

**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).

**FILED**

July 17, 2015  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

2015 IL App (4th) 130680-U  
NO. 4-13-0680

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JOSE CANIZALEZ-CARDENA,	)	No. 10CF1664
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Presiding Justice Pope and Justice Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed the trial court's first-stage dismissal of defendant's postconviction petition, finding defendant forfeited his claims.

¶ 2 Following a stipulated bench trial in June 2011, the trial court found defendant, Jose Canizalez-Cardena, guilty of unlawful possession with intent to deliver methamphetamine. In July 2011, the court sentenced him to 25 years in prison. This court affirmed defendant's conviction and sentence. In April 2013, defendant filed a *pro se* postconviction petition, which the trial court summarily dismissed.

¶ 3 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In September 2010, the State charged defendant by information with one count of

unlawful possession with intent to deliver methamphetamine, a Class X felony, in that he knowingly and unlawfully possessed with the intent to deliver 900 grams of a substance containing methamphetamine (720 ILCS 646/55(a)(1), (2)(F) (West 2010)). In October 2010, Harvey Welch entered his appearance as defendant's attorney. Welch also represented a codefendant, Leonel Galaviz-Galaviz (hereinafter, Galaviz), who was similarly charged. Both defendant and Galaviz required an interpreter as they spoke little or no English.

¶ 6 In November 2010, defendant filed a motion to suppress evidence, arguing evidence seized by police officers following a traffic stop was the result of an unlawful search. In December 2010, the trial court conducted a hearing on the motion.

¶ 7 Illinois State Police trooper Chris Owen testified he was on duty on September 29, 2010, at approximately 5 p.m., when he observed a silver Toyota Camry traveling in excess of the speed limit on Interstate 57 near Rantoul. After noticing the car make an abrupt lane change and follow another car too closely, Owen initiated a traffic stop. Galaviz was driving, and defendant was the only passenger. Galaviz provided a Mexican driver's license. Galaviz's hands trembled and his carotid artery pulsed, and his heart could be seen pounding. Defendant also provided a Mexican license with trembling hands. His carotid artery pulsed and he stared straight ahead. Owen stated it is not unusual for people to be nervous, but Galaviz was overly so, and defendant was equally nervous. Owen could smell air fresheners and saw several in the car, which in his experience indicated the possibility of the presence of drugs.

¶ 8 Galaviz responded to questions "for the most part" in English. He said he came from Los Angeles. He said he was traveling to Illinois but could not say where, but he was there for construction and demolition work as there was no work in Los Angeles. The insurance for the car was in Galaviz's name and recently purchased, but the car did not belong to him. As

Owen's suspicions grew, he went to talk to defendant in the passenger seat while continuing to fill out the warning tickets. He asked defendant in Spanish "where" and "work," but he received no response. Owen found defendant to be "exhibiting numerous non-verbal indicators of excessive nervousness and stress," and he asked defendant in Spanish to exit the vehicle and stand in the ditch. There was a phone in defendant's pocket that rang constantly.

¶ 9 At approximately seven minutes into the stop, Owen opened the rear of his car to release Xocko, his dog trained to detect marijuana, cocaine, methamphetamine, and heroin. As Xocko began to move around the car, defendant turned his body and appeared to be praying. At the front driver's side door, Xocko indicated by his body language that he detected the odor of narcotics. Xocko then jumped into the car through the open window and alerted to an area in the rear seat cushion. Owen called for backup. He requested and received verbal and written consent in Spanish from Galaviz to search the car's interior. Owen found a hidden compartment between the rear tires, directly below the front of the trunk. He said that Toyota Camrys commonly have this compartment. He drilled a hole and used a fiber-optic scope to see green cellophane bundles. The car was towed to State Police headquarters. There, Owen found the access plate inside the driver's side rear wheel well. The compartment contained 2,236.1 grams of methamphetamine.

¶ 10 In January 2011, the trial court denied the motion to suppress. In March 2011, the State filed a motion for joinder of the cases involving defendant and Galaviz. Defense counsel had no objection to the motion to consolidate. The court asked counsel if he had any concerns about antagonistic or inconsistent defenses that could cause prejudice to either defendant, and counsel responded in the negative. The court granted the motion.

¶ 11 In May 2011, defendant and Galaviz waived their rights to a jury trial and

proceeded to a stipulated bench trial. The parties stipulated Owen would testify consistently with his testimony provided at the suppression hearing. He would be qualified as an expert in narcotics trafficking and interdiction, would testify that 2,236.1 grams of methamphetamine is a quantity indicative of an intent to deliver, and that multiple cell phones, two of which were in defendant's possession, indicated drug sales. He would testify the street value of the drugs was \$628,764.

¶ 12 The parties stipulated to Galaviz's postarrest statements. He stated he could not find a job in Los Angeles and a friend, Jose Valle, offered him \$4,000 to drive a car from Los Angeles to Chicago and deliver it to a man unknown to Galaviz. Galaviz believed the car belonged to Valle's brother, Francisco. Galaviz never communicated with the recipient of the car, known to him only as "the Cuban." When defendant and Galaviz arrived at the location, they waited three hours. Jose Valle then called to tell them the Cuban was there. They followed the Cuban for about an hour and a half. Owen believed Galaviz's story to be implausible as Galaviz was off-route from where he said he was going and could not specify where in Illinois he was coming from. Galaviz and defendant had known each other for about six months, having met when working construction. Galaviz stated he and defendant shared the driving duties as they drove across the country. He did not know defendant, Jose Valle, or Francisco Valle to be involved in drug trafficking and did not know methamphetamine was in the car.

¶ 13 Further investigation revealed defendant was actually Bernabe Galaviz-German, and he had previously been deported. Registered letters to the owners of the Toyota, sent to addresses in Utah, were returned unclaimed. The parties stipulated People's exhibit No. 1 was 2,236.1 grams of methamphetamine.

¶ 14 Defense counsel indicated he discussed the stipulations with his clients. He stated

they understood the main issue centered on the search and agreed to proceed with the stipulated bench trial.

¶ 15 The trial court concluded it was not credible to believe the two defendants agreed to drive the car to Chicago in exchange for \$4,000 for Galaviz and "for the thrill of a ride" for defendant. It was not credible that the two men would agree to meet an unidentified Cuban in Chicago, switch cars, and drive back.

"It is apparent they were acting as couriers and clearly knew they were transporting that car and then switching it out for drugs to come back to whatever place was going to be the delivery point. And in that context their reaction to the trooper and that extreme reaction of nervousness out of all proportion to the reason for the stop is understandable."

The court found both defendants guilty.

¶ 16 In July 2011, the trial court sentenced defendant to 25 years in prison. Galaviz also received a 25-year sentence at a separate hearing. Defense counsel filed a motion to reconsider defendant's sentence, which the court denied.

¶ 17 Defendant appealed, arguing (1) the State failed to prove beyond a reasonable doubt that he had either actual or constructive possession of the drugs, (2) the court erred in denying his motion to suppress, and (3) the trial court considered improper factors at sentencing. This court affirmed defendant's conviction and sentence. *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 26, 979 N.E.2d 1014. This court also affirmed Galaviz's conviction and sentence. *People v. Galaviz-Galaviz*, 2012 IL App (4th) 110719-U, ¶ 26.

¶ 18 In April 2013, defendant filed a *pro se* petition for postconviction relief pursuant

to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant alleged trial counsel had a conflict of interest when representing both him and Galaviz in this case as defendant's "involvement, knowledge and culpability [were] in complete disparity" with those of Galaviz. In support of his claim, defendant stated Galaviz told police that he asked defendant to accompany him on a road trip to look for work so Galaviz would not have to drive alone. Further, Galaviz stated he received payment to drive the car to Illinois but defendant did not know about the payment. Defendant argued defense counsel had a duty to make an offer on his behalf to have Galaviz testify regarding this exonerating information. Defendant also argued counsel failed to argue in mitigation at sentencing that he was less culpable than Galaviz and a disparity existed in their knowledge of the crime.

¶ 19 Defendant attached his affidavit to the postconviction petition. Therein, defendant stated he traveled from Los Angeles to Chicago in hopes of obtaining employment, not as a drug courier. He also stated Galaviz made a statement of defendant's lack of knowledge, but the statement was negated by counsel's decision to pursue a stipulated bench trial. Defendant also attached a police report and the transcript from the sentencing hearing.

¶ 20 In July 2013, the trial court issued its written ruling on the postconviction petition. The court found defendant "has not shown that there was an actual conflict of interest in the joint representation of himself and the co-defendant that adversely affected Mr. Welch's representation of [defendant's] interests." The court stated "the only alleged specific defect" in counsel's representation was the allegation that counsel "did not present evidence in mitigation, presumably at sentencing," that Galaviz admitted to police that he arranged to deliver the car and accepted the \$4,000 and defendant was unaware of any monetary payment. The court stated this information was presented in the stipulated bench trial and considered in imposing the sentence.

¶ 21 The trial court found no specific defect in counsel's representation to support a claim of actual conflict of interest. The court also found defendant had not demonstrated any basis to find that, if Galaviz had been represented by different counsel, Galaviz would have waived his right against self-incrimination and accepted sole responsibility for the offense. The court noted both defendants contested their knowledge of the drugs and neither accused the other. In dismissing defendant's petition, the court concluded it was frivolous and patently without merit. This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 Defendant argues the trial court erred in dismissing his postconviction petition at the first stage, arguing the petition stated the gist of a constitutional claim that defense counsel labored under an actual conflict of interest that adversely affected his performance and, as result of the conflict, he failed to challenge the evidence as applied to defendant, capitalize on Galaviz's statement tending to exculpate defendant, and argue at trial and sentencing the disparity in knowledge and culpability between the two defendants.

¶ 24 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 25 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. Here, defendant's petition was

dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). Our supreme court has held "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 26 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2012). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2012). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394. Moreover, we may affirm the dismissal of a postconviction petition on any basis supported by the record. *People v. Wright*, 2013 IL App (4th) 110822, ¶ 32, 987 N.E.2d 1051.

¶ 27 "The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, nor could have been, adjudicated previously upon direct appeal." *People v. Peoples*, 205 Ill. 2d 480, 510,

793 N.E.2d 641, 660 (2002). In light of this, our supreme court has held "issues that could have been raised on direct appeal but were not are forfeited." *People v. Petrenko*, 237 Ill. 2d 490, 499, 931 N.E.2d 1198, 1204 (2010). Moreover, "a claim not raised in a petition cannot be argued for the first time on appeal." *People v. Jones*, 213 Ill. 2d 498, 505, 821 N.E.2d 1093, 1097 (2004); see also 725 ILCS 5/122-3 (West 2012) (stating "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived").

¶ 28 We need not address defendant's claim of ineffective assistance based on counsel's joint representation in this case because we find defendant has forfeited his argument. As stated, issues that could have been raised on direct appeal, but were not, are forfeited. *People v. Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. Here, defendant's claims concerning trial counsel's alleged conflict of interest and his failure to make arguments in mitigation at sentencing are based entirely on facts contained in the trial court record. Thus, these claims could have been raised on direct appeal, and defendant's failure to do so results in forfeiture in this appeal. See *People v. Henderson*, 171 Ill. 2d 124, 133, 662 N.E.2d 1287, 1293 (1996) (finding the defendant's sentencing claim forfeited for not being raised on direct appeal as his argument focused on the statements and actions of the trial court during sentencing, matters that were part of the original trial record).

¶ 29 In his appellate brief, defendant argues direct-appeal counsel was ineffective for failing to raise these issues. However, defendant did not raise the issue of appellate counsel's ineffectiveness in his postconviction petition and the trial court did not have the opportunity to rule on that issue. Thus, this claim cannot be raised for the first time in this appeal and we cannot consider it. See *Jones*, 213 Ill. 2d at 508, 821 N.E.2d at 1099 (stating an "appellate court is not free, as [the supreme] court is under its supervisory authority, to excuse, in the context of

postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition"); see also *People v. Cole*, 2012 IL App (1st) 102499, ¶ 13, 977 N.E.2d 1189 (stating "claims of ineffective assistance of appellate counsel cannot be inferred by postconviction appellate counsel simply because issues of trial error were not raised on direct appeal"). As we have found defendant's claims forfeited or not properly before us, we find no further discussion on the merits is warranted.

¶ 30 We do point out, however, our supreme court has stated a defendant is not without recourse when his postconviction claims have been found to not be properly before the appellate court. "A defendant who fails to include an issue in his original or amended postconviction petition, although precluded from raising the issue on appeal from the petition's dismissal, may raise the issue in a successive petition if he can meet the strictures of the 'cause and prejudice test.'" *People v. Jones*, 211 Ill. 2d 140, 148-49, 809 N.E.2d 1233, 1239 (2004) (quoting *People v. Orange*, 195 Ill. 2d 437, 449, 749 N.E.2d 932, 939 (2001)); see also *Jones*, 213 Ill. 2d at 509, 821 N.E.2d at 1099 (stating "when appellate counsel discover errors not raised by their clients during the summary, first-stage postconviction proceedings, the proper course of action for counsel to take is to file a successive petition in which the newly found claim is properly alleged").

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we 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.

¶ 33 Affirmed.