

No. 1-13-3738

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	No. 04 CR 1517 (03)
)	
EARL FABER,)	Honorable
)	Steven J. Goebel,
Petitioner-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

ORDER

- ¶ 1 *Held:* We affirm the circuit court's dismissal of defendant's post-conviction petition at the first stage as frivolous and patently without merit, finding that the petition's claims are either forfeited in that they could have been addressed on direct appeal, or *res judicata* in that they were addressed on direct appeal, or are without merit or supporting basis in the record.
- ¶ 2 Defendant, Earl Faber, appeals the order of the circuit court dismissing his postconviction petition as frivolous and patently without merit. On appeal, defendant contends the trial court

erred in dismissing his petition because 1) his trial counsel provided ineffective assistance by failing "to competently litigate" meritorious claims, including allegations that defendant was denied his request for counsel during custodial interrogation, that his statement was invalid, and that his trial counsel failed to impeach state witnesses and challenge their identification testimony; 2) his appellate counsel was ineffective; 3) the state knowingly used perjured testimony to sustain defendant's conviction; and 4) prosecutorial misstatements made in closing argument denied him a fair trial.¹ For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court's order dismissing defendant's postconviction petition was entered on October 1, 2013. A notice of appeal was timely filed (per proof of service) on November 12, 2013. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6) and Illinois Supreme Court Rule 651 (eff. Feb. 6, 2013), governing appeals in post-conviction proceedings.

¶ 5 BACKGROUND

¶ 6 The following facts are taken from defendant's direct appeal, *People v. Faber*, 2012 IL App (1st) 093273. Defendant, along with James Lenoir, Donald Phillips, and Leondray McClellan, was charged in the shootings of Deonte Wright and Jose Perez. Wright died from his injuries. The trial court granted Defendant's motion to sever his trial from the other defendants' trials.

¶ 7 Prior to trial, Defendant filed a motion to suppress the testimony of two witnesses who had viewed a photographic array in which they identified Defendant as the shooter. He also sought to

¹ Defendant's appointed counsel for this appeal filed a brief on April 7, 2015. However, defendant thereafter filed a motion to dismiss appointed counsel and strike the filed brief. This court granted defendant's motion to dismiss appointed counsel and proceed *pro se*, but did not strike the brief already filed. Defendant subsequently filed a *pro se* brief. We consider both briefs in this appeal.

suppress witnesses' identification of him from the lineup, arguing the lineup was unduly suggestive. At the hearing, Detective Flaherty testified that on September 17, 2003, witnesses Martha Christopher and Willie Stallworth were shown a photo array containing a photograph of defendant. Detective Flaherty described the photos as head and shoulder shots, approximately the size of a piece of 8 x 11 inch paper. They obtained photos of other subjects from Chicago police computer records. The photos were closely matched by gender, race, age, and facial features. Detective Flaherty went to the residences of Christopher and Stallworth and showed them an array containing a photograph of defendant and five "fillers." He asked them to look through it to see if they recognized anyone. He did not tell them that he believed a photograph of one of the offenders was in the array. Both Christopher and Stallworth selected a photograph of defendant from the array. The selected photo was dated and signed by the witnesses and by Detective Flaherty. He stated that the last time he saw the photos of defendant was October 2003.

¶ 8 On September 19, 2003, Stallworth, Mrs. Christopher, Mr. Christopher, Mr. Nzau, and Mr. Reap came to the police station to view a lineup. At one point, the witnesses sat together in the same room but later they were separated. The lineup contained two codefendants, James Lenoir and Donald Phillips, as well as defendant. Detective Flaherty informed defendant that he would be placed in a lineup and asked him to pick a position in the lineup. He wore his civilian clothes. The witnesses viewed the lineup one at a time. Ms. Christopher, Mr. Christopher, and Mr. Stallworth picked defendant out of the lineup. At no time were witnesses told that the shooter was in the lineup.

¶ 9 At the hearing, defendant testified that while he was in custody at the police station, he saw his clothes in a bag. The police told him he would be in a lineup and was given only his jeans and an undershirt to wear. He was not given his "tee shirt, jacket, [or] [his] hat." He was not asked

where he wanted to sit in the lineup. Instead, others were already seated and there was "a place for [him] to sit once [he] got there." He did not voluntarily participate in the lineup, nor was he offered a phone call. During the lineup, the participants were asked one by one to step up to the two-way mirror and turn left and right. After going through all the participants, they performed the lineup procedure again. Defendant stated that "the second time they ran the lineup it was like I was up there longer than the first time."

¶ 10 The trial court denied defendant's motions, finding that the lineup was not suggestive and the procedure using the photographic array was fair. It accepted the testimony of Detective Flaherty, finding him to be a credible witness. It also believed that the State's loss of the photographs was inadvertent and the State diligently attempted to find the photos once it realized they were missing. No one told the witnesses which photo to select or that the offender's photo was in the array. It stated that it would not "preclude the State from going into the photographic array."

¶ 11 At trial, Officer Kusinski testified that on September 16, 2003, he was conducting narcotics surveillance a few blocks from the intersection of Madison and Western in Chicago, Illinois, when he heard approximately six gunshots in the area. He ran to where he heard the shots fired and saw a lot of people running away. He fought his way through the intersection and found the victim, Deonte Wright, lying on Madison Street in front of a white Blazer. Officer Kusinski called for an ambulance and officer assistance. He observed another victim in the driver's seat of a yellow Camaro with a gunshot wound to his head.

¶ 12 Jose Perez testified that he had been driving northbound on Western when he stopped at the intersection of Western and Madison. He suddenly felt a hot sensation in his head and then awoke in a hospital.

¶ 13 Wright died from his injuries. One shot entered the front right side of his neck, traveled through his Adam's apple, hyoid bone, tongue, and the roof of his mouth to the skull and brain and partially exited the left top side of his head. He also suffered gunshot wounds to the left side of his head, his left arm, left buttock, and the left side of his abdomen. Perez survived, underwent surgery and had a metal plate inserted in his head.

¶ 14 Several witnesses testified regarding the shooting. Willie Stallworth testified that shortly after 3 p.m., he was driving his white Chevrolet Blazer when he stopped at a light at the intersection of Madison and Western. A lot of people were getting out of school. A man approached his vehicle from the left, passed behind and continued along the passenger side. Stallworth watched the man from his side-view mirror. He then observed Wright run south toward a vacant lot to his left. Wright ran in front of Stallworth's vehicle and he saw the man shoot Wright twice. Wright fell in front of the Blazer and the shooter walked up to him, put his gun under Wright's chin, and shot again. No one else shot at Wright. Stallworth testified that the offender was no more than five feet from his Blazer when he shot Wright. After shooting Wright, the man looked directly at Stallworth, turned and walked southbound. Stallworth identified defendant in court as the shooter. The following day, a detective came to his residence and showed him some photographs. From the photo array, Stallworth identified defendant as the shooter. He also identified defendant in a lineup conducted at the police station on September 19, 2003.

¶ 15 Michael Christopher testified that he had parked in a vacant lot so his wife could visit a shoe stand operated by Innocent Nzau on the southeast corner of Madison and Western. As he waited for his wife, he observed a two-tone blue Chevy park in front of him. Four people were inside the vehicle. The two rear passengers exited the vehicle and one of the men was holding

something in his hand, but Mr. Christopher could not see the object. He exited his car and watched as the man pointed the gun toward the people at the bus stop. He heard gunshots and tried to get his wife's attention. He then saw Wright fall in front of a white sport utility vehicle facing west on Madison. The man with the gun stood over Wright, aimed at his head and shot him again. The shooter then walked past Mr. Christopher's car and back to the blue vehicle. Mr. Christopher did not identify the shooter.

¶ 16 Martha Christopher testified that she was looking at shoes when she noticed her husband pointing out something to her. She looked to where he was pointing and saw a man raise his arm and shoot in the direction of a bus stop. She observed Wright run onto Madison Street toward her. The offender continued to shoot at Wright and Wright fell in front of a white Blazer. The man stood over Wright and shot him again. The shooter smiled and walked south toward the vacant lot. He passed her husband's vehicle but she did not see where he went afterwards. Mrs. Christopher described the offender as "tall, dark-skinned. He had a Dago-T on and a pair of jeans." She stated that a Dago-T was "a T-shirt that doesn't have sleeves." When police visited her residence the next day, she viewed six photographs contained on a single page. She identified defendant from the array and also identified him in a lineup at the police station. At trial, she identified defendant as the man she saw holding a gun.

¶ 17 Innocent Nzau testified that he was helping Mrs. Christopher find some shoes when he heard gunshots coming from the area of Madison and Western. He observed Wright in the street with the shooter standing over him. The shooter then shot at Wright's head as he was on the ground, and then ran behind Nzau's van. Nzau acknowledged that he did not get a good look at the shooter because he had to hide behind his display as the shooting occurred. During cross-examination, defense counsel asked Nzau whether he was unable to pick the shooter out of

the lineup and he responded, "I give a probability." After a sidebar, defense counsel asked Nzau if he could "make a hundred percent certain identification of any person in that line-up" to which he answered, "Hundred percent, no."

¶ 18 Before Detective Flaherty took the stand, the State asked the trial court to admonish defense counsel that he not raise the issue of Nzau's identification of Donald Phillips when he viewed the lineup. The trial court agreed with the State since the subject of his identification never arose during Nzau's testimony at trial.

¶ 19 Detective Flaherty testified that he interviewed witnesses including Stallworth, Mr. and Mrs. Christopher, and Nzau at the police station after the shooting. Detective Flaherty put together separate photo arrays each containing a picture of defendant along with five other people. On September 18, 2003, he went to Mrs. Christopher's residence and showed her one photo array. She identified defendant as the shooter. He also went to Stallworth's residence that day and showed him another photo array from which he identified defendant as the shooter. Detective Flaherty stated that the arrays were inventoried and turned over to the assistant State's Attorneys. He acknowledged that the photo arrays have since been lost.

¶ 20 On September 18, 2003, codefendant James Lenoir was arrested. Codefendant Phillips was arrested on September 19, 2003, and defendant was also arrested that day. That afternoon, the police conducted a lineup that included defendant, Lenoir, Phillips and three fillers. Stallworth, Mr. and Mrs. Christopher, and Nzau came to the police station and separately viewed the lineup. Stallworth identified defendant in the lineup as the one who shot Wright. Mrs. Christopher also identified defendant as the man who shot Wright. Mr. Christopher and Nzau did not identify the shooter after viewing the lineup.

¶ 21 Detective Patrick Deenihan testified that when he arrived to work on September 20, 2003, he learned that defendant, Lenoir and Phillips were all in custody at the station, and that another co-defendant, McClellan, was in custody in Waukegan. He also discovered that Lenoir had given a videotaped confession and that defendant had been identified in lineups. Around 1:50 a.m., he and Assistant State's Attorney (ASA) Mary Jo Murtaugh interviewed defendant. She introduced herself as the prosecutor and advised defendant of his rights. He stated that he understood his rights and agreed to speak with her and Detective Deenihan. Defendant initially denied shooting Wright, although he admitted to being in the car. Detective Deenihan informed defendant that Lenoir and Phillips had given statements implicating defendant in the crime. Shortly after 7 a.m., defendant was brought into a room to view the videotaped statements. After the viewing, Detective Deenihan advised defendant of his *Miranda* rights and defendant "said he definitely wanted to talk to" the officers. During the interview, defendant acknowledged that he and Phillips got out of the car and shot Wright.

¶ 22 At around 10 a.m., defendant spoke to ASA Murtaugh and admitted that he shot Wright. At approximately 1p.m., Detective Deenihan spoke with defendant again and defendant admitted that he stood over Wright as he shot him. Defendant repeated the information when ASA Murtaugh entered the room. Defendant agreed to videotape his statement and signed a consent form. When ASA Murtaugh asked him outside the presence of police how he had been treated, he stated that he had no complaints.

¶ 23 Before giving his statement, defendant was again advised by ASA Murtaugh of his *Miranda* rights and he stated that he understood. Defendant stated that a couple of days before the incident, there had been fighting between the Travelers and the Black Disciples. On September 16, 2003, he went to St. Stephen's housing complex and learned that a Black Disciple shot Little

Rob, a person he had known for two years. Codefendants Lenoir and Phillips were also present. Phillips said, "F this, F that, ***. We ain't going like that, man." Lenoir said that "we can find some of them and we can whoop some of them." Phillips then grabbed some guns and they all got into Little Rob's car. Lenoir drove and Phillips handed one of the guns to defendant.

¶ 24 As they were driving, they ran into codefendant McClellan and he got into the car. They told McClellan that Little Rob had been shot. He agreed to go with them to look for Black Disciples. Lenoir drove into Black Disciple territory and parked in a lot near the intersection of Madison and Western. Phillips spotted Wright and asked, "Ain't that a BD right there?" and he and defendant got out of the car. Phillips told defendant to bring his gun in case they ran into more Black Disciples. Phillips walked around a van in the street and defendant walked behind the van. Phillips approached Wright with his gun out and asked him if he was a Black Disciple before firing at him. Defendant also fired a shot. Defendant stated that Wright hit the ground and he walked back approximately three feet before firing another shot at Wright. He stated that he did not know whether his shots hit Wright.

¶ 25 He and Phillips then ran a few blocks before they spotted Lenoir in the car with McClellan. They jumped into the car, and when they got to Oakley and Jackson, Phillips told defendant to give him the gun. Phillips then exited the car and jumped over a fence at St. Stephens. Defendant later spoke of the incident to his friend Frank, and Frank advised him that if his shots did not hit Wright, defendant should turn himself in to the police. He told Frank that the shooting was not supposed to happen that way and it "went all out of proportion." Defendant stated that he went to court the next morning for another case and he was "snatched out of court."

¶ 26 Defendant also stated that he was not threatened or promised anything for giving his statement, and that the police treated him "okay." He was given food to eat, and soda and water to drink. He was also allowed to smoke.

¶ 27 Forensic investigators did not recover any bullets, cartridges or bullet evidence from the scene, nor was a gun ever recovered. A blue 1987 Chevrolet Caprice owned by McClellan was dusted for fingerprints. A lift of fingerprints from the driver's side door interior window matched those of codefendant Lenoir.

¶ 28 Defense counsel did not present evidence in the case. The parties stipulated that if recalled to testify, Nzau would state "that at the time he viewed the lineup at the police station, he tentatively identified Donald Phillips as the person he witnessed fleeing on foot from the scene of the incident." The jury found defendant guilty of first degree murder of Wright and aggravated battery with a firearm of Perez. The trial court sentenced him to 60 years' imprisonment for first degree murder, and 25 years' imprisonment for aggravated battery with a firearm, to be served consecutively.

¶ 29 Defendant filed a direct appeal. In his appeal, defendant contended he was denied a fair trial where 1) the trial court erred in relying on the prosecutor's misstatement of the law and preventing his counsel from eliciting identification testimony from Flaherty; 2) trial counsel provided ineffective assistance by failing to prepare for the case, failing to elicit exculpatory evidence, and not producing evidence promised to the jury during opening remarks; 3) the trial court erred in denying his motion to suppress identification testimony stemming from two photo arrays where the arrays were lost by the State, the testimony was inconsistent, and the subsequent lineup was suggestive; and 4) the lineup in which defendant was identified was

unduly suggestive. *Faber*, 2012 IL App (1st) 093273, ¶ 1. This court affirmed defendant's convictions. *Id.*

¶ 30 While defendant's appeal was pending, he filed a *pro se* "complaint" and motion requesting discovery documents. The trial court characterized defendant's complaint as a postconviction petition and summarily dismissed it on September 17, 2010. Defendant filed a motion to reconsider which the trial court denied. On appeal, the parties entered an agreed motion for a summary disposition for remand to the trial court for admonishments, which this court entered in *People v. Faber*, No. 1-10-3571. The trial court subsequently determined that these pleadings did not comprise a postconviction petition and ruled that defendant would have an opportunity in the future to file a postconviction petition "from scratch."

¶ 31 On April 24, 2013, defendant filed a postconviction petition in which he alleged that 1) the State used perjured testimony regarding the photo arrays and improperly argued the perjured testimony during closing arguments; 2) identification testimony at trial was perjured; 3) his right to counsel was violated during the lineup; 4) the prosecutor made misstatements during closing argument; 5) trial counsel was ineffective for failing to investigate and challenge the identification testimony; 6) trial counsel was ineffective for failing to litigate a fourth amendment claim competently; and 7) trial counsel was ineffective for failing to impeach witnesses who testified that defendant was advised of his right to counsel during his interviews.

¶ 32 The trial court summarily dismissed defendant's petition, finding that his claims were forfeited because they could have been raised on direct appeal, or were *res judicata* because they were addressed on direct appeal, or were meritless and not supported by the record. Defendant filed this timely appeal.

¶ 33

ANALYSIS

¶ 34 On appeal, defendant contends that the trial court erred in dismissing his postconviction petition. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a procedural mechanism in which a defendant can claim that his conviction was the result of a substantial denial of his rights under the United States Constitution or the Illinois Constitution or both. *People v. Cathey*, 2012 IL 111746, ¶ 17. A postconviction proceeding is not an appeal of the underlying judgment; rather, it is a collateral proceeding. *People v. Burns*, 332 Ill. App. 3d 189, 190 (2001).

¶ 35 The Act provides a three-stage process for nondeath penalty cases. *People v. Jones*, 213 Ill. 2d 498, 503 (2004). To survive summary dismissal at the first stage, *pro se* defendant need only present the gist of a constitutional claim. *Id.* at 504. As our supreme court has noted, "the threshold is a low one at this stage – defendant need only present a modest amount of detail and need not make legal arguments or cite legal authority." *Id.* However, the trial court may summarily dismiss a postconviction petition if it is frivolous or patently without merit, which means the petition has "no arguable basis either in law or in fact." *Cathey*, 2012 IL 111746, ¶ 17 quoting *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Furthermore, in postconviction proceedings all issues decided on direct appeal are *res judicata*, and all those which could have been presented but were not are considered waived. *People v. Kitchen*, 189 Ill. 2d 424, 432 (1999). The trial court may dismiss a postconviction petition at the first stage as frivolous or patently without merit if it determines that *res judicata* or forfeiture bars defendant's claims. *People v. Blair*, 215 Ill. 2d 427, 445 (2005). The trial court's dismissal of a postconviction petition at the first stage is reviewed *de novo*. *Burns*, 332 Ill. App. 3d at 191.

¶ 36 Initially, defendant argues that the trial court used the wrong standard in dismissing his postconviction petition. Specifically, defendant contends that the trial court improperly assessed the merits of his petition and engaged in fact-finding, instead of determining only whether his petition presented a gist of a constitutional claim. In reviewing the record, we do not find that the trial court used the wrong standard. In any event, our review is *de novo* and we may affirm the trial court's dismissal of defendant's postconviction petition on any basis supported by the record. *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005).

¶ 37 Defendant first argues that his trial counsel provided ineffective assistance by failing "to competently litigate" meritorious claims, including allegations that defendant was denied his request for counsel during custodial interrogation, that his statement was invalid, and that his trial counsel failed to impeach state witnesses and challenge their identification testimony, particularly the testimony of Martha Christopher. We note that in his direct appeal, defendant raised the issue of trial counsel's ineffective assistance. We found that defendant's counsel "ably advocated on behalf of his client. He filed motions to suppress identification and vehemently argued the motions on behalf of [defendant]. At trial he argued that [defendant] was coerced into making his statement, cross-examined the State's witnesses and questioned the reliability of the witnesses' identification of [defendant]." *Faber*, 2012 IL App (1st) 093273, ¶ 44. Defendant now argues that his counsel should have challenged the identification evidence "through all available means." However, defendant is entitled to competent, not perfect, representation. *People v. Easley*, 192 Ill. 2d 307, 344 (2000). For the reasons stated, this claim is *res judicata* and cannot be the basis of a post-conviction claim. *Blair*, 215 Ill. 2d at 443. To the extent defendant raises additional concerns about trial counsel's representation, those issues are waived as they could have been raised on direct appeal. *Id.*

¶ 38 In addition, defendant's allegation that he was denied his request for counsel during his custodial interrogation is belied by the record. The record shows that defendant was given *Miranda* warnings prior to his interviews with detectives and the assistant state's attorney, and he indicated that he agreed to speak. Defendant was again advised of his *Miranda* rights before he gave his statement. Dismissal is proper if defendant's postconviction claims are contradicted by the record in the original trial proceedings. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998).

¶ 39 Furthermore, dismissal of defendant's ineffective assistance of counsel claim is proper where defendant cannot establish prejudice. In alleging ineffective assistance, defendant "must show both a deficiency in counsel's performance and prejudice resulting from that deficiency." *People v. Harris*, 182 Ill. 2d 114, 146 (1998). Prejudice in this context means that "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Cathey*, 2012 IL 111746, ¶ 23, quoting *Strickland v. Washington*, 104 S. Ct. 2052 (1984). No prejudice results from counsel's alleged failure to challenge identification testimony if the record contains other overwhelming evidence of defendant's guilt. *Harris*, 182 Ill. 2d at 146.

¶ 40 In this case, witnesses Willie Stallworth and Martha Christopher separately identified defendant as the shooter in both the photo array and the lineup. Stallworth and Christopher testified at trial and Christopher identified defendant in court as the man she saw holding the gun. Although defendant questions Christopher's identification testimony, arguing that her grand jury testimony shows she may have identified defendant based on the missing photo array rather than on her actual knowledge, as previously noted Christopher also testified at trial and identified defendant in court as the shooter. There is nothing in the record to indicate that her in-court identification was the product of the challenged procedures rather than based upon her

observations at the time of the offense. See *Harris*, 182 Ill. 2d at 146-47. Even if Christopher's identification had been suppressed based on her grand jury testimony, there remained Stallworth's identification of defendant and defendant's own statement in which he admitted to firing two shots at the victim. As our supreme court determined in *Harris* under similar circumstances, "we are unable to conclude that the defendant was prejudiced by counsel's failure to seek the suppression of the lineup identification, and the defendant's allegation of ineffective assistance therefore must fail." *Id.* at 147.

¶ 41 Defendant also alleged ineffective assistance of appellate counsel in his postconviction petition. Defendant did not raise this issue in his post-conviction petition, but rather raises it for the first time on appeal. Defendant may not raise issues for the first time on appeal and therefore, the "proper forum for the claim is a successive postconviction action." *Jones*, 213 Ill. 2d at 508-09.

¶ 42 Defendant next argues that the state knowingly used perjured testimony to sustain his conviction. He bases his argument on the fact that the witnesses' testimony contained inconsistencies. This issue is forfeited as it could have been brought by defendant on direct appeal. *Kitchen*, 189 Ill. 2d at 432. Defendant's contention also fails on the merits. Defendant bears the burden of proving the State knowingly used false or perjured testimony. *People v. Craig*, 334 Ill. App. 3d 426, 439 (2002). Mere inconsistencies in testimony are not equivalent to perjury, "nor does it establish or show that the State knowingly used perjured testimony." *Id.*

¶ 43 Defendant's final contention is that prosecutorial misstatements made in closing argument denied him a fair trial. Particularly, defendant argues that the prosecutor made misleading remarks about the photo array identification although it failed to introduce the array into

evidence. The photo array evidence was discussed extensively on direct appeal, and since defendant could have raised the issue at that time but failed to do so, he has forfeited the issue in postconviction proceedings. *Kitchen*, 189 Ill. 2d at 432. Furthermore, a prosecutor has wide latitude during closing argument and may comment on the evidence and any reasonable inferences from the evidence. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Prosecutors may also respond to arguments made by defense counsel that clearly invite a response. *People v. Kliner*, 185 Ill. 2d 81, 154 (1998).

¶ 44 Defendant contends that the prosecutor improperly stated that just because the photo array is not in evidence does not mean it never existed or that Detective Flaherty and the witnesses lied about the identifications. The challenged prosecutor remarks regarding the missing photo array were made in response to defense counsel's argument that the absence of the array in evidence indicated that the police fabricated identifications based on the array. Dismissal of a postconviction petition is proper where the allegations are contradicted by the record. *Coleman*, 183 Ill. 2d at 382.

¶ 45 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 46 Affirmed.