



petition. We affirm.

¶ 4

## I. BACKGROUND

¶ 5 In April 2007, a grand jury indicted defendant on single counts of being an armed habitual criminal (count I) (720 ILCS 5/24--1.7(a)(1) (West 2006)), child pornography (count II) (720 ILCS 5/11--20.1(a)(1)(vii) (West 2006)), and unlawful possession of firearm ammunition by a felon (count III) (720 ILCS 5/24--1.1(a) (West 2006)). Defendant pleaded not guilty.

¶ 6 In May 2007, defense counsel filed a motion to sever counts. Counsel argued defendant's prior felony convictions had no relation to child pornography and would cause the jury to believe he has a propensity to commit serious and violent crimes. The trial court denied the motion.

¶ 7 In June 2007, defendant's jury trial commenced. B.D. testified she was born in November 1990. She met Pearl Bigham in July 2006, and Bigham would let her drink and "have boys over" to her house. In May 2006, B.D. and two other girls were late for school so they called defendant. He picked them up, took them to McDonald's, and then took them to school. In December 2006, when she was 16 years old, B.D. and Bigham went over to defendant's house. Defendant provided them with cranberry juice and vodka. Defendant then told B.D. and Bigham to take off their clothes. While B.D. and Bigham were lying naked on the bed, defendant told them to "go at it," which B.D. believed meant they were to engage in oral sex. B.D. refused. When defendant pulled the covers off the bed, B.D. used a pillow to cover her body below her breasts.

¶ 8 B.D. testified defendant had been talking about "his connections" and pulled out a gun from under a pillow. B.D. also saw a bulletproof vest in the bedroom. Near the television,

she saw a video camera. She did not know she was being videotaped. Defendant told her the camera was not on. B.D. told Bigham she had school the next day so they left.

¶ 9 Pearl Bigham testified she was 27 years old. Prior to defendant's trial, Bigham pleaded guilty to child pornography in connection with the filming of B.D. in defendant's home. Bigham testified she dated defendant between January and March 2006. Bigham let B.D. stay over at her house. In late November or early December 2006, Bigham took B.D. over to defendant's house. After making them drinks, defendant told B.D. and Bigham to strip. They took off their clothes and sat on the bed. Defendant wanted B.D. to perform oral sex on Bigham, but B.D. refused. During that night, Bigham saw defendant pull a gun out from underneath a pillow. He waved the gun around "for a little bit" and then put it on his person. Bigham also saw a bulletproof vest in his bedroom. Defendant kept a video camera in the bedroom, but Bigham did not know whether it was on.

¶ 10 Champaign County sheriff's deputy Jason Atwood testified he assisted in the execution of a search warrant at defendant's house at 4312 East Airport Road in December 2006. He photographed a video camera in the living room and removed the videotape. He also seized a bulletproof vest from the master bedroom. In the kitchen, he found rifle cartridges, a .22-caliber round, and seven .38-caliber rounds. In a bedroom, Atwood found 38 rounds of .38-caliber ammunition. He stated he did not recover any items of indicia that led him to believe anyone other than defendant lived at the residence.

¶ 11 The State played the videotape showing defendant, Bigham, and B.D. to the jury. The parties stipulated that defendant had two or more specifically required felony offenses for purposes of the armed-habitual-criminal charge.

¶ 12 Darryl Hicks testified he was the director of security at Wolf Pack Security and had hired defendant to work on several occasions. Hicks had never seen defendant with a gun. Robert Sallee testified he worked as the head of security for the American Legion in Champaign. Defendant worked security on several occasions. Sallee never saw defendant with a gun or a protective vest.

¶ 13 Bridget Wilson testified she dated defendant for three years. She never saw a gun or bullets at defendant's house, but she did see a bulletproof vest that he used for his security work.

¶ 14 Defendant testified on his own behalf. He stated he worked in construction and as a security guard at local clubs. He testified he did not own a gun and did not put any ammunition in his house. He bought the protective vest for use in his security work. Relatives and acquaintances had keys to his house, and some stayed in his guest rooms.

¶ 15 Defendant stated he met B.D. through Bigham, with whom he had a sexual relationship. He thought B.D. was approximately 19 to 20 years old. Defendant assumed B.D. was Bigham's girlfriend because the latter was bisexual. Defendant did not know how old B.D. was, and he never had sex with her. Bigham and B.D. came to defendant's house late in the evening in December 2006. When they arrived, they went into defendant's bedroom. When defendant entered, Bigham and B.D. were lying naked in the bed. Defendant had set cameras up in his bedroom and living room because he was preparing to film a weekend orgy for his birthday. In setting up the cameras, he "inadvertently hit the record button." He believed the camera was off. On the video, he pulled his wallet out from underneath the pillow because he did not trust Bigham and B.D.

¶ 16 Following closing arguments and a jury question, the jury found defendant guilty on all counts. In June 2007, defense counsel filed a posttrial motion. In July 2007, defendant filed a *pro se* posttrial motion. Defendant also asked to represent himself. In August 2007, defense counsel moved to withdraw, which the trial court allowed. Thereafter, the court denied the posttrial motions.

¶ 17 In October 2007, the trial court sentenced defendant to 35 years in prison for unlawful possession of firearm ammunition by a felon (count III), 30 years for his conviction as an armed habitual criminal (count I), and 15 years for child pornography (count II). The court ordered counts I and II to be served consecutively and count III to run concurrent to count I.

¶ 18 Defense counsel filed a motion to reconsider sentence. In February 2008, the trial court granted the motion in part and reduced defendant's sentence on count III to 30 years in prison.

¶ 19 Defendant appealed, arguing the trial court erred in (1) denying his motion to sever counts, (2) failing to properly instruct the jury at *voir dire*, and (3) imposing consecutive sentences. This court affirmed his convictions and sentences. *People v. Haywood*, No. 4-08-0165 (January 27, 2009) (unpublished order under Supreme Court Rule 23).

¶ 20 In November 2009, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122--1 through 122--8 (West 2008)). Defendant argued, *inter alia*, trial counsel failed to introduce evidence of a telephone bill in the name of Jolouis Shaw at 4312 Airport Road, which would have contradicted Deputy Atwood's testimony that he found no indicia that anyone other than defendant lived in the house. Defendant also raised the issue of ineffective assistance of counsel at trial and on appeal and argued the

trial court should have appointed new counsel to represent him during posttrial proceedings instead of allowing him to proceed *pro se*.

¶ 21 In November 2009, the trial court dismissed the petition, finding it frivolous and patently without merit. In December 2009, defendant filed a *pro se* motion for reconsideration, which the court denied. This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 Defendant argues the trial court erred in dismissing his postconviction petition as he stated the gist of a claim of ineffective assistance of counsel. We disagree.

¶ 24 The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 25 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122--2.1(a)(2) (West 2008). Our supreme court has held "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact."

*People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 26 "In considering a petition pursuant to [section 122--2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122--2.1(c) (West 2008); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122--2 (West 2008). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1074 (2010).

¶ 27 Defendant alleged his trial counsel failed to introduce a telephone bill addressed to Jolouis Shaw at defendant's address to rebut the State's evidence that he lived alone. At trial, the State's evidence in support of the charge of unlawful possession of firearm ammunition by a felon showed only that ammunition was found in defendant's house. Deputy Atwood testified he did not photograph any items of mail belonging to other people. Defendant's defense was he did not know the ammunition was in his house, other people lived in the house, and those people must have left the ammunition in locations that he did not use and without his knowledge.

¶ 28 Claims of ineffective assistance of counsel may be raised in a postconviction petition. See *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754 (citing *Strickland v. Washington*, 466

U.S. 668 (1984)). In the petition, a defendant "must show counsel's performance was deficient and that prejudice resulted from the deficient performance." *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754. A petition alleging ineffective assistance of counsel may not be dismissed at the first stage "if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754. Claims that appellate counsel was ineffective are also evaluated under *Strickland*. *People v. Enis*, 194 Ill. 2d 361, 377, 743 N.E.2d 1, 11 (2000).

¶ 29 In the case *sub judice*, defendant alleged his trial counsel failed to introduce into evidence the telephone bill in Shaw's name and listing defendant's address, which would have rebutted Deputy Atwood's testimony that only defendant lived at 4312 East Airport Road. To his petition, defendant attached a copy of the phone bill, which was alleged to have been tendered to counsel by the State in discovery.

¶ 30 A review of the record reveals it is not arguable that defendant was prejudiced by the failure to introduce the telephone bill into evidence. Defendant testified people would come to his house even when he was not there. His first wife, Jenna Lee Haywood, had a key to his house, as did his oldest son, Robert Suggs; defendant's second wife, Tiffany Haywood; her mother, Doris McClendon Smith; his boss, Kent Wilson; and his brothers, Mark and Craig Williams. When asked who received mail at his house, defendant listed his first wife, his second wife, his son, his boss, and Tammie Holmes, his second oldest son's mother. It was obvious the jury believed the ammunition found in the house belonged to defendant and not to the long line of guests and visitors who might have set foot in his house. Introduction of the Shaw phone bill would not have changed the result, and defendant's claim of ineffective assistance of counsel has

no merit.

¶ 31 Defendant also argues appellate counsel failed to raise several claims on direct appeal, including his claim the judge erred in handling his posttrial claims of ineffective assistance of counsel. Defendant argues the judge should have conducted an inquiry into his claims to determine whether new counsel should have been appointed.

¶ 32 The appointment of new counsel is not automatically required in every case in which a defendant makes a claim of ineffective assistance of counsel. *People v. Moore*, 207 Ill. 2d 68, 77, 797 N.E.2d 631, 637 (2003). When confronted with a defendant's posttrial allegations of ineffective assistance of counsel, "[t]he operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations of ineffective assistance of counsel." *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 638. "A court can conduct such an inquiry in one or more of the following three ways: (1) questioning the trial counsel, (2) questioning the defendant, and (3) relying on its own knowledge of the trial counsel's performance in the trial." *People v. Peacock*, 359 Ill. App. 3d 326, 339, 833 N.E.2d 396, 407 (2005).

"During this evaluation, some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim. Trial counsel may simply answer questions and explain the facts and circumstances surrounding the defendant's allegations. [Citations.] A brief discussion between the trial court and the defendant may be sufficient. [Citations.] Also, the trial

court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 78-79, 797 N.E.2d at 638.

Whether a trial court conducts an adequate inquiry is a question of law that we review *de novo*. *People v. Strickland*, 363 Ill. App. 3d 598, 606, 843 N.E.2d 897, 904 (2006).

¶ 33 In his posttrial motion, defendant alleged he had "poor representation" from his appointed trial counsel. He claimed she forgot what the charges were against him and her closing arguments were "theatrical" but "totally observed [*sic*]." In his second posttrial motion, defendant further alleged counsel was ineffective in her handling of witnesses, the defense strategy, and opening and closing arguments. At the hearing on the posttrial motions, defendant detailed his complaints about his counsel. The court, however, found counsel's arguments were appropriate, her performance was not deficient, and no prejudice attached considering the overwhelming evidence in the case.

¶ 34 The record here indicates the trial court conducted an adequate inquiry into defendant's *pro se* claims of ineffective assistance of counsel. Defendant set forth his contentions in his posttrial motions and made his argument to the court. Although the court did not question defense counsel, the court presided over the trial and concluded counsel's performance at trial was not deficient. Thus, defendant was not entitled to the appointment of new counsel. As this issue had no merit, appellate counsel cannot be found to have been ineffective for not raising it on appeal.

¶ 35 As a final issue raised in his brief, defendant argues the trial court failed to

admonish him pursuant to Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) after he indicated his wish to proceed *pro se* during posttrial proceedings. Rule 401(a) requires a court confronted with a defendant seeking to waive counsel to admonish him on the nature of the charge, the minimum and maximum sentence applicable to the charge, and the right to counsel-- court appointed if indigent. Defendant, however, did not raise this issue in his postconviction petition and cannot do so now on appeal. *People v. Petrenko*, 237 Ill. 2d 490, 502, 931 N.E.2d 1198, 1206 (2010) (in a postconviction setting, "a defendant may not raise an issue for the first time while the matter is on review"). Thus, this issue is forfeited.

¶ 36

### III. CONCLUSION

¶ 37 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 38 Affirmed.