

No. 1-10-2473

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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. 04CR18174
)	
MOSES STAMPS,)	The Honorable
)	Diane Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concur in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of *pro se* postconviction petition was affirmed where defendant's claims of ineffective assistance of trial and appellate counsel were forfeited because they were improperly raised for the first time on appeal.

¶ 2 Defendant Moses Stamps appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122 *et seq.* (West 2010)).

On appeal, defendant asserts that this court should remand his postconviction petition for second-

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stage proceedings where he set forth claims of ineffective assistance of trial and appellate counsel which had arguable bases in law and in fact. For the following reasons, we affirm the summary dismissal of defendant's postconviction petition.

¶ 3

I. BACKGROUND

¶ 4 Following a jury trial, defendant Moses Stamps was convicted of first degree murder for the shooting death of Byron Howard. Defendant was sentenced to 55 years' imprisonment, including a 25-year sentence enhancement. On direct appeal, this court affirmed defendant's convictions and sentence, and modified the mittimus. *People v. Stamps*, No. 1-07-0891 (2008) (unpublished order under Supreme Court Rule 23). Because the facts of the offense are fully set out in our order on direct appeal, we restate here only those facts necessary to an understanding of defendant's current appeal.

¶ 5 At trial, defendant's son-in-law Michael Calhoun testified he went to a store with the victim on July 13, 2004, and met defendant on the way. Defendant and the victim had a "little confrontation" lasting 2 or 3 minutes. Although Calhoun could not hear precisely what was said between the two men, he could hear the confrontation was over some sports jerseys. At that time, Calhoun had known the victim for 20 years and had known defendant for 10 years. After visiting the store, Calhoun and the victim went to a nearby playground on West Division Street near the Cabrini-Green housing complex. At the playground they met the victim's six-year-old son Kavar, Kavar's mother Natasha Dyer, Bernetta Wilson, and Steven Dyer. They all talked for awhile. Calhoun then walked to a parking lot about 100 feet away. From the parking lot, he

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heard what sounded like firecrackers and saw people running. He returned to the playground and found the victim on the ground. Calhoun did not see defendant. Calhoun testified that the victim was unarmed.

¶ 6 Natasha Dyer, defendant's step-daughter, testified that she was at the playground around 6 p.m. with her son Kavar, as well as Bernetta and Steven. They spoke with the victim. Soon, defendant approached the victim, and Natasha heard him tell defendant that they were arguing over something petty. Defendant responded, "so what you saying, fuck my family?" Then, defendant drew a gun from the waistband of his pants and hit the victim across the head with it. When he did so, the gun discharged, but the bullet did not hit the victim. The victim "stumbled back" as if to fall, but regained his balance. Defendant then fired the gun into the victim's chest. Natasha was 5 to 10 feet away and had an unobstructed view of defendant and the victim. She testified that the victim was not armed, was holding a bag from the store, and had not made any threatening gestures toward defendant.

¶ 7 Natasha asked defendant why he shot the victim in front of her child, but defendant did not answer. He fled on his bicycle. Natasha saw him ride to a nearby building and give the gun to a boy. Natasha had known both the victim and defendant all of her life. She testified that the victim and defendant were friends. The following day, Natasha went to the police station and gave a statement. She later testified before a grand jury.

¶ 8 Steven Dyer, defendant's brother-in-law, testified that he was at the playground when defendant arrived. Steven was approximately 10 feet from defendant and the victim. He did not hear what the victim told defendant, but did hear defendant say, "so you're saying fuck my

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family?" Steven then saw defendant draw a gun, strike the victim on the head with it, and heard the gun discharge. Steven testified that the victim stumbled backwards and then defendant "aimed and he fired," hitting the victim with the second bullet. Dyer demonstrated for the jury how defendant had pointed the gun at the victim and had fired the gun a second time while the victim was still trying to recover his balance. The victim fell to the ground. Steven testified he thought there was a total of three gunshots fired, but the police only recovered two shell casings. Steven testified that the victim was unarmed and made no threatening movements toward defendant. The following day, he went to the police station and made a statement.

¶ 9 Bernetta Wilson testified that she had known both defendant and the victim for 15 years. She saw defendant arrive at the park and heard him say something to the victim. Defendant then drew a gun and hit the victim on the side of the head. The gun discharged when he did so. The victim looked "shocked and scared." Wilson testified that the victim was unarmed, did not threaten defendant, and did not make a move toward defendant. After the first shot, she ran with Kavar to the other side of the playground. As she was running, she heard another gunshot, but did not see it. When she turned, she saw defendant pointing the gun at the victim. She could not recall the number of gunshots she heard.

¶ 10 Police officers later recovered two shell casings at the scene of the shooting, as well as a loaded .22 semi-automatic pistol in a nearby alley. Illinois State Police forensic scientist Cid Drisi testified as an expert in the field of firearms examination that the recovered gun was the murder weapon. He noted that the gun's trigger pull was working, but the gun's safety was not in working order. He testified that a person would fire this gun "by pulling the trigger," and that it

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took three pounds of pressure to fire the gun. He explained that, although there are tests that can be performed to determine whether a firearm can be fired by hitting it against a surface, he did not perform these tests because he was not asked to do so by either defense or prosecution.

¶ 11 Defendant testified on his own behalf, acknowledging his six prior criminal convictions for drug and weapons offenses: delivery of a controlled substance in 1994; unauthorized use of weapons in 1996; possession of a controlled substance in 1999, 2001 and 2003; and unauthorized use of weapons as a felon in 2001. He testified that he grew up in the Cabrini-Green neighborhood and had known the victim, his good friend, for 15 to 20 years. He saw the victim at a neighborhood grocery store late in the afternoon of July 13, 2004, and told him a jersey the victim had belonged to defendant's family. The victim refused to give it back or pay for it. They argued, then agreed to talk later at the playground. Later, at the playground, defendant demanded that the victim pay for the jersey or give it back. The victim refused, referring to the argument as "petty." Defendant testified that he then drew his gun in order to "scare him" into paying for or returning the jersey. Defendant felt the victim was being disrespectful to his family, and he asked the victim, "what you say, fuck my family?" Defendant admitted hitting the victim on the side of the head with the gun, and agreed the gun discharged when he did so. The gun discharged a second time while the victim was "fixing like to fall." The following exchange took place:

"[ASSISTANT PUBLIC DEFENDER] Q: Moses, how did
you feel when the gun went off?

[WITNESS DEFENDANT] A: I felt bad man.

Q: Did you pull the trigger on the gun?

A: I must have. My friend is dead. It was an accident. I wasn't trying to pull the trigger. If it went off, it was an accident. I wasn't trying."

Defendant testified that he then panicked, left the playground, and gave the gun to a boy. He was arrested the next day.

¶ 12 On cross-examination, defendant admitted he always carries a loaded gun with him. He admitted the victim was unarmed, did not threaten him, and never made an aggressive movement toward him. Defendant knew the gun was loaded, and alternately admitted and denied that he realized the safety was off when he met the victim at the playground. Defendant admitted his finger was on the trigger at all times after he drew the weapon, including when he hit the victim in the head with the gun. He admitted he did not drop the gun or put it on the ground after it discharged the first time, explaining that the shots occurred back-to-back. Even after the gun discharged the first time and he knew the safety was off, he did not take his finger off of the trigger. Although defendant claimed the shooting was an accident, he did not go to the police to tell them it was an accident, but fled the scene and disposed of the gun.

¶ 13 When asked on direct examination about his interrogation by police officers, defendant testified he "might have" denied being at the playground at the time of the shooting. On cross-examination, he said he "could have" lied to the felony review assistant but did not remember telling her that he was sitting on a porch at the time of the shooting. He acknowledged on direct examination that he gave a different account later on and, when asked if he had told the officers he fired the second shot when the victim came toward him, defendant testified, "I don't recall. I

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could have." He did not remember telling the assistant state's attorney that he shot the victim when the victim got up and came toward him. Nor did he remember telling the assistant state's attorney that the gun discharged accidentally while he was playing with it. He did not recall telling her he could not name the shooter because it would not be safe to do so. Nor did he remember refusing to give her the names of witnesses or telling her he would provide this information only if his case went to court.

¶ 14 Assistant state's attorney Veryl Gambino testified in rebuttal that, when she interviewed defendant on July 14, 2004, defendant gave her three varying accounts of the incident "in quick succession." First, defendant said he was sitting on the porch of a nearby building at the time of the shooting. Next, he said he was behind another building, and then he said he was somewhere else in relation to the playground. He refused to give her names of witnesses unless this matter went to court. He told her it would not be safe for him to name the shooter, and that it would not be safe for someone else to name him, either.

¶ 15 Gambino further testified that defendant admitted involvement in the shooting when she interviewed him on July 15. He told her the first shot was accidental and said the victim "might have moved or started to move toward him" when he shot the second time. Defendant also told her he obtained the gun from "one of his guys" after the initial confrontation near the store.

¶ 16 The jury convicted defendant of first degree murder as charged, and the court sentenced him to 55 years' imprisonment.

¶ 17 On direct appeal, defendant argued that: (1) the State failed to prove him guilty beyond a reasonable doubt where the victim's death was merely an accident because defendant hit his

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"good friend" in the head with a loaded gun without a working safety, causing the gun to misfire once into the air and then, as the victim stumbled backwards, to misfire a second time into the victim's chest; (2) he was denied the effective assistance of trial counsel where counsel failed to tender an instruction defining reckless conduct for the involuntary manslaughter charge; (3) the trial court abused its discretion by refusing to admit defendant's prior exculpatory statement that he shot the victim on accident; (4) he was denied a fair trial due to prosecutorial misconduct from various comments made in closing argument; and (5) he was prejudiced where the court failed to comply with certain procedures during *voir dire*.¹ *People v. Stamps*, No. 1-07-0891 (2008) (unpublished order under Supreme Court Rule 23). We disagreed with defendant's contentions of error, and affirmed his conviction and sentence.

¶ 18 In doing so, we also addressed defendant's alternative assertion of error regarding the trial court's failure to comply with certain procedures during *voir dire*. Specifically, defendant argued in the alternative that his trial counsel was ineffective for failing to ask the venire about their understanding of the principles enumerated in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984), and failing to ask the court to do so, either. Specifically, this court found that defendant was "unable to show resulting prejudice where the evidence of his guilt is overwhelming, including occurrence witnesses who saw defendant point the gun at the victim's chest and fire. * * *

Defendant is unable to show prejudice where the result of the proceeding would not have been

¹ Defendant also challenged two errors on his mittimus. Pursuant to our authority under Supreme Court Rule 615(b)(1), we ordered the circuit court to correct the mittimus. *People v. Stamps*, No. 1-07-0891 (2008) (unpublished order under Supreme Court Rule 23).

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different absent counsel's alleged errors." *People v. Stamps*, No. 1-07-0891 (2008) (unpublished order under Supreme Court Rule 23).

¶ 19 Defendant then filed the instant *pro se* postconviction petition in April 2010 alleging, in pertinent part, that: (1) the court erred in instructing the jury that it must consider defendant's prior convictions as evidence of his guilt; (2) his trial counsel "violated [defendant's] right against Self-Incrimination and right not to testify" when counsel allegedly "coerced" defendant to testify at trial and the jury was then made aware of defendant's prior convictions; and (3) his appellate counsel provided ineffective assistance by failing to raise the following issues on direct appeal: ineffective assistance of trial counsel for failing to subject the State's case to meaningful adversarial testing, failing to present defense witnesses, failing to object to the trial court's erroneous jury instruction, failing to object to the State's remarks in argument, and failing to present witnesses to support the defense theory.

¶ 20 In June 2010, the postconviction court dismissed defendant's petition as frivolous and patently without merit in a written order.

¶ 21 Defendant appeals.

¶ 22 II. ANALYSIS

¶ 23 I. Ineffective Assistance of Trial Counsel

¶ 24 On appeal, defendant contends that the postconviction court erred in summarily dismissing his postconviction petition where he stated the gist of a meritorious argument that his trial counsel failed to provide effective assistance. Specifically, defendant argues he was denied

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the effective assistance of trial counsel where counsel allegedly coerced defendant to testify at trial.²

¶ 25 The Post-Conviction Hearing Act provides a remedy for defendants whose constitutional rights were substantially violated in their original trial or sentencing hearing when such a claim was not, and could not have been, previously adjudicated. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). An action for postconviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002).

¶ 26 The summary dismissal of a postconviction petition is appropriate at the first stage of postconviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, the petition has no arguable basis in either law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). To have no arguable basis, the petition must be based on an “indisputably meritless legal theory or a fanciful factual allegation.” *Hodges*, 234 Ill. 2d at 16. In order for a defendant to circumvent dismissal at the first stage, he must allege the “gist” of a constitutional claim, which is a low threshold. *Hodges*, 234 Ill. 2d at 9-10. This standard requires only that a defendant plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The summary dismissal of a

² Initially, defendant also contended that he stated the gist of a meritorious constitutional claim regarding the jury instruction issue. However, after realizing his argument was premised on a mere typographical error in the trial transcript, defendant withdrew that claim from consideration by this court.

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postconviction petition is a legal question which we review *de novo*. *Hodges*, 234 Ill. 2d at 9; *People v. Edwards*, 197 Ill. 2d 239, 247 (2001). “Although the trial court’s reasons for dismissing [the] petition may provide assistance to this court, we review the judgment, and not the reasons given for the judgment.” *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 27 Generally, to establish a claim of ineffective assistance of counsel, a defendant must show that his attorney’s representation fell below an objective standard of reasonableness and that he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Coulter*, 352 Ill. App. 3d 151, 157 (2004). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994). To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 342 Ill. App. 3d 849, 859 (2003). To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel’s insufficient performance, the result of the proceeding would have been different. *People v. Easley*, 192 Ill. 2d 307, 317 (2000). Specifically, the defendant must show that counsel’s deficient performance rendered the result of the proceeding unreliable or fundamentally unfair. *Easley*, 192 Ill. 2d at 317-18.

¶ 28 A defendant alleging ineffective assistance of counsel at the first stage of proceedings must show it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶ 19, citing *Hodges*, 234 Ill. 2d at 17 (“This ‘arguable’ *Strickland* test demonstrates that first-stage

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postconviction petitions alleging ineffective assistance of counsel are judged by a lower pleading standard than are such petitions at the second stage of the proceeding"); accord, *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 49 (the "arguable *Strickland* test" appropriate at the first stage of a postconviction proceeding is more lenient than that appropriate at the second stage of postconviction proceedings). Under this standard, we may proceed directly to the question of prejudice to determine whether defendant has presented a constitutional claim of "arguable merit" that his right to the effective assistance of counsel was violated. See, e.g., *Easley*, 192 Ill. 2d at 317 (To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's insufficient performance, the result of the proceeding would have been different.); *Palmer*, 162 Ill. 2d at 475 (Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim).

¶ 29 Here, in his *pro se* postconviction petition, defendant argued, in pertinent part, that he was denied "due-process and equal protection" when his trial counsel coerced him to testify. The following is the argument contained in his petition in its entirety:

"[My] Trial-Counsel violated [my] right against Self-Incrimination and right not to testify. When Counsel (1) Coerced Petitioner to testify at trial:

I was denied my constitutional right against self-incrimination and right not to testify when I was coerced and pressured by trial-counsel to testify during my jury-trial. I spoke with Trial-Counsel prior to the start of my trial concerning my

reluctance in testifying in my own behalf due to my having prior criminal-convictions.

I told Counsel again during trial that I did not want to testify because I had further concerns about the uncertainty [*sic*] as to the content of the alleged statements relating to the interviews that I had with the police-officer's and Assistant State's Attorney during my arrest and at the police station.

I explain to Counsel that I did not want to testify several time [*sic*], but Counsel insisted that I testify. Counsel told me that he had filed a Motion that would keep the jury from hearing about my prior-convictions when I testified. * * * Counsel told me that I should testify in my own behalf in order to give the jury the opportunity to hear my presentation of the events leading up to and at the time of the actual shooting.

Additionally, Counsel exerted pressure on me to testify by telling me that unless I testified, that I would have no witnesses to present on my behalf.

After Counsel coerced me into testifying, Counsel then presented my prior criminal-convictions to the jury during my testimony which was a total surprise, because he had explained to me prior to my taking the witness-stand that my prior convictions

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would not be known to the jury and that I would not have to testify about them.

Counsel's advice and coercion was erroneous and clearly confused me as to what answers would be appropriate to give during my testifying * * * but due to Counsel's coercion and undue interference of forcing me to decide to testify only minutes prior to my actually testifying assisted in putting me in a state of confusion and misapprehension, which persuaded me to testify involuntary [*sic*].

Counsel's hurried consultation that occurred immediately prior to my testifying compelled me to testify also without being reasonably informed as to the direct consequences of testifying.

Had I not been coerced and persuaded involuntarily to testify, I would not have testified during my trial.

Counsel's actions here in coercing me to testify during my trial was deficient representation and prejudiced my defense because the jury being made aware of my prior convictions were very damaging to my defense."

The postconviction court dismissed this issue, noting that "the decision whether to testify or not is ultimately for the defendant." It stated:

"The line between vigorous persuasion and coercion is a

fine one; the lawyer is obligated not to present testimony that he is satisfied is not true, and he cannot call upon the trial judge to make the decision for him. * * * By hypothesis, in every case in which the issue is raised, the lawyer's advice will in retrospect appear to the defendant to have been bad advice, and he will stand to gain if he can succeed in establishing that he did not testify because his lawyer refused to permit him to do so. Here, the record indicates that petitioner willingly testified and was not forced to do so by his attorney. Therefore, his claim is without merit."

¶ 30 On appeal, defendant argues that this ineffective assistance of counsel claim has arguable merit "because his counsel failed to obtain a ruling on the admissibility of his past convictions, persuaded him to testify by telling him the convictions would be barred, and then anticipatorily fronted these convictions during his direct examination, including at least two convictions that were inadmissible." The State responds that defendant has forfeited this issue and, as such, the issue is not reviewable by this court. We agree with the State.

¶ 31 Our supreme court has made clear that claims not raised in a defendant's postconviction petition may not be raised for the first time on appeal from the circuit court's dismissal of that petition. It has explained:

"Stated bluntly, the typical *pro se* litigant will draft an inartful pleading which does not survive scrutiny under the 'frivolity/patently without merit' standard of section 122-2.1, and it

is only during the appellate process, when the discerning eyes of an attorney are reviewing the record, that the more complex errors that a nonattorney cannot glean are discovered. The appellate attorney, not wishing to be remiss in his or her duty, then adds the newly discovered error to the appeal despite the fact that the claim was never considered by the trial court in the course of its ruling. * * *

[T]he attorney is zealously guarding the client's rights and is attempting to conserve judicial resources by raising the claim expeditiously at the first available chance. These goals are laudable, but they nonetheless conflict with the nature of appellate review and the strictures of the Act." *People v. Jones*, 213 Ill. 2d 498, 504 (2004).

In *Jones*, our supreme court went on to explain that "when appellate counsel discover errors not raised by their clients during the summary, first-stage postconviction proceedings, the proper course of action for counsel to take is to file a successive petition in which the newly found claim is properly alleged." *Jones*, 213 Ill. 2d at 509; accord, *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006) ("claims not raised in a postconviction petition cannot be argued for the first time on appeal").

¶ 32 Here, defendant alleged in his postconviction petition that he was denied his right against self-incrimination and his right not to testify because he was coerced and pressured by his trial counsel to testify during his jury trial. In essence, defendant alleged that his free will was

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overcome by counsel's coercion and pressure, resulting in him involuntarily testifying at his trial. Specifically, he alleged he was "coerced" and "pressured" to testify, that counsel "insisted" he testify, that counsel "exerted pressure" on him to testify, that counsel "forced [him] to decide to testify only minutes before" he actually testified, which put him in a state of confusion and "compelled" him to testify, and that he was "persuaded involuntarily" to testify.

¶ 33 In our opinion, defendant has abandoned this claim on appeal. Instead of arguing as he did in his petition that his free will was overcome by counsel's extreme pressure, resulting in his involuntary testimony, defendant argues on appeal that he was prejudiced by the *consequences* of his testimony. On appeal, he does not argue the merits of this coercion claim, nor does he state that he testified involuntarily. This new argument, that is, that defendant was "persuaded" by counsel to testify and then suffered various consequences such as having specific prior convictions presented to the jury, has not been properly preserved. See *Pendleton*, 223 Ill. 2d at 474 (claims not raised in a postconviction petition cannot be argued for the first time on appeal). We, therefore, find this claim forfeited and do not address the merits on appeal. See *Jones*, 213 Ill. 2d at 508 (The appellate court is not free "to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition.").

¶ 34 Defendant urges us to find this issue not forfeited, and reminds us that our supreme court recently reiterated that "[b]ecause most petitions are drafted at [the first] stage by defendants with little legal knowledge or training, this court views the threshold for survival as low." *Tate*, 2012 IL 112214, ¶ 9. While we are mindful of the low threshold for survival, as well as the leniency

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afforded to *pro se* defendants at first-stage postconviction proceedings, we are also mindful of the limits of our authority. See, e.g., *Jones*, 213 Ill. 2d at 508 ("Our detailed discussion of this issue is intended to stress that our appellate court is not free, as [our supreme court] is under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition."). *Tate* did not involve a claim that was forfeited. Instead, the *Tate* court reviewed a postconviction petition which was dismissed at the first stage of postconviction proceedings and clarified that the appropriate standard in a first-stage postconviction proceeding in which a defendant argues he was denied the effective assistance of counsel is a lower pleading standard than at other stages of proceedings. *Tate*, 2012 IL 112214, ¶ 20. Here, defendant's petition was dismissed at the first stage. An attorney reviewed the petition and, on appeal, included issues on appeal which could have been included in the initial petition but were not. This is precisely what our supreme court in *Jones* warned against. While acknowledging the dilemma of appellate counsel where a *pro se* litigant has omitted a claim from the initial petition, the *Jones* court rejected counsel's solution, namely, to raise the issue even though it was not considered by the circuit court in ruling on the postconviction petition. *Jones*, 213 Ill. 2d at 509. In such a situation, the court advised that the proper course of action for counsel to take was to file a successive petition properly alleging the newly found claim. *Jones*, 213 Ill. 2d at 509. Such is the situation in the case at bar. We find this issue has been forfeited.

¶ 35 ii. Ineffective Assistance of Appellate Counsel

¶ 36 Defendant also contends the postconviction court erred in its determination that defendant

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failed to state the gist of a meritorious claim that his appellate counsel was ineffective for failing to raise the ineffective assistance of trial counsel claim "set forth" in his argument regarding trial counsel allegedly coercing him to testify.³

¶ 37 Defendant's claim regarding appellate counsel as set forth in his petition is as follows:

"Ineffective Assistance of Appellate-Counsel:

Petitioner contends that he was denied his right to effective assistance of counsel as guaranteed by the Fourteenth Amendment [Due Process] Clause of the United States Constitution.

In support of this claim, Petitioner states the following;

That Appellate-Counsel was equally ineffective for failing to raise the following issues on direct-appeal;

(1) Ineffective Assistance of Trial-Counsel for Trial-Counsel's failure to subject the Prosecution's case to Meaningful Adversarial testing, (2) Closing the Defense Case-in-Chief with stipulations without presenting any witnesses for the defendant, (3) Failure to object to the trial-court's submitting an erroneous Jury-Instruction, (4) Failure to object to the Prosecution's Inflammatory-

³ Defendant initially argued that his appellate counsel was ineffective for failing to challenge the apparent jury instruction error on direct appeal. However, defendant subsequently withdrew that argument after determining the argument was based on a typographical error found in the trial transcript.

Remark's during closing-argument's to the Jury, (5) Failure to present any defense-witnesses to support defense-theory, and (6) Appellate-Counsel was ineffective by failing to argue the issues stated above where the issues are clearly available on the trial-court's record and meritorious.

Trial-Counsel's failure to preserve error's for review and Appellate Counsel's failure to challenge the error's on direct-appeal was prejudicial to me and denied me several meritorious issues clearly significant and potentially stringer than some of those presented on direct-appeal.

Appellate-Counsel's failure to raise these claims on direct-appeal prejudice me by not allowing the Appellate Court the opportunity to review and reverse my conviction on a meritorious issue.

Appellate-Counsel argued * * * in the Appellate Brief that the Court should correct Petitioner's mittimus to reflect: (A) one first-degree murder conviction; and (B) credit for 967 days defendant spent in custody prior to sentencing. * * * This argument for an additional one-day raised in the Appellate's Brief ignores much stronger issues that could have been briefed instead. Obviously one-day credit does not matter to me when I've already

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been sentenced to a 55-year prison term.

In conclusion of my claim here, I received ineffective assistance of Appellate-Counsel for the reasons stated above."

¶ 38 As can be seen from the above, defendant did not raise an ineffective assistance of appellate counsel claim relating to trial counsel's alleged coercion. Instead, defendant raised several distinct issues, not one of which related to trial counsel's alleged use of coercion to get him to testify as an issue of ineffective assistance of appellate counsel. Defendant argues that the "catch-all provision" of number six, above, that "Appellate-Counsel was ineffective by failing to argue the issues stated above where the issues are clearly available on the trial-court's record and meritorious" saves this claim from forfeiture because it "obviously" covers the claim set forth earlier in the petition regarding trial counsel's alleged coercion. We disagree.

¶ 39 Defendant's argument that he alleged sufficient facts upon which an ineffective assistance of appellate counsel claim could have been premised would require this court to ignore the plain language of section 122-3 of the Act, which requires:

"Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2010).

Our supreme court in *Jones* instructed this court to adhere to the forfeiture language in section 122.3 of the Act. 725 ILCS 5/122-1(f) (West 2010) See *Jones*, 213 Ill. 2d at 508 (The appellate court is not free "to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition."); 725

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ILCS 5/122-1(f) (West 2010). We note here that defendant is not without remedy, as he may seek leave of court to file a successive postconviction petition alleging the ineffective assistance of appellate counsel. See 725 ILCS 5/122-1(f) (West 2010).

¶ 40

III. CONCLUSION

¶ 41 For all of the foregoing reasons, we conclude that defendant forfeited his claims of error by raising them for the first time on appeal.

¶ 42 The order summarily dismissing defendant's postconviction petition as frivolous and patently without merit is affirmed. The decision of the circuit court of Cook County is affirmed.

¶ 43 Affirmed.