SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
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Jacob A. Rubini
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FIRST DISTRICT OFFICE
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September 27, 2023

in re: People State of Illinois, respondent, v. Jacob A. Rubini, petitioner.
Leave to appeal, Appellate Court, Second District.
129809

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 11/01/2023.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

ILLINOIS APPELLATE COURT
SECOND DISTRICT

55 SYMPHONY WAY
ELGIN, IL 60120
(847) 695-3750

May 31, 2023

Thomas Armond Lilien
Deputy Defender
Office of the State Appellate Defender
One Douglas Avenue, Second Floor
Elgin, IL 60120

RE: People v. Rubini, Jacob A.
Appeal No.: 2-22-0320
County: Lake County
Trial Court No.: 18CF2693

The court has this day, May 31, 2023, entered the following order in the above entitled case:

Pursuant to Pennsylvania v. Finley, the appellate defender moves to withdraw as counsel. Motion allowed. See Summary Order filed May 31, 2023.
(Birkett, Jorgensen, Schostok, JJ).

Jeffrey H. Kaplan
Clerk of the Court

cc: Douglas Robert Hoff
Edward Randall Psenicka
Hon. George D. Strickland
Jacob A. Rubini

Appendix A

No. 2-22-0320
Summary Order filed May 31, 2023

NOTICE: This order was filed under Supreme Court Rule 23(c)(2) and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, RA	)	Appeal from the Circuit Court of Lake County.
v.	)	No. 18-CF-2693
JACOB A. RUBINI, Defendant-Appellant. PA	)	Honorable George D. Strickland, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Jorgensen and Schostok concurred in the judgment.

SUMMARY ORDER

¶ 1 Defendant, Jacob A. Rubini, was indicted in case No. 18-CF-2693 on, *inter alia*, a single count each of home invasion (720 ILCS 5/19-6(a)(2) (West 2018)), attempted criminal sexual assault (*id.* §§ 8-4(a), 11-1.20(a)(1)), and aggravated domestic battery (*id.* § 12-3.3(a). The charges were based on an incident that allegedly occurred on November 25, 2018. On November 29, 2018, the alleged victim, K.C., filed a petition for entry of an order of protection (OP petition) against defendant, which was docketed as case No. 18-OP-2212. The trial court entered an emergency order of protection on the same date. On December 19, 2018, the trial court extended the order of protection to January 17, 2019. On January 17, 2019, the trial court extended the order

of protection to March 1, 2019. At a hearing on March 1, 2019, the prosecutor in case No. 18-CF-2693 appeared and advised the court that a plenary order of protection should be entered pursuant to section 112A-11.5(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/112A-11.5(a) (West 2018)), which provides for entry of a "protective order" where there is *prima facie* evidence of, *inter alia*, a sexual offense. An indictment for a sexual offense constitutes *prima facie* evidence. *Id.* § 112A-11.5(a)(1). Defendant objected. The trial court continued the matter to March 12, 2019, and extended the order of protection until that date. In the interim, on March 7, 2019, the parties appeared in court in case No. 18-CF-2693. The State asked the trial court to consolidate case Nos. 18-CF-2693 and 18-OP-2212. The trial court declined to do so. On March 12, 2019, case No. 18-OP-2212 was "non-suited" on K.C.'s request.

¶ 2 Before trial in case No. 18-CF-2693, defendant's private attorney posted bond for defendant using funds furnished by defendant and held in escrow. The State argued that defense counsel was prohibited from posting bond for defendant. Although counsel insisted that defendant was the source of the funds, the trial court ordered that the funds be returned and defendant be taken back into custody.

¶ 3 A jury trial commenced on October 29, 2019. K.C. testified that she began dating defendant in the summer of 2018, and he moved into her condominium. K.C. did not give defendant keys to the condominium. K.C. acknowledged that, in November 2018, she was facing a charge of driving under the influence of alcohol (DUI).

¶ 4 K.C. testified that defendant was supposed to give her monthly payments, but she never received any money from him. Consequently, she asked him to move out. He did so sometime before Thanksgiving 2018. Nonetheless, they remained in a relationship and celebrated Thanksgiving together. Even though defendant was no longer residing in K.C.'s condominium,

he spent Thanksgiving night there. Defendant left the next morning (Friday, November 24, 2018).[1] K.C. went to bed at around 10 p.m. after she ensured all the doors were locked. She later woke up to find defendant on top of her. K.C. felt defendant's exposed penis next to her buttocks. K.C. grabbed defendant's penis. Defendant then began hitting her and threw her across the room. Defendant said, " 'Are you going to be nice? This is my p***.' " Defendant tore K.C.'s camisole off. K.C. was able to put on a robe and run out the door. She pounded on the door of a neighbor, Dean Stewart. K.C. went into Stewart's residence, and the police were called. On cross-examination, K.C. denied that defendant ever paid her bills or posted bond for her.

¶ 5 Wauconda police officer Jonathan Finze testified that he was dispatched to Stewart's residence on November 25, 2018, at about 1:40 a.m. Finze met with K.C. and took her back to her condominium unit. The doors were locked, but he entered through an open window. Finze did not notice any damage to the patio sliding doors.

¶ 6 After Finze left, K.C. discovered a crowbar in the kitchen. It did not belong to her; she had never seen it before. She wrapped it in plastic wrap and took it to the police station. Wauconda police sergeant Timothy Burke went to K.C.'s condominium unit to look for any markings indicating that someone had used the crowbar to gain entry into the unit. Burke identified in court photographs he took of the unit's patio door showing that the door's wood and metal frames were bent out toward the courtyard. Burke testified, "Based on my observation, it appears that the rear sliding glass door was pried from the outside on the deck area bending the door interior, bending forward so to speak."

¶ 7 K.C.'s daughter testified for the defense that the crowbar "look[ed] like one that my mom had a long time ago maybe. I don't know." Baiba Savage testified for the defense that, on

[1]Thanksgiving Day 2018 was actually November 22.

November 24, 2018, at about 10 p.m., she gave defendant a ride to K.C.'s condominium. Defendant did not testify. The jury found defendant guilty of home invasion and aggravated domestic battery but not guilty of attempted criminal sexual assault. The trial court merged the convictions and sentenced defendant to a 20-year prison term for home invasion. Defendant appealed, and we affirmed his conviction. *People v. Rubini*, 2021 IL App (2d) 200064-U (*Rubini I*).

¶ 8 On May 23, 2022, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)) for relief from his conviction. In his petition, defendant claimed that (1) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by "blocking" K.C. from testifying at the proceedings on her OP petition, (2) the State used perjured testimony from K.C. to obtain defendant's conviction, (3) the State obtained the indictment with false testimony from Finze, (4) K.C. testified per an undisclosed agreement with the State that involved reducing a DUI charge from a felony to a misdemeanor, and (5) the admission of the crowbar into evidence violated the Illinois Rules of Evidence.

¶ 9 Defendant also claimed that trial counsel rendered ineffective assistance by (1) posting bond for defendant from funds in counsel's escrow account, (2) failing to obtain and introduce into evidence certain documents that allegedly would have shown that defendant lived with K.C., (3) failing to present testimony from certain witnesses who allegedly would have testified that defendant lived with K.C., (4) neglecting to present evidence that defendant posted bond for K.C. when she was in custody for DUI in October 2018, (5) failing to obtain recordings of telephone calls K.C. made while in custody for DUI, and (6) not allowing defendant to testify at trial.

¶ 10 The trial court summarily dismissed the petition on August 18, 2022. See 725 ILCS 5/122-2.1(a)(2) (West 2020). Defendant timely appealed, and the trial court appointed the Office of the State Appellate Defender to represent him.

¶ 11 Per *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993), the appellate defender moves to withdraw as counsel. In her motion, counsel states that she read the record and found no issue of arguable merit. Counsel further states that she advised defendant of her opinion. Counsel supports her motion with a memorandum of law providing a statement of facts, a list of potential issues, and arguments why those issues lack arguable merit. We advised defendant that he had 30 days to respond to the motion. Defendant filed a response with various attachments. He later filed an additional collection of documents.

¶ 12 Counsel noted that she considered raising the following issues: (1) whether the summary dismissal of defendant's postconviction petition violated the Act's procedural requirements and (2) whether any of defendant's claims were not subject to summary dismissal. However, counsel concludes that these issues lack arguable merit. We agree.

¶ 13 As our supreme court has explained, "[t]he Act provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). "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. Borizov*, 2019 IL App (2d) 170004, ¶ 10. Consequently, "*res judicata* bars consideration of issues that were raised and decided on direct appeal; issues that could have been raised on direct appeal, but were not, are considered forfeited." *Id.* Section 122-2 of the Act (725 ILCS 5/122-2 (West 2020)) provides that "[t]he petition shall

have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached."

¶ 14 Section 122-2.1(a)(2) of the Act (*id.* § 122-2.1(a)(2)) provides that, within 90 days after the filing and docketing of the petition, "[i]f *** the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision." Our supreme court has held that "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12. A petition lacks an arguable basis either in law or in fact when it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16. If a legal theory is completely contradicted by the record, it is indisputably meritless. *Id.* "Fanciful factual allegations include those which are fantastic or delusional." *Id.* at 17. The term "frivolous or *** patently without merit" also applies to claims forfeited because they could have been raised on direct appeal but were not. *People v. Blair*, 215 Ill. 2d 427, 445 (2005). Moreover, when the allegations of the petition are unupported by affidavits, records, or other evidence, and the petition does not explain their absence, summary dismissal is appropriate. *People v. Roman*, 2022 IL App (1st) 201173, ¶ 18. If the trial court does not dismiss the petition within 90 days, the court may no longer summarily dismiss the petition and must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2020).

¶ 15 As pertinent here, a person commits home invasion when

> "without authority he or she knowingly enters the dwelling place of another when he or she knows or has reason to know that one or more persons is present or he or she

knowingly enters the dwelling place of another and remains in the dwelling place until he or she knows or has reason to know that one or more persons is present *** and

***

(2) Intentionally causes any injury *** to any person or persons within the dwelling place[.]" 720 ILCS 5/19-6(a)(2) (West 2018).

As we noted in our decision on direct appeal, whether defendant committed home invasion hinged, in part, on if he was still living with K.C. at her condominium on November 25, 2018. If he was, he did not enter "the dwelling place of another." See *Rubini I*, 2021 IL App (2d) 200064-U, ¶ 57.

¶ 16 With these principles in mind, we address the issues that counsel considered raising in this appeal. We first consider whether summary dismissal of the petition complied with the Act's procedural requirements. As noted, if the trial court determines that a postconviction petition is frivolous or patently without merit, the court may summarily dismiss the petition within 90 days after the petition was filed and docketed; otherwise, the petition must be docketed for further consideration. 725 ILCS 5/122-2.1(a)(2), (b) (West 2020). The trial court entered its dismissal within 90 days after the petition was filed and docketed. Thus, there is no potentially meritorious basis for arguing that the summary dismissal was procedurally improper.

¶ 17 We next consider whether defendant's petition contained any claims that were not frivolous or patently without merit. We consider the claims individually.

¶ 18 We first consider defendant's claim that the State violated *Brady* by "blocking" K.C. from testifying at the proceedings on her OP petition in case No. 18-OP-2212. *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87; see also *United States v. Agurs*, 427

U.S. 97, 110 (1976), (holding that the State must disclose exculpatory evidence regardless of whether requested by the defense.) According to defendant's postconviction petition, the State attempted to "block" K.C.'s testimony by (1) claiming that defendant's indictment for criminal sexual assault was a sufficient ground for entry of an order of protection and (2) moving to consolidate case No. 18-OP-2212 with the criminal proceedings in case No. 18-CF-2693. Even assuming, *arguendo*, that the State "blocked" K.C.'s testimony in case No. 18-OP-2212, and thereby suppressed evidence, it is a matter of pure speculation whether K.C.'s testimony would have been favorable to defendant. Accordingly, there is no potentially meritorious basis for challenging the dismissal of defendant's *Brady* claim.

¶ 19 Second, we consider defendant's claim that the State knowingly used perjured testimony from K.C. to obtain his conviction. It is well established that "the State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process of law." *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). However, to set aside a conviction on this basis, the defendant must show prejudice in the form of a reasonable likelihood that the perjured testimony affected the jury's verdict. *People v. Moore*, 2022 IL App (1st) 192290, ¶ 38.

¶ 20 In his postconviction petition, defendant claimed that because, in the "Relationship Code" section of her OP petition, K.C. checked the box marked "Shared / common dwelling," the State was aware that her testimony that defendant moved out before November 25, 2018, was false. We disagree. In a narrative portion of the OP petition, K.C. stated, "[Defendant] broke in to [*sic*] *my* sliding glass patio door." (Emphasis added.) She thus indicated that she and defendant were not cohabitating on the date of the incident. The most reasonable interpretation of the OP petition is that the relationship code K.C. selected referred to her past relationship with defendant. Therefore, the OP petition does not arguably support defendant's postconviction allegations that he had

authority to be in the condominium on November 25, 2018, and that the State knew that K.C.'s contrary testimony was untrue.

¶ 21 In his response to counsel's motion to withdraw, defendant notes that, although two police officers were present at the condominium from 1:40 a.m. to 2:20 a.m., "[t]here is no mention of a break in or forced entry in any report during this time frame." Presumably, defendant is referring to police reports. However, in his postconviction petition, defendant never referred to any police reports as the basis for his claim that K.C.'s trial testimony was perjured. A claim not raised in the postconviction petition cannot be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004).

¶ 22 In his postconviction petition, defendant also noted that a number of details in K.C.'s trial testimony do not appear in the narrative portion of her OP petition. However, we would hardly expect K.C.'s petition to be as detailed as her trial testimony. The fact that K.C.'s testimony was more detailed than her petition is not evidence that the additional details were false. Defendant also noted that, whereas K.C. testified that she was sleeping on her stomach when she woke to find defendant on top of her, her OP petition stated that defendant "turned [her] on to [her] stomach." Even if that testimony was false, there is no reasonable likelihood that it could have affected the jury's verdict. Accordingly, the discrepancy is not a ground for setting aside defendant's conviction. See *Moore*, 2022 IL App (1st) 192290, ¶ 38.

¶ 23 We also note that defendant's response to the motion to withdraw relies heavily on certain evidence presented at trial that purportedly supports his argument that the State knowingly used K.C.'s perjured testimony to obtain his conviction. Yet, since defendant could have relied on that evidence to make the same argument on direct appeal, but did not do so, the claim is forfeited.

¶ 24 Third, we consider defendant's claim that the State obtained the indictment through false testimony from Finze before the grand jury. In his postconviction petition, defendant alleged that Finze testified before the grand jury that defendant did not live at K.C.'s condominium and used a tool to gain entry into the condominium. Defendant's petition further alleged that Finze testified before the grand jury that he found pry marks on the screen door. Defendant claimed that this aspect of Finze's grand jury testimony was contradicted by Finze's trial testimony. However, defendant did not attach to his petition a transcript of Finze's grand jury testimony or any other evidence to substantiate his allegations. Nor did the petition contain any explanation for his failure to do so.[2] Accordingly, the claim was subject to summary dismissal. See *Roman*, 2022 IL App (1st) 201173, ¶ 18.

¶ 25 Fourth, we consider defendant's claim that K.C. testified per an undisclosed agreement with the State that involved reducing a DUI charge from a felony to a misdemeanor. Defendant's claim that any such agreement existed is pure speculation. Accordingly, there is no potentially meritorious basis for challenging the summary dismissal of this claim.

¶ 26 Fifth, we consider defendant's claims that (1) the admission of the crowbar into evidence violated the Illinois Rules of Evidence and (2) he received ineffective assistance from trial counsel in that counsel posted bond for defendant from funds in counsel's trust account. Suffice it to say

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[2]Although, before filing his postconviction petition, defendant filed a motion to obtain the grand jury minutes (which the trial court denied), we find nothing in the record to indicate that defendant made any other effort to obtain a transcript of Frinze's grand jury testimony before filing his petition. For instance, we find nothing to indicate that defendant sought a copy of the transcript from either his own attorney or the State's Attorney.

that, because defendant could have raised these issues on direct appeal, but failed to do so, the issues are forfeited.

¶ 27 Sixth, we consider whether trial counsel was ineffective for (1) failing to obtain and introduce into evidence certain documents that allegedly would have shown that defendant lived with K.C. and (2) failing to present testimony from certain witnesses who allegedly would have testified that defendant lived with K.C. Defendant failed to attach to his petition either the referenced documents or affidavits from the witnesses. Moreover, the petition contains no explanation for defendant's failure to do so. Accordingly, these claims were subject to summary dismissal. See *id.*

¶ 28 Seventh, we consider defendant's claim that trial counsel was ineffective because he did not (1) present evidence that defendant posted bond for K.C. when she was in custody for DUI in October 2018 and (2) obtain recordings of telephone calls K.C. made while in custody. We evaluate ineffective-assistance-of-counsel claims under the two-prong *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). *Strickland* requires a showing that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* We note that the record suggests that, while cross-examining K.C., counsel attempted to establish that defendant posted bond for K.C., but the trial court sustained the State's objection to the questioning because it pertained to a collateral matter. In any event, we fail to see how evidence that defendant posted bond for K.C. could possibly have affected the outcome of defendant's trial. Moreover, it is pure speculation that recordings of K.C.'s telephone conversations would have been helpful to the

defense. Thus, there is no potentially meritorious basis for arguing that defendant received ineffective assistance of counsel on these grounds.

¶ 29 Finally, we consider defendant's claim that counsel rendered ineffective assistance by refusing to allow defendant to testify. The record reveals that, at trial, the court advised defendant of his right to testify. Under questioning from the court, defendant confirmed that it was his choice not to testify and that he made that choice after consulting with his attorney. Defendant's statements in response to the trial court's questioning unequivocally rebut his claim that counsel prevented him from testifying. See *People v. Knapp*, 2020 IL 124992, ¶ 54. Accordingly, there is no potentially meritorious basis for arguing that defendant's right to testify was violated.

¶ 30 After examining the record, the motion to withdraw, the memorandum of law, and defendant's response, we agree with counsel that this appeal presents no issue of arguable merit. Thus, we grant the motion to withdraw, and we affirm the judgment of the circuit court of Lake County.

¶ 31 Affirmed.

Appendix A

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
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SPRINGFIELD, ILLINOIS 62701-1721

CYNTHIA A. GRANT
Clerk of the Court

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November 27, 2023

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Jacob A. Rubini
Reg. No. R00268
Western Illinois Correctional Center
2500 Rt. 99 South
Mt. Sterling, IL 62353

In re: People v. Rubini
129809

Today the following order was entered in the captioned case:

Motion by Petitioner, *pro se*, for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Denied.

Order entered by the Court.

This Court's mandate shall issue forthwith to the Appellate Court, Second District.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

cc: Appellate Court, Second District
Attorney General of Illinois - Criminal Division
State's Attorney Lake County
State's Attorney's Appellate Prosecutor, Second District

Appendix D

Appendix E

ILLINOIS APPELLATE COURT
SECOND DISTRICT

55 SYMPHONY WAY
ELGIN, IL 60120
(847) 695-3750

MANDATE

Panel: Honorable Mary Seminara Schostok
Honorable Joseph E. Birkett
Honorable Ann B. Jorgensen

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
JACOB A. RUBINI,
Defendant-Appellant.

Appeal No.: 2-22-0320
County/Agency: Lake County
Trial Court/Agency Case No.: 18CF2693

BE IT REMEMBERED, that on the 31st day of May, 2023, the final judgment of the Illinois Appellate Court, Second District, was entered of record as follows:

Affirmed

In accordance with Illinois Supreme Court Rule 368, this mandate is issued. As clerk of the Illinois Appellate Court, Second District, and keeper of the records, files, and seal thereof, I certify that the foregoing is a true statement of the court's final judgment in the above cause. Pursuant to Illinois Supreme Court Rule 369, the clerk of the circuit court shall file the mandate promptly.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the Illinois Appellate Court, Second District, this 29th day of November, 2023.

Jeffrey H Kaplan

Clerk of the Court

Appendix E

720 ILCS 5/31-1 et seq

Page 16 line 4-8 The Honorable Judge Johnson: And in terms of notice, since as I've indicated, the Assistane State's Attorney does not represent Ms. Cramer in the case, you need not send a copy to the state because it's not there motion.

The hearing is continued to March 12, 2019 to allow counsel for respondent, time to answer Ms. Cramer's motion, which is never filed.

Appendix J

Additional material from this filing is available in the Clerk's Office.