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2012 IL App (3d) 100485-U

Order filed April 24, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-10-0485
	)	Circuit No. 04-CF-2005
	)	
ROBERT HUDSON,	)	Honorable
Defendant-Appellant	)	Carla Policandriotes, Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices Lytton and Carter concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court erred in finding that the defendant waived the constitutional claims presented in his postconviction petition by failing to raise them on direct appeal where the defendant alleged in his postconviction petition that his failure to raise the claims was due to his appellate counsel's ineffectiveness. However, the trial court's summary dismissal of the defendant's postconviction petition was proper because the defendant's claims had no arguable basis in law and were based on indisputably meritless legal theories.

¶ 2 Following a jury trial, the defendant, Robert Hudson, was convicted of armed robbery, a Class X felony (720 ILCS 5/18-2(a)(2) (West 2004)), and three counts of unlawful restraint, Class 4 felonies (720 ILCS 5/10-3(a) (West 2004)). He was sentenced to life in prison as a habitual criminal under the Habitual Criminal Act (formerly 720 ILCS 5/33B-1 *et seq.* (West 2006) (repealed by Pub. Act 95-1052 § 93 (eff. July 1, 2009))).<sup>1</sup> After this court affirmed the defendant's conviction and sentence on direct appeal, the defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). In his postconviction petition, the defendant argued that he was not eligible for sentencing under the Habitual Criminal Act. He also argued that his trial and appellate attorneys were ineffective for failing to raise this issue and for failing to argue that his sentence violated the *ex post facto* clauses of the Federal and State Constitutions. The trial court found that the defendant's constitutional claims were waived because they "could have been raised on direct appeal." The court also found that the defendant's arguments were "substantially without merit" and summarily dismissed the defendant's petition. This appeal followed.

¶ 3 **BACKGROUND**

¶ 4 On December 24, 2004, the defendant entered the Greater Chicago Truck Plaza, pulled out a gun, and ordered the store clerk to open the safe. The defendant took the money contained in the safe and stuffed it into his coat pockets. The defendant and his accomplice restrained three

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<sup>1</sup> Although the Habitual Criminal Act was repealed in 2009, it was in effect at the time of the defendant's sentencing in 2007. Throughout this order, we cite to the Habitual Criminal Act as it was codified at the time of the defendant's sentencing.

store employees with duct tape and then drove from the scene in a green Blazer. Police pursued the Blazer and apprehended the defendant.

¶ 5 The defendant was charged by indictment with armed robbery and three counts of unlawful restraint. During pretrial plea negotiations, the State made two plea offers, one for 20 years in prison, and a second for 18 years in prison on a Class 1 felony or 17 years in prison on a Class X felony. The defendant rejected both offers, and the case proceeded to trial before a jury. During jury deliberations, the State made an offer of 16 years in prison, which the defendant rejected. The jury found the defendant guilty on all counts.

¶ 6 On June 1, 2005, the Will County Adult Probation Department filed a presentence investigation (PSI) report with the court. The PSI report indicated that the defendant had prior convictions under his actual name, "Robert Hudson," for first degree murder, criminal trespass, unlawful possession of a controlled substance, and theft. Moreover, the PSI report noted that the defendant had additional convictions under the alias "Mark Hudson," including two Class X felony convictions in 1979 for armed robbery.<sup>2</sup> The prosecutors, the defense counsel, and the trial court were unaware of defendant's prior convictions under the alias "Mark Hudson" until the PSI report was filed. The defendant's prior Class X felony convictions under the alias "Mark Hudson," together with his subsequent murder conviction under his actual name, appeared to render the defendant eligible for a life sentence under the Habitual Criminal Act (720 ILCS 5/33B-1 *et seq.* (West 2006)).

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<sup>2</sup> The defendant was also convicted under the name "Mark Hudson" for theft and for burglary.

¶ 7 The defendant filed a *pro se* motion for a new trial, alleging that his lead trial counsel was ineffective because he failed to advise the defendant that he faced a life sentence as a habitual offender. The defendant claimed that he would have accepted the State's offer of 16 years imprisonment during jury deliberations if his trial counsel had advised him that he faced natural life in prison. The trial court appointed separate counsel to investigate and argue the defendant's claims and conducted an evidentiary hearing on the motion. During the hearing, the defendant testified that he rejected the State's plea offers because he had been told that the sentencing range for the charged offenses was 6 to 60 years.

¶ 8 The trial court denied the defendant's motion for a new trial. The court ruled that the defendant's trial attorneys did not render ineffective assistance because it was the defendant's own conduct (*i.e.*, his use of an alias and his failure to tell his lawyers about his prior convictions) that prevented them from learning that he could be sentenced as a habitual criminal.

¶ 9 On July 25, 2007, the State filed a petition asking for the defendant to be sentenced as a habitual offender under sections 33B-1 and 33B-2 of the Habitual Criminal Act (720 ILCS 5/33B-1, B-2 (West 2006)). The trial court appointed new counsel from the Public Defender's Office to represent the defendant at sentencing. The court found that the defendant had been convicted of two counts of armed robbery on September 18, 1979, that he was convicted of murder in 1986, and that the instant offense was committed in 2004. Thus, the trial court found that the third offense was committed after conviction was entered on the second offense, and the second offense occurred after conviction on the first offense, as required by sections 33B-1(d)(3) and (4) of the Habitual Criminal Act (720 ILCS 5/33B-1(d)(3), (d)(4) (West 2006)). Moreover, the court found that the State had proven by a preponderance of the evidence that, excluding the

nine years that the defendant had spent in custody for the murder, the third offense was committed within 20 years of the defendant's conviction on the first offense, as required by section 33B-1(d)(2) of the Habitual Criminal Act (720 ILCS 5/33B-1(d)(2) (West 2006)).

Accordingly, the trial court sentenced the defendant to natural life in prison.

¶ 10 The defendant appealed the trial court's denial of his motion for a new trial. On appeal, the defendant argued that his trial attorneys rendered ineffective assistance by failing to inform him during plea negotiations that he could be sentenced to life in prison. A panel of this court rejected the defendant's arguments and affirmed the trial court's judgment.

¶ 11 On March 22, 2010, the defendant filed the postconviction petition that is the subject of the instant appeal. In his petition, the defendant argued that he was not eligible to be sentenced as a habitual criminal under section 33B-1 of the Habitual Criminal Act because: (1) his first offense was not designated as a Class X offense at the time he committed the offense; and (2) his third Class X offense was not committed within 20 years of his conviction on the first offense, as required by section 33B-1(d)(2) of the Habitual Criminal Act (720 ILCS 5/33B-1(d)(2) (West 2006)). In support of the latter argument, the defendant argued that the trial court erred when it excluded the time that the defendant spent in custody after his convictions when calculating the time between the first and third offenses. Although the defendant acknowledged that section 33B-1(d)(2) provides that "time spent in custody shall not be counted," he argued that "in custody" referred only to *presentence* custody, not to a prison sentence served after a judgment of conviction. He also argued that the provision excluding time spent "in custody" referred only to presentence custody relating to the first offense, not the second offense. Accordingly, the

defendant maintained that the trial court lacked the authority to sentence him to a term of life in prison under section 33B-1 of the Habitual Criminal Act.

¶ 12 The defendant also argued that his trial and appellate attorneys were ineffective because they failed to raise these arguments and because they failed to argue that sentencing the defendant as a habitual criminal violated the *ex post facto* clauses of the Federal and State Constitutions. In support of his *ex post facto* argument, the defendant noted that the armed robbery convictions that led to his 1979 conviction were committed before the Habitual Criminal Act was enacted and before any crimes were designated as Class X offenses.

¶ 13 On April 13, 2010, the trial court issued an oral ruling summarily dismissing the defendant's petition. In announcing its ruling, the trial court stated that "the defendant's constitutional challenge to the life sentence that was imposed by this Court pursuant to the habitual criminal provisions of Chapter 720 ILCS 5/33(b)-1 have not been raised on the direct appeal in any way." The court also stated that "the defendant's constitutional argument is substantially without merit." The trial court then entered a written order which stated that the defendant's constitutional challenge to his life sentence "could have been raised on direct appeal and is waived" and that the defendant's constitutional arguments "are substantively without merit."

¶ 14 The defendant filed a motion to vacate or reconsider the dismissal of his postconviction petition, which the trial court denied. This appeal followed.

¶ 15 ANALYSIS

¶ 16 As an initial matter, we must determine whether the defendant forfeited the constitutional claims presented in his postconviction petition by failing to raise them on direct appeal. A

petition for postconviction relief is a collateral proceeding, not a direct appeal of the underlying judgment. *People v. Williams*, 209 Ill. 2d 227, 232 (2004). Accordingly, a postconviction petition permits inquiry "only into constitutional issues that were not, and could not have been, adjudicated on direct appeal." *Id.* at 232-33. Issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*. *Id.* at 233. Issues that could have been raised, but were not, are forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). However, the forfeiture rule does not apply if, among other things "the alleged forfeiture stems from the incompetence of appellate counsel." *Blair*, 215 Ill. 2d at 450-51.

¶ 17 Here, the trial court found that the defendant "waived"<sup>3</sup> the constitutional challenges to his sentence presented in his postconviction petition because those challenges could have been raised on direct appeal but were not. The defendant argues that the trial court erred in finding that he forfeited his constitutional claims because his postconviction petition alleged that his failure to raise these claims on direct appeal was due to his appellate counsel's ineffectiveness.

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<sup>3</sup> In *Blair*, the supreme court used the term "forfeited," rather than "waived," to mean "issues that could have been raised, but were not, and are therefore barred." *Id.* at 444. The supreme court explained that forfeiture is "the failure to make a timely assertion of [a] right," whereas waiver is "the intentional relinquishment or abandonment of a known right." *Id.* at n.2 (citation and internal quotation marks omitted). However, in some published decisions issued after *Blair*, our appellate court has continued to use the term "waiver" to describe claims that are barred because they could have been raised but were not. See, e.g., *People v. Jones*, 362 Ill. App. 3d 31, 34-35 (2005). The trial court in the case at bar also used the term "waiver." We will use "forfeiture," rather than "waiver," throughout this order.

We agree. A defendant may avoid the operation of forfeiture merely by alleging in his postconviction petition that the forfeiture was the result of the ineffectiveness of his appellate counsel. *People v. Turner*, 187 Ill. 2d 406, 413 (1999); see also *People v. Marshall*, 381 Ill. App. 3d 724, 731 (2008) (declining to find defendant's postconviction claim waived and addressing the claim on the merits where defendant alleged that his appellate counsel was ineffective for failing to raise the claim on direct appeal); *People v. Newbolds*, 364 Ill. App. 3d 672, 677 (2006). Accordingly, we find that the trial court erred in finding the defendant's claims forfeited.<sup>4</sup>

¶ 18 However, this does not end our inquiry. Although the trial court found the defendant's claims forfeited, it did not dismiss the defendant's petition on that basis alone. Instead, it considered the merits of the defendant's claims, found them to be "substantively without merit," and dismissed the petition on that basis. The defendant argues that the trial court applied an incorrect legal standard in evaluating and dismissing his claims on the merits. Thus, we must determine whether the trial court applied the proper standard and, if so, whether it properly dismissed the defendant's petition on the merits.

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<sup>4</sup> The State argues that the claims raised in the defendant's postconviction petition are barred by *res judicata* because they were actually litigated and decided on direct appeal. We disagree. On direct appeal, the defendant argued that his trial counsel was ineffective for failing to advise him during plea negotiations that, if convicted, he faced a mandatory life sentence as a habitual criminal. He did not argue that he was *ineligible* to be sentenced as a habitual criminal, that the sentencing provisions of the Habitual Criminal Act were unconstitutional as applied to him, or that his trial and appellate counsel were ineffective for failing to make these arguments. He raised the latter arguments for the first time in his postconviction petition.

¶ 19 Whether the trial court applied the correct legal standard is a question of law which we review *de novo*. *People v. Longoria*, 375 Ill. App. 3d 346, 350 (2007). A trial court may summarily dismiss a postconviction petition during the first stage of postconviction proceedings only if, after independently reviewing the petition and taking its factual allegations as true, the trial court determines that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition is "frivolous" or "patently without merit" under section 122-2.1(a)(2) of the Act if it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 12. A petition which lacks an arguable basis either in law or in fact is one which is based on an "indisputably meritless legal theory" or a "fanciful" factual allegation. An example of an indisputably meritless legal theory is one which is "completely contradicted by the record." *Id.* at 16. Fanciful factual allegations include those which are "fantastic or delusional." *Id.*

¶ 20 The defendant argues that the trial court failed to apply these standards and "utilized an improper standard for dismissal." Specifically, the defendant notes that, in announcing its ruling dismissing the defendant's petition, the trial court stated that the defendant's constitutional argument was "substantially without merit." Then, in its written order of dismissal, the trial court stated that the defendant's constitutional arguments were "substantively without merit." The trial court did not explicitly find that the defendant's petition was "frivolous" or "patently without merit," nor did it cite to section 5/122-2.1(a)(2) of the Act or to any case law articulating the proper standard. The defendant argues that this demonstrates that the trial court improperly required him to "present constitutional arguments that were substantially meritorious," rather than merely requiring him to present the "gist of a constitutional claim," as the Act prescribes.

¶ 21 We disagree. First, the defendant misstates the governing law. Although a *pro se* defendant need only state the "gist" of a constitutional claim to satisfy the *pleading* requirements of section 122-2 of the Act (*Hodges*, 234 Ill. 2d at 9), this "is not the legal standard used by the circuit court to evaluate the petition, under section 122-2.1 of the Act, which deals with summary dismissals." (*Id.* at 11). Rather, the trial court must independently evaluate the claimant's allegations and determine whether the constitutional claims alleged in the petition are "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 11. As noted above, a claim is "patently without merit" if, *inter alia*, it is based on an "indisputably meritless legal theory." *Hodges*, 234 Ill. 2d at 16. If the court determines the petition is frivolous or patently without merit, it must dismiss the petition summarily. *Id.* Thus, contrary to the defendant's suggestion, a petition will not escape summary dismissal merely by stating the "gist" of a constitutional claim; to advance to the second stage, the petition must also present claims that have an "arguable basis in law."

¶ 22 We also disagree with the defendant's interpretation of the trial court's order. Although the trial court did not cite the governing legal standard (*i.e.*, whether the petition was "frivolous or patently without merit"), there is no indication that it imposed a heightened burden upon the defendant. The trial court did not require the defendant to prove a "substantial showing of a constitutional violation" (the standard that would apply during the second stage of postconviction proceedings); rather, it dismissed the defendant's petition because it found that the constitutional claims raised in the petition were "substantively" or "substantially" *without merit*. This suggests that the court made the finding that would justify summary dismissal under the Act, *i.e.*, that the defendant's constitutional claims were meritless because they lacked an arguable basis in law or

fact. Unless the record indicates otherwise, we presume that the trial judge knows and follows the law. *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996). Although the record in this case suggests that the trial court was somewhat imprecise in its language, nothing in the record requires us to conclude that the trial court imposed a heightened burden on the defendant or otherwise applied an incorrect legal standard.<sup>5</sup>

¶ 23 In any event, even if the trial court had evaluated the defendant's constitutional claims under an improper standard, we may affirm if the court's judgment is supported by the record. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995) (noting that a reviewing court "can sustain the decision of a lower court on any grounds which are called for by the record, regardless of whether the lower court relied on those grounds and regardless of whether the lower court's reasoning was correct"); *People v. Reed*, 361 Ill. App. 3d 995, 1000 (2005) ("[w]e review the trial court's judgment, not its rationale," and "[w]e can affirm for any reason the record supports.") (citation omitted); see also *People v. Dent*, 408 Ill. App. 3d 650, 654-55 (affirming the trial court's judgment dismissing defendant's postconviction petition on legal grounds not relied upon by the trial court). Thus, regardless of the reasoning employed by the trial court, the ultimate issue is whether the constitutional claims raised in the defendant's

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<sup>5</sup> This case is therefore distinguishable from *Newbolds*, a case relied upon by the defendant. In *Newbolds*, our appellate court reversed the trial court's summary dismissal of a postconviction petition because the trial court's order stated that the defendant had not "met his burden of making a substantial showing" of the denial of his constitutional rights. In this case, the trial court imposed no such burden on the defendant.

postconviction petition are frivolous or patently without merit and, therefore, subject to summary dismissal.

¶ 24 Here, summary dismissal was proper because the defendant's claims were based on indisputably meritless legal theories. First, the defendant argues that he was not eligible to be sentenced as a habitual criminal under section 33B-1 of the Habitual Criminal Act because his first offense was committed before the enactment of the Habitual Criminal Act and was not designated as a Class X offense at the time the defendant committed the offense. These arguments are refuted by the plain terms of sections 33B-1(a) and 33B-1(d)(1) of the Habitual Criminal Act. At the time of the defendant's sentencing, section 33B-1(a) provided that "[e]very person who has been twice convicted \*\*\* of an offense *that contains the same elements as an offense now classified in Illinois as a Class X felony* \*\*\*, and is thereafter convicted of a Class X felony \*\*\* committed after the 2 prior convictions, shall be adjudged an habitual criminal." 720 ILCS 5/33B-1(a) (West 2006)). The defendant does not argue that the armed robbery offenses he committed in the 1970s contained different elements than the current Class X offense of armed robbery. Accordingly, by the plain terms of section 33B-1(a), those offenses may be considered in determining the defendant's status as a habitual criminal, even if they were not classified as Class X felonies at the time they were committed. Moreover, section 33B-1(d)(1) provided that "the third offense" must be "committed after the effective date of the Act." 720 ILCS 5/33B-1(d)(1) (West 2006). It did not require that the first and second offenses be committed after the Act was enacted.<sup>6</sup>

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<sup>6</sup> An earlier version of the Habitual Criminal Act provided that "[t]his Article shall not apply unless (1) the first felony was committed after the effective date of this act." (Ill. Rev.

¶ 25 Second, the defendant argues that his third offense was not committed within 20 years of his conviction on the first offense, as required by section 33B-1(d)(2) of the Habitual Criminal Act (720 ILCS 5/33B-1(d)(2) (West 2006)). The defendant maintains that, when the trial court calculated the time between the defendant's conviction on his first offense and the commission of the third offense, it erred by excluding the time that the defendant spent in custody after his convictions. Although he acknowledges that section 33B-1(d)(2) provided that "time spent in custody shall not be counted," the defendant argues that the phrase "in custody" referred only to *presentence* custody, not to a prison sentence served after a judgment of conviction. He also argues that the provision excluding time spent "in custody" referred only to presentence custody relating to the first offense, not the second offense. Accordingly, the defendant contends that the trial court lacked the authority to sentence him to a term of life in prison under section 33B-1 of the Habitual Criminal Act.

¶ 26 These arguments contravene the plain terms of the Habitual Criminal Act, and they have been rejected by every court that has addressed them. At the time of the defendant's sentencing, section 33B-1(d)(2) stated that the Habitual Criminal Act shall not apply unless, *inter alia*, "the third offense was committed within 20 years of the date that judgment was entered on the first conviction, provided, however, that *time spent in custody shall not be counted*." (Emphasis added.) (720 ILCS 5/33B-1(d)(2) (West 2006)). This provision simply provided that "time spent

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Stat. 1979, ch. 38, par. 33B-1, eff. Feb. 1, 1978)). In 1980, however, the legislature removed this language and "amended the Act to broaden the types of felony convictions that could trigger the Act to include convictions that occurred prior to" its effective date. *People v. Dunigan*, 165 Ill. 2d 235, 239-40 (1995); see also *People v. Wilson*, 257 Ill. App. 3d 826, 835 (1994).

in custody" should not be counted; it did not place any limitations on the type of "custody" that should not be counted (*e.g.*, presentence custody, imprisonment upon conviction, a sentence imposed for the first offense only, *et cetera.*) Thus, the defendant "reads into the statute a limitation that is not in the text of the statute." *People v. Abdullah*, 336 Ill. App. 3d 940, 953 (2003). If the legislature had intended section 33B-1(d)(2) to be interpreted the way the defendant interprets it, the legislature could easily have said "time in presentence custody shall not be counted" or "time in custody for the second offense shall not be counted." See *People v. Burke*, 362 Ill. App. 3d 99, 105 (2005). It did not do so. Instead the legislature merely stated that "time in custody" shall not be counted. That language is unambiguous, unequivocal, and categorical. *Burke*, 362 Ill. App. 3d at 105. When the language of a statute is plain and unambiguous, courts may not read in exceptions, limitations, or other conditions." *In re D.D.*, 196 Ill. 2d 405, 419 (2001); *Abdullah*, 336 Ill. App. 3d at 953. Accordingly, our appellate court has repeatedly rejected the interpretation of section 33B-1(d)(2) urged by the defendant. See *Abdullah*, 336 Ill. App. 3d at 953 (ruling that a defendant's "time in custody" for purposes of section 33B-1(d)(2) included time the defendant spent in prison for his second offense and time defendant was on parole); *Burke*, 362 Ill. App. 3d at 105 (holding that, in calculating the time between the defendant's conviction on his first predicate offense and the commission of his third offense, the trial court did not err in excluding the time the defendant spent in prison for his second conviction).

¶ 27 The defendant also argued that his trial and appellate attorneys rendered ineffective assistance of counsel. Like his other arguments, these claims have no basis in law and are based on indisputably meritless legal theories. Claims of ineffective assistance are governed by the

standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. More specifically, a defendant must show that his counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; see also *People v. Cathey*, 2012 IL 111746, ¶ 22 (Ill. March 22, 2012). At the first stage of proceedings under the Act, a petition alleging ineffective assistance of counsel 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 by counsel's deficient performance. *Hodges*, 234 Ill. 2d at 17.

¶ 28 The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Jones*, 219 Ill. 2d 1, 23 (2006). In order to prevail on such a claim, a defendant must show that his counsel's failure to raise the issue on appeal was objectively unreasonable and that this decision prejudiced him. *Id.* Appellate counsel is "not required to brief every conceivable issue on appeal and may refrain from developing nonmeritorious issues without violating *Strickland*" (*Id.*), because a defendant suffers no prejudice from counsel's failure to raise an issue unless the issue is meritorious. *Id.*; see also *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). Thus, it is not incompetence for an appellate counsel to refrain from raising issues that he or she believes are without merit, "unless his appraisal of the merits is patently wrong." *People v. Johnson*, 63 Ill. App. 3d 745, 751 (1978) (quoting *People v. Frank*, 48 Ill. 2d 500, 505 (1971));

see also *People v. Jones*, 362 Ill. App. 3d 31, 35 (2005). We must examine the underlying merits of defendant's claims to assess whether he was prejudiced by his trial or appellate counsel's failure to raise these issues on appeal.

¶ 29 The defendant argues that his trial and appellate attorneys were ineffective because they failed to argue that: (1) the defendant was ineligible to be sentenced as a habitual criminal for the reasons discussed above; and (2) sentencing the defendant as a habitual criminal violated the *ex post facto* clauses of the Federal and State Constitutions. As shown above, the defendant's argument that he was ineligible to receive a life sentence under the Habitual Criminal Act has no basis in law and was subject to summary dismissal. Accordingly, it is not arguable that the defendant's trial or appellate attorneys acted unreasonably by failing to raise this issue or that the defendant could have been prejudiced thereby.

¶ 30 We reach the same conclusion with respect to the defendant's *ex post facto* argument. The defendant contended that his sentencing under the Habitual Criminal Act violated the *ex post facto* clauses of the Federal and State Constitutions because the armed robberies that led to his 1979 conviction were committed before the Habitual Criminal Act was enacted and before any crimes were classified as Class X offenses. Our supreme court has rejected this argument. See, e.g., *People v. Dunigan*, 165 Ill. 2d 235, 241-243 (1995) (rejecting defendant's claims that the Habitual Criminal Act violated the *ex post facto* clauses of the Federal and State Constitutions and ruling that the Act "did not punish the defendant for conduct that occurred prior to the effective date of the Act" but rather treated the defendant's prior convictions as aggravating factors that enhanced the penalty imposed for the "third and most recent offense"); see also *People v. Wilson*, 257 Ill. App. 3d 826, 835-36 (1994) ("Illinois courts have consistently held that

the [Habitual Criminal] statute does not \*\*\* act as an *ex post facto* law, because it prescribes punishment only for the most recent crime, which must have been committed after the statute went into effect. The evidence of prior crimes is used solely to augment the penalty for the last crime.") (citations omitted); *People v. Mason*, 119 Ill. App. 3d 516, 524 (1983) (Illinois habitual criminal statute does not violate the Federal and Illinois constitutional provisions regarding *ex post facto* laws), abrogated on other grounds by *People v. Robinson*, 167 Ill. 2d 53, 69-73 (1995).

¶ 31 Accordingly, like the other arguments raised in his postconviction petition, the defendant's *ex post facto* argument has no arguable basis in law. It is not arguable that the defendant was prejudiced by his trial or appellate counsel's failure to raise this argument. Nor is it arguable that the defendant's trial or appellate counsel's decision not to raise the argument was objectively unreasonable. Thus, the ineffective assistance of counsel claims raised in the defendant's postconviction petition are frivolous and patently without merit, and the trial court correctly dismissed them summarily.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court of Will County summarily dismissing the defendant's postconviction petition.

¶ 34 Affirmed.