Document: People v. Gakuba, 2019 Ill. LEXIS 340

# People v. Gakuba, 2019 Ill. LEXIS 340

Supreme Court of Illinois

March 20, 2019, Decided

124481

**Reporter**

**2019 Ill. LEXIS 340 ***

People State of Illinois, respondent, v. Peter **Gakuba**, petitioner.

**Notice:** DECISION WITHOUT PUBLISHED OPINION

**Prior History:** **[*1]** Leave to appeal, Appellate Court, Second District. 2-17-0794.

## Opinion

Petition for Leave to Appeal Denied.

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2019 IL App (2d) 170794-U
No. 2-17-0794
Order filed January 18, 2019



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

| | | |
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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Winnebago County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 06-CF-4324 |
| PETER GAKUBA, | ) | Honorable Brendan A. Maher, |
| Defendant-Appellant. | ) | Judge, Presiding. |

JUSTICE HUDSON delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court properly dismissed defendant's *pro se* petition for post-conviction relief as frivolous and patently without merit as the claims raised in the post-conviction petition are barred by *res judicata*, forfeited, rebutted by the record, or lack merit.

¶ 2 Defendant, Peter Gakuba, appeals from the first-stage dismissal of his *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). For the reasons set forth below, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The facts are set forth in detail in our decision on direct appeal. See *People v. Gakuba*, 2017 IL App (2d) 150744-U. We set forth here only those facts necessary to place into context the issues raised in defendant's post-conviction appeal. All additional facts necessary to resolve the arguments raised on appeal will be discussed in conjunction with the particular alleged basis for reversal.

¶ 5 On December 20, 2006, defendant was charged by indictment with three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)). Each count alleged that on or about November 3, 2006, defendant "committed an act of sexual penetration with [M.S.] (D.O.B. 1-25-92), who was at least 13 years of age but under 17 years of age when the act was committed *** and that the defendant was at least 5 years older than [M.S.]" Defendant initially retained attorney Debra Schafer to represent him. Assistant State's Attorney (ASA) Kate Kurtz was assigned to prosecute the case. The case was placed on the docket of Judge John Truitt.

¶ 6 After extensive pre-trial motion practice and several continuances, the trial was scheduled to begin on September 20, 2010. On that date, however, Schafer moved to continue the matter at which point defendant presented a *pro se* motion entitled "Motion for Continuance & Motion for Substitution of Counsel by Reason of Ineffective Counsel." Defendant argued, *inter alia*, that Schafer had failed to conduct discovery, refused to conduct independent forensic testing of the hard drive of defendant's computer and M.S.'s computer, and failed to adequately prepare for trial. Defendant also referenced the availability of an affirmative defense and suggested that certain witnesses should have been subpoenaed for trial. Upon questioning from the trial court, however, defendant could neither identify a specific affirmative defense nor state the information to which the purported witnesses would testify. The trial court denied the motion for a continuance. Schafer moved to withdraw from the case; this motion was granted.

¶ 7 Defendant retained new counsel, Beau Brindley and Michael Thompson, and additional pre-trial motion practice ensued. The trial court granted defendant's motion to suppress any inculpatory statements made by defendant. The trial court proceeded to grant defendant's motion to reconsider its ruling on defendant's previously filed motion to quash a search warrant, thereby suppressing a buccal swab of defendant as well as physical evidence taken from defendant's hotel room and computer. The trial court also granted defendant's motion to suppress evidence the police obtained from a video rental store pursuant to the Video Privacy Protection Act (Video Privacy Act), 18 U.S.C. § 2710 (2006), which prohibits video rental providers from disclosing "personally identifiable information" concerning any consumer to a law enforcement agency without a court order, subpoena, or warrant. The State, however, subsequently moved to obtain a new buccal sample pursuant to Illinois Supreme Court Rule 413 (eff. Jan. 1, 1982). The trial court granted the motion and ordered defendant to submit to a buccal sample.

¶ 8 Subsequently, on April 26, 2013 (approximately 2½ weeks before trial was set to begin), defendant filed a *pro se* motion to "substitute" his attorneys for ineffectiveness and to impose sanctions against them. Brindley and Thompson moved to withdraw, alleging a conflict of interest making it impossible for them to ethically represent defendant. The trial court reluctantly granted the motion to withdraw. Defendant elected to proceed *pro se* following admonishments by the trial court. Defendant filed several *pro se* motions, including a motion to compel discovery, a motion to compel a "Certificate of Compliance with Mandatory Replevin," a motion to dismiss the indictment based on alleged prosecutorial misconduct, a motion to disqualify the Winnebago County State's Attorney's office and ASA Kurtz, a motion to introduce the "accuser's other criminal sex offenses," and a motion to suppress biographical evidence, including defendant's social security number, date of birth, fingerprints, and DNA profile.

Defendant subsequently filed additional motions, including multiple motions to compel discovery, a motion to suppress "primary and derivative evidence," an addendum to his motion to compel a "Certificate of Compliance with Mandatory Replevin," a motion for a show-cause order to hold ASA Kurtz in direct criminal contempt for suborning perjury, and a motion to dismiss the indictment based on alleged prosecutorial misconduct.

¶ 9 At a hearing on July 19, 2013, defendant, still proceeding *pro se*, filed a motion to substitute Judge Truitt for cause immediately after he denied defendant's motions. Defendant subsequently filed a variety of other motions, including a "second amended motion" to substitute Judge Truitt for cause. Following an evidentiary hearing, Judge Joseph McGraw denied the motion to substitute Judge Truitt for cause. Trial was set for February 24, 2014. In January and February 2014, defendant filed several more *pro se* motions, including a motion to continue the trial. Over the State's objection, the trial court granted defendant's motion to continue the trial but set an "absolute cutoff date" of February 28, 2014, for filing any pretrial motions. Defendant's *pro se* efforts to file multiple additional pre-trial motions beyond that date and motions to substitute judges for cause were unsuccessful as were his attempts to file interlocutory appeals from the denial of the motions.

¶ 10 On November 25, 2014, defendant filed a motion for court-appointed counsel. Following a hearing on the motion at which the trial court admonished defendant about the appointment of counsel, the trial court appointed the public defender's office to represent defendant. On January 6, 2015, the trial court held a conference with assistant Public Defender (APD) Shauna Gustafson and a representative from the State's Attorney's office to assist Gustafson in familiarizing herself with the case.

¶ 11 On March 4, 2015, APD Gustafson filed a motion to disqualify ASA Kurtz as she was no longer employed by the office of Winnebago County State's Attorney. In September 2014, ASA Kurtz left the office of the Winnebago County State's Attorney and became an assistant State's Attorney in Macon County, Illinois. The Winnebago County State's Attorney subsequently appointed ASA Kurtz as a special assistant State's Attorney "for the sole purpose of assisting the Office of the Winnebago County State's Attorney with the prosecution of" defendant's case pursuant to section 4-2003 of the Counties Code (55 ILCS 5/4-2003 (West 2012)). The trial court denied the motion to disqualify ASA Kurtz.

¶ 12 On March 31, 2015, defendant filed *pro se* a "Motion to Substitute Court-Appointed Counsel—Ineffective Representation." He alleged that APD Gustafson was ineffective due to the purportedly limited amount of time she had to prepare for trial. He also alleged that Gustafson was required to adopt all of his previously filed motions because she had filed a motion to disqualify ASA Kurtz from prosecuting the case—a motion defendant previously had filed *pro se*. The trial court denied defendant's motion to substitute counsel at which point defendant informed the court that he wished to proceed *pro se*. The trial court denied the request, noting that it was the third time "on the eve of trial or certainly within a month of trial" that defendant sought to discharge his attorney.

¶ 13 On the date that the trial was scheduled to begin (April 27, 2015), APD Gustafson filed a motion for continuance on grounds she had received additional discovery on April 24 and 25, 2015, and that because of the late disclosures and the inability to ensure the availability of any necessary witnesses, she was not able to answer ready for trial. On April 27, 2015, the trial court heard and denied the motion for continuance, stating that the purported additional discovery was a document that defendant already had in his possession and had tendered it to his prior counsel.

¶ 14 On April 27, 2015, defendant's three-day jury trial commenced. The evidence at trial included testimony that defendant met M.S. online in October 2006. At the time, M.S. was a 14-year-old high school freshman living with his parents in Rockton, Illinois. Defendant was 36 years old and lived out of state. Ultimately, defendant and M.S. agreed to meet, and defendant drove to Rockton on November 3, 2006. Defendant picked up M.S. near his home. After buying video games and food and renting movies, they went to defendant's room at the Marriott Courtyard hotel in Rockford, Illinois, where defendant engaged in oral and anal sex with M.S. The next morning, defendant dropped off M.S. at a bowling alley near M.S.'s home, and M.S. telephoned his father to pick him up.

¶ 15 Meanwhile, M.S.'s parents had reported their son missing. After returning home, M.S. was taken to the police station where he ultimately told the police what happened and gave them information about the hotel room. M.S. was then taken to the hospital where a rape kit was administered, including a swabbing of M.S.'s mouth and anus. M.S. had not showered or changed his clothes. Later that day, the investigation led police officers to defendant's hotel room.

¶ 16 The jury found defendant guilty of three counts of aggravated criminal sexual abuse. The trial court sentenced defendant to three consecutive four-year prison terms.

¶ 17 Defendant appealed *pro se*, arguing (1) the trial court erred in allowing Sergeant Charles O'Brien to testify regarding defendant's name and birth date because the information was obtained in violation of the Video Privacy Act (18 U.S.C. § 2710 (2006)), and corroborated by the illegal seizure of defendant's driver's license at his hotel room; (2) the trial court erred in granting the State's motion to take a new buccal sample of defendant pursuant to Illinois Supreme Court Rule 413 (eff. July 1, 1982) because it quashed a seizure warrant for and

suppressed an earlier buccal sample; (3) the evidence was insufficient to sustain defendant's convictions; (4) the trial court erred in denying defendant's request to proceed *pro se*; (5) the trial court erred in denying the motions to disqualify ASA Kurtz and in allowing her to serve as a Special State's Attorney; (6) the trial court erred in denying defendant's motions to substitute Judge Truitt and Judge McGraw for cause; and (7) the trial court erred in sentencing defendant to a term of imprisonment rather than probation and in imposing consecutive sentences. As detailed in our disposition on direct appeal, we rejected these arguments and affirmed defendant's conviction and sentence. *People v. Gakuba*, 2017 IL App (2d) 150744-U.

¶ 18 On June 30, 2017, defendant filed a *pro se* "Post-Conviction Petition to Vacate Convictions & Sentence Per 6th Amend. Violation Petition for Relief." He alleges the same seven claims he raised on direct appeal although the allegations include multiple sub-parts and duplicative arguments and each claim is prefaced with "The 6th Amend. Viol. Led To." Defendant also filed a supporting appendix including his own affidavits and what appears to be the affidavit of David Shapiro. The affidavit of David Shapiro states that David Shapiro has been defendant's personal lawyer since 1992; that he was present when defendant and APD Gustafson discussed " 'trial strategy' " after the State rested and that APD Gustafson "gave incomprehensible, if not unintelligible responses to [defendant's] questioning, concluding that 'jury nullification' was the best bet;" and that his opinion is that APD Gustafson failed to subject the State's case to the "expectant adversarial testing."

¶ 19 The trial court dismissed the post-conviction petition as frivolous and patently without merit. In doing so, the trial court initially noted, as this court noted on direct appeal, that its review of defendant's claims was complicated by defendant's failure to properly and clearly allege specific facts in support of his claims as well as his failure to properly develop his

arguments and support them with citation to relevant authority. In addressing the entirety of the post-conviction petition, the trial court found that all claims that were raised or could have been raised on direct appeal were barred by principles of *res judicata*. The trial court also found that, to the extent any of defendant's allegations could be construed as claims that APD Gustafson was ineffective based upon trial strategy decisions made by defendant while he was representing himself or by defendant's previously retained private counsel, the claims are frivolous and patently without merit.

¶ 20 The trial court categorized the balance of any remaining allegations as ineffective-assistance-of-counsel claims directed at the performance of APD Gustafson. The trial court found these allegations frivolous and patently without merit. Specifically, regarding defendant's allegations that APD Gustafson failed to cross-examine Sergeant O'Brien, failed to conduct adversarial testing of the State's evidence, and exhibited several other "failures" in her performance, the trial court found that defendant did not allege how the purported failures fell below an objective standard of reasonableness within the range of trial strategy decisions a trial attorney is entitled to make or how such decisions resulted in prejudice to defendant such that the outcome of the proceeding was affected. In particular, defendant failed to assert what questions APD Gustafson should have asked Sergeant O'Brien, the answers that defendant believes Sergeant O'Brien would have given, and how the anticipated answers would have changed the result of the trial.

¶ 21 Regarding defendant's allegations that APD Gustafson was not prepared for trial, did not have a legitimate defense prepared, and insisted on a strategy of jury nullification, the trial court found that defendant failed to set forth specific facts with respect to any deficiencies in trial readiness. The trial court pointed out that despite defendant's assertions that there were several

witnesses necessary for his defense, defendant failed to identify any witnesses by name or explain the relevance of their purported testimony to the issues at trial. The trial court found that the report of proceedings from the three-day jury trial affirmatively rebutted any lack-of-preparation on the part of APD Gustafson and demonstrated a trial strategy of attacking the victim's credibility and memory, questioning the weight and relevance of certain physical evidence, and highlighting inconsistencies in the evidence, including the victim's version of events.

¶ 22 Defendant timely appealed and represents himself *pro se* on appeal.

¶ 23 II. ANALYSIS

¶ 24 Initially, we note that the rules of procedure concerning appellate briefs are not mere suggestions. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. Every appellant, including a *pro se* appellant, is presumed to know the rules and must comply with them. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 528 (2001). As was the case on direct appeal, defendant presents arguments that consist of a multitude of sub-issues with string cites to various cases. However, defendant does not develop these arguments or present a reasoned basis for finding that error was committed. Moreover, defendant does not always discuss the relevance of the cases to which he cites. This makes it difficult to understand and address defendant's arguments. Accordingly, to the extent that we do not address an argument raised in defendant's brief, we consider it forfeited for failure to comply with Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017), which requires the appellant's brief to include argument containing "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." See *Ramos v. Kewanee Hospital,* 2013 IL App (3d) 120001, ¶ 37

(noting that the failure to properly develop an argument and support it with citation to relevant authority results in forfeiture).

¶ 25 We also note that defendant's brief violates Rule 341(h)(6)'s requirement that the statement of facts "contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment and with appropriate reference to the pages of the record on appeal ***." Ill. S. Ct. R. 341(h)(6) (eff. Nov. 1, 2017), Defendant's statement of facts contains extensive argument and purported facts irrelevant to the issues. It is therefore within our discretion to strike defendant's statement of facts. See *Hall*, 2012 IL App (2d) 111151, ¶ 7. Nevertheless, the deficiencies are not so egregious so as to hinder our review. We proceed with the analysis by disregarding any inappropriate argument or irrelevant facts contained within defendant's statement of facts.

¶ 26 The Act outlines a process by which a criminal defendant may challenge his or her conviction on grounds that the conviction was the result of a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1(a)(1) *et seq.* (West 2016). A post-conviction proceeding, however, is not a substitute for, or an addendum to, a direct appeal, but rather a collateral attack on a prior conviction or sentence. *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). The scope of the proceeding is limited to constitutional matters that have not been, nor could have been, previously adjudicated. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). Accordingly, any issue that could have been raised on direct appeal, but was not, is considered procedurally defaulted, and any issue that was adjudicated on direct appeal is barred by the doctrine of *res judicata*. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010).

¶ 27 The Act provides a three-stage process for the adjudication of a post-conviction petition. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). At the first stage, the petition must allege

"sufficient facts to state the gist of a constitutional claim, even where the petition lacks formal legal argument or citations to authority." *People v. Allen*, 2015 IL 113135, ¶ 24. This low threshold, however, does not excuse the *pro se* petitioner from providing any factual support for his claims. *People v. Hodges*, 234 Ill. 2d 1, 9-10 (2009). The petitioner must supply a sufficient factual basis to show the allegations in the petition are capable of objective or independent corroboration. *Id.* at 10. During this initial stage, the trial court independently assesses the allegations in the petition without any input from the State. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). If the trial court determines that the petition is frivolous or patently without merit, it shall dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2016); *People v. Turner*, 2012 IL App (2d) 100819, ¶ 18. A post-conviction petition is frivolous or patently without merit when its allegations, liberally construed, have no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in law or in fact if it is based on an indisputably meritless legal theory, *i.e.*, a legal theory completely contradicted by the record, or a fanciful factual allegation, *i.e.*, those which are fantastic or delusional. *Id.* at 16-17. As noted above, in the present case, the trial court dismissed defendant's petition following a first-stage review. We review *de novo* the first-stage dismissal of a post-conviction petition. *People v. House*, 2013 IL App (2d) 120746, ¶ 9.

¶ 28 Generally, we discern from defendant's brief that he raises essentially the same seven issues that he raised on direct appeal although he prefaces each argument with "The 6th Amend. Viol. Led To." However, despite captioning his claims as ineffective assistance of counsel, defendant fails to demonstrate any basis to satisfy the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that the defendant was

prejudiced, *i.e.*, a reasonable probability that the result of the proceeding would have been different but for counsel's deficient representation. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). Regarding the first prong, a defendant must overcome the presumption that counsel's actions were the result of trial strategy. *Id.* As for the second prong, a reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

¶ 29 Defendant directs his arguments toward the performance of APD Gustafson, including her alleged lack of preparation and alleged failure to conduct adversarial testing of the State's evidence. However, defendant fails to articulate any basis to overcome the presumption that counsel's actions were matters of trial strategy or to show that there is reasonable probability that the result of the proceeding would have been different but for counsel's alleged deficient representation. Indeed, we agree with the trial court that the record rebuts any lack-of-preparation claim on the part of APD Gustafson and demonstrates a trial strategy of attacking the victim's credibility and memory and questioning the weight and relevance of certain physical evidence. Accordingly, as discussed in turn below, each of defendant's post-conviction claims is barred by the doctrine of *res judicata* as the claims amount to the same arguments that were raised and rejected on direct appeal.

¶ 30 Defendant first argues that he was wrongfully indicted and convicted with "illegally obtained" identity evidence although he captions his argument as an ineffective-assistance-of-counsel claim. Namely, he contends that "[t]he 6th Amend. Viol. Led To—The trial ct. erred when 'assum[ing]' *** on June 5, 2013 [defendant's] name & birthdate came from a 'routine booking' Q & A resulting in *Napue* violations at [defendant's] jury trial; this identity evidence, illegally obtained in viol. of 18 U.S.C. § 2710(b), (d) corroborated by the illegal seizure of [defendant's] driver's lic., also was violative of the 4th amend. as a *Brown* claim too."

Defendant, however, fails to allege any arguable basis to satisfy either prong of the *Strickland* analysis. Rather, he reiterates his contention made on direct appeal that the trial court erred in allowing Sergeant O'Brien to testify regarding defendant's name and birth date because the information was obtained in violation of the Video Privacy Act, 18 U.S.C. § 2710 (2006), and pursuant to the illegal seizure of his driver's license at his hotel room. We rejected this argument on direct appeal. We held that the trial court properly admitted evidence of defendant's name and birth date as the information was derived from sources independent of any illegal police conduct. See *Nix v. Williams*, 467 U.S. 431, 443 (1984) ("The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of the constitutional violation."). The record demonstrated that the police learned defendant's name prior to contacting the video store, entering defendant's hotel room, or interviewing him at the police station. The record also demonstrated that the police learned defendant's date of birth during the routine booking process. Accordingly, defendant's argument is barred by the doctrine of *res judicata*.

¶ 31 Defendant next argues that the trial court erred in granting the State's motion to obtain a buccal swab pursuant to Illinois Supreme Court Rule 413 (eff. July 1, 1982). Again, he prefaces the argument with "The 6th Amend. Viol. Led To" but fails to allege any arguable basis to satisfy either prong of the *Strickland* analysis. Defendant contends that "[t]he 6th Amend. Viol. Led To—The trial ct. erred when re-admitting [defendant's] DNA profile into evidence after quashing a 'buccal swab search/seizure warrant' as a *Franks* (and *Brown*) viols.; the warrant was functionally an Il. S. Ct. Rule 413 motion and the doctrines of estoppel and *res judicata* controlled." On direct appeal, defendant argued that the buccal swab should have been excluded under the doctrines of estoppel and *res judicata* because the trial court quashed the seizure

warrant for and suppressed an earlier buccal sample and the seizure warrant was "functionally" a Rule 413 motion. We rejected this argument, holding that the State properly requested leave to obtain a new buccal sample in accordance with Illinois Supreme Court Rule 413(a)(vii) (eff. Jan. 1, 1982), which provides that, notwithstanding the initiation of judicial proceedings and subject to constitutional limitations, a judicial officer may require the accused to permit the taking of samples of his blood, hair, and other materials of his body that involve no unreasonable intrusion thereof. The State alleged probable cause to obtain the buccal sample based upon M.S.'s statements, the corroboration of those statements, and a laboratory report regarding the rectal swab from M.S.'s rape kit. Moreover, in rejecting defendant's argument on direct appeal, we pointed out that the trial court did not quash the seizure warrant as a result of a discovery sanction. Rather, the trial court agreed with defendant's claim that the affidavit filed in support of the warrant contained false statements and material omissions but rejected the notion that what it characterized as a "sloppy" affidavit was executed with intent to mislead. As we already rejected defendant's argument on direct appeal, the doctrine of *res judicata* bars defendant's claim.

¶ 32 Defendant's third basis for reversal appears to be a reiteration of his challenge to the sufficiency of the evidence made on direct appeal. The claim is phrased "The 6th Amend. Viol. Led To—The cumulative evidentiary errors by the trial ct. resulted in [defendant] being wrongfully convicted with legally insufficient evidence; false/fabricated evidence (*Napue*); manifestly insufficient evidence; and deprived [defendant] of a fair trial by barring use of impeachment evidence." However, defendant fails to allege any arguable basis to satisfy either prong of the *Strickland* analysis.

¶ 33 We discern from defendant's allegations that he maintains the claims raised on direct appeal regarding purported false testimony and lack of physical evidence. In rejecting these arguments on direct appeal, we recounted in extensive detail the evidence set forth at trial. To prove the office of aggravated criminal sexual abuse, the State was required to establish beyond a reasonable doubt that defendant committed an act of sexual penetration with M.S., M.S. was at least 13 years old but under 17 years old, and defendant was at least 5 years older than M.S. See 720 ILCS 5/12-16(d) (West 2006); *People v. Bailey*, 311 Ill. App. 3d 265, 269 (2000). The evidence established that M.S. was born on January 25, 1992, making him at least 13 years old but under 17 years old in November 2006. The evidence further established that defendant was born on November 21, 1969, making him at least 5 years older than M.S. Moreover, we held that a rational trier of fact reasonably could have concluded that the contact described by M.S. constituted "sexual penetration" as that term is defined by statute. M.S. testified that defendant placed M.S.'s penis in his mouth. M.S. further testified that defendant placed his penis in M.S.'s mouth and in M.S.'s anus. This conduct falls within the statutory definition of "sexual penetration." Accordingly, we held that, based on the evidence, we could not say that no rational trier of fact could have found defendant guilty beyond a reasonable doubt of the charges alleged in the indictment. See *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007) (the relevant inquiry when faced with a challenge to the sufficiency of the evidence is whether the evidence, construed in the light most favorable to the State, would allow any rational trier of fact to find beyond a reasonable doubt the essential elements of the crime charged). The doctrine of *res judicata* bars defendant's attempt to challenge the sufficiency of the evidence again though a post-conviction petition.

¶ 34 Defendant next argues "The 6th Amend. Viol. Led To—The trial ct. erred in denying [defendant's] 6th Amend. right to be 'pro se' 3-6 weeks before trial despite making a record 5-6 mos. earlier the trial court 'anticipated' it, and would allow it as a matter of law, as [defendant] was 'pro se' for some 18 mos. before being granted appt'd counsel at the time the trial ct. made its anticipatory/prospective ruling known for the record." Defendant fails to allege any arguable basis to satisfy either prong of the *Strickland* analysis. We rejected this argument on direct appeal, holding that the record supported the trial court's finding that defendant's request to proceed *pro se* was interposed as a delay tactic. *Res judicata* bars defendant from relitigating this claim.

¶ 35 Defendant's fifth basis for reversal is that "[t]he 6th Amend. Viol. Led To—The trial ct. erred in denying motions to disqualify ASA Kurtz by [defendant] and [defendant's] retained and appt'd counsel; erred in denying [defendant's] motion for appointment of a special prosecutor; and erred when allowing the illegal appointment of Kurtz as a 'special ASA' per 55 ILCS 5/4-2003." Defendant fails to allege any arguable basis to satisfy either prong of the *Strickland* analysis. We rejected defendant's argument on direct appeal. We held that defendant provided no factual or legal basis to support his claim that ASA Kurtz should have been disqualified. We also held that the plain language of section 4-2003 of the Counties Code (55 ILCS 5/4-2003 (West 2012)) provides the State's Attorney of each county discretion to appoint assistants—precisely what occurred in this case. Accordingly, defendant's claim is barred by the doctrine of *res judicata*.

¶ 36 Defendant next argues that "[t]he 6th Amend. Viol. Led To—The chief circuit judge erred in denying [defendant's] motion to substitute judge for cause (1st), then, denied [defendant's] 'motion to substitute' the chief judge for cause himself; before denying

[defendant's] '2nd motion to substitute' the trial judge for cause, resulting in [defendant] being tried/convicted before a biased trial judge acting as an advocate." Again, defendant fails to allege any arguable basis to satisfy either prong of the *Strickland* analysis. On direct appeal, defendant argued that Judge McGraw abused his discretion in denying defendant's motions to substitute Judge Truitt for cause and defendant's motion to substitute Judge McGraw for cause. Defendant argued that, as a result, he was tried and convicted "before a biased trial judge acting as an advocate." We rejected the argument, holding that defendant failed to offer any factual basis to support the claims set forth in his motions. The doctrine of *res judicata* bars defendant's claim.

¶ 37 Defendant's final argument is that "[t]he 6th Amend. Viol. Led To—The trial ct. abused its discretion when sentencing [defendant] to 4 yrs x 3 counts consecutive prison terms, 12 yrs aggregate, when the PSI report counseled for probation, the State's offer had always been probation for the 8.5 yr pendency of this case, and [defendant] was capable of rehabilitation regardless of his failure to admit any guilt." Defendant alleges no arguable basis to satisfy either prong of the *Strickland* analysis, and he similarly challenged his sentences on direct appeal. We rejected the arguments. We held that the trial court did not abuse its discretion in sentencing defendant to a term of imprisonment instead of probation. The sentences imposed by the trial court fall within the statutory sentencing range for the offenses of which defendant was convicted. In pronouncing defendant's sentence, the trial court stated that it had considered, *inter alia*, the evidence received at trial, the presentence report, a sex offender evaluation of defendant, character reference letters filed on defendant's behalf, the parties' arguments, and the applicable statutory factors in aggravation and mitigation. The court found that a sentence of probation would deprecate the seriousness of the offenses and would be inconsistent with the ends of justice. We also held that the trial court did not abuse its discretion in ordering defendant's

sentences to run consecutively. In exercising its discretion to impose consecutive sentences, the trial court considered defendant's character and conduct and reasoned that consecutive sentences were necessary to protect the public from further criminal conduct by defendant. The doctrine of *res judicata* bars defendant's attempt to challenge his sentence again though a post-conviction petition.

¶ 38 III. CONCLUSION

¶ 39 For the reasons set forth above, we affirm the judgment of the circuit court of Winnebago County dismissing defendant's *pro se* petition for post-conviction relief as frivolous and patently without merit. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 40 Affirmed.