

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).

2013 IL App (4th) 120494-U
NO. 4-12-0494
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
September 12, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
DARRELL JAMES,)	No. 03CF769
Defendant-Appellant.)	
)	Honorable
)	Leo J. Zappa,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition at the second stage of the proceedings where defendant failed to make a substantial showing the eyewitnesses to the crime committed perjury and his pretrial and appellate counsels provided ineffective assistance of counsel.

¶ 2 In May 2007, defendant filed his *pro se* postconviction petition. That same month, the State filed a motion to dismiss defendant's petition. Over the years, defendant had several different attorneys and filed several *pro se* supplements to his petition. In July 2011, postconviction counsel filed a final amended postconviction petition, incorporating defendant's *pro se* supplements. In April 2012, the Sangamon County circuit court held a hearing on the State's motion to dismiss. In May 2012, the court entered a written order dismissing defendant's postconviction petition.

¶ 3 Defendant appeals the dismissal of his postconviction petition at the second stage

of the proceedings, asserting he is entitled to an evidentiary hearing on his following claims: (1) police misconduct led to the subornation of the eyewitnesses' perjury in violation of his due process rights, (2) he was denied effective assistance of pretrial counsel, and (3) he was denied effective assistance of appellate counsel. We affirm.

¶ 4

I. BACKGROUND

¶ 5 In August 2003, the State charged defendant by information with one count of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2002)), one count of armed robbery (720 ILCS 5/18-2(a)(1) (West 2002)), and one count of home invasion (720 ILCS 5/12-11(a)(3) (West 2002)) for his alleged actions on April 1, 2003. Four people lived in the apartment where the crime occurred, but only Adam Greenfield and Nicole Power were home at the time of the offense. Officer Scott Allin interviewed Greenfield and Power shortly after the crime occurred. According to Greenfield and Power, two men with handguns entered the apartment, looking for one of the other residents. The men took several items from the apartment, including marijuana. One of the men had a bandana or something covering his face, and the other man did not have anything on his face and was wearing a tank top. Greenfield and Power eventually identified defendant in a photographic lineup as the unmasked intruder.

¶ 6 In November 2003, defense counsel filed a motion to suppress the identification of defendant, alleging the procedure used by the police in obtaining the pretrial identification of defendant was unreasonably suggestive and led to a substantial likelihood of misidentification. On December 22, 2003, the trial court held a hearing on defendant's motion to suppress. The State presented the testimony of Springfield police detective Paul Carpenter. Detective Carpenter testified to Officer Allin's report of the unmasked intruder's description and to the descriptions

Greenfield and Power gave of the unmasked intruder on April 2, 2003. He also testified about the lineup procedures used in the three photographic lineups in this case. Each lineup had six photographs with one of the photographs being a suspect in this crime, and defendant was the suspect in the third lineup. Detectives Carpenter and James Graham presented the third lineup to Power and then later to Greenfield. Both of them picked defendant out of the lineup without any hesitancy. At the suppression hearing, the State presented all three lineups, and the court admitted them into evidence. The prosecutor specifically asked the court to review all of the photographs in the lineups, and the court said it would. At the conclusion of the suppression hearing, the court denied defendant's motion, finding the lineup procedures were not unreasonably or unnecessarily suggestive and conformed with acceptable procedures.

¶ 7 While represented by counsel, defendant filed numerous *pro se* pretrial motions, in which he asserted defense counsel was working with the State, criticized counsel's continuances, and complained about counsel not filing his motions. Defendant had also filed numerous *pro se* motions to suppress, motions for discovery, and motions to dismiss. One of the *pro se* motions sought to suppress defendant's statements to the police. Defendant denied making any statement to the police and noted he wrote "refused" on the typed statement prepared by the police because he disagreed with it. He also alleged Detective Graham lied at defendant's preliminary hearing. The trial court did not address defendant's *pro se* motions because defendant was represented by counsel.

¶ 8 In January 2004, the trial court held a bench trial at which defendant had stand-by counsel. The State presented the testimony of Officer Allin; Detective James Young, who processed the crime scene for physical evidence; the victims, Greenfield and Power; Clayton

Agnew and Justin Murphy, roommates of Power and Greenfield at the time of the crime; and Detectives Carpenter and Graham. Defendant testified on his own behalf and presented the testimony of Frank Hayes, who testified he was working out with defendant at the time the crime; and Officer Allin. The following is a brief summary of the evidence to put defendant's arguments in perspective. At trial, Greenfield and Power identified defendant as the unmasked intruder and testified how they identified him in the third photographic lineup. Greenfield testified the unmasked intruder had tattooed bands going across his biceps and Chinese symbols all over it. Power testified the unmasked intruder had a Chinese symbol with a tribal band tattooed around his biceps.

¶ 9 Detectives Carpenter and Graham testified about defendant's statements after his arrest. They testified that, after Detective Graham read defendant his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), defendant waived his rights and agreed to speak with them. However, before he gave a statement, defendant declared he would not sign anything. During the interview, defendant stated he lived with Pam Chandler a few blocks away from where the home invasion occurred. Defendant stated he was at Greenfield and Power's apartment on the day the home invasion occurred. He had gone there by himself to complain about some bad marijuana he had bought from "Greenbeard." Another black male was present when he arrived at the apartment. Defendant denied having a handgun when he was at the apartment. He took around a pound of marijuana and left the apartment. Detective Graham typed out defendant's statements and gave defendant a copy to read. Defendant wrote "refused" on the document.

¶ 10 Defendant and Hayes testified defendant was working out at Power House Gym at the time the home invasion occurred. Defendant admitted talking to the police but denied saying

he was around Greenfield and Power's apartment at the time the crime occurred. He wrote "refused" on the document because he disagreed with the police trying to incriminate him with his statements. Defendant also noted he had two tribal band tattoos, a lion tattoo, and a tiger tattoo. He showed his tattoos in court and denied having a Chinese tattoo. Defendant also denied doing drugs.

¶ 11 On January 27, 2004, the trial court found defendant guilty of all three charges. Defense counsel and defendant both filed posttrial motions challenging defendant's guilty judgments. At a joint hearing in April 2004, the court denied defendant's posttrial motions and sentenced him to concurrent prison terms of 7 years for unlawful use of a weapon by a felon, 45 years for armed robbery, and 45 years for home invasion. Defendant represented himself at the part of the hearing on the posttrial motions, and defense counsel represented defendant at the sentencing portion of the hearing. In May 2005, the court denied defendant's motion to reconsider his sentence.

¶ 12 Defendant appealed and argued (1) the trial court's refusal to consider his pretrial, *pro se* motions violated his fifth- and sixth-amendment rights (U.S. Const., amends. V, VI), and (2) his home-invasion sentence should be reduced to 30 years' imprisonment because the sentence enhancement contained in section 12-11(c) of the Criminal Code of 1961 (720 ILCS 5/12-11(c) (West 2002)) violated the proportionate-penalties clause. On January 12, 2006, we affirmed defendant's convictions and sentences. *People v. James*, 362 Ill. App. 3d 1202, 1208, 841 N.E.2d 1109, 1115 (2006). On May 24, 2006, the supreme court denied defendant's petition for leave to appeal. *People v. James*, 219 Ill. 2d 580, 852 N.E.2d 244 (2006).

¶ 13 On May 7, 2007, defendant filed his *pro se* postconviction petition. In his

petition, he asserted he filed a petition for a writ of *certiorari* with the United States Supreme Court on July 13, 2006, which was still pending. In his petition, defendant raised numerous claims, including (1) his pretrial counsel was ineffective for failing to challenge the statements he made to the police, and (2) his appellate counsel was ineffective for failing to challenge the trial court's denial of the motion to suppress the eyewitnesses' identification of him. Defendant attached to the petition two affidavits by him, in which he stated he made several requests to pretrial counsel to file a motion to suppress his statements to the police and all of the statements and information in the postconviction petition were true and correct to the best of his knowledge.

¶ 14 On May 15, 2007, the trial court appointed counsel to represent defendant and gave the State 30 days to respond to defendant's postconviction petition. On May 29, 2007, the State filed a motion to dismiss, asserting (1) defendant's petition stated no grounds showing a substantial denial of defendant's constitutional rights, (2) the ineffective-assistance claims are not supported by the record, (3) the exhibits do not provide facts showing ineffective assistance, (4) defendant waived any claims that could have been raised on direct appeal, and (5) defendant's petition was filed more than six months after the Illinois Supreme Court denied his petition for leave to appeal.

¶ 15 On February 2009, defendant filed a *pro se* supplement to his postconviction petition, arguing, *inter alia*, his due process rights were violated as a result of the State's subornation of perjury from Greenfield and Power. Defendant's exhibits included the following: (1) Officer Allin's April 1, 2003, police report; (2) Detective Carpenter's report filed on July 9, 2003, about April 2, 2003, interviews of Greenfield and Power; (3) Detective Carpenter's August 4, 2003, report about information he gained on July 29, 2003, and prior dates; and (4) Detective

Carpenter's August 8, 2003, report about information gained on July 27-29, 2003. He also presented his affidavit, in which he stated (1) that, when he asked pretrial counsel to file a motion to suppress his statements to police, counsel stated he would not file the motion because he was friends with Detectives Carpenter and Graham and knew they would not lie; and (2) he requested pretrial counsel to check with the " 'Office of Professional Standards' " for complaints and/or violations against Detectives Carpenter and Graham. In July 2009, defendant sought to raise another claim of ineffective assistance of appellate counsel. In December 2009, defendant requested the trial court to put the June 2006 Illinois State Police report about Detectives Carpenter and Graham in his case file.

¶ 16 On July 26, 2011, defendant's postconviction counsel filed a final amended postconviction petition, in which counsel expressly adopted defendant's *pro se* filings and the June 2006 Illinois State Police report. Along with the petition, counsel filed the certificate required by Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). In March 2012, the State filed a memorandum in support of its motion to dismiss. The memorandum adopted the arguments in the initial motion but did not specifically address the timeliness of defendant's petition. On April 26, 2012, the trial court held a hearing on the State's motion to dismiss defendant's postconviction petition and its amendment and took the matter under advisement.

¶ 17 On May 10, 2012, the trial court entered a written order granting the State's motion to dismiss defendant's postconviction petition, supplements, and the amended petition. On May 25, 2011, defendant filed a timely notice of appeal from the dismissal in sufficient compliance with Illinois Supreme Court Rule 606(d) (eff. Mar. 20, 2009). See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to

appeals in postconviction proceedings). Thus, this court has jurisdiction pursuant to Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

¶ 18

II. ANALYSIS

¶ 19

A. Standard of Review

¶ 20 On appeal, defendant challenges the dismissal of his postconviction petition. The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2006)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007.

¶ 21

At the first stage, the trial court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2006). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2006). If the court does not dismiss the petition, it proceeds to the second stage, where, if necessary, the court appoints the defendant counsel. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at

472-73, 861 N.E.2d at 1008. In this case, the State did file a motion to dismiss, and the court granted that motion.

¶ 22 With the second stage of the postconviction proceedings, the trial court is concerned only with determining whether the petition's allegations sufficiently show a constitutional infirmity that would necessitate relief under the Postconviction Act. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). However, at a dismissal hearing, the court is prohibited from engaging in any fact finding. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at 1071. Thus, the dismissal of a postconviction petition at the second stage is warranted 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. *Coleman*, 183 Ill. 2d at 382, 701 N.E.2d at 1072. We review *de novo* the trial court's dismissal of a postconviction petition at the second stage. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. Additionally, a reviewing court may affirm a trial court's dismissal of a postconviction petition at the second stage of the proceedings on any grounds substantiated by the record, regardless of the trial court's reasoning. *People v. Demitro*, 406 Ill. App. 3d 954, 956, 942 N.E.2d 20, 22 (2010).

¶ 23 B. Timeliness of Defendant's Petition

¶ 24 The State asserts defendant's postconviction petition was untimely, and we should

affirm the trial court's dismissal on that basis. Defendant asserts the State forfeited this issue by failing to raise it in the trial court. However, the State's motion to dismiss contains a numbered list of reasons why defendant's petition should be dismissed and the fifth and final one states defendant's "petition was filed May 7, 2007, more than six months after the Illinois Supreme Court denied a petition for leave to appeal on February 14, 2006." While the applicable limitations period was six months after the conclusion of the proceedings in the United States Supreme Court or the time for filing a petition for *certiorari* (725 ILCS 5/122-1(c) (West 2006)), a reading of the motion as a whole indicates the State was asserting a timeliness defense to defendant's postconviction petition.

¶ 25 The applicable time limits for filing a postconviction petition are the ones that were in effect when the defendant filed the petition. *People v. Wallace*, 406 Ill. App. 3d 172, 174, 941 N.E.2d 436, 438 (2010). The Postconviction Act's time limits do not pose a jurisdictional bar, but rather function as a statute of limitations that can be raised, waived, or forfeited by the State. *Wallace*, 406 Ill. App. 3d at 174, 941 N.E.2d at 438. When defendant filed his *pro se* postconviction petition in May 2007, the Postconviction Act had the following time limits for filing a postconviction petition when the defendant had filed a direct appeal:

"When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be

commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2006).

"Under United States Supreme Court Rule 13, a 'petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.' " (Emphasis omitted.) *Wallace*, 406 Ill. App. 3d at 177, 941 N.E.2d at 440. Thus, defendant's request for *certiorari* had to be filed on or before August 22, 2006.

¶ 26 In his petition, defendant asserted he filed his petition for writ of *certiorari* with the United States Supreme Court on July 13, 2006. On appeal, the State contends defendant did not do so. The State did not present any evidence of that fact in the trial court, and the record does not rebut defendant's contention. At stage two of the postconviction proceedings, "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. Thus, we take as true the fact defendant still had proceedings pending in the United States Supreme Court when he filed his petition and find his petition was timely filed under section 122-1(c) of the Postconviction Act.

¶ 27 C. Subornation of Perjury

¶ 28 Defendant contends he made a substantial showing police misconduct led to the subornation of perjury at defendant's trial in violation of his due process rights. Specifically, defendant had argued the State and its agents had suborned perjury by procuring and leading the victims and eyewitnesses, Greenfield and Power, to testify falsely at his trial. He had noted the

discrepancies between Greenfield's and Power's testimony and the information they initially provided Officer Allin as well as the discrepancies in Officer Allin's police reports and Detective Carpenter's police reports. Defendant also supported his argument with the Illinois State Police report that concluded Detectives Carpenter and Graham violated several professional standards of the Springfield police department. The State argues defendant forfeited this issue because he could have raised it on direct appeal as any discrepancies in the victims' descriptions of the unmasked robber would have been evidenced in the record on direct appeal. Since our supreme court has instructed us to begin our review of a case by determining whether any issues have been forfeited (see *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008)), we first address the State's forfeiture argument.

¶ 29 While the alleged inconsistencies in Greenfield's and Power's initial description of the unmasked intruder to Officer Allin and their later descriptions were clearly in the record as the issue was addressed at both the motion-to-suppress hearing and defendant's bench trial, the Illinois State Police investigation report regarding Detectives Carpenter and Graham was not completed until June 2006 and thus could not have been in the record on direct appeal. Thus, we do not find defendant forfeited this issue as the witnesses' alleged inconsistencies standing alone do not establish perjury. See *People v. Trimble*, 220 Ill. App. 3d 338, 346, 580 N.E.2d 1209, 1213 (1991) (noting mere conflicts in a witness's testimony with prior statements made by him or her do not establish the witness gave perjured testimony).

¶ 30 A conviction obtained by the knowing use of perjured testimony violates a defendant's due process rights. *People v. Olinger*, 176 Ill. 2d 326, 345, 680 N.E.2d 321, 331 (1997). To establish a due process violation based on subornation of perjury, "the prosecutor

actually trying the case need not have known that the testimony was false; rather, knowledge on the part of any representative or agent of the prosecution is enough." *Olinger*, 176 Ill. 2d at 348, 680 N.E.2d at 332. The police are agents of the prosecution. *People v. Smith*, 352 Ill. App. 3d 1095, 1101, 817 N.E.2d 982, 989 (2004). Moreover, "[a] witness's testimony constitutes perjury only if the witness knowingly makes a false statement." *People v. Pulgar*, 323 Ill. App. 3d 1001, 1010, 752 N.E.2d 585, 592 (2001).

¶ 31 In support of his argument the inconsistencies along with the Illinois State Police report were sufficient to warrant an evidentiary hearing on this issue, defendant cites *People v. Mitchell*, 2012 IL App (1st) 100907, ¶¶ 28, 34, 972 N.E.2d 1153, where the reviewing court addressed the trial court's dismissal of the defendant's successive postconviction petition at the second stage of the proceedings. There, the *Mitchell* court found the trial court should have held an evidentiary hearing on, *inter alia*, the defendant's claims (1) of new evidence, showing Detective Michael McDermott lied under oath about other interrogations and statements suspects made at Area 2 police headquarters, would have led the court to suppress all of the testimony from the police officers and an assistant State's Attorney about the defendant's confession to the crimes and (2) that the State used perjured testimony to obtain the defendant's conviction. *Mitchell*, 2012 IL App (1st) 100907, ¶ 75, 972 N.E.2d 1153. As to the suppression issue, the McDermott report strongly corroborated the defendant's and his mother's testimony the defendant did not make any statement about the shooting voluntarily. *Mitchell*, 2012 IL App (1st) 100907, ¶ 62, 972 N.E.2d 1153. The report had found "convincing evidence, sufficient to prove guilt beyond a reasonable doubt," Detective McDermott had battered suspects and committed perjury about the suspects' alleged confessions. *Mitchell*, 2012 IL App (1st) 100907, ¶ 60, 972 N.E.2d

1153. Regarding the perjured testimony, the defendant presented the affidavit of one of the State's witnesses at his trial, in which the witness stated he falsely testified the defendant was a member of the Vice Lords because the police had threatened to charge him with the murder unless he gave such testimony. *Mitchell*, 2012 IL App (1st) 100907, ¶¶ 32, 65, 972 N.E.2d 1153.

¶ 32 Unlike in *Mitchell*, defendant has not presented affidavits from Greenfield and Power that they committed perjury at the insistence of Detectives Carpenter and Graham. Additionally, we note Officer Allin's report reflected on his interview of Greenfield and Power on April 1, 2003, while Office Carpenter's police reports were based on an April 2, 2003, and later contacts with the witnesses. Thus, we do not have inconsistent reports of the same interview of Greenfield and Power. Further, the reports are not that different. Officer Allin's report was brief and noted the unmasked intruder had many tattoos but only specified the Chinese tattoo. Detective Carpenter's report of his April 2, 2003, interview noted Chinese writing tattoos and a tribal tattoo that went around the suspect's arm. Additionally, the trial court denied defendant's motion to suppress the witnesses' identification of him, finding the police's lineup procedures were not unreasonably or unnecessarily suggestive and followed acceptable procedures. While Greenfield and Power did not pick anyone out of the first two lineups, they both separately picked out defendant from the third lineup as the unmasked intruder without hesitation. Moreover, the Illinois State Police report's finding Detective Graham himself committed perjury at a criminal trial is different than Detective Graham coercing witnesses to commit perjury. None of the violations involved Detectives Graham and Carpenter coercing witnesses, which is different from *Mitchell* where the report documented the detective had done

the same action with other suspects that the defendant had complained happened to him. None of the evidence showed the eyewitnesses, Greenfield and Power, knowingly gave false testimony. Accordingly, we find defendant failed to make a substantial showing Greenfield and Power committed perjury and thus he did not establish the State suborned such perjury.

¶ 33 D. Ineffective Assistance of Counsel

¶ 34 Defendant contends he received both ineffective assistance of pretrial counsel and appellate counsel. The State disagrees.

¶ 35 This court analyzes such claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Jones*, 219 Ill. 2d 1, 23, 845 N.E.2d 598, 610 (2006) (appellate counsel); *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999) (trial counsel). To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64.

¶ 36 To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Strickland*, 466 U.S. at 687. Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, defendant must show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Stated differently, the defendant must prove a reasonable probability

exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. The *Strickland* Court noted that, when a case is more easily decided on the ground of lack of sufficient prejudice, rather than that counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697.

¶ 37

1. *Pretrial Counsel*

¶ 38 Defendant contends pretrial counsel was ineffective for failing to (1) investigate whether complaints had been filed against Detectives Carpenter and Graham and (2) file a motion to suppress defendant's statements to Detectives Carpenter and Graham. The State again asserts defendant forfeited this issue by not raising it on direct appeal.

¶ 39 However, this court has often stated ineffective-assistance-of-counsel claims that require consideration of matters outside the record on direct appeal are better suited for postconviction proceedings where a complete record can be made and the attorney-client privilege no longer applies. *People v. Millsap*, 374 Ill. App. 3d 857, 863, 873 N.E.2d 396, 403 (2007). While the direct-appeal record set forth defendant's disagreement with Detectives Carpenter and Graham's recitation of his statement to them and defendant's request for a motion to suppress those statements, the record on direct appeal lacked any reasoning from counsel as to why he did not pursue such a motion. Accordingly, we do not find defendant forfeited this issue.

¶ 40 Trial counsel must conduct "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. That obligation comes from counsel's basic function "to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. Reviewing courts judge trial counsel's lack of

investigation against a standard of reasonableness given all of the circumstances and with "applying a heavy measure of deference to counsel's judgments." *People v. Kokoraleis*, 159 Ill. 2d 325, 330, 637 N.E.2d 1015, 1018 (1994) (quoting *Strickland*, 466 U.S. at 691). "What investigation is reasonable depends on the informed strategic choices of, as well as the information supplied by, the defendant." *Kokoraleis*, 159 Ill. 2d at 330, 637 N.E.2d at 1018 (citing *Strickland*, 466 U.S. at 691). With a motion to suppress evidence, trial counsel enjoys a strong presumption his or her decision whether to bring the motion is trial strategy and the failure to move to exclude evidence was proper. *People v. Spann*, 332 Ill. App. 3d 425, 432, 773 N.E.2d 59, 66 (2002). "To overcome that presumption, the defendant must demonstrate a reasonable probability that the motion would have been granted and that the outcome of the trial would have been different." *Spann*, 332 Ill. App. 3d at 432-33, 773 N.E.2d at 66. The *Strickland* Court defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 41 Here, defendant has not made a substantial showing pretrial counsel's actions were unreasonable regarding defendant's statements to the officers. During defendant's pretrial period, the record and defendant's postconviction allegations show the only supporting evidence possessed by trial counsel was defendant's description of his statement to Detectives Carpenter and Graham that conflicted with the detectives' description of defendant's statements. In one of his postconviction affidavits, defendant stated pretrial counsel personally knew the detectives and did not believe they would lie. Besides his disagreement with what the detectives stated he had said, defendant does not argue he presented any other evidence to counsel that would question the detectives' credibility. The Illinois State Police report was not completed until June 2006,

and it indicates the investigation did not begin until June 2005. Thus, pretrial counsel could not have known or discovered that information before defendant's January 2004 trial. Defendant presented no other evidence that pretrial counsel could have reasonably discovered or known to challenge Detectives Carpenter's and Graham's credibility before defendant's trial. Thus, defendant has not made a substantial showing pretrial counsel's investigation would have yielded any impeachment evidence at that time.

¶ 42 Defendant also cannot make a substantial showing of a reasonable probability the motion to suppress would have been granted based only on the conflict between defendant's version of his statements to the officers and the officers' statement. That conflict was presented at defendant's trial and the trial court found defendant was not credible. Additionally, even if the officers' testimony was excluded, the two eyewitnesses, Greenfield and Power, identified defendant as the unmasked intruder. Thus, defendant has also not made a substantial showing the outcome of the trial would have been different.

¶ 43 Accordingly, defendant is not entitled to an evidentiary hearing on his ineffective-assistance-of-pretrial-counsel claim.

¶ 44 *2. Appellate Counsel*

¶ 45 Defendant further asserts he was denied effective assistance of appellate counsel based on counsel's failure to challenge the trial court's denial of his motion to suppress Greenfield's and Power's identification of him. At the hearing on defendant's motion to suppress, the State submitted all three of the lineups in this case, and the trial court admitted them. The record on appeal lacks the first two lineups. Defendant, as the appellant, bears the burden of providing a reviewing court with a complete record sufficient to support his claims of error, and any doubts

that arise from the incompleteness of the record will be resolved against the appellant. *People v. Lopez*, 229 Ill. 2d 322, 344, 892 N.E.2d 1047, 1060 (2008).

¶ 46 Here, defendant argues appellate counsel should have asserted the trial court erred by denying defendant's motion to suppress his identification because the lineup was suggestive. At the hearing, Detective Carpenter testified about the photographic lineup procedures in this case. Greenfield and Power had not identified defendant as the unmasked intruder until the third photographic lineup. Detective Carpenter testified about the first two lineups, and the trial court admitted all three lineups into evidence. Thus, those lineups were before the trial court when it ruled on defendant's motion to suppress. Accordingly, the two missing lineups were a necessary part of the record to determine whether appellate counsel was ineffective for failing to challenge the trial court's ruling. In resolving the incompleteness of the record against defendant, we presume the trial court's denial of the suppression motion conformed with the law and had a sufficient factual basis, and therefore defendant did not make a substantial showing appellate counsel was ineffective for failing to challenge the trial court's denial of the suppression motion.

¶ 47

III. CONCLUSION

¶ 48 For the reasons stated, we affirm the Sangamon County circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 49 Affirmed.