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March 15, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTHONY L. FLETCHER, Defendant-Appellant.	)	Appeal from Circuit Court of McLean County No. 06CF447 Honorable Kevin P. Fitzgerald, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and Turner concurred in the judgment.

ORDER

¶ 1 Held: Defendant's appeal presents no meritorious issues that can be raised. The motion of the office of the State Appellate Defender to withdraw as counsel on appeal is granted and the judgment of the trial court is affirmed.

¶ 2 This consolidated appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised. We agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Defendant's Trial

¶ 5 In May 2006, defendant, Anthony Fletcher, aged 42, was charged with 4 sex offenses against 2 females, A.S. and H.L., both at least 13 years old, but under 17 years of age. In count 1, the State alleged defendant committed aggravated criminal sexual abuse in that he,

using his mouth, committed an act of sexual penetration with H.L.'s vagina (720 ILCS 5/12-16(d) (West 2006)). According to count 2, defendant committed aggravated criminal sexual abuse against A.S. by penetrating her vagina with his penis (720 ILCS 5/12-16(d) (West 2006)). In count 3, the State alleged defendant knowingly photographed H.L. and H.L. was depicted as engaged in an act of masturbation (720 ILCS 5/11-20.1(a)(1) (West 2006)). In count 4, the State charged defendant knowingly photographed A.S. actively or by simulation engaged in an act of intercourse with defendant (720 ILCS 5/11-20.1(a)(1) (West 2006)).

¶ 6 At the May 2007 jury trial, evidence established 14-year-old A.S. first met defendant at his Bloomington home. She visited there a few times in late April and early May 2006. She initially went with H.L. to defendant's house because defendant "was going to paint our clothes."

¶ 7 A.S. did not recall what she did upon arriving at defendant's house, but while there, she consumed alcohol and used marijuana—both of which were provided by defendant. H.L. and A.S. became intoxicated. A.S. remembered changing clothes in the bathroom. She identified herself in certain photographs apparently taken that night. The majority of the photographs were taken in defendant's bedroom.

¶ 8 A.S. identified herself in a video presented by the State. She and defendant had sex that evening, and A.S. stayed "[p]retty late" at defendant's house. The next day, A.S. told defendant to delete the photos. She told defendant she was 15.

¶ 9 On cross-examination, A.S. did not remember the photographs being taken, but did remember having sex with defendant. A.S. also remembered another black man holding her skirt up. A.S. stated she smoked "[a] couple blunts" of marijuana that day, but did not know the

amount she smoked.

¶ 10 H.L. testified, in May 2006, she was 16. She and A.S. had been friends for a few months when the offenses occurred. In April 2006, H.L. and A.S. stopped at defendant's house. H.L. confirmed A.S.'s testimony regarding the idea defendant would do airbrush painting on their clothes. H.L. told defendant she was 16.

¶ 11 H.L. and A.S. later returned to defendant's residence to clean it. When they arrived, a woman, two boys, and another man were present. H.L. and A.S. cleaned defendant's house. Defendant did not airbrush clothing for them or pay them. The girls "ended up drinking [Jack Daniels and Jamaican beer] and smoking marijuana," all provided by defendant. At some point, H.L. and A.S. went to the bathroom to put on shorts defendant gave them. Defendant said he would airbrush the shorts.

¶ 12 H.L. testified the "next thing you know we were taking pictures." Defendant took the pictures of the girls. A few other men H.L. could not identify also stopped by defendant's residence. While defendant took the photographs, H.L.'s shorts came off. She remained in her underwear. In the photographs, H.L. was kissing A.S. and "grabbing" herself, as defendant instructed.

¶ 13 H.L. testified defendant laid on the bed between A.S. and H.L., and placed his hands in H.L.'s pants and touched her crotch. He moved H.L.'s underpants to the side and penetrated her vagina with his tongue. H.L. pushed defendant's head away and left the bedroom. Defendant became angry. H.L. returned and saw A.S. and defendant engaged in sexual intercourse. A.S. told H.L. to "just go." H.L. left defendant's house and went to her grandparents' residence.

¶ 14 The next day H.L. talked to a counselor at her school, and then contacted her advocate, Colleen Lucht. After H.L. and Lucht spoke, Lucht contacted H.L.'s probation officer and then the police. H.L. later spoke to Detective Mike Burns.

¶ 15 On cross-examination, H.L. testified she first saw defendant on Thursday, April 27, 2006. The following day, H.L. and A.S. returned to defendant's house. Defendant provided Jack Daniels and the marijuana, while someone else provided the Jamaican beer. The following Sunday, H.L. and A.S. returned to defendant's house. During this visit, H.L. and A.S. went into defendant's bedroom with defendant. Two other African American males were present at defendant's home. On Sunday night, defendant gave her money for a cab to go home.

¶ 16 H.L. admitted she told Detective Burns the sex activity occurred on Friday night. H.L. agreed she then testified the events occurred on Sunday. H.L. testified to the following: "I'm just remembering as we are talking about this stuff because I haven't, you know—but it happened on Friday or Sunday, one of the days that we were there. I'm not really sure, to be honest with you."

¶ 17 On that Friday night defendant said he knew of a party in Decatur and he wanted H.L. and A.S. to go there with him, but they did not go. Defendant remained home. H.L. told Detective Burns the men and defendant hooked up the computer to the camera and defendant took the photographs.

¶ 18 On redirect examination, H.L. averred the night she was in bed with defendant was Friday and the photographs were taken on Sunday. When asked why her memory was "all of a sudden *** refreshed," H.L. testified "I was getting confused sitting up here and scared."

¶ 19 Colleen Lucht, an advocate for Catholic Social Services was contacted on May 1,

2006, by H.L. Lucht then contacted H.L.'s probation officer and she and the officer decided to call the police. Lucht also called the Department of Children and Family Services.

¶ 20 Dan Donath, a Bloomington police officer, participated in a search of defendant's house. Officer Donath collected and documented items. During his testimony, Officer Donath identified a camera he collected from defendant's house. He also collected a bottle of Jack Daniels.

¶ 21 On cross-examination, Officer Donath testified there were two computers in defendant's house: one in the computer work area and another in the bedroom. Officer Donath did not believe one could see the work-area computer from the bedroom. Officer Donath recalled no fingerprint analysis was conducted in defendant's house.

¶ 22 Tyrone Foy, aged 33, testified he was serving sentences for driving under the influence and for driving with a revoked license. Foy had earlier convictions for several offenses, including aggravated battery. Foy knew defendant and remembered seeing A.S. and another girl in late April 2006 at defendant's house. Foy saw A.S. and a heavyset girl running back and forth between the bathroom and defendant's bedroom, and changing clothes. Defendant stayed in his bedroom.

¶ 23 Foy testified he returned to defendant's house on another day. Both girls were there. After this day, Foy called the "skinny one" to ask what occurred with defendant. A male, claiming to be A.S.'s boyfriend, later called Foy and told him not to call A.S. Foy denied taking photos of the girls. He testified he had access to the computers but did not use them.

¶ 24 Levelle Harris, age 27, testified he was serving a sentence for unlawful delivery of a controlled substance. Harris had a criminal history, that included a domestic-battery convic-

tion. Harris met defendant through Foy on Sunday, April 30. Harris went with Foy to defendant's house. Harris noticed defendant's computers and blank computer disks. He asked defendant if he could download some music, and defendant replied he could. Harris then entered the bedroom to copy music. Two young girls were in the bedroom "[p]laying with each other, like dancing on each other to the music in a seductive type way." Defendant and Foy entered the bedroom after Harris.

¶ 25 Defendant, Foy, and the girls smoked marijuana. Harris did not. Defendant then had one girl put on "some little like Daisy Duke jean shorts." Defendant had the other "put on like a white see-through skirt thing." Defendant "was in and out" of the bedroom. At some point, defendant had a camera around his neck. Foy commented on the girls' breasts. Defendant attempted to get the girls "to bend over and take pictures of like the underwear or whatever under the skirt and stuff." The girls were "standoff-ish and stuff." At some point, defendant took a picture of the girls with their skirts flipped up. Harris "was participating." He testified he "wasn't touching the girls but [] participating like, damn, know what I'm saying." Harris identified himself in two photographs, State's Exhibits Nos. 7 and 8, and his hand flipping up the skirt in State's Exhibit Nos. 5B and 5E. Defendant took the photographs. Harris asked the girls how old they were. According to Harris, the "slimmer" one said she was 16. The other said she was 15.

¶ 26 On cross-examination, Harris stated there were four or five computers in the dining room. Harris, however, was downloading music on the one in the bedroom. When Harris arrived at the house, the girls were sober, but then the girls, Foy, defendant, and a man known as "Twenty" smoked marijuana. Harris was not certain whether he saw defendant touch the girls,

but defendant was taking pictures. Defendant also commented on the girls' bodies and had the girls call him "daddy."

¶ 27 Michael C. Burns, a Bloomington police officer, testified he, on May 1, 2006, investigated the allegations made by H.L. Officer Burns obtained a warrant and the police searched defendant's house. While at defendant's residence, Officer Burns spoke with defendant and learned defendant was born in 1963. Officer Burns also interviewed defendant at the police department and informed defendant of the allegations against him. Defendant indicated he knew the girls but said the girls were not in his house.

¶ 28 According to Officer Burns, he spoke again with defendant in March 2007. Detective Mike Fazio was present during this conversation. Defendant then acknowledged A.S. and H.L. were at his home. Defendant said others were there as well and those individuals photographed the girls.

¶ 29 Detective Fazio testified the police found computer and camera evidence in defendant's house. Detective Fazio found a secure digital (SD) card inside a camera. On this card, Detective Fazio found a number of files, including deleted files. The deleted files were the photographs in the State's Group Exhibit No. 5, exhibits 5A through 5L. Detective Fazio also recovered a movie file, State's Exhibit No. 6, from the SD card.

¶ 30 Defendant called two witnesses to testify. Both witnesses worked at a club in Decatur and both testified defendant, from the early evening hours of Friday, April 28, 2006, until approximately 2 or 3 a.m. Saturday, April 29, was in Decatur taking photographs at the club.

¶ 31 Defendant also testified on his own behalf. According to defendant, he met H.L.

and A.S. on Thursday, April 27, 2006. At that time, Antwon Nelson was talking to H.L. and A.S. Defendant went outside to meet them. A.S. and H.L. entered defendant's house after he told them he knew someone, Greg Heggs, a.k.a. the Clothes Man, who sold clothes. Defendant told the girls Heggs would be at defendant's home the next day. The girls returned on Friday, April 28, 2006.

¶ 32 Defendant testified Nelson and Foy were also at his house when the girls arrived. H.L. and A.S. met with Heggs. The meeting was short. It occurred in the afternoon, maybe 3, 4, or 5 p.m. Then, Heggs drove defendant to Decatur to a club where defendant took photographs from 5 or 6 p.m. until between 1 and 3 a.m. Saturday. Heggs then drove defendant home.

¶ 33 According to defendant, on Sunday morning, April 30, 2006, defendant was at his home by himself. In the early afternoon, Foy, Foy's sons, and a woman arrived at defendant's house. H.L. and A.S. also arrived. Another man was there, having a shirt air-brushed. Defendant said, "Everybody was just there kicking it." At some point, Harris and others arrived. H.L. and A.S. were in the bedroom. Individuals were drinking alcohol, including Hennessy brought by Foy, as well as beer and Grey Goose. Defendant went in and out of the bedroom two or three times. He said the girls told him they were 18 years old when they were introduced. Defendant denied photographing the girls and denied having sexual relations with either. Both H.L. and A.S. were intoxicated.

¶ 34 On cross-examination, defendant acknowledged he first told Officer Burns the girls had not been in his house, but stated he "lied so that [he] could find out what was happening in this case."

¶ 35 The jury found defendant guilty on all charges. He was sentenced to concurrent

terms of imprisonment of 12 years on both the sexual-abuse charges and of 29 years on both child-pornography charges.

¶ 36 B. Defendant's Direct Appeal

¶ 37 In his direct appeal, defendant made the following arguments: (1) his right to a speedy trial was violated, (2) the State failed to prove him guilty beyond a reasonable doubt of the child-pornography charge, (3) he was denied due process when the police destroyed exculpatory fingerprint evidence, (4) defense counsel provided ineffective assistance by failing to object to testimony defendant was engaged in another unlawful activity, and (5) the trial court improperly refused his request to have the indictments read to him at arraignment. We affirmed defendant's conviction. *People v. Fletcher*, No. 4-07-0903 (May 26, 2010) (unpublished order under Supreme Court Rule 23).

¶ 38 C. Defendant's First Petition for Relief from Judgment

¶ 39 In March 2009, while his direct appeal was pending, defendant filed a petition for relief from judgment pursuant to section 2-1401(f) of the Code of Civil Procedure (Civil Procedure Code) (735 ILCS 5/2-1401(f) (West 2008)). Defendant alleged he had not seen the charges against him and he was not afraid of calling anyone to say so. Defendant made the following arguments: (1) evidence in his case was destroyed and he was not informed of the destruction, (2) Bloomington police sergeant Karen Baker lied before the grand jury, and (3) the police failed to establish a proper chain of custody and document the whereabouts of the evidence in his case over a period of 10 days in May 2006.

¶ 40 D. Defendant's Postconviction Petition

¶ 41 In January 2011, defendant filed his postconviction petition under the Post-

Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). Defendant alleged a number of errors: (1) section 109-3.1(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/109-3.1(b) (West 2010)) is unconstitutional because it removes a defendant's "constitutional" right to a preliminary hearing if the defendant was not charged by an indictment first; (2) the trial court lacked subject-matter jurisdiction because he was not provided a timely preliminary hearing after he was charged; (3) he was denied due process of law when a timely preliminary hearing was not afforded him; (4) his trial and appellate counsel's failure to raise the preliminary-hearing issue denied defendant the effective assistance of counsel; and (5) Heggs had been charged with sex offenses against H.L. under the same evidence, but the charges were dismissed for insufficient evidence, and defendant was entitled to a hearing during which he could examine the evidence related to the dismissal of the charges against Heggs.

¶ 42 E. Defendant's Second Petition for Relief from Judgment

¶ 43 On March 14, 2011, defendant filed his second petition for relief from judgment under section 2-1401. He asserted essentially the same claims he had made in his January 2011 postconviction petition.

¶ 44 F. Defendant's Amended Postconviction Petition

¶ 45 On March 25, 2011, defendant filed a *pro se* amended postconviction petition. Defendant introduced his argument as follows: "The legal dismissal of defendant's original complaint [which was unconstitutionally superceded by grand jury indictment] on May 19, 2006 without the discharge of defendant from the original charges of complaint and the re-arrest of the defendant pursuant to the charges by grand jury indictment constitutes false imprisonment and deprivation of liberty under color of law and without due process ***." (Brackets appear in

original). Defendant contends he was arrested under a complaint on May 1, 2006, and two days later formally charged by a criminal complaint. According to defendant, on May 19, 2006, the State "legally dismissed the original complaint and failed to discharge petitioner from custody." That same day, according to defendant, the State superseded the dismissed complaint by a grand-jury indictment, but failed to rearrest defendant.

¶ 46 G. The Dismissals of Defendant's Petitions

¶ 47 On May 2, 2011, the trial court dismissed defendant's postconviction petitions under the Postconviction Act. The court found defendant's claims related to his being charged by indictment rather than through a preliminary hearing were without merit. The court emphasized constitutional, statutory, and case law establish prosecutions may occur by either grand-jury indictment or a prompt preliminary hearing. Ill. Const. 1970, art. I, § 7 ("No person shall be held to answer for a crime punishable *** by imprisonment *** unless either the initial charge has been brought by indictment of the grand jury or the person has been given a prompt preliminary hearing to establish probable cause."); 725 ILCS 5/111-2(a) (West 2000) ("All prosecutions of felonies shall be by information or by indictment."); *People v. Kline*, 92 Ill. 2d 490, 501-02, 442 N.E.2d 154, 159 (1982) (rejecting the argument every defendant, including those indicted by a grand jury, must be afforded a preliminary hearing). The court rejected defendant's arguments related to Heggs. The court observed defendant failed to attach any supporting documents or evidence and could be dismissed on that ground alone. The court concluded the charges against Heggs and defendant involved different dates, and different acts. The court concluded the evidence showed no other male was involved in the incident giving rise to defendant's conviction involving H.L.

¶ 48 On April 26, 2012, the trial court *sua sponte* dismissed defendant's 2-1401 petition. The court observed defendant made the same arguments in his 2-1401 petition as he did in his postconviction petitions under the Postconviction Act. The court concluded defendant's 2-1401 petition was similarly frivolous and patently without merit.

¶ 49 Defendant filed timely notice of appeal in both actions. The trial court appointed OSAD to represent defendant. The appeals were consolidated. OSAD moved to withdraw as counsel under *Pennsylvania v. Finley*, 481 U.S. 551, 95 L. Ed. 2d 639, 107 S. Ct. 1990 (1987). Notice of OSAD's motion was sent to defendant. This court gave defendant time to file additional points and authorities. Defendant filed additional points and authorities. The State filed a brief as well. Defendant filed a reply brief in response.

¶ 50 II. ANALYSIS

¶ 51 A. Defendant's Claims under the Postconviction Act

¶ 52 The Postconviction Act offers "a remedy whereby defendants may challenge their convictions or sentences for violations of federal or state constitutional law." *People v. Coleman*, 206 Ill. 2d 261, 277, 794 N.E.2d 275, 286 (2002). Under the Postconviction Act, a three-stage process gives defendants the opportunity to obtain review of claims their convictions led to substantial denials of constitutional rights. *People v. Dopson*, 2011 IL App. (4th) 100014, ¶17, 958 N.E.2d 367 (2011). In the first stage, a trial court reviews the petition and dismisses any petition it finds to be frivolous and patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652-53 (2010); 725 ILCS 5/122-2.1(a)(2) (West 2008). To survive a first-stage dismissal, a *pro se* petition only needs to contain "sufficient facts upon which a meritorious constitutional claim *could* be based." (Emphasis in original.) *People v. Patton*, 315

Ill. App. 3d 968, 972, 735 N.E.2d 185, 189 (2000) (emphasis in original). This court reviews the first-stage dismissal of a *pro se* postconviction petition *de novo*. *Patton*, 315 Ill. App. 3d at 972, 735 N.E.2d at 189.

¶ 53 OSAD argues no colorable argument can be made section 109-3.1(b) of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/109-3.1(b) (West 2010)) is unconstitutional. Defendant argues (1) OSAD's conduct in filing its motions to withdraw is a disingenuous abdication of its obligations to represent him; (2) the trial court, OSAD, and the State, while drawing their own conclusions, have misunderstood or misrepresented his claims; (3) because the initial charges against him were brought by complaint under section 102-9 of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/102-9 (West 2006), he was entitled to a preliminary hearing under the Illinois constitution and because he was not afforded such a hearing, the trial court lacked subject-matter jurisdiction over his case; and (4) section 109-3.1(b) of the Criminal Procedure Code unconstitutionally usurped his right to a preliminary hearing. We begin with defendant's latter arguments, because if OSAD and the State are correct, OSAD's motion is not "a disingenuous abdication" of its responsibilities as defendant's counsel.

¶ 54 Defendant's main argument is the State and the trial court deprived him of his constitutional right to a preliminary hearing. Defendant contends, because the "initial charge" was brought by a complaint, the State was foreclosed from indicting him on those charges and was required under article I, section 7 of the Illinois Constitution (Ill. Const. 1970, art. I, § 7) to provide a preliminary hearing. The "initial charge" language emphasized by defendant appears in the following sentence from section 7: "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. I, § 7. Defendant further argues section 109-3.1(b) of the Criminal Procedure Code, which allows the State to pursue an indictment or a preliminary hearing regardless of how the "initial charge" was made (725 ILCS 5/109-3.1(b) (West 2006)), is unconstitutional because it conflicts with the plain language of section 7.

¶ 55 Defendant asserts the trial court, OSAD, and the State misrepresent the means by which he was charged. Defendant contends he was charged by complaint and, because of this, was entitled to a preliminary hearing.

¶ 56 The record does not establish defendant was charged by a complaint. Defendant points to two pieces of evidence: the McLean County circuit clerk's certified record sheet and the handwritten, certified felony record sheet. On both, the following statement appears: "Defendant appears with copy of complaint." Defendant, however, does not include or cite a copy of such complaint. Defendant was charged by information and later indicted. A preliminary hearing was not necessary. A "Complaint for Search Warrant," dated May 1, 2006, does appear in the record. This complaint authorized the search of defendant's house for items of evidence of sexual exploitation of a child, child pornography, aggravated criminal sexual abuse, and contributing to the delinquency of a minor; it did not charge defendant with any of these offenses.

¶ 57 Defendant's argument also fails because he misinterprets section 7. The constitution says the "*initial charge* has been brought by indictment," not the charge must be either brought initially by indictment or the defendant be afforded a preliminary hearing. (Emphasis

added.) See Ill. Const. 1970, art. I, § 7. Section 109-3.1(b) of the Criminal Code is consistent with our reading. See 725 ILCS 5/109-3.1(b) (West 2006); see also *Kline*, 92 Ill. 2d at 501, 442 N.E.2d at 159 (holding the language in article 1, section 7, required an accused by provided a prompt determination on probably cause of the initial charge either at a preliminary hearing or by grand-jury indictment). An earlier version of section 109-3.1 withstood constitutional attack on equal-protection and due-process grounds. See *Kline*, 92 Ill. 2d at 500-01, 442 N.E.2d at 159.

¶ 58 Defendant's reliance on *People v. Kelly*, 299 Ill. App. 3d 222, 701 N.E.2d 114 (1998), is misplaced. Defendant relies on *Kelly* to support the premise an accused must be indicted by a grand jury *before* being taken into custody to defeat a defendant's right to a prompt preliminary hearing. *Kelly* does not support this conclusion. *Kelly* concerns the issue of whether the State should have been allowed to dismiss two counts of hate crime upon which the defendant was indicted and add additional counts of hate crime. The court held, under the circumstances of the case, the State altered the essential elements of the offenses for which he had been indicted and defendant was thus entitled to a probable-cause determination by further indictment or a preliminary hearing on the information. *Kelly*, 299 Ill. App. 3d at 227-28, 701 N.E.2d at 117. This holding does not support defendant's conclusion, and undermines it. *Kelly* establishes the State may dismiss and alter charges during its prosecution of a defendant. Had the State in *Kelly* indicted the defendant or held a preliminary hearing on the new charges, such conduct would have been permissible. See *Kelly*, 299 Ill. App. 3d at 227-28, 701 N.E.2d at 117.

¶ 59 We find no colorable argument can be made defendant was entitled to a preliminary hearing and we find no colorable argument can be made either trial counsel or appellate counsel was ineffective for failing to raise the issue. We will not find counsel provided ineffec-

tive assistance when counsel chooses not to raise a meritless argument. See *People v. Easley*, 192 Ill. 2d 307, 329, 736 N.E.2d 975, 991 (2000).

¶ 60 OSAD further argues no colorable argument can be made the trial court erroneously dismissed defendant's request for an evidentiary hearing regarding charges brought against Heggs. The State agrees. Defendant contends the trial court erroneously distinguished the charges against Heggs and defendant on the basis the alleged events occurred on different days. The trial court stated the indictment against Heggs showed an allegation of an offense occurring on April 30, 2006, while the indictment alleged acts by defendant occurring on April 28 or 29, 2006. Defendant contends the evidence is material to his action because a witness's credibility is a material issue and if the evidence was insufficient against Heggs, it is insufficient against defendant. Defendant further contends the trial court ignored the fact he filed a motion on February 14, 2011, for an evidentiary hearing and a subpoena of the Heggs case, which had been impounded.

¶ 61 We find no colorable argument defendant's request was improperly dismissed. First, defendant's postconviction "claim" regarding Heggs is not a claim "there was a substantial denial of [defendant's constitutional] rights" (725 ILCS 5/122-1(a)(1) (West 2010)) under the Postconviction Act. It is a request for an "evidentiary hearing" by which defendant wants to examine the reasons the charges were dismissed against Heggs in hopes of supporting a claim of a substantial denial of his constitutional rights.

¶ 62 Second, the police reports from the Heggs case support the trial court's ultimate conclusion any information defendant would discover from such a hearing would be irrelevant. According to the police report by Officer Burns, H.L., in August 2006, reported she had sex with

Heggs on the living-room floor of defendant's residence, while A.S. and defendant were in defendant's bedroom. She recalled lying on the floor and Heggs was on top of her. Both were naked. H.L. stated she was too drunk to remember the details. H.L. identified Heggs in a photo lineup in November 2006. We agree with defendant, given H.L.'s testimony at his trial, Heggs's indictment, and the police-report information, these events were alleged to have occurred on the same day. However, that does not show defendant was misidentified or H.L. was lying. These events show different acts in different locations of defendant's residence, and there was no testimony Heggs was in the bedroom during the offenses for which defendant was convicted. In addition, Heggs did not testify at defendant's trial, so Heggs's credibility is not an issue.

¶ 63 B. Defendant's Section 2-1401 Actions Under the Civil Procedure Code

¶ 64 Section 2-1401 of the Civil Procedure Code provides the process by which a defendant may seek to vacate an order of final judgment that is over 30 days old. *People v. Moore*, 2012 IL App (4th) 100939, ¶ 26, 975 N.E.2d 1083. Petitions in criminal proceedings filed under section 2-1401 seek to correct factual errors occurring during the prosecution of a case that were unknown to the defendant and the court at trial and, if known at that time, would have prevented the judgment that was entered. *Moore*, 2012 IL App (4th) 100939, ¶ 26, 975 N.E2d 1083. A " 'trial court may dismiss a petition for relief from judgment on its own motion without first providing the defendant with notice and an opportunity to be heard.' " *People v. Ryburn*, 378 Ill. App. 3d 972, 977, 884 N.E.2d 1178, 1183 (2008) (quoting *People v. Malloy*, 374 Ill App. 3d 820, 822, 872 N.E.2d 140, 142 (2007)). We review such dismissals *de novo*. See *People v. Vincent*, 226 Ill. 2d 1, 18, 871 N.E.2d 17, 28 (2007).

¶ 65 OSAD argues no colorable argument can be made the trial court improperly

dismissed defendant's section 2-1401 petitions. OSAD argues the same reasons that are fatal to defendant's postconviction claims under the Postconviction Act apply to defendant's section 2-1401 claims. We agree. Defendant's claims lack merit on their face. Defendant's petition fails to state a cause of action. The dismissal was proper. See *Ryburn*, 378 Ill. App. 3d at 976, 978, 884 N.E.2d at 1181, 1183 (holding the trial court's dismissal of a section 2-1401 petition as frivolous and patently without merit could be affirmed when the appellate court found the petition failed to state a cause of action).

¶ 66 III. CONCLUSION

¶ 67 We grant OSAD's motion to withdraw as counsel and 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.

¶ 68 Affirmed.