

NOTICE
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2011 IL App (4th) 100373-U

Filed 10/05/2011

NO. 4-10-0373

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
TROY FONVILLE,)	No. 06CF1288
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Turner and Cook concurred in the judgment.

ORDER

- ¶ 1 *Held:* The court affirmed the trial court's first-stage dismissal judgment (725 ILCS 5/122-2.1(a)(2) (West 2010)) where defendant's petition for postconviction relief was frivolous, patently without merit, and failed to make a legally cognizable claim.
- ¶ 2 In February 2008, after a stipulated bench trial, the trial court found defendant, Troy Fonville, guilty of unlawful possession with intent to deliver more than 5,000 grams of a substance containing cannabis (720 ILCS 550/5(g) (West 2006)). In exchange for defendant's stipulation to the evidence, the State and the trial court agreed to cap his sentence at 20 years. In March 2008, the court sentenced defendant to 20 years' imprisonment to be followed by 3 years' mandatory supervised release (MSR) and ordered him to pay court costs, a \$100 laboratory analysis fee, a \$3,000 mandatory assessment, and a \$53,000 street-value fine. Defendant appealed, arguing (1) the court erred by denying his motion to suppress, and (2) the State failed

to prove him guilty beyond a reasonable doubt. In January 2009, this court affirmed defendant's conviction. *People v. Fonville*, No. 4-08-0242 (January 13, 2009) (unpublished order under Supreme Court Rule 23), *appeal denied*, 232 Ill. 2d 585, 910 N.E.2d 1129 (2009).

¶ 3 In February 2010, defendant filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2010)). In his petition, defendant argued (1) the addition of the three-year MSR term violated the 20-year cap the State and defendant agreed on; (2) the imposition of the more than \$56,000 in fines exceeded the parameters of the sentence the State and defendant agreed on; (3) he was denied effective assistance of counsel when trial counsel failed to move to dismiss the indictment after evidence adduced at the motion to suppress hearing showed the State offered deceptive and inaccurate testimony to the grand jury; (4) he was denied effective assistance of counsel when trial counsel failed to inform him of the mandatory MSR term and \$3,000 assessment; (5) he was denied effective assistance of counsel when trial counsel failed to object to imposition of the \$53,000 street-value fine where no evidence was offered to corroborate the value; and (6) the trial court's order imposing the street-value fine must be vacated, and any of defendant's bond money applied to the fine must be returned, with interest.

¶ 4 In April 2010, the trial court summarily dismissed defendant's petition for postconviction relief. 725 ILCS 5/122-2.1(a)(2) (West 2010). In one section of the order, the court stated "the [defendant's] claims are *** barred by the doctrines of waiver and procedural default and *res judicata*." However, in another section of the order, the court stated "the court further finds that the Post-conviction Petition *** do[es] not make a substantial showing of a violation of [defendant's] United States [*sic*] or Illinois Constitutional rights." The court then

dismissed the petition and ordered defendant to pay filing fees and court costs pursuant to section 22-105(a) of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/22-105(a) (West 2010)).

¶ 5 On appeal, defendant argues (1) the trial court applied the wrong standard of proof to defendant's petition for postconviction relief, and the matter must be remanded for stage-two proceedings on the petition; (2) defendant's claim of ineffective counsel where trial counsel failed to object to imposition of the \$53,000 street-value fine presented the gist of a constitutional claim; and (3) the court erred in requiring defendant to pay filing fees and court costs, where no finding was made that defendant's petition for postconviction relief was frivolous. The State argues (1) though the court used the wrong language in portions of the order, it found the petition frivolous and patently without merit when it stated the arguments were forfeited or barred by *res judicata* ; (2) this court can affirm the trial court's judgment based on the record, regardless of any errors committed by the trial court; (3) defendant failed to state the gist of a constitutional claim in relation to his ineffective-assistance-of-counsel claim; and (4) the court properly required defendant to pay filing fees and court costs because defendant's petition was frivolous.

¶ 6 For the following reasons, we affirm.

¶ 7 "The Post-Conviction Hearing Act [citation] provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial." *People v. Edwards*, 197 Ill. 2d 239, 243-44, 757 N.E.2d 442, 445 (2001). An action for postconviction relief is a collateral attack on the proceedings, not an appeal on the merits. *People v. Harris*, 206 Ill. 2d 1, 12, 794 N.E.2d 314, 323 (2002). "The purpose of a post-conviction proceeding is to

permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *Id.* Issues decided on direct appeal are barred by *res judicata*, while issues that could have been raised on appeal, but were not, are barred by waiver, *i.e.*, forfeiture. *Harris*, 206 Ill. 2d at 12-13, 794 N.E.2d at 323.

¶ 8 A postconviction proceeding that does not involve the death penalty has three stages. *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d 445. At the first stage, the court must independently review the petition within 90 days and determine whether it is frivolous or patently without merit. *Id.* If the court determines the petition is subject to summary dismissal at the first stage, it must dismiss the petition in a written order. *Id.* This court has stated, "[t]o withstand dismissal at the first stage of postconviction proceedings, a *pro se* petition for postconviction relief need only contain a simple statement that presents the gist of a claim for relief when nothing in the trial record contradicts that claim." (Internal quotation marks omitted.) *People v. Patton*, 315 Ill. App. 3d 968, 972, 735 N.E.2d 185, 189 (2000); see also *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445 ("The gist standard is a low threshold." (Internal quotation marks omitted.)). If a postconviction petition proceeds to the second stage, counsel can be appointed to represent the defendant, if necessary, and the State is allowed to file an answer or a motion to dismiss. *Edwards*, 197 Ill. 2d at 245-46, 757 N.E.2d 446. At the second stage, the court must determine whether the petition makes "a substantial showing of a constitutional violation." *Edwards*, 197 Ill. 2d at 246, 757 N.E.2d at 446. Absent such showing, the petition is dismissed; but if there is a substantial showing of a constitutional violation, the petition moves to the third stage, in which an evidentiary hearing is conducted. *Id.*

¶ 9 In the case at bar, the trial court dismissed defendant's petition at the first stage in a written order. However, in reaching its decision, the court applied a mix of first- and second-stage review to defendant's petition. In one section of the written order, the court dismissed defendant's claims as barred by *res judicata* and waiver. In another portion of the order, the court stated defendant failed to "make a substantial showing of a violation of [defendant's] United States [*sic*] or Illinois Constitutional rights." Thus, the court referenced the wrong standard in the section referring to defendant's failure to make a substantial showing of a violation of his constitutional rights. Defendant argues this court should remand for second-stage proceedings due to the trial court's erroneous application of the law. *People v. Newbolds*, 364 Ill. App. 3d 672, 679, 847 N.E.2d 614, 621 (2006) (remanded because the trial court applied the substantial showing of a constitutional violation standard during the first-stage analysis). The State argues this court can affirm the trial court's judgment based on the record, even though the trial court applied the wrong standard. *Edwards*, 197 Ill. 2d at 247, 757 N.E.2d at 447 (review of dismissal of postconviction petition is *de novo*). We agree with the State.

¶ 10 The supreme court in *Edwards*, 197 Ill. 2d at 247, 757 N.E.2d at 446-47, faced a similar situation where the appellate court had applied a mixture of first- and second-stage review principles to the case before it. The court found that the question before it was "limited solely to whether defendant's petition [was] frivolous or [was] patently without merit." (Internal quotation marks omitted.) *Edwards*, 197 Ill. 2d at 246, 757 N.E.2d at 447. The court went on to state that review was to be conducted *de novo*, and it was " 'free to substitute its own judgment for that of the circuit court in order to formulate the legally correct answer.' " *Edwards*, 197 Ill. 2d at 247, 757 N.E.2d at 447 (quoting *People v. Coleman*, 183 Ill. 2d 366, 388, 701 N.E.2d 1063,

1075 (1998)).

¶ 11 The first two claims in defendant's petition involve alleged violations of the sentencing agreement by the State. Defendant claims the 3-year MSR term imposed as part of his sentence violated the 20-year sentence cap agreed upon by the parties, and the imposition of fines in excess of \$56,000 exceeded the negotiated sentence as well. The record belies these claims. First, the record shows defendant was informed by the trial court that any sentence to the Illinois Department of Corrections would be followed by a three-year MSR term. In addition, the record clearly shows that defendant was informed any finding of guilt would be accompanied by fines of up to \$200,000. Because defendant's claims on these issues are contradicted by the record, we conclude they are patently without merit. See *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204, 1212 (2009) ("An example of an indisputably meritless legal theory is one which is completely contradicted by the record.").

¶ 12 Defendant next claims he was denied effective assistance of counsel where his trial counsel failed to have the indictment dismissed based on deceptive and inaccurate evidence discovered during hearings on a motion to suppress. However, the trial court's denial of defendant's motion to suppress was included in defendant's direct appeal of his conviction, and this court upheld the trial court's denial of defendant's motion to suppress. *Fonville*, slip order at 37. Any issues regarding the motion to suppress are barred by *res judicata* and are inherently frivolous and without merit. See *People v. Alcozer*, 241 Ill. 2d 248, 258, 948 N.E.2d 70, 77 (2011) (issues dismissed on grounds of *res judicata* are necessarily frivolous and patently without merit).

¶ 13 Defendant next claims he received ineffective assistance of counsel where his

trial counsel failed to inform him of the three-year MSR term. As discussed above, the record clearly shows defendant was informed of the three-year MSR term in open court and acknowledged that he understood the terms. His claim that counsel failed to inform him of the MSR term is contradicted by the record and therefore frivolous.

¶ 14 Defendant next claims he received ineffective assistance of counsel where his trial counsel failed to object to the imposition of the \$53,000 street-value fine, where the trial court heard no evidence on the value of the marijuana seized. See *People v. Galmore*, 382 Ill. App. 3d 531, 536, 889 N.E.2d 238, 242-43 (2008) (the trial court must base street-value fine on concrete evidence). The State argues the record contains adequate evidentiary support for the imposition of the \$53,000 street-value fine, and in the alternative, the issue is barred by *res judicata* as it could have been raised on direct appeal but was not.

¶ 15 During first-stage review of a postconviction petition, a petition alleging ineffective assistance of counsel will survive summary dismissal if it is arguable (1) counsel's performance fell below an objective standard of reasonableness, and (2) the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212. In the case at bar, defendant cannot argue his interests were prejudiced by counsel's alleged ineffectiveness.

¶ 16 During grand jury testimony, one of the officers involved in defendant's investigation testified the 8,626 grams of marijuana discovered during the search had a street value in excess of \$64,000, or between \$7.41 and \$7.42 per gram ($\$64,000 / 8,626 = 7.4194$). This testimony was disclosed to defense counsel prior to trial. At trial, defendant was found guilty of possessing 7,109 grams of marijuana. Using the price per gram from the grand jury testimony, the marijuana had a street value of between \$52,677.69 and \$52,748.78. Section 5-9-

1.1(a) of the Unified Code of Corrections (730 ILCS 5/5-9-1.1(a) (West 2006)) requires a street-value fine of "not less than the full street value of the cannabis *** seized." In the instant case, the \$53,000 street-value fine was a fair estimate of the street value of the cannabis seized. Further, evidence in the record, of which defense counsel was aware prior to sentencing, supports the fine imposed by the court. Given the evidence in the record, we cannot say defendant was arguably prejudiced by defense counsel's alleged ineffectiveness; thus, defendant has failed to state the gist of a cognizable constitutional claim on this matter. Because our finding on this issue is dispositive, we need not reach the State's *res judicata* argument.

¶ 17 Defendant's final claim in his petition is that his fines must be vacated and the issue must be remanded to the trial court to determine the proper amount. This last claim is entirely conclusory in nature and seems to be premised on the success of other arguments. As such, we find it to be frivolous and patently without merit. See *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212 (An issue that lacks an arguable basis in law or fact is frivolous and patently without merit.).

¶ 18 In addition to issues pertaining to the merits of his postconviction petition, defendant also claims the trial court improperly held him responsible for filing fees and court costs connected to the petition. Section 22-105(a) of the Procedure Code (735 ILCS 5/22-105(a) (West 2010)) holds a defendant responsible for filing fees and court costs where the court specifically finds a petition filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2010)) to be frivolous. Defendant challenges the imposition of costs and fees in this case because the trial court did not make a specific finding that his petition was frivolous, in that it applied the wrong standard in dismissing his petition. However, because we

find defendant's postconviction petition to be frivolous and patently without merit, we also find that section 22-105(a) applies, and defendant is responsible for filing fees and court costs in connection with his petition.

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

¶ 20 Affirmed.