2015 IL App (4th) 130509-U

NO. 4-13-0509

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 9, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
NICHOLAS CARLOS BROOKS,	)	No. 09CF617
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: We grant appointed counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirm the trial court's summary dismissal of defendant's *pro se* postconviction petition.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised in this case. For the following reasons, we grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. Charges Against Defendant

¶ 5 In July 2009, the State charged defendant by indictment with "violation of order of protection—subsequent offense felony" (720 ILCS 5/12-30(a)(1) (West 2008)). The indictment alleged defendant intentionally violated an order of protection after being served with

notice of its contents. Due to defendant's conviction for unlawful restraint in McLean County case No. 04-CF-485, the charge was a Class 4 felony. See 720 ILCS 5/12-30(d) (West 2008).

¶ 6 B. The Trial

¶ 7 We previously addressed the factual background of defendant's criminal case in *People v. Brooks*, 2012 IL App (4th) 100929, ¶¶ 3-8, 966 N.E.2d 590. We quote our prior recitation of facts:

> "McLean County deputy sheriff Chad Witkowski testified he spoke with Vanessa Middlebrooks in July 2009 regarding her contact with defendant. Witkowski knew Middlebrooks had an active order of protection against defendant. The order of protection required defendant to remain at least 500 feet away from Middlebrooks's residence and her children. Defendant was served with the order of protection on June 1, 2009, and it expired on May 21, 2011. Witkowski testified Middlebrooks told him defendant came to her residence on July 12, 2009, while the order of protection was in effect. Witkowski further testified Middlebrooks moved to dismiss the order of protection in September 2009. ***.
>
> Middlebrooks testified defendant was the father of her two children. In May 2009, Middlebrooks obtained an order of protection against defendant, which was valid until May 2011. In July 2009, Middlebrooks spoke with police and told them defendant had recently come to her residence to see their children. Though she could not remember if defendant actually came inside

the house, Middlebrooks stated she and defendant spoke to each other. Middlebrooks further stated she filed a petition to dismiss the order of protection against defendant in September 2009, and the motion was granted later in the month.

On cross-examination, Middlebrooks testified she did not mind defendant coming to her residence and visiting their children. Middlebrooks testified she did not contact the police regarding defendant's alleged violation of the order of protection; rather, the police contacted her and asked her if she had had any recent contact with defendant. In September 2009, Middlebrooks voluntarily petitioned to dismiss the order of protection.

Outside the presence of the jury, the trial court took judicial notice of defendant's conviction for unlawful restraint in case No. 04-CF-485 without objection. Both parties then rested." *Id.* ¶¶ 4-7, 966 N.E.2d 590.

Following deliberations, the jury found defendant guilty of violating an order of protection.

¶ 8 C. Posttrial Motions and Sentencing

¶ 9 In June 2010, defendant filed a motion for new trial, alleging the "material elements of the offenses charged were not proven beyond a reasonable doubt." At an August 2010 hearing, the trial court denied defendant's posttrial motion and proceeded to a sentencing hearing. At the sentencing hearing, the parties were allowed to suggest corrections to the presentence investigation report (PSI). The State noted the order of protection became inactive on September 12, 2009, not May 21, 2011, as stated in the PSI. Defense counsel did not offer

any corrections to the report. The PSI indicated, from 2000 to 2009, defendant was convicted of four felonies, seven misdemeanors, two traffic offenses, and an ordinance violation. Moreover, no evidence was presented by either party in aggravation or mitigation. Defendant made a statement in allocution, advising the court he believed a sentence of two or three years would be sufficient.

¶ 10 In fashioning defendant's sentence, the trial court observed this was defendant's sixth felony conviction and he was on mandatory supervised release at the time of the offense. The court found some mitigation in terms of the evidence at trial—namely, defendant violated the order of protection because he wanted to see his children. After considering the evidence presented at trial, the PSI, defendant's statement, the statutory factors in aggravation and mitigation, and counsels' recommendations, the court sentenced defendant to a five-year, extended-term sentence.

¶ 11 In October 2010, defendant filed an amended motion to reconsider his sentence, arguing the (1) trial court incorrectly said this was defendant's sixth felony, when in fact, it was his fifth; (2) prosecutor referred to three or four parole violations when there were only two; and (3) sentence did not appropriately weigh factors in mitigation, including the hardship a prison sentence would impose on defendant's family. In October 2010, the trial court denied defendant's motion to reconsider his sentence.

¶ 12 D. Direct Appeal

¶ 13 Defendant appealed, asserting (1) his extended-term sentence must be vacated because his conviction for violating an order of protection did not constitute a felony, and (2) the State failed to prove him guilty of "violation of an order of protection—subsequent offense felony" because it failed to introduce evidence to prove his crime was a felony. *Id.* ¶¶ 13, 25,

966 N.E.2d 590. This court rejected defendant's arguments and affirmed the judgment. *Id.* ¶ 29, 966 N.E.2d 590.

¶ 14 E. Postconviction Petition

¶ 15 In February 2013, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant's petition alleges trial counsel was ineffective for failing to (1) present a theory of defense; (2) assert his arrest was not supported by probable cause; (3) argue his prolonged detention resulted in a statement being used against him at trial; (4) challenge the PSI; (5) assert the trial court considered improper aggravating factors; (6) assert his conviction was against the manifest weight of the evidence; (7) raise the issue of an erroneous extended-term sentence; (8) raise the issue of an "impartial jury"; (9) raise the issue of vindictive prosecution; (10) assert his conviction was void due to lack of probable cause; (11) argue his right to a speedy trial was violated; and (12) assert he did not receive warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966). In addition, defendant alleges his appellate counsel was ineffective for failing to raise the aforementioned claims against trial counsel.

¶ 16 In support of his claims, defendant's statement of facts reads in its entirety as follows:

> "Detectives were investigating me for a murder, in which they had no evidence. So, they conjured up the violation of order of protection case in order to have me imprisoned in case I didn't destroy evidence of the murder or in case I planned to 'run.' Hence no probable cause for the warrant. Furthermore, after I invoked my right to a preliminary hearing was I [*sic*] indicted 2 days before

> the preliminary hearing date; this is because the State knew the court would've ruled there's no probable cause and released me. Counsel had evidence to impeach witnesses testimony, as well as have charges dismissed but instead, helped the State secure the Conviction by not rendering the adversarial process of trial meaningful due to not raising claims at trial or in post-trial motions. I was arrested July 27, 2009 and no[t] taken to trial until May 20, 2010! I was given 5 years extended term because even the State didn't think I would be convicted of the murder, or even charged so that was so I could do extra time. There wasn't any proof by the State I in fact violated the order; hence the against manifest weight claim. No date of my being at victims home while O-P was valid was proven. This further proves vindictiveness as well as the judgment being void."

¶ 17 Defendant attached to his petition the PSI report, a transcript of the grand jury proceeding, and the motion for a new trial. He also attached letters from the office of the Public Defender and OSAD. The letters suggest defendant had concerns about the arguments being raised at trial and on appeal. The letters respond to defendant's concerns by explaining why the issues defendant wanted raised lacked merit. In May 2013, the trial court summarily dismissed the petition in a written order, finding defendant's claims frivolous and patently without merit.

¶ 18 On June 13, 2013, defendant untimely appealed the trial court's decision, but this court allowed defendant's late notice of appeal and OSAD was appointed to represent him.

¶ 19 II. ANALYSIS

¶ 20 OSAD moves to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), arguing no meritorious arguments can be raised on appeal. The record shows service on defendant. On our own motion, this court granted defendant leave to file additional points and authorities, which defendant did. The State filed a response brief and defendant filed a reply brief. After reviewing the record, we agree with OSAD.

¶ 21 The Act (725 ILCS 5/122-1 to 122-7 (West 2012)) allows for postconviction relief through a three-stage procedure. *People v. Hodges*, 234 Ill. 2d 1, 10, 912 N.E.2d 1204, 1208 (2009). Here, defendant's petition was dismissed at the first stage of the postconviction proceeding. At the first stage, the trial court independently reviews the petition to determine whether it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). A court may summarily dismiss a *pro se* postconviction petition "as frivolous or patently without merit only if the petition 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 has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id*. at 16, 912 N.E.2d at 1212. To avoid dismissal at this stage, the petitioner need only present the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). At this point in the proceedings, all well-pleaded allegations in the petition are taken as true and liberally construed in favor of the petitioner. *People v. Brooks*, 233 Ill. 2d 146, 153, 908 N.E.2d 32, 36 (2009). "The summary dismissal of a postconviction petition is reviewed *de novo*." *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010).

¶ 22 Claims of ineffective assistance of counsel may be raised in a postconviction petition. *Id.* at 185, 923 N.E.2d at 754 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate

counsel's performance was deficient and the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. More specifically, a defendant must show counsel's performance was objectively unreasonable under prevailing professional norms and there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. At the first stage of proceedings under the Act, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable (i) counsel's performance fell below an objective standard of reasonableness and (ii) the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212.

¶ 23 A. Claims Not Supported by Affidavits, Records, or Other Evidence

¶ 24 OSAD and the State argue defendant's claims regarding juror partiality, vindictive prosecution, and an improper PSI were properly dismissed as frivolous and patently without merit because they are not supported by affidavits, records, or other evidence. We agree.

¶ 25 Although a *pro se* postconviction petition need only meet "a low threshold" to survive first-stage review (*Id.* at 10, 912 N.E.2d at 1208), it still must comply with the Act's provisions. The petition must "clearly set forth the respects in which petitioner's constitutional rights were violated" and "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The failure to meet the requirements of section 122-2 justifies the petition's summary dismissal. *People v. Delton*, 227 Ill. 2d 247, 255, 882 N.E.2d 516, 520 (2008). The purpose of requiring such materials is to ensure the allegations in the petition are capable of objective or independent corroboration. *Id*. at 254, 882 N.E.2d at 520.

¶ 26 1. *Partial Jury*

¶ 27 In this case, defendant alleges trial counsel was ineffective for failing to raise the "issue of jury being impartial." Assuming defendant meant to say the jury was partial, his petition offers no facts to support his claim the jury was biased or prejudiced. *People v. Burt*, 205 Ill. 2d 28, 35-36, 792 N.E.2d 1250, 1256 (2001) ("[N]onfactual and nonspecific assertions which merely amount to conclusions are insufficient to require a hearing under the *** Act."). Defendant's claim was not supported by any affidavit and he did not explain the absence of such supporting evidence. He did not make any serious attempt to explain how the jury was biased, prejudiced, or subjected to outside influences. *Cf. People v. Hobley*, 182 Ill. 2d 404, 461-62, 696 N.E.2d 313, 341 (1998) (defendant made a substantial showing through affidavits of jurors that some jurors were subjected to outside influences during sequestered deliberations). Accordingly, defendant's claim was properly dismissed at the first stage.

¶ 28 2. *Vindictive Prosecution*

¶ 29 Defendant next alleges his trial counsel was ineffective for failing to dismiss the charge on grounds of vindictive prosecution. More specifically, defendant contends the State's prosecution was vindictive because he was being investigated for murder and the State "conjured up" the present case to prevent defendant from destroying evidence and evading arrest.

¶ 30 "In general terms, a prosecution is vindictive and violates due process if undertaken '[t]o punish a person because he has done what the law plainly allows him to do.' " *People v. Hall*, 311 Ill. App. 3d 905, 911, 726 N.E.2d 213, 218 (2000) (quoting *United States v. Goodwin*, 457 U.S. 368, 372 (1982)). Defendant bears the burden of production and persuasion and "must produce objective evidence that the prosecutor had some animus or retaliatory motive" and "also must produce objective evidence that tends to show the prosecution would not have occurred absent that motive." *Id.* at 913, 726 N.E.2d at 219.

¶ 31 Here, defendant presents no evidence to support his allegation, as nothing is alleged with regard to the prosecutor's conduct. Additionally, the record, on its face, provides no objective evidence demonstrating defendant was subjected to a vindictive prosecution. Defendant bases his claim entirely on the fact the State brought the charge in this case while he was being investigated for murder. This is not enough to demonstrate prosecutorial vindictiveness. Rather, it simply shows, during the course of the murder investigation, detectives learned defendant violated an order of protection. The prosecution in turn sought to punish defendant because he did what the law plainly forbids him to do—violate a court's order of protection. Because the law clearly places the burden on defendant to advance and prove a claim of prosecutorial vindictiveness with his own evidence, we find no error in trial counsel's failure to raise the issue. Defendant's claim was properly dismissed.

¶ 32 3. *Improper PSI*

¶ 33 Defendant also alleges counsel was ineffective for failing to argue he was "sentenced without a proper presentence report." This claim is completely without merit. Defendant provides no facts in support of his claim and he fails to specify what information in the PSI is incorrect. Moreover, defendant does not allege he had insufficient time to review the PSI, nor does he allege he told trial counsel he did not understand the contents of the PSI. Defendant also fails to explain his silence when the trial court made a specific reference to the number of prior felony convictions. See *People v. Tapia*, 2014 IL App (2d) 111314, ¶ 45, 3 N.E.3d 951 (a defendant has an obligation to notify the sentencing court he believes the PSI is deficient). Defendant's failure to provide factual support for his claim is fatal to his postconviction petition. Therefore, the trial court properly summarily dismissed this claim as frivolous and patently without merit.

¶ 34 B. Claims Not Supported by the Record

¶ 35 The State and OSAD contend defendant's remaining postconviction claims are indisputably meritless because they are contradicted by the record. 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." *People v. Torres*, 228 Ill. 2d 382, 394, 888 N.E.2d 91, 100 (2008).

¶ 36 1. *Defense Strategy*

¶ 37 Defendant argues his trial counsel failed to "give a theory of defense." His petition includes the following conclusory allegation: "Counsel had evidence to impeach witnesses' testimony, as well as have charges dismissed but instead, helped the State secure the conviction by not rendering the adversarial process of trial meaningful due to not raising claims at trial or in post-trial motions."

¶ 38 Initially, we note defendant fails to identify the evidence counsel possessed or how it could be used to impeach a witness's testimony. Nor does defendant identify the witness or the testimony that should have been impeached. Moreover, defendant's allegation his trial counsel failed to conduct any meaningful adversarial testing is rebutted by the record. At trial, counsel argued the State failed to meet its burden of proving defendant guilty of violating an order of protection beyond a reasonable doubt. This strategy was based on Middlebrooks' testimony she had no objection to defendant coming to her residence and visiting their children and she eventually had the order of protection dismissed. Middlebrooks further testified she did not contact the police about defendant's alleged violation of the order. Counsel used Middlebrooks' testimony to argue the State failed to meet its burden of proof and pursued this theory during the trial and closing arguments. The record shows counsel conducted meaningful

adversarial testing of the State's case by cross-examining the State's witnesses in a manner consistent with this theory and at no time did counsel concede defendant was guilty of violating the order of protection. Counsel made a motion for a new trial based on the State's failure to prove defendant guilty beyond a reasonable doubt. Defense counsel's strategy is immune from a claim of ineffective assistance of counsel. See *People v. Guest*, 166 Ill. 2d 381, 394, 655 N.E.2d 873, 879 (1995) (Courts will generally not review ineffective assistance claims based on inadequate trial strategy except where "counsel entirely fails to conduct any meaningful adversarial testing.").

¶ 39 Since defendant failed to properly state a claim based on trial counsel's theory of defense, the petition also failed to state a claim for ineffective assistance of counsel. See *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 12, 964 N.E.2d 715 (a defendant can only show he was prejudiced by counsel's failure to raise an issue if the underlying issue has merit). Accordingly, his claim was properly dismissed.

¶ 40 2. *Extended-Term Sentencing and Sufficiency of the Evidence*

¶ 41 Defendant next contends trial and appellate counsel were ineffective for failing to challenge the propriety of his extended-term sentence and the sufficiency of the evidence. However, the record shows trial counsel raised these issues in a motion for a new trial and a motion to reconsider the sentence, and appellate counsel raised these issues on direct appeal. Since these issues were previously raised and decided on direct appeal (*Brooks*, 2012 IL App (4th) 100929, ¶¶ 25-26, 966 N.E.2d 590), our review is barred by *res judicata*. *People v. Harris*, 206 Ill. 2d 1, 12, 794 N.E.2d 314, 323 (2002). Therefore defendant has no colorable argument to survive a first-stage dismissal.

¶ 42 3. *Probable Cause and Void Conviction*

¶ 43 Defendant next contends his due-process rights were violated because the issuance of the arrest warrant was not supported by probable cause. He claims the arresting officers were not aware an order of protection was entered against him and had no reason to believe a crime had been committed.

¶ 44 Probable cause exists when " 'the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime.' " *People v. Jackson*, 232 Ill. 2d 246, 275, 903 N.E.2d 388, 403 (2009). Whether probable cause exists in a given case is governed by commonsense considerations and the determination of the probability of criminal activity, rather than proof beyond a reasonable doubt. *Id*. The existence of probable cause is determined from the totality of the circumstances confronting the officer at the time of the arrest. *People v. Sims*, 192 Ill. 2d 592, 615, 736 N.E.2d 1048, 1060 (2000).

¶ 45 The record here shows deputy Witkowski spoke with Middlebrooks regarding her contact with defendant. Witkowski was aware Middlebrooks had an active order of protection against defendant, which required him to remain at least 500 feet away from Middlebrooks' residence and her children. Middlebrooks told Witkowski defendant came to her residence on July 12, 2009, while the order of protection was in effect. Based on these facts, a reasonably cautious person would believe defendant committed a crime. Indeed, after hearing this evidence and weighing the credibility and demeanor of the witnesses, the jury found defendant guilty beyond a reasonable doubt. If counsel asserted defendant's argument, he would be claiming not only was the jury's decision in error, but the evidence was lacking to such a degree the probable-cause standard could not be met. Counsel's decision to refrain from making this assertion was wholly reasonable.

¶ 46 We further reject defendant's claim his conviction is void on the grounds his arrest was not supported by probable cause. Even if defendant is correct no probable cause existed, this error would not render his conviction void. See *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) ("illegal arrest or detention does not void a subsequent conviction"). Accordingly, this claim is without merit.

¶ 47 4. *Prolonged Detention and Miranda*

¶ 48 Defendant alleges his fourth-amendment rights were violated because his "prolonged detention *** resulted in a statement being used against him at trial" and he never received warnings under *Miranda*. Our review of the record refutes these claims because no statement of defendant was used against him at trial. Since a statement was never used against defendant at trial, his claim is patently without merit. See *People v. Owens*, 54 Ill. 2d 286, 290, 296 N.E.2d 728, 731 (1973) (postconviction relief was not warranted where the record showed any evidence obtained in the illegal search was not offered in evidence).

¶ 49 5. *Improper Aggravating Factors*

¶ 50 Defendant next claims the trial court considered improper aggravating factors in imposing his sentence—namely, the number of prior felony convictions and number of parole violations.

¶ 51 Again, this claim is contradicted by the record, which shows defense counsel raised these issues in a motion to reconsider the sentence. During the hearing on the motion, the trial court acknowledged it incorrectly stated the number of prior felony convictions and reconsidered the sentence in light of its mistake. The court nevertheless found defendant's sentence appropriate based on the violent nature of his prior convictions. Additionally, the court did not place any weight on the number of parole violations. The court explained: "What I did

take into account was the fact that [defendant] was on mandatory supervised release at the time he committed this offense. *** [T]he fact that the prosecutor may have referred to three to four violations when it was really only two didn't play any part in the court's decision." While the court initially was mistaken about the number of defendant's felony convictions, it properly reconsidered its sentence with the correct information and decided its initial sentence was still appropriate. Thus, the court relied on proper aggravating factors—*i.e.*, defendant's corrected criminal history. See *People v. Perruquet*, 68 Ill. 2d 149, 156, 368 N.E.2d 882, 885 (1977) (trial court may consider defendant's criminal history in fashioning a sentence).

¶ 52 6. *Speedy Trial*

¶ 53 Defendant's claim trial counsel was ineffective for failing to assert a speedy-trial violation is rebutted by the record.

¶ 54 A defendant possesses both constitutional and statutory rights to a speedy trial. *People v. Phipps*, 238 Ill. 2d 54, 65, 933 N.E.2d 1186, 1193 (2010). Illinois's speedy-trial statute provides, in part, a defendant in custody must be brought to trial within 120 days from the day he was brought into custody. 725 ILCS 5/103-5(a) (West 2008). The speedy-trial statute tolls during any period of delay occasioned by the defendant. *People v. Kliner*, 185 Ill. 2d 81, 115, 705 N.E.2d 850, 869 (1998). "To prevent the speedy-trial clock from tolling, section 103-5(a) requires defendants to object to any attempt to place the trial date outside the 120-day period." *Phipps*, 238 Ill. 2d at 66, 933 N.E.2d at 1193. "The statute does not mandate any 'magic words' constituting a demand for trial, but it requires some affirmative statement in the record requesting a speedy trial." *Id.* A defendant not tried within the statutory period must be released from custody and have the charges against him dismissed. 725 ILCS 5/103-5(d) (West 2008); *People v. Hunter*, 2013 IL 114100, ¶ 10, 986 N.E.2d 1185.

¶ 55 In this case, the speedy-trial period began to run on July 27, 2009, the date defendant was arrested and taken into custody. After defendant's arrest, he remained in custody and was never released on bond. On September 18, 2009, defense counsel requested a continuance, thereby tolling the speedy-trial term. Thus, the period from July 27, 2009, to September 17, 2009, a total of 54 days, is chargeable to the State.

¶ 56 Thereafter, the case was continued from time to time on defendant's motions, thereby tolling the speedy-trial term. On May 10, 2010, on the trial court's motion, defendant's jury trial was continued to the following week. On May 14, 2010, and May 17, 2010, the trial court granted the State's motion to continue the trial. Defendant's jury trial commenced on May 20, 2010. Thus, the period from May 10, 2010, to May 20, 2010, a total of 10 days, is chargeable to the State.

¶ 57 Our examination of the record reveals 64 days in the speedy-trial term elapsed and defendant was tried well within the 120-day statutory limit. Because no violation of defendant's right to a speedy trial occurred, raising this issue in a posttrial motion would have been futile, and defendant cannot base a claim of ineffective assistance of counsel on his attorney's failure to file such a motion. See *Phipps*, 238 Ill. 2d at 65, 933 N.E.2d at 1192 ("Counsel's failure to assert a speedy-trial violation cannot establish either prong of an ineffective assistance claim if there is no lawful basis for raising a speedy-trial objection.").

¶ 58 C. Ineffective Assistance of Appellate Counsel

¶ 59 Defendant next alleges he received ineffective assistance of appellate counsel because counsel did "not rais[e] the above issues." Because we have already concluded the underlying issues defendant raised are without merit, we conclude he has not shown appellate counsel provided ineffective assistance when counsel failed to raise the issues on appeal. See

People v. Easley, 192 Ill. 2d 307, 329, 736 N.E.2d 975, 991 (2000) (Unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise the issues on appeal.).

¶ 60 III. CONCLUSION

¶ 61 After reviewing the record, we agree with OSAD no meritorious issues can be raised on appeal. We grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 62 Affirmed.