

No. 1-11-1255

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).

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. 08 CR 9605
)	
LEONARD DAVIS,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's postconviction petition affirmed where defendant failed to present an arguable claim of ineffective assistance of counsel.

¶ 2 Defendant, Leonard Davis, appeals from an order of the circuit court of Cook County dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Defendant contends the circuit court erred in summarily dismissing his petition because he sufficiently set forth an arguable claim of ineffective assistance of counsel. We affirm.

¶ 3 Defendant was charged with the burglary of a Lexus SUV (Lexus) and the theft of three briefcases that contained optometry equipment. At the jury trial, Abby Vanderah, an optometry student, testified that she parked her Lexus at the corner of Ogden Avenue and Fry Street in Chicago in the evening hours of May 5, 2008. Ms. Vanderah left \$3,000 worth of optometry equipment in

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three briefcases in the exposed trunk of her car. Ms. Vanderah testified that she did not know defendant and did not give him permission to take her briefcases.

¶ 4 Chicago police officers Luis Crespo and Antonio Guereca testified that at 4:40 a.m., on May 6, 2008, they were driving southbound on Ogden Avenue. At 840 North Ogden Avenue, near the corner of Ogden Avenue and Fry Street, they observed defendant holding three briefcases and attempting to place them into the open trunk of a Buick. When defendant saw the officers, he dropped the briefcases, and hid behind the Buick. After he was apprehended by the officers, defendant told them that the briefcases, one of which had Ms. Vanderah's name on it, did not belong to him. In response to the officers' questions as to why he was out at that early hour, defendant first said he was "getting air," and later said he was looking for work. There was no other person around the area. Defendant's home address—731 Ridgeway Avenue—was 37 blocks away from the scene.

¶ 5 Shortly after finding defendant, the police observed a Lexus with a broken window parked nearby. When Officer Crespo opened the door of the Lexus, the alarm sounded, and Ms. Vanderah came outside. She identified the Lexus as her vehicle and the three briefcases recovered from defendant as her property.

¶ 6 On cross examination, Officer Crespo testified that the police reports did not include a reference to the Buick's trunk being open; defendant did not have tools on his person; there were no glass shards on defendant's clothing; and defendant had no cuts. Officer Crespo said he did not recall whether defendant had car keys. On cross examination, Officer Guereca testified defendant "might have had keys on him" and, when asked to clarify, the officer testified he "didn't know" whether defendant had keys.

¶ 7 In closing arguments, trial counsel discussed the Buick—the "supposed get-away car." Trial counsel told the jury there was no evidence that defendant owned the Buick, and no evidence that he had keys to the Buick.

¶ 8 During deliberations, the jury sent a note to the court inquiring "[d]o we know, was there

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testimony that [the] Buick belonged to the defendant?" The court, with the agreement of the State and trial counsel, told the jury that they had all of the testimony and had received all of the exhibits and to continue to deliberate. The jury subsequently found defendant not guilty of burglary, but guilty of theft of property valued between \$300 and \$10,000.

¶9 Defendant appealed his conviction and argued only that the State had not presented sufficient evidence that the stolen optometry equipment was worth more than \$300 to support his felony theft conviction. This court affirmed that conviction and defendant's extended-term sentence of 10 years' imprisonment. *People v. Davis*, No. 1-09-0068 (2010) (unpublished order under Supreme Court Rule 23).

¶10 On September 20, 2010, defendant filed a *pro se* postconviction petition (petition) which alleged, in relevant part, that his trial counsel was ineffective for failing to present evidence as to the identification of the owner of the Buick at his trial. Defendant contended that trial counsel had a copy of the "D.M.V.," which listed the owner of the vehicle. Additionally, defendant alleged that trial counsel failed to present certain evidence which would have shown defendant did not have the keys to the Buick when he was searched by police. Finally, defendant asserted that appellate counsel was ineffective for not raising these issues on direct appeal. In support of his petition, defendant attached a copy of the Chicago Police Department property inventory sheet which showed that the only personal property recovered from defendant was a wallet. Defendant's petition did not include a copy of a D.M.V. report.

¶11 The circuit court, in a five-page order, summarily dismissed the petition. The court concluded that whether or not the Buick belonged to defendant was irrelevant, and found that the claims of ineffective assistance of trial and appellate counsel were frivolous and patently without merit.

¶12 The Act provides a defendant with a collateral means to assert a substantive denial of his constitutional rights in the proceedings which resulted in his conviction and sentence. 725 ILCS

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5/122-1 (West 2010). At the first stage of postconviction proceedings, a defendant need only present the gist of a meritorious constitutional claim to survive dismissal. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring only that defendant present sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis—either in law or in fact—it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of the dismissal of a postconviction petition is *de novo*. *Id.* at 9.

¶ 13 A postconviction petition may be dismissed at the first stage as frivolous and patently without merit when the claims raised therein are barred by *res judicata* or forfeiture. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). Defendant failed to raise his ineffectiveness of trial counsel claim on direct appeal and, thus, the claim may be subject to forfeiture. *Id.* at 443 (Forfeiture refers to "issues that could have been raised, but were not, and are therefore barred."). But see *People v. Tate*, 2012 IL 112214, ¶ 14 (A claim based on what trial counsel ought to have done may not be subject to default.). However, the State has not presented an argument as to any forfeiture of defendant's ineffectiveness of counsel claim and, thus, we will proceed to consider it.

¶ 14 Ultimately, to prevail on a claim of ineffective assistance of trial counsel, defendant must show that counsel's performance was objectively unreasonable, and that he was prejudiced as a result thereof. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). However, at the first stage of postconviction proceedings, a petition alleging ineffective assistance of trial counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that defendant was prejudiced thereby. *Tate*, 2012 IL 112214, ¶ 19.

¶ 15 Defendant, on appeal, argues that the circuit court erred in summarily dismissing his petition because he set forth an arguable claim of ineffective assistance of trial counsel for failing to present evidence that the Buick was not owned by him and that he did not have the keys. Defendant claims

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such evidence would have refuted the inference that defendant intended to permanently deprive Ms. Vanderah of her optometry equipment because he would not have placed stolen property into a car that he was unable to drive. Defendant further claims that the evidence—that he did not own the Buick and had no keys to the Buick—would have raised considerable doubt about the officers' testimony and, as a result, there would have been "no evidence whatsoever" as to his guilt. In response, the State asserts that the circuit court was correct in finding that any evidence as to the ownership of the Buick and evidence that defendant did not have the keys when he was arrested was immaterial to his guilt. The State also argues the allegations on ineffectiveness of trial and appellate counsel were frivolous and patently without merit.

¶ 16 The offense of theft is defined as follows:

"(a) A person commits theft when he or she knowingly:

(1) Obtains or exerts unauthorized control over property of the owner; [and]

* * *

(A) Intends to deprive the owner permanently of the use or benefit of the property; or

(B) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(C) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

720 ILCS 5/16-1(a) (A), (B), (C) (West 2006).

¶ 17 Defendant was charged with committing theft by obtaining control over the property of Ms. Vanderah with the intent to deprive her permanently of the use or benefit of her property under section 5/16-1(a)(1)(A) of the theft statute. 720 ILCS 5/16-1(a)(1)(A) (West 2006). "A defendant's intent to permanently deprive the owner of property may be deduced by the trier of fact from the facts and circumstances surrounding the alleged criminal act." *People v. Haissig*, 2012 IL App (2d)

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110726, ¶ 46 (quoting *People v. Veasey*, 251 Ill. App. 3d 589, 592 (1993)). The intent to permanently deprive an owner of his or her property may ordinarily be inferred when a person takes the property of another, particularly where the owner of the property is a stranger to the accused. *Id.* Under section 5/16-1(a)(1)(A) of the theft statute, if one takes the goods of another from a place from where they had been put, the crime of theft is complete. *Id.*, ¶ 45 (citing *People v. Lardner*, 300 Ill. 264, 267 (1921)). The theft is complete even if defendant's possession of the stolen goods was brief and he is detected before he has had the chance to carry them away. *Id.*

¶ 18 Here, the officers observed defendant in possession of three briefcases which defendant was placing into the open trunk of the Buick. Defendant dropped the briefcases upon seeing the officers, and then attempted to hide behind the Buick. Defendant admitted to the officers that the briefcases did not belong to him. One of the briefcases was labeled with Ms. Vanderah's name. Ms. Vanderah owned the briefcases, had left them in the exposed trunk of her Lexus which was parked near where defendant had been seen with the briefcases, and had not given defendant permission to take them. She did not know defendant. The rear window of the Lexus was shattered after Ms. Vanderah had parked her car. The facts and circumstances established defendant—without authority—had in his possession and control the briefcases of Ms. Vanderah—a stranger—and that the briefcases were not where Ms. Vanderah had left them. Defendant's control and possession of these briefcases under these facts sufficiently demonstrated defendant's intent to permanently deprive Ms. Vanderah of ownership of the briefcases. The officer's testimony as to defendant's attempt to conceal the briefcases in the trunk of the Buick was further proof of defendant's illicit intent, whether or not defendant owned the Buick, and whether or not he could immediately drive off. The import of the testimony relating to defendant's attempts to place the briefcases in the Buick was that defendant was exerting improper control over and hiding the briefcases from their owner.

¶ 19 As applied here, any evidence as to the ownership of the Buick, or whether defendant had keys to the Buick, was irrelevant to defendant's guilt of theft. Thus, trial counsel's failure to

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introduce evidence regarding the Buick's ownership and keys did not present an arguable claim of ineffective assistance of trial counsel. Moreover, as the evidence was overwhelming as to the theft, there was no arguable claim of prejudice. Defendant's petition, thus, was properly dismissed by the circuit court at the first stage of proceedings. *Tate*, 2012 IL 112214, ¶ 19.

¶ 20 We further note that trial counsel, in fact, elicited testimony that the arresting officers did not recall or did not know whether defendant had the keys to the Buick on his person. Trial counsel also argued to the jury that the State had not presented evidence showing defendant had keys to and owned the Buick. Thus, trial counsel placed the issue of a lack of showing as to ownership and possession of the keys before the jury. The allegations in the petition—that trial counsel also should have used the claimed D.M.V. report and the inventory sheet—fall within the scope of trial strategy. Such issues are generally immune from ineffectiveness of counsel claims. *People v. Manning*, 241 Ill. 2d 319, 327 (2011). Additionally defendant failed to satisfy the requirement of section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)), by not providing any documentation—such as the D.M.V. report—to support his claim that the Buick did not belong to him. *People v. Delton*, 227 Ill. 2d 247, 253-54 (2008). Defendant's argument—if this evidence had been introduced the officers' testimony would not have been believable and, therefore, the evidence would have been insufficient to convict—is both speculative and an issue as to the weight of the evidence, one not properly raised in a postconviction petition. See *People v. Johnson*, 205 Ill. 2d 381, 388 (2002) ("In a post-conviction proceeding, the trial court does not redetermine a defendant's innocence or guilt, but instead examines constitutional issues which escaped earlier review."). We find no error in the dismissal of defendant's petition.

¶ 21 Defendant "acknowledges" but challenges the case law as set forth in *Haissig*—that the intent to permanently deprive may be inferred when a person takes the property of another. Defendant argues due process prohibits the automatic proof of one fact from proof of another basic fact citing *People v. Woodrum*, 223 Ill. 2d 286 (2006). Defendant's argument lacks merit.

¶ 22 In *Woodrum*, the supreme court held that mandatory presumptions—which require the trier of fact to assume the existence of an ultimate fact after establishing certain predicate facts—are unconstitutional as they relieve the State from the burden of proving each element of the offense beyond a reasonable doubt, and conflict with the presumption of innocence. *Id.* 308-09. In *Woodrum*, the child abduction statute in question provided that a person commits child abduction by intentionally luring or attempting to lure a child under 16 years of age into a motor vehicle or other enclosure without the consent of a parent or lawful custodian for other than a lawful purpose. 720 ILCS 5/10-5(b)(10) (West 1998). The child abduction statute further provided that, for purposes of this subsection, the prohibited acts "shall be *prima facie* evidence of other than a lawful purpose." 720 ILCS 5/10-5(b)(10) (West 1998). The supreme court found that the language "shall be *prima facie* evidence," improperly shifted the burden of production to defendant, thereby creating an unconstitutional mandatory presumption. *Woodrum*, 223 Ill. 2d at 309-10.

¶ 23 The theft statute, on the other hand, contains no such language nor does it provide for a mandatory presumption. 720 ILCS 5/16-1 (West 2010). Rather, our courts have found that intent to permanently deprive is an element of the offense that may be inferred from the surrounding circumstances and facts of the case. *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 32.

¶ 24 In *Haissig*, the reviewing court explained that proof of intent under subsection 16-1(a)(1)(A) of the theft statute does not require proof of the defendant's subsequent actions—such as use, concealment, or abandonment—as those actions were specifically delineated in subsections (B) and (C) of section 16-1(a)(1). Thus, under subsection (A), the necessary proof of intent could consist of defendant's initial *taking* of control over the property under circumstances that suggested he *intended to permanently* deprive the owner of the property. *Haissig*, 2012 IL App (2d) 110726, ¶ 31. In this case, defendant's possession and control over the property of a person unknown to him, under the circumstances described by the police officers, permits a rational inference that he intended to permanently deprive the owner of her property. As such, it was not an unconstitutional

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"mandatory presumption," as in *Woodrum*, nor did it violate defendant's right to due process or present a basis for an arguable claim of ineffective assistance of counsel.

¶ 25 We further observe that— independent of his claim of ineffective assistance of trial counsel— defendant, on appeal, contends that because he was found not guilty of burglary, "it is plausible that [he] found the luggage after [he] examined their contents," and abandoned them. Thus, there was "no proof that [he] was knowingly exerting unauthorized control over them with intent to permanently deprive the owner of their use and benefit." Defendant did not raise this allegation in his postconviction petition and, thus, cannot raise it for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 508 (2004). Moreover, this is a sufficiency of the evidence argument which is not a proper postconviction claim. *People v. Dunn*, 52 Ill. 2d 400, 402 (1972).

¶ 26 Because defendant's ineffectiveness of trial counsel claim was nonmeritorious, appellate counsel's decision not to raise it was not erroneous. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001).

¶ 27 For the foregoing reasons, we affirm the order of the circuit court of Cook County which summarily dismiss defendant's petition for postconviction relief.

¶ 28 Affirmed.