NO. 4-09-0523

Filed 1/26/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARK A. WINGER, Defendant-Appellant.	)	Appeal from Circuit Court of Livingston County No. 06CF44
	)	Honorable Jennifer H. Bauknecht, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court. Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

Held: Where defendant's allegations in his postconviction petition were meritless, contradicted by the record, or forfeited, the trial court did not err in summarily dismissing the petition.

In June 2007, a jury found defendant, Mark A. Winger, guilty of two counts of solicitation of murder. In July 2007, the trial court sentenced him to two concurrent 35-year prison terms to be served concurrently with a previous life sentence. This court affirmed his convictions and sentences. In April 2009, defendant filed a *pro se* petition for postconviction relief. In July 2009, the trial court dismissed the petition, finding it frivolous and patently without merit.

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

I. BACKGROUND

In February 2006, the State charged defendant by information with two counts of solicitation of murder (720 ILCS 5/8-1.1(a) (West 2006)). The State alleged defendant, with the intent that the offense of first degree murder be committed upon DeAnn Anderson (count I) and Jeffrey Gelman (count II), requested that Terry Hubbell arrange for a third person or persons to commit the first degree murder of Anderson and Gelman. Defendant pleaded not guilty.

In February 2007, defendant filed a motion *in limine*, stating no enhanced or modified recording of conversations between him and a paid informant should be allowed into evidence without a proper hearing. Defendant also filed a motion to suppress, seeking suppression of all recorded statements of defendant. The trial court denied the motions and allowed the recordings to be admitted into evidence.

In June 2007, defendant's jury trial commenced. At the time of trial, defendant was serving a life sentence at Pontiac Correctional Center for his 2002 convictions for murdering his wife and another man in Sangamon County. *People v. Winger*, No. 4-02-0631 (May 14, 2004) (unpublished order under Supreme Court Rule 23). Terry Hubbell testified he was serving a life sentence at Pontiac Correctional Center for a 1992 conviction for murder. Hubbell met defendant while they were in prison. In May and June

2005, defendant approached Hubbell in the recreation yard and mentioned his desire "to get rid of a witness in his case." Defendant named the witness as DeAnn Anderson or Shultz. Hubbell initially blew it off "because everybody that is in prison pretty well says they would like to get rid of a witness in their case." Hubbell stated the issue came up "repeatedly" and he eventually contacted a private investigator who worked on his case. Hubbell hoped to receive consideration for himself.

In June 2005, Hubbell received a written plan from defendant setting forth defendant's idea to have something done to Anderson. Hubbell was supposed to look over the document and return it to defendant. Hubbell gave the original to a correctional officer, and it was later returned to Hubbell.

Sometime later, Special Agent Peter Buckley of the Federal Bureau of Investigation (FBI) and Special Agent Casey Payne of the Illinois State Police approached Hubbell and inquired about him wearing a device to record his conversations with defendant. Hubbell agreed and wore the concealed recorder while he engaged in conversation with defendant in the recreation yard. The tape of the conversation was played for the jury, and a transcript was also provided. Hubbell stated the conversation concerned "killing DeAnn Anderson and Gelman, Jeff Gelman and his family." Further, Hubbell understood defendant's document to be "the directions of how it was supposed to happen."

Edward Vilt, a correctional officer at Pontiac Correctional Center, testified Hubbell approached him in May and June 2005. Hubbell produced approximately 20 pages of handwritten notes allegedly authored by defendant. Vilt made copies and returned the original to Hubbell.

Special Agent Buckley testified he was assigned to this case in May 2005. Thereafter, he contacted Anderson and Gelman about the possible threats. Buckley then obtained Hubbell's consent to place a recording device on his person to record conversations with defendant. Sometime after the overhear, Buckley met with defendant in a prison interview room. Defendant indicated he thought Buckley wanted to talk about Anderson's possible involvement in defendant's original murder case. When defendant discovered that was not the intent of the meeting, he stated he had nothing more to say. He did make the comments there were "some people that he wished would not wake up in the morning" and that "so many things go against a man, that a man has to do what a man has to do."

Steven Weinhoeft testified he is first assistant State's Attorney in Sangamon County and prosecuted defendant's murder case. Weinhoeft stated he was familiar with Anderson as she was "an extraordinarily important witness to the case." Anderson coming forward "really helped reopen the case" because she testified to statements made by defendant that were "very

highly indicative of guilt."

Special Agent Payne testified for the defense. She stated the FBI signed on Hubbell as a cooperating witness. Hubbell wanted his mother's phone bill paid and a transfer to another prison where he could obtain a job. Special Agent Buckley stated Hubbell received $3,250 on his behalf.

Defendant testified in his own defense. He met Hubbell in prison in November 2004. Defendant admitted writing the document, stating it was an "iterative process" of fantasy that had been bandied about the recreation yard. He stated it took him five months to write the 19 pages of material but he never had any intent it would be taken as a serious plan of action. Instead, defendant stated he wrote it to "pass the time" and to release his anger and bitterness at being wrongfully convicted.

Defendant testified he knew Jeff Gelman but was not angry at him for not posting bond. Defendant stated he did not want Anderson or Gelman to be murdered. Defendant claimed Hubbell was "scamming" him, but defendant could not confront him because Hubbell was "extremely dangerous." Defendant also stated he never gave any money or anything of value to Hubbell in furtherance of any solicitation of a crime.

On cross-examination, defendant testified Gelman was a wealthy man and Anderson was an important witness in his murder trial. He knew a recantation claim from her would be important

to him personally, although courts find recantations inherently unreliable. Defendant claimed Hubbell "outsmarted" him with details from defendant's life.

Following closing arguments, the jury found defendant guilty on both counts. In July 2007, defendant filed a motion for a new trial and other posttrial relief, which the trial court denied. Thereafter, the court sentenced defendant to concurrent 35-year prison terms on each count, with both counts to run concurrently with his murder conviction from Sangamon County.

Defendant appealed, arguing (1) the State failed to prove him guilty on one count of solicitation of murder, (2) the trial court erred in shackling him to the floor, and (3) the court erred in allowing an eavesdrop recording to be admitted as evidence without a proper foundation. This court affirmed his convictions and sentences. *People v. Winger*, No. 4-07-0636 (December 3, 2008) (unpublished order under Supreme Court Rule 23).

In April 2009, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2008)) and for relief from judgment under section 2-1401(c) of the Code of Civil Procedure (735 ILCS 5/2-1401(c) (West 2008)). Defendant raised the following issues: (1) state and federal authorities engaged in collusion to circumvent the Illinois eavesdropping statute; (2) his

conviction rested on evidence obtained from the improper eavesdrop; (3) his right to due process was violated when law-enforcement officers gave false testimony and the prosecutor failed to correct the untrue statements; (4) his right to due process was violated when the State suppressed or destroyed relevant evidence; (5) his right to due process was violated when Weinhoeft gave testimony at trial that contradicted evidence presented at defendant's 2002 murder trial; (6) the prosecutor withheld material evidence from the defense and knowingly failed to correct false testimony by law-enforcement officers at the hearing on the motion to suppress, or defense counsel received the evidence and was ineffective for failing to use it as impeachment; (7) appellate counsel was ineffective for failing to obtain transcripts of his 2002 murder trial to show Weinhoeft gave contradictory testimony as well as not arguing statements allegedly made by defendant were improperly admitted; (8) he was questioned about the murders without his attorney being present; and (9) the State's prosecution of the solicitation charges was meant to interfere with his postconviction proceedings in Sangamon County.

In July 2009, the trial court found defendant's postconviction petition was frivolous and patently without merit. The court stated all of the issues but one involved matters that were raised or could have been raised on direct appeal. The

nonevidentiary claim involving ineffective assistance of appellate counsel stated only conclusions. The court dismissed the postconviction petition. The court also dismissed the petition for section 2-1401 relief, finding defendant failed to set forth even the basic elements of such a claim. This appeal followed.

II. ANALYSIS

Defendant argues the trial court erred in summarily dismissing his postconviction petition. We disagree.

The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-

2.1(a)(2) (West 2008). Our supreme court has held "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

"In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2008); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2008). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. King*, 395 Ill. App. 3d 985,

987, 919 N.E.2d 958, 960 (2009).

A. State and Federal Collusion

In his direct appeal, defendant argued the trial court erred in allowing the eavesdrop recording to be admitted into evidence because the State failed to establish a foundation that the recording was obtained in accordance with Illinois and federal requirements. This court found the trial court's admission of the recording into evidence was not an abuse of discretion. *Winger*, No. 4-07-0636, slip order at 19.

In his postconviction petition, defendant argued new evidence showed state and federal authorities engaged in collusion to circumvent the requirements of the Illinois eavesdropping law. Defendant attached to his petition portions of transcripts and exhibits he received through Freedom of Information Act (FOIA) requests (5 U.S.C. §552 (2006)). He claimed these items showed the investigation into his crimes was a state investigation requiring Illinois law to be followed.

Under the eavesdropping statute in section 14-2 of the Criminal Code of 1961 (720 ILCS 5/14-2 (West 2006)), the General Assembly prohibits "recording conversations unless all the parties consent or one party consents and prior judicial authorization is obtained." *People v. Coleman*, 227 Ill. 2d 426, 434, 882 N.E.2d 1025, 1029 (2008). The federal eavesdropping statute is less stringent and only requires one party to give prior

consent to the eavesdrop. 18 U.S.C. §2511(2)(c) (2006); see also *United States v. Barone*, 913 F.2d 46, 49 (2d Cir. 1990) (since the government made the recording with the informant's consent, there was no need to inform the defendant or obtain a court order).

Our supreme court has held "electronic surveillance evidence gathered pursuant to federal law, but in violation of the eavesdropping statute, is not inadmissible absent evidence of collusion between federal and state agents to avoid the requirements of state law." *Coleman*, 227 Ill. 2d at 439, 882 N.E.2d at 1032. "'Collusion' means '"secret agreement; secret cooperation for a fraudulent or deceitful purpose."'" *People v. Burnom*, 338 Ill. App. 3d 495, 509, 790 N.E.2d 14, 26 (2003) (quoting *People v. Hodge*, 220 Ill. App. 3d 886, 889, 581 N.E.2d 334, 336 (1991), quoting Webster's Third New International Dictionary, 446 (1976)-).

At the hearing on defendant's motion to suppress, Special Agent Buckley testified FBI Special Agent Robert Hardesty, now deceased, received information about the murder-for-hire scheme on April 13, 2005. Buckley stated an Assistant United States Attorney felt on April 17, 2005, that the case was better suited for the Illinois State Police. On April 24, 2005, the United States Attorney's office contacted the FBI and indicated its desire that the FBI look into the matter. Buckley then

became involved, and he noted the federal government had an interest in the case given the federal murder-for-hire statute and the possible interstate use of the mail and telephones along with an out-of-state victim. The State was also involved given the Illinois statute and because the primary actors were in Illinois.

Buckley stated he and Special Agent Payne were co-case agents. No discussion ever took place that the involvement of the FBI was simply to circumvent the state eavesdropping statute. While the joint investigation proceeded, Buckley stated he assumed the case was "going to go federal" and wanted to make sure he did everything according to federal guidelines. The investigation revealed evidence defendant was planning to kill individuals related to his previous murder conviction. Investigators wanted to get defendant to admit "in his own words" his involvement in the murder-for-hire scheme and they decided on a body recording to capture conversations between defendant and the informant. The recording took place on June 13, 2005.

FBI policy required Buckley to go through his supervisor and above to receive permission to use the recording device as well as permission from the informant. Buckley submitted the necessary notification to his supervisors. He also submitted federal form FD-759, an internal document that acted as an additional hurdle to ensure compliance with federal law. He

stated it included "sensitive techniques" the FBI does not want to divulge.

As of June 13, 2005, Buckley stated it had not been determined whether the United States Attorney's office would prosecute the case. An investigation continues even though the FBI is out of the case. Buckley stated it was FBI policy to maintain an open file until a prosecution, whether it be in state or federal court. The final decision declining federal prosecution was made on January 6, 2006.

Special Agent Payne testified she became involved in the case in May 2005 after the FBI contacted the Illinois State Police. Since both Illinois and federal statutes set forth the offense of murder-for-hire, and as it was impossible to predict where the evidence was going to lead, a joint investigation was conducted. Payne stated she was "on board to investigate" in case the matter did not proceed to federal court. Payne did not consider herself to be solely in charge of the investigation. Instead, she felt she and Agent Buckley were both in charge at different points in the investigation depending on who was doing what. She anticipated federal charges being filed. She and Agent Buckley never had any discussions about getting around state eavesdropping provisions. They did, however, discuss the possibility of obtaining authority for the eavesdrop under Illinois law.

On May 18, 2005, Payne wrote a report indicating the United States Attorney declined involvement in the case. Shortly thereafter, Payne became aware the federal prosecutor wanted the FBI to pursue the investigation.

It should be noted defendant's exhibits show dates that differ from Agent Buckley's testimony. Exhibit H-1.2, an FBI document, indicates the FBI received a declination of federal prosecution on May 17, 2005. On May 24, 2005, the federal prosecutor reversed that decision. That same day, the FBI contacted the Illinois State Police, and the State Police indicated it had conducted some preliminary investigation, including covering defendant's prison mail and making a request to record his telephone calls. Both entities agreed to investigate the matter as a team.

In its initial brief, the appellate defender references May 17 and May 24, 2005, but in the reply brief, April 17 and April 24, 2005, are listed. At one point in the hearing on the motion to suppress, the trial court asked Agent Buckley if he meant May 24 when he previously referred to April 24. Buckley thought the correct month was April but stated he would need to review his notes. The matter was not cleared up, but, in the end, it does not impact our analysis.

A review of the allegations in defendant's petition, together with the transcripts and exhibits, fail to show any

evidence of collusion between the FBI and the State Police. Instead, the evidence indicates an ongoing, dual investigation between federal and state authorities.

Defendant argues that on May 24, 2005, when the federal prosecutor decided the FBI should investigate, nothing conferred jurisdiction on federal authorities. However, the job of the FBI is to investigate. In the initial stages of the investigation, the FBI may not have all the facts necessary for a federal prosecution, but that does not preclude an investigation. In April or May 2005, the FBI became aware of a murder-for-hire plot being discussed inside Pontiac Correctional Center, thereby justifying an investigation. See *United States v. Bunchan*, 626 F.3d 29, __ (1st Cir. 2010) (where a fellow inmate contacted the FBI after learning of the defendant's murder-for-hire plot and the defendant later sent a letter through the outgoing prison mail to a "hit man"). In a prison environment, one could readily assume the mail or a facility of interstate commerce, *i.e.*, a telephone (see *United States v. Covington*, 565 F.3d 1336, 1343 (11th Cir. 2009)), would be used in a murder-for-hire plot unless, for example, the criminal mastermind on the inside of the secured walls of the penitentiary wanted to take the chance and meet with his same-state conspirator in the monitored visiting area to discuss the future demise of their same-state victim.

In the case *sub judice*, the evidence shows that, at the

time of the body recording, the FBI was aware a possible target of the plot lived in Florida. The federal wiretap statute (18 U.S.C. §2516 (2006)) authorizes wiretaps in cases involving the federal murder-for-hire statute (18 U.S.C. §1958 (2006)). Nothing shows any evidence of collusion. See *Basham v. Kentucky*, 675 S.W.2d 376, 381-82 (1984) (stating collusion would be found if no federal investigation was in progress and no reason to believe a federal offense existed that would fall under the federal wiretap statute).

Defendant's argument the case was initially a state investigation is of little consequence. That the state may have initiated an investigation does not preclude federal involvement. Moreover, Agent Buckley conducted the investigation as if it was a federal matter, and once Agent Payne came on board, she anticipated federal charges would be brought. "Sharing information and combining their efforts is cooperation, not collusion." *Basham*, 675 S.W.2d at 382; see also *Coleman*, 227 Ill. 2d at 439, 882 N.E.2d at 1032; *Hodge*, 220 Ill. App. 3d at 889, 581 N.E.2d at 336 ("cooperation should be encouraged by the court, not deterred under the guise of a conspiracy or plot to evade the State criminal code"). The record is completely devoid of any evidence of collusion, and defendant's allegations are baseless and without merit.

Defendant argues that, even if no collusion can be

shown, the eavesdrop was improper because the FBI has no record of the form FD-759 that Buckley testified he submitted to obtain authorization. We note one of the issues raised on direct appeal was that the recording was erroneously admitted where the State failed to establish a foundation the recording was obtained in compliance with federal procedures, where the FD-759 document was not produced. Agent Buckley testified he submitted the form and followed the requisite federal guidelines in obtaining the authorized body recording. That defendant's FOIA request showed no record of FD-759 being filed does not show a constitutional violation.

B. Destruction or Withholding of Evidence

Defendant argues the prosecution withheld or destroyed evidence that could have been used to impeach the State's witnesses and suppress the recorded conversation. We disagree.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court held the prosecution must disclose evidence that is favorable to the accused and "material either to guilt or to punishment." The State's duty to disclose encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

In Illinois, the *Brady* rule has been codified in Supreme Court Rule 412. Ill. S. Ct. R. 412(c) (eff. March 1, 2001). To succeed on a claim of a *Brady* violation, the defendant

must show the following:

> "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either wilfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. [Citations.] Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. [Citations.] To establish materiality, an accused must show '"the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."' [Citations.]" *Beaman*, 229 Ill. 2d at 73-74, 890 N.E.2d at 510.

Defendant argues the State knowingly withheld or destroyed evidence that would have refuted claims made by Buckley and Payne at the hearing on the motion to suppress. Defendant cites three exhibits to support his contention.

Defendant argues exhibit H, the FBI investigation document referenced above, could have been used to show the

federal authorities lacked jurisdiction to investigate the case. However, exhibit H offers nothing that would preclude either federal investigation into the murder-for-hire plot or cooperation with state authorities. Moreover, Gelman, the Florida resident, was known to the FBI at the time of the body recording in June 2005. Exhibit H would not have been impeaching.

Exhibit I consisted of two letters from the FBI concerning defendant's FOIA requests for form FD-759. The letters indicate a search of FBI records revealed no such form. Defendant argues exhibit I could have been used to impeach Buckley. However, none of the documents state that Agent Buckley did not submit the FD-759 form or that it does not exist. That the document could not be found does not show a constitutional violation.

Exhibit J is the response of the Department of Corrections (Department) to defendant's FOIA request. Defendant sought a copy of the warrant or order authorizing Pontiac Correctional Center to record his conversations in May or June 2005. The Department denied the request. Had he had a copy of the warrant, defendant argues he may have been able to impeach the testimony of Buckley or Payne as to how they obtained authority to record Hubbell's conversation with him.

Exhibit J was not material in this case. The June 13, 2005, recording was lawfully obtained under the federal guide-

lines. Thus, the warrant would not have impeached the testimony of Buckley or Payne. Even considering the specified exhibits, defendant's allegations in his postconviction petition fail to establish a constitutional violation that the prosecutor withheld or destroyed material evidence that would have helped his defense.

C. Right to a Fair Trial

Defendant argues he set forth an arguable claim he was denied his right to a fair trial when the prosecutor knowingly failed to correct the false testimony of Buckley and Payne regarding federal jurisdiction to investigate and Buckley's testimony as to the FD-759 form. These arguments are clearly baseless, as nothing shows Buckley or Payne gave false testimony that would require the prosecutor to correct.

Defendant also argues the prosecutor should not have presented the testimony of Steven Weinhoeft, the assistant State's Attorney who prosecuted defendant at his Sangamon County murder trial. Defendant states Weinhoeft testified DeAnn Anderson was "extremely important" to the murder case and it was only after she came forward with new evidence that the case was reopened.

On the other hand, defendant states Springfield police officer Doug Williamson testified the reason for reopening the case was not Anderson but a change in command in the police

department. Defendant claims Williamson's testimony directly contradicted that of Weinhoeft, would have weakened any motive to have her killed, and the prosecutor should not have presented Weinhoeft's testimony at trial as evidence of defendant's motive to commit the crime.

We note this argument could have been raised on direct appeal. Defendant, however, argues appellate counsel was ineffective for failing to raise the issue.

> "A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating that such failure was objectively unreasonable and that counsel's decision prejudiced defendant. If the underlying issue is not meritorious, then defendant has suffered no prejudice." *People v. Enis*, 194 Ill. 2d 361, 377, 743 N.E.2d 1, 11 (2000).

Here, defendant's claim that Weinhoeft's and Williamson's testimony conflicted such that Weinhoeft should not have testified as to motive is clearly baseless. Defendant has shown nothing more than two witnesses, one a prosecutor and the other an investigator, giving different interpretations as to why, in their minds, defendant's Sangamon County murder case was reopened. As this issue has no merit, appellate counsel was not

ineffective for not raising it on direct appeal.

D. Remaining Allegations

In his brief on appeal, defendant claims he made other allegations in his postconviction petition pertaining to his right to counsel and the State's solicitation-of-murder charges that justified the appointment of counsel and an evidentiary hearing. He offers no argument or citation to case law in support of his contentions.

In his petition, defendant alleged his right to counsel was violated when, during the investigation of this case, he was questioned about the charges in his 2002 Sangamon County case outside the presence of his attorney. He also claimed the prosecution brought the solicitation-of-murder charges to interfere with his postconviction proceedings in Sangamon County. These issues could have been raised on direct appeal but were not. Thus, the issues are forfeited now on appeal. See *People v. Blair*, 215 Ill. 2d 427, 443, 831 N.E.2d 604, 614-15 (2005).

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

Affirmed.