2015 IL App (1st) 140985-U

FIRST DIVISION
AUGUST 24, 2015

No. 1-14-0985

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 3266
	)	
NICHOLAS BULSKI,	)	Honorable
	)	Diane G. Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in summarily dismissing defendant's postconviction petition at the first stage of the proceedings, where the petition failed to state a gist of a constitutional claim to survive dismissal.

¶ 2 This appeal arises from the December 6, 2013 ruling by the circuit court of Cook County, which summarily dismissed defendant Nicolas Bulski's *pro se* postconviction petition as patently frivolous and without merit. On appeal, the defendant argues that the trial court erred in dismissing his petition at the first stage of the postconviction proceedings. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The facts reproduced below are summarized from this court's December 21, 2012 order, which affirmed the defendant's conviction and sentence on direct appeal. See *People v. Bulski*, 2012 IL App (1st) 112006-U. The evidence adduced at a bench trial, which commenced on November 17, 2010, showed that on January 9, 2009, the police obtained search warrants for the defendant at two different locations: (1) 6559 West George Street, Unit 413, in Chicago, Illinois; and (2) 2643 North 73rd Avenue, Apartment GW, in Elmwood Park, Illinois. On that afternoon, Chicago police officer Joseph Mirus (Officer Mirus), who was conducting a surveillance of the condominium building located at the George Street address, saw the defendant leave in a gray Ford Explorer and followed him to the 73rd Avenue address. The defendant entered the apartment building, emerged 20 minutes later, and drove away. No one else entered or left the apartment building during that time. Enforcement officers stopped the defendant in his gray Ford Explorer and returned him to the 73rd Avenue address where Officer Mirus and other officers forcibly entered Apartment GW. Meanwhile, Irene Baran (Irene) appeared on the scene, identified herself as the landlord of the building, and gave Officer Mirus a lease agreement for Apartment GW signed by the defendant.

¶ 5 On cross-examination, Officer Mirus added that the defendant did not have anything in his hands when he stepped out of the Ford Explorer or when he emerged from the apartment building. He identified Defense Exhibits One, Two, and Three, as photographs depicting the front door of Apartment GW after it was forced open, the living room, and the bedroom, and stated that mail found in the bedroom was not addressed to the defendant.

¶ 6 Chicago police officer John Elstner (Officer Elstner) identified the defendant in court as the person he and his partner stopped in a gray Ford Explorer, at which point the defendant

identified himself as Nick Bulski. A protective pat-down search of the defendant revealed $550, but no drugs.

¶ 7 Chicago police officer Orlando Rodriguez (Officer Rodriguez) was the evidence technician who photographed Apartment GW. He identified People's Exhibit Two as a photograph of the kitchen and pointed out the cabinets where a digital scale and several clear sandwich bags were recovered. He identified Defense Exhibit Three as a photograph of the bedroom and noted there was mail on a dresser and the bed was made. He identified People's Exhibit Three as a photograph of the bedroom after it was searched, noting the absence of clothes in the open dresser drawers, on the bed, or on the floor. People's Exhibit Four was identified by Officer Rodriguez as a photograph of two clear plastic bags containing a white chunky substance found inside the box spring of the bed, and People's Exhibit Five as a photograph of the empty bedroom closet. He identified People's Exhibits Six and Seven as photographs of the kitchen cabinets which contained very little food. Lastly, he identified People's Exhibit Eight as a photograph of a bucket in the kitchen containing clear plastic bags which he suspected were used for packaging drugs.

¶ 8 On cross-examination, Officer Rodriguez acknowledged that he did not inventory the mail on the bedroom dresser or remember the addressee, but maintained that he would have inventoried the mail had it been addressed to the defendant. He also acknowledged that the apartment and the evidence recovered therein were not tested for fingerprints.

¶ 9 Testimony from the landlords of the apartment building at the 73rd Avenue address established that the defendant signed a one-year lease agreement for Apartment GW on June 1, 2008. Irene identified the defendant in court as the person who signed the lease agreement for that apartment, and to whom she gave a key to Apartment GW and watched as he checked to see

that it worked properly. Because the defendant wanted to carefully read the lease agreement before signing it, Irene instructed him to give it to her husband Stanley after he signed it. Irene testified that Stanley was always in the apartment building. She identified People's Exhibit One as a copy of the lease agreement bearing the defendant's signature and dated June 1, 2008. On cross-examination, Irene added that the defendant previously rented an apartment on the second floor.

¶ 10 Stanley Baran (Stanley) testified through an interpreter and identified the defendant in court as the person who handed him a signed lease agreement for Apartment GW and $600 rent on June 1, 2008. Stanley also identified People's Exhibit One as a copy of that lease agreement and stated that he collected rent from the defendant each month, "sometimes downstairs, sometimes upstairs at his apartment," but "always at 2643 North 73rd Avenue." On cross-examination, Stanley stated the George Martinez (Martinez) and Johnny Ortuz (Ortuz) paid rent on Apartment GW before the defendant rented it. Between December 2008 and January 2009, he did not observe the prior tenants entering or leaving Apartment GW. However, between June 2008 and January 2009, he occasionally observed Martinez and Ortuz inside Apartment GW with the defendant.

¶ 11 After the parties stipulated to the chain of custody and forensic analysis of the suspected cocaine, the State rested and the trial court denied the defendant's motion for a directed finding. The defendant testified in his own defense after learning that his witness, Martinez, would invoke his fifth amendment right against self-incrimination if questioned about Apartment GW.

¶ 12 According to the defendant, he never resided in Apartment GW even though he signed a one-year lease agreement for that unit. He lived with his family at the George Street address and signed the lease agreement at issue on behalf of a friend who was supposed to rent the unit but

never showed up. He gave Irene $600 for rent, half of which came from his absent friend. Irene gave him a key to the apartment which he held for two weeks until Ortuz, a prior tenant, moved into the unit. Martinez, another prior tenant, moved in with Ortuz in early January 2009. The defendant stated that he remained responsible for making sure the rent was paid on Apartment GW and he went there "once, maybe every two weeks, or once when I had to collect the rent." He went to the apartment on January 9, 2009, for that purpose but no one answered the door or answered his phone calls. As he was driving away, he was stopped by the police, asked about Apartment GW and drugs, then searched for contraband. The officers then drove him back to the apartment building and tried to unlock the apartment using his house key.

¶ 13 On cross-examination, the defendant acknowledged that he signed the lease agreement for Apartment GW and remained the tenant of record on the date in question. He also identified People's Exhibit One as a copy of the lease agreement bearing his name and signature. He read the lease agreement before signing it, but not "all the fine print" because Irene was a friend. His friends, Martinez and Ortuz, were obligated to pay rent because they lived in the apartment, but he was responsible for the rent if they did not pay it. Irene only issued rent receipts when Martinez and Ortuz paid rent, never when he did so. Although he had $550 on his person when he went to the apartment building to collect rent from his friends on January 9, 2009, he did not give that money to Irene because "[t]hat's my money I worked for, why would I pay the money for my friend's apartment?" He stated that he could have kicked them out and, in fact, tried to do so several times.

¶ 14 On April 27, 2011, in finding the defendant guilty of possession of a controlled substance with intent to deliver, the trial court noted the unequivocal testimony of the landlords that the defendant was the only renter of Apartment GW, that police followed the defendant from the

George Street address to the 73rd Avenue address, where a large amount of cocaine, a scale, and related paraphernalia were discovered inside an apartment under his name, with no sign of habitation. The trial court also denied the defendant's motion to reconsider, stating, "that is based on the amount of narcotics, condition of the residence which had no clothing in it, no food, no evidence of inhabitation whatsoever. It was, and for all practical purposes a stash house for drugs. And it is well beyond any personal use for anyone." Thereafter, on May 25, 2011, the trial court sentenced the defendant to 10 years of imprisonment.

¶ 15 On direct appeal, the defendant only challenged the sufficiency of the evidence to sustain his conviction. On December 21, 2012, this court affirmed the defendant's conviction and sentence. See *Bulski*, 2012 IL App (1st) 112006-U.

¶ 16 On November 25, 2013, the defendant filed a *pro se* postconviction petition, alleging that: (1) the police stopped, searched, and arrested him without probable cause and without a signed search warrant; (2) defense trial counsel provided ineffective assistance by failing to file a motion to suppress the illegal arrest and evidence seized as a result of the illegal arrest and search; (3) the State failed to disclose to the defense that the search warrants used to stop, arrest, and search him and his vehicle were not valid; (4) defense trial counsel provided ineffective assistance by failing to file a motion to quash the search warrants and suppress evidence pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); (5) defense trial counsel provided ineffective assistance by failing to challenge the chain of custody of the narcotics seized by the police; (6) he was denied his sixth amendment right to a conflict-free trial counsel, where counsel simultaneously represented two opposing interests; (7) the trial court erred in failing to make an inquiry to determine whether a conflict of interest existed for defense trial counsel; (8) the trial court abused its discretion in denying his right to counsel of his choice; (9) the trial court denied

his right to have witness Martinez testify for the defense; (10) defense trial counsel provided ineffective assistance by failing to investigate his illegal stop, search, and arrest by the police, and counsel's unreasonable performance prejudiced him;[1] (11) and (12) defense appellate counsel was ineffective for failing to raise significant and obvious issues of trial counsel's ineffectiveness, but instead challenged only the sufficiency of the evidence on direct appeal; and (13) the cumulative effect of the trial court and defense trial counsel's errors deprived him of due process.

¶ 17 On December 6, 2013, the trial court summarily dismissed the *pro se* postconviction petition as "patently frivolous and without merit."

¶ 18 On April 24, 2014, this court granted the defendant leave to file a late notice of appeal, which was then filed on May 6, 2014.

¶ 19 ANALYSIS

¶ 20 We have jurisdiction over this appeal pursuant to Supreme Court Rules 603 and 606 (eff. Feb. 6, 2013). The sole inquiry before us is whether the trial court erred in summarily dismissing the defendant's *pro se* postconviction petition at the first stage of the proceedings, which we review *de novo*. See *People v. Davis*, 403 Ill. App. 3d 461, 464 (2010).

¶ 21 As a preliminary matter, the State argues that the defendant's opening brief should be stricken for violating Supreme Court Rule 314(h)(6), (h)(7) (eff. Feb., 6, 2013), on the basis that it failed to include record citations in both the statement of facts and argument sections. Compliance with supreme court rules regarding appellate practice are mandatory, and parties who violate these rules run the risk of having their briefs stricken. *People v. Hatchett*, 397 Ill.

[1] This claim was essentially an ineffective assistance of counsel claim which included defense trial counsel's alleged deficient performance under claims (2), (4), (5), (6).

App. 3d 495, 511-12 (2009). However, because the defendant's failure to cite to the record in no way hinders our resolution of the issues before us, we decline to strike the defendant's brief in its entirety for noncompliance with the supreme court rules.

¶ 22 Turning to the merits of the appeal, we determine whether the trial court erred in dismissing the defendant's *pro se* postconviction petition at the summary stage of the proceedings.

¶ 23 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-step procedural mechanism by which a convicted defendant can assert that there was a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. *People v. Harris*, 224 Ill. 2d 115 (2007). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Consequently, issues that could have been raised on direct appeal but were not are forfeited. *Id.* Under the Act, a defendant bears the burden of establishing that a substantial deprivation of his constitutional rights occurred. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004). At the first stage, a postconviction petition may be summarily dismissed if the claims in the petition are frivolous and patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009); see 725 ILCS 5/122-2.1(a)(2) (West 2010)). A petition is considered frivolous and patently without merit "if the petition's allegations, taken as true, fail to present the gist of a constitutional claim." *People v. Torres*, 228 Ill. 2d 382, 394 (2008). However, if the petition survives initial review, the process moves to the second stage, where the circuit court appoints counsel for the defendant when the defendant cannot afford counsel. 725 ILCS 5/122-4 (West 2010). Because most petitions are drafted at the first stage by defendants with little legal knowledge, the threshold for survival is low and only a limited

amount of detail is required in the petition. *Torres*, 228 Ill. 2d at 394. However, a *pro se* petitioner is not excused from providing any factual detail at all surrounding the alleged constitutional violation. *Hodges*, 234 Ill. 2d at 10. Section 122-2 of the Act also provides that affidavits, records, or other evidence supporting the allegations in the petition shall be attached thereto or the petition shall state why such evidence is not attached. *Id.* at 10; 725 ILCS 5/122-2 (West 2010). The purpose of the "affidavits, records, or other evidence" requirement is to establish that a petition's allegations are capable of objective or independent corroboration. *Hodges*, 234 Ill. 2d at 10. "Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *People v. Delton*, 227 Ill. 2d 247, 254 (2008). Moreover, our supreme court has consistently upheld the dismissal of a postconviction petition when the allegations are contradicted by the record from the original trial proceedings. *Torres*, 228 Ill. 2d at 394.

¶ 24 The defendant initially argues that the trial court erred in summarily dismissing his postconviction petition, by speculating that the court may not have read the petition. He argues that the record contains no evidence that the court gave any consideration to the petition in dismissing it, and it appeared that the court "had no clue as to why the case was on the call at all." He argues that the postconviction petition raised a "gist" of constitutional claims and was not frivolous or patently without merit.

¶ 25 The State counters that the trial court properly dismissed the postconviction petition at the first stage, arguing that this court should reject the defendant's speculation that the trial court failed to review the petition before dismissing it. We agree.

¶ 26 The transcript of the December 6, 2013 proceedings reveals that when the matter was called, the trial court engaged in brief dialogue with the clerk by stating that it was unclear why the case was on the calendar call that day. The clerk replied that the case was on call for a hearing on the defendant's postconviction petition, to which the trial court noted that it had the "order"[2] and then denied the petition as patently frivolous and without merit. We find that while the court was initially unclear as to why the matter was on the calendar call, the record does not reflect the amount of time the trial court spent in reviewing the defendant's postconviction petition after speaking with the clerk and before dismissing it. Thus, we decline to speculate that the trial court did not review the petition or give any consideration to the petition before dismissing it. Moreover, although the trial court only made brief remarks and did not give detailed reasons for dismissing the petition as frivolous and without merit, we find that it was not required to do so. See *People v. Porter*, 122 Ill. 2d 64, 81 (1988) ("[a]lthough we deem it advisable that the trial court state its reason for dismissal [of the postconviction petition], we do not conclude it is mandatory"); *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003) (although the trial court's reasons for dismissing a petition may provide assistance to this court, this court reviews the trial court's judgment and not the reasons given for the judgment; this court can affirm the dismissal on any basis supported by the record even if the trial court reasoned incorrectly). Therefore, we decline to grant relief to the defendant on this basis.

¶ 27 The defendant next makes various arguments regarding the substance of the claims in his postconviction petition, arguing that he had raised the gist of a constitutional claim on each one

[2] The referenced "order" is presumed to be this court's December 21, 2012 order affirming the defendant's conviction on direct appeal.

of these claims and the trial court erred in summarily dismissing the petition. We take each argument in turn.[3]

¶ 28 First, the defendant argues that he was denied his due process rights because he was arrested without probable cause and the police officers lied at trial about when they had acquired the search warrants for two different locations. Specifically, he argues that the police officers falsely testified at trial that they had obtained two search warrants for the defendant for the George Street address and the 73rd Avenue address *prior* to detaining him and gaining entry into Apartment GW at the 73rd Avenue location. Instead, he claims, the police did not obtain the search warrants until *after* he was detained. The defendant further argues that defense trial counsel was ineffective for failing to file a motion challenging the alleged lack of probable cause for his arrest, and failing to conduct an adequate review of the discovery documents that would have allowed counsel to challenge the probable cause issue. The State counters that the record positively refutes the defendant's claims and defense trial counsel was not arguably ineffective for choosing not to file a motion to quash his arrest that would have been futile.

¶ 29 To the extent that the defendant argues that the police arrested him without probable cause, we note this argument is forfeited where it could have been, but was not, raised on direct appeal. See *Petrenko*, 237 Ill. 2d at 499. Thus, we focus our attention on whether the defendant has stated an arguable claim of ineffective assistance of counsel on the bases that defense trial counsel failed to file a motion challenging the probable cause for his arrest and failed to conduct an adequate review of the discovery documents that would have yielded the information for him to do so. A petition alleging ineffective assistance of counsel at the first stage of the

[3] To the extent that the dismissal of any claim in the petition is not challenged in the defendant's opening brief on appeal, those claims are abandoned pursuant to Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013).

postconviction proceedings may not be summarily dismissed if: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness; and (2) it is arguable that the defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶ 19. Counsel's performance is arguably unreasonable if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In assessing counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. With respect to prejudice, it is arguable that the defendant was prejudiced where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Failure to satisfy one prong of the *Strickland* test is fatal to the whole ineffective assistance of counsel claim. *Id.* at 687. Further, a defendant is prejudiced by defense trial counsel's decision not to file a motion to quash his arrest only where "there is a reasonable probability that the motion, if filed, would have been granted and that the outcome of the trial would have been different." *People v. Deluna*, 334 Ill. App. 3d 1, 16 (2002).

¶ 30 In the postconviction petition, the defendant alleged that the police did not obtain the search warrants until *after* he was detained, pointing specifically to the State's "complaint for forfeiture" attached to the petition in which it alleged that Sergeant Nelson Perez (Sergeant Perez) stated that on January 9, 2009, police surveillance teams observed the defendant leave the 73rd Avenue apartment building, stopped his Ford Explorer about two blocks away from the

location, and "detained [him] until the [search] warrants were signed." The defendant alleged that the "complaint for forfeiture" showed that he was arrested without probable cause, that officers lied at trial about when they had acquired the search warrants, and that defense trial counsel was ineffective for failing to file a motion to quash his arrest and failing to conduct an adequate review of the discovery documents that would have allowed him to challenge the probable cause issue. We cannot conclude that the petition arguably stated a claim for ineffective assistance of counsel on this basis, where the defendant's allegations are positively rebutted by the record. The record reflects that the two search warrants for the defendant for the George Street and the 73rd Avenue locations were signed by Judge Nicholas Ford on January 9, 2009 and bore the time of issuance as either "1:07 p.m." or "1:09 p.m." The defendant's arrest report shows that he was arrested at "16:31" (or 4:31 p.m.). Indeed, the "complaint for forfeiture" also reveals that the defendant was "placed in custody" at about 4:30 p.m. when the police executed the search warrant at the 73rd Avenue location. Thus, the record shows that the police obtained the search warrants *before* arresting the defendant, and the record positively refutes the defendant's allegation that he was arrested without probable cause because the police officers waited until after he was arrested to secure the search warrants. See *Torres*, 228 Ill. 2d at 394 (our supreme court has consistently upheld the dismissal of a postconviction petition when the allegations are contradicted by the record from the original trial proceedings). We likewise find that the record positively rebuts the defendant's allegation that officers testified falsely at trial about acquiring the search warrants prior to his arrest, on the basis that the warrants were not signed or valid at the time of his arrest. At trial, Officers Mirus and Rodriguez testified about the *execution* of the search warrants, but did not testify as to when the warrants were *obtained*. Officer Elstner testified on cross-examination that the police already "had a warrant" for the

defendant at the time of his arrest, which was corroborated by the times denoted on the search warrants and the arrest report. Thus, because defense counsel, even after conducting a sufficient review of the discovery documents, had no basis upon which to file a motion to quash the defendant's arrest, it could not be argued that there was a reasonable probability that any such motion would have been granted by the trial court. Further, because the record positively refutes the defendant's allegation that the officers lied at trial about their timing in acquiring the search warrants, defense trial counsel also lacked any basis to attack their testimony. Therefore, we find that the defendant failed to state an arguable claim of ineffective assistance of counsel on these bases. Accordingly, the trial court did not err in summarily dismissing these allegations in the postconviction petition.

¶ 31 Second, the defendant argues, without citing relevant legal authority, that the postconviction petition presented the gist of a constitutional claim for ineffective assistance of counsel, where defense trial counsel failed to challenge the chain of custody of the narcotics evidence seized by the police and the narcotics tested by the forensic chemist. Specifically, he argues that defense trial counsel was ineffective for stipulating to the forensic chemist's testimony that the suspect narcotics tested positive for cocaine, despite a discrepancy between the inventory number of the narcotics seized by the police and the narcotics tested by the forensic chemist. The State counters that the defendant failed to state an arguable claim for ineffective assistance of counsel on this basis, arguing that the record reflects that the assistant State's Attorney simply misspoke when she first identified the inventory number but then later stated the correct inventory number during the parties' stipulation to the chain of custody of the narcotics evidence.

¶ 32 At trial, Officer Rodriguez testified that he recovered two bags of suspect cocaine at Apartment GW and inventoried them under the unique inventory number "115<u>4</u>9841." The assistant State's Attorney later offered into evidence, by the parties' stipulation, that the forensic chemist would testify that she had received inventory number "1159841," tested the contents of the package, and determined that they tested positive for cocaine. The assistant State's Attorney then continued to state that the parties stipulated that "after the testing and analysis of inventory 115<u>4</u>9841 was complete," the forensic chemist resealed the items, and that she would be able to identify it again in open court as the same items that she tested and would be able to testify that the proper chain of custody was maintained at all times.

¶ 33 We find that the petition failed to state an arguable claim for ineffective assistance of counsel on this basis. The record clearly shows that, during the stipulation to the evidence, the assistant State's Attorney first misspoke by omitting the underscored "<u>4</u>" from the inventory number, but stated two paragraphs later in the trial transcript that the forensic chemist tested and analyzed the contents inventoried under number "115<u>4</u>9841," which matched the unique inventory number testified to by Officer Rodriguez. It is not arguable that defense trial counsel's conduct in stipulating to the forensic chemist's testimony and in not challenging the chain of custody of the narcotics evidence, fell below an objective standard of reasonableness, where the discrepancy as to the one digit in the inventory number was later corrected by the assistant State's Attorney and the parties stipulated that the chain of custody was properly maintained at all times. See *People v. Hunter*, 376 Ill. App. 3d 639, 644 (2007) (affirming summary dismissal of a *pro se* postconviction petition, by rejecting defendant's argument that counsel was ineffective for failing to challenge the chain of custody based upon a discrepancy in the inventory numbers, where the parties not only stipulated that the chain of custody was proper at

all times but the officer's testimony describing the substance sufficiently matched the testimony to which the parties stipulated); see generally *People v. Carodine*, 374 Ill. App. 3d 16, 26-27 (2007) (rejecting defendant's claim that the State failed to establish a sufficient chain of custody of the controlled substance, despite the discrepancy in the inventory numbers, by finding that the State showed that the police took reasonable protective measures to ensure that the substance they recovered was the same substance tested by the forensic scientist. Without actual evidence of tampering or substitution, once the State established the probability that the evidence was not compromised, any deficiencies in the chain of custody "went to the weight, not admissibility, of the evidence"). Therefore, we find that the defendant failed to state an arguable claim of ineffective assistance of counsel on this basis. Accordingly, the trial court did not err in summarily dismissing these allegations in the postconviction petition.

¶ 34 Next, the defendant argues that he was denied his sixth amendment right to a conflict-free trial counsel, where counsel simultaneously represented two opposing interests. Specifically, he argues that a *per se* conflict of interest existed because defense trial counsel, without the defendant's knowledge, represented both he and "Chicago police officers and their union." He contends that defense trial counsel provided ineffective assistance of counsel because he had a "prior and contemporaneous attorney-client relationship with the Chicago Police Department," noting that defense counsel was representing him at the same time that he was representing "the interests of members of the police entity that assisted in the petitioner-appellants [*sic*] prosecution."

¶ 35 The State responds that the defendant's claim that he was denied his right to a conflict-free trial counsel was properly dismissed because it lacked an arguable basis in fact or law. The State argues that to the extent that the defendant now claims on appeal that defense trial counsel

represented the "Chicago Police Department," this argument is forfeited because it was never alleged in the postconviction petition. Instead, the State argues, the defendant's claim of conflict was limited to his allegation in the petition that defense trial counsel represented the interests of the members of the police union and that the union is an entity that assisted in the defendant's prosecution. The State argues that the defendant's claim must fail "because it is based on an indisputably meritless legal theory, where no conflict of interest existed." Further, the State argues that the defendant could not establish the existence of a *per se* conflict because he presented "no arguable basis in fact to support his assertion that any conflict existed in this case."

¶ 36 A criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). "Such representation means assistance by an attorney whose loyalty to his or her client is not diluted by conflicted interests or inconsistent obligations." *Id.* Our supreme court has identified two categories of conflicts of interest: *per se* and actual. *Id.*; *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). Here, the defendant only argues that defense counsel labored under a *per se* conflict of interest. "A *per se* conflict of interest exists where certain facts about a defense attorney's status engender, by themselves, a disabling conflict." *Hernandez*, 231 Ill. 2d at 142. A *per se* conflict exists in three situations: "(1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved in the prosecution of defendant." *Id.* at 143-44.

¶ 37 In the postconviction petition, the defendant alleged that he was denied his sixth amendment right to a conflict-free counsel, where defense trial counsel labored under a *per se*

conflict of interest during the time he represented him. He alleged that counsel failed to disclose to him that counsel was representing "Chicago Police Officers and others through his job as counsel for the Police Benevolent Labor Committee." Attached to the petition was an affidavit submitted by the defendant, in which he claimed that in September 2013, over two years after sentencing, he first learned that counsel "represented and worked for the Police Benevolent Committee." Attached to the petition were also a "pension report" dated January 2011, four newspaper articles, and a transcript of a March 22, 2010 pretrial status hearing in the instant case. The January 2011 "pension report" states that one of the benefits of police officers' membership in the Police Benevolent Labor Committee is "legal representation for appearances at the Internal Affairs Division [IAD] and the Independent Police Review Authority [IPRA]." It further states that "[i]f you are notified to appear at IAD or IPRA as an accused, call the Office of Robert D. Kuzas."[4] The first newspaper article, which contains no date of publication and appears to be incomplete, references allegations of police misconduct by a police sergeant and identifies Attorney Kuzas as his legal counsel. The second newspaper article, dated November 3, 2010, identifies Attorney Kuzas as counsel for a Peoria police officer accused of overstepping regulations and beating a man after a traffic stop. The third newspaper article, dated March 7, 2013, identifies Attorney Kuzas as counsel for a former Markham police officer who was accused of sexual abuse. The fourth newspaper article, dated May 2012, identifies Attorney Kuzas as counsel for a former Chicago police officer who was convicted of police misconduct in federal court. In the March 22, 2010 transcript of a pretrial status hearing in the instant case, Chris Syregelas, an attorney from defense trial counsel's private law offices, informed the trial

[4] Attorney Robert D. Kuzas (Attorney Kuzas) was the defense trial counsel in the case at bar.

court that defense trial counsel could not be present because he had an emergency court hearing in an unrelated matter pertaining to the termination of a police officer before the Cook County Police Board.

¶ 38 We find that the petition failed to state an arguable claim for a violation of the defendant's sixth amendment right to a conflict-free and effective counsel. Here, under the *per se* conflict rules, the defendant does not argue that defense trial counsel had a prior or contemporaneous association with a victim or the prosecution, that defense trial counsel contemporaneously represented a prosecution witness, or that defense trial counsel was a former prosecutor who had been personally involved in the prosecution of the defendant. See *Hernandez*, 231 Ill. 2d at 143-44. Rather, the defendant only argues that a *per se* conflict existed by claiming that defense trial counsel represented him at the same time that counsel also represented the interests of members of the police entity that assisted in his prosecution. First, to the extent that the defendant now argues defense trial counsel contemporaneously represented the "Chicago Police Department," this argument must be rejected because it was never alleged his postconviction petition. See *People v. Jones*, 213 Ill. 2d 498, 505 (2004) (a claim not raised in a petition cannot be argued for the first time on appeal). Thus, the defendant's claim of conflict is restricted to what was alleged in his petition—that defense trial counsel represented police officers through the police union (Police Benevolent Labor Committee) and that union is an entity that assisted in the defendant's prosecution. Second, we find that the defendant presented no arguable basis in fact to support his assertion that any *per se* conflict existed in his case. In *People v. Fields*, our supreme court held that a *per se* conflict of interest arises where defense counsel has some tie to a person or entity which would benefit from an unfavorable verdict. *People v.* Fields, 2012 IL 112438, ¶ 30. Nothing in the defendant's petition or the

attached documents supported his allegation that the police union was an entity that assisted in the defendant's prosecution or would have benefitted from an unfavorable verdict against the defendant. Rather, the documents attached to the petition revealed that defense trial counsel simultaneously represented other defendants, who happened to be police officers or former officers, in proceedings unrelated to the criminal case brought against the defendant by the State. But *cf. People v. Washington*, 101 Ill. 2d 104 (1984) (holding that a *per se* conflict existed where defense counsel simultaneously represented the defendant and also served as a part-time attorney for the municipality where the defendant was being prosecuted"). Unlike *Washington*, the police union—Police Benevolent Labor Committee—which represents the interests of individual police officer members during investigatory proceedings before the IAD and IPRA, does not benefit from a guilty verdict against the defendant. Further, none of the police officers represented by defense trial counsel in those unrelated cases testified as a witness in this defendant's case. Thus, because the defendant failed to establish an arguable basis in fact that any conflict of interest existed, his sixth amendment right to a conflict-free counsel was not implicated. Therefore, we find that the defendant could not establish an arguable basis in fact or law that defense trial counsel's representation was ineffective on this basis or that he was prejudiced by counsel's performance. Accordingly, the trial court did not err in summarily dismissing this allegation in the postconviction petition.

¶ 39 The defendant next argues that he was denied his sixth amendment right to counsel of his choice. He contends that the trial court erred in denying his request to substitute counsel after trial had commenced, by arguing that his request was reasonable; that new counsel was "ready to step in"; that no frivolous delay was intended; and that defense counsel made "no vigorous objection."

¶ 40 The State counters that the defendant's right to counsel of choice argument was unfounded, arguing that in denying his request to substitute counsel, the trial court properly considered the length of time the defendant had been represented by defense counsel; considered whether the defendant's request for counsel to withdraw was merely a guise to thwart the effective administration of justice; and considered the defendant's reasons for seeking new counsel.

¶ 41 "The sixth amendment guarantees that, in all criminal prosecutions, the accused shall have the right to assistance of counsel (U.S. Const., amend. VI), which includes the right to counsel of his choosing. *People v. Graham*, 2012 IL App (1st) 102351, ¶ 32. The right to counsel of choice is distinct from the right to effective representation of counsel. *Id.* "The right to counsel of choice exists for its own sake and is protected independent of concerns regarding the fairness of the proceedings." *Id.* Therefore, the inquiry is "whether the petitioner was prevented from being represented by counsel of his own choosing, and not the quality of representation he actually received at trial." *Id.*; *People v. Childress*, 276 Ill. App. 3d 402, 413 (1995) (holding that a showing of prejudice is not necessary to establish a violation of the right to counsel of choice). The right to counsel of choice is measured against the trial court's interest in trying the case with diligence and the orderly process of judicial administration. *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 41. "Therefore, the trial court may consider the defendant's reasons for seeking new counsel, whether the request is merely a guise to thwart effective prosecution, whether the defendant has cooperated with current counsel, and the length of time the defendant has been represented by current counsel." *Id.* A trial court's decision on a motion to substitute is subject to review under an abuse of discretion standard. *Id.* The trial court does not abuse its discretion in denying a motion if chosen counsel is not specifically identified or

does not stand "ready, willing and able" to enter an appearance. *Id.* "Dissatisfaction with one's counsel, a deteriorating relationship, or the fact that defense counsel and defendant argue or disagree about trial tactics, alone, will not constitute good cause for substitution." *People v. Wanke*, 303 Ill. App. 3d 772, 782 (1999).

¶ 42 In the postconviction petition, the defendant alleged that in April 2011, he wrote a letter to defense trial counsel requesting that he immediately cease representing him. The petition alleged that defense trial counsel informed the court about this letter in open court on April 15, 2011.[5] He further alleged that the trial court simply disregarded his letter, denied his request for substitute counsel, but the trial court stated that the defendant had the option of proceeding *pro se*. The defendant also alleged in the petition that defense trial counsel's representation was of low caliber, that the defendant filed a misconduct complaint against defense trial counsel with the Attorney Registration and Disciplinary Commission (ARDC) in August 2011, and that he hired a new attorney, Michael Gillespie (Attorney Gillespie), after he was convicted and sentenced by the trial court. In the attached affidavit, the defendant stated that at the April 15, 2011 hearing, the trial court did not allow him to hire another attorney, "particularly [Attorney Gillespie]." Attached to the petition was also a December 1, 2011 letter from the defendant to defense trial counsel requesting that all documents in his case file be sent to Attorney Gillespie.

¶ 43 The record shows that the April 15, 2011 hearing was held after the bench trial had commenced but had continued until a later date. At the hearing, the trial court noted that the defendant's bench trial had commenced on November 17, 2010—during which the State presented witness testimony, rested its case-in-chief, the defense began its case, and the trial was

[5] The record reveals that defense trial counsel filed a motion to withdraw as counsel in response to the defendant's letter.

then-currently continued until a later date.[6] The trial court noted that defense trial counsel had been representing the defendant since December 2009; that the defendant was arrested on another charge while he was out on bail pending the trial in the case at bar; and that the defendant had been in custody since violating his bond. The trial court then explained to the defendant that, before the trial was continued during the defense's presentation of evidence, the court appointed an attorney to represent defense witness Martinez because Martinez chose to invoke his fifth amendment right against self-incrimination. The trial court further noted that defense trial counsel had so far made opening statements and cross-examined the State's witnesses at length at trial, that the court would not allow the defendant to remove defense counsel "as a trial strategy mid trial," but that the court would allow defense trial counsel to withdraw only if the defendant presented a legitimate reason that warranted it. In response, the defendant informed the court that defense trial counsel did not visit him in custody to discuss the case. He claimed that he had asked defense trial counsel to interview certain witnesses prior to trial, including Martinez, but did not state whether defense counsel failed to do so. He also claimed that defense trial counsel failed to ask State witness Irene certain "specific questions" on cross-examination at trial. In response to the defendant's comments, the trial court stated it was not defense trial counsel's fault that Martinez chose to exercise his right not to testify for the defense in order to avoid incriminating himself. The trial court also stated that rather than stipulating to the testimony of the apartment landlords, Irene and Stanley, defense trial counsel forced the State to call them to testify and he cross-examined them extensively at trial. At the hearing, defense trial counsel countered the defendant's remarks by informing the court that he *had* discussed this case with the defendant on several occasions and had visited him in custody at

[6] The bench trial was eventually continued until April 27, 2011.

least twice. Defense trial counsel noted that, during one of their discussions, the defendant wanted counsel to ask the court to consider giving him bond. Defense trial counsel recalled that, when he told the defendant that the court would not do so unless there was a substantial change in circumstances because he had violated his previous bail bond, the defendant was "unhappy with that answer." The trial court then explained to the defendant that counsel had indeed requested bond more than once, but that the court made the decision not to grant it. The trial court then gave the defendant the option to proceed *pro se*, which he declined, and the court denied counsel's motion to withdraw as the defendant's attorney.

¶ 44 We first find that the defendant's argument is forfeited, because it could have been, but was not, raised on direct appeal. See *Petrenko*, 237 Ill. 2d at 499. Even if not forfeited, we find that the petition failed to state an arguable claim that the defendant was denied his sixth amendment right to counsel of his choice. Here, the record reflects that the trial court expressly considered that the defendant had been represented by defense trial counsel for a number of years at the time he requested new counsel. The trial court also considered whether the defendant's request was merely a guise to thwart effective prosecution, by noting that he was not allowed to remove defense counsel "as a trial strategy mid trial." The trial court also considered the defendant's reasons for seeking new counsel, by finding that it was not defense trial counsel's fault that Martinez chose to invoke his fifth amendment right against self-incrimination and that defense trial counsel had extensively cross-examined the State's witnesses. See *Brisco*, 2012 IL App (1st) 101612, ¶ 41 (factors used in measuring the right to counsel of choice and the trial court's interest in trying the case with diligence and the orderly process of judicial administration); *Wanke*, 303 Ill. App. 3d at 782 ("[d]issatisfaction with one's counsel, a deteriorating relationship, or the fact that defense counsel and defendant argue or disagree about

trial tactics, alone, will not constitute good cause for substitution"). Contrary to the defendant's assertions, the trial court carefully considered these factors and found that they did not weigh in favor of allowing counsel to withdraw. Although the defendant now argues on appeal that the trial court abused its discretion in denying his request to substitute counsel because new counsel was "ready to step in," we find nothing in the record, his petition, or the documents attached thereto, to support his claim that new counsel was "ready, willing and able" to enter an appearance or represent him at the April 15, 2011 hearing. See *Brisco*, 2012 IL App (1st) 101612, ¶ 41 (the trial court does not abuse its discretion in denying a motion if chosen counsel is not specifically identified or does not stand "ready, willing and able" to enter an appearance). In fact, the allegations in the postconviction petition and its attached documents revealed that he did not retain Attorney Gillespie, his new counsel, until *after* he was convicted and sentenced for the crime charged. Nor do we find anything in the petition, its attachments, or the record to support the defendant's claim on appeal that the trial court "intimated [*sic*] [him] and gave him improper and coercive advice." Thus, we conclude that the defendant established no arguable basis that the trial court abused its discretion in denying his request to substitute counsel. Therefore, even taking the allegations in the petition as true, the defendant failed to present the gist of a constitutional claim that he was denied his sixth amendment right to counsel of his choice.

¶ 45 The defendant next argues, without citation to any legal authority or the record, that he was denied his rights to due process and a fair trial when, at trial, the trial court advised defense witness Martinez that he should have the advice of counsel prior to testifying about the apartment where the cocaine was recovered by the police, and the court then appointed a public defender to confer with Martinez. In doing so, he argues, the trial court "interjected itself into

the defense case" and "force[d] Martinez to stay off the witness stand," where Martinez conferred with the appointed public defender and decided to invoke his fifth amendment right against self-incrimination on questions relating to the apartment. The State counters that the trial court properly dismissed this claim because it had no arguable basis in fact or law.

¶ 46 We find this argument to be forfeited, where the defendant, in violation of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008), cites no legal authority whatsoever to support his position. See *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶¶ 80-82 (failure to cite legal authority in violation of Rule 341(h)(7) results in forfeiture of the issue). Moreover, this argument is forfeited for the additional reason that it could have been, but was not, raised on direct appeal. See *Petrenko*, 237 Ill. 2d at 499. Accordingly, the trial court did not err in summarily dismissing this allegation in the postconviction petition.

¶ 47 Finally, the defendant argues that he was denied effective assistance of appellate counsel, claiming that appellate counsel failed to raise certain errors on direct appeal. He contends that had appellate counsel raised these omitted issues on direct appeal, his convictions would have been reversed and the cause remanded for a new trial.

¶ 48 The State counters that the trial court properly dismissed the defendant's claims of ineffective assistance of appellate counsel because they had no arguable basis in fact or law. The State argues that to the extent that certain allegations of ineffective assistance of appellate counsel in the petition were not raised in the defendant's brief on appeal, those claims are forfeited for review. To the extent that those allegations of ineffective assistance of appellate counsel were not forfeited, the State argues, they should be rejected as without any arguable merit.

¶ 49 A defendant has a constitutional right to effective assistance of counsel during his appeal as of right. *People v. Robinson*, 217 Ill. 2d 43, 61 (2005). To establish that appellate counsel was ineffective, defendant must satisfy the standard set forth in *Strickland*, and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). *People v. English*, 2013 IL 112890, ¶ 33. "Under that standard, a defendant must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *Id.* Appellate counsel is not obligated to raise "every conceivable issue on appeal," but rather is expected to "exercise professional judgment to select from the many potential claims of error that might be asserted on appeal." (Internal quotation marks omitted.) *Id.* (quoting *People v. Williams*, 209 Ill. 2d 227, 243 (2004)). Where the underlying claims lack merit, a defendant cannot be said to have received ineffective assistance of appellate counsel for appellate counsel's failure to raise the claim on appeal. *People v. Johnson*, 206 Ill. 2d 348, 378 (2002).

¶ 50 On appeal, in arguing that appellate counsel was ineffective, the defendant makes no specific arguments but only generally refers to the claims raised in his postconviction petition. In the petition, he alleged that appellate counsel was ineffective for failing to allege on direct appeal that: (1) defense trial counsel was ineffective for failing to obtain security video footage from the condominium building at the George Street location that would have contradicted information provided by an informant to the police in securing a search warrant; (2) defense trial counsel had a conflict of interest while representing him in this matter; (3) defense trial counsel was ineffective for failing to challenge the chain of custody of the narcotics seized by the police and tested by the forensic chemist; (4) the trial court erred in informing defense witness Martinez

of his right to counsel before he testified; (5) the trial court erred in denying his right to counsel of choice.

¶ 51 We first note that the defendant fails to make any arguments whatsoever on appeal before us regarding defense trial counsel's alleged ineffectiveness in not obtaining the security video footage from the George Street location and fails to make specific arguments in support of his position that appellate counsel was ineffective for not raising this claim on direct appeal. Thus, we find allegation (1) for ineffective assistance of appellate counsel, forfeited for review on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Guest*, 166 Ill. 2d 381, 414 (1995) (petitioner for postconviction relief forfeited review of issues where he simply stated he had incorporated all issues raised in the petition, without providing *argument* or *relevant authority*). Likewise, because we have already found in the instant appeal, that the defendant's argument regarding the trial court's advice to Martinez about his right to counsel is forfeited for failure to cite any legal authority, and the defendant fails to make any specific arguments that appellate counsel was ineffective for not raising this claim on direct appeal, the defendant's ineffective assistance of appellate counsel claim under allegation (4) is also forfeited for review before us. With respect to allegations (2), (3), and (5), because we have already found those claims to be without arguable merit, the defendant's claim that appellate counsel was ineffective for failing to raise these arguments on direct appeal is also without merit. Therefore, we find that the defendant has failed to state a gist of a constitutional claim on any one of his bases for postconviction relief. Accordingly, we hold that the trial court did not err in summarily dismissing the petition as frivolous and patently without merit.

¶ 52 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 53 Affirmed.