

FIRST DIVISION
March 26, 2012

Nos. 1-07-3296 & 1-11-0863 cons.

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. |) | 95 CR 17061 |
| |) | |
| MICHAEL THOMPSON, |) | Honorable |
| |) | Joseph G. Kazmierski, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE HALL delivered the judgment of the court. Presiding justice Hoffman and justice Karnezis concurred in the judgment.

ORDER

HELD: We affirm the circuit court's order dismissing defendant Michael Thompson's postconviction petition.

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¶ 1 This case returns to us following remand to the trial court for the limited purpose of advancing defendant Thompson's postconviction petition for second-stage proceedings under the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)). At the second-stage of the postconviction proceedings the trial court was to determine whether defendant Thompson's petition made a substantial showing of a constitutional violation. Specifically, the trial court was asked to determine whether defendant Thompson's petition made a substantial showing of ineffective assistance of appellate counsel for counsel's alleged failure to raise a potentially meritorious *Batson* (*Batson v. Kentucky*, 476 U.S. 79 (1986)) claim on defendant Thompson's second direct appeal to the reviewing court.

¶ 2 Upon review, we find that the trial court properly determined that defendant Thompson failed to make a substantial showing that appellate counsel was ineffective for failing to assert a *Batson* claim at his second direct appeal. We also find that defendant Thompson's remaining contentions are meritless and therefore we uphold his conviction and sentence.

¶ 3 On June 19, 1995, Ms. Arazeli Zizumbo was killed when she was caught in gang-related gunfire. Defendant Thompson was charged by indictment with first-degree murder. Following his first jury trial, defendant Thompson was found guilty of first-degree murder under accountability and transferred intent theories and was sentenced to 75 years' imprisonment. Defendant Thompson filed an amended motion to reconsider his sentence and was resentenced to 60 years' imprisonment.

¶ 4 On defendant Thompson's first direct appeal, we reversed his conviction and sentence and remanded the matter for a new trial after we found that the prosecutor's closing argument implied that counsel had conspired with defendant Thompson to obtain witness recantations thereby denying

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defendant Thompson a fair trial. *People v. Thompson*, 313 Ill. App. 3d 510, 514-16 (2000). A second jury found defendant Thompson guilty of first-degree murder and he was subsequently sentenced to 50 years' imprisonment.

¶ 5 Defendant Thompson filed a second direct appeal raising a number of issues, none of which included a *Batson* claim. We affirmed defendant Thompson's conviction and sentence. *People v. Thompson*, No. 1-02-1964 (January 21, 2004) (unpublished order under Supreme Court Rule 23).

¶ 6 Defendant Thompson then filed a *pro se* postconviction petition raising a number of claims of ineffective assistance of trial and appellate counsel. Defendant Thompson was represented by the same counsel at his second trial and second direct appeal. In one of the claims in the petition, defendant Thompson alleged that he was denied the effective assistance of appellate counsel because of counsel's refusal to present a *Batson* claim on appeal. The trial court summarily dismissed the petition as frivolous and patently without merit.

¶ 7 On review, we determined that defendant Thompson's *pro se* postconviction petition stated the gist of a constitutional claim of ineffective assistance of appellate counsel based on defendant Thompson's allegations that counsel failed to raise a potentially meritorious *Batson* claim on appeal. *People v. Thompson*, No. 1-07-3296 (December 31, 2009) (unpublished order under Supreme Court Rule 23). We also found that counsel's failure to obtain transcripts of the trial *voir dire* deprived defendant Thompson of an opportunity to present evidence to substantiate his *Batson* claim and it prevented us from conducting a proper review of the claim. *Id.*

¶ 8 We remanded the matter back to the trial court for appointment of postconviction counsel and second-stage postconviction proceedings for a determination as to whether defendant

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Thompson's petition made a substantial showing of ineffective assistance of appellate counsel for counsel's alleged failure to raise the *Batson* issue on appeal. *Id.* We retained jurisdiction in order to review the trial court's ruling on the *Batson* matter and to address the remaining issues raised in defendant Thompson's original *pro se* postconviction petition. *Id.*

¶ 9 Upon remand, defendant Thompson filed an amended claim "C" to his original *pro se* postconviction petition advancing a new allegation that his trial counsel was ineffective for failing to raise a *Batson* claim during *voir dire* when the prosecutor used a peremptory challenge to remove an African-American man who was a prospective alternate juror. Defendant Thompson renewed his *pro se* claim that appellate counsel was ineffective for failing to raise the *Batson* issue on direct appeal. Defendant Thompson also attached a transcript of the trial *voir dire*, which had not previously been made a part of the record.

¶ 10 Following oral argument on the *Batson* matter, the trial court issued a written order finding that defendant Thompson "failed to make a substantial showing that his constitutional rights were violated in either the trial or appellate proceedings." The trial court determined that defendant Thompson had not established a *prima facie* case of racial discrimination under *Batson* and that therefore appellate counsel was not ineffective for failing to raise the issue on direct appeal. Defendant Thompson appealed. We now affirm the trial court.

¶ 11 ANALYSIS

¶ 12 The Illinois Post-Conviction Hearing Act (Act) provides a procedure by which an imprisoned criminal defendant can collaterally attack his conviction or sentence based on a substantial denial of his federal or state constitutional rights. *People v. Tenner*, 175 Ill. 2d 372, 377 (1997); *People v.*

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Haynes, 192 Ill. 2d 437, 464 (2000). The Act provides defendants the opportunity to present claims that were neglected on direct appeal or based on matters outside the record. *People v. Chatman*, 357 Ill. App. 3d 695, 698 (2005).

¶ 13 A post-conviction proceeding not involving the death penalty is divided into three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Defendant Thompson's petition was dismissed at the second stage of the postconviction proceedings.

¶ 14 To survive dismissal at the second stage, the petition must make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). At this stage, all well-pled facts in the petition are taken as true unless positively rebutted by the record. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). We review a trial court's dismissal of a postconviction petition at the second stage *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 15 *Batson* established a three-step process for evaluating claims of alleged racial discrimination in the jury selection process. *Batson*, 476 U.S. at 96-98; *People v. Williams*, 209 Ill. 2d 227, 244 (2004). First, the defendant must make a *prima facie* showing that the prosecutor exercised peremptory challenges on the basis of race. Second, once such a showing is made, the burden shifts to the State to provide a race-neutral explanation for excluding each of the venirepersons in question. Defense counsel may rebut the proffered explanations as pretextual. Finally, the trial court determines whether the defendant has met his burden of demonstrating purposeful discrimination. *Williams*, 209 Ill. 2d at 244; *People v. Houston*, 226 Ill. 2d 135, 147 (2007).

¶ 16 In order to establish a *prima facie* case under *Batson*, a defendant must show that the facts and circumstances give rise to the inference that the prosecutor exercised the peremptory challenges

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with a discriminatory purpose, and in deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. *People v. Williams*, 173 Ill. 2d 48, 71 (1996).

¶ 17 Some of the relevant circumstances a trial court may consider in determining whether a *prima facie* case of discrimination has been established include: (1) the racial identity between the defendant and the excluded venirepersons; (2) a pattern of strikes against African-American venirepersons; (3) a disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witnesses. *Williams*, 173 Ill. 2d at 71. These examples are "merely illustrative" and are not all-inclusive. *People v. Holman*, 132 Ill. 2d 128, 173 (1989).

¶ 18 Defendant Thompson contends that he established a *prima facie* case under *Batson* because several relevant circumstances created an inference that the State exercised its peremptory challenges in a discriminatory manner. As a result, defendant Thompson claims that the trial court erred in not requiring the State to provide race-neutral explanations for its peremptory strikes as required at the second step of the *Batson* analysis. Defendant Thompson maintains that his attorney, who represented him at trial and on appeal, was ineffective for failing to fully develop this issue at trial and was ineffective for failing to raise it at all during his second direct appeal. We must disagree.

¶ 19 A trial court's determination as to whether a *prima facie* case under *Batson* has been

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established will not be overturned unless it is against the manifest weight of the evidence. *Williams*, 173 Ill. 2d at 71. A judgment is against the manifest weight of the evidence when an opposite conclusion is apparent, or when the findings appear to be unreasonable, arbitrary or not based on the evidence. *People v. Urdiales*, 225 Ill. 2d 354, 433 (2007).

¶ 20 In the instant case, we do not believe that the trial court's decision denying defendant Thompson's *Batson* motion was against the manifest weight of the evidence. The record is silent regarding the racial backgrounds of the venirepersons and most of the selected jurors. However, a review of the record shows at the time defense counsel made his *Batson* motion, ten individuals, two of whom were African-American, had been selected to serve on the jury. Our supreme court has held that when a *Batson* claim is made regarding discrimination against a particular race, the unchallenged presence of jurors of that race on the seated jury tends to weaken the basis for a *prima facie* case of discrimination. *People v. Rivera*, 221 Ill. 2d 481, 513 (2006).

¶ 21 Moreover, when defense counsel made his *Batson* motion, he stated that he was making the motion because the State had used two out of four peremptory challenges against African-Americans. This argument, standing alone, was insufficient to establish a *prima facie* case of discrimination under *Batson*. Our supreme court has determined that the mere number of African-American venirepersons peremptorily challenged, without more, does not establish a *prima facie* case of discrimination. *Rivera*, 221 Ill. 2d at 512. "The number of persons struck takes on meaning only when coupled with other information such as the racial composition of the venire, the race of others struck, or the *voir dire* answers of those who were struck compared to the answers of those who were not struck." *Id.*

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¶ 22 In this case, there was no pattern of strikes against African-American venirepersons that would give rise to an inference of discrimination. Additionally, there were no questions asked or statements made by the State or venirepersons during *voir dire* that would indicate that the prosecutor's strikes were racially motivated. On the contrary, the majority of the relevant circumstances either refute an inference of discrimination or are neutral. Our review of the evidence in light of the relevant circumstances shows that defendant Thompson failed to establish a *prima facie* case of discrimination under *Batson*.

¶ 23 The evidence established that out of 22 available prospective jurors, the State exercised four peremptory challenges while the defense exercised six challenges. Two of the State's challenges were used against African-Americans. However, two African-Americans served on the jury. With regard to the alternate jurors, the State exercised a peremptory challenge on 1 out of 3 possible jurors. The State had two remaining peremptory challenges at the completion of jury selection.

¶ 24 This evidence did not establish any purposeful discrimination in the prosecutor's use of peremptory challenges. The trial court correctly found that defendant Thompson failed to establish a *prima facie* showing of discrimination in the jury selection process. Therefore, the trial court did not err in failing to require the State to explain its use of peremptory strikes since *Batson* and its progeny hold that such an explanation is required only after a defendant has established a *prima facie* case of discrimination. See *People v. Dent*, 266 Ill. App. 3d 680, 684 (1994).

¶ 25 Moreover, trial counsel was not ineffective for failing to raise and argue this meritless issue, and as appellate counsel, he was not ineffective for failing to raise the issue on direct appeal. In sum, defendant Thompson's amended postconviction petition failed to make a substantial showing of

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ineffective assistance of trial or appellate counsel with respect to defendant's *Batson* claims.

¶ 26 Next, we address the remaining issues defendant Thompson raised in his original *pro se* postconviction petition. Defendant Thompson raised the following claims: (1) trial counsel was ineffective for failing to object or move to further investigate alleged new evidence presented by the State connecting the murder weapon with the fatal bullet; (2) trial counsel was ineffective for failing to investigate and call potential occurrence witnesses and his former attorney; (3) trial counsel was ineffective for failing to object to testimony and argument that he beat his child; and (4) appellate counsel was ineffective for failing to obtain a transcript of the hearing on defendant's motion to suppress statements where the suppression issue was raised on appeal.

¶ 27 The trial court summarily dismissed these claims at the first stage of the postconviction proceedings, finding that they were frivolous and patently without merit. At the first stage of a postconviction proceeding, a petition may be summarily dismissed as frivolous and patently without merit if the allegations in the petition, taken as true and liberally construed, fail to present the "gist" of a constitutional claim. *People v. Hunter*, 376 Ill. App. 3d 639, 642-43 (2007).

¶ 28 The gist standard is a low threshold where the defendant need only set forth a limited amount of detail, need not set forth the claim in its entirety, and need not include citation to legal authority. *People v. Holt*, 372 Ill. App. 3d 650, 652 (2007). However, the gist of a meritorious claim is more than a bare allegation of a deprivation of a constitutional right. *People v. Lemons*, 242 Ill. App. 3d 941, 946 (1993). Rather, a defendant must plead sufficient facts from which the trial court could find a valid claim of deprivation of a constitutional right. *Lemons*, 242 Ill. App. 3d at 946.

¶ 29 In determining whether a meritorious constitutional claim has been presented, the trial court

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may examine the court file and transcripts of the proceeding from which the defendant was convicted and any action taken by an appellate court in such proceeding. 725 ILCS 5/122-2.1(c) (West 2000).

The trial court may summarily dismiss a postconviction petition if the allegations contained in the petition are contradicted by the record. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). Our review of a summary dismissal is *de novo*. *People v. Hunter*, 376 Ill. App. 3d 639, 643 (2007).

¶ 30 In the instant case, we find that none of the claims in defendant Thompson's *pro se* petition for postconviction relief states the gist of a constitutional claim and therefore the trial court properly dismissed the petition as frivolous and patently without merit. We address each claim in turn.

¶ 31 In determining whether a defendant was denied the effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland*, 466 U.S. at 687; *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel.

¶ 32 Defendant Thompson's first claim of ineffective assistance of trial counsel relates to the expert testimony of Aaron Horn, a forensic scientist specializing in the area of firearms and tool mark identification. At defendant Thompson's second trial, Horn opined that the fatal bullet was fired from a .9-millimeter Uzi pistol recovered by the police. Defendant Thompson contended that Horn's expert opinion testimony was directly at odds with the preexisting forensic evidence developed by the State at defendant's first trial which established that the fatal bullet was unsuitable

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for comparison and therefore could not be matched with the Uzi pistol.

¶ 33 Defendant Thompson maintained that his trial counsel was ineffective for failing to object to Horn's expert opinion testimony regarding the connection between the fatal bullet and the Uzi pistol, and for failing to request a continuance to further investigate the validity of Horn's testimony. We must disagree since a review of the record shows that Horn's expert opinion testimony was not directly at odds with the testimony presented at his first trial.

¶ 34 At defendant Thompson's first trial, Ernest Warner, a firearms examiner for the Chicago Police Department, testified by stipulation that the fatal bullet recovered from the victim's body was unsuitable for comparison due to its damaged condition, but that it could have been fired from the Uzi pistol recovered by the police. Warner's expert testimony left open the possibility that the fatal bullet could have been fired from the Uzi pistol and therefore his testimony was not directly at odds with Horn's expert testimony on this issue.

¶ 35 Moreover, trial counsel's purported failure to request a continuance to further investigate the validity of Horn's testimony did not amount to ineffective assistance where counsel challenged Horn's testimony during cross-examination and got him to acknowledge that experts can disagree as to their opinions regarding firearms identification. Trial counsel also established that Horn and Warner had examined the same fatal bullet, and that Warner had concluded that the bullet was unsuitable for comparison. This is substantially the same evidence defendant Thompson would have presented through his own expert. Under these circumstances, trial counsel's failure to request a continuance to further investigate the validity of Horn's expert opinion testimony did not prejudice defendant Thompson and, thus, did not amount to ineffective assistance.

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¶ 36 Defendant Thompson next contends that trial counsel was ineffective for failing to investigate and call occurrence witnesses who would have undermined the State's evidence and supported his version of events. A defense counsel's decision on whether to call a particular witness is generally viewed as a matter of trial strategy which cannot support a claim of ineffective assistance of counsel. *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989).

¶ 37 In his petition, defendant Thompson claims that his trial counsel should have called two occurrence witnesses whose potential testimony was outlined in a police report and differed from statements given by defendant Thompson's codefendants. Upon review of the record, we cannot say that counsel's supposed failure to call the witnesses at issue was so unreasonable or prejudicial as to result in ineffective assistance of trial counsel.

¶ 38 The discrepancies alleged by defendant Thompson related to where the witnesses were sitting, where the shooters were standing, and the color of the clothing worn by the shooters. Even if trial counsel had called the identified witnesses and assuming they would have testified as defendant Thompson claims, which he has not established, he still has not demonstrated that their testimony would have probably changed the outcome of the trial.

¶ 39 Throughout the trial, defendant Thompson maintained that he was not present during the shooting and he presented an alibi defense. In addition, the evidence showed that defendant Thompson did not do the actual shooting. Rather, defendant Thompson was found guilty of first-degree murder under accountability and transferred intent theories. Therefore, trial counsel's decision not to call the occurrence witnesses at issue did not amount to deficient performance as required to support claim of ineffective assistance of counsel where the witnesses' proposed

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testimony would have been irrelevant to the defense theory that defendant Thompson was not present during the shooting.

¶ 40 Defendant Thompson also contends that trial counsel was ineffective for failing to call his original trial Attorney Scott Sherwin as a witness to give testimony concerning a photograph depicting physical injuries defendant Thompson allegedly sustained when he attempted to leave his former gang. Defendant Thompson claims that the attorney's testimony would have established that the gang retaliated against him when he left the gang and that the testimony of certain State witnesses were a continuation of this retaliation. We must disagree.

¶ 41 Trial counsel was not ineffective for failing to call Attorney Sherwin as a witness to give testimony concerning the alleged injuries depicted in the photograph because such testimony would have been cumulative to testimony presented through defendant Thompson and his fiancée Ms. Paschell Bennett. "Failure to call or investigate a witness whose testimony is cumulative does not demonstrate ineffective assistance of counsel." *People v. Jarnagan*, 154 Ill. App. 3d 187, 194 (1987).

¶ 42 At trial, defendant Thompson testified that following the gang-related murder of 11-year-old Robert "Yummy" Sandifer in 1994, he decided to leave the Black Disciples street gang. Defendant Thompson stated that his decision to leave the gang resulted in him sustaining a beating by other gang members. Defendant Thompson claimed that his injuries were serious enough for him to go to the hospital, but that he did not go to the hospital. Defendant Thompson stated that Ms. Bennett, his fiancée, took a photograph of him following the beating and that he gave the photograph to Attorney Sherwin.

¶ 43 Ms. Bennett testified that defendant Thompson had been beaten by his former gang members

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and that she photographed the injuries. Ms. Bennett stated that defendant Thompson's eye was injured, his jaw was swollen, and he sustained bruises. Ms. Bennett testified that she gave the photograph to Attorney Sherwin.

¶ 44 Attorney Sherwin's proposed testimony concerning the alleged injuries depicted in the photograph would not only have been cumulative to testimony presented through defendant Thompson and Ms. Bennett, defendant Thompson also failed to present an affidavit from the attorney supporting the allegations regarding the injuries. A defendant's failure to either attach the necessary affidavits, records, or other evidence or explain their absence is fatal to a postconviction petition and by itself justifies the petition's summary dismissal. *People v. Miller*, 393 Ill. App. 3d 629, 640 (2009).

¶ 45 Defendant Thompson claims that he was unable to attach affidavits because he was incarcerated. This argument is insufficient. Not only have other *pro se* petitioners attached necessary affidavits to their postconviction petitions while in prison, but defendant Thompson had a fiancée who could have assisted him in securing Attorney Sherwin's affidavit. Attorney Sherwin, whose performance is not directly implicated by defendant Thompson's claim of ineffective assistance of counsel, could have provided defendant Thompson with an affidavit supporting the allegations regarding the injuries.

¶ 46 Defendant Thompson next contends that trial counsel was ineffective for failing to object to testimony and argument that he beat his child. Again, we must disagree.

¶ 47 At trial, defendant Thompson claimed that he decided to quit his street gang following the gang-related murder of 11-year-old Sandifer. The State believed that defendant Thompson decided

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to leave the gang after the gang refused to pay his bond following his arrest for hitting his child, and cross-examined him accordingly. Defendant Thompson denied making such a statement to Detective John Griffin.

¶ 48 When the State asked Ms. Bennett whether defendant Thompson had ever been arrested for hitting his child, trial counsel objected and the trial court sustained the objection. The State called Detective John Griffin in rebuttal.

¶ 49 The detective testified that when he interviewed defendant Thompson concerning the fatal shooting of Ms. Zizumbo, defendant Thompson told him that he had left the gang because the gang had refused to pay his bond following his arrest for hitting his child, an incident that occurred a few years before. However, on cross-examination, trial counsel got the detective to acknowledge that the report he prepared in conjunction with his interview of defendant Thompson failed to contain any reference as to why defendant Thompson's bond was not paid.

¶ 50 We do not believe that trial counsel was ineffective in regard to the State's questioning of defendant Thompson concerning his prior arrest for hitting his child. Defendant Thompson denied making such a statement. And when the State pressed the issue by asking Ms. Bennett whether defendant Thompson had ever been arrested for hitting his child, trial counsel objected and the trial court sustained the objection. Then, on cross-examination of Detective Griffin, trial counsel got the detective to admit that his general progress report failed to contain any reference as to why defendant Thompson's bond was not paid. Trial counsel's representation of defendant Thompson on this issue was vigorous and competent.

¶ 51 Defendant Thompson finally contends that appellate counsel was ineffective for failing to

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obtain a transcript of the hearing on his motion to suppress statements where the suppression issue was raised on appeal. We disagree.

¶ 52 Claims of ineffective assistance of appellate counsel are evaluated using the two-pronged test set forth in *Strickland*. *People v. Diehl*, 335 Ill. App. 3d 693, 700 (2002). As a general rule, an appellate counsel's decision whether to pursue certain issues on appeal is accorded substantial deference. *People v. Mack*, 167 Ill. 2d 525, 532-33 (1995). In order to succeed on a claim of ineffective assistance of appellate counsel, a defendant must show that counsel's failure to raise a particular issue was objectively unreasonable and that prejudice resulted from counsel's decision. *Diehl*, 335 Ill. App. 3d at 701. Appellate counsel is not required to raise every conceivable argument, and counsel's assessment of what to raise and argue will not be questioned unless it can be said that counsel's judgment was patently erroneous. *People v. Collins*, 153 Ill. 2d 130, 140 (1992).

¶ 53 If a claim of ineffective assistance can be disposed of on the basis that defendant did not suffer sufficient prejudice, a court need not consider whether counsel's performance was deficient. *Diehl*, 335 Ill. App. 3d at 701. Moreover, if trial counsel performed adequately, then appellate counsel cannot be ineffective for failing to argue trial counsel's ineffectiveness. See *People v. Winsett*, 153 Ill. 2d 335, 347 (1992); *People v. Easley*, 192 Ill. 2d 307, 329 (2000).

¶ 54 On appeal, defendant Thompson claimed that the trial court erred by denying his motion to suppress alleged inculpatory statements he made to Assistant State's Attorney Sybil Thomas. The record shows that when defendant Thompson was first interviewed by ASA Thomas, he was apprised of his *Miranda* rights and he exercised them by declining further discussion absent the

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presence of counsel.

¶ 55 Approximately 1.5 hours later, defendant Thompson saw ASA Thomas and shouted that he wanted to talk to her. ASA Thomas asked defendant Thompson if he was sure he wanted to waive his right to an attorney and he responded that he wished to waive this right. Defendant Thompson then stated that he wanted to cut a deal, stating that he would tell ASA Thomas where the guns were if he could cut a deal. ASA Thomas responded that she did not have the power to cut a deal. Defendant Thompson continued talking, stating that "he had driven a couple of the defendants to the area – to the park. And that as he was driving them there that he had tried to talk them out of it." Defendant Thompson thereafter asked for an attorney and ASA Thomas terminated the conversation.

¶ 56 These are the statements defendant Thompson sought to suppress. Appellate counsel cannot be held ineffective for failing to submit a suppression hearing transcript to the appellate court absent a showing of actual prejudice. In this case, the record shows that defendant Thompson voluntarily made the statements after he waived his right to counsel. There was no evidence in the suppression hearing transcript that would have altered the outcome on appeal and therefore prejudice was not demonstrated.

¶ 57 For the foregoing reasons, we affirm the circuit court's order dismissing defendant Thompson's postconviction petition.

¶ 58 Affirmed.