

No. 1-10-0460

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. 81 C 001317
)	
GEOFFREY FREEMAN,)	Honorable
)	Victoria A. Stewart,
Defendant-Appellant.)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

ORDER

¶ 1 Held: Because the claims in his pro se postconviction petition were based on indisputably meritless legal theories, defendant was not entitled to an evidentiary hearing on that petition and the court did not err when it dismissed it as frivolous and patently without merit.

¶ 2 Following a 1984 jury trial, defendant Geoffrey Freeman ("defendant") was convicted of the murder and armed robbery of 71-year-old Medeline Mullenix and was sentenced to life in prison. Defendant appealed and his case was remanded twice for Batson hearings.

Defendant's conviction was affirmed following his third appeal. Defendant then filed a pro se post-conviction petition, which the court dismissed as frivolous and patently without merit on November 6, 2009. This appeal followed.

¶ 3 BACKGROUND

¶ 4 Following a 1984 jury trial, defendant was found guilty of murder and armed robbery. The evidence indicated that defendant shot the victim twice, killing her, while stealing her vehicle. Defendant confessed to killing the victim in the presence of a State's Attorney and a court reporter. License plates belonging to the victim were found where defendant had been residing at the time, and multiple witnesses observed him driving the victim's vehicle.¹

¶ 5 After his jury was unable to reach a unanimous decision on the imposition of the death penalty, the trial court sentenced defendant to life in prison. The record, suggests that defendant filed a postconviction petition on July 17, 1984. The State moved to dismiss that motion but the court instead, per defendant's motion, placed his petition in abeyance pending the resolution of defendant's direct appeal, which was contemporaneously filed.²

¶ 6 Defendant's conviction was eventually affirmed in 1995, after three appeals and two remands for *Batson* hearings. On July 22, 1998, defendant received a letter from a paralegal in the Cook County Public Defender's Office regarding his 1984 postconviction petition. That letter advised him that the Public Defender's Office had "motioned up [his] post

¹ A full recitation of the events at defendant's trial can be found in this court's opinion from defendant's direct appeal. See *People v. Freeman*, 162 Ill. App. 3d 1080 (1987) ("*Freeman I*").

² A copy of his original 1984 petition is not included in the record on appeal, but reference is made to it in the State's motion to dismiss and subsequent proceedings.

conviction matter for August 6, 1998." On August 10, 1998, defendant received another letter from that paralegal indicating that his case was continued until November 6, 1998. The letter further indicated that his case had not yet been assigned to an attorney and that it could "take anywhere from two to six months" to obtain his trial transcripts. It went on to state that "[o]nce an attorney is assigned to your case they will research the issues you have raised in your Petition, and decide if there are any other issues to raise. This process generally takes a while: the attorney must be very thorough in their research since a person may file one Post Conviction Petition."

¶ 7 Although not included in the record, defendant asserts that he filed a pro se amended petition on November 6, 1998, two pro se supplemental petitions in December of 1998 and 1999, and a pro se addendum in August 2000. The record indicates that defendant also filed a pro se second supplement to his postconviction petition dated October 26, 2007, a pro se "Formal and Verified Petition for Relief from Judgment" on June 10, 2008, and a pro se Petition for Writ of Habeas Corpus Ad Testificandum on November 21, 2008. Along with his habeas petition, defendant filed a motion to dismiss the public defender and proceed pro se, which the court granted on December 12, 2008.

¶ 8 The record further reveals that on that same date, the court further ordered defendant to "prepare an amended post conviction petition which shall incorporate all relevant prior pleadings [and] issues therein." The court ordered defendant to file this petition on February 27, 2009.

¶ 9 Defendant appeared in court on February 27, 2009 and attempted to file a motion for

discovery instead of the postconviction petition he was instructed to file. In that motion, he argued that he could not file a his petition without first obtaining records he alleged were in the Public Defender's possession, specifically reports relating to alleged torture that took place at the hands of Jon Burge and others at Area Two Police Headquarters in Chicago. The court then denied defendant's motion for discovery and ordered the matter "off call for want of prosecution" due to defendant's "fail[ure] to file a superseding post-conviction petition as previously ordered."

¶ 10 On June 15, 2009, defendant filed a motion for substitution of judge, a motion to reinstate his postconviction petition, and a motion for leave to file a "final amended petition for postconviction relief instanter, as ordered on December 12, 2008." These motions were all denied on July 24, 2009.

¶ 11 On August 10, 2009, defendant, despite being denied leave of court to do so, nevertheless filed a pro se petition for postconviction relief. The court ruled on the merits of this petition, denying it on November 6, 2009 as frivolous and patently without merit. On December 3, 2009, defendant filed a motion to reconsider and/or a motion to vacate that denial. This motion was denied on January 15, 2010. This appeal followed.

¶ 12 We note that the record before us on appeal only contains the transcripts of defendant's jury selection, post-trial proceedings and sentencing, and Batson hearings, as well as portions of the common law record from defendant's trial and postconviction proceedings. No transcripts of the actual trial testimony are included. The briefs that multiple copies of defendant's trial records existed and one such copy in either the State's or

the Public Defender's Office's possession was possibly destroyed in the 2003 fire at the 69 West Washington building in Chicago.

¶ 13 Defendant asserts that soon after the fire, he forwarded his own personal complete record to the Public Defender's Office. After being discharged by defendant in December, 2008, defendant's appointed Public Defender sent defendant a letter indicating that he was returning several documents to defendant, including a motion to dismiss and a transcript from a hearing on that motion dated January 17, 1984. The Public Defender was unable to locate a transcript of a January 5, 1984 proceeding, as defendant requested. Nor did he send defendant a copy of The Report of the Special State's Attorney regarding Jon Burge, but instead directed defendant to a copy of the report which was accessible on-line.

¶ 14 In January, 2009, the Public Defender sent defendant additional documents in response to a December 28, 2008 letter from defendant. That letter from defendant is not included in the record. Included with the Public Defender's letter in response were several more documents that defendant requested. That responding letter made no mention of defendant's trial transcripts, but did indicate that a copy of the Report of the Special State's Attorney would be sent to defendant shortly thereafter.

¶ 15 The State, for its part, does not attempt to fault defendant for the incomplete record, or fault him for tendering an incomplete copy to this court. Instead, it asserts that it was unable to supply any missing portions of the record, stating that "[d]espite diligent searching, the State was only able to find part of defendant's trial court record. *** All trial testimony from defendant's trial is missing."

¶ 16 Generally, the burden is on the appellant to provide a complete record on appeal, and in the absence of such a record, "it will be presumed that the order entered by the circuit court was in conformity with law and had a sufficient factual basis." *People v. Fair*, 193 Ill. 2d 256, 264 (2000). In a criminal appeal such as this, where fault cannot be attributed to defendant for the lack of a complete record, the law as to the presumptions that follow is less than clear.

¶ 17 However, we need not resolve that question since despite the missing portions of the record, it is nevertheless possible to resolve all otherwise viable issues raised on this appeal with the record we do have. See *Midwest Builder Dist. v. Lord & Essex*, 383 Ill. App. 3d 645, 655 (2007) ("in instances where the court has all the evidence it needs to make a proper decision on the merits under the appropriate standard of review, the court may undertake substantive analysis of the case even if the record is not fully complete.").

¶ 18 ANALYSIS

¶ 19 Defendant raises eleven separate issues on this appeal: (1) that the court improperly ordered his case off call for want of prosecution, (2) that the court erred in denying his motion for substitution of judge, (3) that his constitutional rights were violated when he was charged by information instead of a grand jury, (4) that his confession was an inadmissible product of torture, (5) that his appellate counsel was ineffective for failing to raise claims regarding the voluntariness of his confession, (6) that his trial counsel was ineffective for not requesting that the judge question jurors during voir dire as to whether they would be biased against a defendant who opted not to testify at his own trial, (7) that

his appellate counsel was ineffective for failing to raise a Zehr claim, (8) that he was denied effective assistance of counsel at trial, (9) that his appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness, (10) that the trial court improperly communicated ex parte with potential jurors, and (11) that his due process rights were violated when his case was ordered off the call.

¶ 20 We review defendant's claims de novo. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998). In our analysis of these issues, we are mindful that the dismissal of a pro se postconviction petition is proper "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). A petition lacks such a basis if it is "based on an indisputedly meritless legal theory or fanciful factual allegation" or is "completely contradicted by the record." *Hodges*, 234 Ill. 2d at 16. Nevertheless, for the reasons that follow, we affirm.

¶ 21 A. Improper Dismissal for Want of Prosecution

¶ 22 Defendant first contends that the Post-Conviction Hearing Act ("the Act") does not permit the court to dismiss a postconviction petition for want of prosecution

¶ 23 The Act "provides a mechanism by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *Coleman*, 183 Ill. 2d at 378-79; 725 ILCS 5/122-1 et seq. (2011). The Act directs a court to examine a petition within 90 days after it is filed, and dismiss that petition if it determines that "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1. If the petition is not dismissed

or otherwise ruled upon within 90 days, then it advances to second stage proceedings and counsel may be appointed. *People v. Harris*, 224 Ill. 2d 115, 129 (2007); 725 ILCS 5/122-4 - 122-6. The Act is silent as to whether a court may dismiss a postconviction petition for want of prosecution.

¶ 24 Defendant argues that since the Act does not provide for dismissal for want of prosecution, such a dismissal by the court constituted an abuse of its discretion. Alternatively, he contends that if denial for want of prosecution is permitted under the Act, then he should have been allowed to refile his petition under Section 13-217 of the Illinois Code of Civil Procedure ("the Code"). Section 13-217 the Code provides that a party in a civil case whose action is dismissed for want of prosecution may, within one year of such dismissal, commence a new action. (735 ILCS 5/13-217). Our courts have relied on Section 13-217 in criminal cases to allow the reinstatement of a voluntarily withdrawn postconviction petition within one year of its withdrawal. *People v. English*, 381 Ill. App. 3d 906, 910 (2008).

¶ 25 The State contends that such a dismissal was proper, arguing that section 122-5 gives the court wide discretion to enter orders "as *** generally provided in civil cases." 725 ILCS 5/122-5. It further contends that a court has the "inherent authority ***to dismiss a cause of action with prejudice for violations of court orders *** on the basis of the court's inherent authority to control its docket," and that this power "exists independent of any statute." *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 65-66 (1995). The State further argues that defendant was not prejudiced by the court's denial of his motion for leave to

refile his postconviction petition because that denial was rendered moot by defendant's filing of that petition and the court's subsequent substantive ruling on it.

¶ 26 We need not determine whether a dismissal for want of prosecution was proper in a postconviction context here because defendant has either forfeited our consideration of this issue by appealing it too late, or rendered it moot by re-filing his previously dismissed postconviction petition in August 2009 pursuant to Section 13-217 of the Code.

¶ 27 Defendant's initial postconviction petition was dismissed for want of prosecution on February 27, 2009 and this appeal followed in January 2010. If defendant's petition was not subject to reinstatement under Section 13-217, then the court's dismissal of his petition on February 27, 2009, whether dismissed correctly or dismissed in error, represented a final and appealable judgment which we are without subject matter jurisdiction to consider because defendant did not appeal it within 30 days. See Il. S. Ct. R. 606(b) (2011) ("notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from").

¶ 28 We further note that if defendant was correct in his assertion that dismissal for want of prosecution is not applicable to postconviction petitions, then Section 13-217 would not provide him with any right to refile. Consequently, the dismissal of his petition would have become immediately appealable.

¶ 29 If, however, defendant had a right to reinstate his petition pursuant to Section 13-217, which he contends that he did, then any error associated with the court's dismissal for want of prosecution was rendered moot by his re-filing of his petition on August 10, 2009, within

one year of its dismissal. Contrary to defendant's contention, the fact that defendant was initially denied leave to file this petition does not prejudice him because, notwithstanding the court's denial of his motion for leave to file such a petition, the court proceeded to evaluate that petition on its merits, treating it as if it was already filed, and dismissed it, not because it was filed without authorization, but because it was frivolous and patently without merit.

¶ 30 Thus, any error in dismissing defendant's petition for want of prosecution was either rendered moot because the court treated it as if it was legitimately refiled, or alternatively, would be jurisdictionally precluded from consideration because it was not timely appealed. We must therefore turn our attention to defendant's "refiled" postconviction petition. Defendant argues that this petition had advanced to second stage proceedings under the act and thus should have been evaluated pursuant to the applicable standard of whether he made a substantial showing of a constitutional violation. The State, however, asserts that defendant's refiled petition which the court ruled upon in December 2009 was properly dismissed as if it was in the first stage, and thus the correct standard was applied.

¶ 31 The Act provides that if a postconviction is not dismissed or otherwise ruled upon within 90 days, then it advances to the second stage where the court may appoint counsel and the State may move to dismiss the petition. *People v. Harris*, 224 Ill. 2d 115, 129 (2007); 725 ILCS 5/122-4 - 122-6. Nothing in the act provides for the tolling of the 90 day period, even if a petition is placed in abeyance pending a direct appeal. As long as 90 days elapse from the filing of that petition without a court ruling, it advances to second stage

proceedings. *Harris*, 224 Ill. 2d at 129 ("if a trial court did hold a petition in abeyance and 90 days passed without the court ruling on the petition, the proceeding would have to move to the second stage."). At the second stage, a court must "determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *Hodges*, 234 Ill. 2d at 11. The petition will be dismissed if the petitioner is unable to make such a showing.

¶ 32 Here, defendant contends that his refiled petition was dismissed while in the second stage of proceedings under the Act. This would only be the case if we treat his refiled petition as a continuation of initial petition he filed in 1984, which had advanced to second stage proceedings. Otherwise, the petition was a new action and therefore was properly dismissed at stage one proceedings having been refiled on August 10, 2009 and undisputedly ruled upon within 90 days of that date.

¶ 33 If defendant's refiled petition is treated as a new action, which is consistent with Supreme Court precedent in civil cases (see *Dubina v. Mesirow Realty Dev.*, 178 Ill. 2d 496, 504 (1997) (holding that under Section 13-217, "the original and refiled actions are completely distinct actions.")), then his petition would have begun anew at stage one proceedings as less than 90 days elapsed from the date it was filed to the date the court dismissed it on its merits.

¶ 34 On the other hand, if, as defendant suggests, his refiled petition would have reached stage two, insofar as its age, as noted above, would be treated as a continuation of his initial petition which he filed in 1984, he would have been entitled to appointed counsel and to

have his petition evaluated, as noted earlier, for a substantial showing of a constitutional violation. The requirement of appointed counsel was satisfied since the court did, in fact, appoint the Public Defender to represent defendant in 1988, and who was then discharged by defendant when he chose to proceed pro se. While arguably an incorrect standard may have been applied if defendant's petition had advanced to stage two proceedings under the Act, for the reasons discussed below, any error stemming from the application of this standard would be harmless because the result would be the same under either standard.

¶ 35B. Substitution of Judge

¶ 36 Defendant next alleges that the court erred in denying his June 15, 2009 Motion For Substitution of Judge For Cause pursuant to 725 ILCS 5/114-5(d) (West 2008) because he demonstrated that Judge Stewart "committed a plethora of unlawful acts against [him]" and "was acting as a surrogate protector of Jon Burge and Associates, and has undertaken every possible measure to ensure that the allegations raised by [defendant] will never see the light of day." He argues that because Judge Stewart may have been a Cook County State's Attorney or may have been a member of that office's felony review at the time the alleged abuses took place, she may have been "actively involved in Burge antics and conduct," thus resulting in "the appearance of impropriety." We disagree.

¶ 37 "A defendant does not have an absolute right to substitution of judge at a post-conviction proceeding.[Citations.] Rather, a defendant must demonstrate that he will be substantially prejudiced if his motion for substitution is denied." *People v. Enis*, 194 Ill. 2d 361, 416 (2000), citing *People v. Steidl*, 177 Ill. 2d 239, 264 (1997). " "The determination

of prejudice or the absence of prejudice will stand unless it is against the manifest weight of the evidence." *People v. Craig*, 313 Ill. App. 3d 104, 106 (2000). The mere fact the judge has some kind of relationship with someone involved in the case, without more, is insufficient to establish judicial bias or to warrant a judge's removal from the case." *Steidl*, 177 Ill. 2d at 264.

¶ 38 Here, defendant has made no showing that he was substantially prejudiced by Judge Stewart presiding over his postconviction case. He has provided no evidence linking Judge Stewart to Jon Burge in any way, and even concedes this point, stating "petitioner has no idea as to whether Judge Stewart herself has involvement in the Burge matters." His claims against Judge Stewart amount to nothing more than bald, speculative conjecture and generalized allegations that abuses took place at Area 2. These claims did not warrant a substitution of judge and therefore we cannot say that the court's denial of defendant's motion for substitution of judge was against the manifest weight of the evidence.

¶ 39C. Charge by Information

¶ 40 Defendant next alleges that he was unlawfully charged by information, denying him his fifth amendment right to a grand jury indictment. We disagree.

¶ 41 We first note that this claim is barred by principles of waiver and res judicata as it was not only not included in his postconviction petition, but it was also raised and rejected on direct appeal. See *People v. Jones*, 211 Ill. 2d 140, 145 (2004); *Freeman I*, 162 Ill. App. 3d at 1097; *People v. Scott*, 194 Ill. 2d 268, 273 (2000) ("rulings on issues that were previously raised at trial or on direct appeal are res judicata").

¶ 42 Even if we were to consider this claim, we would nevertheless find it without merit.

Both the Illinois and United States Supreme Courts have repeatedly held that charging a criminal defendant by information does not violate his due process rights. In *Redmond*, our Illinois Supreme Court explicitly held that "a prosecution by information *** does not violate the due process clause of the fourteenth amendment. The provision of the fifth amendment requiring indictment by a grand jury is not applicable to State criminal proceedings." *People v. Redmond*, 67 Ill. 2d 242, 246-59 (1977). See also *Hurtado v. California*, 110 U.S. 516, 538, 4 S. Ct. 111, 122, 28 L. Ed. 232, 239 (1884) ("we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information *** is not due process of law.").

¶ 43 Defendant's attempts to rely on *District of Columbia v. Heller* in support of this contention are unavailing. 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

Heller's holding was limited to the scope of the Second Amendment right to bear arms and did not somehow incorporate the Fifth Amendment right to indictment by grand jury to the states. See *McDonald v. Chicago*, 561 U.S. ___, 130 S. Ct. 3020, 3104, 177 L. Ed. 2d 894, 987 (2010) ("the *Heller* plaintiff sought only dispensation to keep an operable firearm in his home for lawful self-defense, *** and the Court's opinion was bookended by reminders that its holding was limited to that one issue."). We are both unwilling and unable to, as defendant suggests, rule contrary to binding precedent and read such a holding into *Heller*.

¶ 44D. Voluntariness of Confession

¶ 45 Defendant next argues that his due process rights were violated when the trial court

admitted into evidence his statement confessing to the murder of Mullennix because that statement was the "direct product of threats, physical abuse, racial intimidation, coercion, and denial of right to counsel" by Jon Burge.

¶ 46 Here, defendant does not allege that he would have found support for this claim in the record, nor does anything in the limited record before us suggest that he would. On his direct appeal, the appellate court found, with respect to his confession, that defendant "chose to speak voluntarily and freely." Freeman I, 162 Ill. App. 3d at 1096. Defendant did not raise any allegations of threats, violence, or coercion on direct appeal, and cannot now raise this issue for the first time, 25 years after his conviction, when he clearly would have known about these alleged instances both at trial and on direct appeal. Consequently, defendant cannot establish that his rights were violated by the admission of his confession at trial. See *People v. Tenner*, 206 Ill. 2d 381, 392 (2002) (issues that could have been raised on direct appeal but were not are considered waived).

¶ 47E. Ineffective Assistance of Appellate Counsel - Voluntariness of Confession

¶ 48 Defendant next contends that his counsel on direct appeal was ineffective because she failed to challenge the voluntariness of his confession, forcing him to argue the issue in a pro se supplemental brief. We disagree.

¶ 49 Claims of ineffective assistance of appellate counsel claims are governed by the same two pronged standard for assessing claims of ineffective assistance of trial counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *People v. Harris*, 206 Ill. 2d 1 (2002). In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove both

(1) his attorney's actions constituted errors so serious, as to fall below an objective standard of reasonableness; and (2) absent these errors, there was a reasonable probability that his trial would have resulted in a different outcome. *People v. Ward*, 371 Ill.App.3d 382, 434 (2007), citing *Strickland*, 466 U.S. at 687-94, 80 L.Ed.2d at 693-98, 104 S.Ct. at 2064-68. With respect to such claims, our Illinois Supreme Court has held that in order to determine whether a petitioner's assistance of counsel was effective on appeal, a reviewing court must decide whether his underlying claims would have been successful if they had been raised on direct appeal, stating:

“[a] petitioner who contends that appellate counsel rendered ineffective assistance of counsel must show that the failure to raise an issue on direct appeal was objectively unreasonable and that the decision prejudiced petitioner. [Citation]. Unless the underlying issue is meritorious, petitioner suffered no prejudice from counsel's failure to raise it on direct appeal. [Citation]. We, therefore, must determine whether petitioner's underlying ineffective assistance of trial counsel claim would have been successful if raised on direct appeal.” *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

¶ 50 A petitioner's appellate counsel is not obligated to raise every conceivable issue on appeal, nor is he incompetent for failing to raise issues that he deems without merit. *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Unless an issue is meritorious, a petitioner has suffered no prejudice from his appellate counsel's failure to raise that issue on appeal.

Easley, 192 Ill. 2d at 329.

¶ 51 Here, defendant is unable to show that the outcome of his direct appeal would had been different had appellate counsel raised the issue of the voluntariness of defendant's confession herself on direct appeal. He has cited no additional support which suggests that this claim would have been successful if brought by appointed counsel instead of himself, and therefore cannot establish that his appellate counsel was ineffective for not doing so.

¶ 52 F. Ineffective Assistance of Trial Counsel - Zehr

¶ 53 Defendant next alleges that his trial counsel was ineffective for failing to ask the trial court to question jurors during voir dire about whether they would harbor bias or prejudice against a defendant who chose not to testify at his own trial under Zehr, 103 Ill. 2d 472 (1984).

¶ 54 In Zehr, the Illinois Supreme Court held that the trial court erred when it denied defense counsel's request to ask questions about the State's burden of proof, defendant's right not to testify, and the presumption of innocence during voir dire. Zehr, 103 Ill. 2d at 476-78. Zehr was decided in March, 1984, after defendant was convicted, and has been held to apply prospectively, rather than retroactively. People v. Britz, 112 Ill. 2d 314, 319 (1986), People v. Harris, 123 Ill. 2d 113, 128-29 (1988) (affirming Britz). In 2007, our Supreme Court made it a requirement that trial courts ask the Zehr questions to all prospective jurors, regardless of whether requested by defense counsel. Ill. Sup. Ct. R. 431(b) (2011), People v. Glasper, 234 Ill. 2d 173, 187 (2009).

¶ 55 Here, there was no requirement that trial counsel ask the trial court to question his jurors concerning his decision not to testify at trial. Our courts have repeatedly held that a defendant is not denied effective assistance of counsel by his defense attorney's decision not to have a judge question jurors about the Zehr principles because doing so is optional. In *People v. Yarbor*, 383 Ill. App. 3d 676 (2008), this court found that defense counsel was not ineffective for failing to request questioning on the Zehr principles, stating that "defendant has failed to cite a case in which an attorney was found to be ineffective for failing to request the optional questioning under Rule 431(b)." *Yarbor*, 383 Ill. App. 3d at 686. See also *People v. Braboy*, 393 Ill. App. 3d 100 (2009) (affirming *Yarbor*); *People v. Schmidt*, 392 Ill. App. 3d 689, 671 (2009) (decision not to ask for Zehr principles was not ineffective assistance of counsel because doing so was not mandatory). Thus, under these circumstances, we cannot say that defense counsel's decision not to ask for optional questioning was objectively unreasonable.

¶ 56 Moreover, defendant cannot show that but for this decision, the outcome of his trial would have been different because the evidence adduced at trial was overwhelming. On direct appeal, the court indicated that not only did defendant confess freely to the murder of the victim, but the circumstantial evidence also supported a finding of guilt. That evidence included defendant's driver's license being found in the victim's car, the victim's license plates being discovered by police in defendant's home, and police recovering the murder weapon from another home where defendant had stayed, and testimony of two eyewitnesses who observed defendant driving the victim's

car following her death. Freeman I, 162 Ill. App. 3d at 1087 Thus defendant is unable to satisfy either prong of Strickland and cannot show that his trial counsel was ineffective.

¶ 57 G. Ineffective Assistance of Appellate Counsel - Zehr

¶ 58 Defendant next alleges that his appellate counsel was ineffective for failing to raise his trial counsel's ineffectiveness for her failure to press the Zehr claim. As stated above, trial counsel was not ineffective for failing to request that potential jurors be instructed on the Zehr principles. At the time of his trial, requesting the Zehr principles was optional, and a decision not to request them did not deny a defendant the effective assistance of counsel. Yarbor, 383 Ill. App. 3d at 686. Moreover, even under Zehr, reversible error only occurs if trial counsel actually requests that the Zehr questions be asked, which was not the case here. Thus, defendant cannot establish that his appellate counsel was ineffective for its failure to allege ineffective assistance of trial counsel for its failure to raise a Zehr issue. Childress, 191 Ill. 2d at 175.

¶ 59 H. Ineffective Assistance of Trial Counsel - Failure to Render Adequate Assistance

¶ 60 Defendant next alleges that he was denied the effective assistance of counsel at trial because his appointed attorney did not "apply[] his energies" to defendant's case by opting not to give a closing argument and by attempting to withdraw as defendant's counsel.

¶ 61 As stated above, in order to succeed on a claim of ineffective assistance of counsel, defendant must show that his attorney's performance was objectively unreasonable and that prejudice resulted from that deficient performance. People v.

Bailey, 232 Ill. 2d 285, 289 (2009). A failure to satisfy either prong will defeat a claim for ineffective assistance of counsel.

¶ 62 Here, defendant argues that his defense counsel did not provide him with an adequate defense by not giving a closing argument because he was "not being paid" to do so. The record, however, indicates that defendant instructed his attorney not to give a closing argument. During sentencing, defendant advised the trial court that "[defense counsel] wanted to give an opening statement, I didn't want him to say anything. At the closing, I didn't want him to say anything." Thus, it appears that defense counsel was following defendant's instructions when he opted not to give a closing argument.

¶ 63 Even if defense counsel's decision not to give a closing statement was objectively unreasonable (see *People v. Wilson*, 392 Ill. App. 3d 189, 200 (2009) ("It would be a rare case in which choosing not to make a closing argument in a jury trial would be sound trial strategy.")), defendant, can not establish, nor does he even contend, that this alleged deficiency substantially prejudiced him in that the results of his trial would have been different. As discussed above, the evidence against defendant, including his own confession, was overwhelming. Thus, he is unable to satisfy the second prong of Strickland and cannot establish that his trial counsel was ineffective for refusing to give a closing statement.

¶ 64 Defendant further contends that his trial counsel was ineffective for "intentionally tank[ing]" his case, but has failed to provide any evidence of this. Without any support, defendant's allegations are rendered baseless and cannot establish a constitutional

violation. *People v. Smith*, 136 Ill. App. 3d 300, 302 (1985) ("Mere conclusory allegations that constitutional rights have been violated are insufficient to entitle the petitioner to an evidentiary hearing.").

¶ 65 Thus, in light of the appellate court's previous finding that defendant's trial counsel was capable of adequately representing defendant, and the lack of any evidence to the contrary, defendant is unable to establish that his trial counsel was ineffective.

¶ 66I. Ineffective Assistance of Appellate Counsel - Trial Counsel's Failure to Render Adequate Assistance

¶ 67 Defendant next alleges that his appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel on direct appeal for trial counsel's decision not to give a closing argument at trial. As outlined above, however, defendant's trial counsel was not ineffective for choosing not to do so and, consequently, we cannot say that his appellate counsel was ineffective for failing to raise this claim on direct appeal. *Childress*, 191 Ill. 2d at 175 (a defendant cannot establish ineffective assistance of counsel on appeal if the underlying issue is meritless).

¶ 68 J. Ex Parte Communication with Jurors

¶ 69 Defendant next alleges that he was denied a fair trial when the trial judge engaged in improper ex parte communications with potential jurors outside the presence of him and his defense counsel.

¶ 70 The transcripts contained in the record indicate that following the first day of voir dire, after one juror had been selected, the trial judge asked the parties if they would "have any objection if the Court went to the jurors and asked them to come back tomorrow." Both the State and defense counsel answered, "No." The following conversation then took place between the trial judge and potential jurors outside the presence of the parties:

"Juror: You want us at what time, sir?"

Court: We are going to try to start at 1:00. *** I doubt we are going to finish, because it is a long process. It is a capital case. *** We can usually pick a jury in two, three, four hours, but on a capital case, it just isn't going to be that fast."

¶ 71 Then a prospective juror raised concerns about serving on a lengthy trial. When asked by the judge why he wanted to be excused, the juror replied that he would not be able to serve for a duration of two weeks, and doing so would affect his ability to be fair and impartial. The trial judge then stated, "I am going to take it on my own to tell you not to come tomorrow."

¶ 72 Another potential juror then raised additional concerns about the length of the selection process, to which the trial judge replied, "In a capital case, it is very difficult to estimate. *** Each side has twenty challenges, that is forty people they could theoretically excuse. And then there is the ones like him, I just excused, people who tell me they cannot be fair."

¶ 73 The trial judge was then asked by another potential juror if jurors whose spouses were police officers were selected. The judge responded, "Depending on how you answer the questions. It is possible that you would serve. I have had Judge's wives serve - once - depending on if the lawyers keep you, even if your husband is a police officer. *** They may say no, we don't want you. It all depends on the answers you give."

¶ 74 The following day, the trial judge informed the parties of his conversation with the potential jurors and that he had instructed one of them not to return. Neither the State nor defendant objected.

¶ 75 Defendant now claims that these conversations violated his due process right to a fair and impartial trial because they essentially gave potential jurors a roadmap for avoiding jury service and prevented him and his attorney from observing "reactions, facial expressions, and any and all non-verbal gestures" of those potential jurors. We disagree.

¶ 76 We note that defendant has waived this claim because he did not raise it on direct appeal. See *People v. Tenner*, 206 Ill. 2d 381, 392 (2002) ("[a] post-conviction petition is a collateral attack upon a prior conviction and sentence, not a surrogate for a direct appeal. [Citation.] Any issues which were decided on direct appeal are barred by res judicata; any issues which could have been raised on direct appeal are defaulted."). Moreover, the record indicates that the judge was careful to obtain both defendant's and the State's consent both before speaking to the potential jurors, as well as after doing so. Defendant voiced no objection at either instance.

¶ 77K. Opportunity to be Heard

¶ 78 Defendant finally alleges that he was denied his due process right to be heard when the court dismissed his post-conviction petition for want of prosecution on February 27, 2009. As discussed above, however, defendant rendered this issue moot when he filed his pro se postconviction petition in August, 2010. The court subsequently evaluated that petition on its merits and dismissed it. As such, defendant cannot claim that he was denied an opportunity to be heard in this matter.

¶ 79 III. CONCLUSION

¶ 80 For the foregoing reasons, we affirm the court's dismissal of defendant's postconviction petition.

¶ 81 AFFIRMED.