

No. 1-13-3641

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 26182
)	
JOHN TAYLOR,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

O R D E R

- ¶ 1 *Held:* We affirm the summary dismissal of defendant's postconviction petition where appellate counsel's performance was not arguably deficient and no arguable claim of prejudice resulted from alleged ineffective assistance of counsel.
- ¶ 2 Following a jury trial, defendant John Taylor was convicted of first degree murder and sentenced to 60 years' imprisonment. This court affirmed that judgment on direct appeal (*People*

v. Taylor, No. 1-08-0056 (2010) (unpublished order under Supreme Court Rule 23)). Defendant subsequently filed a petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) alleging, *inter alia*, ineffective assistance of counsel, which the circuit court summarily dismissed. On appeal, defendant contends the court erred in dismissing his petition, as it set forth an arguable claim that appellate counsel was ineffective for failing to raise as error the admission of evidence at trial that defendant was arrested for domestically battering the victim a few weeks before her death. We affirm the dismissal of defendant's petition.

¶ 3 The evidence at trial established that on October 14, 2003, defendant strangled his wife, Nickole Kitchen, at her mother's home in Chicago. The underlying facts are set forth in this court's opinion affirming defendant's conviction on direct appeal (*Taylor*, No. 1-08-0056 (2010) (unpublished order under Supreme Court Rule 23)) and we restate only what is pertinent to the current appeal.

¶ 4 Prior to trial, defendant filed a motion *in limine* to exclude evidence that he had been arrested for domestically battering Nickole during their honeymoon. At the hearing, the State contended that defendant's arrest established his motive for the murder, as he was then on parole and the incident constituted a parole violation. The State submitted that a witness, Tasha Jones, would testify that defendant claimed Nickole was violent and "was trying to send him back to prison." In response, defense counsel argued that any reference to the domestic battery would be improper evidence of other crimes. The court barred the State from introducing evidence of the domestic battery during its case-in-chief, and ruled that statements made by Nickole after the honeymoon were inadmissible as hearsay.

¶ 5 At trial, Florence Kitchen, Nickole's mother, testified that Nickole and defendant married on September 27, 2003. Nickole returned early from the honeymoon after calling Florence on October 2, 2003, and was hysterical when they met at the airport. Instead of living with defendant, Nickole moved into Florence's apartment. Defendant visited twice, accompanied by his parents. On the night of October 14, 2003, Florence went shopping but her brother Little Kitchen, her uncle Ellis, her ill mother Annie, and Nickole all stayed in the apartment. On October 16, 2003, defendant called Florence and asked if he killed Nickole. Florence said, "yes," and defendant said, "thank you, I'm gonna kill myself."¹

¶ 6 Little Kitchen testified that after Florence left the apartment on October 14, 2003, the doorbell rang and Nickole let defendant inside. They went to the back bedroom while Little and Ellis watched television. Little's daughter, Vicky, and her two daughters arrived and visited Annie. After defendant left, Vicky told Little that she had knocked on Nickole's door and did not get a reply. Little and Vicky forced the door and found Nickole unresponsive on the bed.

¶ 7 Vicky Richard testified that she and her daughters visited Annie in the room adjacent to Nickole's bedroom. She heard noises from Nickole's room and believed that Nickole and defendant were having sex. After defendant left, Vicky knocked on Nickole's door but did not receive a response. Vicky and Little forced the door and found Nickole on the bed with the cover over her head. She had urinated on herself, had a mark around her neck, and did not have a pulse.

¹ In the trial record, Florence states that "[h]e called me, he said mom, did I kill Nicole [*sic*] Annie [*sic*] said yes." We interpret the name "Annie" to be a typographical error and read Florence's testimony as follows: "He called me, he said mom, did I kill Nicole [*sic*] and I said yes." In their briefs, neither party suggests that Nickole's grandmother, Annie, was involved in the conversation between defendant and Florence.

Vicky called 911. Soon afterwards, she received a call from defendant, who asked if Nickole was asleep. Vicky lied and said that Nickole was sleeping. On cross-examination, Vicky said the noise from Nickole's bedroom resembled a sigh and something hitting the floor. She denied telling a detective that she heard screaming and shouting, or that she asked Ellis about the noise and he told her to knock on Nickole's door.

¶ 8 LaSharon Richard, Vicky's daughter, testified that while she was in Annie's room, she heard a moan from Nickole's bedroom and thought that Nickole and defendant were having sex. Afterwards, she saw defendant in the hallway. He was not wearing a tie, his shirt was open and his shirt tail was out, and his shoes were untied, but he appeared calm and did not have visible injuries. He asked LaSharon about her college applications and left the apartment. Later, LaSharon and other family members knocked on Nickole's door but did not hear an answer. When they opened the door, Nickole was on the bed beneath a cover. She was "purple" and had "scars" on her neck. Vicky called 911. Soon afterwards, Vicky received another call and told the other people in the apartment, "this [is] him." On cross-examination, LaSharon denied telling police officers that she heard Nickole yelling in the bedroom, or that Vicky asked Little and Ellis if they heard the noise. LaSharon also denied telling the police that Ellis told Vicky to knock on Nickole's door but "they didn't because *** they didn't want to disturb" Nickole and defendant.

¶ 9 Tasha Jones testified that she had a child with defendant and was engaged to him prior to his marriage with Nickole. On October 10, 2003, defendant visited Jones and said that he was getting divorced and "felt like [Nickole] was going to send him back to jail." On October 13, 2003, defendant visited Jones and stated that he and his wife were getting an annulment and

asked Jones to get back together. He said that his wife was violent and was taking part in sending him to prison, and talked about committing suicide if he had to go back. Jones also saw defendant on the evening of October 14, 2003. Later that night, he called her and said "[i]t's over, it's over, Nicole's [sic] gone. I'm sorry, I love you. Take care of my son." On October 16 or 17, 2003, defendant called Jones and asked if Nickole was dead. Jones answered "yes," and defendant replied that he would kill himself. On cross-examination, Jones testified that she did not recall telling police officers that defendant claimed Nickole was going to send him back to prison on October 10, 2003. Jones also stated that defendant spoke on the phone while he was at her house on October 14, 2003, and told her the conversation was with Nickole. Jones thought defendant was happy when he left that night.

¶ 10 Tracey Garfield testified that she dated defendant prior to his marriage with Nickole. On October 20, 2003, defendant left Garfield a voicemail stating that his marriage was a mistake and that he should have married her, and that he had killed Nickole and was going to kill himself.

¶ 11 Officer Thomas Mander, a forensic investigator, testified that he searched Nickole's bedroom for a rope or cord because ligature marks were found on Nickole's throat, but he did not find either item.

¶ 12 FBI Agent Matthew Alcoke testified that the Chicago Police Department requested his assistance in tracking defendant on October 15, 2003. Alcoke located defendant's car in New York City, and, using cell phone and credit card records, tracked him to a hotel in Charlottesville, Virginia, on October 20, 2003.

¶ 13 FBI Agent Stephan Duenas testified that on October 21, 2003, he arrested defendant at the hotel with the assistance of a SWAT team. On cross-examination, Duenas stated that he noticed injuries on defendant's face, arms, and neck.

¶ 14 Dr. Ponni Arunkumar, an assistant medical examiner, reviewed records from Nickole's autopsy and testified that her death was a homicide by strangulation. Nickole had marks on her neck between .15 and .2 inches wide, which extended from earlobe to earlobe and resulted from frontal pressure. The marks indicated that Nickole had been strangled with a ligature, but based on their width, Arunkumar did not believe it was a necktie. Nickole also had external injuries to her face, eyes, neck, arms, and thigh, internal injuries to her neck and scalp, and bite marks on her tongue, caused by her own teeth. Arunkumar further testified that a person loses consciousness after blood has been cut off to the brain for 10 to 30 seconds, and death from strangulation could occur in 3 ½ to six minutes.

¶ 15 The State rested and defendant's motion for directed verdict was denied.

¶ 16 Shaster Giles testified that she worked with defendant at the New Covenant Baptist Church in Chicago and they were friends. Giles testified that, in her opinion, defendant was a peaceful person and that other members of the church viewed him as a peaceful person as well.

¶ 17 Stephen Thurston, pastor of the New Covenant Missionary Baptist Church in Chicago, also testified as to defendant's peacefulness.

¶ 18 Defendant testified that he committed robberies as a result of a drug addiction and had been sentenced to prison. Upon parole, he moved to Chicago and worked as a minister under

Thurston. He married Nickole on September 27, 2003, and they went to Florida for their honeymoon, planning to stay about 10 days. The following colloquy occurred:

"ASSISTANT PUBLIC DEFENDER (APD): Did you stay the whole ten days?

DEFENDANT: Yes.

APD: Did Nicole [*sic*]?

DEFENDANT: No.

APD: Why not?

DEFENDANT: She left to return to be with her grandmother, ailing grandmother and I had to stay.

APD: Why did you have to stay?

DEFENDANT: I had to preach that Sunday. She left that Saturday and I had to preach that Sunday in Orlando."

¶ 19 When defendant returned to Chicago, Nickole met him at the airport and they spent two nights together. Afterwards, he saw Nickole every day at Florence's house. Shortly before 7 p.m. on October 14, 2003, defendant was visiting Jones and received a call from Nickole. He went to Florence's home, wearing a suit, tie, and "slip on shoes." Nickole told him to go straight to the bedroom. After closing and locking the door, she expressed anger that defendant had used their marriage license to obtain insurance for their vehicles and said that she wanted to separate and "fuck everybody I want to fuck."

¶ 20 Defendant tried to embrace Nickole but she began swinging at him, scratching both their faces, and said that she did not care if her family heard them fighting. Eventually, defendant held

Nickole on the floor while he sat on the edge of the bed. She grabbed his tie and it became wrapped around her neck. They both pulled on the tie until Nickole sighed and fell over.

Defendant tried to wake her but she was unresponsive. He panicked, put her on the bed, and pulled the covers over her. Then, he locked the bedroom door and left the apartment without talking to anyone, the tie still around his neck.

¶ 21 Defendant called several people and asked them to check on Nickole because he believed he might have killed her, but he did not call 911 or Nickole's house. A few days later, he called Florence and asked if Nickole was still alive. She told him that Nickole was dead, and he stated that he would take his own life. He drove to Detroit, Cleveland, Philadelphia, New York, and, finally, Charlottesville, Virginia, where he checked into a hotel and consumed pills and alcohol, intending to kill himself before the police arrived. He denied that he intended to hurt or kill Nickole.

¶ 22 Prior to defendant's direct examination, the State requested a sidebar and submitted that defendant's direct testimony "opened the door" to questions about his domestic battery arrest on the honeymoon. The court noted that defendant "clearly inferred that [Nickole] left because her grandmother was sick," and that his testimony gave the impression that "everything was hunky-dory when she left and it wasn't." Over defense counsel's objection, the court ruled that the State could ask defendant about the arrest but could not ask whether that was the reason Nickole left Florida.

¶ 23 On cross-examination, the State questioned defendant as follows:

"ASSISTANT STATE'S ATTORNEY (ASA): Now before on direct testimony, sir, you had talked a little bit about the circumstances surrounding Nicole [*sic*] leaving your honeymoon early, correct?

DEFENDANT: Yes.

ASA: Didn't she leave the same day that you were arrested for domestic battery?

DEFENDANT: No.

ASA: She didn't?

DEFENDANT: No, sir.

ASA: When did she leave?

DEFENDANT: Saturday.

ASA: What day was that?

DEFENDANT: October. I came back on the 6th on a Sunday, so that was the 5th. October the 4th.

ASA: Hang on a second. You came back a day after she did?

DEFENDANT: Yes.

ASA: That's your testimony?

DEFENDANT: Yes.

ASA: She signed a refusal to prosecute on that domestic battery that same day, didn't she?

DEFENDANT: Yes."

¶ 24 Defendant also testified on cross-examination that in October 2003, he was five feet eleven inches tall and weighed 210 pounds, and Nickole was five feet five inches tall and weighed 152 pounds. The struggle over the tie lasted several minutes, but defendant did not try to push Nickole away, leave the room, or yell for help. Instead, he kept his own grip on the tie and screamed, "let me go." When Nickole let go, defendant thought she was dead. Afterwards, defendant locked the door "so nobody could see what had happened to her," and did not ask anyone for help, call the police, or perform CPR. He did not tell anyone that Nickole attacked him or that he killed her in self-defense. After his arrest, defendant acknowledged asking detectives the difference between first, second, and third degree murder.

¶ 25 The parties stipulated that Detective Schnoor would testify that on October 14, 2003, Vicky Richard told police that she heard screaming and shouting from Nickole's bedroom and asked other people in the apartment if they heard it. Vicky stated that Little told her to knock on the door, but she thought they should leave Nickole and defendant alone because they were newlyweds. Detective Schnoor would also testify that on October 14, 2003, LaSharon Richard told police that she heard Nickole yelling in her bedroom and Vicky asked Little and Ellis if they had heard the noise. Ellis told Vicky to knock on Nickole's door, but Vicky did not do so because Nickole and defendant were newlyweds.

¶ 26 The State called Sergeant Jose Lopez in rebuttal, who testified that he interviewed defendant with Schnoor. Defendant stated that "I killed Nicole [*sic*]. I know I did it and I have to live with it." Defendant then asked the detectives to explain the difference between first, second, and third degree murder.

¶ 27 During the State's initial closing argument, the prosecutor stated:

"You know that October 2nd, Florence Kitchen got a call from her daughter, and she was hysterical. She flew, left in the middle of her honeymoon, came back home. She picked her up from the airport, and she was hysterical."

During the defense's closing argument, defense counsel stated:

**** [W]hen Nicole [*sic*] came back early, you know that her grandmother was very close to death. And she was obviously close to her.

[Defendant] told you she came back because she was concerned about her grandmother. That's not a lie. Nicole [*sic*] was concerned about her grandmother."

During the State's rebuttal closing argument, the prosecutor stated:

"Nicole [*sic*] didn't leave their honeymoon because her grandmother was ill. Yes, she loved her grandmother. Her grandmother was ill four [*sic*] days before when she left on that honeymoon. Did she leave her? Yes. That's not why she cut her vacation short, ladies and gentlemen. And you know that."

After closing arguments, the court instructed the jury that a mitigating factor reducing first degree murder to second degree murder exists if "at the time of the killing the defendant acts under a sudden and intense passion resulting from serious provocation by the deceased."

¶ 28 The jury found defendant guilty of first degree murder. Defendant filed a motion for new trial, alleging, *inter alia*, that the trial court erred in allowing the State to ask him about his domestic battery arrest. The court denied defendant's motion and sentenced him to 60 years' imprisonment. This court affirmed defendant's conviction on direct appeal (*Taylor*, No. 1-08-

0056 (2010) (unpublished order under Supreme Court Rule 23)). Subsequently, defendant filed a *pro se* postconviction petition alleging, *inter alia*, that appellate counsel was ineffective for failing to raise a claim that the prosecution elicited evidence of the arrest in violation of the trial court's ruling on defendant's motion *in limine*.

¶ 29 On September 26, 2013, the circuit court summarily dismissed defendant's postconviction petition. The court stated:

“*** [P]etitioner's claim that the State improperly presented evidence of petitioner's domestic battery arrest is without merit. The record indicates that during the hearing on the motion *in limine*, the trial court inquired whether the State would seek to introduce the evidence of the domestic battery arrest in the State's case-in-chief. The State indicated that it would not use the evidence of the domestic abuse arrest during its case-in-chief, but that it would introduce evidence that petitioner called Tasha Jones and told her that the victim was violent and wanted to put him back in jail. At trial, the State used the domestic abuse arrest to impeach petitioner as follows:

On cross-examination, the State asked Taylor if Nickole left Florida on the same day he was arrested for domestic battery and whether Nickole signed a “refusal to prosecute” the battery. Taylor testified that Nickole left on a different day than the arrest and she signed a “refusal to prosecute” the battery. The domestic battery arrest was not discussed any further.

People v. Taylor, No. 1-08-0056, p. 14 (1st Dist. 2010) (unpublished order under Supreme Court Rule 23). The record therefore rebuts petitioner's claim that the State had

improperly presented evidence of petitioner's domestic battery arrest at trial. Petitioner's claim is meritless. Appellate counsel was therefore not ineffective for failing to raise this meritless claim on direct appeal."

¶ 30 On appeal, defendant contends that the circuit court erred in dismissing his postconviction petition, which set forth an arguable claim that appellate counsel was ineffective for not raising as error the admission of evidence at trial of defendant's domestic battery arrest. As the trial court did not issue a limiting instruction regarding the arrest, defendant argues that the jury may have treated defendant's arrest as evidence of his propensity for violence against Nickole. He asserts that the State reinforced this misperception in closing arguments by urging the jury to consider the arrest as evidence that Nickole feared defendant. Defendant concedes the evidence overwhelmingly established that he killed Nickole, but argues that the arrest gave the jury an improper basis for rejecting his theory that Nickole's death occurred unintentionally during a physical struggle that she initiated, thus constituting second degree murder rather than first degree murder.

¶ 31 In response, the State contends that defendant's domestic battery arrest was not used to establish his propensity for violence, but rather, to impeach defendant when he claimed that Nickole left their honeymoon to visit her grandmother. Therefore, as evidence of the arrest was properly admitted, appellate counsel was not ineffective for omitting the issue on direct appeal. The State further argues that the arrest did not prejudice defendant, as his account of Nickole's death was implausible and other evidence established his guilt. The State contends that, as a

result, defendant's postconviction petition failed to raise an arguable claim for ineffective assistance of appellate counsel.

¶ 32 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a three-stage process for a defendant to challenge a conviction based on alleged violations of his constitutional rights that were not, and could not have been, adjudicated previously on direct appeal. *People v. English*, 2013 IL 112890, ¶¶ 21-23. At the first stage, the trial court will summarily dismiss a petition that is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Allen*, 2015 IL 113135, ¶ 21. The allegations in the petition, taken as true and liberally construed, need only present the gist of a constitutional claim and have an arguable basis either in law or fact. *Allen*, 2015 IL 113135, ¶¶ 24-25. If the petition survives to the second stage, the State may file responsive pleadings. 725 ILCS 5/122-5 (West 2012); *People v. Hodges*, 234 Ill. 2d 1,10-11 (2009). If the defendant makes a “substantial showing” of a constitutional violation, the petition will proceed to the third stage, where the trial court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2012); *Allen*, 2015 IL 113135, ¶ 22. We review a circuit court's dismissal of a postconviction petition *de novo*. *Allen*, 2015 IL 113135, ¶ 19.

¶ 33 At the first stage of postconviction proceedings, a claim of ineffective assistance of appellate counsel may not be dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness, and (2) it is arguable there exists a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010) (citing *Strickland v. Washington*, 466 U.S. 668,

687-88, 694 (1984)). Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetent to refrain from raising issues that, in counsel's judgment, are without merit, unless counsel's assessment is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). A defendant suffers no prejudice from appellate counsel's failure to raise a nonmeritorious claim. *Id.*

¶ 34 As an initial matter, the State contends that the circuit court properly dismissed defendant's postconviction petition where defendant failed to support the petition with affidavits or other evidence supporting his allegation of ineffective assistance of counsel. See 725 ILCS 5/122-2 (West 2012) ("The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached."). However, a defendant is not required to attach supporting documents to a postconviction petition where the basis for its claims can be determined on the record. *People v. Johnson*, 377 Ill. App. 3d 854, 859 (2007). Here, the fact that appellate counsel did not raise as error the admission of evidence at trial of defendant's domestic battery arrest is apparent from the record.²

¶ 35 Turning to the merits of the present appeal, we find that defendant has made no showing that appellate counsel was arguably ineffective for failing to raise as error the admission of evidence at trial regarding defendant's arrest for domestic battery, as evidence of the arrest was properly admitted. *Simms*, 192 Ill. 2d 348, 362 (2000) (appellate counsel not obliged to raise meritless issues on appeal). During direct examination of defendant, defense counsel asked why

² Defendant's brief on direct appeal is not included in the record. However, this court's order did not indicate that defendant's brief raised the issue of defendant's domestic battery arrest.

Nickole returned early from the honeymoon and defendant stated that "[s]he left early to be with her *** ailing grandmother." In a sidebar, the court recognized that defendant's testimony was misleading for suggesting there were no problems between defendant and Nickole at the time she went home, and therefore permitted the State to ask defendant about the domestic battery arrest. *People v. Cortes*, 181 Ill. 2d 249, 282-84 (1998) (State may introduce evidence of defendant's other crimes to impeach misleading statements made by defense witness); *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 38 (admissibility of bad-acts evidence is within trial court's sound discretion).

¶ 36 Notably, defense counsel again opened the door to the arrest during closing arguments by stating that Nickole returned from the honeymoon because she was concerned about her grandmother. In rebuttal, the State told the jury "[t]hat's not why she cut her vacation short *** [a]nd you know that." The record reflects the State's questions to defendant and comments during closing argument were minimal and limited, and were posed to clarify a misconception raised by the defense regarding Nickole's early return from the honeymoon. Consequently, evidence of defendant's domestic battery arrest was properly admitted and appellate counsel was not ineffective for not raising the issue as error.

¶ 37 Additionally, even if appellate counsel's performance was deficient, we cannot say that defendant has set forth an arguable claim of prejudice. *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 12 (to prove prejudice, defendant must show reasonable probability that but for counsel's errors, the results of the proceedings would have been different). To the contrary, the record shows no reasonable probability that defendant would not have been found guilty of first

degree murder but for evidence of the domestic battery arrest and lack of limiting instructions regarding its evidentiary use. *People v. Bew*, 228 Ill. 2d 122, 135 (2008) (“*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice.”).

¶ 38 Defendant testified that he argued and grappled with Nickole and eventually restrained her against the floor. According to defendant, his tie went around Nickole's neck and they each pulled on the tie until she died. Although he was taller and heavier than her, he did not try to push her away, leave the room, or yell for help. Afterwards, he locked the door and did not call the police or tell anyone in the apartment what had happened.

¶ 39 Nothing in defendant's testimony suggested that Nickole seriously provoked him or elicited a sudden and intense passion that would support a finding of second degree murder. Rather, the jury was free to reject his testimony in view of its improbability and the other evidence at trial. *People v. Hart*, 214 Ill. 2d 490, 520 (2005) (“If a defendant chooses to give an explanation for his incriminating situation, he should provide a reasonable story or be judged by its improbabilities.”); *People v. Jones*, 2014 IL App (3d) 121016, ¶ 19 (trier of fact is not required to accept explanations consistent with defendant's innocence or to disregard inferences flowing from the evidence).

¶ 40 Dr. Arunkumar testified that Nickole would have been unconscious for several minutes before dying from strangulation, and that the marks around her neck did not indicate she was strangled with a necktie. LaSharon Richard contradicted defendant's testimony regarding his appearance and conduct after leaving Nickole's bedroom. Four other witnesses testified that defendant contacted them in the days following Nickole's death but none testified that defendant

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stated he had been provoked. In view of the evidence supporting defendant's conviction for first degree murder and the absence of mitigating factors that would support a finding of second degree murder, we cannot say that defendant was arguably prejudiced by evidence of his domestic battery arrest.

¶ 41 For all the foregoing reasons, we affirm the summary dismissal of defendant's postconviction petition.

¶ 42 Affirmed.