that he had not given his trial counsel full names or proper contact information for the proffered witnesses. Additionally, defendant's trial counsel testified that Lee was never indicated as a potential witness by defendant but was named in the police reports, and he declined to interview him after reading his statements and determining that he was not an alibi witness and would only serve to place defendant near the location of the shooting.

¶ 5 The trial court denied defendant's motion, finding that counsel's actions related to investigating possible witnesses for whom defendant was unable to provide contact information or whose names were never provided to trial counsel and the decision on how to impeach Lovett

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were all trial strategy decisions. The court concluded that defendant failed to show unreasonable representation or prejudice from trial counsel's representation. Defendant was subsequently sentenced to a 30-year prison term.

¶ 6 On direct appeal, defendant argued that the victim's show up identification was inadmissible hearsay, that both his initial statement and show up identification violated the confrontation clause, that the trial court erred in instructing the jury on accountability and transferred intent, and that trial counsel was ineffective for failing to properly impeach Lovett. This court affirmed defendant's conviction and sentence. *People v. Goodloe*, No. 1-07-1095 (2009) (unpublished order under Supreme Court Rule 23).

¶ 7 On November 24, 2010, defendant mailed a *pro se* post-conviction petition to the circuit court, alleging that his trial counsel was ineffective for failing to investigate and call three witnesses, namely Maceo Lee, Shana Young and Algeron McKinley. He attached affidavits from Lee and Young averring that defendant's trial counsel never contacted them, that defendant was in the neighborhood because he drove Lee home, went to his uncle McKinley's house to use the bathroom, and left on foot to meet his girlfriend Young on 114th Street and Calumet Avenue. Defendant also included his own affidavit that he was unable to reach McKinley but indicated the substance of McKinley's testimony. The trial court summarily dismissed defendant's petition in a written order as frivolous and patently without merit on February 10, 2011. The court found defendant's petition to be meritless because none of the proffered witnesses could provide an alibi for defendant at the precise time of the shooting and because defendant had a personal relationship with each of the proffered witnesses. This timely appeal followed.

¶ 8 ANALYSIS

¶ 9 On appeal, defendant contends the trial court erred in summarily dismissing his *pro se* post-conviction petition because it included an "arguable" claim of ineffective assistance of trial counsel for failure to investigate and call three witnesses whose testimony would have provided an "innocent alternative" to the State's theory of the case. Additionally, in his brief on appeal, defendant contends for the first time that post-trial counsel was ineffective for failing to call the witnesses to testify at the hearing on his motion for new trial.

¶ 10 A post-conviction proceeding is not an appeal of the underlying judgment but rather, a collateral proceeding where the defendant may challenge a conviction or sentence for violations of constitutional rights. *People v. Burns*, 332 Ill. App. 3d 189, 190 (2001). The Post-Conviction Hearing Act (Act) creates a three stage procedure for post-conviction relief. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). At stage one, the trial court, without input from the State, examines the petition to determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2010). If the petition is not dismissed at stage one, it proceeds to stage two, where section 122-4 of the Act provides for the appointment of counsel for an indigent defendant. 725 ILCS 5/122-4 (West 2010). At stage two, the State has the opportunity to either answer or move to dismiss the petition (725 ILCS 5/122-5 (West 2010)), and the trial court determines whether the petition makes a substantial showing of a constitutional violation. *Makiel*, 358 Ill. App. 3d at 104. If the petition is not dismissed at stage two, it proceeds to stage three, where the trial court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2010).

¶ 11 In the present case, defendant's petition was dismissed at stage one. Our review of a trial

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court's dismissal of defendant's post-conviction petition without an evidentiary hearing is *de novo*. *Burns*, 332 Ill. App. 3d at 191. Any claim of substantial denial of constitutional rights that was not raised in the original or in an amended petition is waived. 725 ILCS 5/122-3 (West 2010). Issues that were decided on direct appeal are barred by the doctrine of *res judicata* and issues that could have been raised on direct appeal, but were not, are deemed waived. *Makiel*, 358 Ill. App. 3d at 105.

¶ 12 Here, defendant contends that his trial counsel was ineffective for failing to investigate and call three witnesses who could have challenged the State's theory of the case. We note that defendant initially raised allegations of ineffective assistance of counsel during his oral statements made during allocution, indicating that his trial counsel essentially neglected his case and failed to investigate possible witnesses, for which he received a *Krankel* hearing. Following the *Krankel* hearing, appointed counsel submitted a new written motion for new trial, alleging ineffective assistance for failing to investigate the case and for improperly impeaching one of the State's witnesses. As indicated previously, defendant attached affidavits from Lee and Young to his post-conviction petition averring that defendant's trial counsel never contacted them, that defendant was in the neighborhood because he drove Lee home, went to his uncle McKinley's house to use the bathroom, and left on foot to meet his girlfriend Young on 114th Street and Calumet Avenue. Defendant also included his own affidavit that he was unable to reach McKinley but indicated the substance of McKinley's testimony. In his post-conviction petition, defendant alleged that trial counsel was ineffective for failing to investigate three witnesses, two of which were addressed during the post-trial proceedings (Lee and McKinley). Trial counsel

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cannot be deemed ineffective for failing to investigate witnesses because the affidavits do not provide an alibi for defendant and in fact, such testimony might have been damaging to defendant's theory of the case. See *People v. Williams*, 147 Ill. 2d 173, 245 (1991) (incompetence is not indicated where defendant can point to no potentially favorable testimony the witnesses might offer). Moreover, we find that the issue of trial counsel's ineffectiveness for failing to investigate Lee and McKinley is precluded by *res judicata* as it was already decided during the post-trial hearing. *People v. Cummings*, 375 Ill. App. 3d 513, 518 (2007) (a claim is barred by *res judicata* if it has been previously raised and decided). Although this is a different basis from that relied upon by the trial court in its ruling, we may affirm the trial court on any basis supported by the record. *People v. Dinelli*, 217 Ill.2 d 387, 403 (2005).

¶ 13 With regard to defendant's allegation of trial counsel's ineffectiveness based on the failure to investigate defendant's girlfriend, we find that it is forfeited or waived as it is an issue that could have been raised during the post-trial proceedings or on direct appeal, but was not, and is therefore barred. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). Defendant could have raised the issue of trial counsel's failure to investigate his girlfriend as a witness during the initial post-trial proceedings, but did not. Nor was the issue raised in the revised motion for new trial by appointed counsel, or on direct appeal. Defendant was cognizant during the post-trial proceedings and on direct appeal that his girlfriend was a potential witness who was not called. Additionally, defendant's allegations in the post-conviction petition and the statements in his girlfriend's affidavit attached to his petition indicate that she was not with defendant when he was in the area of the shooting, thus she would not have been an alibi witness. It follows then that

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counsel was not ineffective for failing to call a witness who could not contribute to the defense theory of the case and whose testimony was not exculpatory. See *People v. Broughton*, 344 Ill. App. 3d 232, 239 (2003). Accordingly, we conclude that the issue of trial counsel's ineffectiveness for failure to investigate and call defendant's girlfriend as a witness is waived and the summary dismissal of this issue in defendant's post-conviction petition was proper. As with the previous issue, although the trial court summarily dismissed defendant's post-conviction petition on a different basis, we may affirm on any basis supported by the record. *Dinelli*, 217 Ill. 2d at 403.

¶ 14 Likewise, we find that defendant's argument that appointed post-trial counsel was ineffective for failure to investigate and call those witnesses at the post-trial hearing, made for the first time in his brief before this court, is waived because the issue was not raised in his post-conviction petition. 725 ILCS 5/122-3 (West 2010). Our supreme court has held that claims not raised in a defendant's post-conviction petition may not be raised for the first time on appeal from the trial court's dismissal of that petition. *People v. Jones*, 213 Ill. 2d 498, 504 (2004); see also *People v. Cole*, 2012 IL App (1st) 102499, ¶13. Thus this issue is waived.

¶ 15 Accordingly, we conclude that defendant's *pro se* post-conviction petition was properly dismissed at the first stage as his allegations of ineffective assistance of counsel are barred by *res judicata* or waiver.

#### ¶ 16 CONCLUSION

¶ 17 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 18 Affirmed.