

NOTICE

Decision filed 10/03/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 110399-U
NO. 5-11-0399
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Massac County.
)	
v.)	No. 07-CF-94
)	
MARLON GREG PEPPERS,)	Honorable
)	Joseph Jackson,
Defendant-Appellant.)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Justices Stewart and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: Postconviction relief was not available for the defendant where the claims upon which he sought relief were barred by the doctrine of *res judicata*.

¶ 2 The defendant, Marlon Greg Peppers, appeals the circuit court's dismissal of his *pro se* petition for postconviction relief. The State Appellate Defender has been appointed to represent him. The State Appellant Defender has filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and an extension of time to file briefs, memoranda, or other documents demonstrating why the judgment should not be affirmed and why counsel should not be permitted to withdraw. The defendant has not submitted any briefs, memoranda, or other documents. Upon examination of the entire record and brief of the State Appellate Defender, we find no error or potential grounds for appeal. Therefore, we now grant the motion of the State

Appellate Defender to withdraw as counsel and affirm the judgment of the circuit court of Massac County based on the following.

¶ 3

BACKGROUND

¶ 4 The defendant was found guilty of home invasion in a Massac County jury trial. He subsequently appealed his conviction in this court claiming ineffective assistance of counsel, alleging that his attorney at trial (1) failed to file a motion for discovery, (2) failed to present evidence that contradicted the statements of Richard Modglin regarding who attacked him, (3) failed to impeach witness Ralph Miller's statements about the type of car he saw at the victim's residence on the night of the attack, (4) failed to object to Richard Ford's testimony regarding the telephone conversation he overheard between Joey Draffen and the defendant, (5) failed to object to the playing of a taped conversation between Cynthia (Cindy) Featherstone and Tammie Rodgers when Tammie was outside the scope of the eavesdropping order, and (6) failed to put the defendant on the stand to testify. *People v. Peppers*, No. 5-08-0652 (2010) (unpublished order under Supreme Court Rule 23). This court rejected his claims of ineffective assistance of counsel and affirmed the judgment of the Massac County circuit court. *Id.*

¶ 5 On June 2, 2011, the defendant filed a *pro se* motion for postconviction relief in the Massac County circuit court. In the petition, the defendant alleged ineffective assistance of counsel based on a failure (1) to file a motion for discovery, (2) to present evidence to contradict the victim's statements about who attacked him, (3) to impeach Ralph Miller about the type of vehicle he saw on the night of the incident, (4) to object to admission of the telephone conversation between Cindy Featherstone and Tammie Rodgers as outside the scope of the eavesdropping order, and (5) to place the defendant on the stand to testify. The circuit court dismissed the petition as frivolous or without merit because it found that the issues raised in the petition either were or could have been raised in the appeal. The

defendant now appeals the dismissal order.

¶ 6

ANALYSIS

¶ 7 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2010)) allows an individual convicted of a criminal offense to challenge the proceeding in which he or she was convicted under the United States or Illinois Constitution or both. *People v. Cathey*, 2012 IL 111746, ¶ 17 (citing *People v. Harris*, 224 Ill. 2d 115, 124 (2007)). The appellate court will review a circuit court's order summarily dismissing a *pro se* postconviction petition *de novo*. *Id.* (citing *People v. Coleman*, 183 Ill. 2d 366 (1998)). A petition for relief under the Act may be summarily dismissed by the circuit court if it is "frivolous or is patently without merit." *Id.* (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). "A postconviction petition is considered frivolous or patently without merit only if it has no 'arguable basis either in law or in fact.'" *Id.* (quoting *People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. The Illinois Supreme Court has determined that "the legislature intended that the phrase 'frivolous or *** patently without merit' encompasses *res judicata* and forfeiture." *People v. Blair*, 215 Ill. 2d 427, 445 (2005). It is established that "where a person convicted of a crime has taken an appeal from the judgment of conviction on a complete record, the judgment of the reviewing court is *res judicata* as to all issues actually decided by the court and all issues which could have been presented to the reviewing court, if not presented, are waived." *People v. Kamsler*, 39 Ill. 2d 73, 74 (1968) (citing *People v. Armes*, 37 Ill. 2d 457, 458 (1967)).

¶ 8 The defendant has appealed the circuit court's dismissal of his petition for postconviction relief, which alleged ineffective assistance of counsel; however, the claims upon which the defendant alleges error are identical to those which this court previously

rejected in the defendant's original appeal after consideration of the entire record. Because the defendant's claims in the current appeal are barred by the doctrine of *res judicata* and therefore frivolous and patently without merit, the circuit court did not err in summarily dismissing the petition.

¶ 9

CONCLUSION

¶ 10 For the foregoing reasons, the judgment of the circuit court of Massac County is affirmed, and the motion of the State Appellate Defender to withdraw as counsel is granted.

¶ 11 Judgment affirmed; motion granted.