

No. 1-10-0916

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 8561
	)	
NATHANIEL BANKS,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justices Connors and Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's *pro se* motion for substitution of judge did not deprive the trial court of the authority to rule on defendant's *pro se* postconviction petition because section 114-5(d) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-(5)(d) (West 2008)), does not apply to postconviction proceedings. Summary dismissal of the postconviction petition and the imposition of \$105 in court costs and fees was proper when the petition raised a claim that could have been raised on direct appeal and the broad term "court costs" includes the filing fees and actual court costs assessed when a pleading is found to be frivolous.

¶ 2 Defendant Nathaniel Banks appeals from the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, defendant contends that the trial court's order dismissing his postconviction petition is void because defendant's *pro se* motion for substitution of judge was never properly ruled on by the trial court. Defendant further contends that the petition set forth an arguable claim that he was denied effective assistance of counsel because trial counsel failed to subpoena defendant's wireless telephone records.

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He also contests the collection of certain court costs from his prisoner trust account. We affirm the judgment of the circuit court of Cook County.

¶ 3 Defendant and codefendant Thomas Moore (codefendant Moore) were arrested after a March 12, 2005 incident during which the victims, Charles Wilson (Wilson) and Patricia Jones (Jones), were shot while they were sitting in Wilson's car. At trial, defendant was identified as the shooter by Wilson and witness Cassandra Moore (Cassandra). Although defendant testified that he did not shoot anyone, he was ultimately found guilty of two counts of attempted first-degree murder and one count of the unlawful use of a weapon by a felon.

¶ 4 Posttrial, trial counsel filed a motion to reconsider or in the alternative for a new trial. At a subsequent hearing, the trial court asked defendant, based upon certain allegations made to the Attorney Registration and Disciplinary Commission, whether he wished to be represented by trial counsel going forward. After defendant indicated that he wanted new counsel, the trial court appointed a public defender to represent him. Appointed counsel then filed a motion for a new trial alleging numerous instances of trial counsel's ineffectiveness, including the failure to subpoena defendant's wireless telephone records. The motion for a new trial further alleged that if the records had been obtained the outcome of the trial may have been different.

¶ 5 At a subsequent hearing on the motion for a new trial, defendant testified, in pertinent part, that he asked trial counsel to get his wireless telephone records because the records would have proven that he was not with codefendant Moore at the time of the shooting. Trial counsel then testified that he did not subpoena the telephone records because they would not have indicated where defendant was "physically located," that is, defendant could have been anywhere making telephone calls. During cross-examination, trial counsel indicated that he did not remember defendant telling him that defendant was on the telephone with codefendant Moore at the time of the shooting. He acknowledged that the telephone numbers in the records may have helped to locate potential witnesses.

¶ 6 In denying defendant's motion for a new trial, the trial court stated that the matter of the telephone records was one of trial strategy and was not sufficient to establish prejudice because there was no evidence before the court that the telephone records showed "anything." Defendant was ultimately sentenced to consecutive terms of 40, 25, and 7 years of imprisonment.<sup>1</sup>

¶ 7 On appeal, this court affirmed defendant's convictions and sentences while also granting the State Appellate Defender's motion to withdraw filed pursuant to *Anders v. California*, 386 U.S. 738 (1967). See *People v. Banks*, No. 1-07-1257 (2008).

¶ 8 In 2009, defendant filed, *pro se*, a petition for postconviction relief (postconviction petition) alleging, *inter alia*, that he received ineffective assistance of counsel because trial counsel failed to subpoena telephone records which would have "confirmed" that defendant and codefendant Moore were not together at the time of the shooting. Defendant did not attach the allegedly exculpatory telephone records. Defendant also filed a *pro se* motion for substitution of judge (motion for substitution) pursuant to section 122-8 of the Act (725 ILCS 5/122-8 (West 2008)), alleging that the judge who presided over his trial "may possess bias" against him because the postconviction proceeding sought review of the judge's previous rulings. The trial court summarily dismissed the petition as frivolous and patently without merit while also assessing \$105 in filing fees and costs. It is from this judgment that defendant appeals.

¶ 9 Defendant first contends on appeal that the trial court's failure to rule on the *pro se* motion for substitution violated section 114-5(d) of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/114-5(d) (West 2008)). Defendant further argues that the filing of the motion for substitution deprived the trial court of jurisdiction to rule on the postconviction petition, and, consequently, the

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<sup>1</sup>Although defendant's mittimus, dated April 23, 2007, indicates that defendant was sentenced to two consecutive terms of imprisonment for the attempted murder convictions and a concurrent term of imprisonment for the unlawful use of a weapon by a felon, his "corrected" mittimus, dated August 10, 2007, indicates that all three prison terms were to be served consecutively.

order dismissing the postconviction petition is void.

¶ 10 Section 114-5(d) states that when either the defendant or the State files a motion for substitution for cause in the trial court, a different judge must decide whether to grant the substitution. See 725 ILCS 5/114-5(d) (West 2008). During the pendency of the motion for substitution, the judge that the defendant seeks to replace loses the authority to enter any orders in the case. *People v. Bell*, 276 Ill. App. 3d 939, 947 (1995); see also 725 ILCS 5/114-5(a), (c) (West 2008) (once a motion for substitution is filed "the court shall proceed no further"). Any orders that are entered when the motion for substitution is pending are void. *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008). However, section 114-5(d) does not apply to postconviction proceedings. *Id.* at 522.

¶ 11 We find *Harvey*, 379 Ill. App. 3d 518 (2008), a factually similar case, to be instructive. There, the defendant argued that the dismissal of his postconviction petition was a void judgment because the trial court did not rule on the simultaneously filed motion for substitution in violation of section 114-5(d) of the Code (725 ILCS 5/114-5(d) (West 1994)).

¶ 12 On appeal, the *Harvey* court determined that the defendant's reliance on section 114-5(d) was wrong for two reasons. First, the defendant had filed his motion for substitution pursuant to section 122-8 of the Act (725 ILCS 5/122-8 (2004)), a provision which had previously been ruled unconstitutional by our supreme court. *Harvey*, 379 Ill. App. 3d at 522, citing *People v. Joseph*, 113 Ill. 2d 36, 48 (1986). Second, even if the motion for substitution had been filed pursuant to section 114-5(d), that statute did not apply to postconviction proceedings and the defendant did not have the absolute right to a substitution of judge in a postconviction proceeding. *Harvey*, 379 Ill. App. 3d at 522. Rather, the judge who presided over the defendant's criminal trial should also preside over the postconviction proceeding, unless it was shown that the judge was "substantially prejudiced." *Id.*

¶ 13 The *Harvey* court then recognized that in those "limited" circumstances where there might be an appearance of prejudice, a judge must recuse himself or herself from a postconviction

proceeding, and was in fact required to do so by the Code of Judicial Conduct when his or her impartiality might reasonably be questioned. *Id.* (listing examples). However, when the circumstances were not such that either mandatory recusal or an independent evaluation of the defendant's claims of prejudice was required pursuant to section 114-5(d), the trial judge is in the best position to determine whether he or she can remain impartial. *Id.*, quoting *People v. Jackson*, 205 Ill. 2d 247, 277 (2001) (although judges are presumed to be impartial, each judge must ultimately determine whether he or she can "hold the balance nice, clear and true" between the defendant and the State). To disqualify a judge for cause, a defendant must demonstrate animosity, hostility, ill will, distrust or prejudice, *i.e.*, show something more than that the judge presided over the defendant's criminal trial. *Harvey*, 379 Ill. App. 3d at 523; see also *Liteky v. United States*, 510 U.S. 540, 555 (1994) (a judge's prior rulings in a case "almost never" form a valid basis for a bias motion).

¶ 14 The *Harvey* defendant's motion for substitution alleged that the trial judge was "predisposed" to deny the postconviction petition because the judge had previously ruled on the issue raised in the postconviction petition. However, the *Harvey* court determined that this allegation, in and of itself, did not suggest that the judge would be unable to "hold the balance" between the State and the defendant, and, furthermore, the fact that a judge made prior rulings in a case was not a valid basis for a recusal motion. *Harvey*, 379 Ill. App. 3d at 523. Ultimately, the *Harvey* court determined that the fact that the defendant's motion for substitution was not ruled upon had no effect upon the trial court's authority to rule on the postconviction petition as section 114-5(d) and its procedural requirements did not apply to the postconviction proceeding at issue. *Id.* As the trial court was neither required to transfer the motion to another judge for evaluation nor divested of the authority to enter orders in that case, the ruling on the postconviction petition was made with full authority. *Id.*

¶ 15 Similarly, here, defendant's *pro se* motion for substitution relied upon section 122-8 of the

Act (725 ILCS 5/122-8 (West 2008)), and alleged that the judge who presided over his trial "may possess" bias against him because of the judge's "extensive involvement" in the case. However, 122-8 of the Act has been ruled unconstitutional and cannot serve as a valid basis for the motion for substitution. *See Harvey*, 379 Ill. App. 3d at 522. Second, even if the motion for substitution had been filed pursuant to section 114-5(d), that provision does not apply to postconviction proceedings. *See id.* As in *Harvey*, defendant's allegation that the trial judge would be biased against him merely because the postconviction petition challenged previous rulings in the case, in and of itself, does not suggest that the judge would be unable to be impartial and was not a valid basis for the motion for substitution. *See id.* at 523. The fact that defendant's *pro se* motion for substitution was not ruled upon did not impact the trial court's authority to rule upon the postconviction petition, and, consequently, the order summarily dismissing the petition was made with full authority. *See id.*

¶ 16 Defendant next contends that his postconviction petition was improperly dismissed because it set forth an arguable claim that he was deprived of the effective assistance of counsel by trial counsel's failure to obtain the wireless telephone records which would have allegedly substantiated his alibi.

¶ 17 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2008). At the first stage of proceedings under the Act, the trial court determines whether a defendant's petition is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). A postconviction petition is summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). We review the summary dismissal of a postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

¶ 18 Before reaching the merits of defendant's claim, we must address the State's contention that defendant has forfeited this issue for purposes of the instant postconviction proceeding because it

was raised before the trial court and could have been raised on direct appeal.

¶ 19 The scope of a postconviction proceeding is limited to constitutional matters that have not been, and could not have been, previously adjudicated; issues that could have been raised on direct appeal but were not are procedurally defaulted and issues that were previously decided by a reviewing court are barred by the doctrine of *res judicata*. *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007); see also *People v. Scott*, 194 Ill. 2d 268, 274 (2000) (rulings on issues that were raised before the trial court or on direct appeal are *res judicata*, and issues that could have been raised in an earlier proceeding but were not are generally waived).

¶ 20 Here, the record reveals that the issue of whether trial counsel was ineffective for a failure to obtain the telephone records was raised in defendant's motion for a new trial. At the hearing on the motion for a new trial, trial counsel was questioned as to why he did not obtain the records. Ultimately, the trial court denied the motion for a new trial finding, *inter alia*, that defendant's claim of ineffective assistance failed because the decision whether to obtain the telephone records was one of trial strategy and defendant had not established prejudice. Thus, as this issue could have been raised on direct appeal, but was not, it is forfeited for purposes of the instant proceeding. *Harris*, 224 Ill. 2d at 124.

¶ 21 Defendant attempts to avoid the procedural bar of forfeiture by arguing that he could not have raised this issue on direct appeal because it concerns a matter outside the record, *i.e.*, the telephone records. While it is certainly true that telephone records themselves were not part of the trial record, defendant ignores the fact that this issue, whether trial counsel's failure to obtain the records constituted ineffective assistance, was raised in the motion for a new trial and argued before the trial court. Thus, it was of record and could have been raised on direct appeal. Consequently, as this issue could have been raised on direct appeal but was not, it is forfeited for the purposes of this proceeding (see *Harris*, 224 Ill. 2d at 124), and the trial court properly dismissed defendant's postconviction petition.

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¶ 22 Defendant finally contends that the trial court erred when it assessed \$105 in filing fees and court costs pursuant to section 22-105(a) of the Code of Civil Procedure because only \$15 of the \$105 assessed against him is subject to collection from his prisoner trust account. See 735 ILCS 5/22-105(a) (West 2008) (if a prisoner files a petition seeking postconviction relief and the trial court makes a "specific finding" that the pleading is frivolous, the prisoner is responsible for payment of the "filing fees and actual court costs"). Defendant argues that section 22-105(a) limits collection from a prisoner's trust fund to only "court costs." See 735 ILCS 5/22-105(a) (West 2008) (upon the filing of "the action or proceeding the court shall assess and \*\*\* collect \*\*\* court costs required by law"). According to the defendant, the term "court costs" does not apply to the \$90 filing fee assessed against him, which therefore precludes the Department of Corrections from removing that amount from his account.

¶ 23 However, this claim was rejected in *People v. Smith*, 383 Ill. App. 3d 1078, 1094 (2008), in which the court determined that "the legislature's use of the broad phrase 'any court costs' in delineating a means of collection" in section 22-105(a) was intended to include the filing fees and actual court costs assessed when a pleading is found to be frivolous. Accord *People v. Dixon*, 409 Ill. App. 3d 915, 925 (2011) (agreeing with *Smith* that the phrase "court costs" is "a shorthand expression for all expenditures connected with the filing of pleadings in court, including filing fees"). Thus, there was no error in the trial court's order that \$105 be collected from defendant's prisoner trust account.

¶ 24 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 25 Affirmed.