

the State Appellate Defender's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Fayette County.

¶ 3

BACKGROUND

¶ 4 On July 30, 2008, a jury found the defendant guilty of one count of participation in methamphetamine manufacturing pursuant to section 15(a)(2)(D) of the Methamphetamine Control and Community Protection Act (720 ILCS 646/15(a)(2)(D) (West 2006)). The circuit court sentenced the defendant to 16 years' imprisonment and imposed a \$3,000 drug assessment, a \$100 fine, and other fees. On direct appeal, the defendant argued that the State failed to prove him guilty beyond a reasonable doubt because there was insufficient evidence to prove that he participated in the manufacturing of methamphetamine. This court affirmed the defendant's conviction. *People v. Griffith*, No. 5-08-0499 (2009) (unpublished order under Supreme Court Rule 23).

¶ 5 On August 3, 2009, the defendant filed a *pro se* petition for postconviction relief pursuant to section 122-1 of the Act. Counsel was appointed and filed a postconviction petition on the defendant's behalf on April 9, 2010. On May 21, 2010, the defendant filed through counsel an amended postconviction petition. In his amended postconviction petition, the defendant made several allegations of ineffective assistance both of trial counsel and appellate counsel. The defendant argued that trial counsel was ineffective for (1) not impeaching Investigator Kelvin Worker, (2) failing to object to Investigator Worker's "continuous harassment" of a witness during trial, (3) failing to interview a witness, Troy Burgess, who could have provided an alibi for the defendant, (4) failing to introduce exculpatory evidence, namely that there was a child's toy which required batteries in the defendant's truck where investigators found lithium batteries thought to be purchased for manufacturing methamphetamine, and (5) failing to object to the State referring to the defendant's codefendant as the defendant's wife, rather than ex-wife. The defendant argued

that appellate counsel was ineffective for not raising the same arguments regarding trial counsel's effectiveness. The defendant further contended that he could not have been found guilty beyond a reasonable doubt. Next, the defendant argued that he was sentenced in violation of the proportionate penalties clause of the Illinois Constitution. Lastly, the defendant argued that his due process rights were violated when the State destroyed the remaining substance containing methamphetamine.

¶ 6 The State filed a motion to dismiss on June 22, 2010, and then an amended motion to dismiss on September 8, 2010. The court held a hearing on the State's motion to dismiss on October 13, 2010. On January 10, 2011, the court dismissed the defendant's amended postconviction petition, finding that the defendant had failed to demonstrate a substantial denial of his constitutional rights. The defendant filed a timely notice of appeal, and the State Appellate Defender was appointed to represent him.

¶ 7 ANALYSIS

¶ 8 The Act provides a mechanism by which state prisoners may challenge their convictions or sentences for violations of state or federal constitutional law. *People v. Barrow*, 195 Ill. 2d 506, 518-19 (2001). Postconviction proceedings may consist of as many as three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the second stage of a postconviction proceeding, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Graham*, 2012 IL App (1st) 102351, ¶ 31. Section 122-2 of the Act provides that a petitioner must attach affidavits, records, or other evidence to support his allegations or he must state why such information is not attached. 725 ILCS 5/122-2 (West 2010). Issues that were raised and decided on direct appeal are barred by *res judicata*, and all issues that could have been raised but were not are forfeited. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). We review the dismissal of a second-stage postconviction petition *de novo*. *People*

v. Coleman, 183 Ill. 2d 366, 389 (1998).

¶ 9 The defendant alleges several instances of ineffective assistance of both trial and appellate counsel. Counsel is ineffective if his or her representation falls below an objective standard of reasonableness and the substandard representation prejudiced the defendant such that the result in the trial court would have been different but for counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). With those principles in mind, we now address the defendant's arguments.

¶ 10 The defendant's first argument is that his trial counsel was ineffective for failing to impeach Investigator Worker. The defendant fails to assert any factual allegations to support this claim. There is no information within the record that shows how or upon what information Investigator Worker should have been impeached. Broad conclusory statements about counsel's alleged ineffectiveness are not permitted under the Act. *People v. Delton*, 227 Ill. 2d 247, 258 (2008). The defendant does not show that trial counsel's failure to impeach Investigator Worker would have changed the outcome of the trial and, thus, cannot show that he was prejudiced by counsel's representation. Therefore, this argument cannot stand.

¶ 11 Next, the defendant argues that his trial counsel was ineffective for not investigating the "continuous harassment" of a witness by Investigator Worker. During a sidebar, the circuit court informed the State that Investigator Worker, who was sitting at counsel table with the State, would stare and smile in disbelief at Diane Griffith, the codefendant, while she testified. The court told the State to admonish him to "keep a poker face." No other incidents were reported concerning Investigator Worker's courtroom behavior. The defendant attached an affidavit signed by Diane Griffith that stated she felt threatened and intimidated by Investigator Worker while she was testifying. However, Diane Griffith does not include any information in the affidavit that shows what her testimony would have been

had she not felt threatened and intimidated by Investigator Worker. Also, the defendant does not point to any information that would indicate his trial counsel was aware of Investigator Worker's behavior until the court informed the State about it, at which point it appears that the situation was adequately resolved. Nor is there any information to indicate the jury was aware of Investigator Worker's behavior. Even if trial counsel had investigated and addressed the issue with the court, the court was already aware of the behavior and the situation was properly addressed. Therefore, we find that trial counsel's representation did not fall below an objective standard of reasonableness.

¶ 12 The defendant next contends that his trial counsel was ineffective for failing to interview Troy Burgess, a witness the defendant claims could have provided an alibi for him. Burgess submitted an affidavit in which he stated that in December of 2006, the defendant informed him that he and his ex-wife, Diana Griffith, had gotten into a fight, that the defendant then stayed one night at Burgess's home, and that the defendant left the home the next day. The defendant claims that his ex-wife made the methamphetamine while he was staying with Burgess. The defendant identified Burgess as a potential witness to his counsel one day before his trial began. Trial counsel moved to continue the trial because Burgess was unavailable to testify at that time. The court denied the motion to continue. We find counsel's actions to be reasonable, as there was not more that counsel could have done to present Burgess as a witness. Further, counsel cannot be blamed for the defendant's delay in informing counsel of Burgess's existence.

¶ 13 Next, the defendant argues that his trial counsel was ineffective for failing to introduce evidence that the lithium batteries found in the defendant's truck were purchased for a child's toy. We agree with the circuit court's order: the evidence against the defendant consisted of more than lithium batteries, and thus, trial counsel's failure to present evidence that a child's toy was purchased at the same time as the batteries did not prejudice the

defendant. The evidence against the defendant consisted of multiple packages of pseudoephedrine pills purchased at different locations, a receipt for Coleman fuel, and other items used for "meth cooks" found in the defendant's basement. Further, investigators testified that the "meth lab" in the defendant's basement was well-used and was not new. We do not find that trial counsel's failure to introduce evidence of the child's toy prejudiced the defendant such that the result of the trial would have been different as there was ample evidence to implicate the defendant in the production of methamphetamine.

¶ 14 The defendant argues that his trial counsel was ineffective for failing to object to the State repeatedly referring to the codefendant, Diana, as the defendant's wife, and not his ex-wife. At trial, it was adduced that the defendant and Diana were at one point married but then divorced. However, at the time of the offense, the defendant and Diana lived together as a couple and had done so for approximately three years. The State repeatedly referred to Diana as the defendant's wife. We fail to see how this in any way prejudiced the defendant. He and Diana lived together as a couple at the time of the offense, a fact the State relied upon when making its closing argument. The State focused on the relationship between the defendant and Diana rather than their marital status. Not only so, but trial counsel did correct the State after its opening statement by saying: "The rest of the story is that yes, these officers did stop Mr. Griffith and Diana Griffith, who, just to correct something, is his ex-wife. They were back together but ex-wife, so let's make that clear." The jury also heard evidence that the defendant and Diana were no longer married. Therefore, we do not see how trial counsel's failure to object to the State's reference to "wife" rather than "ex-wife" prejudiced the defendant.

¶ 15 The defendant's next argument is that his appellate counsel was ineffective for not raising the issues above regarding trial counsel's effectiveness. Claims of ineffective assistance of appellate counsel are held to the same standard as that of trial counsel. *People*

v. Lampton, 385 Ill. App. 3d 507, 511 (2008). Therefore, the defendant must show that appellate counsel's representation fell below an objective standard of reasonableness and, as a result, the defendant was prejudiced. *Strickland*, 466 U.S. at 687. Appellate counsel is not required to brief every conceivable issue on appeal and is not ineffective for raising only meritorious claims. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 30. Here, we found that there were no instances of ineffective assistance of trial counsel; thus appellate counsel could not be expected to raise any such claims.

¶ 16 The defendant also claims that the State failed to prove him guilty beyond a reasonable doubt. However, the defendant made this same claim on direct appeal. See *People v. Griffith*, No. 5-08-0499 (2009) (unpublished order under Supreme Court Rule 23). As this is a previously adjudicated issue, this argument is barred by *res judicata*. *Williams*, 209 Ill. 2d at 233.

¶ 17 Next, the defendant argues that the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) was violated because the amount of the liquid that allegedly contained methamphetamine had no relation to the higher penalties used to prevent larger methamphetamine-manufacturing operations. The defendant further argues that his due process rights were violated in contravention of the Illinois Constitution (Ill. Const. 1970, art. I, § 2) when the circuit court permitted the weight of the byproduct produced during the manufacture of methamphetamine to count towards determining a penalty for the alleged manufacture of the drug. In *People v. McCarty*, 223 Ill. 2d 109, 134-35 (2006), the Illinois Supreme Court found that the phrase "substance containing methamphetamine" included the byproducts produced during the manufacture of methamphetamine. The supreme court further found that the statute under which the defendant was convicted and sentenced did not violate the proportionate penalties or due process clauses of the Illinois Constitution. *McCarty*, 223 Ill. 2d at 136-40. Here, therefore, the defendant's constitutional

rights were not violated.

¶ 18 Finally, the defendant argues that his due process rights were violated when the State destroyed all of the evidence relating to the weight of the substance suspected to contain methamphetamine. We do not agree. "When evidence is only potentially useful, not material exculpatory evidence, a failure to preserve the evidence does not violate due process unless the defendant can show bad faith by the State." *People v. Schroeder*, 2012 IL App (3d) 110240, ¶ 33. "Destroying hazardous material pursuant to a routine, well-intentioned policy cannot be bad faith." *People v. Gentry*, 351 Ill. App. 3d 872, 879 (2004). At trial in this case, the officer who initially weighed the substance and reserved a sample to send to the lab testified that the remainder of the substance was destroyed due to the hazardous nature of methamphetamine. We find that the destruction of the remainder of methamphetamine was not done in bad faith considering the volatile and dangerous nature of methamphetamine.

¶ 19

CONCLUSION

¶ 20 For the foregoing reasons, the motion of the State Appellate Defender to withdraw as counsel is granted, and the judgment of the circuit court of Fayette County is affirmed.

¶ 21 Motion granted; judgment affirmed.