

six-year sentences to the Illinois Department of Corrections. On July 28, 2010, the defendant filed a *pro se* postconviction petition. Counsel was appointed and ultimately a second amended postconviction petition (the petition) was filed on September 12, 2011. Although counsel attached three signed affidavits to the petition, only one of the three affidavits was notarized. On October 11, 2011, the State filed a motion to dismiss, which was granted on November 22, 2011, after a hearing. The trial judge's November 22, 2011, order found, *inter alia*, that: (1) the defendant had not shown prejudice because he had not shown that any action of plea counsel had coerced the defendant into pleading guilty, and had not shown that plea counsel was otherwise ineffective, (2) the record of the plea hearing showed that the defendant's plea was knowing and voluntary, (3) some of the defendant's allegations were speculative, conclusory, and not supported by notarized affidavits, and (4) evidence the defendant claimed his plea counsel would not review was not available to counsel. This timely appeal followed.

¶ 5

ANALYSIS

¶ 6 On appeal, the defendant first takes issue with the performance of postconviction counsel. Specifically, the defendant contends he received less than the required level of assistance from postconviction counsel because counsel failed to: (1) include a claim in the petition that the defendant did not receive proper admonishments at the conclusion of his guilty plea, (2) ensure the petition contained both of the relevant trial court case numbers, and (3) obtain notarized affidavits from the defendant and another individual in support of the defendant's *pro se* claims. It is axiomatic "that a defendant in postconviction proceedings is entitled to only a 'reasonable' level of assistance, which is less than that afforded by the federal or state constitutions." *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). Pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013)), the duties of postconviction counsel "include consultation with the defendant to ascertain his contentions of deprivation

of constitutional right, examination of the record of the proceedings at trial, and amendment of the petition, if necessary, to ensure that defendant's contentions are adequately presented." *Pendleton*, 223 Ill. 2d at 472. Counsel is not required "to advance frivolous or spurious claims," and " 'is only required to investigate and properly present the *petitioner's* claims.' (Emphasis in original.)" *Id.* (quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993)). Although counsel may choose to raise issues not found in the *pro se* petition, counsel is under "no obligation to do so." *Id.* at 476. Accordingly, because in the case at bar the defendant did not include in his *pro se* petition a claim related to improper admonishments at the conclusion of his guilty plea, counsel was under no obligation to include such a claim in the petition, and the defendant's first claim of error fails.

¶ 7 With regard to the defendant's claim that postconviction counsel failed to ensure the petition contained both of the relevant trial court case numbers, we agree with the State that the defendant has failed to argue that he was prejudiced in any way by postconviction counsel's actions, and has failed to support this contention with citation to authority. Accordingly, the defendant has waived consideration of this argument. See Ill. S. Ct. R. 341(h)(7) (eff. Mar. 16, 2007) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing). As our colleagues in the Fourth District recently held in a supplemental opinion filed on denial of rehearing, "this court does not have the function or the obligation to act as an advocate for defendant or search the record for error," and thus will consider only "those issues the appellant has clearly defined and supported with cohesive arguments and citation to pertinent authority." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 79. Waiver notwithstanding, our independent review of the record reveals no possible prejudice to the defendant as a result of the failure of postconviction counsel to ensure the petition contained

both of the relevant trial court case numbers. Indeed, counsel for the defendant correctly notes in the defendant's opening brief that at the trial court level, both postconviction counsel and the State agreed that adding an additional trial court case number would not have changed the substance of their arguments "in any significant way," and our review of the record reveals that the lack of one of the trial court case numbers did not prevent the trial judge from addressing all the claims raised by the defendant in the petition.

¶ 8 With regard to the defendant's claim that postconviction counsel failed to obtain notarized affidavits from the defendant and from one Darryl Mason in support of the defendant's *pro se* claims, we begin by noting that the petition itself stated that the purpose of including the affidavits was to support the defendant's claim of ineffective assistance of plea counsel. To prevail on a claim of ineffective assistance of counsel in the context of a guilty plea, "a defendant must establish that counsel's performance fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's substandard performance." *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005). The first requirement of this standard is met, and an attorney's conduct will be deemed to be deficient, "if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently." *Id.* at 335. To meet the prejudice requirement of this standard, "the defendant must show there is a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial." *Id.* This requires more than a bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient: "the defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Id.* at 335-36.

¶ 9 In the case at bar, the defendant's claim of ineffective assistance of plea counsel would have failed even if the accompanying affidavits had been notarized, and thus, even if we

assume, *arguendo*, that postconviction counsel should have had them notarized, the defendant can demonstrate no prejudice as the result of postconviction counsel's failure to do so. Nowhere in the petition does the defendant claim that he is innocent, and nowhere does he claim he would have pleaded not guilty and insisted on a trial if counsel had not been deficient, let alone articulate a plausible defense he would have raised at trial.

¶ 10 The defendant's problems meeting the prejudice requirement notwithstanding, he also cannot demonstrate that plea counsel "failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently." See *id.* at 335. In his unnotarized affidavit the defendant alleged, *inter alia*, that he alerted plea counsel to the existence of Mason as an alibi witness, and provided counsel with signed and notarized affidavits from Mason and from victim Ricky McGary, the latter of whom purportedly recanted, in his affidavit, his allegation that the defendant was the one who shot him. The defendant further alleged that plea counsel ignored this information, and that even though the defendant did not wish to plead guilty, plea counsel "coerced" and "threatened" him until he did so. In Mason's unnotarized affidavit, Mason purported to provide an alibi for the defendant on October 16-17, 2005. In the petition, the defendant alleged that plea counsel was ineffective because he failed to call or contact Mason, and because he downplayed the significance of the affidavits, informing the defendant that the affidavits would not help him and that he should plead guilty.

¶ 11 On appeal, the defendant contends that the petition would have advanced to an evidentiary hearing "but for [postconviction counsel's] failure[]" to get the two affidavits notarized. There are a number of problems with the defendant's contention on appeal. First, the petition would not have advanced to an evidentiary hearing "but for [postconviction counsel's] failure[]" to get the two affidavits notarized. Although in his November 22, 2011, order, the trial judge based his dismissal of the petition *in part* on the fact that two of the affidavits were not notarized, he also based that dismissal on his conclusion that the record

of the plea hearing demonstrated that the defendant's plea was knowing and voluntary, despite the alleged ineffective assistance of plea counsel. The judge based this finding on the fact that at the plea hearing, when the judge asked the defendant if anyone had threatened him or forced him to enter his plea, the defendant replied, "No, sir." Accordingly, the judge could appropriately conclude that the defendant's claim that his plea was not knowing and voluntary was positively rebutted by the record, and that dismissal of the petition, without an evidentiary hearing, was proper. See, e.g., *People v. Lander*, 215 Ill. 2d 577, 586 (2005) (at second stage of postconviction petition proceedings, all factual allegations are accepted as true, unless positively rebutted by the record). The defendant does not contend on appeal that the trial court erred in finding that the record demonstrated that the defendant's plea was knowing and voluntary, and accordingly has waived consideration of any argument that the court's finding is in error. See Ill. S. Ct. R. 341(h)(7) (eff. Mar. 16, 2007) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing). Therefore, we could summarily affirm the dismissal of the petition on these grounds. See, e.g., *People v. Johnson*, 208 Ill. 2d 118, 128-29 (2003) (reviewing court may affirm on any basis supported by the record). Moreover, in the face of an uncontested and unappealed finding by the trial court that the defendant's plea was knowing and voluntary, the defendant cannot possibly satisfy the first requirement of a claim of ineffective assistance of plea counsel: that plea counsel failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently.

¶ 12 A second problem with the defendant's contention on appeal is that, as the State points out, the affidavits would have been useless even if notarized because the dates listed on the affidavits do not correspond to the date of the defendant's crime, and thus would provide no alibi to the defendant and no support for the defendant's contention that plea counsel was

ineffective because counsel's lack of investigation of his purported alibi somehow "coerced" the defendant into pleading guilty. Although in his reply brief counsel for the defendant posits that perhaps the dates in the affidavits are typographical errors, we find his proposition highly speculative, and in any case, counsel does not explain how having the affidavits notarized—the sole "failure" with regard to the affidavits raised in the defendant's opening brief, and thus the only "failure" preserved for purposes of appeal (see Ill. S. Ct. R. 341(h)(7) (eff. Mar. 16, 2007) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing))—would have remedied the purported typographical errors.

¶ 13 The defendant next contends the trial court erred when it refused to allow postconviction counsel to further amend the petition to include both relevant trial court numbers. However, as noted above, the defendant has failed to argue that he was prejudiced in any way by the trial judge's ruling, and has failed to support this contention with citation to authority. Accordingly, the defendant has waived consideration of this argument. See Ill. S. Ct. R. 341(h)(7) (eff. Mar. 16, 2007) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing). Waiver notwithstanding, our independent review of the record reveals no prejudice to the defendant, because, as we reiterate, the lack of one of the trial court case numbers did not prevent the trial judge from addressing all the claims raised by the defendant in the petition.

¶ 14 Finally, the defendant contends his sentence is void because there was no presentence investigation (PSI) and no proper finding on the record of the defendant's full criminal history. In the alternative, he contends he received less than the required level of assistance

from postconviction counsel where counsel failed to recognize this error and amend the petition to include it. With regard to his alternative argument, we reiterate that postconviction counsel "is only required to investigate and properly present the *petitioner's* claims.' (Emphasis in original.)" *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006) (quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993)). Although counsel may choose to raise issues not found in the *pro se* petition, counsel is under "no obligation to do so." *Id.* at 476. Accordingly, because in the case at bar the defendant did not include in his *pro se* petition a claim related to this issue, counsel was under no obligation to include such a claim in the petition, and the defendant's alternative argument fails.

¶ 15 With regard to his primary argument, that his sentence is void because there was no PSI and no proper finding on the record of the defendant's full criminal history, we agree with the State that not a single reported decision supports the defendant's position with regard to the circumstances in the case at bar. At the very most, the parties' waiver, in the case at bar, of the PSI, coupled with the omission of the nature of the defendant's previous misdemeanor conviction and the sentence he received as a result of that conviction, renders the defendant's present sentence voidable, not void. However, a voidable judgment is not subject to collateral attack in a postconviction petition. *People v. Davis*, 156 Ill. 2d 149, 155-56 (1993). Accordingly, the defendant is entitled to no relief.

¶ 16 CONCLUSION

¶ 17 In sum, all of the defendant's contentions on appeal are without merit. For the foregoing reasons, we affirm the dismissal of the defendant's petition.

¶ 18 Affirmed.