2018 IL App (1st) 161233-U
Order filed: December 14, 2018

FIRST DISTRICT
Fifth Division

Nos. 1-16-1233 and 1-16-1702, consolidated

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. 11 CR 11984
	)	
RAYMOND HOLLAND,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

O R D E R

Held: In appeal No. 1-16-1233, we affirmed the circuit court's first-stage dismissal in appeal of defendant's postconviction petition for relief filed under the Post-Conviction Hearing Act over his contentions that: (1) his jury waiver was not voluntary and knowing; (2) his appellate counsel was ineffective for failing to raise the jury waiver issue on appeal; (3) his trial counsel was ineffective for failing to present a witness who would have supported his defense; and (4) his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. We dismissed appeal No. 1-16-1702 for lack of jurisdiction.

¶ 1 In this consolidated appeal, defendant-appellant, Raymond Holland, appeals the circuit court's: (1) summary dismissal of his *pro se* petition for relief filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) (appeal No. 1-16-1233); and (2)

denial of his postconviction petition for relief which the court analyzed as a motion for leave to file a successive postconviction petition under the Act (appeal No. 1-16-1702).

¶ 2 On appeal, defendant contends that the circuit court erred in dismissing his postconviction petition because he presented arguable claims that: (1) his jury waiver was not voluntary and knowing; (2) his appellate counsel was ineffective for failing to raise the jury waiver issue on appeal; (3) his trial counsel was ineffective for failing to present a witness who would have supported his defense; and (4) his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal. He also contends that the circuit court abused its discretion when it treated his motion to reconsider the dismissal of his petition as a successive postconviction petition. We affirm the circuit court's summary dismissal of defendant's postconviction petition (appeal No. 1-16-1233), and dismiss appeal No. 1-16-1702 for lack of jurisdiction.

¶ 3 Following a bench trial, defendant was convicted of aggravated battery with a firearm in violation of 720 ILCS 5/12-4.2(a)(1) (West 2010), and was sentenced to 16 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Holland*, 2015 IL App (1st) 132524-U. Because we had set forth the facts of this case on the direct appeal, we recount them here only to the extent necessary to resolve the issue raised in these consolidated appeals.

¶ 4 On May 20, 2013, defense counsel tendered a signed jury waiver to the circuit court. The jury waiver stated: "I, the undersigned, do hereby waive jury trial and submit the above entitled cause to the Court for hearing." The court confirmed that defendant had signed the waiver and asked defendant if it was his wish to waive a jury trial. Defendant responded in the affirmative and also confirmed that he had discussed the matter with his counsel. The court found that

defendant's jury waiver was knowingly, voluntarily, and intelligently made. The case then proceeded to a bench trial.

¶ 5 At trial, the parties stipulated that, if called, Maali Elsaeeh, manager of the Four Stars Liquor Store located at 82nd Street and Exchange Avenue in Chicago (store), would testify that, on June 12, 2011, there were several video surveillance cameras inside the store and that the cameras were operating properly and functioning. It was further stipulated that Mr. Elsaeeh would testify that the surveillance video footage of the events on that date was fair and accurate and that he downloaded and tendered the surveillance video (video) to the Chicago police department. Without objection, the video was admitted into evidence.

¶ 6 The video depicted defendant and a female, later shown to be defendant's girlfriend Sallie Lewis, walking into the store. Inside the store, defendant speaks with the cashier and then briefly looks toward the ceiling. Shortly thereafter, two men, later identified as Vincent Noble and Kenya Murdock, enter the store. Mr. Noble and Mr. Murdock speak with the cashier and complete a transaction. Defendant and his girlfriend exit the store and walk eastbound on 82nd Street. Mr. Noble and Mr. Murdock then exit the store and stand on the corner of 82nd and Exchange Streets, looking east. The video next depicts Mr. Noble and Mr. Murdock running westbound. A different camera depicts defendant and his girlfriend running eastbound.

¶ 7 Mr. Noble testified that, on June 12, 2011, he and Mr. Murdock went to the store. Neither he, nor Mr. Murdock, had a gun in their possession. Mr. Noble estimated that there were five other people in the store. Mr. Noble and Mr. Murdock did not speak to anyone and left the store quickly.

¶ 8 As the two men prepared to cross Exchange Street, Mr. Noble noticed a man wearing a black hoodie, about 10 to 15 feet away, standing next to a woman. The man asked whether they

were from the "Bs," a faction of the Vice Lords street gang. Mr. Noble turned, but did not see the man's face. Before Mr. Noble or Mr. Murdock could answer, the man pointed a gun at them and fired it about four or five times. Mr. Noble ran away, but saw that Mr. Murdock had been hit and that his head was bleeding. Mr. Noble returned to check on Mr. Murdock. When the police arrived on the scene, Mr. Noble left.

¶ 9 During his testimony, Mr. Noble was shown the video. He explained that the video depicted him lifting his shirt because his pants were falling down. He further explained that he held his cell phone in his hand to check the time. Mr. Noble also testified that the individual seen in the video running from the area of the store and toward the train tracks was the person who shot at him.

¶ 10 On cross-examination, Mr. Noble testified that he initially left the store without Mr. Murdock, but returned because he did not want to leave Mr. Murdock alone. Mr. Noble denied that, after walking out of the store, he stated: "What's up Lord?" Mr. Noble admitted to speaking with a detective regarding a tattoo of the name "Bingo" on his arm, but denied telling the detective that the name "Bingo" referred to the name of a former "3B" gang member who had been killed.

¶ 11 Mr. Murdock testified that he was with Mr. Noble at the store. As they left the store, Mr. Murdock heard gunshots and realized that he had been shot. Mr. Murdock identified defendant as the person who shot him. As a result of his injuries from the shooting, he has a large scar on his head and his speech is impaired.

¶ 12 Lolita Hancock testified that, on June 12, 2011, she and her sister went to the store around 7 p.m. Her sister parked her vehicle on the side of the store facing east toward the tracks and went into the store. Ms. Hancock remained in the vehicle with the window open. As she

waited, she saw a man in a black hoodie and a woman exit the store. They stopped about 10 to 15 feet away from her. The man reached into his pants, retrieved a gun, and fired three shots behind him toward 82nd and Exchange Streets. She ducked down until the gunshots stopped and then saw the man and woman fleeing toward the railroad tracks. On July 2, 2011, Ms. Hancock viewed a lineup at Area 2 police station and identified defendant as the shooter.

¶ 13 Detective Isaac Lambert testified that, on July 2, 2011, he met with Ms. Hancock at the police station. There, Ms. Hancock identified defendant in a lineup as the shooter. On July 2, 2011, Detective Lambert, his partner, and an Assistant State's Attorney, met Mr. Murdock at Northwestern University Rehabilitation Center where he was being treated for his gunshot wounds. Mr. Murdock viewed a photo array and identified defendant as the shooter.

¶ 14 Defendant testified that, although he is not a gang member, he was forced to have relationships with gangs because of where he lived (on 82nd Street and Coles Avenue). He carried a firearm with him following two prior confrontations with the Vice Lords.

¶ 15 On the evening in question, defendant and Ms. Lewis walked to the store, which is situated on the dividing line of gang territory. Defendant saw Mr. Noble and Mr. Murdock, standing on 82nd Street and Escanaba Avenue, one block from Exchange Street. Inside the store, defendant observed on a monitor that Mr. Noble and Mr. Murdock were crossing the street toward the store. Defendant told Ms. Lewis that he "didn't feel right" because the two men were approaching from territory controlled by the Vice Lords and the "Bs." Mr. Noble and Mr. Murdock entered the store and asked the cashier for change for a $10 bill. When Mr. Noble lifted his shirt, defendant saw a gun in the waistband of his pants. Later, defendant noticed that Mr. Noble was on his cell phone calling or texting someone. Eventually, Mr. Noble and Mr. Murdock left the store, as did defendant and Ms. Lewis.

¶ 16 As defendant and Ms. Lewis walked, they could hear voices behind them. Defendant turned to see the two men looking at them. Mr. Noble said: "What's up Lord?" Defendant responded: "I am no Lord." Defendant saw Mr. Noble reach for the same side of his waistband where defendant had initially seen the gun. Defendant believed Mr. Noble was going to shoot at him, so defendant retrieved his gun and fired it. Defendant did not actually see Mr. Noble retrieve a gun. After the shooting, defendant and Ms. Lewis fled eastbound. Defendant explained that he fired his gun as he ran, not aiming at anyone in particular. He did not intend to kill or hurt either of the men, but shot at them because he was afraid they were going to shoot him.

¶ 17 On cross-examination, defendant admitted to intentionally taking the gun out of his waistband. Defendant denied telling the police that he had sold the gun used in the shooting to a man named Mike.

¶ 18 In rebuttal, Chicago police detective, Devin Jones, testified that, on July 2, 2011, he was working at Area 2 with his partner, Detective Lambert, when defendant asked to speak with them while he was in lock-up. Defendant told the detectives that he had left the store, pulled his hoodie over his head and turned the corner when "Kiki," and an unknown black male with dreads said: "What's up?" Defendant saw the man with dreads "reach," so he pulled out his gun and shot three times. Defendant did not tell the detectives that the victim said: "What's up Lord?" Defendant told the detectives that he sold the gun he used in the shooting to a person named Mike on 84th St. and Saginaw Avenue.

¶ 19 On direct appeal, in *Holland*, 2015 IL App (1st) 132524-U, appellate counsel argued that defendant's sentence was excessive given the presence of several mitigating factors, including his rehabilitative potential and lack of criminal history. *Id.* ¶ 27. This court affirmed his conviction and sentence. *Id*. ¶ 33.

¶ 20 On February 4, 2016, defendant filed a *pro se* postconviction petition alleging that: (1) he did not knowingly and intelligently waive his right to a jury; (2) the circuit court abused its discretion in sentencing him; (3) his trial counsel was ineffective for waiving his right to a jury, for failing to call certain witnesses, and for failing to challenge the weight of the evidence; and (4) his appellate counsel was ineffective for failing to raise these issues on appeal. In support of his petition, defendant attached his own affidavit, averring, *inter alia*, that he did not knowingly waive his right to a jury.

¶ 21 On February 29, 2016, the circuit court summarily dismissed defendant's petition in a written order, finding that it was frivolous and patently without merit. With respect to defendant's claims that his jury waiver was invalid and his trial counsel was ineffective, the circuit court noted that, because defendant had failed to raise these claims on direct appeal, the issues were waived. The court further found that, based upon the record, defendant had knowingly, voluntarily, and intelligently waived his right to a jury. Therefore, defendant failed to show that his trial counsel was ineffective as to defendant's waiver of a jury trial. In dismissing defendant's additional claims of ineffective assistance of trial counsel, the court found that defendant failed to provide sworn affidavits detailing the testimony of the purported witnesses that his counsel should have presented. Finally, the court concluded that defendant could not demonstrate that he suffered any prejudice from appellate counsel's decision to not raise nonmeritorious issues on appeal.

¶ 22 On April 1, 2016, defendant filed a notice of appeal (appeal No. 1-16-1233) from the circuit court's February 29, 2016, dismissal order. The circuit court found that defendant's notice of appeal was timely filed based on the proof of service. See *People v. Johnson*, 232 Ill. App. 3d

882, 884 (1992) (holding that when a defendant is incarcerated, a postconviction petition is considered "filed" on the day it is placed in the prison mail system).

¶ 23 On the same date, defendant filed in the circuit court a document entitled "Rehearing *Pro Se* Post-Conviction Petition" where he stated that "this petition was mailed to the clerk of the circuit court within the time frame enumerated under 725 ILCS 5/122-1, and 5/122-1(f)." In the petition, defendant referenced the "cause and prejudice test" outlined in section 122-1(f) of the Act. He then cited several cases from other jurisdictions that address appellate counsel's obligations under *Anders v. California*, 386 U.S. 738 (1967), arguing that he "fits a requirement under the *Anders* claim where [he] did not have the 'opportunity for full and fair litigation at trial and on direct appeal." Specifically, defendant claimed that, but for his trial counsel's ineffective assistance, he would not have waived his right to a jury trial. He further argued that the affidavit he filed with his initial postconviction petition demonstrated that he acted in self-defense and would have pursued such a theory during a jury trial.

¶ 24 On May 4, 2016, the circuit court, treating defendant's document as a successive postconviction petition, denied defendant leave to file the petition. In doing so, the court concluded that he had failed to meet the requirements of the cause and prejudice test because he had previously raised these claims in his initial postconviction petition.

¶ 25 On May 31, 2016, defendant moved for leave to file a late notice of appeal (appeal No. 1-16-1702). On the notice of appeal, defendant indicated that he was appealing from a "guilty verdict" dated "July 25, 2013." Defendant attached an affidavit where he again referenced his July 25, 2013 conviction. Defendant averred that he did not file the motion within 30 days for "lack of legal terms, misguiding of Dixon Law Library Clerks, and [his] lack of knowledge of legal procedures." He further averred that his appeal had merit because there was "certain

concealment of evidence, [ineffective assistance of counsel], no equal protection of law, due process, and excessive sentencing."

¶ 26 On June 10, 2016, the circuit court entered an order granting the late notice of appeal and appointed the office of the State Appellate Defender to represent defendant. The court's order indicated that defendant's notice of appeal was from the court's May 4, 2016, ruling.

¶ 27 This court consolidated the two appeals. We first consider appeal No. 1-16-1233.

¶ 28 In appeal No. 1-16-1233, defendant argues that the circuit court erred when it summarily dismissed his postconviction petition because he presented arguable claims that: (1) his jury waiver was not voluntary and knowing; (2) his appellate counsel was ineffective for failing to raise the jury waiver issue on appeal; (3) his trial counsel was ineffective for failing to present a witness who would have supported his defense; and (4) his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on appeal.

¶ 29 Where, as here, a postconviction petition does not implicate the death penalty, a circuit court adjudicates the petition in three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage of postconviction proceedings, the circuit court may dismiss a petition only if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014); *People v. Cotto*, 2016 IL 119006, ¶ 26. A petition is frivolous and or patently without merit if it has no arguable basis in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. "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." *Id.* at 16. "An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Id.* at 16-17 (citing *People v. Robinson*, 217 Ill. 2d 43 (2005)). "Fanciful factual allegations include those which are fantastic or

delusional." *Id.* at 17. We review the dismissal of a first-stage postconviction petition *de novo*. *People v. Williams*, 2015 IL App (1st) 131359, ¶ 28.

¶ 30 Defendant first maintains that he presented an arguable claim that he did not knowingly and intelligently waive his right to a jury.

¶ 31 "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Issues that could have been presented on direct appeal, but were not, are considered forfeited. *Id.*

¶ 32 Because defendant could have raised the jury waiver issue on direct appeal and did not, he has, therefore, forfeited this claim. That said, even if we were to consider defendant's argument on the merits, we would, nonetheless, conclude that he did not present an arguable claim that his jury waiver was invalid.

¶ 33 The right to a trial by jury is a fundamental right guaranteed by our federal and state constitutions. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). A defendant may waive the right to a jury trial. However, to be valid, any such waiver must be "understandingly waived by defendant in open court." 725 ILCS 5/103-6 (West 2014). Whether a defendant knowingly and understandingly waived his or her right to a jury trial, is based upon the facts and circumstances of each particular case, and not upon the application of any set formula. *People v. McGee*, 268 Ill. App. 3d 582, 585 (1994). Although a signed jury waiver is insufficient on its own, its presence weighs in favor of finding a valid waiver. See *People v. Parker*, 2016 IL App (1st) 141597, ¶ 50. Moreover, a jury waiver is generally valid where defense counsel waives that right

in open court and the defendant does not object to the waiver. *People v. West*, 2017 IL App (1st) 143632, ¶ 10.

¶ 34 The record shows that defendant was present and did not object on February 4, 2012, when his counsel first informed the court that he had elected a bench trial. On May 20, 2012, the court informed defendant that he had a right to a jury trial and confirmed with defendant that he had signed the jury waiver. The court then asked defendant if he understood that, by signing the jury waiver, he was giving up his right to a have a trial by jury. Defendant responded: "Yes, sir." The court explained that the "legal effect" of signing the jury waiver was that it would determine his guilt based on the evidence. Defendant acknowledged that he understood. Defendant also confirmed that it was his desire that the court hear his case and not a jury. Defendant further confirmed that he discussed the matter with his attorney.

¶ 35 Under the facts and circumstances of this case, we find that defendant knowingly and intelligently waived his right to a jury trial. See *Parker*, 2016 IL App (1st) 141597, ¶ 53 (finding defendant's jury waiver valid where he executed a jury waiver and confirmed to the court that he knew what a jury trial was). Accordingly, the circuit court did not err in summarily dismissing defendant's claim that his jury waiver was invalid.

¶ 36 Because defendant cannot show that his jury waiver was invalid, we find that the circuit court did not err in summarily dismissing his claim that his appellate counsel was ineffective for failing to raise the issue on appeal. Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). A petitioner who contends that appellate counsel rendered ineffective assistance of counsel must show that the failure to raise an issue on direct appeal was objectively unreasonable and that the decision prejudiced petitioner. *Id.*

¶ 37 " 'Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong.' " *People v. Papaleo*, 2016 IL App (1st) 150947, ¶ 21 (quoting *People v. Simms*, 192 Ill. 2d 348, 362 (2000)). Since defendant's argument was without merit, appellate counsel was under no obligation to raise the issue on appeal and, thus, the circuit court did not err in summarily dismissing his claim arguing otherwise.

¶ 38 Defendant next contends that his petition presented an arguable claim that his trial counsel was ineffective for failing to present Ms. Lewis as a witness because her testimony would have supported his defense of self-defense. We agree with the State's response that the circuit court correctly dismissed defendant's petition on this ground because he failed to either attach the necessary evidence to support his claim, or provide an explanation for the absence of such evidence, as required by section 122-2 of the Act.

¶ 39 Section 122-2 of the Act requires a defendant to support the allegations in his postconviction petition by either attaching factual documentation to the petition, or otherwise explaining the absence of such evidence. 725 ILCS 5/122-2 (West 2014) (A postconviction petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached."); *People v. DuPree*, 2018 IL 122307, ¶ 31-32 (emphasizing that section 122-2 of the Act requires that a petition must be supported by either "affidavits, records, or other evidence."). The purpose of this requirement is to show that the allegations in the petition are capable of independent or objective corroboration. *People v. Delton*, 227 Ill. 2d 247, 254 (2008); *People v. Allen*, 2015 IL 113135, ¶ 34. When a petition sets forth a claim that trial counsel failed to investigate and present a witness, an affidavit from the

witness is not required, so long as the petitioner supports his claim with evidence that "sufficiently demonstrate[s] the alleged constitutional deprivation." *DuPree*, 2018 IL 122307, ¶ 32. However, the failure to attach sufficient evidence in the form of the "affidavits, records, or other evidence," as required by section 122-2 of the Act, or an explanation of their absence, is "fatal" to a postconviction petition and alone justifies summary dismissal of the petition. *Delton*, 227 Ill. 2d at 255 (citing *People v. Collins*, 202 Ill. 2d 59, 66 (2002)). If a postconviction petition is not properly supported with attachments as required by section 122-2, the circuit court need not reach the question of whether it states the gist of a constitutional claim to survive summary dismissal. *Id.* at 255.

¶ 40 Here, defendant's petition is supported only by his own affidavit, which does not include any information indicating what the testimony of Ms. Lewis would have been, nor does it describe any efforts or unsuccessful attempts which were made to obtain the necessary evidence. As such, given defendant's failure to include any evidence to support the allegations in his petition and his failure to sufficiently explain the absence of such evidence, as required by the pleading requirements of section 122-2 of the Act, we find that the trial court did not err in summarily dismissing his petition as to this claim. See *People v. Enis*, 194 Ill. 2d 361, 380 (2000).

¶ 41 Defendant, nevertheless, argues that his failure to present an affidavit is not fatal to his claim because the statement of Ms. Lewis to the police was made part of the record when it was impounded by court order along with the trial exhibits. In support of this contention, defendant cites *People v. Coleman*, 2012 IL App (4th) 110463 (2012). Although attaching a witness's potential statement to the police in lieu of a witness's affidavit may, under certain circumstances, satisfy defendant's obligations under section 122-2 of the Act (*DuPree*, 2018 IL 122307, ¶¶ 41-

42), defendant was still required to attach the statement of Ms. Lewis to his petition, and failed to do so. See 725 ILCS 5/122-2 (West 2014) (A postconviction petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.").

¶ 42 Even if we agreed with defendant—that he was not required to attach to his petition the unsworn and unverified statement of Ms. Lewis produced during discovery—we would, nevertheless, find that the circuit court did not err in dismissing his ineffective assistance of counsel claim.

¶ 43 To prevail on a claim of ineffective assistance of counsel, "a defendant must show that 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.' " *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland v. Washington*, 466 U.S. 688, 694 (1984)). " 'At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if *** it is arguable that counsel's performance fell below an objective standard of reasonableness and *** it is arguable that the defendant was prejudiced.' " (Emphases omitted.) *People v. Tate*, 2012 IL 112214, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 17).

¶ 44 Here, defendant argues that he has established prejudice because the testimony of Ms. Lewis would have bolstered his argument that he acted in self-defense. Assuming Ms. Lewis would testify at trial consistent with her statement to police, there is no reasonable probability that her testimony would have changed the outcome of defendant's trial. Ms. Lewis stated that, while in the store, she "wasn't trying to pay attention" to Mr. Noble or Mr. Murdock. She did not see Mr. Noble or Mr. Murdock carrying a weapon. Rather, she stated that defendant told her,

after-the-fact, that one of the men was armed. At most, the testimony of Ms. Lewis corroborates defendant's contention that Mr. Noble or Mr. Murdock said something "gang related" to him after they left the store.

¶ 45 In light of the evidence presented against him, and the little that we know about the purported testimony of Ms. Lewis, we cannot say that it is arguable that the proceedings would have been different had Ms. Lewis testified. Se*e People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26 (citin*g People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001)) ("Whether the failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial."). Accordingly, we conclude that the circuit court did not err in dismissing defendant's claim of ineffectiveness as to Ms. Lewis as frivolous and patently without merit.

¶ 46 Because defendant's claim is without merit, we also conclude that the circuit court did not err in dismissing defendant's claim that his appellate counsel was ineffective for failing to raise this issue on appeal. As mentioned, "[u]nless the underlying issue is meritorious, petitioner suffered no prejudice from counsel's failure to raise it on direct appeal." *Childress*, 191 Ill. 2d at 175.

¶ 47 In appeal No. 1-16-1702, defendant contends that the court erred in treating his motion to reconsider the dismissal of his *pro se* postconviction petition as a motion for leave to file a successive postconviction petition and argues that the case should be remanded for the court to rule on the motion to reconsider. In the alternative, he maintains that, if we find that the court properly recharacterized the motion to reconsider, then we must remand the case for admonishments pursuant to *People v. Shellstrom*, 216 Ill. 2d 45, 57 (2005), and *People v. Pearson*, 216 Ill. 2d 58, 67 (2005).

¶ 48 Before proceeding to the merits of this case, we must address our jurisdiction. An appellate court has a duty to consider its jurisdiction and to dismiss an appeal if jurisdiction is lacking. See, generally, *In re M.W.*, 232 Ill. 2d 408, 414-15 (2009). The filing of a notice of appeal is a jurisdictional step which begins the appellate process. *Niccum v. Botti, Marinaccio, DeSalvo & Tameling, Ltd.*, 182 Ill. 2d 6, 7 (1998). Unless there is a properly filed notice of appeal, a reviewing court has no jurisdiction over the appeal and is obliged to dismiss it. See *People v. Anderson*, 375 Ill. App. 3d 121, 131 (2006). The notice must identify the nature of the order appealed if the appeal is not from a conviction. Ill. S. Ct. R. 606(d) (eff. July 1, 2017); *People v. Lewis*, 234 Ill. 2d 32, 37 (2009). A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal. See *People v. Smith*, 228 Ill. 2d 95, 104 (2008).

¶ 49 A notice of appeal is to be liberally interpreted. *Id.* However, the purpose of a notice of appeal is to inform the prevailing party that the opposing party seeks review of a judgment. To that end, a notice of appeal should fairly and adequately set forth the judgment complained of and the relief which is sought. *Id.* at 105. Further, "a failure to comply strictly with the form of notice is not fatal if the deficiency is one of form rather than substance and the appellee is not prejudiced." *People v. Patrick*, 2011 IL 111666, ¶ 27.

¶ 50 Here, defendant's notice of appeal (No. 1-16-1702) makes no reference to the circuit court's decision of May 4, 2016, which denied him leave to file a successive postconviction petition. Rather, the notice of appeal reflects the judgment appealed from as the date of defendant's conviction, July 25, 2013. The notice of appeal also does not make reference to anything that would indicate that defendant was appealing from the court's May 4, 2016, order. In fact, had defendant's intention been to appeal the court's May 4, 2016, ruling he would not

have been required to file a late notice of appeal, as he did here, because his filing was well within 30 days of that ruling. Here, defendant's notice of appeal, which references a three year old judgment and fails to mention his postconviction proceedings, does not fairly and adequately give the State notice of the nature of his appeal. Indeed, defendant's defect is one of substance rather than form. See *Smith*, 228 Ill. 2d at 105 (defendant's appeal which was dismissed for lack of jurisdiction because his notice of appeal points out only his 2004 conviction date and not the 2006 order from which he allegedly appealed, was more than "a mere defect in form").

¶ 51 Under these circumstances, we have no jurisdiction to consider the propriety of the court's May 4, 2016 ruling. See *Smith*, 228 Ill. 2d at 104 (a notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal). Accordingly, we dismiss appeal No. 1-16-1702 for lack of jurisdiction.

¶ 52 For the aforementioned reasons, we affirm the circuit court's summary dismissal of defendant's postconviction petition (appeal No. 1-16-1233); and we dismiss appeal No. 1-16-1702 for lack of jurisdiction.

¶ 53 Appeal No. 1-16-1233, affirmed.

¶ 54 Appeal No. 1-16-1702, dismissed.