

arraignment, and the trial court set bond at \$3,000 and denied defendant's motion for recognizance. On November 14, 2010, a third party posted bond for defendant and he was released from custody.

¶ 5 On June 16, 2011, the parties appeared before the trial court with a plea agreement. In exchange for defendant's guilty plea, the State agreed to recommend a sentencing cap of four years. The court admonished defendant of his right to a trial and asked defendant if his plea was voluntary. Defendant stated his plea was voluntary and no one had threatened him or forced him to plead guilty. The State presented a factual basis for the charge, and the court accepted defendant's guilty plea. Defendant also signed a written waiver of his right to a trial by jury.

¶ 6 On July 19, 2011, while defendant was released on bond and awaiting sentencing in case No. 10-CF-1776, the State charged defendant with burglary in Champaign County case No. 11-CF-1136, alleging defendant committed burglary on July 18, 2011 (720 ILCS 5/19-1(a) (West 2008)).

¶ 7 On July 27, 2011, the trial court held defendant's sentencing hearing. The State's Attorney informed the court that he spoke with defendant's attorneys in case Nos. 10-CF-1776 and 11-CF-1136 and that all parties involved had come to a new agreement with respect to the forgery charge in case No. 10-CF-1776. The State's Attorney informed the trial court defendant would plead guilty in case No. 10-CF-1776 in exchange for (1) the State's dismissal of his burglary charge in case No. 11-CF-1136 and (2) the State's recommendation that defendant receive a sentence of seven years in the Illinois Department of Corrections. The court then allowed defendant to withdraw his original guilty plea in case No. 10-CF-1776 and plead anew

under the terms of the renegotiated agreement.

¶ 8 Before pleading anew in case No. 10-CF-1776, the trial court admonished defendant that he faced a possible extended-term sentence up to 10 years in prison and a fine up to \$25,000. The court admonished defendant he would be subject to consecutive sentences if he were convicted on the forgery and burglary charges. Defendant confirmed that he understood both charges would be dealt with in one plea. The court admonished defendant of his rights and those he would be giving up if he pleaded guilty. Defendant stated he understood his rights and that his guilty plea was voluntary. Defendant confirmed no one had threatened him or forced him to plead guilty and that he had not been promised anything other than what was offered in the plea agreement. The State presented a factual basis for the charge, and the court asked defendant if he pleaded guilty to forgery. Defendant stated, "Yes, sir. I plead guilty to it[.]" and the court accepted defendant's plea. The court sentenced defendant to seven years' imprisonment, with one year of mandatory supervised release.

¶ 9 Defendant did not file a postsentencing motion or a direct appeal. On November 23, 2011, defendant filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), alleging (1) he could prove someone else committed the offense and he could not have committed the offense, and (2) he was unable to present his defense because his counsel "insisted he ple[a]d guilty by duress, fraud and being misled [*sic*]" to believe he would serve a lesser sentence. Defendant's affidavit stated "Pat and John (last name given later)" were responsible for the forgery and "Ieasha Washington" and "Ms. Kimmy Jone" would testify he did not forge his name to the check.

¶ 10 On December 14, 2011, the state filed a motion to dismiss defendant's petition for

relief from judgment or for judgment on the pleadings.

¶ 11 On January 12, 2012, defendant filed a notice of appeal in the trial court. OSAD was appointed to represent defendant.

¶ 12 II. ANALYSIS

¶ 13 Counsel filed a motion to withdraw accompanied by a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Our records show defendant was provided notice of the motion. On our own motion, we gave defendant leave to file additional points and authorities on his behalf by January 17, 2013. Defendant has failed to do so. After examining the record in accordance with our duties under *Finley*, we grant OSAD's motion to withdraw as counsel on appeal and affirm the trial court's dismissal of defendant's petition.

¶ 14 OSAD alleges no colorable argument can be made the trial court erred by dismissing defendant's section 2-1401 petition. Specifically, OSAD contends no colorable argument can be made defendant (1) raised specific allegations which would support a right to relief and (2) sufficiently alleged due diligence. OSAD also argues defendant can make no colorable argument that the trial court should have construed his section 2-1401 petition as a postconviction petition, or, if the court had done so, that his petition stated a substantial showing of a constitutional violation that would entitle him to relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). We agree with OSAD.

¶ 15 "Section 2-1401 is intended to correct errors of fact, unknown to the petitioner and the court at the time of the judgment, which would have prevented the rendition of the judgment had they been known." *People v. Muniz*, 386 Ill. App. 3d 890, 893, 899 N.E.2d 428, 431 (2008). To obtain relief under this section, defendant must affirmatively set forth factual

allegations to satisfy the following three requirements: (1) the existence of a meritorious claim or defense; (2) due diligence in discovering the claim or defense; and (3) due diligence in presenting the petition. *People v. Pinkonsly*, 207 Ill. 2d 555, 565, 802 N.E.2d 236, 243 (2003). We review *de novo* a trial court's dismissal of a section 2-1401 petition. *People v. Vincent*, 226 Ill. 2d 1, 18, 871 N.E.2d 17, 28 (2007).

¶ 16 Defendant can make no colorable argument his section 2-1401 petition presented a meritorious claim or defense. In his petition, defendant alleged as a meritorious defense that (1) he could prove someone else committed the offense and (2) defendant could not have committed the offense. In support of his petition, defendant's affidavit stated that (1) "Pat and John (last names given later)" committed the forgery with which he was charged, and (2) "Ieasha Washington" and "Ms. Kimmy Jone" would testify he did not forge his name to the check. Defendant's allegations in his petition were nothing more than conclusory statements, and defendant did not identify or explain what, if any, evidence was available to substantiate his claims. Moreover, defendant's defense that he did not forge the check would not have precluded judgment against him in the original action because the State charged him with knowingly delivering a forged instrument, not creating the forged instrument.

¶ 17 Likewise, defendant can make no colorable argument he fulfilled the due diligence requirements. Defendant alleged he was unable to present his defense until now because his counsel "insisted he ple[a]d guilty by duress, fraud and being misled [*sic*]" to believe he would serve a lesser sentence. Defendant further claimed he told his counsel he wanted to go to trial. That defendant wanted to go to trial but was forced to plead guilty by his counsel is not evidenced by the record. Thus, pursuant to section 2-1401, defendant was required to file an

affidavit or make other appropriate showing in support of his claim. See 735 ILCS 5/2-1401(b) (West 2010) (requiring matters not of record to be supported by affidavit or other appropriate showing). Defendant, however, did neither.

¶ 18 Further, the record directly contradicts defendant's contentions. On June 16, 2011, during defendant's first guilty plea hearing, defendant assured the trial court his plea was voluntary and no one had threatened him or forced him to plead guilty. Defendant also signed a written jury trial waiver. Again, on July 27, 2011, after the court allowed defendant to withdraw his guilty plea and defendant pleaded anew to the forgery charges, he informed the court that his plea was voluntary, no one had threatened him or forced him to plead guilty, and he had not been promised anything other than what was offered in the plea agreement. Moreover, the court asked defendant if he understood that he could still demand a trial, and defendant responded in the affirmative. On this record, defendant can make no colorable argument he was diligent in presenting his defense.

¶ 19 OSAD also argues defendant can make no colorable argument that the trial court should have construed his section 2-1401 petition as a postconviction petition, or, if the court had done so, that his petition stated a substantial showing of a constitutional violation that would entitle him to relief.

¶ 20 Our supreme court has held that a trial court may treat a defendant's *pro se* pleading as a postconviction petition if the pleading alleges a deprivation of rights cognizable in a postconviction proceeding. *People v. Shellstrom*, 216 Ill. 2d 45, 51, 833 N.E.2d 863, 867 (2005). However, the court is not required to do so. *Shellstrom*, 216 Ill. 2d at 53 n.1, 833 N.E.2d at 868 n.1. Thus, "a trial court's decision not to recharacterize a defendant's *pro se* pleading

as a postconviction petition may not be reviewed for error." *People v. Stoffel*, 239 Ill. 2d 314, 324, 941 N.E.2d 147, 154 (2010). Because the trial court did not treat defendant's section 2-1401 petition as a postconviction petition, defendant can make no colorable argument that this court should review such decision. Further, because we may not review the court's decision not to recharacterize defendant's petition, we need not address whether defendant can make any colorable argument that his petition stated a substantial showing of a constitutional violation that would entitle him to relief under the Act.

¶ 21

III. CONCLUSION

¶ 22 After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD no colorable argument can be made in this appeal, and we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's dismissal of defendant's petition.

¶ 23

Affirmed.