

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).

2018 IL App (4th) 160727-U

NO. 4-16-0727

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 28, 2018

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee)	Circuit Court of
v.)	Adams County
CHADWICK KELLY,)	No. 14CF416
Defendant-Appellant.)	
)	Honorable
)	Robert K. Adrian,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court’s dismissal of defendant’s postconviction petition because it was frivolous and patently without merit.

¶ 2 In January 2015, defendant, Chadwick Kelly, pleaded guilty pursuant to a negotiated plea agreement to home invasion while armed with a firearm. 720 ILCS 5/19-6(a)(3) (West 2014). The trial court sentenced defendant to 23 years in prison, ordered him to pay all mandatory fines and fees, and also ordered that defendant receive \$800 in *per diem* credit for time spent in pretrial custody. Defendant did not file a direct appeal.

¶ 3 In June 2016, defendant filed a postconviction petition raising claims of ineffective assistance of counsel. In September 2016, the trial court summarily dismissed the petition.

¶ 4 Defendant appeals, arguing (1) his trial counsel was ineffective for not moving to suppress a photo lineup, (2) his counsel was ineffective for advising him to plead guilty to a fire-

arm enhancement without any evidence that a firearm was used in the commission of the offense, and (3) the circuit clerk failed to apply his *per diem* credit to his outstanding fines. We disagree and affirm.

¶ 5

I. BACKGROUND

¶ 6

A. Procedural History

¶ 7

In July 2014, the State charged defendant with home invasion while armed with a firearm (720 ILCS 5/19-6(a)(3) (West 2014)) and burglary (Id. § 19-1(a)).

¶ 8

In January 2015, the trial court conducted a hearing on a negotiated plea agreement. Because defendant was alleged to have used a firearm during the home invasion, he had a sentencing range of 21 to 45 years. In exchange for defendant's pleading guilty, the State dismissed the burglary charge, and the parties agreed to a sentence of 23 years in prison, followed by 3 years of mandatory supervised release. The court accepted the plea, imposed all mandatory fines and fees as well as restitution, and ordered defendant receive \$800 in *per diem* credit for his time in pretrial custody.

¶ 9

The trial court did not advise defendant of his appeal rights pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001), and defendant did not file a direct appeal. In April 2016, defendant appealed the trial court's denial of his motion to prepare a common law record and transcripts but subsequently voluntarily dismissed the appeal.

¶ 10

B. The Postconviction Petition

¶ 11

In June 2016, defendant filed a postconviction petition, asserting his counsel was ineffective for various reasons, two of which are relevant to this appeal. First, defendant claimed his counsel was ineffective because she failed to move to suppress a photographic lineup. Defendant contended a July 2014 photo lineup, at which the victim identified defendant, was im-

proper because it was conducted by the investigating officer instead of an independent administrator as required by section 107A-2 of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 5/107A-2(a)(1) (West 2016).

¶ 12 Second, defendant asserted that his counsel was ineffective for failing to challenge the home invasion charge. Specifically, defendant claimed he should not have been charged with a firearm enhancement because the State could not prove he possessed a firearm during the commission of the offense. Defendant contended that he had only possessed an “airsoft gun” (airsoft guns are replica weapons which use air to fire plastic projectiles at low velocity) and admitted to having a firearm only because his counsel told him he would not be eligible for the plea without such an admission. In support of his claim, defendant attached various police reports which included (1) an interview of the victim describing defendant as pointing a revolver at him and threatening him and (2) a police report that stated the police recovered an airsoft gun at the victim’s apartment building and that gun “might be” the one defendant dropped during the commission of the crime.

¶ 13 C. The Trial Court’s Order

¶ 14 In September 2016, the trial court entered a written order dismissing defendant’s postconviction petition because it was frivolous and patently without merit. The court concluded that defendant’s arguments were meritless because defendant could have raised these arguments in a motion to withdraw his guilty plea and defendant never filed such a motion.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Defendant appeals, arguing (1) his trial counsel was ineffective for not moving to suppress a photo lineup, (2) his counsel was ineffective for advising him to plead guilty to a fire-

arm enhancement without any evidence that a firearm was used in the commission of the offense, and (3) the circuit clerk failed to apply his *per diem* credit to his outstanding fines. We disagree and affirm.

¶ 18 A. The Trial Court's Judgment

¶ 19 Initially, we note that the trial court's reasoning for dismissing defendant's postconviction petition was incorrect. It is well settled that a defendant does not waive the right to raise constitutional claims under the Act by failing to withdraw his guilty plea or pursue a direct appeal. *People v. Flowers*, 208 Ill. 2d 291, 301, 802 N.E.2d 1174, 1180 (2003); *People v. Miranda*, 329 Ill. App. 3d 837, 841, 769 N.E.2d 1000, 1004-05 (2002); *People v. Stroud*, 333 Ill. App. 3d 416, 418, 775 N.E.2d 1038, 1040 (2002). However, the appellate court reviews judgments, not reasons therefor, and "may affirm a lower court's judgment on any ground of record." *People v. Johnson*, 208 Ill. 2d 118, 129, 803 N.E.2d 442, 449 (2003). Accordingly, we address the merits of defendant's claims.

¶ 20 B. The Standard of Review and Applicable Law

¶ 21 The Post-Conviction Hearing Act (Act) provides a criminal defendant the means to redress substantial violations of his constitutional rights that occurred in his original trial or sentencing. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23, 38 N.E.3d 1256; 725 ILCS 5/122-1 (West 2016). A proceeding under the Act is collateral and not an appeal from the defendant's conviction and sentence. *Crenshaw*, 2015 IL App (4th) 131035, ¶ 23.

¶ 22 The Act contains a three-stage procedure for relief. *People v. Allen*, 2015 IL 113135, ¶ 21, 32 N.E.3d 615; 725 ILCS 5/122-2.1 (West 2016). Within the first 90 days after the petition is filed and docketed, the trial court shall dismiss a petition summarily if the court determines it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016).

A petition may be dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Allen*, 2015 IL 113135, ¶ 25. The trial court considers “the petition’s substantive virtue rather than its procedural compliance.” *People v. Hommerson*, 2014 IL 115638, ¶ 11, 4 N.E.3d 58.

¶ 23 Because most postconviction petitions are drafted by *pro se* defendants, the threshold for a petition to survive the first stage of review is low. *Allen*, 2015 IL 113135, ¶ 24. If a petition alleges sufficient facts to state the gist of a constitutional claim, first-stage dismissal is inappropriate. *Id.* If the petition is not dismissed as being frivolous or patently without merit, then the trial court orders the petition to be docketed for further consideration. 725 ILCS 5/122.-2.1(b) (West 2016). When the trial court dismisses a petition at the first-stage, its ruling is reviewed *de novo*. *People v. Bowens*, 2013 IL App (4th) 120860, ¶ 11, 1 N.E.3d 638.

¶ 24 Claims of ineffective assistance of counsel in the guilty-plea context are analyzed under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), “which requires a defendant to demonstrate both a deficient performance by trial counsel and prejudice arising therefrom.” *People v. Akins*, 2016 IL App (4th) 150539, ¶ 38, 64 N.E.3d 69. “To show prejudice in the plea context, the defendant must demonstrate that but for trial counsel’s error, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial.” (Internal quotation marks omitted.) *Id.*

¶ 25 C. The Failure To File a Motion To Suppress

¶ 26 Defendant first argues the trial court erred when it dismissed his postconviction petition because he stated the gist of a constitution claim for ineffective assistance of counsel. Defendant contends his counsel was ineffective because she did not file a motion to suppress the July 2014 photo lineup, during which the victim identified defendant. According to defendant,

the photo lineup was defective because it was not conducted by an independent administrator, as required by section 107A-2 of the Code. 725 ILCS 5/107A-2(a)(1) (West 2016). Defendant concedes that section 107A-2 became effective on January 1, 2015, well after the lineup in this case was conducted, but claims nonetheless that section 107A-2 is a procedural rule that was in effect at the time of his plea. Accordingly, police noncompliance with that section constituted a basis to suppress the lineup. We disagree.

¶ 27 The legislature passed the act which added section 107A-2 to the Code on August 22, 2014. Pub. Act 98-1014 (eff. Jan. 1 2015). This law requiring new lineup procedures took effect on January 1, 2015. “Courts have held that the legislature’s postponement of an effective date is direct evidence that a retroactive application was not intended.” *People v. Blanks*, 361 Ill. App. 3d 400, 410, 845 N.E.2d 1, 11 (2005). In a case similar to this one, when considering a lineup that took place in 2012, the First District declined to address the applicability of section 107A-2 because it “[did] not govern the lineup proceedings in [that] case.” *People v. Moore*, 2015 IL App (1st) 141451, ¶ 21, 45 N.E.3d 696, *overruled on other grounds by People v. Hardman*, 2017 IL 121453, 104 N.E.3d 372.

¶ 28 In this case, the photo lineup took place in July 2014, one month before the legislature passed Public Act 98-1014. Clearly, the police could not have been required to comply with a law that had not been passed, much less one that became effective months later.

¶ 29 Defendant attempts to distinguish the instant case by noting that his trial had not taken place prior to the effective date. But the fact remains that defendant claims his counsel was ineffective for not seeking to apply a statute to an event which occurred long before that statute became effective. Because section 107A-2 of the Code did not apply to the photo lineup in defendant’s case, defendant’s claim in his postconviction petition regarding how the police

conducted the lineup was meritless.

¶ 30 D. The Failure To Challenge the Firearm Enhancement

¶ 31 Defendant next argues that his counsel was ineffective because she advised him to plead guilty to home invasion with a firearm even though there was no evidence that a firearm was used. Defendant claims the only evidence the State could have presented was that an airsoft gun was found at the scene. The record belies defendant's claim.

¶ 32 The offense of home invasion is committed when a person enters a dwelling place of another without authority and “[w]hile armed with a firearm uses force or threatens the imminent use of force upon any person *** within the dwelling.” 720 ILCS 5/19-6(a)(3) (West 2014). A violation of subsection (a)(3) results in 15 years being added to the term of imprisonment. Id. § 19-6(c). “The State does not have to prove the gun is a firearm [within the meaning of the statutory definition] by direct or physical evidence; unequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant was armed during a robbery.” (Internal quotation marks omitted.) *People v. Clark*, 2015 IL App (3d) 140036, ¶ 20, 40 N.E.3d 845.

¶ 33 Here, the police reports indicated that the victim told the police that defendant pointed a black revolver at him and cocked the hammer. Had the victim so testified at trial, his testimony would have been sufficient to find defendant guilty of home invasion with a firearm. Moreover, defendant himself repeatedly told the court during his guilty plea that he used a “firearm” during the commission of the offense. Defendant stated, “The gun I used was a black revolver [lying] on [the victim's] bed.” At the hearing, the following exchange took place:

“THE COURT: [Defendant], I just want to be sure you understand you don't have to do this.

DEFENDANT: No. I know I don't have to, but I'm guilty of the crime. I can't beat – I can't beat them at trial, so this is what I have to do.”

Defense counsel stated she was “not happy with this negotiation, but based on the facts and the sentencing range that we are faced with, I believe it is in [defendant's] best interests that he take this negotiated plea versus taking the case to trial when the sentencing range is up to 45 years.”

¶ 34 Contrary to defendant's claims, the record demonstrates there was ample evidence to support the firearm charge. Defendant cannot show he was prejudiced by his counsel's performance or that her conduct was unreasonable. Accordingly, the trial court properly dismissed defendant's postconviction petition.

¶ 35 E. Fines and Fees

¶ 36 Last, defendant argues that the circuit clerk failed to properly calculate his *per diem* credit against applicable fines. The State responds that this court lacks jurisdiction over defendant's claim. We agree.

¶ 37 Defendant supplemented the record to include a printout of the circuit clerk's balance sheet. However, subsequent to our order allowing defendant to supplement the record, the supreme court decided *People v. Vara*, 2018 IL 121823. In *Vara*, the supreme court held that printouts such as the one offered by defendant are not a part of the record on appeal and cannot be considered by the appellate court. *Id.* ¶ 22. The court further held that we are without jurisdiction to address this issue, stating as follows:

“Because the circuit clerk had no authority to levy any fines against defendant, the recording of the additional fines was invalid and unenforceable. However, the fact that the clerk's action was improper does not mean that defendant can challenge the unauthorized fines through the appeal process. The appel-

late court is constitutionally vested with jurisdiction to review final judgments entered by circuit courts. The recording of a fine is a clerical, ministerial function and is not a judgment—void or otherwise. Therefore, the improper recording of a fine is not subject to direct review by the appellate court.” *Id.* ¶ 23.

Thus, the supreme court concluded that “the appellate court lacked jurisdiction to review the clerk’s recording of mandatory fines that were not included as part of the circuit court’s final judgment.” *Id.*

¶ 38 Accordingly, we decline to consider whether the circuit clerk properly applied defendant’s *per diem* credit to his fines.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court’s judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 41 Affirmed.