

No. 1-10-0582

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 23784
)	
JOHNNY CROSS,)	
)	
Defendant-Appellant.)	The Honorable
)	John A. Wasilweski,
)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

Held: Defendant's postconviction petition was properly dismissed at the second stage where defendant's petition was: (1) untimely filed and made no allegations that the untimeliness was not due to his own culpable negligence; and (2) did not make a substantial showing of any constitutional violations.

¶ 1 Defendant Johnny Cross appeals from an order of the trial court dismissing his petition for relief at the second stage under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). On appeal, defendant contends that his petition was improperly dismissed because the trial court: (1) erred in finding defendant's petition untimely, or alternatively, that

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appointed postconviction counsel provided unreasonable assistance; and (2) his petition stated substantial claims of constitutional violations. For the following reasons, we affirm.

¶ 2

I. BACKGROUND

¶ 3 On October 24, 2003, defendant was charged with possession of a stolen motor vehicle pursuant to section 4-103(a)(1) of the Illinois Vehicle Code (625 ILCS 5/4-103(a)(1) (West 2002)). Defendant was alleged to have knowingly possessed a 1994 Mercedes-Benz E320 Coupe (Mercedes) belonging to Edward Cohen without Cohen's permission.

¶ 4 At defendant's bench trial, Cohen was called as the State's first witness. He testified that he owned a Mercedes which was stolen from the front of his house around September 24, 2003. Cohen testified that he had kept a backup key in his wallet and that a couple weeks prior to his car being stolen, his wallet had been stolen from his residence. On October 14, 2003, the police called Cohen to inform him they had recovered his vehicle and backup key. Cohen testified he did not give defendant permission to possess his car.

¶ 5 Officer Thomas Delgado testified next on behalf of the State. At around 12:20 a.m. on October 14, 2003, Officer Delgado and his partner, Officer Quintero, were in a squad car near 7400 South Union in Chicago where a group of individuals, including defendant, was observed on a street. Defendant was drinking a beer and standing to the rear of a dark colored Mercedes. Officer Delgado drove by and decided to check the Mercedes' license plate. As the license plate was being looked up, Officer Delgado drove around the block. When Officer Delgado returned, defendant entered the driver's side of the Mercedes and drove off with a passenger. Shortly afterwards, Officer Delgado was informed that the Mercedes was stolen and so he pulled

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defendant over and asked for a driver's license. Defendant failed to produce one and was placed into custody. Officer Delgado saw that an abnormal key, matching Cohen's description of his backup key, was in the ignition of the Mercedes.

¶ 6 After placing defendant in a squad car, Officer Delgado read defendant his *Miranda* rights. Defendant then admitted to Officer Delgado that he had received the car from a friend named Ed who had stolen it, and that defendant had only given Ed money to use the car. At one point during his cross-examination, Officer Delgado was asked whether his partner was present during the conversation, to which Officer Delgado replied affirmatively.

¶ 7 After the State presented its case-in-chief, defendant testified on his own behalf. Defendant testified that he lived at 10323 South Indiana in Chicago. On October 14, 2003, he was in the area of 47th Street and Woodlawn Avenue when he recognized an individual named June driving a Mercedes. Defendant stated he was not friends with June and had only known him for three or four months. June honked his horn and defendant stopped to speak with June. During their conversation, defendant asked June if he could borrow June's car to "make amends with [his] girlfriend," and the two eventually came to an arrangement: for \$20, June would let defendant use the car "for a little while and bring it back to him later." Defendant testified June originally asked for \$100, but defendant did not have that amount on him so June accepted \$20 instead. Defendant also testified that he was allowed to use the car until 1 a.m. and would return the car to 47th and Woodlawn where he had seen June driving by then. The key to the car looked unusual to defendant but he stated he had never seen a key for a Mercedes before. After examining the car, defendant drove to 74th and Union at around midnight. He, his girlfriend,

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and a friend were standing outside, talking and drinking beer.

¶ 8 At one point, he saw a police car drive down the street and go around the block. When the police car came around the second time, defendant got in the Mercedes and drove off. He testified he left because he did not have a driver's license or insurance. Defendant was stopped by the police and when he failed to produce a driver's license or insurance, he was asked to step out of the car. Defendant testified that the police officer "sat [him] on the side of the car" and asked defendant how he got the Mercedes. Defendant "told him [he] got the car from a guy in the neighborhood." Defendant stated that he did not tell the officer that he thought the car was stolen. During cross-examination, defendant stated that he had asked June if the Mercedes was stolen and June claimed it was not. Defendant stated he knew June was a drug addict but did not feel it was unusual for him to have a Mercedes because he knew "a lot of people that do drugs that have nice cars and nice homes." He further testified it did not seem unusual for June to rent out a Mercedes for \$20 because he had seen "drug addicts sell anything." Defendant was also impeached by the State with a prior conviction from 1996 for the unlawful use of a weapon by a felon.

¶ 9 Defendant was found guilty and sentenced to eight years' imprisonment. Defendant appealed and this court affirmed his conviction and sentence in an unpublished order. *People v. Cross*, No. 1-04-1663 (2006) (unpublished order under Supreme Court Rule 23). Defendant's petition for leave to appeal to the Illinois Supreme Court was denied on May 24, 2006. As will be explained in further detail below, defendant had until February 22, 2007, to file a postconviction petition. On February 14, 2007, however, defendant filed a motion for an

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extension of time to file his postconviction petition, which was denied on March 14, 2007.

Defendant mailed his postconviction petition on March 23, 2007.

¶ 10 On May 7, 2007, defendant's petition was advanced to second stage proceedings and defendant was appointed counsel. Defendant's counsel filed a certification pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984) on July 17, 2009, stating he had not prepared a supplemental petition because defendant's *pro se* petition adequately set forth his claims. The State filed a motion to dismiss on October 16, 2009. The State argued, *inter alia*, that defendant's petition did not allege claims of actual innocence, that certain claims were forfeited, there was an insufficient showing of any deprivation of his constitutional rights and that it was untimely. After a hearing, the trial court granted the State's motion to dismiss, noting both that the petition was untimely and contained claims which did not warrant being advanced to the third stage. Defendant timely appealed.

¶ 11

II. ANALYSIS

¶ 12

A. Untimeliness - Lack of Culpable Negligence

¶ 13 Defendant's first contention is that his petition was timely filed. We will address this contention in a manner consistent with the relevant procedures under the Act which, generally speaking, provides a procedural mechanism with which a convicted criminal can assert that his or her constitutional rights were violated. 725 ILCS 5/122-1(a)(1) (West 2008). To this end, postconviction proceedings are collateral proceedings, rather than an appeal from the underlying case, allowing review of constitutional issues which were not and could not have been adjudicated on direct appeal. *People v. Gillespie*, 407 Ill. App. 3d 113, 123 (2010).

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¶ 14 Postconviction petition proceedings have three stages of review. At the first stage, the circuit court reviews the petition, focusing on whether the petition presents the "gist of a constitutional claim." *People v. Bocclair*, 202 Ill. 2d 89, 99-100 (2002) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). If a petition is not filed within the statutory limitations period, the Act requires that the defendant allege "facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2008). The petition, however, may not be dismissed as untimely at the first stage. *Bocclair*, 202 Ill. 2d at 99. At the second stage of the proceedings, the trial court is directed to dismiss a petition as untimely upon the State's motion should the petition be filed outside the limitations and not allege a lack of culpable negligence. *People v. Perkins*, 229 Ill. 2d 34, 43 (2007). A trial court's findings of fact as to a petition's timeliness will not be reversed unless manifestly erroneous, although the conclusion as to whether those facts demonstrate culpable negligence is reviewed *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182 (2005). Because the trial court here only stated that the petition was untimely without making any related findings of fact, we review defendant's contention *de novo*.

¶ 15 Under the Act, a defendant not sentenced to death, who takes a direct appeal from his conviction but does not file a petition for writ of certiorari to the United States Supreme court, must file a postconviction petition within six months of the date for filing a certiorari petition. 725 ILCS 5/122-1(c) (West 2008). This time limitation is inapplicable to claims of actual innocence and, as stated above, can also be excused if the defendant alleges facts showing that the delay was not due to his culpable negligence. *Id.*

¶ 16 Here, defendant's conviction was affirmed by this court on February 22, 2006. *People v.*

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Cross, 1-04-1663 (2006) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on May 24, 2006. Defendant then had 90 days from the denial of his petition for leave to appeal, or until August 22, 2006, to file a writ of certiorari to the United States Supreme Court. U.S. Sup. Ct. R. 13. Defendant, however, did not file a writ of certiorari. He then had six months to file his postconviction petition, with the deadline falling on February 22, 2007. 725 ILCS 5/122-1(c) (West 2008).

¶ 17 Defendant did not mail his petition until March 23, 2007, and does not dispute his petition was filed outside of the prescribed limitations period. Defendant did, however, mail a motion for an extension of time to file his petition on February 14, 2007, which was not denied until March 14, 2007. Pursuant to this, he now argues on appeal that a petition filed after the denial of a timely-filed motion to extend the time of filing of a petition does not amount to culpable negligence. We first observe that defendant has not cited any authority, nor is this court aware of any authority, which would allow a trial court to entertain a motion for an extension of time to file a petition under the Act. The likely reason for this is that the Act already provides for specific ways to overcome tardiness in the filing of a petition, either through claims of actual innocence (which are unaffected by any time limitation) or the allegation of sufficient facts to show that the delay in filing was not due to defendant's culpable negligence. 725 ILCS 5/122-1(c) (West 2008).

¶ 18 In any event, defendant argues that the delay in the filing of his petition was not due to his culpable negligence because he had filed a motion requesting additional time to file his

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petition, suggesting that it was reasonable for him to wait until the trial court ruled on his motion. In so arguing, defendant deems irrelevant the fact that the trial court ultimately denied his motion. We find such an argument to be unavailing. First, defendant provides no legal support for such a proposition, nor can we find any. Second, as a practical matter, to accept defendant's argument would allow a defendant to unilaterally circumvent the Act's time limitations by merely filing a motion for an extension of time, even if it lacks merit, immediately before the filing deadline. We decline to carve such an exception into the Act's time limitations and choose to adhere to the requirements of the Act.

¶ 19 It is well-established that a defendant who asserts he was not culpably negligent in the tardy filing of his petition "must support his assertion with allegations of specific fact showing why his tardiness should be excused." *People v. Hobson*, 386 Ill. App. 3d 221, 234 (2008). Our supreme court has defined culpable negligence as "something greater than ordinary negligence and is akin to recklessness." *Boclair*, 202 Ill. 2d at 108. As an initial matter, we note that defendant's motion for an extension of time simply stated he needed more time to conduct "proper investigation and research," and nothing more, as the reason his untimeliness should be excused. Even if the trial court could properly consider the motion, such an assertion is wholly insufficient to excuse any untimeliness on defendant's part. Next, defendant's petition notably does not advance arguments or allege facts establishing that his petition's untimeliness was not due from his own culpable negligence. Instead, defendant's petition addresses untimeliness in its fourth paragraph by stating that the six month limitation period of the Act in section 122-1(c) of the Act " 'does not apply to a petition advancing a claim of actual [innocence],' ***", as the

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Petitioner advances such [innocence] herein, in the following particulars." It is apparent that defendant, in his petition, attempted to circumvent the time limitations of the Act by stating he was advancing claims of actual innocence,¹ as opposed to providing allegations of specific fact related to culpable negligence.

¶ 20 However, we note that the issue of culpable negligence was indeed raised during the hearing on the State's motion to dismiss. The State argued that defendant was culpably negligent and had done nothing to show otherwise. Defendant's postconviction counsel responded that defendant "filed a request for extension before the expiration" of the time limitation and that defendant was attempting to "get affidavits from those people he was mentioning," apparently referencing two individuals defendant believes should have been called as witnesses at his trial. We note that no affidavits by those individuals was attached to defendant's petition or otherwise exists in the record.

¶ 21 We have stated that freedom from culpable negligence is difficult for a defendant to establish (*People v. Tooley*, 328 Ill. App. 3d 418, 421 (2002)), with vague and conclusory allegations being insufficient to affirmatively support such freedom (*People v. Walker*, 331 Ill. App. 3d 335, 340 (2002)). In our view, defendant's motion and the remarks cited above, which are without verification or any further factual support, are insufficient to constitute the allegations of specific fact required to establish a lack of culpable negligence. See *People v.*

¹ Defendant does not argue that his claims are exempted from the time limitations under the actual innocence exception and correctly concedes that such an exception is inapplicable here.

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Gerow, 388 Ill. App. 3d 524, 531 (2009) (holding that ambiguous excuses, without verification or factual support, are insufficient to establish a showing of a lack of culpable negligence).

Accordingly, defendant failed to meet his burden here and the trial court properly deemed defendant's petition to be untimely.

¶ 22 B. Unreasonable Assistance of Postconviction Counsel

¶ 23 Alternatively, defendant argues that appointed postconviction counsel provided unreasonable assistance in "failing to amend his petition to include allegations that [defendant] requested additional time to locate potential trial witnesses and obtain affidavits." At the second stage of postconviction proceedings, an indigent defendant is entitled to appointed counsel. 725 ILCS 5/122-4 (West 2008). A defendant is not constitutionally entitled to effective assistance of counsel at postconviction proceedings; rather, assistance of counsel is purely a statutory right and the Act only provides for a "reasonable" level of assistance. *Perkins*, 229 Ill. 2d at 42.

¶ 24 Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), requires, *inter alia*, that postconviction counsel make amendments to a defendant's *pro se* petition "that are necessary for an adequate presentation of petitioner's contentions." Our supreme court in *Perkins* has established that Rule 651(c) "requires counsel to amend an untimely *pro se* petition to allege any available facts necessary to establish that the delay was not due to the petitioner's culpable negligence" that might be "apparent from the pleadings and the portions of the record counsel must review to present petitioner's claims." *Perkins*, 229 Ill. 2d at 49-50. This includes alleging any available facts necessary to establish that the delay was not due to the petitioner's culpable negligence. *Id.* Fulfillment of the obligation to make the necessary amendments to a petition,

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however, does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 25 We have held that when counsel files a certificate of compliance under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), a presumption is created that the rule has been complied with. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). It is then the defendant's burden to overcome this presumption. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Here, postconviction counsel filed a certificate under Rule 651(c) officially asserting he had complied with the rule. Postconviction counsel also noted during one hearing that he had read defendant's petition with "an eye towards a couple of amendments," and "informed [defendant] to give me an affidavit as to why he filed [his petition] late. So, I do have that coming." Furthermore, postconviction counsel presented an argument at the hearing on the State's motion to dismiss, again explaining that defendant had filed a motion to extend the time for filing his petition and that defendant "believes he is innocent and was hoping to - that is why there was delay - get affidavits from those people he was mentioning."

¶ 26 Under these circumstances, it does not appear postconviction counsel provided unreasonable assistance. First, despite the lack of any specificity whatsoever in defendant's *pro se* motion to extend his filing time, postconviction counsel did attempt to provide the background of defendant's timeliness claims during the hearing on the motion to dismiss in an attempt to explain the delay. Therefore, although postconviction counsel did not amend defendant's petition, counsel in effect did argue that any delay was not due to defendant's culpable negligence. See *Perkins*, 229 Ill. 2d at 51. Although postconviction counsel's

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arguments were not persuasive, this does not demonstrate that there was a more successful factual allegation that could have been raised. See *Id.* In *Perkins*, our supreme court held that a defendant's postconviction counsel sufficiently complied with Rule 651(c) where counsel did not amend the defendant's petition to include timeliness arguments but did argue the relevant allegations at a hearing on a motion to dismiss. *Id.* at 50-52 The supreme court stated that while postconviction counsel's arguments were not "particularly compelling" and lacked merit, it was "apparently the best option available," and thus reasonable assistance of counsel was provided. *Id.* at 51. This reasoning is applicable here, particularly because the argument advanced by defendant's postconviction counsel on untimeliness at the dismissal hearing is identical to the one defendant now provides in his brief on appeal.

¶ 27 Second, although no affidavit explaining defendant's delay was ultimately filed, it is readily apparent from postconviction counsel's statements that he not only spoke to defendant regarding the matter but also attempted to acquire the necessary documentation from him to potentially amend defendant's petition. As stated, defendant carries the burden of overcoming postconviction counsel's reasonable assistance but he has not made any cognizable allegation as to why he did not produce an affidavit after being asked to. A review of the record reveals nothing that would have us find that postconviction counsel was required to amend defendant's petition to include further allegations on the timeliness of the petition. With nothing more, the only conclusion here is that postconviction counsel did not believe that any amendment to defendant's petition was necessary or would otherwise be beneficial.

¶ 28 Finally, we also observe that the trial court did not dismiss defendant's petition out of

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hand based solely on untimeliness. Although the trial court stated, "[F]irst of all, this petition is not timely," nothing more was said on the matter. In fact, the trial court went on to discuss whether defendant's petition advanced sufficient claims warranting a third stage evidentiary hearing (as is evidenced by the next two issues raised on appeal). Arguably, it appears that postconviction counsel's arguments on untimeliness were persuasive enough such that the trial court was compelled to examine the sufficiency of the claims of defendant's petition in dismissing it. Accordingly, we find that defendant's postconviction counsel sufficiently complied with Rule 651(c) and provided a reasonable level of assistance.

¶ 29 C. Ineffective Assistance of Counsel - Officer Delgado

¶ 30 While we acknowledge defendant's delay in filing was brief, even if we were to somehow excuse defendant's untimeliness, we would also affirm the trial court's findings that the petition made an insufficient showing of constitutional violations to warrant further advancement. On appeal, defendant also argues that his petition was improperly dismissed because it properly alleged that he was denied his constitutional right to effective assistance of counsel.

¶ 31 Defendant first argues that his trial counsel failed to impeach Officer Delgado with inconsistent preliminary hearing testimony concerning defendant's confession. Specifically, he points out that at trial, Officer Delgado was asked whether his "partner was present" when being questioned as to the circumstances around defendant's admission that he borrowed the car from a friend named Ed who had stolen it. Officer Delgado replied, "Yes, he was." A copy of the preliminary hearing report, attached to defendant's petition, indicates that when Officer Delgado was asked who was present during that conversation, he replied, "Myself and the defendant." It

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is this alleged inconsistency that defendant takes issue with.

¶ 32 As stated above, the State may move to dismiss a defendant's petition at the second stage of postconviction proceedings. If the State does so, the trial court may hold a dismissal hearing, which is still part of the second stage proceedings. *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009). To survive the second stage, defendant's petition must make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). A trial court is foreclosed from engaging in any fact finding at a dismissal hearing because all well-pleaded facts are taken as true, unless rebutted by the record. *Wheeler*, 392 Ill. App. 3d at 308.

¶ 33 Under *Strickland v. Washington*, 466 U.S. 668 (1984), to establish a claim of ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that the defendant suffered prejudice as a result. *People v. Houston*, 226 Ill. 2d 135, 143 (2007). Under this two-prong *Strickland* test, a defendant must show that "(1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *Id.* at 144.

¶ 34 As an initial matter, the State argues that defendant has forfeited this issue because it was never raised on direct appeal. We note, however, that on direct appeal, this court is precluded from considering preliminary hearing testimony which was not introduced at trial but only added later to the record. *People v. Dunn*, 326 Ill. App. 3d 281 (2001). Where disposition of an ineffective assistance of counsel claim requires consideration of matters beyond the scope of the

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record on appeal, it is more appropriate for such a contention to be addressed in postconviction proceedings. See *People v. Ligon*, 365 Ill. App. 3d 109, 122 (2006). Here, it is undisputed that the preliminary hearing testimony was not introduced at trial and thus could not have been properly addressed until now. Accordingly, defendant's contention is not forfeited and we will review it.

¶ 35 As stated above, during the preliminary hearing, Officer Delgado indicated that only he and defendant were present during the conversation where defendant admitted knowing that the car he possessed was stolen. Later, at trial, the following exchange occurred:

"Q. [Defense Attorney:] Now, the conversation that you had with [defendant],
was that in your squad car?

A. [[Officer Delgado:] Yes.

Q. And he was in the back seat of your squad car?

A. That's correct.

Q. And your partner was present?

A. Yes, he was."

Defendant argues his trial counsel was ineffective by failing to impeach Officer Delgado with his prior testimony. We disagree. First, as a general matter, the examination or impeachment of a witness is considered to be trial strategy, which does not support a claim of ineffective assistance of counsel. *People v. Lacy*, 407 Ill. App. 3d 442, 461 (2011). Second, effective assistance of counsel is competent, not perfect, representation. *People v. Vega*, 408 Ill. App. 3d 887, 889 (2011). Neither mistakes in strategy, nor the fact that another attorney with the benefit of

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hindsight would have handle a case differently, indicates that trial counsel was incompetent. *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010). To the extent that we might consider defendant's counsel's failure to impeach Officer Delgado a mistake, the inconsistency here is immaterial. Not only is the inconsistency slight, but the presence of Officer Delgado's partner during the conversation has absolutely no bearing on the elements of the crime defendant was charged with. In our view, the failure to impeach a witness on such a trivial facet of his testimony does not rise to the level of objectively unreasonable and deficient performance.

Moreover, Officer Delgado's testimony was not inconsistent in any other way and we note that the trial court, after hearing the evidence, explicitly stated that defendant's testimony was "totally unbelievable." Again, because the inconsistency was minor, even if we were to assume defendant's counsel's performance was deficient under *Strickland*, the trial court's findings of credibility would have remain unaltered and therefore we do not see how counsel's alleged mistake prejudiced defendant or affected the outcome of the trial. A failure to make the requisite showing of either deficient performance or sufficient prejudice defeats an ineffective assistance of counsel claim. *People v. Palmer*, 162 Il. 2d 465, 475-76 (1994). Even taking all well-pleaded facts as true, defendant here fails to under both *Strickland* prongs and has thereby failed to make a substantial showing of a deprivation of a constitutional violation under the Act.

¶ 36

D. Ineffective Assistance of Counsel - Closing Argument

¶ 37 Defendant also argues that his constitutional right to effective assistance was violated when trial counsel failed to object to a misstatement of defendant's testimony during closing arguments. At trial, defendant testified that he rented the Mercedes from an individual named

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June. During cross-examination, the following exchange occurred:

"Q. [State's Attorney:] Rather, you didn't ask June, hey, is this your Mercedes?

You didn't ask him that?"

A. [Defendant:] I did ask him that.

Q. He said yes?

A. Yes, sir."

During closing arguments, the State stated: "He is going to take this Mercedes from a hype and not even ask him, hey, is this your car. He didn't ask him that because he knew the car was stolen, Judge; and then you even have - and that is if you believe the defendant."

We first observe that defense counsel failed to object to the statement, but defendant asserts that any forfeiture should be overlooked because appellate counsel was ineffective in failing to raise the issue and, in turn, postconviction counsel was ineffective in failing to raise appellate counsel's ineffectiveness. See *People v. Turner*, 187 Ill. 2d 406, 413 (1999). The State responds that appellate counsel's performance was not ineffective because the underlying claim lacks merit. As a practical matter, therefore, determining whether any forfeiture occurred or is otherwise excused requires us to examine the merit of the claim under *Strickland*.

After an examination of the record, we must find that defendant has overstated the magnitude of the alleged error. In a bench trial, such as the one in the instant case, the trial court is presumed to have considered only competent evidence in reaching its verdict, unless that presumption is rebutted by affirmative evidence in the record. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91. This presumption also extends to the arguments and remarks of counsel.

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(*People v. Shum*, 117 Ill. 2d 317, 367 (1987)), as closing arguments are not considered to be evidence (*People v. Griffin*, 368 Ill. App. 3d 369, 377 (2006)). We find nothing in the record indicating the trial judge relied on the State's representation of defendant's testimony in making its findings. Instead, the trial court specifically stated it based its credibility findings on defendant's testimony, where he claimed that by happenstance, he encountered June (who was, at best, an acquaintance) and rented a Mercedes from him on the spot for 20 dollars, promising to return it at 1 a.m. to the same, random intersection they saw each other. In discussing all of these items, the trial court did not express any concern as to whether defendant had asked or failed to ask June if the Mercedes was stolen. Because we find nothing to suggest that the trial court based its verdict on the State's closing arguments or on a belief that defendant had never asked June whether the Mercedes was stolen, the above presumption that the trial court only considered competent evidence in rendering its verdict remains intact here. Therefore, even after taking all of defendant's well-pleaded facts as true, we find that there is no showing of prejudice resulting from trial counsel's performance. Based on this alone, we can conclude that there defendant has failed to make a substantial showing of ineffective assistance of trial counsel. See *People v. Patterson*, 192 Ill. 2d 93, 107 (2000) (stating that the failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel).

¶ 38

III. CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 40 Affirmed.