

SECOND DIVISION
AUGUST 14, 2012

No. 1-11-2263

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. 06 CR 18135
)	
RAUL GOMEZ,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's summary dismissal of the defendant's postconviction petition was appropriate where the petition failed to set forth the manner in which the defendant's constitutional rights were violated by his trial counsel's alleged ineffectiveness, the sentence imposed was not void, and other issues were precluded by *res judicata*.

¶ 2 Defendant Raul Gomez appeals from the circuit court order summarily dismissing his postconviction petition. On appeal, the defendant contends that first-stage dismissal of his petition was improper where the petition made a showing of ineffective assistance of trial counsel for counsel's failure to introduce exculpatory photographic evidence in support of the defendant's self-defense theory. He also contends his sentence for attempted murder exceeded statutory limits, and that trial errors precluded his right to present a defense. We affirm.

¶ 3 Following a jury trial, the defendant was found guilty of the first-degree murder of Rafael

Trujillo and attempted first-degree murder of Luis Aguirre. The court sentenced the defendant to consecutive prison terms of 50 years for first-degree murder and 40 years for attempted first-degree murder.

¶ 4 The trial testimony revealed that the crimes occurred in front of Aguirre's home on South Talman Avenue in Chicago.¹ During the summer of 2005, Aguirre's next-door neighbor, Pedro "Guero" Tuscano (Guero), a teenager, had been inviting young people to his own house to congregate and to drink on his property and the property of neighbors. Aguirre testified that Guero's visitors would congregate on Aguirre's property, urinate, and leave their liquor bottles in his bushes. In the early morning hours of October 9, 2005, Aguirre and his friend Trujillo returned to Aguirre's home in Trujillo's Dodge Durango after attending a birthday party and found Guero's friends on Aguirre's porch, Guero's porch, and around the area. Trujillo double-parked his Durango in front of Aguirre's house, leaving the keys in the ignition with the engine running. Aguirre saw a number of males and females gathered around his stairs and porch, laughing, drinking, and getting loud. He told them in a loud voice to leave. Then he returned to the Durango to retrieve the keys because he was concerned someone would try to take the vehicle. Aguirre yelled and swore at the group of people. The defendant, whom Aguirre had never seen before, walked up to Aguirre, stared at him, and asked if Aguirre knew who he was. Aguirre asked him his name and what his problem was, and told him to get off the property. The defendant turned to the gangway between Aguirre's and Guero's homes, put a gun against Aguirre's chest, and fired. Aguirre fell to the ground, after which he heard additional shots and heard Trujillo moan each time he was hit. Aguirre and Trujillo were unarmed during the confrontation, and Aguirre did not see anyone else with a gun.

¶ 5 Guero testified that some of the people in the group were his friends but others, including the

¹The defendant has not included the trial court record in the record on appeal. The facts presented here are from our opinion in the defendant's direct appeal, *People v. Gomez*, 402 Ill. App. 3d 945 (2010).

defendant, were not. Guero left his house that evening and when he returned from his car, he saw Aguirre and the defendant arguing. They were about three feet apart, and Aguirre was pointing his finger at the defendant. Guero could not hear what they were saying. Trujillo was standing behind Aguirre and was trying to defend Aguirre. Guero never saw Aguirre return to Trujillo's Durango or grab the defendant by the arm. Guero saw Edgar Serrano try to intervene by pushing the defendant and trying to calm him. The defendant pushed Edgar out of the way, drew a pistol, and fired at Aguirre and then at Trujillo.

¶ 6 Jose Moreno testified that from where he was sitting in his car, he saw several men, including the defendant, Aguirre, Trujillo, and Jesse "Baby" Medina in a confrontation. The defendant and Aguirre were less than five feet apart. As Moreno started to exit his car, he heard gunshots. He did not see Aguirre or Trujillo holding a weapon at any time during the confrontation.

¶ 7 Erica Lujano testified that she, her friend Marie Sell, her sister Amy, her cousin Sabrina Aponte, and the defendant were "hanging out" in front of a house. A Dodge Durango pulled up in front of the house and two men exited. They approached the house and asked the defendant why he was "disrespecting" in front of their house. The defendant replied, "[I]t's fine. We'll leave." Lujano and the other women went to Marie's car while the defendant picked up beer from the porch and stairs. Lujano stated: "I saw when Sabrina was standing by the door, and I looked, I glanced back and I saw the guy with the long hair ran to his truck and Sabrina said get in the car, [defendant], watch it." The man then reached into the car. After he did so, Lujano did not recall seeing anything in the man's hands. Aguirre and Trujillo appeared drunk and the two men were moving their arms about as they argued with the defendant and Medina.

¶ 8 The State's eyewitnesses testified that the defendant was between three and five feet from the victims when he shot them.

¶ 9 During trial, defense counsel moved *in limine* to prevent the State from cross-examining an anticipated defense witness, Sabrina Aponte, about a telephone call she received before trial in which

a female voice conveyed a threat to Aponte's life, allegedly originating from the defendant. The court ruled that if Aponte's trial testimony differed from her testimony before the grand jury, the State would be permitted to cross-examine her about the phone call to explain her change in testimony. Following that ruling, the defense decided not to call Aponte as a witness.

¶ 10 The defendant testified on his own behalf. He was at Guero's house with his fiancée, Sabrina Aponte, Erica Lujano and two other women when a Dodge Durango double-parked in front. Jesse Medina handed the defendant a firearm and suggested that the defendant watch the Durango. The defendant told Sabrina to watch out. Two men got out of the Durango and Trujillo, the driver, was yelling and cursing. The defendant told them to calm down, and that he and his friends were leaving. He told the women to get in the car. As the defendant was collecting the beer, Trujillo and Aguirre complained about people coming onto Aguirre's property and making a mess. Then Sabrina left the car and told the defendant to "watch out," and that one of the men was "getting something." The defendant testified that he saw Aguirre in the passenger side of the Durango "under the passenger seat." Someone mentioned the police, but Aguirre said he did not need the police. The defendant testified, "I went back to ask Luis and them what are you on. I had grabbed the firearm out of my waistband and I pointed it at them, like man put your hands up, man, what you all on, we leaving, you know. Calm down." Then Aguirre "reached for his back behind his jacket and I shot him." The defendant aimed at Aguirre's chest. The defendant testified that he did not see a gun but was "not going to wait to see it and get shot." Aguirre never threatened him, but the defendant took Aguirre's "motions" as a threat. The defendant's attention then turned to Trujillo, whom he saw coming toward him and "reaching for his shirt." The defendant opened fire on Trujillo. After the first shot, the defendant held onto the trigger because Trujillo kept coming at him, so he continued to fire as Trujillo fell to the ground. The defendant testified that he "felt like they were pulling a gun" on him. Based on Aguirre's trip to the Durango and the victims' motions of reaching into their shirts, coupled with his experiences of "growing up in the city" and having been shot previously, the defendant

believed they were pulling guns and he shot first.

¶ 11 The jury, which was instructed on both self-defense and second-degree murder premised on imperfect self-defense, returned verdicts of guilty on the murder and attempted murder charges. Following denial of the defendant's posttrial motion, the court sentenced him to 50 years in prison for the first-degree murder of Trujillo and a consecutive prison term of 40 years for the attempted murder of Aguirre.

¶ 12 On direct appeal, the defendant raised several claims but did not challenge the sufficiency of the trial evidence or the sentence imposed. This court affirmed the judgment of the circuit court. *People v. Gomez*, 402 Ill. App. 3d 945 (2010). One of the claims the defendant raised in that appeal was that the circuit court erred in refusing to bar the State's cross-examination of Sabrina Aponte about the alleged threat on her life. *Id.* at 953-55. The defendant claimed that Aponte would have testified that when Aguirre went to Trujillo's vehicle, Sabrina warned the defendant that Aguirre had grabbed something from the car. *Id.* at 954. We held that this claim of error was defeated by the fact the defendant chose not to call Aponte as a defense witness. *Id.* We noted that the defendant himself had testified about Aponte's warning and that similar testimony was developed through Erica Lujano's testimony. *Id.* We also held that the circuit court did not err in refusing to give a jury instruction on second degree murder based on provocation resulting from aggressive and threatening conduct of Aguirre and Trujillo. *Id.* at 959. Our holding on this issue was based in part on our determination that the category of serious provocation advanced by the defendant was not recognizable under Illinois law, and in part on the fact that the defendant did not present even slight evidence to support such an instruction. *Id.* at 957-59.

¶ 13 On May 24, 2011, the defendant, represented by counsel, filed in the circuit court a petition seeking relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). The petition asserted in pertinent part:

"Trial counsel was ineffective for failing to present relevant

evidence which would have corroborated the petitioner's position and belied that of the [S]tate when trial counsel failed to produce and introduce the crime scene photo which clearly showed the keys in the ignition of the decedent's vehicle. Per the affidavit of the petitioner attached, this photo was shown to him by counsel some weeks prior to trial and corroborated the reasonable belief that the decedent [*sic*] was moving to his vehicle for reasons other than retrieving his keys from the ignition."

Attached to the petition was the defendant's affidavit which stated, *inter alia*, that prior to trial his retained trial attorney showed him a crime scene photo depicting the keys in the ignition of the vehicle, but his attorney "never introduced the photo in my defense to support my position at trial."

¶ 14 The defendant's postconviction petition also asserted that the circuit court denied the defendant a fair trial and due process by: (1) erroneously denying the defendant's motion *in limine* to bar testimony of a threat to Sabrina Aponte; (2) excluding a jury instruction on second-degree murder based on passion and provocation; and (3) improperly imposing an extended consecutive sentence for attempted murder. On June 30, 2011, the circuit court summarily dismissed the defendant's postconviction petition as frivolous and patently without merit.

¶ 15 On appeal, the defendant's first assignment of error is that his trial counsel was ineffective in failing to submit in evidence a photograph of keys in the ignition of Trujillo's vehicle that the defendant contends would have bolstered his claim of self-defense.

¶ 16 A circuit court may summarily dismiss a postconviction petition if it determines that the petition is "frivolous and patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2004); *People v. Cathey*, 2012 IL 111746, ¶ 17. A petition brought pursuant to the Act is considered frivolous or patently without merit only if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in law when it is grounded in "an indisputably

meritless legal theory," for example, a legal theory which is completely contradicted by the record. *Id.* A petition lacks an arguable basis in fact when it is based on a "fanciful factual allegation." *Id.* at 16-17. The petition may not consist of nonfactual and nonspecific assertions that amount merely to conclusions that errors occurred at trial. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 54. Rather, the petition must "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2004). The petition must also "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.'" *People v. Delton*, 227 Ill. 2d 247, 253 (2008). We review *de novo* the circuit court's summary dismissal of a postconviction petition at the first stage. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 17 A claim of ineffective assistance of counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing of deficient performance by counsel and resulting prejudice to the the defendant. *Cathey*, 2012 IL 111746, ¶ 23. At the first stage of postconviction proceedings, a petition may not be summarily dismissed if it is arguable that (1) counsel's performance fell below an objective standard of reasonableness, and (2) the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 18 The defendant's claim fails because he has not demonstrated how it has any basis in law or in fact. On *de novo* review, we consider, without deference to the trial court's decision, "those issues the appellant has clearly defined and supported with cohesive arguments and citation to pertinent authority." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 79. The defendant's theory of defense at trial was self-defense. A person is justified in the use of force in self-defense against another that is intended or likely to cause death or great bodily harm when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another or the commission of a forcible felony. 720 ILCS 5/7-1 (West 2004); *People v. Salas*, 2011 IL App (1st) 091880, ¶ 84. The defendant has failed to explain, either in his postconviction petition or on appeal, how a photograph depicting the ignition key of Trujillo's vehicle in the ignition after the shooting would

have supported his claim of self-defense.

¶ 19 The defendant's petition claimed that "the decedent" (Trujillo) was moving to his vehicle "for reasons other than retrieving his keys from the ignition." The defendant asserts that the fact that the key had not been removed from the ignition supported his claim that the decedent actually went to the vehicle for another purpose. The facts as set out in our opinion on direct appeal indicate that Trujillo did not go to his vehicle. Aguirre testified at trial that he went to the vehicle to remove the ignition key. The ignition photo would have been relevant to a self-defense claim only if there was some evidence that Aguirre had actually armed himself at the vehicle. The defendant's claim, that the presence of the ignition key in the vehicle was proof that a victim went to the vehicle to get a gun, was conjectural and irrelevant to any self-defense claim since no evidence was adduced at trial that either Aguirre or Trujillo had a weapon. As we noted in the defendant's direct appeal, Erica Lujano testified that she saw one of the victims run to the Durango and heard Sabrina Aponte tell the defendant to "watch it." However, Lujano also testified that she did not see anything in Aguirre's hands after he reached into the vehicle. Other witnesses testified that neither victim had a gun. Where neither Aguirre nor Trujillo was armed, where no gun was found on either victim or shown to have been in the Durango, where Lujano did not recall seeing anything in Aguirre's hands after he reached into the vehicle, and where the defendant never claimed during his own trial testimony to have seen a weapon in the hands of either victim, his claim that the ignition photo would support his self-defense theory was fanciful and had no basis in fact. Moreover, it does not overcome the evidence in the record positively rebutting his self-defense claim as a matter of law. We conclude that the defendant's trial counsel was not ineffective for failing to offer the photograph of the Durango's ignition in evidence.

¶ 20 We also note that the defendant's petition lacked the corroboration required by the Act. The defendant was represented by counsel who prepared his postconviction petition. But even a *pro se* petition "must set forth some facts which can be corroborated and are objective in nature or contain

some explanation as to why those facts are absent.' " *Hodges*, 234 Ill. 2d at 10 (quoting *Delton*, 227 Ill. 2d at 254-55). The affidavits and exhibits which accompany a petition must identify with reasonable certainty the sources, character and availability of the alleged evidence supporting the petition's allegations. *Delton*, 227 Ill. 2d at 254. The defendant's affidavit in support of his petition asserted that prior to trial his trial counsel had shown him a "crime scene photo which displayed the keys in the ignition of the decedent's vehicle." However, he failed to attach the photograph or a reproduction of it or otherwise explain why it was not attached to the petition.

¶ 21 The defendant also alleges that two errors occurred during his trial. He contends that the circuit court erred in denying his motion *in limine* to prevent the State from cross-examining Sabrina Aponte about a telephone threat she received before trial, and in failing to instruct the jury on self-defense based on provocation. The defendant raised these identical issues in his direct appeal and they were addressed and ruled on by this court, which found no error. Postconviction petitions are subject to the doctrine of *res judicata*, which bars consideration of issues that previously have been raised and decided on direct appeal. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). The procedural factor of *res judicata* is sufficient to justify a first-stage dismissal of a postconviction petition. *Id.* at 456. Consequently, those claims of error, which this court rejected on direct appeal, could not be raised again in the defendant's postconviction petition.

¶ 22 Finally, the defendant asserts that his sentence, consecutive terms of 50 years for murder and 40 years for attempted murder, was void. He contends that the relevant sentencing statute provided that an extended term was permitted only for the most serious offense for which he was convicted (here, murder), and that the 40-year sentence for attempted murder, a Class X felony, exceeded the 6-to-30-year range for that offense. The State responds that the defendant has forfeited this issue by failing to raise it on direct appeal. However, a sentence that violates a statutory requirement is void (*People v. Arna*, 168 Ill. 2d 107, 113 (1995)) and may be challenged at any time (*People v. Flowers*, 208 Ill. 2d 291, 308 (2004)).

¶ 23 We agree with the State, however, that the sentence imposed for attempted first-degree murder was not an extended sentence and did not violate the statutory sentencing scheme. The defendant's argument is premised on his claim that attempted murder is a Class X offense and that the penalty for a Class X offense is a range of 6 to 30 years in prison. He concludes that a sentence of more than 30 years for attempted murder is an impermissible extended sentence. When the defendant was sentenced on August 5, 2008, the sentencing statute provided in pertinent part that "*except as otherwise provided in the statute defining the offense*, for a Class X felony, the sentence shall be not less than 6 years and not more than 30 years." (Emphasis added.) 730 ILCS 5/5-8-1(a)(3) (West 2008). The sentencing provision of the statute defining the offense of attempt states in pertinent part:

"(1) the sentence for attempt to commit first degree murder
is the sentence for a Class X felony, except that

* * *

(D) an attempt to commit first degree murder during
which the person personally discharged a firearm that
proximately caused great bodily harm, permanent disability,
permanent disfigurement or death to another person, is a
Class X felony for which 25 years or up to a term of natural
life shall be added to the term of imprisonment imposed by
the court." 720 ILCS 5/8-4(c)(1) (West 2008).

¶ 24 Subsection (1)(D) was applicable under the facts of this case. Consequently, the minimum sentence the circuit court was authorized to impose on the murder count was not less than 31 years, and the maximum sentence was 30 years plus a mandatory additional "25 years or up to a term of natural life" in prison. The term actually imposed, 40 years, was well within the permissible range. Consequently, the sentence imposed was not void.

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

¶ 26 Affirmed.