

knowingly and unlawfully possessed with the intent to deliver between 5 to 15 grams of a substance containing cocaine. On May 20, 2009, a jury found defendant guilty of the charged offense and, on June 30, 2009, the trial court sentenced him to 22 years in prison. Defendant appealed and, on February 16, 2011, this court affirmed his conviction and sentence. *People v. Posey*, No. 4-09-0560 (2011) (unpublished order under Supreme Court Rule 23). At that time, we summarized the circumstances surrounding defendant's arrest as follows:

"On January 20, 2009, a police officer observed defendant and another man talking outside of Walgreens. The officer watched defendant get in the passenger side of a vehicle waiting in the parking lot. The officer suspected that he had just observed a drug transaction, so he followed the vehicle as it left the lot. The officer found a plastic bag containing suspected cocaine in the street after the vehicle had passed. Because the officer did not have backup, he chose not to pursue defendant. The next day, the officer and his partner found defendant and another man in the area, apparently searching for something on the ground. The officers arrested defendant for possession of the cocaine found in the street the day before." *Posey*, slip order at 2.

¶ 5 On September 26, 2011, defendant filed a *pro se* postconviction petition. Relevant to this appeal, he "challenge[d] the chain of custody concerning the drugs found by" police. He asserted trial testimony regarding when the drugs were placed into evidence was inconsistent with the time listed on a "dispatch ticket," arguing Officer Jay Loschen, the police

officer who found and recovered the drugs, testified they were entered into evidence at 6:15 p.m. but "the dispatch ticket clearly demonstrates they were not discovered until 6:35 p.m." Defendant further alleged he discovered documentation from the police department showing the drugs were entered into evidence on January 22, 2009, rather than January 20, 2009, and noted the number sequence on evidence inventory tags was inconsistent with the order in which evidence was found and acquired by police. Specifically, defendant argued a bucket and surveillance video from his case were acquired after the drugs but, per the number sequence on the inventory tags, were entered into evidence before the drugs. Defendant also argued that both trial and appellate counsel were ineffective for failing to previously raise the issues presented in his petition.

¶ 6 On December 21, 2011, the trial court entered an order dismissing defendant's postconviction petition, finding it was patently without merit.

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant argues his postconviction petition presented the gist of a constitutional claim and was sufficient to warrant further consideration under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-7 (West 2010)). Specifically, he contends a chain-of-custody issue existed with respect to the State's drug evidence, and his trial counsel provided ineffective assistance by failing to raise that issue before the trial court. Defendant further argues his appellate counsel was ineffective on direct appeal for failing to raise trial counsel's ineffectiveness on the chain-of-custody issue.

¶ 10 The Act "provides a method by which persons under criminal sentence in this

state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. At the first stage of postconviction proceedings, the trial court may summarily dismiss a petition upon a determination that it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10, 912 N.E.2d 1204, 1208-09 (2009) (citing 725 ILCS 5/122-2.1(a)(2) (West 2006)). A *pro se* petition for postconviction relief is frivolous or patently without merit only when it "has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12, 912 N.E.2d at 1209. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. "The summary dismissal of a postconviction petition is reviewed *de novo*." *Tate*, 2012 IL 112214, ¶ 10, 980 N.E.2d 1100.

¶ 11 In postconviction proceedings "issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited." *Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. Here, defendant filed a direct appeal but failed to argue that his trial counsel was ineffective for failing to challenge the chain of custody of the State's drug evidence. As a result, that issue has been forfeited. However, as stated, defendant also argues his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on the chain-of-custody issue. This claim has not been forfeited and necessarily involves consideration of trial counsel's performance. *People v. English*, 2013 IL 112890, ¶ 22, 987 N.E.2d 371 ("[T]he doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires, where the forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the issue do not appear on the face of the original appellate record").

¶ 12 Ineffective-assistance-of-counsel claims are guided by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that a defendant show both that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance prejudiced the defense. *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212 (quoting *Strickland*, 466 U.S. at 687-88). "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212.

¶ 13 Here, the underlying claim to defendant's ineffective-assistance-of-counsel claims involves a challenge to the chain of custody of the State's drug evidence. To introduce an object into evidence, the State must lay an adequate foundation through either identification of the object by witnesses or establishing a chain of possession. *People v. Woods*, 214 Ill. 2d 455, 466, 828 N.E.2d 247, 254 (2005). "[W]here a defendant is accused of a narcotics violation, the physical evidence is often not readily identifiable or may be susceptible to tampering, contamination or exchange." *Woods*, 214 Ill. 2d at 466-67, 828 N.E.2d at 255. "In such instances, the State is required to establish a chain of custody" and must establish one "that is sufficiently complete to make it improbable that the evidence has been subject to tampering or accidental substitution." *Woods*, 214 Ill. 2d at 467, 828 N.E.2d at 255.

"[T]he State establishes a *prima facie* showing that the chain of custody for controlled substances is sufficient by meeting its burden to establish that reasonable protective measures were taken to ensure that the evidence has not been tampered with,

substituted or altered between the time of seizure and forensic testing. After the State establishes a *prima facie* case, the burden then shifts to the defendant to produce evidence of *actual tampering, alteration or substitution*. Upon the defendant making such a showing, the burden again shifts to the State to rebut the defendant's claim." (Emphasis added.) *Woods*, 214 Ill. 2d at 468, 828 N.E.2d at 255.

¶ 14 If a defendant is unable to show evidence of actual tampering, alteration, or substitution, deficiencies in a chain of custody will go to the weight of the evidence and not its admissibility. *Woods*, 214 Ill. 2d at 467, 828 N.E.2d at 255. "Unless the defendant produces evidence of actual tampering, substitution or contamination, a sufficiently complete chain of custody does not require that every person in the chain testify, nor must the State exclude every possibility of tampering or contamination[.]" *Woods*, 214 Ill. 2d at 467, 828 N.E.2d at 255. However, the State must establish "that reasonable measures were employed to protect the evidence from the time that it was seized and that it was unlikely that the evidence has been altered." *Woods*, 214 Ill. 2d at 467, 828 N.E.2d at 255.

¶ 15 At defendant's jury trial, Officer Loschen testified that, after beginning to follow defendant, he found an object lying in the road that turned out to be a plastic bag containing 30 smaller plastic bags, each of which held a white chunky substance that he suspected was crack cocaine. The State's evidence showed the incident in question occurred on January 20, 2009, and Loschen estimated it transpired "at about 6:10 p.m." Loschen stated he placed the items he found into evidence and explained that process as follows:

"[W]hen we collect something, especially when it comes to drugs, we field test it ourselves. We process it. We put it in a plastic bag. It's sealed. And with me I always put my initials, my badge number and the date and I slide a piece of tape over it, and then I submit it into an evidence locker."

Loschen testified he followed those steps when placing the plastic bags and suspected cocaine into evidence.

¶ 16 At trial, Loschen identified People's exhibit No. 1 as the 30 individually packaged bags of crack cocaine he collected on January 20, 2009. He noted that, when he processed them into evidence, he removed them from the larger plastic bag in which they were discovered. The larger bag was separately processed into evidence and Loschen identified People's exhibit No. 2 as the larger bag. Loschen testified that both items of evidence were in substantially the same condition as when he originally processed them into evidence. Prior to trial, the parties stipulated to the chain of custody of People's exhibits Nos. 1 and 2 after being placed into evidence, when taken for testing at the Illinois State Police Crime Laboratory, and when returned from testing to be used at trial. They also stipulated that testing revealed People's exhibit No. 1 contained 5.1 grams of cocaine.

¶ 17 Here, the State presented ample evidence to establish a sufficient chain of custody for the controlled substance at issue. It showed reasonable protective measures were taken to ensure the evidence was maintained in its original condition and that it had not been tampered with, substituted, or altered between the time it was taken into evidence and when it was tested. Because the State established a *prima facie* case, the burden shifted to defendant to produce

evidence of actual tampering, alteration, or substitution. None of the points defendant raised in his postconviction petition, or on appeal, even arguably meet this standard.

¶ 18 To support his position that he had a legitimate challenge to the State's chain of custody for the drug evidence, defendant argues discrepancies existed between Loschen's testimony and police department documentation regarding the order in which evidence was collected in the case and the precise time the drug evidence was seized. Defendant points out that inventory tag numbers were out of sequence and the cocaine had a higher tag number than evidence discovered at a later date. However, this discrepancy does not amount to evidence of actual tampering, alteration, or substitution. The inventory tags or stickers to which defendant refers clearly show the large plastic bag and 30 smaller bags with the suspected crack cocaine were found on January 20, 2009, at approximately 6:15 p.m. That information is consistent with Loschen's testimony regarding when the events at issue occurred. At most, the sequencing discrepancy went to the weight of the evidence and not its admissibility.

¶ 19 On appeal and in his postconviction petition defendant additionally refers to a computer generated "dispatch report" and a computer generated "A.R.M.S. sheet." Again, the "A.R.M.S. sheet" is consistent with Loschen's testimony, stating the 30 rocks of suspected crack cocaine were recovered on January 20, 2009, at 6:15 p.m. The "dispatch report" contains no specific reference to the recovery or entering into evidence of the cocaine. Neither document constitutes evidence of actual tampering, alteration, or substitution.

¶ 20 Defendant cites *People v. Coleman*, 2012 IL App (4th) 110463, 981 N.E.2d 1178, for the proposition that trial counsel's failure to challenge the introduction of drug evidence can amount to ineffective assistance of counsel. However, the facts of that case are distinguishable

from the present situation. Notably, in that case, defense counsel stipulated to the weight of the controlled substance at issue when the record showed the contents of 15 bags of a controlled substance had been commingled into a single bag prior to chemical analysis. *Coleman*, 2012 IL App (4th) 110463, ¶ 66, 981 N.E.2d 1178. The facts of this case are not similar to *Coleman* and it has no application here.

¶ 21 In this case, defendant's postconviction claims present no legitimate basis for challenging the State's drug evidence due to an insufficient chain of custody. As a result, it is not arguable that either the performance of defendant's trial counsel or appellate counsel fell below an objective standard of reasonableness or that defendant suffered prejudice. Although, as defendant points out, the trial court did not address the specific issue raised by this appeal when dismissing his postconviction petition, this court may affirm the trial court on any basis supported by the record. *People v. Little*, 335 Ill. App. 3d 1046, 1051, 782 N.E.2d 957, 962 (2003). As discussed, the issue presented on appeal has no merit. The trial court committed no error in summarily dismissing defendant's postconviction petition.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal.

¶ 24 Affirmed.