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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06-CF-3223
)	
ELIAS DIAZ,)	Honorable
)	Timothy Q. Sheldon,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s first-stage dismissal of defendant’s postconviction petition was affirmed where defendant failed to present the “gist” of a constitutional claim; the trial court’s dismissal of defendant’s section 2-1401(f) petition was affirmed where defendant’s conviction and sentence were not void.

¶ 2 *Pro se* defendant, Elias Diaz, appeals from the trial court’s orders dismissing his petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) and his petition for relief from judgment under section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2010)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 10, 1996, at approximately 5 a.m., six-year-old Nico Contreras was shot and killed as he slept in bed at 671 Aurora Avenue in Aurora, Illinois. The home was owned by Nico's grandparents, and Nico was spending the night in a back bedroom that was occupied at one time by Robert Saltijeral, a member of the Latin Homeboys street gang. The shots were fired through a bedroom window from the yard. Footprints in the frost on the grass revealed where the shooter or shooters stood. The crime went unsolved until 2006.

¶ 5 In January 2006, Alejandro Solis was arrested by the Aurora police on outstanding warrants. He told the police he had information regarding the Contreras murder. He cooperated with the Aurora police and the FBI and became a paid informant as of June 2006. Solis consented to the use of electronic surveillance to record conversations among himself, defendant, and others related to the Contreras murder. Detective Michael T. Nilles of the Aurora Police Department prepared a petition for an eavesdropping order. The State's Attorney authorized the petition and order, and a judge issued an order that day that allowed the overhearing and recording of conversations to which Solis was a consenting party. Certain telephone conversations between Solis and defendant were recorded.

¶ 6 On December 13, 2006, a warrant was issued for defendant's arrest on two counts of first-degree murder, and defendant was placed in custody on December 14, 2006. The matter was continued to January 26, 2007, for a preliminary hearing; however, the grand jury indicted defendant on two counts of first-degree murder on January 19, 2007. Consequently, no preliminary hearing was held.

¶ 7 At a bench trial, Alejandro Solis testified that he was the chief of the Ambrose street gang in 1996 and defendant was his second-in-command. Mark Anthony Downs and Ruben Davila were also Ambrose members. Saltijeral was a member of a rival gang, the Latin Homeboys.

Solis knew that Davila and Downs were questioned by the police in connection with the Contreras murder, and Solis decided to kill Davila, who people were saying murdered the child. At about this time, according to Solis, defendant admitted to him that he (defendant) was the one who drove Davila and Downs to Lincoln Avenue in Aurora, behind the Saltijeral home, so that Davila and Downs could kill Saltijeral. Solis testified that defendant told him that Davila and Downs got out of the car and jumped a fence, after which defendant heard shots. Then Davila and Downs reentered defendant's car, and defendant drove to his own house. According to Solis, defendant also told him that the shooting of Contreras was the reason "the .380," which was a handgun that belonged to the Ambrose street gang, was missing. Recordings of judicially authorized overhears of telephone conversations between defendant and Solis were introduced into evidence and played for the trial judge.

¶ 8 Davila testified that, before he became a member of the Ambrose street gang, he was a member of the Latin Homeboys street gang and was friends with Saltijeral. Davila testified that the house at 671 Aurora Avenue belonged to Saltijeral's parents and that he was familiar with the bedroom in which Saltijeral slept. According to Davila, on November 3, 1996, which was after he had become a member of the Ambrose gang, two members of the Latin Homeboys gang followed him home and fired shots into his car. One week later, in the early morning hours of November 10, 1996, Davila was in a car with defendant and Downs. According to Davila, defendant drove Davila and Downs to a house occupied by a man named Kenny, who gave Downs a .380 caliber handgun. Defendant then drove Davila and Downs to Saltijeral's house. Davila testified that defendant, as second-in-command of the Ambrose street gang, ordered him to kill Saltijeral in retaliation for the November 3 incident. Davila testified that Downs fired the shots through a back bedroom window, and then he and Downs ran back to the car, and

defendant drove away. Two days after the shooting, Davila witnessed Downs break apart the .380 caliber gun with a hammer and scatter the pieces in various locations. Davila testified that, in 2007, he started cooperating with the police and the FBI and became a paid informant.

¶ 9 Billie Mireles, who was serving a prison sentence in Indiana, testified that she was a member of the Ambrose street gang in 1996, and she was at a party a few days after the Contreras murder. At the party, defendant was beaten. According to Mireles, she was instructed to stitch a wound on defendant's head following the beating, and defendant repeatedly said to her that he was only the driver and asked why Davila did not also receive a beating.

¶ 10 The State presented stipulated testimony from an evidence technician that the four bullets recovered from the back bedroom of 671 Aurora Avenue were fired from the same weapon as the two bullets recovered from Contreras's body. The stipulated testimony was that all six bullets were .380 caliber.

¶ 11 Defendant called Mireles to testify in his case. Mireles testified that, at her apartment at some point after the shooting, she overheard Davila say, while intoxicated and crying, that he "didn't mean for it to happen, that he had kids of his own." Mireles further testified that she did not remember Davila saying that he actually killed someone; however, Mireles was impeached with her statement to the Indiana State Police, in which she told police that Davila said he " 'couldn't believe he killed a kid.' "

¶ 12 Kenneth Thomas, who was in the custody of the Illinois Department of Corrections for murder and other offenses, testified that in November 1996, Downs never came to his house to pick up a .380 caliber handgun. On cross-examination, Thomas admitted to being a member of the Ambrose street gang in 1996 and to possessing guns in the past. Thomas further testified that he knew defendant and Downs in 1996 and that he had heard of Davila.

¶ 13 Defendant testified on his own behalf that he was asleep at his parents' home at the time of the murder. He denied any involvement in the murder.

¶ 14 The trial court found defendant guilty of both counts of first-degree murder. The court denied defendant's motion for a new trial and sentenced defendant to 60 years' imprisonment. Defendant filed a motion to reconsider sentence, which the trial court denied. This court affirmed defendant's conviction and sentence on direct appeal. *People v. Diaz*, No. 2-09-0199 (unpublished order under Supreme Court Rule 23).

¶ 15 On February 15, 2011, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure. The trial court *sua sponte* dismissed the petition, reasoning that a section 2-1401 petition was an improper vehicle for defendant's claims, and granted defendant leave to file a postconviction petition.

¶ 16 On May 18, 2011, through counsel, defendant filed a postconviction petition in which he incorporated and re-alleged all of the claims from his section 2-1401 petition. Defendant alleged, among other things, that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence on direct appeal. On July 27, 2011, the trial court *sua sponte* dismissed the petition, finding that it failed to state the gist of a constitutional claim. The court determined that the record positively rebutted defendant's ineffective-assistance-of-appellate-counsel claim, because the evidence "was more than sufficient" to establish defendant's guilt. Defendant timely filed a notice of appeal, which is the subject of appeal No. 2-11-0877.

¶ 17 On October 7, 2011, defendant filed a *pro se* petition for relief from judgment under section 2-1401(f) of the Code of Civil Procedure. Defendant alleged, among other things, that his conviction and sentence were void because section 109-3.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/109-3.1 (West 2010)) was unconstitutional in that it conflicted

with article 1, section 7, of the Illinois constitution (Ill. Const. 1970, art. I, § 7). On December 14, 2011, the trial court *sua sponte* dismissed the petition. Defendant timely filed a notice of appeal, which is the subject of appeal No. 2-12-0080.

¶ 18

II. ANALYSIS

¶ 19

A. Defendant's Postconviction Petition

¶ 20 The Act provides a method by which a criminal defendant can assert that a conviction was the result of “a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both.” 725 ILCS 5/122-1(a)(1) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Proceedings in noncapital cases are divided into three stages. *Hodges*, 234 Ill. 2d at 9; *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, if the trial court determines that a petition “is frivolous or is patently without merit,” it can summarily dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10. The allegations in the petition, taken as true and liberally construed, need only present the “gist” of a constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 21 To present the “gist” of a claim, the petition need only have an “ ‘arguable basis either in law or in fact.’ ” *Brown*, 236 Ill. 2d at 184-85 (quoting *Hodges*, 234 Ill. 2d at 16). A petition has no arguable basis in law when it is based upon an “indisputably meritless legal theory.” *Brown*, 236 Ill. 2d at 185; *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in fact when it is based upon “[f]anciful factual allegations,” such as “those that are fantastic or delusional.” *Brown*, 236 Ill. 2d at 185; *Hodges*, 234 Ill. 2d at 17.

¶ 22 If a petition survives to the second stage, counsel may be appointed to an indigent defendant, and the State will be allowed to file responsive pleadings. 725 ILCS 5/122-4, 122-5 (West 2010); *Hodges*, 234 Ill. 2d at 10-11. If the petition advances to the third stage, the court

conducts an evidentiary hearing. 725 ILCS 122-6 (West 2010); *Edwards*, 197 Ill. 2d at 246. An appellate court's review of the first-stage dismissal of a postconviction petition is *de novo*. *Brown*, 236 Ill. 2d at 184.

¶ 23 Defendant argues that appellate counsel was ineffective for failing to challenge on direct appeal the sufficiency of the evidence. Under *Strickland v. Washington*, 466 U.S. 668 (1984), to succeed on an ineffective-assistance-of-counsel claim, a defendant must show both (1) that counsel's performance fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 694; *People v. Manning*, 241 Ill. 2d 319, 326 (2011). When challenging appellate counsel's performance, a defendant "must show that appellate counsel's failure to raise [an] issue was objectively unreasonable and prejudiced the defendant." *People v. Simms*, 192 Ill. 2d 348, 362 (2000). However, "a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal." *Simms*, 192 Ill. 2d at 362. At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel is sufficient if it is "arguable" that both *Strickland* prongs were met. *Brown*, 236 Ill. 2d at 185; *Hodges*, 234 Ill. 2d at 17.

¶ 24 Defendant has failed to establish that it is arguable that he was prejudiced by appellate counsel's failure to challenge the sufficiency of the evidence on direct appeal. When presented with a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S.

307, 319 (1979)). The section of defendant's brief addressing the sufficiency of the evidence consists of the background section of this court's decision affirming defendant's conviction and sentence on direct appeal, copied word for word, with no citations to the pages of the record relied upon. At the conclusion of the section, defendant conclusorily asserts that "this is not evidence of guilt beyond a reasonable doubt" and cites boilerplate law regarding the burden of proof at a criminal trial. Defendant's failure to articulate a coherent argument supported by citations to the record subjects his argument to forfeiture. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (requiring the argument section of an appellant's brief to "contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"); *In re Estate of Doyle*, 362 Ill. App. 3d 293, 301 (2005) ("[A] court of review is entitled to have issues clearly defined with pertinent authority cited and coherent arguments presented or the inadequately presented argument is deemed forfeited.").

¶ 25 Forfeiture aside, the evidence against defendant was overwhelming, and it is not arguable that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence on direct appeal. Solis, the leader of the gang in which defendant was second-in-command, testified that defendant admitted to driving Davila and Downs to the house where six-year-old Contreras was shot and killed through the bedroom window. Davila testified that defendant ordered him to kill Saltijeral, a rival gang member who at one time occupied the bedroom in which Contreras was sleeping when he was killed. Davila further testified that defendant drove Davila and Downs to Saltijeral's house and that Downs fired the shots through a back bedroom window using a .380 caliber handgun. Mireles testified that she was a member of defendant's gang and that, a few days after the Contreras murder, she witnessed defendant being beaten at a party. According to Mireles, following the beating, defendant repeatedly said that he was only the

driver and asked why Davila did not also receive a beating. Evidence also established that all of the bullets fired into the bedroom, including those bullets recovered from Conteras's body, were fired from the same .380 caliber weapon. In light of the evidence presented at trial, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Although defendant testified that he was at home at the time of the murder, the trier of fact was responsible for weighing the evidence, assessing the credibility of witnesses, resolving conflicts in the evidence, and drawing reasonable inferences and conclusions from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Consequently, it is not arguable that appellate counsel was ineffective for failing to raise a meritless issue on direct appeal, and the trial court properly dismissed defendant's postconviction petition at the first stage.

¶ 26 Defendant next contends that the court erred when it summarily dismissed his postconviction claim of actual innocence. Defendant begins his argument by asserting that "[t]he record indicates that on August 20, 2012 the lower court dismissed [defendant's] petition for post-conviction relief based upon newly discovered evidence." Defendant does not cite any pages of the record. Our review of the record does not reveal either an order dated August 20, 2012, or a postconviction claim of actual innocence. Furthermore, in his brief, defendant repeatedly discusses "Down's affidavit," but the record contains no such affidavit. Even if the record contained an order dated August 20, 2012, defendant did not file a notice of appeal from an order entered on that date, so we would lack jurisdiction to review it. Ill. S. Ct. R. 301 ("The appeal is initiated by filing a notice of appeal. No other step is jurisdictional.").

¶ 27 Defendant's final three arguments are that (1) his conviction was void because the trial court lacked "inherent authority" to find him guilty of first-degree murder based on an accountability theory; (2) his sentence was void because the indictment did not allege that he was

guilty of first-degree murder based on an accountability theory; and (3) his conviction was void because the trial court exceeded its jurisdiction when it convicted him based on an indictment that did not charge an offense. These three arguments do not correspond to any claims in defendant's postconviction petition contained in the record. Nevertheless, because the three arguments all allege in various ways that defendant's conviction and sentence are void because the trial court lacked jurisdiction, we will address them. See *People ex rel. Jackson v. Mannie*, 393 Ill. App. 3d 745, 748 (2009) ("It is well established that where the circuit court lacked subject matter jurisdiction, or the inherent power to enter the particular order at issue, the court's judgment or order is void and may be attacked at any time in any court.").

¶ 28 Defendant's arguments are without merit. A void order is one entered by a court lacking jurisdiction. *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 16. A trial court's jurisdiction is not conferred by information or indictment, but rather by the Illinois constitution. *People v. Hughes*, 2012 IL 112817, ¶¶ 20, 27; *People v. Benitez*, 169 Ill. 2d 245, 256 (1996). Even a defective indictment that fails to charge an offense does not deprive a trial court of jurisdiction. *Benitez*, 169 Ill. 2d at 256. Here, the State indicted defendant on two counts of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2006)), which was sufficient to invoke the trial court's jurisdiction. See *Hughes*, 2012 IL 112817, ¶ 28 ("[T]he only consideration is whether the alleged claim falls within the general class of cases that the court has the inherent power to hear and determine." (Internal quotation marks omitted.)). Because the trial court had jurisdiction, defendant's conviction and sentence are not void.

¶ 29 B. Defendant's Section 2-1401(f) Petition

¶ 30 Section 2-1401 of the Code of Civil Procedure provides a mechanism for the vacatur of a final judgment older than 30 days. 735 ILCS 5/1-1401(a) (West 2010); *People v. Nitz*, 2012 IL

App (2d) 091165, ¶ 9. Ordinarily, the petition must be filed no later than two years after the entry of the order or judgment. 735 ILCS 5/2-1401(c) (West 2010); *Hubbard*, 2012 IL App (2d) 101158, ¶ 13. The two-year limitations period does not apply to petitions under section 2-1401(f), however, which allows for relief from void orders or judgments. 735 ILCS 5/2-1401(f) (West 2010); *Hubbard*, 2012 IL App (2d) 101158, ¶ 13. A trial court may *sua sponte* dispose of a section 2-1401 petition “when it is clear on its face that the requesting party is not entitled to relief as a matter of law.” *People v. Vincent*, 226 Ill. 2d 1, 12 (2007). An appellate court’s review of the dismissal of a section 2-1401 petition is *de novo*. *Vincent*, 226 Ill. 2d at 13.

¶ 31 Defendant contends that his conviction and sentence are void because section 109-3.1 of the Code of Criminal Procedure is unconstitutional in that it conflicts with article 1, section 7, of the Illinois constitution. Defendant filed his petition more than two years after his conviction and sentence were entered, so section 2-1401(f) provides his only avenue for relief. To be entitled to relief, defendant must establish that his conviction and sentence are void.

¶ 32 Article 1, section 7, of the constitution provides, “No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause.” Ill. Const. 1970, art. 1, § 7. Section 109-3.1 of the Code of Criminal Procedure, in turn, provides in pertinent part that “[e]very person in custody in this State for the alleged commission of a felony shall receive either a preliminary examination *** or an indictment by Grand Jury *** within 30 days from the date he or she was taken into custody.” 725 ILCS 5/109-3.1 (West 2010).

¶ 33 We need not address defendant’s challenge to the constitutionality of section 109-3.1. See *People v. Nash*, 173 Ill. 2d 423, 432 (1996) (reviewing court should not reach constitutional

issues if the case can be determined on other grounds). As noted above, a trial court's jurisdiction is not conferred by information or indictment, but rather by the Illinois constitution. *Hughes*, 2012 IL 112817, ¶¶ 20, 27; *Benitez*, 169 Ill. 2d at 256. Even if section 109-3.1 were unconstitutional, the trial court in this case had jurisdiction, and defendant's conviction and sentence are not void. See *Hubbard*, 2012 IL App (2d) 101158, ¶ 16 (a void order is one entered by a court lacking jurisdiction).

¶ 34 Moreover, “[t]he purpose of the right to a prompt preliminary hearing is to ensure that a defendant will not be held in custody or to bail, that is, that his freedom will not be restricted, without a prompt showing of evidence that a crime has been committed.” *People v. Clarke*, 231 Ill. App. 3d 504, 508 (1992). The United States Supreme Court has held that “although a suspect who is presently detained may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that defendant was detained pending trial without a determination of probable cause.” *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); see also *People v. Hendrix*, 54 Ill. 2d 165, 169 (1973) (“The second paragraph of section 7 [of article I of the Illinois constitution] does not provide a grant of immunity from prosecution as a sanction for its violation.”). Thus, even if defendant is correct that section 109-3.1 is unconstitutional and that he was entitled to a preliminary hearing despite having been indicted by the grand jury, it would not render his conviction and sentence void.

¶ 35 Defendant also alleged in his section 2-1401(f) petition that trial counsel was ineffective for failing to challenge the constitutionality of section 109-3. Even if trial counsel were ineffective, it would not render defendant's conviction and sentence void. Moreover, our supreme court has “long held that section 2-1401 proceedings are not an appropriate forum for ineffective-assistance claims because such claims do not challenge the factual basis for the

judgment.” *People v. Pinkonsly*, 207 Ill. 2d 555, 567 (2003). The trial court properly dismissed defendant’s section 2-1401(f) petition.

¶ 36

III. CONCLUSION

¶ 37 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 38 Affirmed.