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2018 IL App (5th) 120351-U

NO. 5-12-0351

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 05-CF-1079
	)	
NATHANIEL HILL,	)	Honorable
	)	Ann E. Callis,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Justices Goldenhersh and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held*: The circuit court's summary dismissal of the defendant's postconviction petition is affirmed.

¶ 2 The defendant, Nathaniel Hill, appeals *pro se* the summary dismissal of his postconviction petition. He argues that his petition stated the gist of a claim that he was denied his constitutional rights to the effective assistance of trial and appellate counsel, due process of law, a fair trial, and a speedy trial. For the following reasons, we affirm.

¶ 3 **BACKGROUND**

¶ 4 On April 28, 2005, Hill and his brother, Clinton, were each charged with two counts of first-degree murder in connection with the deaths of Derek Pitts and Vincent

Rollins. The Madison County public defender was appointed to represent Hill. On May 27, 2005, Hill appeared and waived counsel. On June 6, 2005, Hill filed *pro se* a motion requesting the appointment of counsel and the court again appointed the public defender's office to represent him. Assistant public defender Billy Hahs was assigned to represent Hill.

¶ 5 Over the course of the next year Hahs sought and obtained a number of continuances. During this time Hill filed numerous *pro se* documents with the court demanding a speedy trial, objecting to the continuances, and seeking a dismissal of the charges based on the purported denial of his right to a speedy trial. On March 23, 2006, Hill filed *pro se* a motion to discharge Hahs and requesting leave to proceed *pro se*. Hill alleged that Hahs had a conflict of interest because he had negotiated a plea deal for Chester Hodge, a cellmate of Hill's who had given a statement against him. Hill also alleged that Hahs had provided ineffective assistance by seeking repeated continuances, which Hill opposed, and by failing to assert his speedy trial demands.

¶ 6 Following a hearing on June 22, 2006, the court granted Hill's request to proceed *pro se* and discharged Hahs. On December 26, 2006, Hill filed *pro se* a motion requesting the appointment of counsel. The court granted the motion and again appointed the public defender to represent Hill. On September 11, 2007, the public defender filed a motion to withdraw as counsel, alleging that Hill no longer wanted to be represented by the public defender and wanted substitute counsel. The court granted the motion and appointed attorney John Delaney to represent Hill. On January 22, 2008, the court allowed Delaney to withdraw because of a conflict of interest and appointed attorney

Anthony Dos Santos to represent Hill. Dos Santos continued to represent Hill for the remainder of the proceedings in the trial court.

¶ 7 On August 27, 2008, Hill filed notice of his intent to present the affirmative defense of justification. On October 14, 2008, the State filed a motion *in limine* seeking to introduce evidence that two shotguns of the same gauges as those involved in the murders of Pitts and Rollins had been stolen from a private residence several months before the crime, and that Hill had been directly involved in the theft. The State also filed a motion *in limine* seeking to bar Hill from introducing evidence of misconduct on the part of the victims. Hill filed a motion *in limine* seeking to introduce evidence of specific acts of violence perpetrated by the victims as well as their histories of drug addiction and thefts committed to support their addiction.

¶ 8 At a hearing on October 20, 2008, the State dismissed count I of the indictment, which charged Hill with the murder of Pitts, in exchange for Hill's waiver of his right to a jury trial. The court then ruled that Hill could admit evidence of the victims' prior crimes of violence but not their alleged thefts. The court reserved ruling on the State's motion to introduce the evidence about the theft of the shotguns.

¶ 9 A bench trial commenced on October 27, 2008. Joseph Kuegler testified that on April 23, 2005, he was mushroom hunting in a wooded area near his home in Alhambra, Illinois, when he discovered two bodies. Kuegler went home and called the police.

¶ 10 Jay Zuber testified that he was the regional field supervisor for the Illinois State Police's Crime Scene Unit. On April 23, 2005, he received a call from the Madison County Sheriff's Department requesting his assistance with a crime scene near Alhambra

where two bodies had been discovered. Zuber processed the crime scene and the bodies were transported to a nearby hospital morgue for an autopsy. The following day Zuber attended the autopsies, which were performed by Dr. Raj Nanduri. Zuber collected plastic fragments of a fired shotgun cartridge and some lead bird shot from Pitts's head. The skulls of both victims were given to Matthew Davis, the lab's physical anthropologist.

¶ 11 Zuber also testified that on April 25, 2005, he processed a crime scene at a residence in Edwardsville, Illinois, where Hill's parents lived and where Hill had been staying. The house had a basement which could be accessed via stairs from the main floor or via a door leading outside. There was a great deal of blood evidence in the basement. There was a recliner in the southwest corner and a baseboard heater along the wall by the recliner. There appeared to be no blood on the recliner, but there was a great deal of blood on the baseboard heater. There was blood on two legs of a table that was positioned in front of the recliner. The blood on the table legs and the baseboard heater tested positive for Pitts's DNA. Zuber testified that the blood spatter evidence on the table legs was consistent with a gunshot and suggested a significant bloodletting in close proximity to the table legs and no more than a foot or two off the floor.

¶ 12 Dr. Raj Nanduri testified that she is a forensic pathologist for Madison County. On April 24, 2005, she performed autopsies on Pitts and Rollins. Both bodies showed advanced decomposition. Pitts had a shotgun entry wound to the right side of his face, and shotgun pellets and wadding were recovered from his head. Dr. Nanduri stated that such a wound would result in considerable bleeding and that there would be a lot of blood

at the scene. The upper right rear of Rollins's skull had a rounded depressed fracture where a portion of the skull had been pushed into the brain.

¶ 13 Matthew Davis testified that he is a patrol master sergeant with the Illinois State Police. Prior to that he was the forensic anthropologist for Division of Forensic Services. He received the skulls of Pitts and Rollins shortly after their autopsies. The blast from the shotgun entered the right side of Pitts's face around the cheek, and the pellets travelled through the center of the cranium to the rear, from right to left and slightly upwards. The upper right rear of Rollins's skull revealed a hole cause by a tubular or circular instrument. The injury was not consistent with the butt of a shotgun. Knowing that a shotgun was used in the crime and realizing that the dimensions of the hole were consistent with a shotgun barrel, Davis consulted with one of the lab's firearm tool mark examiners.

¶ 14 Ronald Locke testified that he was employed with the Illinois State Police Forensic Science Laboratory. His duties included examining tool marks, firearms, and firearm evidence. Based on the wad recovered from Pitts's head, Locke determined that Pitts's injury was caused by a .410 shotgun. Locke identified People's Exhibit 122 as a single-action .410 shotgun. Locke compared the barrel diameter of various shotguns in the lab's reference collection with the hole in Rollins's skull and determined that the hole was consistent with the muzzle of a 20-gauge shotgun. Based on a small notch on the edge of the hole which was caused by the weapon's sighting mechanism, Locke determined that the hole was consistent with the barrel of a 20-gauge Remington 1100

shotgun. Locke identified People's Exhibit 123 as a photograph of the Remington 1100 20-gauge shotgun from the lab's reference collection which he used for the comparison.

¶ 15 Kelly Matlock testified that she had known Rollins and Pitts for at least 10 years. She also knew Hill and his family, and lived across the street from Hill. On the morning of March 23, 2005, she went with Clinton to bail out Hill, who had been arrested the day before as the result of a domestic dispute. They took Hill to his parents' house because he was not permitted to return home. A short while later, Rollins showed up wanting to buy some crack cocaine. Matlock, Hill, Rollins, and Clinton went down to the basement to smoke crack. Pitts and another man came by, also wanting to buy crack. Hill and Rollins were playing chess, and everyone except Clinton was smoking crack and drinking. Earlier that day Hill had given Matlock a list of things he wanted from his house. Around 4 p.m. she and Clinton left to go to Hill's house to get the items Hill wanted. As soon as they arrived, Clinton, who had received a phone call, told Matlock that they had to leave. They went to Clinton's cousin's house where they met Hill, who instructed them to drive back to his parents' house. Once there, Hill told Matlock to wait in the car, and he and Clinton went into the house. Shortly thereafter she heard a scream for help and a gunshot. She ran into the house and to the door leading to the basement. There she saw Rollins on the ground, begging for his life, while Hill was beating him with his fists. Clinton was pointing a gun at Rollins. Matlock then went upstairs to smoke a "blunt" with Clinton's girlfriend. While upstairs she saw two open gun cases. Matlock identified People's Exhibit 103 as one of the gun cases. After smoking half the "blunt" Matlock went downstairs to the living room. After a while Hill and Clinton came up from the

basement. Both had blood on them. Hill washed up, and then he and Clinton went back downstairs with some trash bags. After a couple of hours Hill asked Matlock to back her truck into the driveway and to help dispose of the bodies. Hill and Clinton placed the bodies, which were rolled up in carpeting, in the back of Matlock's truck. Hill and Matlock left in the vehicle to find someplace to dump the bodies. While en route Matlock asked Hill why he had killed Pitts and Rollins. Hill told her that after she left with Clinton he had gone upstairs when a drug dealer named R.C. came by to kill him. Listening through a vent Hill heard Pitts tell R.C. that Hill was with Matlock. Hill then went to Clinton's cousin's house to call Clinton and Matlock. Once back at their parents' house Hill told Clinton to shoot Pitts, which he did. When Matlock asked why they killed Rollins, Hill responded "wrong place, wrong time." They dumped the bodies in a wooded area near Alhambra. Once back at the house Matlock smoked crack while Hill and Clinton attempted to wipe up the blood.

¶ 16 Danika Hill testified that she was married to Hill. On March 22, 2005, she and Hill got into an argument which resulted in the police being called. Hill was arrested and taken to jail. He was released the following day but was prohibited from returning home for several days, so he went to stay at his parents' house. Hill called her and told her that Clinton and Kelly Matlock were coming over to collect some things for him. Shortly after they arrived she received a telephone call. When she answered it was Hill. He asked whether Clinton had arrived yet, and when she told him that they were there he asked to speak with Clinton. She handed the phone to Clinton. Clinton spoke with Hill and then he and Matlock immediately left.

¶ 17 Danika testified that Hill moved home several days later. About one month later police came to speak with them regarding a couple of missing persons. Police returned several days later and arrested Hill. After the first visit but before police returned to arrest him, Hill suggested to Danika that they take their daughter to Glick Park in Edwardsville to play. Once there, Danika took their daughter to the playground while Hill remained by the car. While walking toward the playground, Danika saw Hill retrieve a black bag from the trunk of the car and walk toward a nearby lake. She could not see what Hill did while at the lake, but after several minutes he came to the playground and told Danika that it was time to leave. Hill did not have the black bag with him.

¶ 18 Matthew Breihan testified that he was a police officer for the City of Edwardsville. On April 30, 2005, he was dispatched to Glick Park in response to a report that a .410 shotgun had been found. The shotgun had been found in a case which was floating in a lake in the park and wedged under a rock. Breihan identified People's Exhibit 122 as the shotgun in question, and he identified People's Exhibit 103 as the case in which the shotgun was found.

¶ 19 Brian Rothe testified that he was presently incarcerated in the Illinois Department of Corrections for armed robbery. In November 2004 he and Hill had broken into Robert "Ed" Shea's house and taken some jewelry, a safe, four shotguns, and a rifle. They sold some of the stolen items but were unable to sell the weapons. Hill subsequently decided to keep the weapons.

¶ 20 Ed Shea testified that during the summer of 2004 Hill had worked for him doing "cement work." Hill had been to his house many times. Shea had a gun cabinet in which



he kept 6 guns: two 12-gauge shotguns, two 20-gauge shotguns, a .410 shotgun, and a rifle. One of his 20-gauge shotguns was a Remington model 1100. Hill had seen the gun cabinet during his visits. Shea was out of town on November 20, 2004. His daughter called him to tell him that his house had been burglarized. At trial Shea identified People's Exhibit 122 as the .410 shotgun that had been stolen from his home. He also testified that People's Exhibit 123, a photograph of a Remington 1100 20-gauge shotgun, looked similar to the shotgun that was stolen from his home.

¶ 21 Hill testified that on March 23, 2005, he was in the Madison County jail. He was released around 1:30 or 1:45 p.m. and was picked up by Kelly Matlock, Clinton, and Clinton's girlfriend. Hill was prohibited from returning home, so they drove to Hill's parents' house. Hill told his mom, Donna, that he needed to stay there for a couple of days and would sleep in the basement. Hill wrote down a list of things he needed from his home and sent Matlock and Clinton to retrieve them while he cleaned the basement. Hill reconsidered staying in the basement, so he walked over to Norieka Johnson's house to use her phone. Hill called Yvette Gilmore, the mother of Hill's youngest son, and asked her if he could stay with her. She told him no because she had a boyfriend. Hill then called his house, and his wife, Danika, answered. Hill asked to speak with Clinton and told him not to worry about his stuff and to go ahead and come back. He returned to his parents' house. As he continued to clean the basement, Pitts and Rollins came over. Pitts sat in a recliner in the corner and asked Hill to play chess with him. As Hill was seated across from Pitts and was setting up the chessboard, he heard Rollins, who was standing behind him, say, "I hate to have to do this to you, cuz." Hill turned and saw

Rollins pointing a shotgun at him. As he turned and began to get up he grabbed the barrel of the shotgun, pushing it away from his face. As he did so the shotgun discharged. Hill and Rollins began fighting over the shotgun. Hill got the shotgun away from Rollins and, holding it by the barrel, struck Rollins in the head with the back of the shotgun, knocking him down. The shotgun shattered, and Hill began beating Rollins with his fists and kicking him. Hill then heard someone banging on the back door. It was Clinton, who went upstairs. Hill saw Pitts slumped over in the recliner. Not wanting his mother to see what had happened, Hill began looking for something to conceal the bodies. Hill heard another knock at the door. It was Kelly Matlock. Hill picked up the pieces of the broken shotgun and put them in a trash bag. He took a piece of carpet from one corner of the basement, used it to wrap the bodies, and tied it up with telephone and speaker wire. He put the bodies in the back of Matlock's truck, and they drove to a wooded area near Alhambra where they dumped them.

¶ 22 Chester Hodge testified that in April 2005 he was incarcerated in the Madison County jail awaiting trial on pending charges of possession of methamphetamine. While there, he met and became friends with Hill. According to Hodge, Hill related the following regarding the murders of Pitts and Rollins. Hill was staying at his parents' house. He had just been released from jail and was prohibited from returning home. Pitts, Rollins, and someone known as R.C. came to the house. Hill had a history of confrontations with R.C. and feared that R.C. was there to rob him, but R.C. left. Hill went upstairs and, while there, overheard Pitts and Rollins discussing robbing or "scamming" him. Hill retrieved a shotgun, went back downstairs, and shot Pitts in the

face. Hill and Rollins then began to struggle over the weapon. Clinton came to Hill's aid and they overpowered Rollins. Rollins broke free and tried to flee, but Hill struck him in the back of the head with the shotgun. Hill then wrapped both bodies in some carpet and called Matlock to help him dispose of them. Hodge testified that the detective who interviewed him advised him that no promises would be made in exchange for any statement or testimony. On cross-examination, Hodge admitted that he was facing three Class X felony charges, that he had told police that he would take a Class 1 conviction, that he had ultimately pled guilty to a Class 1 charge, and that he received a minimum sentence of six years' imprisonment notwithstanding his extensive criminal history.

¶ 23 In closing, Hill argued that his use of deadly force was justified, but that if his belief in the need to use deadly force was not reasonable, he was guilty only of second-degree murder. The circuit court found that the State had proved beyond a reasonable doubt that Hill had committed the offense of first-degree murder, that his use of deadly force was not justified, and that he had failed to prove by a preponderance of the evidence the presence of a mitigating factor that would reduce the offense to second-degree murder. Hill was found guilty of first-degree murder and subsequently sentenced to 60 years' imprisonment.

¶ 24 Hill appealed, arguing that the circuit court erred in attributing to him delays that were caused by defense counsel's numerous motions for continuance when he had made clear his opposition to those continuances. He also argued that the court erred in refusing to allow him to support his claim of self-defense with evidence that the victims had

previously robbed and stolen from people to support their crack cocaine addictions. This court affirmed. *People v. Hill*, 2011 IL App (5th) 090085-U.

¶ 25 On July 3, 2011, Hill filed *pro se* a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Hill alleged (1) that he was denied his constitutional right to a speedy trial because trial counsel sought and obtained numerous continuances to which Hill was opposed, (2) that he was denied his right to the effective assistance of trial counsel, (3) that he was denied his constitutional right to the effective assistance of appellate counsel, (4) that he was denied due process, and (5) the trial court failed to apply mitigating factors that would reduce the charge to self-defense.

¶ 26 The circuit court summarily dismissed Hill's petition, finding that it was frivolous and patently without merit. Hill's motion to reconsider was denied and this appeal followed.

¶ 27 ANALYSIS

¶ 28 On appeal, Hill argues (1) that he was denied his constitutional right to the effective assistance of trial counsel, (2) that he was denied his constitutional right to the effective assistance of appellate counsel, (3) that he was denied due process of law, (4) that he was denied his right to a fair trial, and (5) that he was denied his right to a speedy trial.

¶ 29 The Act provides a mechanism by which state prisoners may collaterally challenge their convictions and/or sentences for substantial violations of their federal or state constitutional rights that occurred at their trial and that were not, and could not have



a defendant's ineffective-assistance-of-counsel claim will fail if either prong of the *Strickland* test is not met, a reviewing court need not determine whether counsel's performance was deficient before determining whether he was prejudiced. *People v. Perry*, 224 Ill. 2d 312, 342 (2007). There is a strong presumption that counsel's action or inaction was a matter of trial strategy (*People v. Evans*, 186 Ill. 2d 83, 93 (1999)), and matters of trial strategy will not support a claim of ineffective assistance of counsel unless counsel's strategy is so unsound that he entirely fails to conduct any meaningful adversarial testing of the State's case. *People v. Patterson*, 217 Ill. 2d 407, 441 (2005).

¶ 32 Hill argues that he was denied his constitutional right to the effective assistance of trial counsel where counsel (a) failed to introduce evidence of the victims' violent criminal background in order to support his claim of self-defense, (b) failed to investigate and present blood evidence that would contradict the State's theory that Pitts was on the floor when he was shot, (c) failed to subpoena and interview four key witnesses, and (d) failed to seek a discharge based on the denial of Hill's right to a speedy trial.

¶ 33 *Evidence of the victims' violent background*

¶ 34 Hill argues that trial counsel was ineffective for failing to introduce evidence of the victims' violent background in order to bolster his theory of self-defense. The record refutes this claim.

¶ 35 The State filed a motion *in limine* to exclude any evidence of misconduct by the victims other than a conviction for a crime of violence, and Hill filed a motion *in limine* to seeking to introduce evidence of specific acts of violence perpetrated by the victims as well as their histories of drug addiction and thefts committed to support their addiction.

The circuit court ruled that Hill could admit evidence of the victims' prior crimes of violence but not their alleged thefts. On direct appeal, Hill argued that the circuit court erred in refusing to allow him to support his claim of self-defense with evidence that the victims had previously stolen from people to support their crack cocaine addictions. We rejected that argument, noting that while evidence of a victim's violent character is admissible when the defendant claims he acted in self-defense, evidence of a victim's nonviolent character, including nonviolent crimes, is inadmissible. *Hill*, 2011 IL App (5th) 090085-U, ¶ 8 (citing *People v. Cook*, 352 Ill App. 3d 108, 127 (2004), and *People v. Lynch*, 104 Ill. 2d 194, 200 (1984)). We concluded that the circuit court's ruling was not an abuse of discretion because evidence that the victims had committed prior thefts would not have made Hill's story any more believable where the court already heard evidence that the victims frequently visited the basement of the home of Hill's parents, where the murders occurred, looking for and ingesting drugs, and that the victims used crack on the day of the murders. *Id.* We further concluded that Hill's self-defense theory would have failed regardless of whether the evidence had been admitted because the forensic evidence contradicted Hill's testimony. *Id.* Trial counsel cannot be deemed to be ineffective for failing to introduce evidence of the victims' drug addictions and prior thefts where counsel's attempt to do so was rejected and where the admission of such evidence would not have affected the outcome of the trial.

¶ 36 In his postconviction petition, Hill argued that Rollins's criminal history included armed robbery; that Pitts's criminal history included home invasion, aggravated criminal sexual assault, theft of a motor vehicle, and residential burglary; and that both men had a

history of drug charges. He contends that counsel failed to attempt to have this evidence admitted. This argument is meritless. The victims' history of drug charges was inadmissible both because they were charges rather than convictions and because they were not crimes of violence; although Rollins was arrested for armed robbery he was never convicted, and mere arrests, even for crimes of violence, are not admissible; Pitts's arrests for motor vehicle theft and residential burglary are not admissible because they are mere arrests and do not involve violence. Although Pitts was convicted of sexual assault and home invasion, those convictions were reversed on appeal. See *People v. Pitts*, 257 Ill. App. 3d 949 (1994). Because none of this evidence was admissible, counsel's decision not to seek to have it admitted cannot be said to be objectively unreasonable.

¶ 37

*Blood evidence*

¶ 38 Hill argues that trial counsel was ineffective for failing to investigate and present blood spatter evidence, which he argues would have supported his claim of self-defense. Specifically, Hill contends that there was blood on the recliner in the basement and that such evidence would have supported his testimony regarding how Pitts was killed.

¶ 39 At trial, Hill testified as follows. He was in his parents' basement along with Rollins and Pitts. Pitts was seated in a recliner, and he and Pitts were playing chess. He heard Rollins, who was standing behind him, say, "hey, I hate to do this to you, cuz," and turned to see Rollins pointing a shotgun at him. As he and Rollins struggled, the shotgun discharged. Hill saw Pitts slumped over in the recliner. He managed to get the shotgun away from Rollins and struck Rollins in the head with the butt of the weapon.



¶ 40 The pathologist who performed the autopsy on Pitts testified that Pitts's wound would have resulted in a significant amount of bleeding and that there would have been a great deal of blood where the wound occurred. Crime scene investigator Jay Zuber testified that although there was a great deal of blood in the basement, there appeared to be none on the recliner. There were "significant amounts of blood" on the back of a baseboard heater to the left of the recliner and blood spatter on two legs of a table in front of the recliner which tested positive for Pitts's DNA. Zuber testified that the blood spatter evidence at the base of the table legs was consistent with Pitts having been shot in the face while his head was no more than a foot or two off the floor. Zuber identified People's Exhibit 54, which is a photograph of a light-colored recliner. There is no blood on the recliner in the photo.

¶ 41 The forensic evidence at trial rebuts Hill's claim that there was blood evidence on the recliner, and Hill attached no evidence to his postconviction petition that there was any blood on the recliner. Trial counsel cannot be deemed to have been ineffective for failing to introduce evidence that does not exist.

¶ 42 *Witnesses*

¶ 43 Hill also claimed that trial counsel was ineffective for having failed to investigate and call four witnesses. Section 122-2 of the Act requires a postconviction petitioner to attach to his or her petition affidavits, records, or other evidence supporting the petition's allegations or explain the absence of such documentation. 725 ILCS 5/122-2 (West 2014). It is well-settled that a claim that trial counsel was ineffective for having failed to investigate and call a witness must be supported by affidavit from that witness. *People v.*

*Jones*, 399 Ill. App. 3d 341, 371 (2010). Here, Hill did not attach affidavits from the persons he claims counsel should have investigated and called as witnesses. Hill argues that he was unable to obtain their affidavits because he was incarcerated and indigent, and could not locate their addresses. As the State observes, however, if mere incarceration or indigency were a sufficient explanation for failing to supply supporting documentation, section 122-2 would be rendered meaningless. Because Hill failed to support this claim of ineffective assistance of trial counsel with the required affidavits or to adequately explain their absence, it necessarily fails.

¶ 44

*Speedy trial*

¶ 45 Hill also argues that trial counsel was ineffective for having failed to seek a discharge pursuant to section 103-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5 (West 2006)), which provides that everyone in custody for an alleged offense shall be tried within 120 days unless delay is occasioned by the defendant.

¶ 46 On direct appeal, Hill argued that the circuit court erred in attributing to defendant delays that were caused by defense counsel's numerous motions for continuance when defendant had made clear his opposition to those continuances. We rejected Hill's argument, finding that the circuit court properly charged the delays to Hill because Hill's objections were related to counsel's strategy, not his representation, and that Hill was bound by counsel's strategic choices. We further noted that Hill could not show ineffective assistance of counsel because the speedy trial issue was meritless. *Hill*, 2011 IL App (5th) 090085-U, ¶¶ 4-7. Hill's postconviction claim that trial counsel was ineffective for failing to seek a discharge based on a denial of his statutory right to a

speedy trial is merely a reiteration of a claim already rejected on direct appeal and is therefore meritless.

¶ 47 Based on the foregoing, we agree with the circuit court that Hill's postconviction petition failed to state the gist of a claim of denial of the constitutional right to the effective assistance of trial counsel.

¶ 48 Ineffective Assistance of Appellate Counsel

¶ 49 Hill also argues that he was denied the effective assistance of appellate counsel where appellate counsel (1) failed to argue the ineffective assistance of trial counsel, (2) failed to argue that "other crimes evidence" was improperly admitted at trial, (3) failed to argue mitigating factors that would have reduced the charge to second-degree murder, (4) failed to argue that Hill was not proved guilty beyond a reasonable doubt, and (5) failed to argue the disparity of sentences between codefendants.

¶ 50 Claims of the ineffective assistance of appellate counsel are evaluated under the same two-prong test set forth in *Strickland* for evaluating claims of ineffective assistance of trial counsel. *People v. Jones*, 219 Ill. 2d 1, 23 (2006). To prevail on a claim of the ineffective assistance of appellate counsel based on appellate counsel's failure to argue an issue, the defendant must show that the failure to raise the issue was objectively unreasonable and that there is a reasonable probability that, but for this failure, the defendant's conviction or sentence would have been reversed. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). Appellate counsel is not obligated to argue every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues that, in counsel's professional judgment, are meritless, unless counsel's assessment of the

merits is patently wrong. *People v. Harris*, 206 Ill. 2d 1, 34 (2002). Moreover, experienced appellate advocates will often screen out weaker arguments in order to focus on the most important issues. *People v. Richardson*, 189 Ill. 2d 401, 413 (2000).

¶ 51 *Trial counsel's ineffectiveness*

¶ 52 Hill argues that appellate counsel provided ineffective assistance by not arguing the ineffective assistance of trial counsel with respect to the claims set forth above. Having determined that those claims are meritless, this ineffective-assistance-of-appellate-counsel claim necessarily fails.

¶ 53 *Other crimes evidence*

¶ 54 Hill argues that appellate counsel was ineffective for failing to argue that the circuit court erred in allowing the State to present evidence that he had been involved in the theft of four shotguns and a rifle from Ed Shea's house.

¶ 55 Evidence that a defendant has committed other crimes is admissible if relevant for any purpose other than demonstrating his propensity to commit crimes, unless its prejudicial impact substantially outweighs its probative value. *People v. Chapman*, 2012 IL 111896, ¶ 19. Admission of such evidence is within the trial court's discretion, and the court's decision will not be disturbed on review absent an abuse of that discretion. *Id.* The rule generally barring other crimes evidence is based on the concern that such evidence might over-persuade a jury to convict the defendant because the jury believes the defendant to be a bad person deserving of punishment. *People v. Nash*, 2013 IL App (1st) 113366, ¶ 24. In a bench trial, however, it is presumed that the trial court

considered the other crimes evidence only for the limited purpose for which it was introduced. *Id.*

¶ 56 The State was allowed to introduce evidence that two shotguns of the same gauges as those involved in the crime had been stolen from Ed Shea's house several months prior to the murders and that Hill had been directly involved in that theft. The State sought to introduce this evidence to show that Hill had access to the weapons used in the crime and to show opportunity or preparation, not to show Hill's propensity to commit crimes. Competent appellate counsel could have concluded that there was little chance of obtaining a reversal on this issue, particularly because Hill opted for a bench trial and the trial court presumably considered this evidence only for the limited purpose for which it was admitted.

¶ 57 Hill also argues that throughout the trial the State made repeated references to his having killed Pitts even though he was being tried only for the murder of Rollins. Where an uncharged offense is inextricably intertwined with or part and parcel of the charged offense, the rules relating to other crimes evidence does not apply and admissibility of such evidence is analyzed under ordinary relevance principles. *People v. Morales*, 2012 IL App (1st) 101911, ¶¶ 24-25. Here, the killing of Pitts was inextricably intertwined with the killing of Rollins and relevant thereto. Moreover, Hill claimed to have killed both men in self-defense. There is no reasonable probability that appellate counsel could have obtained a reversal of Hill's conviction based on the admission of evidence that Hill killed Pitts, and appellate counsel was not ineffective for declining to raise this issue.

¶ 58

*Mitigating factors/Reasonable doubt*

¶ 59 Hill contends that appellate counsel should have argued that the evidence did not support a conviction for first-degree murder and that the circuit court erred in finding that he had failed to prove the existence of the mitigating factors that reduce first-degree murder to second-degree murder.

¶ 60 "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." 720 ILCS 5/7-1(a) (West 2010). "However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." *Id.* A person is guilty of second-degree murder when he commits the offense of first-degree murder and either (1) he acted under a sudden and intense passion resulting from a serious provocation, or (2) he believed the killing was justified under the principles set forth above but that belief was unreasonable. *Id.* § 9-2(a). Whether a defendant proved the existence of a mitigating circumstance is a question of fact, and the fact finder's determination that he or she failed to do so will not be disturbed on review if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present. *People v. Castellano*, 2015 IL App (1st) 133874, ¶ 144.

¶ 61 In the present case, Hill testified that he was seated across a table from Pitts preparing to play a game of chess when Rollins approached him from behind and pointed

a shotgun at him, intending to kill him. Hill grabbed the barrel of the shotgun, and as he and Rollins struggled over the weapon it discharged, killing Pitts. Hill claimed that he got the weapon away from Rollins and, holding it by the barrel and wielding it like a club, smashed it over Rollins's head, shattering the weapon. The forensic evidence utterly refuted Hill's testimony. Pitts was killed by a .410 shotgun and Rollins was killed when he was jabbed in the back of head with the muzzle of a 20-gauge shotgun. Hill testified that after he was shot, Pitts was slumped over in the recliner. There was no blood on the recliner, however, and Zuber testified that Pitts's head was no more than a foot or two off the floor when he was shot. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the mitigating factors were not present, and appellate counsel's decision to forego raising such a manifestly meritless argument on appeal is not objectively unreasonable.

¶ 62

*Sentence disparity*

¶ 63 Hill argues that appellate counsel was ineffective for failing to argue that Hill's 60-year sentence was disproportionate to that of his codefendant, who received a 20-year sentence. Although an arbitrary and unreasonable disparity between the sentences of similarly situated codefendants is impermissible, a mere disparity in sentences alone is insufficient to establish a constitutional violation because the disparity may be warranted by the nature and extent of the defendant's participation in the offense, the relative character and history of the codefendants, their respective rehabilitative potential, and differences in their criminal record. *People v. Rodriguez*, 402 Ill. App. 3d 932, 939-40 (2010). A sentence imposed on a codefendant who pled guilty cannot be compared to a

sentence imposed after trial because a court may exercise leniency when a defendant pleads guilty, accepts responsibility, and ensures the prompt application of justice. *People v. Morales*, 339 Ill. App. 3d 554, 562 (2003). In the present case, not only did Clinton plead guilty, the evidence revealed that Hill's degree of culpability was greater and his presentence investigation report revealed that he had a prior conviction for attempted murder. No nonfrivolous argument can be made that appellate counsel's decision not to pursue the sentencing disparity issue was objectively unreasonable or that there is a reasonable probability that, had counsel done so, Hill's sentence would have been reduced or reversed.

¶ 64 Based on the foregoing, we find that the circuit court correctly concluded that Hill's postconviction claim of ineffective assistance of appellate counsel was frivolous and patently without merit.

¶ 65 Due Process

¶ 66 Hill next argues that he was denied due process where (1) the trial court denied his motion to dismiss based on the violation of his statutory right to a speedy trial, (2) the trial court failed to investigate his allegation of a *per se* conflict of interest, (3) the State failed to disclose evidence favorable to the defense, (4) the State knowingly used perjured testimony, (5) the State failed to correct a witness's false testimony about having received leniency in exchange for his testimony, (6) the State vouched for the credibility of Kelly Matlock, (7) the trial court improperly considered other crimes evidence, and (8) the judge was biased.



¶ 67

*Speedy trial*

¶ 68 Hill argues that he was denied due process when the trial court, following a hearing on August 18, 2006, denied his *pro se* motion to dismiss based on a violation of his statutory right to a speedy trial. Hill contends that his motion should have been granted because he repudiated the continuances obtained by defense counsel. On direct appeal we held that the trial court properly charged these delays to Hill notwithstanding his objections to them. Consequently, this claim is meritless.

¶ 69

*Conflict of interest*

¶ 70 Hill argues that he was denied due process where the trial court failed to investigate his allegation that attorney Billy Hahs was operating under a *per se* conflict of interest because he had been involved in plea negotiations for Chester Hodge, who testified for the prosecution.

¶ 71 There are two categories of conflict of interest: *per se* and actual. *People v. Peterson*, 2017 IL 120331, ¶ 102. A *per se* conflict exists where facts about the attorney's status engender, by themselves, a disabling conflict. *Id.* ¶ 103. A *per se* conflict of interest exists where defense counsel (1) has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution, (2) contemporaneously represents a prosecution witness, or (3) was a former prosecutor who had been personally involved with the prosecution of the defendant. *Id.* Absent a waiver of the right to conflict-free representation, the existence of a *per se* conflict of interest is automatic grounds for reversal. *People v. Fields*, 2012 IL 112438, ¶ 18. If the defendant fails to show a *per se* conflict of interest, the analysis depends on when he raised the

issue. *People v. Hardin*, 217 Ill. 2d 289, 301 (2005) (citing *People v. Spreitzer*, 123 Ill. 2d 1, 17-18 (1988)). If the potential conflict is brought to the court's attention at an early stage, the trial court must either appoint separate counsel or ascertain whether the risk of conflict is too remote to warrant separate counsel. *Id.* If the potential conflict of interest is not brought to the court's attention then the defendant's conviction will be reversed only if there was an actual conflict which adversely affected counsel's performance. *Id.*

¶ 72 In the present case, Hill's postconviction petition failed to state the gist of a claim that Hahs labored under a *per se* conflict of interest because it contained no allegation that Hahs's representation of Hodge was contemporaneous. *Fields*, 2012 IL 112438, ¶ 20 (prior representation of a prosecution witness does not create a *per se* conflict of interest). Moreover, any potential conflict of interest was eliminated when the circuit court granted Hill's request to discharge Hahs and to proceed *pro se*.

¶ 73 *Favorable evidence*

¶ 74 Hill next argues that he was denied due process where the State either suppressed or failed to disclose evidence of blood on the recliner. This argument is meritless because, as noted above, a photograph of the recliner was introduced at trial and it showed no blood on the recliner.

¶ 75 *Perjured/False testimony*

¶ 76 Hill argues that he was denied due process by the State's knowing use of perjured testimony and its failure to correct the false testimony of one of its witnesses. He contends that Danika Hill and Donna Hill lied under oath because detectives threatened them with the loss of their children. We find this claim to be forfeited because Hill made

no claim in his postconviction petition that either Danika Hill or Donna Hill testified falsely, and a defendant may not raise for the first time on appeal any claim that was not raised in the petition. *People v. Jones*, 211 Ill. 2d 140, 148 (2004).

¶ 77 Hill also contends that Matlock testified falsely that she did not receive a lesser sentence in exchange for her testimony. While being cross-examined by defense counsel, Matlock stated that she did not receive a lesser sentence in exchange for her cooperation but acknowledged that during her plea hearing the prosecutor informed the court that she would testify truthfully in Hill's trial. This does not establish that Matlock testified falsely, let alone that the State knew that she testified falsely.

¶ 78 Hill claims that Chester Hodge testified falsely that he received no consideration in exchange for his testimony and that the State failed to correct his false testimony. At trial, Hodge testified that he told police about his conversation with Hill and he was told by a detective that no promises could be made to him in exchange for any testimony or statement. On cross-examination Hodge acknowledged that he had been charged with three Class X felonies but ultimately pled guilty to a Class 1 felony. Although Hill contends that this implies an agreement, nothing in the record suggests that Hodge was given leniency in exchange for his testimony or that he lied when he testified that he received no consideration in exchange for testifying at Hill's trial.

¶ 79 *Vouching for witness*

¶ 80 Hill argues that the State improperly vouched for Matlock's credibility. We disagree. During his closing argument defense counsel argued that Matlock was not credible. In rebuttal, the State argued that Matlock had no reason to lie and that she had

not lied. The State also argued that only two things that Hill said—that he had his hands on the shotgun when it went off and that he beat Rollins until he stopped moving—were truthful. Although a prosecutor may not personally vouch for the credibility of a witness or express a personal opinion, he or she may comment on a witness's credibility and challenge the defendant's credibility. *People v. Pope*, 284 Ill. App. 3d 695 (1996). Parties are given wide latitude in making closing arguments, and improper remarks by the prosecutor result in reversible error only where those remarks constituted a material factor in the defendant's conviction. *Id.* Here, the prosecutor did not personally vouch for Matlock's credibility or express his personal opinion; instead, he commented that Matlock had no motive for lying and that Hill was not credible. He did so in response to defense counsel's argument that Matlock was not credible (see *People v. Grisset*, 288 Ill. App. 3d 620, 633 (1997) (no error where prosecutor's comments on a witness's credibility was invited by the defendant's suggestion that he was not)). Even if the comments in question were improper, no plausible argument can be made that they constituted a material factor in Hill's conviction.

¶ 81

*Other crimes evidence*

¶ 82 Hill next argues that he was denied due process where the court improperly considered evidence that he killed Pitts and that he had been involved in the burglary of Ed Shea's home. As noted above, this evidence was not introduced to show Hill's propensity to commit crimes, and because this was a bench trial, we presume that the trial court considered this evidence only for the limited purpose for which it was introduced.

¶ 83

*Judicial bias*

¶ 84 Hill argues that the trial judge demonstrated bias against him when she failed to honor his discovery request, ignored his persistent demands for a speedy trial, and refused to hold hearings on the numerous motions he filed. These pleadings were filed *pro se*. In fact, the record reveals that, despite being represented by counsel, Hill inundated the court with a stream of *pro se* filings. It is well-settled that a defendant who is represented by counsel may not file *pro se* documents with the court and the court should not consider them. *People v. Serio*, 357 Ill. App. 3d 806, 815 (2005). We note that from June 22, 2006, when the court granted Hill's request to proceed *pro se* and discharged Hahs, to December 26, 2006, when the court granted Hill's request for the appointment of counsel, Hill proceeded *pro se*, and pleadings filed by Hill during this time were addressed by the court. The court's refusal to consider documents Hill filed *pro se* while represented by counsel is not indicative of judicial bias.

¶ 85 Based on the foregoing, we find that Hill's postconviction claim that he was denied due process was frivolous and patently without merit.

¶ 86

Fair Trial

¶ 87 Hill next argues that he was denied the right to a fair trial where the trial court failed to apply the mitigating factors that reduce first-degree murder to second-degree murder, and that he produced evidence that the crime occurred in the heat of a physical fight. As noted above, the court did not fail to consider the mitigating factors—it simply found that Hill failed to prove that any were present. Given that Hill's testimony was

contradicted by the forensic evidence, such finding was not contrary to the manifest weight of the evidence.

¶ 88 Speedy Trial

¶ 89 Finally, Hill argues that his postconviction petition stated the gist of a claim that he was denied his constitutional right to a speedy trial. As noted above, Hill argued on direct appeal that the circuit court erred in attributing to him delays that were caused by defense counsel's numerous motions for continuance when he had made clear his opposition to those continuances. We concluded that those continuances were properly attributed to him notwithstanding his objections to them and that he was not denied his statutory right to a speedy trial. Hill's claim that he was denied his constitutional right to a speedy trial is also premised on his argument that the circuit court erred in attributing to him the continuances sought by defense counsel. Having previously concluded that the circuit court properly attributed those delays to Hill notwithstanding his objections thereto and that counsel was not ineffective for having sought those continuances, we must conclude that Hill was not denied his constitutional right to the effective assistance of counsel and that his postconviction claim to the contrary was frivolous and patently without merit.

¶ 90 For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed.

¶ 91 Affirmed.