

for appeal. Therefore, we now grant the motion of the State Appellate Defender to withdraw as counsel and affirm the judgment of the circuit court of Effingham County based on the following.

¶ 3

BACKGROUND

¶ 4 A complete detailing of the facts and procedure in this case is unnecessary, and therefore, we present only the facts and procedural history necessary to our decision. On the nights of June 7-8, 2006, S.D. was at home with two of her four children when she was awakened by an intruder. She was tied up and sexually assaulted. On September 21, 2006, the defendant was charged with five counts relating to the attack of S.D.: count I, home invasion (720 ILCS 5/12-11(a)(6) (West 2004)), count II, aggravated criminal sexual assault (vaginal) (720 ILCS 5/12-14(a)(4) (West 2004)), count III, aggravated criminal sexual assault (anal) (720 ILCS 5/12-14(a) (West 2004)), count IV, criminal sexual assault (vaginal) (720 ILCS 5/12-13(a)(1) (West 2004)), and count V, criminal sexual assault (anal) (720 ILCS 5/12-13(a)(1) (West 2004)). The jury found him guilty on all counts. The circuit court sentenced him to mandatory life imprisonment for counts I, II, and III, pursuant to the habitual criminal enhancement provision of section 33B-1 of the Criminal Code of 1961 (720 ILCS 5/33B-1 (West 2006)). This court affirmed the judgment of the circuit court. *People v. Sharp*, No. 5-07-0438 (Jan. 5, 2010) (unpublished order pursuant to Supreme Court Rule 23). Prior to our decision on direct appeal, the defendant filed a petition for relief from judgment and a motion for DNA database search. The circuit court dismissed the petition and motion on October 1, 2009. We affirmed the dismissal. *People v. Sharp*, No. 5-09-0580 (Mar. 10, 2011) (unpublished order pursuant to Supreme Court Rule 23). The defendant filed a postconviction petition on November 10, 2011, and the petition was dismissed by the circuit court at the first stage on February 7, 2012, exactly 90 days after its filing, including the day upon which it was filed. This dismissal is the subject of the defendant's current

appeal.

¶ 5

ANALYSIS

¶ 6 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) allows an individual convicted of a criminal offense to challenge the proceeding in which he or she was convicted under the United States or Illinois Constitution or both. *People v. Cathey*, 2012 IL 111746, ¶ 17 (citing *People v. Harris*, 224 Ill. 2d 115, 124 (2007)). A petition for relief under the Act may be summarily dismissed "[w]ithin 90 days after [its] filing" (725 ILCS 5/122-2.1(a) (West 2010)) if it is "'frivolous or is patently without merit.'" *Cathey*, 2012 IL 111746, ¶ 17 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). "A postconviction petition is considered frivolous or patently without merit only if it has no 'arguable basis either in law or in fact.'" *Id.* (quoting *People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). "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. The appellate court will review a circuit court's order summarily dismissing a *pro se* postconviction petition *de novo*. *Cathey*, 2012 IL 111746, ¶ 17 (citing *People v. Coleman*, 183 Ill. 2d 366 (1998)).

¶ 7 Regarding postconviction proceedings that follow a direct appeal, it is established that "where a person convicted of a crime has taken an appeal from the judgment of conviction on a complete record, the judgment of the reviewing court is [r]es judicata as to all issues actually decided by the court" (*People v. Kamsler*, 39 Ill. 2d 73, 74 (1968) (citing *People v. Armes*, 37 Ill. 2d 457, 458 (1967))), and "issues that could have been raised on direct appeal, but were not, are considered forfeited and, therefore, barred from consideration in a postconviction proceeding." *People v. Youngblood*, 389 Ill. App. 3d 209, 214 (2009) (citing (*People v. Blair*, 215 Ill. 2d 427, 443-44 (2005))). "There is, however, an exception to the [forfeiture] doctrine in post-conviction proceedings." *People v. Turner*, 187 Ill. 2d 406, 412-

13 (1999). The doctrine of forfeiture does not bar claims that could have been raised on appeal if postconviction counsel amends the postconviction petition "to allege ineffective assistance of appellate counsel for failing to raise petitioner's claims on direct appeal." *Id.* at 413.

¶ 8 The defendant presented numerous issues in his postconviction petition, including the following, which were also raised and rejected on direct appeal: (1) whether the State proved the defendant guilty beyond a reasonable doubt, and (2) whether the defendant was denied a fair trial by the admission of testimony by Deputy Finrock regarding his observation of a gag, a rope, and Vaseline in the defendant's vehicle several months before the attack. In its motion, the appellate defender has asserted that the defendant's contention regarding whether he was proved guilty beyond a reasonable doubt is without merit as it is barred by the doctrine of *res judicata*. We agree. The appellate defender has not, however, addressed the defendant's contention regarding the admissibility of Deputy Finrock's testimony. Nonetheless, as it is clear from the record that this issue was brought before this court on direct appeal and rejected, we likewise find this issue barred. We also find that the defendant's contention, that an "Arizona" search might divulge other matches to the DNA, is barred by the doctrine of *res judicata*. The defendant previously raised the issue in a petition for relief from judgment and a motion for DNA testing, both of which were denied, said denials being affirmed on appeal.

¶ 9 Next, we turn to the appellate defender's assertion that the defendant's contention, that his trial attorney was ineffective for failing to call Stephanie Beine to testify as an expert rather than using her suggested questions to cross-examine the State's expert, is without merit.

¶ 10 In order to succeed in a claim of ineffective assistance of counsel, the defendant must show "that counsel's performance fell below an objective standard of reasonableness," and

"that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). Also, "decisions concerning whether to call certain witnesses on a defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel." *People v. Enis*, 194 Ill. 2d 361, 378 (2000) (citing *People v. West*, 187 Ill. 2d 418, 432 (1999); *People v. Reid*, 179 Ill. 2d 297, 310 (1997)). "Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence" (*id.* (citing *People v. Wiley*, 165 Ill. 2d 259, 289 (1995))), and therefore, are "generally immune from claims of ineffective assistance of counsel." *Id.* (citing *People v. Reid*, 179 Ill. 2d 297, 310 (1997)).

¶ 11 We note, as has the appellate defender, that this issue was not raised on direct appeal, nor did the defendant allege ineffective assistance of appellate counsel in his petition. Therefore, this issue is forfeited. Moreover, the issue is substantively without merit. In his *pro se* petition, the defendant alleged that Stephanie Beine, the defense DNA expert, would have testified to a number of items. In support of his argument, the defendant attached a list of potential questions for the cross-examination of the State's expert, Aaron Small, along with a list of questions provided to the defense by Stephanie Beine, the defense expert, and meant as a "guideline" for defense counsel in formulating questions. It appears that the defendant's list of statements, to which he asserts Beine would have testified, is based on a combination of these lists. Our review of the trial transcript leads us to agree with the appellate defender that defense counsel asked the majority of these questions on cross. While the defendant complained that defense counsel did not call Beine, we note that Beine's proposed questions include likely answers, not of Beine, but of Small, the State's expert, on cross-examination. We agree with the appellate defender that defense counsel likely implemented the strategy of obtaining this information from Mr. Small himself, as such

testimony would be just as effective, if not more so, than obtaining the testimony from Beine. As the circuit court put it, "trial counsel's decision to consult with Ms. Beine, as opposed to calling her as a witness at trial, smacks of sound trial strategy." Under these circumstances, we agree with the appellate defender that the defendant's contention, that defense counsel was ineffective for not having called Beine to testify, is frivolous and patently without merit.

¶ 12 The appellate defender also asserts that the defendant's contention, that trial counsel was ineffective for failing to move pretrial to exclude the gas station surveillance camera footage, lacks merit. We agree with the appellate defender that this issue has been forfeited as it was not raised on direct appeal and the defendant has not alleged ineffective assistance of appellate counsel. We note that even if the issue had not been forfeited, it is substantively without merit. This evidence would have been admitted as it meets the standard for relevancy, which is that the evidence "has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence." *People v. Ursery*, 364 Ill. App. 3d 680, 686 (2006) (citing *People v. Morgan*, 197 Ill. 2d 404, 455-56 (2001)). Clearly, whether the defendant's vehicle was parked in the area on the night of the attack is a fact of consequence. The defendant seemed to argue that the footage would have been excluded because it was of poor quality, did not show the make or year of the vehicle, did not show the license plate, did not show who was driving the vehicle, and did not show where the car went subsequently; however, "[t]he jury as trier of fact is perfectly capable of weighing such evidence and assigning to it an importance concomitant with its probative value." *People v. Hill*, 60 Ill. App. 2d 239, 250 (1965); *People v. Nash*, 282 Ill. App. 3d 982, 985 (1996) (citing *People v. Campbell*, 146 Ill. 2d 363, 375 (1992)).

¶ 13 The appellate defender next asserts that the defendant's argument, that the State's expert, Aaron Small, developed the DNA recovered so that it would fit the defendant's

profile, is without merit. The defendant did not attach any affidavits or other documentation in support of this contention, or explain the absence of such documentation, as is required by the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2006)), nor does the record reveal any support for the defendant's contention. Therefore, we agree with the appellate defender that this issue is without merit.

¶ 14 The State Appellate Defender argues that the doctrine of forfeiture also bars the following claims of the defendant: (1) that the defendant's DNA standard, State's Exhibit 34, was tampered with, where it was found to have been opened at trial; (2) that there were breaks in the chain of custody for the material believed to be part of a condom wrapper, State's Exhibit 13; (3) that hearsay evidence from David Valle and Kara Emmerich about A.V.'s out-of-court statements should not have been admitted because A.V. was not asked and did not testify that she identified the defendant in a photo array; (4) that the State improperly impeached its own witness about whether the attacker used a condom; (5) that the State's Attorney's investigator was permitted to remain in the court during the trial, over counsel's objection; (6) that the State did not prove an assault to the victim because no semen was recovered from the victim; (7) that the trial court erred in refusing to give an instruction that the testimony of alibi witnesses was entitled to as much weight as that of State's witnesses; and (8) that the jury instructions were confusing.

¶ 15 Given that these issues could have been, but were not, raised on appeal, and that the defendant has not asserted an ineffective-assistance-of-appellate-counsel claim with regard to these issues, we agree with the appellate defender that these issues are forfeited.

¶ 16 Finally, the appellate defender argues that the defendant's assertion, that had the police turned over phone records related to his cell phone, they would have revealed that he was at another location at the time of the attack, is without merit. The appellate defender argues that this claim would fail because the defendant did not attach any supporting documentation.

We agree.

¶ 17

CONCLUSION

¶ 18 Because there are no nonfrivolous, meritorious arguments to be made on the defendant's behalf, the motion of the State Appellate Defender is granted, and the judgment of the circuit court is affirmed.

¶ 19 Motion granted; judgment affirmed.