

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).

2012 IL App (4th) 110375-U

NO. 4-11-0375

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 18, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
ROBERT S. ARNETTE,)	No. 07CF1775
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Turner and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in summarily dismissing defendant's postconviction petition because defendant's argument his trial counsel was ineffective for not moving to quash his arrest could have been raised on direct appeal.

¶ 2 In March 2011, the trial court summarily dismissed defendant Robert S. Arnette's *pro se* postconviction petition, finding the petition frivolous and patently without merit.

Defendant appeals, arguing the court erred in summarily dismissing his petition because his petition presented the gist of a constitutional claim. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In August 2008, a jury found defendant guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 2006)). In November 2008, the trial court sentenced defendant to consecutive terms of 60 years'

imprisonment for first degree murder and 5 years' imprisonment for concealment of a homicidal death.

¶ 5 In his direct appeal, defendant made the following arguments: (1) the trial court erred in denying his motion to change the trial venue; (2) his trial counsel was ineffective (a) for failing to file a motion to suppress statements defendant made during a custodial interrogation and (b) failing to request the redaction of a reference to defendant as a sex offender in his videotaped statement to police; and (3) the court deprived him of a fair trial by refusing to redact from his videotaped statement to police a reference to defendant's prior felony convictions. *People v. Arnette*, No. 4-09-0075 at 1-2 (2010) (unpublished order under Supreme Court Rule 23). This court affirmed defendant's conviction. *Id.* at 17.

¶ 6 On March 24, 2011, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2010)). In the petition, defendant argued his due process rights were violated because the State did not prove his guilt beyond a reasonable doubt. According to defendant, the State neither proved his wife's cause of death nor disproved his statement his wife hung herself. Defendant also alleged his trial counsel was ineffective for not seeking the substitution of the trial court judge. In addition, defendant argued his due process rights were violated because his indictment was too vague. Finally, defendant alleged his trial counsel was ineffective for not moving to quash his arrest.

¶ 7 On March 29, 2011, the trial court summarily dismissed defendant's petition. The court stated defendant's petition attempted to relitigate his conviction and raised issues that could have been raised on direct appeal.

¶ 8 This appeal followed.

¶ 9

II. ANALYSIS

¶ 10 Defendant argues he stated the gist of a constitutional claim his trial counsel was ineffective for failing to move to quash his arrest based on a lack of probable cause. Defendant makes no arguments as to the other allegations raised in his postconviction petition. Defendant also makes no argument with regard to the trial court's finding this issue could have been raised on direct appeal. We review the first stage dismissal of a postconviction petition *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010).

¶ 11 Our supreme court has stated a trial court is to independently examine a postconviction petition during the first stage of postconviction proceedings. *Id.* To survive the first stage of postconviction proceedings, a petitioner is only required to present a limited amount of detail. *Id.* He is not required to include citation to legal authority or legal argument. *Id.* However, he is "is not excused *** from providing any factual detail whatsoever on the alleged constitutional deprivation." *Id.*

"The allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim. [Citation.] This standard presents a 'low threshold' [citation], requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim [citation]."

In considering the petition, the trial court may examine the court file of the criminal proceeding, any transcripts of the proceeding, and any action by the appellate court. *** We recently explained that a *pro se* postconviction petition is frivolous or

patently without merit only if it 'has no arguable basis either in law or in fact.' [Citation.] A petition lacking an arguable basis in law or fact is one 'based on an indisputably meritless legal theory or a fanciful factual allegation.' [Citation.] A claim completely contradicted by the record is an example of an indisputably meritless legal theory. [Citation.] Fanciful factual allegations include those that are fantastic or delusional." *Brown*, 236 Ill. 2d at 184-85, 923 N.E.2d at 754.

¶ 12 Before reaching the merits of defendant's argument, we first address the State's argument defendant forfeited his claim his trial counsel was ineffective for not moving to quash his arrest because the issue could have been raised on direct appeal. The State also points out defendant's appellate brief does not contend his argument falls within an exception to the forfeiture doctrine, which constitutes a forfeiture of the issue on appeal pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). We agree with the State on both points.

¶ 13 A trial court may summarily dismiss a postconviction petition during the first stage of postconviction proceedings based on *res judicata* and waiver. *People v. Blair*, 215 Ill. 2d 427, 442, 831 N.E.2d 604, 614 (2005). According to our supreme court, "In an initial postconviction proceeding, the common law doctrines of *res judicata* and waiver operate to bar the raising of claims that were or could have been adjudicated on direct appeal." *Blair*, 215 Ill. 2d at 443, 923 N.E.2d at 614-15. Defendant's argument his trial counsel was ineffective for not moving to quash his arrest based on a lack of probable cause could have been adjudicated on direct appeal as it does not appear his argument is based on anything outside the record.

¶ 14

Our supreme court has noted:

"It has long been held that *res judicata* and forfeiture do not apply where fundamental fairness so requires; where the alleged forfeiture stems from the incompetence of appellate counsel; or where facts relating to the claim do not appear on the face of the original appellate record. [Citations.] Further, defendant has an opportunity to respond to the court's summary dismissal based on *res judicata* and forfeiture. A defendant may file a motion to reconsider which may claim exceptions to *res judicata* and forfeiture. A defendant may also challenge a summary dismissal on appeal. Successive petitions may also be filed as permitted by law." *Blair*, 215 Ill. 2d at 450-51, 831 N.E.2d at 619.

As the State argued in its brief, defendant presented no argument why his claim could not have been presented on direct appeal, why his appellate counsel was ineffective for not doing so, or why fundamental fairness requires this court to review the issue regardless of forfeiture. It is not the duty of this court to make arguments for defendant.

¶ 15

However, even if defendant had not forfeited this claim, defendant's claim is completely contradicted by the record. Based on the record in this case, the police clearly had probable cause to arrest defendant. Witnesses had placed defendant at the victim's home the day she went missing. The victim in this case, Naomi Arnette, was defendant's wife, although they were separated at the time of her disappearance, and she was dating another man. Although he did not deny being at the victim's home or seeing her on the day of her disappearance, defendant

consistently told police on multiple occasions over the period between the victim's disappearance and his arrest nearly five months later that he had no idea what happened to the victim, where she might be, or, after her body was found, how her body arrived at that location. However, with the cooperation of defendant's girlfriend, Theresa Henson, the police conducted court-ordered overhears of conversations between defendant and Henson. During those conversations, at the same time he was telling the police he had no knowledge regarding what happened to his wife, defendant told Henson how and where his wife died.

¶ 16 Because a motion to quash defendant's arrest based on a lack of probable cause would not have been successful, defendant was not prejudiced by his trial counsel's failure to file such a motion. As a result, defendant clearly could not establish the second requirement, *i.e.*, prejudice, necessary to establish ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 17 III. CONCLUSION

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

¶ 19 Affirmed.