2019 IL App (5th) 150463-U

NO. 5-15-0463

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clinton County.
	)	
v.	)	No. 14-CF-58
	)	
TERRY L. CRISTEL,	)	Honorable
	)	William J. Becker,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant failed to state the gist of a constitutional claim because there was no *per se* conflict of interest with his appointed attorney; because he could not show that he was prejudiced by his attorney's lack of knowledge that a 10-year-old conviction had been vacated; and because he did not establish that his guilty plea was not knowing and voluntary, we affirm the trial court's order summarily dismissing the *pro se* postconviction petition.

¶ 2 Defendant appeals from the trial court's summary dismissal of his first stage postconviction petition. In his underlying criminal case, defendant was convicted of one count of burglary after reaching a negotiated plea with the State. He was sentenced to three years in the Illinois Department of Corrections (IDOC). Defendant's direct appeal

was dismissed. Defendant filed his *pro se* postconviction petition. The trial court summarily dismissed defendant's postconviction petition finding that it was frivolous and patently without merit. For the reasons that follow in this order, we affirm.

¶ 3 BACKGROUND

¶ 4 The State charged the defendant with two counts of burglary on May 12, 2014. The information alleged that on May 8, 2014, defendant entered a building owned by Nathan Jackson on Parkview Drive in Trenton with the intent to commit a theft in violation of section 19-1 of the Criminal Code of 2012 (720 ILCS 5/19-1 (West 2012)) (count I). The information also alleged that on May 8, 2014, the defendant entered a building owned by Jesse Barton on Parkview Drive in Trenton with the intent to commit the offense of obstructing justice by knowingly concealing physical evidence of a theft in that building in order to prevent his apprehension or to obstruct his prosecution in violation of section 31-4(a)(1) of the Criminal Code (*id.* § 31-4(a)(1)) (count II). Both felonies were categorized as Class 2 felonies. The State alleged with both counts that defendant was subject to an extended term sentence pursuant to section 5-5-3.2(b)(1) of the Unified Code of Corrections. 730 ILCS 5/5-5-3.2(b)(1) (West 2012).

¶ 5 Defendant made his first court appearance without counsel on May 12, 2014. He requested that an attorney be appointed on his behalf. The trial court stated that it would appoint attorney Stewart Freeman to represent the defendant. The following exchange occurred between the court and the defendant.

> "[DEFENDANT]: I can't have him he was a prosecutor on my—he prosecuted me.

THE COURT: On what case?

[DEFENDANT]: I don't remember. Back in—

THE COURT: Well, you can have him. He prosecuted a lot of people. He's defended a lot of people.

[DEFENDANT]: I think that would be—

THE COURT: Well, what you think is not really relevant. What I think is the issue. When you talk to Mr. Freeman, if you believe there's a conflict between you and you want to tell me about it at your court appearance, you can tell me about it then, but you're at least going to talk to Mr. Freeman first.

[DEFENDANT]: I don't want to talk to him.

THE COURT: That's fine. Then you can appear without an attorney because you don't get to pick your lawyer, Mr. Cristel.

[DEFENDANT]: Well, I mean, he—

THE COURT: Mr. Cristel, we're not having a debate. Here's your choices. Mr. Freeman/nobody. Okay? Those are your choices.

[DEFENDANT]: I can't understand why you would do that, Your Honor.

THE COURT: Well, because that's the law, Mr. Cristel. Mr. Freeman is a lawyer who's a professional, and he represents a lot of people that he prosecuted previously. He does a good job with them, and he's an aggressive person. Just because you don't like him, you don't have to like your lawyer.

[DEFENDANT]: Conflict of interest.

THE COURT: So if you don't want Mr. Freeman, then find yourself a lawyer. I will reset your case for appearance with your attorney and give you a chance to hire one."

¶ 6 At this same initial hearing, the trial court asked the State for the defendant's criminal history. The State replied that the defendant had an extensive criminal history including a prior robbery conviction, which was a Class 2 felony, and which formed the

basis for the State's belief that the defendant was eligible for an extended term sentence in this case. The defendant informed the State and the court that the robbery charge had been "dropped." The court informed the defendant that the record reflected that he was sentenced on a robbery charge.

¶ 7 The defendant's second appearance was on May 28, 2014, at which he informed the court that he could not afford to hire his own attorney. The court reminded the defendant that he was previously advised "that if you could not afford a lawyer, I would appoint the public defender, Mr. Freeman, to represent you." The defendant then asked the court to appoint Stewart Freeman as his attorney. The case was then set for a preliminary hearing on June 3, 2014.

¶ 8 On the date of his preliminary hearing, the defendant opted to plead guilty pursuant to a negotiated plea. In exchange for a three-year sentence in the IDOC, the State's dismissal of count II, and the promise not to pursue any further charges stemming from the offense in count I, the defendant agreed to plead guilty to count I. The trial court asked the defendant if he understood the plea terms and whether he had had enough time to discuss the plea terms with his attorney. The court stated: "Now, Mr. Cristel, back when this case started you didn't want me to appoint Mr. Freeman. You apparently had some disagreement with him in the past. Have you been able to talk to him about this case?" In response, the defendant responded that he had put "that" behind him. To confirm, the trial court asked him if he was "able to get past that." The defendant answered affirmatively and stated that he was satisfied with his attorney's representation. The court then asked attorney Freeman if he had had an opportunity to go over the police

reports with the defendant. Attorney Freeman stated that he had only gotten the discovery within the past hour, but that he had gone over it, and then informed the defendant what it contained. He further stated that the defendant decided to accept the State's offer as he had "been through the system."

¶ 9 The trial court then admonished the defendant about his rights and the processes associated with entering a plea of guilty. The defendant responded that he understood that by pleading guilty he would not have a trial of any kind, and that he still wanted to plead guilty. The trial court then inquired about the police reports since there was not much time for his attorney to review the reports. The defendant indicated his understanding that his attorney had not had much time to investigate the case. Thereafter, the trial court advised the defendant about the charge and the possible sentence, including the fact that a Class 2 felony has a minimum sentence of 3 years and a maximum sentence of 7 years, but that because the State determined that he was extended term eligible that he could be sentenced for as much as 14 years. The defendant stated that he did understand the sentencing range and that he still wanted to plead guilty.

¶ 10 The trial court and the State's representative then had a discussion about the defendant's criminal history to determine if he should be charged as a Class X felon, or if he would be eligible for extended term sentencing. The State noted that the defendant's prior Class 2 felony was in 2002 and that he was "barely eligible" for extended term, stating that "because of the time he spent in custody, I think he would be eligible for extended term."

¶ 11 The trial court sentenced the defendant to the minimum sentence of three years in the IDOC plus two years of mandatory supervised release.

¶ 12 The defendant appealed the conviction on June 25, 2014. On July 25, 2014, the trial court issued a notice that the defendant had failed to first file a motion to withdraw his plea or to modify his sentence before filing the notice of appeal. This court dismissed the defendant's direct appeal on October 29, 2014.

¶ 13 On September 10, 2015, the defendant wrote the circuit clerk a letter about the "old robbery charge." He stated: "I was convicted of robbery in approximately 2009[,] but then it was overturned. I need something from you in writing that shows the final disposition of this case."

¶ 14 The defendant filed his *pro se* postconviction petition on October 2, 2015. The trial court summarily dismissed the petition on October 14, 2015, finding that the defendant waived any claims of conflict of his appointed attorney and any errors due to the attorney's lack of time spent to investigate whether he was eligible for extended term sentencing. The court also found that the defendant's extended-term issue was moot because he was sentenced to the minimum sentence for a Class 2 felony.

¶ 15 The defendant timely appeals from the order dismissing his postconviction petition. We have jurisdiction over this appeal pursuant to article VI, section 6 of the Illinois Constitution and Illinois Supreme Court Rule 651(a) (Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 651(a) (eff. Feb. 6, 2013)).

¶ 16 ANALYSIS

¶ 17 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a three-stage process by which a criminally convicted individual can challenge his conviction by arguing that his constitutional rights were substantially denied. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008); *People v. Johnson*, 2018 IL App (5th) 140486, ¶ 21, 99 N.E.3d 1. Only the first stage of the postconviction process is involved in this appeal.

¶ 18 At the first stage of postconviction proceedings, the trial court "reviews the petition to determine whether it is frivolous and patently without merit." *Johnson*, 2018 IL App (5th) 140486, ¶ 21. A petition that is frivolous or is patently without merit has been defined as one arguing an "indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204, 1212 (2009). The trial court independently reviews the petition without any input from the State. *People v. Tate*, 2012 IL 112214, ¶¶ 9-10, 980 N.E.2d 1100; *Johnson*, 2018 IL App (5th) 140486, ¶ 21; *People v. York*, 2016 IL App (5th) 130579, ¶ 15, 65 N.E.3d 1029. The trial court must interpret all well-pleaded facts in the defendant's petition as true and must not engage in any fact-finding. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071-72 (1998). To advance to the second stage of the postconviction process, the petition must state the gist of a constitutional claim. *Johnson*, 2018 IL App (5th) 140486, ¶ 19; *York*, 2016 IL App (5th) 130579, ¶ 15. The court will summarily dismiss the petition if it concludes that the petition does not meet this standard. 725 ILCS 5/122-2.1(a) (West 2012); *Johnson*, 2018 IL App (5th) 140486, ¶ 21. The court

should only dismiss the postconviction petition if the petition contains no arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 16.

¶ 19 We review a trial court's summary dismissal of a first-stage postconviction petition on a *de novo* basis. *Tate*, 2012 IL 112214, ¶ 10.

¶ 20 The defendant makes the following three arguments in support of his claim that his postconviction petition stated the gist of a meritorious constitutional claim: (1) that the appointment of his former prosecutor as his defense attorney in this case was a *per se* conflict of interest; (2) that his appointed attorney was ineffective for failing to investigate his criminal history—specifically his 2002 robbery conviction—prior to advising him to plead guilty; and (3) because his appointed attorney was ineffective, his guilty plea was not knowing and voluntary. We will address each claim separately.

¶ 21 *Per Se* Conflict of Interest

¶ 22 A criminal defendant is entitled to the effective assistance of counsel. U.S. Const., amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 690-92 (1984); Ill. Const. 1970, art. I, § 8; *People v. Albanese*, 104 Ill. 2d 504, 525-27, 473 N.E.2d 1246, 1255-56 (1984). The sixth amendment right to effective assistance of counsel includes representation without a conflict of interest. *People v. Hernandez*, 231 Ill. 2d 134, 142, 896 N.E.2d 297, 303 (2008). Prejudice to the defendant is presumed if an attorney's conflict of interest is deemed a "*per se*" conflict of interest. *Id.* at 143; *People v. Morales*, 209 Ill. 2d 340, 345, 808 N.E.2d 510, 513 (2004). In *People v. Coslet*, the supreme court coined the term, *per se* conflict, to describe its earlier holding in *People v. Stoval*, 40 Ill. 2d 109, 112, 239 N.E.2d 441, 443 (1968). *People v. Coslet*, 67 Ill. 2d 127, 133, 364

N.E.2d 67, 70 (1977). A *per se* conflict was later defined in *People v. Spreitzer* as one where "facts about a defense attorney's status *** engender, *by themselves*, a disabling conflict." (Emphasis in original.) *People v. Spreitzer*, 123 Ill. 2d 1, 14, 525 N.E.2d 30, 34 (1988). The court explained that in every *per se* conflict case, "the conflict was created by the defense attorney's prior or contemporaneous association with either the prosecution or the victim." *Id.* The supreme court further explained:

> "The justification for treating these conflicts as *per se* has been that the defense counsel in each case had a tie to a person or entity—either counsel's client, employer, or own previous commitments—which would benefit from an unfavorable verdict for the defendant. The existence of such a tie created, in each instance, several problems. First, the knowledge that a favorable result for the defendant would inevitably conflict with the interest of his client, employer or self might 'subliminally' affect counsel's performance in ways difficult to detect and demonstrate." *Id.* at 16.

¶ 23 The court must determine if there was a *per se* conflict of interest in order to determine whether a defendant received the effective assistance of counsel. *Hernandez*, 231 Ill. 2d at 142. *Per se* conflicts of interest are divided into three categories: (1) if the attorney has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) if the attorney contemporaneously represents a prosecution witness; or (3) if the attorney was a former prosecutor who had been personally involved in the prosecution of the defendant. *People v. Fields*, 2012 IL 112438, ¶¶ 10, 18, 980 N.E.2d 35. If a *per se* conflict exits, it is presumed that the attorney's actual performance was impacted. *Id.* ¶ 18. A *per se* conflict is automatic grounds for reversal, unless the defendant waived his right to a conflict-free representation. *Hernandez*, 231 Ill. 2d at 143; *Morales*, 209 Ill. 2d at 345. A defendant

waives his right to a *per se* conflict-free representation if he was advised or was aware of the conflict and subsequently waived it. *Hernandez,* 231 Ill. 2d at 142.

¶ 24 Upon learning of a potential conflict of interest, the trial court must either appoint a different attorney or take adequate steps to determine if the risk of conflict is too remote to warrant separate counsel. *Spreitzer*, 123 Ill. 2d at 18.

¶ 25 Here, the defendant claims that attorney Freeman had a *per se* conflict of interest under the third category—attorney Freeman was a former prosecutor who had been personally involved in the prosecution of the defendant. He cites to several cases in support of his claim, but we find that they are all distinguishable.

¶ 26 In *People v. Hernandez*, the supreme court concluded that a *per se* conflict of interest existed because the attorney appointed to represent the defendant was contemporaneously also representing the defendant's victim and the victim was on the list of State witnesses to be called in the defendant's case. The court stated:

> "the *per se* conflict rule applies whenever an attorney represents a defendant and the alleged victim of the defendant's crime, regardless of whether the attorney's relationship with the alleged victim is active or not, and without inquiring into the specific facts concerning the nature and extent of counsel's representation of the victim." *Hernandez*, 231 Ill. 2d at 151-52.

¶ 27 We find that *Hernandez* is not analogous to this case because in this case there was no contemporaneous representation of the defendant and of the defendant's victim, and thus no possibility that the defendant's conviction or acquittal would conflict with another client's representation.

¶ 28 The defendant cites *Morales*, 209 Ill. 2d 340, another supreme court case, but that case too is inapposite. In *Morales*, the supreme court found that there was no *per se*

conflict. The defendant's attorney contemporaneously represented a potential, but not called, State witness. *Id.* at 346.

¶ 29 The defendant cites to and claims that *People v. Everhart*, 405 Ill. App. 3d 687, 939 N.E.2d 82 (2010), is particularly instructive. We disagree. In *Everhart*, the defense attorney promptly withdrew from representing the defendant when the State's motion to allow other crimes evidence was allowed, because the defense attorney had been the defendant's prosecutor on one of those other crimes. *Id.* at 701. The court did not rule that this situation constituted a *per se* conflict because that issue was not raised by the defendant. The court stated that the attorney's voluntary withdrawal under those circumstances was proper. *Id.* Until the State sought and was allowed to introduce other crimes evidence, the fact that the defense attorney used to be a prosecutor and had prosecuted the defendant in a prior matter was not prejudicial. The defendant had argued that the fact that his defense attorney had been his prosecutor on a different crime was prejudicial to the defense, but the appellate court disagreed. *Id.*

¶ 30 We find that the facts of *People v. Franklin*, 75 Ill. 2d 173, 387 N.E.2d 685, (1979), are similar to the facts here. In *Franklin*, the defendant's court-appointed defense attorney had prosecuted him on a different case over four years before. *Id.* at 175. In concluding that this was not a *per se* conflict, the court distinguished the facts of *Franklin* from its earlier case in *People v. Kester*, 66 Ill. 2d 162, 361 N.E.2d 569 (1977), in which the court-appointed defense attorney had previously served as a prosecutor in the same case. *Franklin*, 75 Ill. 2d at 178. The court further noted that there could be "subliminal effects" or "subtle influences" resulting in a conflict of interest despite the fact that the

earlier prosecution occurred so long before. *Id.* at 178-79 (citing *Stoval,* 40 Ill. 2d at 113 (where the defendant's defense attorney also represented the victim of the defendant's burglary, the supreme court found that this constituted a conflict of interest unfair to the defendant because the attorney's representation could have been subliminally affected), and *Kester,* 66 Ill. 2d at 163 (where the defendant's defense attorney had appeared on behalf of the prosecutor's office earlier in the same case, the court found that representing both sides in the same case could have subjected the attorney to subtle or subliminal influences from his past association with the prosecutor's office, and thus this case involved a conflict of interest)). The court in *Franklin* found that the attorney's representation was not marred by subliminal or subtle influences because the defense attorney did not have an independent recollection of that prosecution. *Id.*

¶ 31 We turn to the facts of this case to determine if there was a *per se* conflict of interest. From the record, it is clear that the defendant believed that attorney Freeman had prosecuted him at some point. He immediately brought his perceived conflict to the attention of the trial court. The trial court questioned the defendant about the prosecution, but the defendant could not provide further details, and the trial court dismissed his concerns, advising the defendant that he could either accept attorney Freeman or he could pay for his own private attorney. The trial court implored the defendant to meet with attorney Freeman to determine if he could work with him. Then at his second appearance, the defendant asked the trial court to appoint attorney Freeman to represent him because he could not afford to hire his own attorney. On the date of the defendant's plea hearing, the trial court revisited the issue of the defendant's original concern that attorney

Freeman had a conflict of interest. The defendant advised the court that he had put that behind him and that he was satisfied with attorney Freeman's representation. The record contains no documents to confirm or deny that attorney Freeman ever prosecuted the defendant.

¶ 32 We find that there was no *per se* conflict in this case. The defendant's argument is partly premised upon the fact that at the first hearing he claimed to recognize the name of the proposed defense attorney and stated that attorney Freeman could not represent him because of a conflict of interest. Defendant's utterance of that phrase does not automatically transform the "conflict" into a *per se* conflict. Furthermore, even if attorney Freeman had prosecuted the defendant, he did not prosecute the defendant in this same case. See *People v. Lawson*, 163 Ill. 2d 187, 218, 644 N.E.2d 1172, 1186-87 (1994) (where the appointed assistant public defender had previously served as the assistant state's attorney on the same case, there was a *per se* conflict of interest).

¶ 33 In addition, the defendant filed no affidavit attesting to attorney Freeman's prior prosecution. He did not attach any documents to his *pro se* postconviction petition detailing the claimed prosecution or detailing the prior charge he believes involved attorney Freeman. Section 122-2 of the Act (725 ILCS 5/122-2 (West 2012)) requires that a petitioner provide affidavits, records, or other evidence to support his allegations or explain the absence of such documentation. The purpose of this requirement is to establish that a petition's allegations are capable of objective or independent corroboration. *People v. Brown*, 2014 IL App (1st) 122549, ¶ 46, 16 N.E.3d 299. If a postconviction petition is not supported by affidavits, records, or other evidence as

required by section 122-2 of the Act, then on review, we do not need to consider if the petition sets forth the gist of a constitutional claim. *Id.*

¶ 34 Although we conclude that this was not a *per se* conflict of interest, we also find that the defendant waived any actual conflict. The defendant's waiver is the result of his "awareness" that he was formerly prosecuted by attorney Freeman; his failure to produce any supporting documents to confirm his claim; his subsequent acceptance of the appointment of attorney Freeman; his confirmation on the record that he had worked through any personal issues he had with attorney Freeman; and his statement that he was satisfied with attorney Freeman's representation. Furthermore, the defendant does not claim that there was an actual conflict—only that there was *per se* conflict. See *People v. Patterson*, 2013 IL App (2d) 120359, ¶¶ 7, 18, 997 N.E.2d 673 (where there was no *per se* conflict, the appellate court reversed the first stage dismissal and remanded on the issue of an "actual conflict" where the defendant apparently concluded that the defendant stated the gist of a constitutional claim).

¶ 35 The defendant also argues that the trial court failed to fulfill its duty to either appoint a different attorney to represent him or to ascertain that the risk of a conflict was too remote to justify doing so. *Holloway v. Arkansas*, 435 U.S. 475 (1978). Here, we find that the trial court made an effort to satisfy the question of whether the risk of a conflict was too remote. The court asked the defendant when he had been prosecuted by attorney Freeman, but the defendant did not know. In fact, the defendant could not provide any detail—not a year, the type of case, or any other fact that could have served to require further inquiry. In addition, as stated earlier, the defendant filed no affidavits, records, or

other evidence to support this argument in his petition. Accordingly, the defendant's argument fails.

¶ 36 Ineffective Assistance of Counsel

¶ 37 In order to succeed on an ineffective assistance of counsel claim, a defendant must be able to show that his attorney's representation was both objectively unreasonable and that this unreasonable representation caused prejudice—that there is a reasonable probability that without counsel's errors, the outcome of the case would have been different. *Strickland*, 466 U.S. at 687.

¶ 38 The Illinois Supreme Court has concluded that the above-stated *Strickland* test should apply at the second stage of the postconviction process when the defendant must make " 'a substantial showing of a constitutional violation.' " *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 11 n.3). At the first stage of the postconviction petition process, the court must view ineffective assistance allegations with a lower standard of pleading. *Id.* ¶¶ 19-20; *People v. Burns*, 2015 IL App (1st) 121928, ¶ 30, 47 N.E.3d 266. " 'At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced.' " (Emphases added.) *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17).

¶ 39 The defendant claims that attorney Freeman was ineffective because he did not know that the defendant's 2002 conviction had been vacated. This 2002 conviction was the basis for the State's statement that the defendant was eligible for an extended term

sentence. The 2002 conviction had been vacated more than 10 years prior to this case when the trial court granted the defendant's motion to withdraw his guilty plea. Defendant attached his affidavit to his postconviction petition attesting to the vacated 2002 conviction. The defendant alleged that he would not have pled guilty if he had known that he was not eligible for an extended term sentence.

¶ 40 During the plea hearing, the trial court specifically asked the defendant if attorney Freeman had "gone over the police reports and all of that with you?" The defendant stated that he had, but that his attorney had just received the documents that day. Attorney Freeman then stated:

> "I just got it today about a half an hour ago. I've told him that I've gone over it. I told him what I thought it initially contained and what the State's offer and what our offer—our counteroffer, and he wants to take it; and he's been through the system, so that's really his decision."

The court then reminded the defendant that he could simply have the preliminary hearing rather than a plea hearing on that date, stating, "you understand you don't have to do this today?" The defendant answered affirmatively. Then in admonishing the defendant that if he pled guilty he would not be able to have a trial, the trial court revisited the issue, stating: "Understand now, Mr. Freeman is saying that he just got these police reports today. So he's not had a lot of time to do much investigation on this. Do you understand that?" The defendant answered affirmatively. He was asked again: "Are you comfortable with this?" The defendant again answered affirmatively.

¶ 41 The defendant argues that in order for his decision to plead guilty to be deemed knowing and voluntary, attorney Freeman should have fully informed him of the facts

and the law relevant to the State's offer, and that the information should have included the accurate minimum and maximum sentences he faced. *People v. Williams*, 2016 IL App (4th) 140502, ¶ 33, 54 N.E.3d 934.

¶ 42 While we agree that it would have been beneficial if attorney Freeman had more time to review the defendant's criminal history, we do not need to determine whether or not attorney Freeman's legal assistance was ineffective because the defendant is not able to establish the second *Strickland* prong—that defendant was *arguably* prejudiced. *Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17). "A bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice." *People v. Hall*, 217 Ill. 2d 324, 335, 841 N.E.2d 913, 920 (2005) (citing *People v. Rissley*, 206 Ill. 2d 403, 458-59, 795 N.E.2d 174, 204-05 (2003)). At the plea hearing, the State set forth its evidence against the defendant on this charge of burglary. Nathan Jackson of Trenton was the victim of a burglary of his shed. A lawnmower, a gas-powered weed eater, a pressure washer, and a snow blower were taken in the burglary. Jackson would testify that he had previously hired the defendant to mow his lawn using Jackson's equipment. When the defendant finished the mowing job, the defendant had helped Jackson put the equipment back into Jackson's shed. Jesse Barton knows the defendant and had a photograph of the defendant loading a lawnmower into a truck. Jesse Barton called the police because he found a weed eater, a pressure washer, and a snow blower in his garage that he did not own. He told the Trenton police that he did not give the defendant permission to store these items in his garage. We find that in light of the evidence that would have been adduced at trial,

coupled with the defendant's lengthy criminal history as outlined at the plea hearing, the defendant cannot arguably claim that he would have insisted upon a trial. The State's evidence in support of the burglary charge was strong, especially with the photographic evidence of the defendant with the victim's lawnmower. " '[Appellant's] self-serving statements that, but for his counsel's inadequate advice he would have pleaded not guilty, unaccompanied by either a claim of innocence or the articulation of any plausible defense that he could have raised had he opted for a trial, is insufficient to demonstrate the required prejudice.' " (Emphasis omitted.) *Rissley*, 206 Ill. 2d at 459-60 (quoting *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev'd on other grounds*, 520 U.S. 751 (1997)). Here, the defendant does not claim that he was innocent but states that "there was no stolen property found in the possession of the defendant or his control" and that there "was no witness(es)" to the crime. Given the victim's anticipated testimony that the defendant had used and knew where the missing equipment was stored, the photograph Barton took of the defendant loading the victim's lawn mower onto a truck, coupled with Barton's testimony, we find that the defendant does not raise a plausible defense, and thus was not arguably prejudiced by attorney Freeman's inaccurate knowledge of the status of the defendant's 2002 conviction.

¶ 43 Furthermore, we find that the defendant affirmatively waived any claim that attorney Freeman had to spend more time researching his case. Waiver requires an intentional relinquishment of a known right. *People v. Phipps*, 238 Ill. 2d 54, 62, 933 N.E.2d 1186, 1191 (2010). The defendant clearly knew that attorney Freeman had just received the police reports and other discovery prior to the plea hearing. The defendant

said that he was ready to make his plea despite the trial court's repeated questioning about whether he wanted to wait to enter his guilty plea until after his attorney had more time to review the case file.

¶ 44 Accordingly, we find that even if the defendant's trial counsel was ineffective, the defendant was not arguably prejudiced. Alternatively, we find that he waived this issue by his in-court statements that he was aware that his attorney only had a limited review of his case and yet he wished to proceed with his guilty plea. The defendant is not able to establish a gist of a constitutional claim and the trial court did not err in summarily dismissing his postconviction petition.

¶ 45 Guilty Plea Not Knowing and Voluntary

¶ 46 The defendant finally argues that his guilty plea was not knowing and voluntary due to his attorney's ineffective assistance. The crux of this argument is that he was unable to comprehend the true maximum and minimum sentences he faced because his attorney, the trial court, and the State were under the mistaken impression that he was eligible for extended term sentencing. The prosecutor stated that "he thought" that the defendant was eligible. At sentencing, the trial court stated that the State "alleged" that he was eligible for an extended term, to which the court stated: "*If* that's the case, you could then be sentenced to up to 14 years in the Department of Corrections." (Emphasis added.)

¶ 47 We find that whether the defendant was eligible or not for an extended term sentence is immaterial because he was not sentenced to an extended term. Instead, the defendant received the minimum sentence promised as part of his negotiated plea deal. Defendant decided to plead guilty when offered the minimum sentence for a Class 2

felony. Despite the claimed extended term eligibility, the defendant was not sentenced to an extended term sentence and was sentenced in accordance with the terms of his negotiated plea deal.

¶ 48 We conclude that the defendant's claim that he did not knowingly and voluntarily plead guilty because he was incorrectly advised that he was eligible for an extended term sentence was rendered moot because the defendant received the minimum possible sentence, and thus sustained no prejudice. We affirm the trial court's order dismissing his postconviction petition as to this issue.

¶ 49 CONCLUSION

¶ 50 For the foregoing reasons, we affirm the judgment of the Clinton County circuit court.

¶ 51 Affirmed.