SIXTH DIVISION
March 31, 2015

No. 1-12-2261

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. 92 CR 4156
	)	
JOHN HERSEY,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ 1 ***Held*:** The trial court did not err in the second-stage dismissal of defendant's postconviction petition.

¶ 2 Defendant John Hersey appeals from the trial court's dismissal of his postconviction petition at the second stage of postconviction proceedings. On appeal, defendant argues he made a substantial showing that (1) his right to due process was violated by the introduction of a physically coerced confession at his trial; (2) trial counsel rendered ineffective assistance when

he usurped defendant's right to testify; (3) the State's use of a witness's coerced, perjured testimony violated defendant's right to due process; and (4) trial counsel rendered ineffective assistance by failing to use evidence to impeach the State's witness.

¶3 For the reasons that follow, we affirm the trial court's dismissal of defendant's postconviction petition.

¶4 I. BACKGROUND

¶5 Defendant John Hersey was arrested and charged for various offenses stemming from the July 31, 1991 armed robbery and shooting deaths of two convenience store clerks. Codefendants Lindsey Crittle, Raymond Brown, and James Sardin also participated in the offense. The police investigation led to the arrests of Crittle, Brown and Sardin, who gave statements about the robbery and shootings and implicated defendant. Defendant surrendered himself to the police on December 23, 1991, and gave a detailed statement to the police and Assistant State's Attorney (ASA) John Murphy about the robbery and shootings.

¶6 At defendant's bench trial in March 1996, the State's theory that defendant was guilty by reason of accountability of the armed robbery and murder of the two clerks was supported by the testimony of Detective James Boylan, defendant's signed handwritten statement, and the testimony of Melinda Graham, who was Crittle's girlfriend.

¶7 Detective James Boylan testified that he was informed at about 4:30 p.m. on December 23, 1991, that defendant was in custody at the seventh district police station, so Boylan drove there, signed defendant out, and brought him to Area Two for questioning. They did not have any conversation en route to Area Two. At Area Two, Boylan read defendant his rights, defendant stated that he understood his rights, and they talked about the convenience store robbery and double murder. Boylan contacted the State's Attorney's office, and ASA Murphy

arrived at Area Two at about 9 p.m. and reviewed information regarding the case. After Murphy explained his role and advised defendant of his rights, defendant waived those rights and gave a second verbal statement, which was substantially the same as his first verbal statement to Boylan aside from a few discrepancies. The various procedures for memorializing verbal statements were explained to defendant, and he chose to have Murphy handwrite a summary of the verbal statement. Boylan and Murphy left the interview room, and Murphy wrote a summary of defendant's verbal statement. Thereafter, Boylan and Murphy reentered the room, and Murphy explained the form to defendant and had him read the preprinted explanation of rights portion of the form aloud. After defendant signed the rights portion, he read aloud a few lines of the statement handwritten by Murphy. Then Murphy read the statement aloud while defendant sat beside him and read along. Defendant made some corrections to the statement, which was taken at about 11:30 p.m., initialed the corrections, and signed the statement. The defense never moved to suppress the statement, and Boylan published it to the court.

¶8 According to his statement, defendant admitted that he knew Crittle, Brown and Sardin had robbed stores before. On the evening of July 31, 1991, defendant was riding in a car with them and they were talking about robbing a store. They had a gun. Crittle was driving, and Graham, who was 16-years-old and pregnant, was in the front passenger seat. According to defendant, the plan was that Sardin would hold the gun, Brown would get the money, and Crittle would look around the register and find another gun.

¶9 According to defendant's statement, Crittle said he knew a store, so he drove there and stopped the car in an alley. Brown, Sardin and defendant exited the car and entered the store. Defendant went to the back of the store to get two large bottles of beer. When he returned to the front, he saw Sardin point the gun at the clerk at the register and demand that the clerk open the

register. The clerk refused, and when Brown yelled to Sardin that the clerk was reaching for something, Sardin shot the clerk, who fell down. Sardin and Brown banged on the register and tried to open it. Brown lay across the counter and reached under the register with his hands. Sardin pointed the gun at the second clerk, who begged Sardin not to shoot. Defendant ran out the door and heard a gunshot. As defendant ran back to the car, he fell, broke a beer bottle, and cut his hand and scraped his knee. Defendant got in the car, and Brown and Sardin came out a few seconds later. They drove to Brown's house. Defendant claimed that Brown and Sardin were mad at him for not helping them at the register, and Sardin called defendant a "punk" and a "b_tch." Sardin used the money and food stamps taken in the robbery to buy food. Sardin, Brown, Crittle and defendant ate the food the next day.

¶10 According to defendant's statement, he turned himself in to the police because he wanted to tell the truth, stated that he was treated well by the police and ASA, and had been allowed to eat, drink and use the bathroom. He stated that he was not made any promises in return for his statement, nor was he threatened in any way. Defendant did not testify at the bench trial.

¶11 Defendant's statement was corroborated by Graham, who testified that she was in the car on the day of the robbery; knew that defendant, Brown and Sardin were going into the store to rob it; saw them walk toward the store; heard three gunshots and saw all three run from the direction of the store back to the car; saw defendant drop the beer bottle before all three got back into the car; and saw that Sardin was holding money and the gun, and Brown was holding money. Graham added that close to the time of the robbery she had seen defendant handle and examine the gun. That may have happened on the day of the robbery or at least within one week of the robbery. She explained that the gun belonged to everyone, "whoever used it." Graham did not actually see defendant receive any of the money taken during the robbery. She did not

remember Brown or Sardin being angry at defendant or calling him names for not helping them. On cross-examination, defense counsel asked Graham if she was testifying against defendant because the police or the State had threatened to take her baby away if she refused to cooperate. Graham denied that any such conversation with the police or the State ever occurred.

¶12 Following the bench trial, defendant was convicted under a theory of accountability of the first degree murder of one of the store clerks and the armed robbery of both clerks, but acquitted of the murder of the second clerk. Defendant was sentenced to 60 years in prison for the murder count and 30 years in prison for each of the two armed robbery counts. The armed robbery convictions ran consecutively to each other and concurrently with the murder sentence.

¶13 On direct appeal, defendant argued that he was not proven guilty beyond a reasonable doubt, his sentence was excessive, and the trial court improperly applied consecutive sentences. This court affirmed defendant's convictions and corrected the mittimus to provide that defendant's two armed robbery sentences should run concurrent to one another and to the murder sentence. *People v. Hersey*, No. 96-2866 (June 7, 2000) (unpublished order under Supreme Court Rule 23).

¶14 Defendant filed a *pro se* postconviction petition in May 1999, alleging that his trial and appellate counsel rendered ineffective assistance by (1) failing to argue that defendant's two armed robbery convictions violated the one-act, one-crime rule; (2) failing to establish through witnesses that the police and ASA coerced Graham's testimony by threatening to take away her unborn child; and (3) conceding defendant's guilt without discussing that trial strategy with him. The affidavits of defendant, codefendant Brown, and defendant's mother were attached to the *pro se* petition.

¶15 In defendant's January 1999 affidavit, he asserted that Graham told him she gave her statement to the police and ASA only because they threatened to take away her child if she did not sign it. He also stated that Graham's mother was not allowed to accompany Graham to the police station even though she was only 16 years old at the time. In addition, Vivian Dixon told defendant that she saw someone from the State's Attorney's office pay Graham after codefendant Crittle was found guilty.

¶16 In codefendant Brown's September 1998 affidavit, he asserted that Detectives McDermott and Wilkins violated the law dealing with the interrogation of juveniles when they took Graham into custody on October 29, 1991, to question her about the murders without allowing her mother to accompany her to the police station. Brown also asserted that Detective McDermott committed perjury when he testified that he was present during the signing of a document. In his January 1999 affidavit, Brown asserted that Vivian Dixon told him that sometime in November 1995, she saw a State's Attorney employee give cash to Graham shortly after codefendant Crittle was found guilty.

¶17 In her April 1999 affidavit, Iola Shelton, defendant's mother, asserted that defendant's trial counsel never spoke to her about the strategy he used at the trial but they did talk about Graham.

¶18 The *pro se* petition was summarily dismissed at the first stage. However, in 2004, the Illinois Supreme Court remanded it for reinstatement, and the petition later advanced to the second stage.

¶19 In September 2010, postconviction counsel supplemented the petition. Specifically, counsel adopted defendant's *pro se* claims of ineffective assistance of counsel and raised two additional issues: (1) trial counsel rendered ineffective assistance when he did not allow

defendant to testify about the police beating and threatening him during the interrogation that resulted in his statement; and (2) newly discovered evidence, in the form of Graham's affidavit, established that her trial testimony was false and the result of coercion and intimidation by the police, who isolated her from her mother for two days during the interrogation and threatened to have an agency take away her unborn child. The affidavits of defendant, Graham, defendant's mother and sister, and Graham's mother and friend were attached to the supplemental petition.

¶20 In his December 2009 affidavit, defendant asserted that he was 17 years old when he was interrogated about this offense. According to defendant, he was handcuffed behind his back when he first encountered Detective Boylan at the seventh district police station at about 5 p.m. on December 23, 1991. Detective Boylan grabbed defendant's wrists and squeezed the handcuffs tighter, which caused defendant intense pain. Defendant begged him to loosen the cuffs, but Boylan refused and said that things would get much worse if defendant did not cooperate. Boylan also told defendant that he would go home if he just cooperated. Thereafter, while Boylan drove defendant to Area Two, Boylan told him the substance of the statement defendant would write and sign. When defendant responded that he would not comply, Boylan stopped the unmarked police car in an alley, opened the back door and grabbed defendant, and struck him several times in the chest with a closed fist. Then Boylan struck the back of defendant's head several times. Boylan also placed his hands on defendant's throat and choked him until he almost lost consciousness. Boylan threatened defendant that he had better be able to say what Boylan would tell him to say when they arrived at Area Two.

¶21 Furthermore, defendant asserted that Boylan left him alone in a room at Area Two for ten minutes and then brought him to Boylan's desk and told him to sign a prewritten statement. Defendant refused, and Boylan shouted and cursed at him and returned him to the room in which

he had previously been held. Shortly thereafter, Boylan entered the room, struck defendant several times and choked him, and kept repeating, "What did I tell you in the car?" After several minutes, Boylan told defendant he would not be hit anymore and could go home if he signed the prewritten statement. Boylan said that the ASA was coming, and if defendant did not sign the prewritten statement, Boylan would beat him again and throw him in a cell with some older inmates and let them beat him. Defendant signed the prewritten, false statement due to fear of further beatings and based upon Boylan's promise that defendant could go home. Defendant asserted that he told his trial attorney at their first meeting and on many other occasions about Detective Boylan's threats and beatings during the interrogation. Defendant also told his family about the threats and beatings.

¶22 Thereafter, defendant withdrew his December 2009 affidavit and substituted his December 2010 affidavit, which contained the same information but added that he wanted to testify at the trial to refute Graham's account of the July 31, 1991 events and explain that he had signed the false, prewritten statement as a result of physical coercion by Detective Boylan during interrogation. Defendant also added that he had told trial counsel and his staff on several occasions of his desire to testify; counsel informed him on the date of trial that he would not be called as a witness because counsel did not think the judge would believe his testimony; and counsel never informed him that the decision to testify belonged to defendant alone.

¶23 In her August 2009 affidavit, Graham asserted that her trial testimony was untrue; Area Two detectives arrested her for this offense when she was only 16 years old and did not allow her mother to be present during questioning; the detectives told her that her children would be taken away if she did not say that codefendant Crittle masterminded the robbery; and she told Casanova LaMon, Jr., who had driven her to the court hearings, that she wanted to tell the truth

but the State's Attorney threatened to lock her up.

¶24 In her March 2010 affidavit, Graham asserted that she never saw defendant or codefendants Brown and Sardin handle the gun connected to the offense; at the time of the offense, the group drove to get something to eat, parked in an alley, and Brown, defendant, and Sardin exited the car; Graham did not see them enter the store; after she heard three gunshots, Brown, defendant and Sardin returned to the car and none of them had a gun or any money; Graham never saw defendant receive any money from the robbery and was not aware that he ever did; Graham was pregnant and 16 years old when Detectives Wilkins and McDermott took her to the police station and interrogated her; the police refused her mother's requests to accompany her to the station and be present during all questioning; the police told Graham that if she did not testify as she was told to by them, that they would ensure that her baby was taken away from her; and Graham was kept at the police station for two days before she was released.

¶25 In his October 2009 affidavit, Casanova LaMon, asserted that he drove Graham and his aunt, Vivian Dixon, to defendant's trial in March 1996 and heard Graham tell Dixon that the ASA in the case had threatened to charge Graham in the instant case and take away her child if she did not give false testimony in the cases against defendant, Crittle and others. LaMon also asserted that Graham told Dixon she would not adhere to the plan to give false testimony and would so inform the ASA. LaMon informed defendant about this information during a telephone call shortly after the trial.

¶26 In her October 2009 affidavit, defendant's mother, Iola Shelton asserted that she had spoken to defendant's trial counsel on several occasions prior to trial and informed him that defendant had signed the statement because the police had beaten him during interrogation and promised to release him. After the trial, counsel told her and Jeene Hersey, her daughter, that

defendant had wanted to testify but counsel did not allow him to do so because he did not think the judge would believe him. Then, counsel apologized to them. Shelton also asserted that the defense strategy had always been to establish defendant's innocence and counsel never discussed prior to trial any strategy that involved conceding defendant's guilt.

¶27 In her October 2009 affidavit, Jeene Hersey, defendant's sister, reiterated the information contained in her mother's affidavit concerning counsel's knowledge that defendant's statement was coerced and he had not been allowed to testify.

¶28 In her August 2009 affidavit, Graham's mother, Patricia Graham, asserted that, on October 29, 1991, at least four detectives, including Detective McDermott, searched her home without a warrant or permission, took her daughter to Area Two for questioning, and refused her request to accompany her daughter. Patricia Graham also asserted that when she went to the police station, no youth officer or adult was present to represent her daughter's interests during her interrogation by the four detectives.

¶29 The State moved to dismiss the supplemental petition, arguing that (1) all defendant's issues could have been raised on direct appeal, were barred by the doctrine of *res judicata*, and were forfeited; (2) defense counsel provided effective assistance because his decisions were matters of reasonable legal strategy and defendant suffered no prejudice from counsel's performance; (3) Graham's testimony was not newly discovered evidence; and (4) the affidavits attached to the postconviction petition and supplemental petition constituted hearsay.

¶30 In July 2012, the trial court granted the State's motion to dismiss. Defendant now appeals the second-stage dismissal of his petition.

¶31 II. ANALYSIS

¶32 On appeal, defendant contends that his postconviction petition should have advanced to a

stage three evidentiary hearing because he made a substantial showing that (1) his right to due process was violated by the introduction of his physically coerced confession at his trial; (2) trial counsel rendered ineffective assistance when he usurped defendant's right to testify; (3) the State's use of Graham's coerced, perjured testimony violated defendant's right to due process; and (4) trial counsel rendered ineffective assistance by failing to use available evidence to impeach Graham.

¶33 The Illinois Post-Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et seq.* (West 2010), provides a means by which a defendant may challenge his conviction for "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). A postconviction proceeding is not an appeal of the defendant's underlying judgment but, rather, is a collateral attack on the judgment. *People v. Evans*, 186 Ill. 2d 83, 89 (1999). "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶34 Except in cases where the death penalty has been imposed, proceedings under the Act are divided into three distinct stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the first stage, the trial court must examine the petition independently and summarily dismiss it if it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2010); *Gaultney*, 174 Ill. 2d at 418. If not summarily dismissed, the petition proceeds to the second stage, at which an indigent

defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. 725 ILCS 5/122–4, 122–5 (West 2010); *Gaultney,* 174 Ill. 2d at 418. When the State seeks dismissal of a postconviction petition instead of filing an answer, its motion to dismiss assumes the truth of the allegations to which it is directed and questions only their legal sufficiency. *People v. Miller*, 203 Ill. 2d 433, 437 (2002). At the second stage, the petition may be dismissed "when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005). The court's focus during second-stage review is the legal sufficiency of the petition, and the court may not engage in any fact-finding or credibility determinations, but must take as true all well-pleaded facts. *People v. Domagala*, 2013 IL 113688, ¶ 35. A postconviction petitioner is not entitled to an evidentiary hearing as a matter of right; rather, to warrant an evidentiary hearing, the allegations in the petition must be supported by the record or by accompanying affidavits. *Coleman*, 183 Ill. 2d at 381. Nonspecific and nonfactual assertions that merely amount to conclusions are not sufficient to warrant a hearing under the Act. *Id*. In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits that are not positively rebutted by the trial record are to be taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition that is not dismissed at the first or second stage advances to the third stage, at which an evidentiary hearing is held. See 725 ILCS 5/122-6 (West 2010); *Gaultney*, 174 Ill. 2d at 418. Dismissal of a petition at the second stage, as occurred here, is reviewed *de novo. People v. Whitfield*, 217 Ill. 2d 177, 182 (2005).

¶35 A. Reasonable Assistance of Counsel and a Physically Coerced Confession

¶36 Defendant argues for the first time on appeal that the circuit court erroneously dismissed his postconviction petition because his right to due process was violated by the introduction of an alleged physically coerced confession and defendant was denied reasonable assistance of counsel when postconviction counsel failed to raise this issue as a freestanding due process claim in his supplemental petition. The first time defendant raised the allegation that his 1991 confession was physically coerced was in his December 2009 affidavit, which was attached to the supplemented petition filed by postconviction counsel. Defendant cites *Jackson v. Denno*, 378 U.S. 368, 376-77 (1994), for the proposition that it is "axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession [citation], and even though there is ample evidence aside from the confession to support the conviction."

¶37 We conclude, however, that this issue has been procedurally defaulted. "The principle is well established that a defendant waives a post-conviction issue if the issue is not raised in the original or amended post-conviction petition." *People v. Barrow*, 195 Ill. 2d 506, 538 (2001); see 725 ILCS 5/122-3 (West 2010) ("[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived").

¶38 The issue presented to the circuit court was that trial counsel rendered ineffective assistance when he did not allow defendant to testify about the police beating and threatening him during the interrogation that resulted in his handwritten statement. At the second-stage proceeding, the State argued, *inter alia*, that the court should dismiss this issue because defendant failed to overcome the presumption that the challenged conduct was sound trial strategy under the circumstances. Specifically, the State argued that the defense never

challenged the admission of defendant's statement but, rather, used the statement to support the defense theory that defendant was not accountable for the armed robbery and murders because his statement showed that he did not aid, abet, encourage or facilitate the crime planned by Crittle, Brown and Sardin, who—according to defendant—complained that defendant failed to help them in the store. The State argued that defendant's version of the events in his handwritten statement clearly attempted to remove himself as an active participant in the commission of the crimes, and the admission of the statement through the testimony of Detective Boylan allowed defendant to submit into evidence his version of the events without being subject to cross-examination.

¶39 The circuit court agreed with the State and ruled that defendant failed to make a substantial showing that he was denied effective assistance of trial counsel based on counsel's alleged conduct of not allowing defendant to testify about being beaten and coerced by a detective into giving a statement. Instead of challenging that ruling, defendant now argues on appeal that postconviction counsel should have raised the physically coerced confession issue as a freestanding due process claim in the supplemental petition instead of couching the issue in a claim of ineffective assistance of counsel.

¶40 We disagree. The right to postconviction counsel is a matter of legislative grace, and a postconviction petitioner is only entitled to a reasonable level of assistance. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) imposes specific duties on postconviction counsel to ensure that counsel provides that reasonable level of assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Rule 651(c) requires that postconviction counsel consult with the defendant to ascertain his contentions of the deprivation of constitutional rights, examine the record of the proceedings at trial, and make any

amendments to the defendant's *pro se* petition that are necessary for an adequate presentation of his contentions.

¶41 Compliance with Rule 651(c) may be shown by the filing of a certificate representing that counsel has fulfilled his duties. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007). The filing of the certificate gives rise to the presumption that the defendant received the required representation during second-stage proceedings. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010). However, this presumption may be rebutted by the record. *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007).

¶42 Here, postconviction counsel filed a Rule 651(c) certificate on September 20, 2010, thereby creating a presumption that the defendant received the representation required by the rule at this stage of proceedings. Furthermore, postconviction counsel is not required to amend a defendant's *pro se* petition (*People v. Turner*, 187 Ill. 2d 406, 412 (1999)), but, rather, is only required to investigate and present the defendant's claims (*Pendleton*, 223 Ill. 2d at 475). Although counsel may raise additional issues if he chooses, counsel is not required to do so. *Id.* at 476. Moreover, counsel is not required to advance frivolous or spurious claims. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Counsel's decision not to amend a defendant's *pro se* petition has been held not to constitute a deprivation of adequate representation where his claim lacks a sufficient factual basis. *People v. Johnson*, 17 Ill. App. 3d 277, 279 (1974).

¶43 While we acknowledge that the court may not engage in any fact-finding or credibility determinations during the second stage of postconviction proceedings, we do not believe that we are required to assess the reasonableness of postconviction counsel's assistance in a vacuum that ignores defendant's failure to exercise his right to timely object to the use of his alleged involuntary confession and to have a fair hearing and a reliable determination on the issue of

voluntariness. See *Jackson*, 378 U.S. at 376-77 (emphasizing that the defendant's right to object to the use of a confession and have a fair hearing and reliable determination on the issue of voluntariness is as equally clear as his due process right protecting him from a conviction based on an involuntary confession). The record indicates that Detective Boylan testified concerning the voluntary nature of defendant's confession, the procedures taken by ASA Murphy to memorialize defendant's verbal statement in a handwritten statement, and defendant's acknowledgment that he was treated well by the police and ASA and was not made any promises in return for his statement nor threatened in any way. In addition, trial counsel neither moved to suppress defendant's statement as involuntary nor challenged the voluntariness of the statement during the 1996 trial. Moreover, defendant's original *pro se* petition and affidavit did not include any allegations that the police beat and threatened him during his interrogation. The facts that defendant alleges to support his coerced confession claim in his amended petition are so detailed and shocking that any reasonable person would have thought to include such facts in the original *pro se* petition, particularly here where defendant was already alleging that the police and ASA had coerced Graham's statement. Based on the record and defendant's failure to raise the allegation of his physically coerced confession until his second affidavit—dated December of 2009—in support of his amended postconviction petition, we cannot conclude that defendant has rebutted the presumption of reasonable assistance from postconviction counsel. Consequently, we conclude that defendant has failed to make a substantial showing of a constitutional violation concerning this claim.

¶44 B. Effective Assistance of Counsel and Defendant's Right to Testify

¶45 Next, defendant argues the trial court erroneously dismissed his postconviction petition because trial counsel rendered constitutionally ineffective assistance of counsel by refusing to

allow defendant to testify despite defendant's repeated statements to counsel expressing his desire to testify and by failing to inform defendant that it was his decision alone as to whether to testify.

¶46 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶47 The decision whether to take the witness stand and testify on one's own behalf ultimately belongs to the defendant (*People v. Thompkins*, 161 Ill. 2d 148, 177 (1994)), but that decision should be made with advice of counsel (*People v. Brown*, 54 Ill. 2d 21, 23-24 (1973)). "Advice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests that counsel refused to allow the defendant to testify." *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009). A defendant making a postconviction claim that

trial counsel was ineffective for refusing to allow the defendant to testify must allege that he "made a 'contemporaneous assertion *** of his right to testify.' " *Id.*, quoting *Brown*, 54 Ill. 2d at 24. Further, a defendant must "show prejudice from the denial of his right to testify in order to make out a claim of ineffective assistance of counsel." *Youngblood*, 389 Ill. App. 3d at 218.

¶48 Here, defendant makes the conclusory allegation that counsel did not allow him to testify but fails to allege any facts concerning his assertion of his right to testify after counsel advised him against testifying. Defendant concedes that he and his counsel discussed defendant's option to testify because defendant asserted in his affidavit that counsel informed him on the day of trial that counsel would not be calling him as a witness because counsel thought the judge would not believe defendant's testimony. Although defendant asserts counsel refused to allow him to testify, defendant fails to allege any facts to show that, when the time came for him to testify, he told his lawyer that he wanted to do so despite counsel's advice to the contrary. According to the record, after the State rested its case and the defense's motion for a directed finding was denied, defendant remained silent when counsel informed the court that the defense rested its case. On this record it appears that defendant acquiesced in counsel's view that defendant should not testify. In the absence of a contemporaneous assertion by the defendant of his right to testify, the circuit court properly denied an evidentiary hearing.

¶49 Assuming *arguendo* that defendant has made a substantial showing that counsel's performance was deficient, defendant's petition fails to establish that he was prejudiced by counsel's advice. The defense strategy may account for defendant's acquittal of the murder of the second store clerk and imposition of a sentence that was significantly less than the sentences his codefendants received. The record supports the decision that defendant not testify as reasonable trial strategy because, as discussed above, the theory of the defense was that

defendant was not accountable for the armed robbery and murders and his version of the events, which emphasized his lack of participation, was admitted into evidence through Detective Boylan's publication of defendant's handwritten statement without exposing him to cross-examination. On cross-examination, defendant would have been impeached by the fact that he did not raise any allegations of abuse and coercion to ASA Murphy, who interviewed him at Area Two. Furthermore, defendant would have been impeached for not documenting any of the injuries he undoubtedly would have sustained based on his allegations that Detective Boylan punched defendant's head and chest, severely beat him, and choked him almost to the point of losing consciousness.

¶50 The mere fact that defendant did not testify does not demonstrate that he was prejudiced or that there was a reasonable probability that his testimony would have changed the outcome of his trial. In his petition, defendant concedes that he was at the crime scene during the offense and voluntarily surrendered to the police after a warrant was issued for his arrest. Although defendant asserts his testimony at trial would have shown that he was beaten into making an inculpatory handwritten statement, Graham's testimony corroborated the handwritten statement and placed defendant at the scene of the crime as part of a group that shared a gun and intended to rob a convenience store of beer and money.

¶51 Moreover, defendant fails to specify which allegations he would have refuted if he had testified. See *People v. Barkes*, 399 Ill. App. 3d 980, 989-90 (2010) (where the defendant did not specify which allegations he would have refuted, his assertion of prejudice from counsel's alleged usurpation of his right to testify was conclusory and properly disregarded by the postconviction court). Defendant does not indicate that, if he had been called to testify, he would have stated that he did not accompany the offenders to the convenience store, was not inside the

store at the time of the offense, did not steal beer from the store during the offense, and did not return to the car and flee the scene with the offenders. Accordingly, because defendant did not establish prejudice, we find that the circuit court properly dismissed this allegation for failure to make a substantial showing of a constitutional violation.

¶52 C. New Evidence of the State's Use of Perjured Testimony

¶53 Defendant argues the trial court erroneously dismissed his postconviction petition because he made a substantial showing that his constitutional right to due process was violated by the State's knowing use of false testimony from Melinda Graham. See *People v. Jimerson*, 166 Ill. 2d 211, 223 (1995) (the State's knowing use of perjured testimony to obtain a criminal conviction violates due process). In his amended petition, defendant contends this claim of perjury is sufficiently supported by newly discovered evidence that Graham testified falsely at the trial as a result of threats from the police and employees at the State's Attorney's office.

¶54 The newly discovered evidence consists of Graham's affidavits stating that her trial testimony was untrue; that she never actually saw defendant or codefendants Brown and Sardin hold a gun or money on the night of the offense; that Area Two detectives, including Detective Michael McDermott, threatened to take away her children if she did not incriminate codefendant Crittle or testify as she was told to by the police; and that she told LaMon en route to a court hearing that she wanted to tell the truth but the State's Attorney threatened to lock her up. Furthermore, LaMon's affidavit stated that he overheard Graham tell his aunt that the ASA threatened to charge Graham and take away her child, and that Graham was testifying falsely against her will. Defendant argues that taking the new evidence of Graham's and LaMon's affidavits as true, defendant's petition has made a substantial showing that his convictions were contrived through a deliberate deception of the court by the presentation of testimony known to

be perjured.

¶55 Newly discovered evidence must be evidence that was not available at defendant's trial and that the defendant could not have discovered sooner through diligence. *People v. Burrows*, 172 Ill. 2d 169, 180 (1996); *People v. Barrow*, 195 Ill. 2d 541 (2001). Here, the affidavits of Graham and LaMon are not newly discovered evidence because the record establishes that defendant and his counsel knew about the alleged threats and coercion prior to the bench trial. Specifically, counsel cross-examined Graham at the trial about the truthfulness of her testimony and coercion and threats from the police and State's Attorney's office to take away her child. Defendant's petition actually concedes that he and trial counsel knew at the time of the bench trial about the alleged coercion and false testimony of Graham because defendant's petition alleges, as discussed below, that trial counsel rendered ineffective assistance by failing to call available witnesses to testify about Graham's false testimony and the threats and coercion from the police and the State's Attorney's office.

¶56 The record establishes that the alleged threats against Graham were known at the time of trial, that she was available to testify at trial and did, in fact, testify, and that she was cross-examined about the very claims of coercion and threats asserted in her affidavits. Accordingly, defendant's petition fails to make a substantial showing that new evidence supports his claim that the State violated his due process rights by knowingly using perjured testimony. We conclude the circuit court properly dismissed this claim without holding an evidentiary hearing.

¶57 D. Effective Assistance of Counsel and the Use of Impeaching Evidence

¶58 Defendant argues the trial court erroneously dismissed his postconviction petition because trial counsel rendered ineffective assistance where he knew about but failed to present specific facts that would have undermined Graham's credibility. Specifically, defendant

complains that counsel failed to present evidence concerning (1) the police and ASA's threats to Graham to testify falsely or lose her baby; (2) the police interrogation of Graham in violation of the law dealing with the interrogation of juveniles; and (3) a witness, Vivian Dixon, seeing Graham in November 1995 receive cash from a State's Attorney employee shortly after codefendant Crittle was found guilty.

¶59 The scrutiny of counsel's performance must be highly deferential because of the inherent difficulties in making the evaluation, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. "Although an attorney's decision regarding whether or not to present a particular witness is generally a matter of trial strategy, counsel may be deemed ineffective for failure to present exculpatory evidence of which he or she is aware." *People v. Redmond*, 341 Ill. App. 3d 498, 516 (2003). While the cross-examination of a witness is a matter of trial strategy, the failure to use significant impeaching evidence against an important witness is deficient representation. *People v. Salgado*, 263 Ill. App. 3d 238, 247 (1994). To establish deficient performance, defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). Defendant must show that counsel's errors were so serious and his performance so deficient that he did not function as the counsel guaranteed by the sixth amendment. *Id*. at 342.

¶60 Defendant argues trial counsel should have called witnesses to impeach Graham with hearsay statements she allegedly made to defendant and codefendant Crittle, and to Vivian Dixon in a conversation overheard by Casanova LaMon. We conclude that defendant has not made a substantial showing of ineffective assistance of counsel because there is no reasonable probability that the outcome of the trial would have been different if counsel had presented the

evidence defendant refers to in this appeal. First, as discussed above, the record refutes defendant's assertion that trial counsel missed an opportunity to attack the credibility of Graham's testimony. According to the record, counsel cross-examined Graham regarding possible threats by the police and ASA. Graham, while under oath, denied that any threats or coercion was used by the police or the State's Attorney's office. Trial counsel also cross-examined Graham concerning her inability to see the offenders enter or exit the store based on where Crittle had stopped the car in the alley. Moreover, counsel obtained a concession from Graham that she did not actually see defendant receive any proceeds from the robbery.

¶61 Furthermore, there was no reason to further cross-examine Graham with the hearsay statements defendant proffers in this appeal because Graham merely corroborated defendant's own handwritten statement and established his presence at the scene. None of the affidavits submitted with the postconviction petition state that Graham told the affiants defendant was neither a participant in the crimes nor present at the scene of the crimes. In her own affidavits, Graham does not recant her trial testimony that defendant exited the car with codefendants Brown and Sardin when they arrived at the convenience store, and that she heard three gunshots before defendant and the codefendants returned to the car. The changes in Graham's testimony, according to her affidavits, were limited to whether she actually saw defendant, Brown and Sardin handle a gun in connection with this offense or receive any money from the robbery, not that defendant was not present at the convenience store and innocent of any participation in the crimes. Because the evidence from the affiants does not differ sufficiently from the evidence at trial, defendant has not shown a reasonable probability that the affiants' testimony would have changed the outcome of the trial. In addition, a witness testifying to Graham's age and the absence of her mother during questioning or the alleged fact that Graham was seen receiving

money from some unknown State employee after codefendant Crittle's hearing would not have amounted to significant impeachment of Graham. Finally, defendant fails to cite any relevant authority to show that LaMon's hearsay testimony would have been admissible at the bench trial. See *People v. Cole*, 215 Ill. App. 3d 585, 588 (1991) (an affidavit based only on hearsay is insufficient to warrant postconviction relief).

¶62 For the foregoing reasons, we affirm the trial court's second-stage dismissal of defendant's postconviction petition.

¶63 Affirmed.