Illinois Official Reports

Appellate Court

People v. Carroll, 2024 IL App (4th) 231207

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROGER W. CARROLL JR., Defendant-Appellant.
District & No.	Fourth District No. 4-23-1207
Filed	November 25, 2024
Decision Under Review	Appeal from the Circuit Court of Jersey County, No. 18-CF-68; the Hon. Allison Lorton, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Erin K. Conner, of Kuehn, Beasley & Young, P.C., of Belleville, for appellant. Ben Goetten, State's Attorney, of Jerseyville (Patrick Delfino, David J. Robinson, and Connor Goetten, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE DeARMOND delivered the judgment of the court, with opinion. Justices Lannerd and Knecht concurred in the judgment and opinion.

OPINION

¶ 1 In March 2020, a jury found defendant, Roger W. Carroll Jr., guilty of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2010)) and found he personally discharged a firearm (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010)) in connection with the disappearance of Bonnie Woodward (Woodward). Defendant retained new counsel for posttrial motions, who presented claims of ineffective assistance of trial counsel. Posttrial counsel then represented defendant on direct appeal, again raising issues of ineffective trial counsel. This court affirmed. *People v. Carroll*, 2021 IL App (4th) 200491-U, ¶ 94. In June 2022, posttrial counsel filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2022)), raising additional issues of ineffective assistance of trial counsel. However, posttrial counsel did not allege he rendered ineffective assistance as appellate counsel.

¶ 2 The trial court dismissed the petition at the second stage, finding two claims lacked merit and the others were forfeited because they could have been raised on direct appeal. Defendant appeals with new counsel, who now argues (1) the court erred in failing to advance two claims to third-stage proceedings; (2) postconviction counsel labored under an actual conflict of interest when, in his representation of defendant as postconviction counsel, he did not allege his own ineffective assistance as appellate counsel for failing to raise the forfeited issues on direct appeal, necessitating a remand without consideration of the merits of the underlying claims; and (3) postconviction counsel provided unreasonable assistance in failing to properly present defendant's claims, requiring an automatic remand for new second-stage proceedings with new counsel. We affirm.

¶ 3 ### I. BACKGROUND

¶ 4 In April 2018, the State filed an information charging defendant with three counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2010)), one count of concealment of a homicidal death (720 ILCS 5/9-3.4(a) (West 2010)), and one count of aggravated kidnapping (720 ILCS 5/10-2(a)(3) (2010)). The aggravated kidnapping and concealment of a homicidal death counts were eventually dismissed before the verdict. Defendant was represented at trial by attorneys Scott Snider and David Fahrenkamp. The facts of the underlying case are found in *Carroll*, 2021 IL App (4th) 200491-U, and have been repeated here where necessary to address the issues raised on appeal.

¶ 5 In his opening statement, defense counsel asserted the evidence would show "holes" in the State's case, including the lack of any identification of defendant near Woodward's workplace, a failure to show when fingerprints might get placed on a vehicle, and the lack of deoxyribonucleic acid (DNA) connecting defendant to bone fragments found on his property. Defense counsel also stated defendant's son, Nathan Carroll (Nathan), would not be found credible.

¶ 6 Nathan, who was 25 years old at the time of trial, testified he was 16 when Woodward disappeared. Nathan testified before grand jury proceedings and at trial under a grant of immunity. Nathan said he knew Woodward's stepdaughter, Heather Woodward (Heather), through a church group. In June 2010, Heather ran away from Woodward's home, and defendant offered to have Heather live with them until she was 18 and able to be on her own. Nathan said he never met Woodward, but defendant told him she "was a bad person," who was

"mean and aggressive and abusive" to Heather. Nathan testified defendant told him Woodward "needed to go away and never come back."

¶ 7 When the family was vacationing with in-laws in late June 2010, defendant told Nathan that Woodward "needed to die." Nathan attempted to talk defendant out of doing anything, but eventually, at defendant's direction, Nathan and defendant returned to their property in Jerseyville, Illinois, a day earlier than defendant's wife, Monica Carroll (Monica), and Heather, who had accompanied them on the trip. Nathan said, once they arrived, defendant drove to Woodward's workplace at a nursing home, pointed at her truck, and said, "[G]ood she is working today." Nathan testified defendant was familiar with Woodward's work schedule because he asked Heather what time Woodward would typically arrive and leave for work.

¶ 8 Nathan said, once defendant arrived home from the trip, defendant showered, shaved, dressed, loaded his gun, and said, "[T]his has gotta happen whether you like it or not," before leaving. In preparation, Nathan erected a tent away from the house with the idea that defendant would tell Woodward that Heather was staying inside the tent to lure Woodward inside.

¶ 9 Nathan testified he heard eight or nine gunshots from an area behind the garage after defendant returned. When he walked outside through the garage, he saw the lower part of human legs wearing tan "scrub pants." Defendant told him "not to go back there because it's ugly." Nathan saw defendant start up a tractor, scoop a body up in the front loader, and dump the body in a large brush fire previously lit by Nathan. According to Nathan, when defendant showed him Woodward's cell phone, Nathan took it, smashed it with a hammer, put it in a plastic bag, and threw it on the fire. Nathan and defendant both mowed the grass everywhere Woodward's body had been and continually stoked the fire for several days.

¶ 10 After the fire burned out, defendant scooped up the remains with the tractor and dumped them in the creek. Nathan testified defendant talked about the murder "[a]lmost nightly for a couple years," constantly telling Nathan not to talk to police and to delete text messages from Monica, which she later described as having been sent on the day Nathan and defendant returned home from vacation early, inquiring about what they were doing. Nathan said defendant told him he had placed his arm on Woodward's truck. Nathan testified defendant had previously killed two dogs on the property.

¶ 11 Nathan testified he lied when first called to testify at the grand jury because he wanted to protect his father. During the course of his testimony before the grand jury, the prosecutor advised him his grant of immunity was in jeopardy if he failed to tell the truth. After speaking with his attorney, Nathan said he then began telling the truth about his and defendant's involvement in the murder and the disposal of Woodward's remains. Over defense counsel's objection, Nathan testified he received threats from family members after his grand jury testimony, and most of his father's family refused to speak with him.

¶ 12 James David Brand, defendant's brother-in-law, testified he saw newspaper articles about Woodward's disappearance. Based on a description of the person suspected in the disappearance and the vehicle that person drove, Brand called the police and told them it looked like defendant was involved in the disappearance.

¶ 13 Scott Golike testified that, in 2010, he was chief of detectives with the Alton Police Department and oversaw the investigation into Woodward's disappearance. He testified about the various circumstances that led authorities to become suspicious about the unexplained disappearance of Woodward in 2010. Those included her unexplained absence from work, conversations with friends and family, and the fact her truck was found in her workplace

parking lot, apparently abandoned, with the doors locked and windows down. Several employees said they observed an interaction between an unknown man and Woodward in the parking lot sometime before she disappeared. Based on descriptions of the man and the vehicle he appeared to be driving, which matched defendant and his vehicle, defendant became a suspect approximately one month after Woodward's disappearance.

¶ 14 On July 5, 2010, Golike spoke with defendant at his home. Defendant was cooperative, spoke to Golike voluntarily, and consented to a search of his home. He also allowed his car to be towed to the Alton Police Department to be searched. Defense counsel emphasized those points on cross-examination. On September 29, 2010, a search warrant was executed on defendant's property, and investigators seized firearms and ammunition. However, the case went cold until March 2018, when defendant's neighbor contacted Golike, prompting him to contact Detective Nick Manns about a then pending domestic battery investigation involving defendant.

¶ 15 Golike laid the foundation for the admission of a redacted version of defendant's September 29, 2018, interview with police. The record shows defense counsel asked the State before trial to redact references in the interview to the use of cadaver dogs "hitting" on things on defendant's property, and the State agreed to do so.

¶ 16 Golike testified he placed defendant in his squad car and spoke with him for about three hours. He then transported defendant to the police station to "memorialize" and record the conversation that occurred in the squad car. The recording of that interview was admitted into evidence but has not been included in the record on appeal. However, the court reporter's transcript of the interview as it was played for the jury is in the record on appeal.

¶ 17 At the beginning of the recorded interview, the following colloquy occurred:

> "MR. GOLIKE: Okay but as far as this morning, um, (inaudible) we we came out, um, you didn't know your (inaudible)…helicopter and airplane, I guess. Um, did you (inaudible) left and then you guys left, um, you (inaudible) I just want to make sure for my notes that I got this, uh, (inaudible) but I contacted ya we took you up to the (inaudible) let you know your *Miranda* rights [(see *Miranda v. Arizona*, 384 U.S. 436 (1966))] we went over and then we got basically just walked you through (inaudible) you're you're account basically I read you you're *Miranda* earlier and we went over that basically (inaudible) with Nathan and you, um, stayed on your property 'til you guys went to dinner somewhere that day means that roughly by (inaudible), um, you don't recall anytime you went to Alton at all on that day and your grey car was there on that day but you guys brought the En Envoy and the boat back.
>
> [DEFENDANT]: Yeah."

¶ 18 During the interview, Golike asked questions affirming defendant's reported lack of contact with Woodward. For example, the following colloquy occurred:

> "MR. GOLIKE: Okay. No (inaudible). Okay. You ever been in an argument with [Woodward]? She's never been in any of your vehicles?
>
> [DEFENDANT]: That's correct.
>
> MR. GOLIKE: She's never been in (inaudible).
>
> [DEFENDANT]: No.
>
> MR. GOLIKE: Okay. Um, she's never been in your Envoy? And you've never been in her vehicle, right?

[DEFENDANT]: (Inaudible).

MR. GOLIKE: And you've never had the occasion to handle her vehicle or touch her vehicle?

[DEFENDANT]: That's correct."

Golike also asked, "But really [your] association with [Woodward] is almost nonexistent according to you, right? [You] have met Heather almost a year ago [through] church." Defendant responded, "Right." When asked if anyone in his family ever accused him of involvement in Woodward's disappearance, defendant stated his mother and brother-in-law had and said, "Well, anyway you know my mom she's like oh my gosh did you do this? I'm like, no, you know I didn't do it. Just…(inaudible)."

¶ 19 At another point in the interview, Golike summed it up in part as follows:

"MR. GOLIKE: Um, okay. So, that's that's pretty much that's pretty much the story and, um, and not to beat a dead horse but just to cover the whole thing you (inaudible) we're out (inaudible) she is not on your property. She's not in your garage. She's not been in your kitchen in your house, any of your cars and and vice versa. You never been in her car and you ain't been in her house and we've I think we've (inaudible). Um, you've had no contact with (inaudible) and she's had no (inaudible) contact with you or your property?"

¶ 20 Overall, defendant denied ever speaking with Woodward, having a disagreement with Woodward, or being around, handling, or touching her vehicle. He explained why Heather was at his home and her relationship with Nathan. Golike asked a number of questions about Nathan that were probative of his possible involvement in Woodward's disappearance. Defendant did not implicate Nathan in the crime and instead said he did not think Nathan held any grudges against Woodward.

¶ 21 Toward the end of the interview, Golike asked, "Any chance your fingerprints would be on [Woodward's] car on the driver's door? Like all over it. (inaudible). No chance?" Defendant stated, "[N]o, there's no way that my fingerprints are on that car door or my DNA is on the car door (inaudible)." Defendant voluntarily provided a DNA sample. After Golike made statements indicating he believed defendant killed Woodward and asking defendant to tell him where the body was, defendant said, "[T]rying to be cooperative." Defendant also said, "[A]nd you know I was instructed by the attorney's not to say anything and maybe that's why I (inaudible). Just shut my yap and just, you know, not say anything." There were references made to "booking" defendant, and he said, "So, when do I get to talk to my attorney?" Golike told him he could do so and asked, "You want to do that?" Defendant responded, "Well, (inaudible)," and the video then ended.

¶ 22 Manns, a detective with the Jersey County Sheriff's Office, testified that, in March 2018, he received a report of defendant committing a domestic battery against Monica and viewed photographs of her injuries. A police search for defendant in the Jerseyville area was unfruitful. Manns, being familiar with the area, drove by defendant's home after his shift, and he found defendant lying unconscious in a wooded area far off the road. Found on defendant were a bag of syringes and insulin, which defendant later admitted using, intending to commit suicide because "he hurt his wife bad." While investigating the domestic battery, Manns learned from Golike defendant was suspected in Woodward's disappearance 10 years earlier.

¶ 23 The State presented testimony from several family members and friends of Woodward, who said the last time they saw or heard from her was the day she disappeared. They also said she had engaged in no online activity or financial transactions since that day.

¶ 24 The State called witnesses from Woodward's workplace, who testified about seeing her in the employee parking lot on June 25, 2010. April Cathers testified she saw a man in the parking lot and indicated his hands were on the driver's side door of Woodward's truck. Cathers gave a general description of the man. When asked to describe his height, she said, "He wasn't that tall," and "maybe 5 foot 7 maybe 5 foot 6 somewhere around there." She was unable to identify the man in a photo lineup.

¶ 25 Another coworker, Wanda Bausily, testified, as she was leaving work on that day, she saw a man standing next to Woodward's truck and saw his face. As she drove away, she saw Woodward and the man standing next to a silver four-door car. She identified defendant in court as the man she saw that day. She explained she was unable to pick him out of the photo lineup in 2010 because, as she recalled, the men's pictures contained more facial hair. When shown a copy of what was represented to be the same lineup, she did not believe it was the same one shown to her before.

¶ 26 Bausily stated she got a good look at defendant's face and was only 10 feet away from him at one point. On cross-examination, she testified the state's attorney showed her a photograph of defendant in preparation for her testimony. She also said she had seen defendant on social media over the past 10 years because Woodward's disappearance had been in the news. However, she insisted she accurately remembered defendant from when she saw him with Woodward.

¶ 27 Monica testified she and defendant were in the process of getting divorced. Upon returning to Jerseyville from vacation in June 2010, she saw a large brushfire, which burned continuously for six or seven days while being repeatedly stoked by defendant and Nathan. She also saw both of them use the tractor to scoop up the ashes from the brushfire and take them down over the hill to the creek. When she was asked about the domestic violence incident in March 2018, she said she was preparing to leave for work one morning when defendant suddenly grabbed her by the hair and struck her in the head, neck, and across the face 10 or 12 times with a Taser. Defendant told Monica he "had killed for [her]," and he was a monster. He admitted to Monica he used to be able to control his anger, "but he couldn't anymore." Monica said she was able to convince defendant to let her leave, and she immediately drove to the Jersey County Sheriff's Office to report the incident.

¶ 28 The State presented evidence about the multiday search and excavation of defendant's property in April 2018 to attempt to find Woodward's body. A 9-millimeter cartridge, shell casing, and projectile were located within the area where Woodward was purportedly murdered. Throughout the excavation of defendant's property, the search team located over 25 bone fragments. Forensic scientists with the Illinois State Police testified the projectile and shell casing had been fired from a Stoeger handgun taken from defendant's residence.

¶ 29 The parties entered a stipulation concerning bone fragments found in a "burn pit" on defendant's property. Under the stipulation, 10 bones were taken from "quadrant one" and 15 from "quadrant two." An expert determined two fragments taken from quadrant one could not be excluded as having human origin. A Federal Bureau of Investigation (FBI) report determined DNA testing on two bone fragments tested from quadrant two did not belong to

Woodward. The stipulation indicated DNA testing could not be conducted on the remaining bone fragments.

¶ 30 Matthew Davis, a forensic anthropologist and archeologist, testified some of the bone fragments had been subjected to "extreme burning" and were consistent with "incomplete cremation." Although some fragments were found to contain DNA, it did not match that of Woodward. Davis also concluded from finding bone fragments in different locations on defendant's property that they were scattered across the ground surface, working their way into the ground over time.

¶ 31 A research botanist for the United States Department of Agriculture Forest Service testified he received samples from a tree located near the location of the brushfire. After analyzing the tree rings in the samples provided, his opinion was the tree experienced a traumatic event during the wood growth season of 2010.

¶ 32 Amy Hart, a forensic scientist, testified about fingerprints found on Woodward's truck. She testified a fingerprint and palmprint located on Woodward's truck door matched defendant's fingerprint card. Defense counsel objected to the testimony. On cross-examination, defense counsel asked questions of Hart aimed at attacking the reliability of the fingerprint analysis.

¶ 33 Before the State rested its case, the parties stipulated, after defendant's laptop was seized, the term "Bonnie" was found several hundred times after June 25, 2010. However, "Bonnie" appeared zero times on the hard drive before her disappearance date of June 25, 2010.

¶ 34 During closing arguments, the State played portions of Golike's interview with defendant to argue he appeared guilty when explaining his denial of involvement in Woodward's disappearance. Regarding the bone fragments, the State told the jury, "He burnt her for days and he made it impossible for DNA to be extracted from all those bone fragments."

¶ 35 Defense counsel focused on defects in the evidence, including the testimony of eyewitnesses who saw Woodward talking to a man outside of her place of employment, and emphasized testimony saying the man was approximately five feet, seven inches, tall when defendant was over six feet tall. Counsel also argued Nathan's testimony was not credible. Counsel repeatedly noted the absence of DNA evidence and argued its absence should be more persuasive than the testimony of witnesses whom he contended were motivated to lie.

¶ 36 The jury found defendant guilty of first degree murder and found the statutory enhancement for personally discharging a firearm causing death was proved. After trial, attorney Clyde Kuehn entered an appearance as counsel. Snider also remained as counsel. Kuehn filed a motion for a new trial, arguing, in part, defendant did not receive effective assistance of counsel at trial. Among the ineffective assistance claims, Kuehn alleged ineffective assistance when counsel (1) failed object to Bausily's identification of defendant, (2) stipulated to the admissibility of the bone fragment evidence, (3) failed to request additional redactions of Golike's interview with defendant, (4) failed to hire a defense expert on fingerprint identification evidence, and (5) failed to move for a change of venue. The trial court denied the motion. In October 2020, the court sentenced defendant to 40 years in prison, with an additional 25-year enhancement for the use of a firearm. Defendant appealed.

¶ 37 Kuehn represented defendant on appeal. In his appeal, defendant raised several issues, including multiple claims of ineffective assistance of counsel. Among those, defendant alleged ineffective assistance based on trial counsel's (1) stipulation to bone fragment evidence,

(2) failure to object to Bausily's identification of defendant, and (3) failure to seek to further redact portions of Golike's interview with defendant. In particular, defendant argued the bone fragment evidence did not prove anything about Woodward, and the presence of human bone fragments that did not belong to Woodward could lead the jury to speculate defendant was a serial killer. This court affirmed. *Carroll*, 2021 IL App (4th) 200491-U, ¶ 94.

¶ 38 On January 5, 2022, defendant moved for access to the bone fragments in order to perform radiocarbon testing to determine the age of the fragments. The motion was granted. On January 11, 2022, defendant moved for access to the original, unedited video of Golike's interview with him. The parties agreed to continue that motion pending the resolution of a possible postconviction petition.

¶ 39 On June 23, 2022, Kuehn filed a postconviction petition on defendant's behalf, alleging ineffective assistance of trial counsel based on counsel's (1) failure to move to suppress defendant's statements to Golike, alleging defendant was in custody and had asked to speak with his attorney; (2) stipulation to the admission of the bone fragment evidence without having them radiocarbon tested for age before trial; (3) failure to interview witnesses who saw a man by Woodward's truck at her workplace; (4) failure to make the lack of DNA evidence against defendant a central theme of the trial; (5) failure to file a motion to change venue; (6) failure to retain a fingerprint expert to attack the reliability of fingerprint evidence; and (7) failure to interview a news reporter about a source who identified the man in the parking lot of Woodward's workplace as a smoker. The petition noted one of the witnesses at Woodward's workplace had died before trial. Another was never called at trial. Kuehn attached copies of news articles. Kuehn also included affidavits from multiple people, including Cathers, defendant, defendant's mother, the attorney who represented defendant at the time of the interview, and Alexander Cherkinsky, a scientist who performed radiocarbon testing on the bone fragments.

¶ 40 Cherkinsky's affidavit established he was an expert in radiocarbon testing. Cherkinsky determined two bone fragments taken from defendant's property possessed sufficient radiocarbon for testing. Cherkinsky determined a bone fragment from quadrant one more likely than not came from a species that died at or around 1996 to 1998. A bone fragment from quadrant two more likely than not came from a species that died between 1991 and 1994. The affidavit did not establish if the "species" was animal or human.

¶ 41 In his affidavit, defendant averred he was six feet, one inch, tall. He asserted he was asked questions without being given *Miranda* warnings (see *Miranda v. Arizona*, 384 U.S. 436 (1966)) and after he asked to speak with his attorney. He also averred Golike told him his DNA had been found on cigarette butts found in the parking lot of Woodward's workplace, and a news article stated police were looking for a smoker who was seen speaking to Woodward in the parking lot. Defendant averred he was not a smoker. He stated he asked his attorneys before trial to perform radiocarbon testing of bone fragments to determine their age. Defendant also averred he asked his trial counsel to pursue a change of venue, but counsel said they wanted to keep the current trial judge, whom they felt was important to ensure a fair trial. Defendant stated his mother later learned the judge would have traveled with the case to another venue. Defendant also averred defense counsel hired a fingerprint expert, but the expert was never called to testify.

¶ 42 Defendant's mother, Jean Carroll, averred she spoke with defense counsel about substituting the trial court judge and a change of venue, and counsel told her it was too late to

substitute the judge except for cause, and a change of venue could lead to a more conservative judge. She said counsel told her there was no need to test bone fragments because the State's evidence of bone fragments would not be able to be admitted into evidence. She also averred she paid for a fingerprint expert.

¶ 43 Kuehn argued all the issues raised in the postconviction petition involved facts outside of the trial court record that could not have been raised on direct appeal. He did not argue he rendered ineffective assistance of counsel by failing to raise any of the issues on direct appeal. The trial court advanced the petition to the second stage of postconviction proceedings. The State moved to dismiss, arguing defendant forfeited the issues raised because they could have been raised on direct appeal. In the alternative, the State argued the issues lacked merit.

¶ 44 The trial court found issues 3 through 7 relied on information known or readily available to defendant at the time of trial and could have been raised on direct appeal. Thus, the court found them forfeited. Regarding the first two issues, the court found defendant could not establish deficient representation or prejudice. As to counsel's failure to move to suppress defendant's statements, the court found the matter was likely one of trial strategy, in order to allow evidence of defendant's statements of innocence. The court further found, even if the statements were suppressed, the outcome of trial would not have been different. The court next found the results of radiocarbon testing of bone fragments did not refute the findings of the stipulation, they could have been a matter of trial strategy, and they would not have changed the outcome of trial. Accordingly, the court dismissed the petition. The court denied defendant's motion to reconsider.

¶ 45 This appeal followed.

¶ 46 II. ANALYSIS

¶ 47 On appeal, defendant contends the trial court erred in dismissing his postconviction petition. Specifically, he argues he made a substantial showing of ineffective assistance of trial counsel based on the failure of counsel to file a motion to suppress and obtain radiocarbon testing of the bone fragments. Thus, he seeks third-stage postconviction proceedings on those claims. Regarding the remaining issues, he maintains this court should remand for new second-stage proceedings because Kuehn, when acting as postconviction counsel (1) labored under an actual conflict of interest when he was faced with the obligation to raise his own ineffective assistance as appellate counsel in the postconviction petition to avoid forfeiture of the issues and (2) rendered unreasonable assistance by failing to adequately present defendant's claims. He further contends this court should automatically remand without consideration of the underlying merits of the forfeited claims, especially regarding prejudice.

¶ 48 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2022). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2022). At the second stage, the State may file an answer

or move to dismiss the petition. 725 ILCS 5/122-5 (West 2022). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the State filed a motion to dismiss, and the trial court granted that motion. We review the court's second-stage dismissal *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006).

¶ 49 A. Forfeiture

¶ 50 At the outset, the State argues, not only did defendant forfeit issues 3 through 7 in his postconviction petition by failing to raise them on direct appeal, but he also forfeited the two issues the trial court addressed. We agree.

¶ 51 The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal. *People v. Harris*, 206 Ill. 2d 1, 12, 794 N.E.2d 314, 323 (2002). Issues that were raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010). The doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness requires, the forfeiture stems from the ineffective assistance of appellate counsel, or the facts relating to the issue do not appear on the face of the original appellate record. *People v. Williams*, 209 Ill. 2d 227, 233, 807 N.E.2d 448, 452 (2004). However, while the doctrine of forfeiture does not bar consideration of an issue where the forfeiture stems from the incompetency of counsel on appeal, a claim of ineffective assistance of appellate counsel must appear in the postconviction petition. *People v. Lacy*, 407 Ill. App. 3d 442, 461, 943 N.E.2d 303, 320 (2011).

¶ 52 Defendant suggests we may not find forfeiture of the issues when the trial court did not do so. However, our review of the matter is *de novo*. *Pendleton*, 223 Ill. 2d at 473. Further, the State may argue any point in support of the judgment on appeal, even though not directly ruled on by the trial court, when the factual basis for such point was before the trial court. *People v. Rajagopal*, 381 Ill. App. 3d 326, 329, 885 N.E.2d 1152, 1155 (2008). "Moreover, it is well settled that we review the judgment of the trial court, not its reasoning." *Rajagopal*, 381 Ill. App. 3d at 329. "Accordingly, we may affirm the judgment below on any basis supported by the record, even if that basis was rejected by the trial court." *Rajagopal*, 381 Ill. App. 3d at 329.

¶ 53 Here, regarding the failure of counsel to file a motion to suppress, defendant argued in his postconviction petition the interview showed he was in custody, and he alleged he was not properly given *Miranda* warnings and asked to speak to his attorney. See *Miranda*, 384 U.S. at 478-79. He also alleged counsel failed to challenge the process by which the statements were obtained, recorded, and played to the jury. All of those were facts derived from the record or were known by defendant, and thus available to counsel on direct appeal. However, on direct appeal, when Kuehn raised the issue of the interview, instead of arguing trial counsel should have moved to suppress the evidence, he instead argued counsel was ineffective for failing to redact portions of it.

¶ 54 This court has previously explained, " '[w]aiver is the intentional relinquishment of a known right, whereas forfeiture is the failure to make a timely assertion of a known right.' " *People v. Scott*, 2015 IL App (4th) 130222, ¶ 21, 25 N.E.3d 1257 (quoting *People v. Bowens*, 407 Ill. App. 3d 1094, 1098, 943 N.E.2d 1249, 1256 (2011)). The forfeiture exception based on facts outside of the original appellate record is not an invitation for defendants to present incomplete claims at trial, sit back, and if they are unsuccessful, raise the "new" facts in a postconviction petition. *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 40, 68 N.E.3d 423.

¶ 55 Defendant had the opportunity to raise arguments regarding the interview on direct appeal and actually did so, but chose not to argue trial counsel should have filed a motion to suppress, thereby forfeiting the argument. Thus, defendant's claim is most reasonably construed as directed at appellate counsel for failing to raise the issue on direct appeal. See *People v. Campbell*, 2023 IL App (4th) 220652-U, ¶ 25.

¶ 56 As to radiocarbon testing of the bone fragments, on direct appeal, this court rejected defendant's argument trial counsel was ineffective for stipulating to the bone fragment evidence. *Carroll*, 2021 IL App (4th) 200491-U, ¶¶ 71-73. In his postconviction petition, defendant alleged trial counsel was ineffective for stipulating to the evidence without having the bone fragments radiocarbon tested. He argues that is a "new" fact outside of the record because he sought the testing after the direct appeal was decided. But that simply relates back to the facts known at trial and in the record. Indeed, in his postconviction petition, defendant stated he asked trial counsel to test the bone fragments for their age, thus admitting knowledge of the potential for such testing at the time of trial. "A defendant cannot avoid the bar of *res judicata* by simply rephrasing issues previously addressed on direct appeal." *People v. Kimble*, 348 Ill. App. 3d 1031, 1034, 811 N.E.2d 346, 349 (2004). Ultimately, the issue of trial counsel's stipulation has been decided and is *res judicata*. To the extent alternate arguments concerning the matter were not raised on direct appeal, they are forfeited.

¶ 57 Forfeiture aside, regarding defendant's claim he received unreasonable assistance from postconviction counsel for failing to raise the issues on direct appeal, we determine defendant also failed to make a substantial showing of a constitutional violation because the forfeited claims would have lacked merit had they been raised on direct appeal.

¶ 58 B. Unreasonable Assistance of Postconviction Counsel

¶ 59 Defendant argues Kuehn, acting as postconviction counsel, rendered unreasonable assistance by failing to raise the forfeited claims on direct appeal. In doing so, defendant seeks a remand without any consideration of the merits of the underlying claims because Kuehn (1) failed to adequately present defendant's claims and (2) labored under an actual conflict of interest when he was faced with the obligation to raise his own ineffective assistance as appellate counsel in the postconviction petition to avoid forfeiture of the issues. We first address whether defendant is entitled to a remand without an analysis of the merits of his claims.

¶ 60 1. *Failure to Properly Present the Claims*

¶ 61 Defendant first argues, aside from any conflict of interest, Kuehn provided unreasonable assistance as postconviction counsel by failing to adequately present defendant's claims, including failing to present sufficient factual information. In doing so, defendant cites Illinois Supreme Court Rule 651(c) (eff. July 1, 2017), a provision pertaining to appointed counsel,

and suggests we should remand for new second-stage proceedings without consideration of the merits of the claims. See *People v. Suarez*, 224 Ill. 2d 37, 47, 862 N.E.2d 977, 982 (2007) (holding where appointed counsel has not complied with Rule 651(c), a remand is required regardless of whether the petition's claims have any merit).

¶ 62 We first note criminal defendants have no constitutional right to postconviction counsel. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *People v. Moore*, 189 Ill. 2d 521, 541, 727 N.E.2d 348, 358 (2000). Nonetheless, our supreme court "has long held that, at the second and third stages of postconviction proceedings, defendants are entitled to a 'reasonable' level of attorney assistance." *People v. Johnson*, 2018 IL 122227, ¶ 16, 123 N.E.3d 1083.

¶ 63 In *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 51, 84 N.E.3d 527, the First District held that, when the initial petition is filed by retained counsel, Rule 651(c) does not apply, and retained counsel's performance is governed by a general standard of reasonable assistance that does not incorporate the requirements of Rule 651(c). See *People v. Cotto*, 2016 IL 119006, ¶ 41, 51 N.E.3d 802. Thus, an "automatic-remand rule" does not apply where retained counsel files the initial postconviction petition. *Zareski*, 2017 IL App (1st) 150836, ¶ 55. Instead, the court in *Zareski* adopted a "*Strickland*-like analysis" (see *Strickland v. Washington*, 466 U.S. 668 (1984)), which requires an evaluation of prejudice to determine whether reasonable assistance was provided by counsel. *Zareski*, 2017 IL App (1st) 150836, ¶ 59. This court agreed with that view in *People v. Perez*, 2023 IL App (4th) 220280, ¶¶ 40-57, 233 N.E.3d 334, and found no conflict between *Zareski* and subsequent Illinois Supreme Court decisions. This court held, "Where Rule 651(c) does not apply, to justify a remand on a claim of unreasonable assistance, a defendant must identify some meritorious postconviction claim that he or she lost due to counsel's conduct." *Perez*, 2023 IL App (4th) 220280, ¶ 54. "In other words, had counsel done the things the defendant claims should have been done *** the postconviction proceedings would have advanced to the next stage or the trial court would have granted the defendant postconviction relief." *Perez*, 2023 IL App (4th) 220280, ¶ 54.

¶ 64 We continue to adhere to our decision in *Perez* and will not remand without consideration of the merits of defendant's claims within the framework of the "*Strickland*-like analysis" mentioned above. As a result, defendant must show how he was prejudiced by the claimed errors of counsel. See *Zareski*, 2017 IL App (1st) 150836, ¶ 61 (finding if a potential claim had no merit, the defendant could not receive postconviction relief on that claim, regardless of whether postconviction counsel should have presented it earlier, better, or at all).

¶ 65 We note defendant also asks that we adopt the view from *People v. Williams*, 2023 IL App (5th) 220185-U, ¶ 21, and *People v. Johnson*, 2022 IL App (1st) 190258-U, ¶¶ 33-43, which departed from *Zareski* and remanded when a lack of prejudice could not be determined from the record due to postconviction counsel's failure to properly shape the defendant's claims or include proper support for the claims. Given our decision in *Perez*, we decline to do so. Further, we find those cases inapplicable here because we are able to determine defendant's underlying claims lack merit aside from any failures of counsel to attach affidavits or properly shape defendant's claims.

¶ 66 2. *Actual Conflict of Interest*

¶ 67 Defendant next argues, under the recent Second District case of *People v. Janusz*, 2024 IL App (2d) 220348, 240 N.E.3d 82, an automatic remand is required because Kuehn was laboring under an actual conflict of interest. The State, however, argues this court should follow the

approach of the First District in *Zareski*, which, aside from holding Rule 651(c) did not apply, examined the underlying merits of forfeited claims to determine whether an actual conflict of interest occurred.

¶ 68 "A criminal defendant's sixth amendment right to the effective assistance of counsel includes the right to conflict-free representation." *People v. Peterson*, 2017 IL 120331, ¶ 102, 106 N.E.3d 944. "Such representation means 'assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations.' " *Peterson*, 2017 IL 120331, ¶ 102 (quoting *People v. Spreitzer*, 123 Ill. 2d 1, 13-14, 525 N.E.2d 30, 34 (1988)). "Two categories of conflict of interest exist: *per se* and actual." *Peterson*, 2017 IL 120331, ¶ 102. Defendant here does not raise a *per se* conflict of interest. Instead, he argues only an actual conflict of interest.

¶ 69 When a defendant cannot establish the existence of a *per se* conflict of interest, he or she must show the existence of an actual conflict to obtain a reversal of his or her conviction. *Peterson*, 2017 IL 120331, ¶ 105. "To succeed on an actual conflict-of-interest claim, the defendant must establish that the conflict adversely affected counsel's performance." *Peterson*, 2017 IL 120331, ¶ 105. The First District has held "an actual conflict does not result in an automatic reversal, as a defendant must show some specific defect in his counsel's strategy, tactics, or decision making attributable to the conflict." *People v. Zirko*, 2021 IL App (1st) 162956, ¶ 22, 196 N.E.3d 1131. "To establish an actual conflict, a defendant must do more than proffer speculative allegations and conclusory statements." *Zirko*, 2021 IL App (1st) 162956, ¶ 22.

¶ 70 In *Zareski*, a jury convicted the defendant of first degree murder, and the trial court sentenced him to 24 years' imprisonment. The defendant retained new counsel, Scott Frankel, to represent him during the posttrial proceedings. In the defendant's posttrial motion, Frankel raised several claims asserting trial counsel provided ineffective assistance. Frankel also represented the defendant on direct appeal, again raising claims of ineffective assistance of trial counsel. The appellate court affirmed. *Zareski*, 2017 IL App (1st) 150836, ¶¶ 1, 24. Later, while still retained by defendant, Frankel filed a postconviction petition, claiming in part ineffective assistance of trial counsel. *Zareski*, 2017 IL App (1st) 150836, ¶¶ 26-27. That petition raised a new claim that was not raised on direct appeal. Frankel did not claim he rendered ineffective assistance by failing to raise that claim on direct appeal. The trial court advanced the petition to the second stage, and the State moved to dismiss the petition. *Zareski*, 2017 IL App (1st) 150836, ¶¶ 28, 32. The court granted the motion. *Zareski*, 2017 IL App (1st) 150836, ¶ 28.

¶ 71 On appeal, the defendant contended Frankel labored under a conflict of interest and failed to provide reasonable assistance by omitting certain claims and presenting others deficiently. *Zareski*, 2017 IL App (1st) 150836, ¶¶ 3-4. The appellate court disagreed. Regarding the omitted claim of ineffective assistance of appellate counsel, the First District considered whether prejudice was an element of such a claim.

¶ 72 The *Zareski* court first noted, when evaluating an actual conflict of interest, instead of obtaining an automatic reversal, a defendant must show a specific defect in his counsel's strategy, tactics, or decision making attributable to the conflict. *Zareski*, 2017 IL App (1st) 150836, ¶ 38. While the court noted cases that held a defendant, in instances involving an actual conflict, was not required to prove the conflict contributed to his conviction, it also observed the defendant was required to offer more than speculative or conclusory statements

to show counsel's performance was affected by the conflict. *Zareski*, 2017 IL App (1st) 150836, ¶ 38. The court agreed with the State's argument that, to make such a determination, it must look beyond the mere fact of counsel's failure to raise his or her own ineffectiveness as appellate counsel to avoid forfeiture. *Zareski*, 2017 IL App (1st) 150836, ¶ 39. Instead, the court held a "layered approach to review an attorney's performance makes the most sense." *Zareski*, 2017 IL App (1st) 150836, ¶ 39. The court further reasoned, "For instance, when a defendant claims that direct appeal counsel was ineffective for failing to raise a claim, we examine the underlying claim to determine if that attorney's performance was deficient." *Zareski*, 2017 IL App (1st) 150836, ¶ 39.

¶ 73 The *Zareski* court acknowledged the defendant need not prove "prejudice" in the same sense as a regular ineffective assistance claim but stated it must at least look at the underlying claims to determine if counsel should have raised them. *Zareski*, 2017 IL App (1st) 150836, ¶ 40. Otherwise, the trial court could be forced on remand to evaluate claims that have no chance of success in a new postconviction petition. *Zareski*, 2017 IL App (1st) 150836, ¶ 40. The court noted cases in which courts have applied such an approach in either accepting or rejecting actual conflict of interest claims. *Zareski*, 2017 IL App (1st) 150836, ¶ 40 (citing *People v. Williams*, 139 Ill. 2d 1, 12-14, 563 N.E.2d 431, 436-37 (1990), and *People v. White*, 362 Ill. App. 3d 1056, 1061, 842 N.E.2d 188, 192 (2005)). The court then considered the forfeited claim and found it would not have been successful on direct appeal. Thus, there was no "specific defect" in Frankel's performance when he did not raise the issue on direct appeal. *Zareski*, 2017 IL App (1st) 150836, ¶¶ 38-39, 42.

¶ 74 For similar reasons, aside from an analysis of whether there was a specific defect to show an actual conflict of interest, the court in *Zareski* found that general allegations counsel provided unreasonable assistance for failing to raise claims of his own ineffective assistance would be analyzed using a "*Strickland*-like analysis." *Zareski*, 2017 IL App (1st) 150836, ¶ 59. This court recently agreed with that holding and held, "in order to succeed on a claim postconviction counsel provided unreasonable assistance by failing to raise a particular claim, a defendant must demonstrate that he was prejudiced by the omission." *People v. Schoolcraft*, 2022 IL App (4th) 200601-U, ¶ 41. A defendant does so by establishing the claim has arguable merit and would have survived dismissal if it had been included in the petition. *Schoolcraft*, 2022 IL App (4th) 200601-U, ¶ 41 (citing *Zareski*, 2017 IL App (1st) 150836, ¶ 60). This court agreed with *Zareski* that " '[i]n evaluating the performance of postconviction counsel, whether the petitioner was prejudiced (at a minimum) should be part of the inquiry.' " *Schoolcraft*, 2022 IL App (4th) 200601-U, ¶ 41 (quoting *Zareski*, 2017 IL App (1st) 150836, ¶ 60).

¶ 75 However, in *Janusz*, the Second District took a different approach. There, the defendant was found guilty of multiple offenses. As in *Zareski*, the defendant retained new counsel after the jury verdict, who represented him for the remainder of the trial court proceedings, on direct appeal, and in postconviction proceedings. *Janusz*, 2024 IL App (2d) 220348, ¶¶ 9, 11, 15. Counsel raised a claim of ineffective assistance of trial counsel on direct appeal, and the appellate court affirmed. *Janusz*, 2024 IL App (2d) 220348, ¶ 11. In the postconviction petition, counsel raised new claims of ineffective assistance. The trial court summarily dismissed the petition, finding in part the new claims were forfeited because they could have been raised on direct appeal. *Janusz*, 2024 IL App (2d) 220348, ¶¶ 15-16. The defendant appealed, contending his counsel labored under an actual conflict of interest, owing to counsel's former representation on direct appeal, when counsel would have been required to

plead his own ineffectiveness as appellate counsel to avoid forfeiture of the issues. *Janusz*, 2024 IL App (2d) 220348, ¶ 19.

¶ 76 The Second District agreed and remanded for further proceedings. In doing so, the court rejected the State's argument the defendant's petition failed on the merits. The court reasoned the prejudice required in the context of an actual conflict of interest claim—that is, a specific defect attributable to the alleged conflict—was not the same type of "outcome-centric prejudice" as in a typical ineffective assistance claim or an unreasonable assistance of postconviction counsel claim. *Janusz*, 2024 IL App (2d) 220348, ¶ 25. The court cited cases holding that, in an actual conflict of interest claim, a defendant is not required to prove prejudice in that the conflict contributed to his or her conviction or outcome of the proceeding. *Janusz*, 2024 IL App (2d) 220348, ¶ 25 (citing *People v. Taylor*, 237 Ill. 2d 356, 375-76, 930 N.E.2d 959, 971 (2010), and *People v. Salamie*, 2023 IL App (2d) 220312, ¶ 56, 239 N.E.3d 675).

¶ 77 However, the court also acknowledged another panel of the Second District had examined the merits of a forfeited claim where the defendant alleged unreasonable assistance of postconviction counsel but not a conflict of interest. *Janusz*, 2024 IL App (2d) 220348, ¶ 25 (citing *People v. Delgado*, 2022 IL App (2d) 210008, ¶ 25, 211 N.E.3d 872). The court also recognized *Zareski* had acknowledged the different meaning of "prejudice" in a conflict of interest claim and nevertheless had addressed whether the forfeited claims would have been successful on direct appeal. *Janusz*, 2024 IL App (2d) 220348, ¶ 25 (citing *Zareski*, 2017 IL App (1st) 150836, ¶¶ 40-42). Citing a case involving appointed counsel, the *Janusz* court then stated, "While we recognize that much of the case law on actual conflicts of interest does not involve postconviction counsel laboring under an actual conflict of interest, our supreme court requires that postconviction counsel be as conflict-free as trial counsel when shaping a defendant's postconviction claims." *Janusz*, 2024 IL App (2d) 220348, ¶ 25 (citing *People v. Hardin*, 217 Ill. 2d 289, 300, 840 N.E.2d 1205, 1212-13 (2005)).

¶ 78 The *Janusz* court further reasoned the failure of postconviction counsel to raise ineffective assistance was "a specific defect that itself may amount to unreasonable assistance." *Janusz*, 2024 IL App (2d) 220348, ¶ 28. Citing Rule 651(c) and noting by analogy an appointed counsel's fundamental duty to shape claims into a legally cognizable form at the second stage of proceedings, the court reasoned a defendant should expect the same level of representation from retained counsel, including at the first stage of proceedings. *Janusz*, 2024 IL App (2d) 220348, ¶ 29. The court found pleading ineffective assistance to avoid forfeiture was a "routine amendment" and defendant's petition lacked that routine assertion. *Janusz*, 2024 IL App (2d) 220348, ¶ 31. The court then stated, "In light of the limited context of first-stage proceedings and the recognized reticence to argue one's own ineffectiveness, we conclude that the defect in defendant's first-stage petition was attributable to postconviction counsel's conflict in arguing his own ineffectiveness on direct appeal." *Janusz*, 2024 IL App (2d) 220348, ¶ 31. The court then remanded to allow the defendant to replead the petition and did not address the merits of the claims.

¶ 79 We adhere to *Zareski*. We first note, unlike here, *Janusz* involved the summary dismissal of a postconviction petition at the first stage. Further the reasoning of the *Janusz* court relied in part on a case involving appointed counsel and Rule 651(c). However, as previously discussed, this court in *Perez* specifically adopted the reasoning of *Zareski* and our supreme court in *Cotto*, holding Rule 651(c) is inapplicable in cases involving retained counsel. See

Perez, 2023 IL App (4th) 220280, ¶¶ 40-57. Lastly, the idea counsel would raise an ineffective assistance of counsel claim solely as a tactical means of avoiding forfeiture speaks volumes about the concept of "manufactured" issues on appeal—something we should do nothing to encourage.

¶ 80 We also agree with the reasoning of *Zareski*. To show an actual conflict, a defendant normally is not required to prove "prejudice" in the same sense as an ineffective assistance claim; however, we must at least look at the merits of the underlying claims to determine if counsel should have raised them. See *Zareski*, 2017 IL App (1st) 150836, ¶ 40. Indeed, aside from allegations of an actual conflict of interest, we have previously adopted *Zareski*'s use of a " '*Strickland*-like analysis' " to determine if postconviction counsel provided unreasonable assistance when omitting claims of his or her own ineffective assistance on direct appeal. See *Schoolcraft*, 2022 IL App (4th) 200601-U, ¶¶ 40-41 (quoting *Zareski*, 2017 IL App (1st) 150836, ¶ 59). To allow essentially an automatic reversal when a defendant claims an actual conflict of interest based on postconviction counsel's failure to raise his or her own ineffective assistance on appeal would allow defendants to repackage their unreasonable assistance claims as conflict of interest claims in a manner that could prolong the process and potentially lead to unnecessary proceedings. Much like the conclusion reached by the *Zareski* court regarding *per se* conflicts, an actual "conflict of interest does not exist merely because a defense attorney's competence is questioned by his [or her] client during posttrial proceedings." (Internal quotation marks omitted.) *Zareski*, 2017 IL App (1st) 150836, ¶ 36.

¶ 81 Accordingly, in determining whether a defendant showed some specific defect in his or her counsel's strategy, tactics, or decision making attributable to an actual conflict of interest arising from counsel's failure to allege his or her own ineffective assistance as appellate counsel, we consider whether those claims, had they been asserted, had merit. If defendant was able to make a substantial showing that his underlying forfeited claims had merit, then, likewise, he would have made a substantial showing Kuehn was laboring under actual conflict of interest and was ineffective when he failed to raise the claims on direct appeal.

¶ 82 C. Defendant's Underlying Claims

¶ 83 1. *Motion to Suppress*

¶ 84 Defendant first contends trial counsel was ineffective for failing to move to suppress his statements to Golike. Specifically, defendant argues his statements were presumed inadmissible based on section 103-2.1(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-2.1(b) (West 2022)).

¶ 85 A claim of ineffective assistance of counsel is analyzed under the two-pronged, performance-prejudice test established in *Strickland*, 466 U.S. at 687. *People v. Patterson*, 217 Ill. 2d 407, 438, 841 N.E.2d 889, 907 (2005). To prevail, a defendant must show (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defendant to the extent he was deprived of a fair proceeding. *Patterson*, 217 Ill. 2d at 438. A defendant's failure to satisfy either prong of the *Strickland* test prevents a finding of ineffective assistance of counsel. *Patterson*, 217 Ill. 2d at 438. In reviewing a claim of ineffective assistance of counsel, a court must consider defense counsel's performance as a whole and not merely focus upon isolated incidents of conduct. See *People v. Cloyd*, 152 Ill. App. 3d 50, 57, 504 N.E.2d 126, 130 (1987).

¶ 86 A strong presumption exists that defense counsel's conduct was within the wide range of reasonable professional assistance and all decisions were made in the exercise of reasonable professional judgment. *Cloyd*, 152 Ill. App. 3d at 57; *People v. Martin*, 236 Ill. App. 3d 112, 121, 603 N.E.2d 603, 609 (1992). In particular, a defendant must overcome the strong presumption the challenged action or inaction may have been the product of sound trial strategy. *People v. Manning*, 241 Ill. 2d 319, 327, 948 N.E.2d 542, 547 (2011). Matters of trial strategy will generally not support a claim of ineffective assistance of counsel, even if defense counsel made a mistake in trial strategy or tactics or made an error in judgment. *Patterson*, 217 Ill. 2d at 441; *People v. Perry*, 224 Ill. 2d 312, 355, 864 N.E.2d 196, 221 (2007). "Only if counsel's trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the State's case will ineffective assistance of counsel be found." *Perry*, 224 Ill. 2d at 355-56.

¶ 87 To establish prejudice, the defendant must prove there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Richardson*, 189 Ill. 2d 401, 411, 727 N.E.2d 362, 369 (2000). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Richardson*, 189 Ill. 2d at 411. The prejudice prong entails more than an "outcome-determinative" test. *Richardson*, 189 Ill. 2d at 411. "The defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Richardson*, 189 Ill. 2d at 411.

¶ 88 Likewise, claims of ineffective assistance of appellate counsel are governed by the two-pronged test of *Strickland*. *People v. Johnson*, 206 Ill. 2d 348, 378, 794 N.E.2d 294, 312 (2002). Appellate counsel's decision regarding which issues to pursue is generally entitled to substantial deference. *People v. Johnson*, 205 Ill. 2d 381, 406, 793 N.E.2d 591, 606 (2002). Appellate counsel is not required 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.' " *Johnson*, 206 Ill. 2d at 378 (quoting *People v. Easley*, 192 Ill. 2d 307, 329, 736 N.E.2d 975, 991 (2000)). Where the underlying issue is nonmeritorious, a defendant suffers no prejudice; therefore, the reviewing court is required to examine the merits of the claims not raised by appellate counsel. *People v. Simms*, 192 Ill. 2d 348, 362, 736 N.E.2d 1092, 1107 (2000).

¶ 89 Section 103-2.1(b) provides in part that an oral statement of an accused made as a result of a custodial interrogation conducted at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused in any criminal proceeding unless an electronic recording is made of the custodial interrogation and the recording is substantially accurate and not intentionally altered. 725 ILCS 5/103-2.1(b) (West 2022).

¶ 90 Here, defendant focuses on the lack of recording of his statements made to Golike in the squad car and asserts that makes the later recorded interview inadmissible because those statements were a memorialization of the earlier conversation. However, defendant's statements in the squad car were not introduced at trial. It was defendant's properly recorded interview that was presented to the jury. While Golike characterized the later interview as a memorialization and recording of the earlier conversation, it nevertheless was a new recorded interview with defendant. Because the statements admitted at trial were recorded, they met the requirements of section 103-2.1(b).

¶ 91 Defendant also suggests he made a substantial showing he was not properly given *Miranda* warnings and was questioned after he asked for counsel. See *Miranda*, 384 U.S. at 478-79. However, the record shows defendant agreed when Golike stated *Miranda w*arnings were previously given and defendant did not mention counsel until the end of the interview. In any event, to the extent the affidavits provided from defendant and his counsel may have presented such issues, or to the extent section 103-2.1(b) could be deemed to apply, we also find defendant has failed to overcome the presumption his counsel's decision to forgo filing a motion a suppress was one of trial strategy.

¶ 92 Defendant did not address trial strategy in his postconviction petition, nor does he address it in his brief on appeal. Even in his reply brief, defendant barely addresses the issue, but states counsel could not have had a reasonable strategy for failing to seek to suppress the admission of incriminating statements or prejudicial facts. However, defendant's statements to Golike were generally exculpatory rather than inculpatory. The statements did not indicate defendant committed the charged crimes. Instead, defendant agreed with statements from Golike that defendant was not involved with Woodward's disappearance.

¶ 93 Overall, the defense strategy did not include a claim the statements were involuntary. Instead, the defense noted defendant's cooperation with the police. Such a defense was reasonable. Defense counsel bolstered defendant's case by eliciting testimony defendant was cooperative. Admission of the interview further showed defendant's cooperation and allowed evidence of his exculpatory statements without having defendant testify and be subjected to cross-examination. Meanwhile, counsel successfully sought a redaction of statements from the interview that were prejudicial to defendant. We cannot fault trial counsel's tactical decision to follow that path rather than challenging the voluntariness of the statements.

¶ 94 Because we find defendant failed to show the evidence was inadmissible or, even if it was, failed to overcome the presumption counsel allowed its admission as a matter of strategy, any argument of ineffective assistance of trial counsel would have failed on direct appeal. Accordingly, defendant has failed to demonstrate Kuehn was laboring under an actual conflict of interest or show unreasonable assistance of postconviction counsel for failing to raise the issue.

¶ 95 2. *Bone Fragments*

¶ 96 Defendant next contends trial counsel rendered ineffective assistance by stipulating to bone fragment evidence without first having the fragments radiocarbon tested for age. He argues, had such testing been completed, there was a reasonable probability that the State's bone fragment evidence would have been excluded as irrelevant. As previously discussed, the general issue of the stipulation to bone fragment evidence is *res judicata* because it was raised and decided on direct appeal. However, to the extent defendant could be viewed as raising an issue not available on direct appeal, we also find it lacks merit.

¶ 97 On direct appeal, defendant argued, as he does here, that trial counsel was ineffective for entering the stipulation when the evidence had questionable relevance other than perhaps to suggest he was a serial killer. In his brief on direct appeal, defendant did not provide other cogent arguments or citation to authority for why the bone fragment evidence as a whole was inadmissible or irrelevant. This court determined defendant failed to show counsel's decision to enter the stipulation was not a matter of strategy. In doing so, this court wrote:

> "Barring any likelihood defendant had a competing expert available to refute the findings of the FBI forensic scientist, the fact he may have chosen to minimize the import of bone fragment evidence by stipulating to the ultimate findings is not an unreasonable trial strategy. Defense counsel had two options: allow a seasoned FBI scientist to walk the jury through each excruciatingly macabre detail about the bone fragments and their exposure to heat and charring, thereby keeping the thought of a burning human being in the forefront of their minds for as long as the testimony takes, or read an emotionless stipulation stating sterile facts to the jury in a perfunctory fashion, thereby hoping to minimize the impact. [Citation.] It is also conceivable defense counsel did not want [the expert] highlighting the fact there were dozens of untested bone fragments found on defendant's property, which could not be excluded as coming from Woodward. The stipulation to such evidence was a reasonable trial strategy, defendant's claim of prejudice is speculative at best, and he fails to overcome the 'reasonable trial strategy' presumption." *Carroll*, 2021 IL App (4th) 200491-U, ¶ 73.

¶ 98 Here, defendant again argues the evidence lacked relevance. However, unlike in his direct appeal, defendant cites cases primarily from other jurisdictions to argue the bone fragments would not be admissible unless connected to himself and the crime. He then suggests the radiocarbon testing, which was performed after the direct appeal was decided, shows the State's evidence was irrelevant.

¶ 99 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). Here, the presence of human bone fragments was relevant to a determination a human body had been present on defendant's property. While two fragments were not connected to Woodward's DNA, others that could not be tested could not be excluded as being of human origin. Given Nathan's testimony, evidence of potential human bone fragments in the burn pit was relevant to corroborate his version of events and provide circumstantial evidence of defendant's guilt. We disagree with defendant's claim the evidence lacked relevance.

¶ 100 Meanwhile, Cherkinsky was able to test only two of the many bone fragments. Other fragments could not be excluded as being of human origin, and it was also known that two dogs had been killed on the property on unknown dates. The radiocarbon testing does not refute the fact, based on the stipulation, that Woodward was excluded as the source of two fragments. The reasoning we expressed on direct appeal applies equally here.

¶ 101 As we found on direct appeal, counsel's decision to stipulate to the evidence prevented the State from lengthy testimony highlighting the burning of a human body and the number of fragments that could not be excluded as belonging to Woodward. Defendant also argued unsuccessfully on direct appeal the evidence lacked relevance. Thus, we agree with the State the matter is barred by *res judicata* because we already determined the issue on direct appeal. A postconviction petitioner may not avoid the bar of *res judicata* simply by rephrasing issues previously addressed on direct appeal. See *People v. Franklin*, 167 Ill. 2d 1, 23, 656 N.E.2d 750, 760 (1995); see also *People v. Emerson*, 153 Ill. 2d 100, 106-07, 606 N.E.2d 1123, 1126 (1992) (where defendant's claim of ineffective assistance of counsel is addressed on direct appeal, a similar argument with "changed phraseology" may not be relitigated in postconviction proceedings). To the extent the radiocarbon testing could be viewed as new

facts, we reach the same conclusion we did on direct appeal. The evidence was relevant, and defendant has not overcome the presumption the stipulation was reasonable trial strategy. Any such argument would have failed on direct appeal.

¶ 102 3. *Remaining Claims*

¶ 103 As to the remaining claims, defendant does not argue the claims would have had merit had they been raised on direct appeal. As such, he has forfeited any such arguments. See *People v. McKee*, 2022 IL App (2d) 210624, ¶ 39, 215 N.E.3d 1055 (finding arguments not raised in an opening brief are forfeited). However, forfeiture aside, we find defendant could not show the claims had merit such that Kuehn labored under an actual conflict of interest or rendered ineffective assistance when he failed to raise them on direct appeal.

¶ 104 a. Failure to Interview Witnesses

¶ 105 Regarding counsel's failure to interview witnesses to counter Bausily's testimony, defendant focuses primarily on his height of over six feet, as compared to Cathers's testimony the man she saw was not tall, and the lack of a positive identification by other witnesses. However, the failure of others to identify defendant was shown at trial, and counsel argued defendant's height to the jury. Additionally, the jury heard the conflicting evidence about defendant's height and did not consider it determinative. Meanwhile, Bausily's general testimony was corroborated by her description of seeing defendant with his hand on the door of Woodward's truck, when defendant's handprint and fingerprint were later found there. Her recollection of defendant as clean shaven when she saw him by the truck was corroborated by Nathan's testimony defendant had shaved just before going to Woodward's workplace. This further explained Bausily's confusion with the photo lineup, which included suspects with facial hair. Nathan testified defendant was at Woodward's workplace and subsequently killed her. Defendant's prints were on Woodward's truck, and defendant reportedly told Nathan he had put his arm on the truck while in the parking lot. Given the additional evidence against defendant, we find there is no reasonable probability the trial's outcome would have been different had counsel interviewed the witnesses.

¶ 106 b. DNA and News Report

¶ 107 Defendant next contends trial counsel should have focused on the failure of police to test numerous items in Woodward's truck for his DNA. He also argues counsel should have found the source of a news report that police were looking for a smoker who was seen talking to Woodward. These are less claims of error than matters of trial strategy. Because defendant does not tell us how this newfound trial strategy would have probably changed the outcome of the trial, we view trial counsel's decisions on these matters solely as trial strategy. Twenty/twenty hindsight born from the luxury of time to pore over trial transcripts lends itself to the creation of new defense theories, but that does not necessarily equate to ineffective assistance of trial counsel. Effective assistance of counsel requires competent, not perfect representation. *People v. Hayes*, 2022 IL App (4th) 210409, ¶ 52, 217 N.E.3d 327. Even " '[m]istakes in trial strategy or tactics do not necessarily render counsel's representation defective.' " *Hayes*, 2022 IL App (4th) 210409, ¶ 52 (quoting *People v. Thomas*, 2017 IL App (4th) 150815, ¶ 10, 93 N.E.3d 664). The decision to rely on one theory of defense to the

exclusion of other theories of defense is a matter of trial strategy that is generally immune from claims of ineffective assistance of counsel. *Hayes*, 2022 IL App (4th) 210409, ¶ 52.

¶ 108 Here, as previously noted, defense counsel's theory focused in part on defendant's cooperation with the police and issues with Nathan's credibility. While counsel also focused on "holes" in the State's case, it was reasonable to emphasize the stronger elements of their case rather than raising issues for which other evidence already existed. Defendant was identified by one eyewitness, a vehicle matching the description of his vehicle, and by others, and his own son placed him there. His own brother-in-law told police he thought defendant might have had something to do with Woodward's disappearance based on a newspaper article with a description matching defendant and his vehicle. Further, the State never suggested defendant was inside Woodward's truck, which was found abandoned in the parking lot, and defendant told Golike he had never been in the truck. Meanwhile, a jury could infer from the State's lack of DNA evidence, and the stipulation indicating some of the bone fragments were either too small or too burned for DNA retrieval, that it did not have any. The State argued as much to the jury, stating, "He burnt her for days and he made it impossible for DNA to be extracted from all those bone fragments." Defense counsel argued its absence to the jury repeatedly throughout his closing argument, as well. In fact, counsel kept noting the absence of DNA evidence and how, as science, its absence should be more persuasive than the questionable testimony of witnesses he contended were motivated to lie. Defendant's argument here is essentially that counsel should have argued its absence even more. A further focus on the lack of DNA evidence would add little the case. It was clear to the jury there was no DNA evidence connecting defendant to the murder, so additional argument of counsel would not have changed the outcome of trial. The evidence indicating defendant's guilt was overwhelming, despite the lack of DNA evidence.

¶ 109 Without an affidavit from the author of the news article that defendant contends counsel should have pursued, we have no way of weighing its import. When a defendant attacks the competency of his counsel for failing to call or contact witnesses, he must attach to his postconviction petition affidavits showing the potential testimony of such witnesses and explain the significance of their testimony. *People v. Dean*, 226 Ill. App. 3d 465, 468, 589 N.E.2d 888, 890 (1992). Defendant contends Kuehn's failure to properly support his claims is further evidence of Kuehn's unreasonable assistance and suggests a remand is necessary to allow defendant to establish prejudice. We disagree. As previously noted, we adhere to *Perez*, holding that Rule 651(c) is inapplicable here. In addition, the matter here is merely an alternate reason as to why the underlying claim lacks merit. Overall, we find defendant's claim lacks merit.

¶ 110 c. Fingerprint Expert

¶ 111 Defendant also contends trial counsel should have hired a fingerprint expert to counter the testimony of the State's expert. However, affidavits from defendant and his mother show counsel did retain an expert but decided not to call that person to testify. Defendant also did not include an affidavit or fingerprint analysis from the expert with the postconviction petition. We can only speculate as to why counsel did not call the expert as a witness, though it would appear counsel must have not done so as a matter of strategy. We will not find merit to the underlying claim or a postconviction counsel's representation unreasonable based on speculation. As with the issue concerning the news source, while defendant argues in relation

to other issues that Kuehn's failure to support his claims is further evidence of Kuehn's unreasonable assistance, we disagree it creates an issue requiring remand.

¶ 112 d. Venue

¶ 113 Finally, defendant argues trial counsel was ineffective for failing to seek a change of venue. However, the affidavits from defendant and his mother show the matter was one of trial strategy. While defendant claimed the trial court judge would have moved with the case had a change of venue been sought, he provided no support for that conclusion. Further, defendant has not provided details to show that, had a change of venue occurred, the trial's result would have been different. Accordingly, the issue lacks merit.

¶ 114 In sum, the forfeited postconviction claims would not have had merit had they been raised on direct appeal. Defendant has not made a substantial showing that Kuehn labored under an actual conflict of interest or provided unreasonable assistance when, acting as postconviction counsel, he forfeited the issues by not alleging his own ineffective assistance of appellate counsel.

¶ 115 III. CONCLUSION

¶ 116 For the reasons stated, the judgment of the trial court is affirmed.

¶ 117 Affirmed.