

2014 IL App (1st) 120229-U
No. 1-12-0229
MARCH 28, 2014

SIXTH DIVISION

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 15632
)	
RICARDO GUZMAN,)	Honorable
)	Garritt E. Howard,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices LAMPKIN and REYES concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Summary dismissal of defendant's post-conviction petition affirmed where defendant's jury waiver claim was barred by *res judicata*.
- ¶ 2 Defendant, Ricardo Guzman, appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He

contends that he presented the gist of a constitutional claim that his jury waiver was not knowing and voluntary, and also contends that his mittimus should be corrected to reflect two additional days of sentencing credit.

¶ 3 Defendant and two co-defendants, who are not parties to this appeal, were tried in simultaneous, but severed bench trials, on charges of first degree murder and aggravated battery. The record of pre-trial court proceedings shows that on September 24, 2008, the trial court conducted a hearing with the use of a Spanish interpreter, regarding the setting of a trial date. The court inquired as to whether defendants were seeking bench or jury trials, and defendant's counsel responded: "I believe we would be looking for a bench trial." At the conclusion of the hearing, the court set a tentative date of November 17th for a bench trial, but stated that it would have a better idea as to whether defendants would be seeking bench or jury trials at the next court date.

¶ 4 The case was continued to October 20, 2008, to allow respective counsel to confer with the accused to determine their preferences. On October 20, 2008, the trial court indicated, through a Spanish interpreter, that the case was still set for a bench trial on November 17th. Neither defendant, nor counsel, voiced any objections. On November 17, 2008, by agreement of the parties, the case was continued and reset for a bench trial commencing on January 14, 2009.

¶ 5 On that date, counsel tendered defendant's signed jury waiver to the court, and the following colloquy occurred:

Court: The record should reflect that we are being assisted by the court interpreter. *** Mr. Ricardo Guzman, does this form contain your signature, sir?

Defendant: Yes.

Court: Do you understand by signing this form, you are waiving your right to a jury trial?

Defendant: Yes.

The trial commenced, defendant was found guilty of first degree murder and aggravated battery, then sentenced to 20 years' imprisonment.

¶ 6 On direct appeal, defendant contended, in pertinent part, that his jury waiver was not knowingly and voluntarily made because the court's inquiry into the waiver was cursory, he was unable to read English, he had limited education and experience with the criminal justice system, and there was no indication in the record that he had read or understood the waiver. *People v. Guzman and Gomez-Ramirez*, Nos. 1-09-0452 & 1-09-0530, 2-3, 6 (cons.) (2011) (unpublished order under Supreme Court Rule 23). In affirming his convictions and sentence, this court held that the record revealed that defendant's jury waiver, given in open court with the assistance of a Spanish interpreter, was made knowingly and understandingly. *Guzman and Gomez-Ramirez*, Nos. 1-09-0452 & 1-09-0530, 6. In so holding, we noted that, on more than one occasion, counsel "represented on [defendant's] behalf and in [defendant's] presence that [defendant] would seek [a] bench trial[.]" *Guzman and Gomez-Ramirez*, Nos. 1-09-0452 & 1-09-0530, 8. We also found that there was "no indication in the record that [defendant was] dissatisfied with the interpreter or that [he] had difficulty understanding the proceedings due to [his] alleged inability to read or speak English." *Guzman and Gomez-Ramirez*, Nos. 1-09-0452 & 1-09-0530, 6.

¶ 7 In reaching that conclusion, we distinguished *People v. Phuong*, 287 Ill. App. 3d 988 (1997), in which defendant's waiver was found involuntary because the court failed to inquire whether defendant understood the nature of a jury trial. We noted that in *Phuong*, "defendant

was a recent immigrant with only a few months of education in this country and that she had no prior criminal record or any involvement with the American criminal justice system." *Guzman and Gomez-Ramirez*, Nos. 1-09-0452 & 1-09-0530, 9, citing *Phuong*, 287 Ill. App. 3d at 996.

Defendant, by contrast, "reported that he came to the United States in 2002, seven years prior to trial *** [and his] record indicates four arrests, with at least one conviction for theft." *Guzman and Gomez-Ramirez*, Nos. 1-09-0452 & 1-09-0530, 8-9.

¶ 8 In the post-conviction petition at bar, defendant claimed that he was denied his right to the effective assistance of counsel when counsel failed to impeach a witness, and that the court violated his right to a trial by jury when it accepted his jury waiver without ensuring it was knowingly and voluntarily made. In support, defendant attached his own affidavit, in which he averred that trial counsel "did not explain the difference between a trial by judge and a trial by jury. He only spoke English and it was very difficult to communicate with him." He further alleged that "I do not know the law of the United States. I do not know how to speak English or to write it." He also contended that "the translator did not do a clear job translating what I said, and he spoke softly and quickly." The circuit court summarily dismissed defendant's petition as frivolous and patently without merit.

¶ 9 In this appeal from that ruling, defendant contends that his petition should have proceeded to the second-stage because he presented the gist of a constitutional claim regarding whether his jury waiver was entered knowingly and voluntarily. We initially observe that by focusing solely on the issue regarding his jury waiver, defendant has waived for review the remaining allegations in his petition. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 10 The Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. 725 ILCS 5/122-1 *et*

seq. (West 2010). At the first stage of a post-conviction proceeding, the circuit court may dismiss the petition if it is frivolous or patently without merit, *i.e.*, it has no arguable basis in law or in fact. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). We review the summary dismissal of a post-conviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 11 The state maintains that defendant's jury waiver claim is barred by the procedural doctrine of *res judicata*, because it was ruled on in defendant's direct appeal. It is well-settled that the scope of a post-conviction proceeding is limited to constitutional matters that have not been, and could not have been, previously adjudicated. *People v. Harris*, 224 Ill. 2d 115, 124 (2007). Thus, issues that were considered by the court on direct appeal are barred by the doctrine of *res judicata* and issues that could have been considered on direct appeal are procedurally defaulted. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). It therefore follows that a trial court may summarily dismiss a petition as frivolous and patently without merit where the claims are *res judicata*. *People v. Blair*, 215 Ill. 2d 427, 442 (2005).

¶ 12 Defendant contends that *res judicata* does not bar his post-conviction claim because it is based on matters outside of the record on direct appeal, namely his affidavit describing the lack of communication between him and his trial counsel and his inability to speak or write in English. Although *res judicata* may be relaxed in circumstances where the facts relating to the claim do not appear on the face of the original appellate record (*Blair*, 215 Ill. 2d at 450–51; *People v. Patterson*, 192 Ill. 2d 93, 139 (2000)), we do not find this to be such a case.

¶ 13 Defendant cannot avoid the bar of *res judicata* by simply adding allegations that are encompassed by a previously adjudicated issue (*People v. Kimble*, 348 Ill. App. 3d 1031, 1034 (2004)), or by rephrasing issues previously addressed on direct appeal (*People v. Simms*, 192 Ill.

2d 348, 360 (2000)). In this case, defendant merely used different terminology and set forth additional allegations to assert that his jury waiver was not voluntarily and knowingly made. That claim, however, was raised and thoroughly weighed and rejected by this court on direct appeal. Accordingly, it is barred by *res judicata*.

¶ 14 Defendant disagrees and further contends that this court's prior determination was wrong in light of the report of proceedings from defendant's 2006 guilty plea hearing, of which he asks us to take judicial notice. He notes that on direct appeal, we distinguished *Phuong*, in part, based on defendant's prior experience with the criminal justice system, and claims that this conclusion is flawed because during defendant's guilty plea, the parties did not discuss defendant's right to a jury trial. Defendant's guilty plea proceeding, however, is not before this court (Ill. Sup. Ct. R. 606 (eff. March 20, 2009)), and the transcript on which he bases his argument was not included in his post-conviction petition or presented to the circuit court. As such, that claim may not properly be raised for the first time on review. *People v. Jones*, 213 Ill. 2d 498, 508 (2004); *People v. Jones*, 211 Ill. 2d 140, 149 (2004).

¶ 15 Defendant next contends, the State concedes, and we agree that he was entitled to 978 days of pre-sentence credit, but was only given 976. Pursuant to this court's authority to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008); Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), we order the amendment of defendant's mittimus to reflect two additional days of credit, for a total of 978 days.

¶ 16 For the foregoing reasons, we affirm the summary dismissal of defendant's *pro se* post-conviction petition by the circuit court of Cook County.

¶ 17 Affirmed.

1-12-0229