2013 IL App (2d) 120399-U
No. 2-12-0399
Order filed September 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL J. REYES, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 06-CF-2112 Honorable Thomas E. Mueller, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in summarily dismissing defendant's postconviction petition. Defendant forfeited his argument on appeal that defense counsel was ineffective for failing to call two witnesses at trial, because defendant did not raise this issue until his motion to reconsider the dismissal of his postconviction petition. Even otherwise, there was no arguable basis in law or fact to support this claim. Defendant's petition also failed to state an arguable claim that he was denied his right to conflict-free trial counsel. Therefore, we affirmed.

¶ 2 Following a bench trial, defendant, Michael J. Reyes, was convicted of attempted first-degree murder (720 ILCS 5/8-4, 9-1(a)(1) (West 2006)) and sentenced to 37 years' imprisonment. He subsequently filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*

(West 2010)), which the trial court dismissed in the first stage of proceedings. On appeal, defendant argues that the trial court erred in summarily dismissing the petition, because the petition presented arguable claims that: (1) defendant's trial counsel was ineffective for failing to investigate and call two witnesses who would have corroborated his version of events and contradicted the State's key witnesses, and (2) his appellate counsel was ineffective for failing to argue on direct appeal that he was denied his right to conflict-free counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Trial and Direct Appeal

¶ 5 We previously set forth a thorough review of the trial evidence in our resolution of defendant's direct appeal. See *People v. Reyes*, No. 2-08-0850 (2010) (unpublished order under Supreme Court Rule 23). Therefore, we provide a shorter summary here.

¶ 6 According to the evidence presented by the State, during the afternoon of August 8, 2006, Eduardo Almanza was driving in Aurora and stopped to talk to two friends, John Torres and Rafael Vasquez, who were members of the Insane Deuces street gang. A maroon Durango passed by, and Almanza's friends looked nervous. The Durango had large chrome rims with a design like spider legs. Almanza became concerned and offered Torres a ride to the Hanson Motel, where Torres was living. Almanza went into Torres's room for about five minutes, and when Almanza descended the outside staircase to return to his car, he saw the same Durango on the street. Almanza reached the front of his car, and the Durango pulled into the parking lot. The driver came within three feet of Almanza and said, " 'You're a Deuce, right?' " before shooting him in the back. Almanza had observed a "young kid" in the front passenger seat of the Durango and a baby seat in the back of the car.

¶ 7 A security video showed the Durango pulling into the parking lot. A car salesman from a nearby business heard a "pop" and saw a red Dodge Durango quickly exit the motel's parking lot; he estimated it to be a 1998 or 2000 model.

¶ 8 Almanza described the shooter to police as Hispanic, in his 30s, and with short black hair, bushy eyebrows, and a goatee that did not attach to the man's mustache. The man was wearing a blue or black tank top. Almanza also said that the man had piercings, and he believed that his eyebrow was pierced. The man had many tattoos around his arms and chest area. Almanza told the police that one of the tattoos was a "tribal" tattoo or design, and he testified that it was multiple colors but could not recall what colors. Almanza identified defendant as the shooter in a photo line-up and in court.

¶ 9 We summarize the testimony of Roman Lucio in more detail, as it is implicated in the issues defendant raises in the instant appeal. Lucio testified as follows. He had been facing both federal and state charges for crimes unrelated to this case, and he was testifying as part of a plea agreement with the United States Attorney's Office and the Kane County State's Attorney's Office. He was faced with a base level sentence of 41 years for just the federal charges, but as part of the plea deal, he received a 20-year sentence for the federal crimes, with the sentences for his State crimes to run concurrently. In exchange, Lucio, a member of the Latin Kings gang, agreed to provide authorities with information about his criminal history and that of other Aurora Latin Kings.

¶ 10 Lucio testified that he used to be friends with defendant, who was also a Latin King. On August 8, 2006, Lucio went to a currency exchange with his cousin Elizabeth because he bought a car from another Latin King, Brian Jones, and wanted to put the title in Elizabeth's name. The car's title was in the name of Jones's wife, Daniella Reyes, who was defendant's sister. Lucio parked his

car in the currency exchange's parking lot next to a red Ford in which Jones and Daniella Reyes were sitting. Defendant was in the Ford's back seat and mentioned a truck for sale. Lucio then went into the currency exchange with Jones and Elizabeth.

¶ 11 When Lucio returned to the parked cars, defendant, who was still in the back of the Ford, offered to sell him a red Durango with chrome rims. Defendant said that he needed to get rid of the car because it was "hot." Defendant "basically" said that he had shot someone at the Hansen Motel because "he caught him slipping or snoozing," which means that "the guy wasn't aware." Defendant "might" have said that it was a rival gang member. Defendant was listening to a police scanner, and he said that the victim was being air-lifted.

¶ 12 On cross-examination, Lucio agreed that he knew defense counsel because counsel had "represented [him] before."

¶ 13 Two FBI agents testified that they were conducting surveillance on Lucio and learned of his plans to go to the currency exchange. At 5:33 p.m., the agents observed a red Ford enter the parking lot, but they were not able to see how many passengers it contained. When the Ford parked, their view of it was obstructed by another vehicle. Lucio drove into the lot in another car and parked in the same vicinity as the Ford. The agents then saw Lucio, Elizabeth, and Jones walk towards the currency exchange. They later saw Jones and Daniella Reyes walking back towards the vehicles, and a short time later, Lucio and Elizabeth walking back.

¶ 14 Police detectives testified that defendant was arrested on August 17, 2006, and initially waived his right to counsel. When the detectives asked defendant where he was on August 8, defendant said that he had been unemployed for a few months and that his routine was generally to take care of his four kids, who ranged in age from 2 to 12, while his girlfriend worked. Defendant

said that he would not run any errands during those hours. When his girlfriend would get home around 5 p.m., he would go to a friend's house. Defendant said that he had friends who were Latin Kings and that he used to be a Latin King, but he was no longer an active member. Defendant also said that he drove a burgundy Dodge Durango with 20-inch star-shaped rims. The only other person who drove the car was his girlfriend.

¶ 15 Defendant denied having been in the area of the Hansen Motel on the day in question and denied involvement in the shooting. At one point a detective said that Almanza's injury was minor, and defendant responded that he heard it was a spinal injury. Thomas asked where he had heard this, and defendant stopped himself and said, "I want to tell you what happened but I don't want to give you any rope to hang myself ***."

¶ 16 Defendant asked to speak to the detectives on August 18 and said that "he would like to make a deal in this case." A detective told defendant that the police were not in a position to make deals; deals were something that the State's Attorneys and defense attorneys addressed at a later date. Defendant then said, "what benefit would it make [*sic*] to me that if I came out and tell you the truth?" Defendant made remarks showing confusion about whether he should have his attorney with him, and the detectives ended the interview. When defendant was walking back to the booking area with a detective, defendant "[s]eemed almost kind of broken up about the whole thing" and said "you know, man, I haven't been gang-banging for like 3 years now. I was faced with this situation, I had to deal with it. I have kids now and I got to think about them."

¶ 17 An Aurora police officer accepted as an expert in the area of gangs and gang identification testified that defendant was a Latin King nicknamed "Lefty" and Almanza was an "associate" of the Insane Deuces. The officer described defendant's various tattoos, all of which were black.

Defendant also had a five-pointed crown earring in his left ear. Russell did not recall seeing defendant with a pierced eyebrow or any additional piercings.

¶ 18 After the State rested, defense counsel informed the trial court that defendant had chosen to testify, but counsel would not be able to ask him any questions. The parties and the trial court agreed that defendant would testify in a narrative form. Defendant testified that on the day in question, to the best of his recollection, he was home all day with his children until about 5 p.m. He watched children's movies with them and cleaned the house, as was his routine. He remembered not leaving until after 5 p.m., once his girlfriend came home from work. He did not have any tribal art tattoos on his arms and had never had an eye piercing. Defendant testified that he did not know the victim and that the police had arrested the wrong man.

¶ 19 On cross-examination, defendant admitted he had been a Latin King for almost 20 years and that the gang had been rivals with the Insane Deuces for almost 18 years. However, he had been inactive in his gang for about three years. Defendant agreed that his girlfriend's name was Marisol Fonseca[1] and that on August 8, 2006, she was the registered owner of a Dodge Durango that the two of them would drive. Defendant testified that he did not have any independent recollection of the day in question but testified about his routine on most days. Defendant further agreed that he told police that he had four kids, that he was faced with a situation, and that he said that he wanted to make a deal in the case. By "situation," he was referring to being wanted for questioning, and he did not know whether he should continue to follow through with the police questioning.

¶ 20 Certified copies of registration and title history were admitted showing that Fonseca had a 1998 Dodge Durango registered in her name at the address where defendant also resided. The parties

[1]Defendant's girlfriend is also referred to as Maricelia Fonseca in the record.

stipulated that on August 12, 2006, the police conducted a traffic stop in Aurora of a red Durango with chrome rims that did not belong to Fonseca.

¶ 21 The trial court found defendant guilty of attempted first-degree murder. On direct appeal, defendant argued that: (1) the trial court erred in denying his motion to suppress; (2) his counsel was ineffective for failing to object to testimony regarding plea-related statements; (3) the trial court erred by allowing defense counsel to refuse to participate in defendant's trial testimony without requiring counsel to give a reason for counsel's decision; and (4) he was entitled to additional pretrial custody credit. *Reyes*, No. 2-08-0850, slip order at 1. We affirmed the trial court's judgment but modified defendant's mittimus to reflect 35 additional days of sentence credit. *Id.* at 33.

¶ 22 B. Postconviction Petition

¶ 23 On October 12, 2011, defendant filed the instant *pro se* postconviction petition. He alleged, among other things, that his trial counsel was ineffective (1) for failing to present available "alibi" evidence and (2) because counsel had a conflict of interest from formerly representing Lucio. Defendant also alleged that appellate counsel was ineffective for failing to raise these issues on direct appeal. Defendant further stated that he "reserve[d] the right to make" supplements or amendments to his petition and that he was awaiting several supporting documents because of the limitations of prison mail delivery and accessing witnesses.

¶ 24 At the conclusion of his postconviction petition, defendant included a verification paragraph that was signed but not notarized. Defendant further included a separate, notarized affidavit detailing his version of events. The affidavit also generally referred to witnesses who were not called to testify on his behalf and Lucio's allegedly false testimony. The affidavit requested that the trial court review all of his issues and any new evidence that he may present in the postconviction phase

of the case. The affidavit concluded with a sentence that incorporated the following language: "I declare, under penalty of perjury, that I am a named party in the above action, that I have read the above documents & that the information contained therein is true & correct to the best of my knowledge." An almost identical, notarized statement is present on the certificate of service filed along with defendant's postconviction petition.

¶ 25 The trial court summarily dismissed the postconviction petition on January 4, 2012. Regarding the issue of ineffective assistance of counsel, the trial court found that none of the allegations met the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and that defendant had failed to state the gist of a constitutional claim.

¶ 26 On January 16, 2012, defendant filed a *pro se* motion to reconsider the dismissal of his petition. Among other things, defendant alleged that defense counsel was ineffective for failing to call as witnesses: (1) Fonseca, who would have testified that she was home with defendant on the day of the shooting, and (2) Daniella Reyes, who would have testified that defendant was not present at the currency exchange, thereby contradicting Lucio's testimony. Defendant attached to his motion notarized affidavits from these individuals. Fonseca's affidavit is dated January 6, 2012, and states that defendant was home on the day in question, and that Fonseca was willing to testify to this fact. Reyes's affidavit is dated December 27, 2011, and states that defendant was not present when Reyes met Lucio in the parking lot of the currency exchange, and that Reyes would be willing to testify to this information.

¶ 27 The trial court denied defendant's motion to reconsider on March 16, 2012.[2] As relevant here, the trial court stated that defendant had reasserted several of his postconviction claims and also

[2]The order is dated March 16, 2012, but is file-stamped March 15, 2012.

alleged a few new constitutional claims, but defendant failed to demonstrate that the trial court erred in dismissing his postconviction petition. Defendant timely appealed.

¶ 28 II. ANALYSIS

¶ 29 The Act creates a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). In the first stage, the trial court independently determines, without input from the State, whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). This is true if the petition is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record, or a fanciful factual allegation. *Id.* at 16-17. At the first stage, the petition's allegations, liberally construed and taken as true, need to present only "the gist of a constitutional claim." *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The petition needs to set forth just a limited amount of detail and does not need to set forth the claim in its entirety. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The trial court is not allowed to engage in any fact finding or credibility determinations at this stage, and all well-pleaded facts not positively rebutted by the record are taken as true. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 23. If the petition is frivolous or patently without merit, the trial court must dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2010). Otherwise, the proceedings move on to the second stage. *Harris*, 224 Ill. 2d at 115. We review *de novo* a trial court's first-stage dismissal of a postconviction petition. *People v. Shaw*, 386 Ill. App. 3d 704, 708 (2008).

¶ 30 A summary dismissal of a postconviction is a final judgment in a civil proceeding, and a party may move to reconsider such a judgment within 30 days of its entry. *People v. Dominguez*,

366 Ill. App. 3d 468, 472 (2006). In an appeal from a denial of a motion to reconsider, we may also review the dismissal of the postconviction petition. *Id.* at 473.

¶ 31 A. Verification of Postconviction Petition

¶ 32 Noting that we may affirm the summary dismissal of a postconviction petition on any basis supported by the record (see *People v. Wright*, 2013 IL App (4th) 110822, ¶ 32), the State initially argues that we should affirm the trial court's dismissal because defendant's petition was not verified as required by the Act. The State cites section 122-1(b) of the Act, which states that a petition must be verified by affidavit. 725 ILCS 5/122-1(b) (West 2010). The State also cites *People v. Carr*, 407 Ill. App. 3d 513, 515 (2011), where this court stated, "Affidavits filed pursuant to the Act must be notarized to be valid," and a "trial court properly dismisses a postconviction petition where the petition does not comply with the requirements of the Act." See also *People v. Hommerson*, 2013 IL App (2d) 110805, ¶ 14, *appeal allowed* (Ill. May 29, 2013) (affirming trial court's decision to summarily dismiss postconviction petition based on the defendant's failure to verify his petition with a proper affidavit).

¶ 33 The State further cites *People v. McCoy*, 2011 IL App (2d) 100424, ¶ 10. There, the defendant attached to his petition a verification page that was signed but not notarized. The defendant also included a properly notarized affidavit in which he summarized most of the petition's claims. *Id.* ¶ 5. This court affirmed the trial court's summary dismissal of the petition, reasoning that because the defendant's verification was not notarized, it was not a proper affidavit under the Act. We also rejected the notion that the defendant's notarized affidavit could serve as a verification. We stated that although the defendant swore to the truth of broad elements of his

petition, the statements were sufficiently vague such that he did not swear to the essential details. *Id.* ¶ 12.

¶ 34 We note that this district has not uniformly held that the failure to provide a notarized affidavit verifying a postconviction petition justifies a summary dismissal. See *People v. Cage*, 2013 IL App (2d) 11264, ¶ 14 (invalid affidavit not a basis for a first-stage dismissal of a postconviction petition); *People v. Gardner*, 2013 IL App (2d) 110598, ¶ 14 (same); *People v. Turner*, 2012 IL App (2d) 100819, ¶ 46 (same). Other districts have also held that the lack of notarization is not a basis to affirm a first-stage dismissal. See *People v. Terry*, 2012 IL App (4th) 100205, ¶ 23; *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 72; *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 34.

¶ 35 We need not take a stance on the issue of whether a court can affirm a summary dismissal based on a lack of proper verification, because we conclude that defendant's petition was sufficiently verified. Unlike *Carr* and *Hommerson*, defendant included a notarized affidavit with his petition. We recognize that the defendant in *McCoy* also included a notarized affidavit, which this court deemed deficient. *McCoy*, 2011 IL App (2d) 100424, ¶ 12. However, there the defendant did not swear to the details of his petition (*id.*), whereas in this case, the affidavit references all of the issues in defendant's postconviction petition and states that defendant has read the documents, and the information was true and correct to the best of his knowledge. An almost identical notarized statement was included with the certificate of service for the postconviction petition. Accordingly, defendant met section 122-1(b)'s verification requirement.

¶ 36 B. Defense Counsel's Failure to Call Witnesses

¶ 37 Turning to defendant's claim that his trial counsel was ineffective for failing to call Fonseca and Reyes as witnesses, the State argues that defendant forfeited this argument. The State maintains

that: defendant did not make such an allegation in his postconviction petition; defendant did not attach the affidavits to his initial petition; and defendant did not allege in his motion to reconsider that he told trial counsel to investigate these witnesses and call them to testify at trial. The State argues that although defendant could have sought to file an amended or supplemental petition under section 122-5 of the Act (725 ILCS 5/122-5 (West 2010)), he did not do so, and any amended or supplemental petition was required to be filed before the trial court's ruling on the petition.

¶ 38 We agree with the State that defendant forfeited his argument about trial counsel's failure to call witnesses, because defendant did not sufficiently raise this issue in his postconviction petition. To withstand summary dismissal, a defendant must plead sufficient facts to assert an arguable constitutional claim. See *People v. Brown*, 236 Ill. 2d 175, 184 (2010); see also 725 ILCS 5/122-2 (West 2010) (the petition shall "clearly set forth the respects in which petitioner's constitutional rights were violated."). Here, as to the instant issue, defendant asserted only that trial counsel was ineffective for failing to present available "alibi" evidence and failing to elicit testimony of the "alibi defense." Defendant provided no facts indicating what the evidence consisted of, much less any names and alleged testimony. "A pro se petitioner is not excused *** from providing any factual detail whatsoever on the alleged constitutional deprivation." *Brown*, 236 Ill. 2d at 184.

¶ 39 Once the trial court issued its order dismissing the petition, it constituted a final judgment. 725 ILCS 5/122-2.1(a)(2) (West 2012). While the trial court had the discretion to allow defendant to amend the petition before the final judgment, defendant did not have a statutory right to amend the petition after the final judgment (*People v. Smith*, 2013 IL App (4th) 110220, ¶ 23), notwithstanding defendant's statement in his initial petition that he was reserving the right to make amendments. Any claims not raised in an original or amended postconviction petition are forfeited.

See 725 ILCS 5/122-3 (West 2010). As defendant did not allege in his postconviction petition that trial counsel was ineffective for failing to call Fonseca and Reyes as witnesses, he forfeited this claim for review.

¶ 40 Defendant argues that his motion to reconsider was properly before the trial court and that the State is applying a hypertechnical reading of *pro se* pleadings that is inappropriate at the first stage. However, the issue here is not the liberal reading of allegations in a *pro se* postconviction petition, but rather that defendant failed to assert the allegations at issue in his actual postconviction petition; defendant instead made the allegations in his motion to reconsider. A " '*pro se* litigant must comply with the rules of procedure required of attorneys, and a court will not apply a more lenient standard to *pro se* litigants.' " *People v. Vilces*, 321 Ill. App. 3d 937, 940 (2001) (quoting *People v. Fowler*, 222 Ill. App. 3d 157, 163 (1991)). A motion to reconsider is meant to bring the trial court's attention to newly discovered evidence, changes in the law, or errors the trial court made in applying the law. *American Chartered Bank v. USMDS, Inc.*, 2013 IL App (3d) 120397, ¶ 16. The only question before a court ruling on a motion to reconsider the dismissal of a postconviction petition is whether it had ruled correctly in dismissing the petition. *Vilces*, 321 Ill. App. 3d at 939. Thus, a motion to reconsider is not a vehicle for raising new issues, and defendant forfeited his claims of ineffective assistance of counsel for failing to call Fonseca and Reyes as witnesses by not raising the claims in his initial postconviction petition. See *id.* at 939 (the defendant forfeited issue by first raising it in the motion to reconsider the dismissal of his postconviction petition).

¶ 41 Even if, *arguendo*, defendant's aforementioned claims were properly before the trial court, we conclude that the trial court did not err in dismissing the petition. For a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v.*

Washington, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). The defendant must first establish that, despite the strong presumption that counsel acted competently and that the challenged action was the product of sound trial strategy, counsel's representation fell below an objective standard of competence under prevailing professional norms, to the extent that he or she was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 227 Ill. 2d 403, 416 (2008). Second, the defendant must establish prejudice by showing a reasonable probability that the proceeding would have resulted differently had counsel's representation not been deficient. *People v. Houston*, 229 Ill. 2d 1, 11 (2008). The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000). Thus, the petitioner must show both that appellate counsel's performance was deficient, and that the error was prejudicial. *People v. Robinson*, 217 Ill. 2d 43, 61 (2005). At the first stage of postconviction proceedings, a petition alleging ineffective assistance of 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 the defendant was prejudiced. *People v. Wright*, 2013 IL App (4th) 110822, ¶ 22.

¶ 42 The decision of which witnesses to call at trial is a matter of trial strategy within trial counsel's discretion. *Enis*, 194 Ill. 2d at 378. Such decisions come with the strong presumption that they are a product of sound trial strategy and are generally immune from claims of ineffective assistance of counsel. *Id.* at 378. Still, an attorney may be deemed ineffective for failing to present exculpatory evidence, such as failing to call witnesses to support an otherwise uncorroborated defense theory. *People v. Redmond*, 341 Ill. App. 3d 498, 516 (2003). Further, counsel has a duty to conduct both factual and legal investigations in the case. *People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001). Whether the failure to investigate constitutes ineffective assistance of counsel is

determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial. *Id.* at 185.

¶ 43 Here, even taking as true, as we must do in the first stage, defendant's well-pleaded facts about the witnesses, a postconviction claim must present the gist of a claim for relief which is meritorious when considered in light of the record of the trial court proceedings. *People v. Deloney*, 341 Ill. App. 3d 621, 627 (2003); see also *People v. Coleman*, 183 Ill. 2d 366, 382 (1998) (reviewing court will uphold the dismissal of a postconviction petition where the allegations are contradicted by the record in the trial proceedings). Thus, while we may not strictly make credibility assessments in the first stage, a postconviction petition is subject to summary dismissal if it has no arguable basis in fact, and we must therefore assess whether the factual allegations are irrational or wholly incredible. *People v. Jones*, 399 Ill. App. 3d 341, 362-63 (2010).

¶ 44 In this case, defendant's allegations regarding Fonseca fail because they are contradicted by the record. Defendant alleged in his motion to reconsider that Fonseca would have testified that she was home with defendant on the day of the shooting. However, Fonseca's affidavit actually states that defendant was home on the day in question, and she does not state that she was home with him. Further, defendant testified at trial that to the best of his recollection, he was with his children all day and did not leave the house until Fonseca returned from work at 5 p.m. Defendant's trial testimony corresponds to what he told the police nine days after the shooting. Accordingly, counsel's failure to call Fonseca as a witness was not arguably unreasonable, as defendant's allegation that Fonseca was home with him on the day in question is incredible in light of the record.

¶ 45 As for Daniella Reyes, there is no arguable possibility that defendant was prejudiced by trial court's failure to call her as a witness to contradict Lucio's testimony about defendant being present

at the currency exchange. *Cf. People v. Barcik*, 365 Ill. App. 3d 183, 194 (2006) (affirming trial court's summary dismissal of the defendant's postconviction petition alleging ineffective assistance of counsel for failing to call certain witnesses, because the defendant could not establish prejudice). First, Reyes was defendant's sister, making her testimony automatically suspect. See *id.*, 365 Ill. App. 3d at 192-93 (the defendant failed to show that he was prejudiced by his trial counsel's decision not to call his fiance as a witness, because, among other things, her relationship to the defendant made it likely that the jury would not have considered her a credible witness). Second, Lucio's testimony was already suspect because he had agreed to testify for the State about Aurora Latin King activities as part of a plea bargain. Therefore, having Reyes contradict Lucio's testimony would have scant effect. Finally, the State's evidence indicated that Almanza was shot by a rival gang member largely matching defendant's description who was driving a 1998 or 2000 red Dodge Durango with a child in the front seat and a baby seat in the back. The evidence correspondingly showed that defendant was a member of a rival gang, that he drove a red 1998 Dodge Durango, and that he was admittedly with his children on the day in question. Almanza, the victim, identified defendant as the shooter. Lucio's testimony was secondary to all of this evidence.

¶ 46 In sum, considering Reyes's relationship to defendant, the already questionable motivations of Lucio, and all of the other evidence pointing to defendant as the shooter, counsel's failure to call Reyes as a witness did not arguably result in prejudice to defendant, so defendant failed to present a gist of a constitutional claim of ineffective assistance of counsel in this regard.

¶ 47 C. Conflict of Interest

¶ 48 Defendant next argues that his postconviction petition states an arguable claim that he was denied his right to conflict-free counsel at trial and that appellate counsel was ineffective for failing to raise this issue on direct appeal.

¶ 49 At the beginning of Lucio's cross-examination, the following exchange occurred:

> "[Counsel:] Roman, before we get started, you and I know each other, correct?
>
> A. Yes.
>
> Q. I represented you before; is that correct?
>
> A. Yes."

¶ 50 Defendant argues that this exchange revealed that his attorney represented Lucio in at least one prior matter, which alerted the trial court to counsel's potential conflict of interest. Defendant maintains that the trial court thereafter arguably had a duty to inquire into any potential conflict, especially given the crucial nature of Lucio's testimony. Defendant argues that the trial court failed to take adequate protective measures to protect his rights under the six amendment, such as: clarifying that counsel's representation of Lucio had ended; asking when the representation ended; asking whether counsel possessed any privileged information about Lucio, and if so, whether the information could impair his cross-examination; and asking whether defendant was aware of the potential conflict and waived it. According to defendant, because the trial court did not make any such inquiry, he need not show any specific prejudice as a result of the conflict. Defendant further argues that because the conflict was a matter of record on direct appeal, it is at least arguable that appellate counsel was ineffective for failing to raise this claim, which arguably had a reasonable probability of success.

¶ 51 Included in a criminal defendant's right to effective assistance of counsel is the right to conflict-free representation, which means that defense counsel's loyalty to his or her client is not diminished by conflicting interests or inconsistent obligations. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). "The prohibition against conflicts of interest is based on the principle that 'no man can serve two masters.' " *People v. Spreitzer*, 123 Ill. 2d 1, 13 (1988). Conflicts of interest can fall into two categories: *per se* and actual. *Taylor*, 237 Ill. 2d at 364. A *per se* conflict of interest occurs where facts about a defense attorney's status create a disabling conflict. *Id.* There are three situations where a *per se* conflict exists: (1) defense counsel has a prior or on-going association with the victim, the prosecution, or an entity assisting the prosecution; (2) defense counsel is contemporaneously representing a prosecution witness; and (3) defense counsel was a former prosecutor who was personally involved in the defendant's prosecution. *Id.* If a *per se* conflict exists and the defendant did not waive the right to conflict-free representation, it is grounds for automatic reversal, without the need to show that the attorney performed deficiently. *Id.* at 375.

¶ 52 Defendant does not take the position that his counsel had a *per se* conflict of interest by formerly representing Lucio, but rather argues that the prior representation created a potential, or "actual," conflict. This second category of conflicts of interest generally, though not exclusively, involves joint or multiple representation of codefendants. *Id.* "If counsel brings the potential conflict to the attention of the trial court at an early stage, a duty devolves upon the trial court to either appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel." *Spreitzer*, 123 Ill. 2d at 18 (citing *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978)). It is the attorney's contemporaneous allegations of a conflict, not the simple existence of multiple representation, which gives rise to the trial court's duty to take adequate

measures. *Id.* Reversal for a trial court's failure to do so does not require a showing of prejudice, *i.e.*, a showing that the attorney's actual performance was affected by the conflict. *Id.* On the other hand, if the potential conflict of interest is not brought to the trial court's attention, a defendant must show that an actual conflict of interest manifested at trial, such as through strategy, tactics, or decision-making attributable to the conflict. *Taylor*, 237 Ill. 2d at 375-76.

¶ 53 We conclude that defendant's argument is without merit. A trial court has a duty to inquire into the potential conflict if it is brought to its attention at an "early stage" (*Spreitzer*, 123 Ill. 2d at 18), whereas in this case the alleged conflict was revealed in the midst of the trial. See also *People v. Clark*, 374 Ill. App. 3d 50, 65 (2007) (trial court not obligated to conduct an inquiry because the potential conflict was not bought to its attention before trial). *Spreitzer* further teaches us that it is the "attorney's contemporaneous allegations of a conflict" which give rise to the trial court's duty to either appoint separate counsel or take steps to ascertain whether the risk of conflict was too remote to require separate counsel. *Id*. Our supreme court clarified in *People v. Morales*, 209 Ill. 2d 340, 348 (2004), that defense counsel must raise the issue of a conflict to trigger a trial court inquiry. While defense counsel arguably "raised" the issue of a conflict in the instant case by revealing that he had previously represented Lucio, defense counsel must actually object to representing the defendant. See *id.* Here, defense counsel never claimed that there was a conflict of interest from his prior representation of Lucio, so the trial court had no duty to inquire about such a conflict.

¶ 54 As defense counsel did not raise the issue of a conflict of interest, defendant must show that, arguably, an actual conflict of interest adversely affected his counsel's performance. See *id*. at 348-49. "Speculative allegations and conclusory statements are not sufficient to establish that an actual

conflict of interest affected counsel's performance." *Id.* at 349. A defendant must point to a specific defect in counsel's strategy, tactics, or decision-making attributable to the conflict. *Id.* (the defendant's bare allegation that his counsel's cross-examination was somehow affected by a conflict of interest was insufficient to show an adverse effect).

¶ 55 Even if, *arguendo*, there was a conflict of interest from defense counsel's prior representation of Lucio, defendant's postconviction petition did not allege how this conflict negatively affected counsel's performance. Instead, defendant argued that the "conflict of interest alone supports ineffective assistance of counsel." On appeal, defendant states that the conflict may have hampered counsel's cross-examination of Lucio. However, the record positively rebuts any assertion that a conflict of interest manifested itself through counsel's cross-examination of Lucio. Defense counsel vigorously cross-examined Lucio about the details of his plea agreement, including that: two friends of Lucio received life sentences for the same charges he was facing; he would not serve any additional time for pleading guilty to conspiracy to commit two murders; and he did not go to the police with information about defendant but rather was testifying to help himself. Considered in light of the record (see *Deloney*, 341 Ill. App. 3d at 627), defendant failed to present an arguable claim that defense counsel had a conflict of interest that manifested itself in an inadequate cross-examination of Lucio.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we affirm the judgment of the Kane County circuit court.

¶ 58 Affirmed.