



seventh claim of his postconviction petition, which alleged the trial court erred in denying defendant's request for a continuance on the day of trial to hire private counsel. We affirm.

¶ 5

## I. BACKGROUND

¶ 6 In February 2007, the State charged defendant with one count of residential burglary (720 ILCS 5/19-3(a) (West 2006)), two counts of theft by possession of more than \$300 (720 ILCS 5/16-1(a)(4) (West 2006)), and five counts of theft by possession (720 ILCS 5/16-1(a)(4) (West 2006)).

¶ 7 In March 2007, the trial court appointed the public defender to represent defendant.

¶ 8 In August 2007, the State charged defendant with three additional counts of residential burglary (720 ILCS 5/19-3(a) (West 2006)).

¶ 9 In a September 10, 2007, letter to the trial court, defendant stated the following:

"I have been having problems with [my attorney] and I really don[']t want to go to trial with her but when I told her on [September 6, 2007,] that I was going to let you know that I no longer wanted her on my case[. She] then said that if I told you that you would[n't] give me anyone else so I would have to defend myself but I don[']t want to wait until my [September 20, 2007, scheduled] trial date [to] bring this matter up, so I am writing you to ask what am I to do about this?"

¶ 10 On September 20, 2007, the morning of defendant's trial, the following colloquy took place:

"THE COURT: Next matter is 07-CF-199, People versus John Johnson, matter comes on for a bench trial today. The

defendant appears with his attorney, Ms. Harvey, Ms. Patton appears for the [S]tate, and, are the parties ready to proceed?

MS. HARVEY [(Assistant Public Defender):] Actually, [defendant] is asking to continue this case. He has indicated a desire to hire private counsel, and I have spoken with his wife and she said there was some communication on to hire Ms. Lee Ann Hill, although I don't know to what extent. I don't know if a retainer has been made or any appointments had been made or met, and I believe he is also requesting that the public defender be allowed to withdraw as he does not wish to be represented by myself.

THE COURT: All right. Two different issues there. Is Ms. Hill here?

MS. HARVEY: No, she is not. She's not filed an appearance.

THE COURT: I don't see an entry of appearance which I can take notice of. Has Ms. Hill communicated with you, Ms. Patton?

MS. PATTON: No, your Honor.

THE COURT: So, basically, although Ms. Hill, if she would be entered, or for that matter any other private counsel interested in entering his or her appearance, they could do so, however, they would be required to proceed to trial today, this matter having been set for trial today and any entry of appearance would be subject to not only

willingness, but the requirement that they proceed to trial on today's date. So that appears to be a non-issue at this point in time, that being an uncertainty or unknown as to whether or not any private attorney will, in fact, be entering his or her appearance can deal with, realistically, no one else is here, and no one's filed an entry of appearance as well."

The court then granted a recess so defendant could discuss the matter with his court-appointed counsel. After the recess, defendant proceeded to trial with appointed counsel.

¶ 11 At the conclusion of the trial, defendant was convicted of one count of residential burglary and five counts of theft by possession.

¶ 12 In January 2008, the trial court sentenced defendant as stated.

¶ 13 On July 21, 2009, this court affirmed defendant's convictions and sentences on direct appeal. *People v. Johnson*, No. 4-08-0244, slip order at 15 (July 21, 2009) (unpublished order under Supreme Court Rule 23). The supreme court denied defendant's petition for leave to appeal but issued a supervisory order directing us to vacate our judgment and to reconsider our decision in light of *People v. Miller*, 238 Ill. 2d 161, 938 N.E.2d 498 (2010) (applying the abstract elements test and finding the defendant's conviction for retail theft did not violate the one-act, one-crime doctrine because it was not a lesser-included offense of burglary). *People v. Johnson*, 238 Ill. 2d 664, 938 N.E.2d 517 (2010) (nonprecedential supervisory order on denial of petition for leave to appeal) (No. 109003). Because *Miller* did not change the result, we again affirmed defendant's conviction and sentence. *People v. Johnson*, 2011 IL App (4th) 080244-U,

¶ 3.

¶ 14 On June 7, 2010, defendant filed a *pro se* postconviction petition, which alleged 12 claims of error. The seventh claim alleged defendant was "denied his 6th Amendment right to [c]hoice of counsel and representation at trial." In the attached memorandum, defendant argued the trial court erred in denying his motion to continue for the purpose of retaining private counsel where (1) he indicated his desire to retain private counsel, (2) he maintained his wife had been communicating with private counsel, and (3) he did not wish to have appointed counsel represent him.

¶ 15 On September 19, 2011, the State filed a motion to dismiss defendant's postconviction petition.

¶ 16 On September 27, 2011, the court dismissed claims 1 through 4 and 6 through 12 at the second stage of the postconviction proceedings. With regard to defendant's seventh claim, the court found the following:

"Claim 7, the petitioner claims that he was denied his right to counsel of his own choice. That issue also could have/should have been raised on direct appeal, so it is forfeited. In addition, the court notes from review of the record that the defendant did not retain private counsel, that he had no right to select appointed counsel, absent a conflict, none of which was asserted or alleged. The defendant did not have private counsel present to try the case on the day that the bench trial was set, and, in addition, the defendant was afforded the opportunity to represent himself, a choice he elected not to pursue. So, again, several bases [exist] upon which to dismiss Claim 7."

¶ 17 Following an October 2011 third-stage evidentiary hearing, the trial court dismissed the fifth claim.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues the trial court erred in dismissing count seven of his postconviction petition where he alleged the trial court erred in denying his motion to continue to allow him to retain private counsel.

¶ 21 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) allows for postconviction relief through a three-stage procedure. *People v. Boclair*, 202 Ill. 2d 89, 99, 789 N.E.2d 734, 740 (2002). At the first stage, the trial court must independently review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). 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, 912 N.E.2d 1204, 1212 (2009). A petition lacks an arguable basis in law or fact if it is "based on an indisputably meritless legal theory." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. If the trial court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage. Counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2010)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2010)). At this stage, the trial court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. See *People v. Coleman*, 183 Ill. 2d 366, 380-81, 701 N.E.2d 1063, 1071 (1998). If a substantial showing of a constitutional violation is set forth, then the petition advances to the

third stage, where the trial court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2010).

¶ 22 The State argues defendant failed to raise his contention of error on direct appeal and, thus, has forfeited it. Defendant acknowledges he did not raise the issue but argues his postconviction petition alleged his appellate counsel was ineffective for not raising his postconviction claims on direct appeal. To establish ineffective assistance of appellate counsel, a defendant must demonstrate (1) the failure to raise an issue was objectively unreasonable, and (2) but for the failure to raise the issue, the trial court's ruling would have been reversed. *People v. Flores*, 153 Ill. 2d 264, 283, 606 N.E.2d 1078, 1087 (1992). However, appellate counsel is not obligated to brief every issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his judgment, are without merit. *People v. Jackson*, 205 Ill. 2d 247, 267, 793 N.E.2d 1, 14 (2001). Accordingly, we must first determine whether the issue defendant raises is meritorious. For the reasons that follow, we find it is not.

¶ 23 "The determination whether to grant a continuance for substitution of counsel is a matter left to the discretion of the trial court, and will not be overturned absent an abuse of that discretion." *People v. Segoviano*, 189 Ill. 2d 228, 245, 725 N.E.2d 1275, 1283 (2000). "The factors to be considered in evaluating a trial court's exercise of its discretion include the diligence of the movant, the right of the defendant to a speedy, fair and impartial trial, and the interests of justice." *Segoviano*, 189 Ill. 2d at 245, 725 N.E.2d at 1283. An abuse of discretion will be found only where the court's ruling is "arbitrary, fanciful, unreasonable," or where "no reasonable person would take the view adopted by the trial court." (Internal quotation marks omitted.) *People v. Baez*, 241 Ill. 2d 44, 106, 946 N.E.2d 359, 395 (2011).

¶ 24 In this case, defendant expressed a hope to hire a specifically identified attorney. However, that attorney was not present and ready, willing, and able to enter an unconditional appearance on the day of trial. "[A] trial court will not be found to have abused its discretion in denying a motion for substitution of counsel in the absence of ready and willing substitute counsel." *Segoviano*, 189 Ill. 2d at 245, 725 N.E.2d at 1283. Moreover, while defendant expressed he had "been having problems" with his appointed counsel, defendant did not explain what those problems entailed. "[W]hen a defendant cannot 'articulate an acceptable reason for desiring new counsel and is already being represented by an experienced, court-appointed criminal lawyer, it is not an abuse of discretion to deny defendant's trial-day request for a continuance.'" *People v. Staple*, 402 Ill. App. 3d 1098, 1103, 932 N.E.2d 1064, 1069 (2010) (quoting *People v. Jackson*, 216 Ill. App. 3d 1, 7, 574 N.E.2d 719, 723 (1991)). The trial court did not abuse its discretion when it denied defendant's motion to continue and thus, appellate counsel had no obligation to raise that issue on appeal.

¶ 25 III. CONCLUSION

¶ 26 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 27 Affirmed.