SECOND DIVISION
February 3, 2015

No. 1-12-3708

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 3169
	)	
JAMES SMITH,	)	Honorable
	)	Brian Flaherty,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *HELD*: Circuit court dismissal of defendant's postconviction claim for ineffective assistance of trial counsel is reversed, where defendant made substantial showing that he was denied his right to testify, and cause is remanded for an evidentiary hearing. Dismissal of defendant's postconviction claim for ineffective assistance of appellate counsel is affirmed.

¶ 2 Defendant James Smith appeals from the dismissal of his petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2012). He contends that he is

entitled to an evidentiary hearing because he made a substantial showing that his trial counsel was ineffective by denying him his right to testify and that his appellate counsel was ineffective by failing to challenge his sentence on appeal. Additionally, defendant requests that the mittimus be corrected to reflect his sentencing credits for time served. We reverse in part, affirm in part, and remand for further proceedings consistent with this order.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with the first degree murder of Ronald Branch, who was shot to death on the evening of January 14, 2002. On the night of the shooting, Branch was driving his young two children back to the home of his estranged wife, Loletta Brown. Defendant was living at the house with Brown at that time. Brown testified that defendant told her that if Branch "comes here, I'm going to kill him." She attempted to calm down defendant, but after her attempts were unavailing, she told her daughter to pack a bag because they were leaving. Brown was standing near her car outside of her house when Branch drove his van into her driveway. She testified that defendant approached the van and fired his gun at Branch, killing him.

¶ 5 Prior to the jury trial, the circuit court had ruled that evidence of any prior threats or violence by Branch against defendant could be introduced at trial pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984). Such evidence ultimately was introduced, including evidence of a prior physical altercation between defendant and the victim which the victim had initiated. During trial, the defense pursued a theory that defendant had either a reasonable or unreasonable belief that his use of force against Branch was necessary. Defendant declined to testify in his own defense, and the trial court confirmed on the record that defendant understood that he had a right to testify and was foregoing that right. At the close of the evidence in the case, the jury was given instructions on second degree murder and self-defense.

¶ 6 Defendant was found guilty of first degree murder and was sentenced to 30 years for the murder charge and an additional 30 years as a firearm enhancement, for a total of 60 years' imprisonment. On direct appeal, this court affirmed defendant's conviction but ordered that the mittimus be corrected to reflect one count of first degree murder. *People v. Smith*, No. 1-05-1535 (March 31, 2008) (unpublished order under Supreme Court Rule 23).[1]

¶ 7 Defendant first filed his postconviction petition, *pro se*, in November 2008, alleging that his trial counsel was ineffective. The circuit court did not rule on the petition, and defendant subsequently filed a second petition in May 2009, alleging ineffective assistance of both trial and appellate counsel. Our review is limited to the claims alleged in the 2009 petition only.

¶ 8 In his postconviction petition, defendant alleges that he informed his attorney "[p]rior to trial" and "at a recess during the trial" that he wanted to testify. According to defendant, he told his attorney that he "was afraid for [his] life" at the time he shot Branch, because Branch had threatened to kill him "on numerous occasions" and "had attacked [him] on several occasions." Defendant allegedly told his attorney that Branch "had recently purchased a gun" and had informed others that "he was going to kill [defendant]." Defendant further claims that he explained to his counsel that he fired the gun because he thought that Branch "had reached beneath the drivers [*sic*] seat of his van" for his gun. Defendant maintains that his trial counsel told him that he would not be placed on the stand to testify and that "they would withdraw from the case if [he] insisted on testifying and would not return any of the fee [he] had already paid" them.

[1] Our supreme court denied defendant's petition for leave to appeal on September 24, 2008 (*People v. Smith*, 229 Ill. 2d 652 (2008)), and the United States Supreme Court denied his petition for writ of certiorari on March 30, 2009 (*Smith v. Illinois*, 129 S. Ct. 1678 (2009)).

¶ 9 Defendant's petition was advanced to the second stage of postconviction proceedings, and counsel was appointed to represent defendant. The circuit court granted the State's motion to dismiss on November 30, 2012. Defendant timely appealed, and we have jurisdiction pursuant to Illinois Supreme Court Rule 651(a). Ill. S. Ct. R. 651(a).

¶ 10 ANALYSIS

¶ 11 On appeal, defendant argues that (1) his trial counsel was ineffective by denying him his constitutional right to testify; (2) his appellate counsel was ineffective by failing to appeal his sentence; and (3) the mittimus should be corrected to reflect the proper amount of sentencing credit for his time served. We address each issue in turn.

¶ 12 A. Ineffective Assistance of Trial Counsel

¶ 13 Defendant alleges that his trial counsel denied him the right to testify and present evidence in his defense by threatening to withdraw from defendant's representation when defendant told counsel that he wanted to testify at trial. Defendant claims that had his counsel not impeded his right to testify, he would have testified about Branch's propensity for violence and would have established a basis for his belief that Branch was a threat because he was reaching for a gun when defendant encountered him in the driveway. Defendant argues that, given the fact that the jury was instructed on self-defense and the lesser mitigated offense of second degree murder, there is a reasonable probability that the outcome of his trial would have been different had he been allowed to present testimony regarding his state of mind at the time he shot Branch.

¶ 14 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*.)(West 2010)) "provides a mechanism" by which a petitioner may assert, through a collateral proceeding, that his conviction was "the result of a substantial denial" of his constitutional rights. *People v.*

Delton, 227 Ill. 2d 247, 253 (2008). Three stages of review are provided for under the Act. *People v. Domagala*, 2013 IL 113688, ¶ 32.

¶ 15 At the initial stage, the petitioner must first file a petition that "clearly set[s] forth the respects in which the petitioner's rights were violated." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). The circuit court must then determine if the petition is frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If so, the court may dismiss the petition at the first stage without further proceedings.

¶ 16 In the second stage, "the circuit court must determine whether the petition and any accompanying documentation make a 'substantial showing of a constitutional violation.' " *Domagala*, 2013 IL 113688, ¶ 33 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). At this stage, "all well-pleaded facts that are not positively rebutted by the trial record are *** taken as true[.]" *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Dismissal is warranted only if the allegations in the petition, when "liberally construed in light of the trial record," cannot support such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our supreme court has provided some guidance as to what constitutes a "substantial showing" of a violation:

> "The second stage of postconviction review tests the legal sufficiency of the petition. Unless the petitioner's allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or 'show' a constitutional violation. In other words, the 'substantial showing' of a constitutional violation that must be made at the second stage (citation omitted) is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief."

(Emphasis in original.) *Domagala*, 2013 IL 113688, ¶ 35.

¶ 17 Because the threshold at the second stage is whether the petition is legally sufficient, "[t]he inquiry into whether a post-conviction petition contains sufficient allegations of constitutional deprivations does not require the circuit court to engage in any fact-finding or credibility determinations." *Coleman*, 183 Ill. 2d at 385. Therefore, our review of the dismissal of a postconviction petition at the second stage is *de novo*. *Id.* at 387-89.

¶ 18 Defendant asserts that his constitutional right to effective assistance of counsel (U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8) was violated when his trial counsel denied him the right to testify in his own defense. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Shatner*, 174 Ill. 2d 133, 144 (1996) (applying *Strickland*). Namely, a defendant must establish (1) "that counsel's performance was deficient"; and (2) that this "deficient performance prejudiced the defense," such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687; *Shatner*, 174 Ill. 2d at 144. In performing this inquiry, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. Indeed, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* In other words, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" *Id.* Counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id*. at 690.

¶ 19 Here, defendant maintains that his trial counsel's representation was deficient because it deprived him of his right to testify. "The decision whether to testify on one's own behalf belongs

to the defendant." *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2d Dist. 2009). Such a decision "should be made with the advice of counsel," but "[a]dvice 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." *Id.* In addition, 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." *Id.* at 218.[2]

¶ 20 In this case, defendant alleges that his attorneys told him that "they would not put [him] on the stand to testify under any circumstances and that they would withdraw from the case if [he] insisted on testifying and would not return any of the fee [he] had already paid" them. According to defendant, he told his trial counsel that he was afraid of Branch when he shot him. He also alleges that he was prepared to testify that he and Branch had a prior history of conflict, and that based on Branch's previous threats and recent purchase of a gun, defendant "was afraid for [his] life" when he shot Branch, because he "thought [Branch] was reaching for his gun" when he "reached beneath the drivers [*sic*] seat of his van."

¶ 21 Following the conclusion of the State's and defense respective cases, the jury was given instructions on second degree murder and self-defense, and was required, therefore, to determine whether defendant had either a reasonable or unreasonable belief that his use of force against Branch was necessary. Specifically, the jury was instructed that a defendant is guilty of second degree murder, as opposed to first degree murder, "if at the time of the killing the defendant believes that circumstances exist which would justify the deadly force he uses, but his belief that

[2] Defendant maintains that "prejudice can be shown by demonstrating the denial of the right to testify alone, without inquiring further into the substance of the un-presented testimony." While we acknowledge that there is some authority supporting this position, we decline to adopt it here because it is inconsistent with this court's prior opinions, including *Youngblood*. There, this court concluded that the denial of a defendant's right to testify must be prejudicial to support an ineffective assistance of counsel claim. 389 Ill. App 3d at 218; see also *People v. Barkes*, 399 Ill. App. 3d 980 (2010) (recognizing that defendant must show prejudice from the denial of his right to testify to satisfy the *Strickland* test).

such circumstances exist is unreasonable." As to self-defense, the jury was instructed that a defendant "is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself."

¶ 22 Accepting the allegations in defendant's petition as true and construing them liberally for purposes of a second stage proceeding, we find that the petition supports a substantial showing that he was denied effective assistance of counsel at trial. In reaching this conclusion, we are persuaded by the argument that evidence of defendant's purported perception of a physical threat from the victim would have been relevant to the jury's determination of whether defendant acted in self-defense, or whether defendant's actions amounted to the lesser mitigated offense of second degree murder. Moreover, evidence of defendant's subjective belief at the time he encountered and shot Branch—regardless of whether a jury found it to be objectively reasonable—could only have been elicited through defendant's own testimony. Brown's testimony that defendant said he would kill Branch if the latter showed up at the house does not foreclose the possibility that defendant perceived Branch as a threat, particularly when viewed against the evidence at trial that revealed a prior history of violent confrontations between the two men. As such, there is a reasonable probability that the jury would have reached a different verdict had it considered testimony by defendant regarding his subjective state of mind and belief as to the existence of a threat—regardless of whether it was objectively reasonable—at the time he shot Branch. For these reasons, we find that defendant has sufficiently alleged facts to avoid a second stage dismissal of his postconviction claim of ineffective assistance of trial counsel. Our finding today does not suggest, however, that defendant's allegations regarding his perception of a threat would outweigh any evidence challenging the credibility or reasonableness of his alleged

perception. We simply conclude that defendant's petition—which contain well-pled allegations that must be taken as true, is legally sufficient and establishes a substantial showing of a constitutional violation based on ineffective assistance of counsel. Therefore, a third stage evidentiary hearing is warranted.

¶ 23 The State argues that defendant failed to contemporaneously assert that he wanted to testify during the presentation of his case, and cites to *People v. Youngblood* as support. Defendant has alleged in his petition, however, that he did inform his trial counsel of his desire to testify during the trial. Furthermore, this court explained, in *Youngblood*, that where a defendant asserts the denial of his right to testify in a postconviction petition, as opposed to a direct appeal claiming a general violation of the defendant's right to testify, the defendant need only "inform his attorney, rather than the trial court, of his desire to testify." *Youngblood*, 389 Ill. App. 3d at 218 (citing *People v. Brown*, 54 Ill. 2d 21, 24 (1973)). In other words, where defendant seeks relief in a postconviction petition, the threshold inquiry is not what he told the trial court, but what he told his trial counsel regarding his wish to testify. In this case, defendant alleged in his petition that he "expressed [his] wish to testify" to his trial counsel both "[p]rior to trial" and "again at a recess during the trial." Defendant has alleged that he made the requisite contemporaneous assertion to his attorney of his right to testify.

¶ 24 The State next asserts that the record "affirmatively rebuts defendant's claim" because he told the trial court he did not want to testify. We disagree.

¶ 25 During the trial, the court confirmed on the record the defendant was waiving his right to testify in his own defense:

> "The Court: And your client, Mr. Smith, is not testifying?
>
> [Defense Counsel]: That's correct your honor.

The Court: I must advise him.

[Defense Counsel]: Yes, your honor.

The Court: Mr. Smith, you understand you have a constitutional right to testify, absolute right to testify in your behalf. Understand that, sir?

[Defendant]: Yes, sir.

The Court: You also have the absolute right not to testify and rely on the presumption of innocence. Do you understand that, sir?

[Defendant]: Yes.

The Court: Have you discussed your case with your lawyer?

[Defendant]: Yes, I have.

The Court: Do you desire to testify rely [*sic*] on the presumption of innocence or not testify?

[Defendant]: Correct.

The Court: Which one? Do you want to testify or not testify?

[Defendant]: No, I don't want to testify.

The Court: And you've discussed this matter with your lawyer?

[Defendant]: Yes."

¶ 26 But contrary to the State's position, these statements to the court do not positively rebut defendant's allegations; namely, they do not address either the off-the-record conversations with his counsel or whether defendant was coerced into not testifying. Accordingly, at this stage we must accept as true the well-pled allegations in defendant's petition regarding his communications with his trial attorneys, during trial, as to his desire to testify.

¶ 27 The State additionally contends that, because his trial counsel took the case on a *pro bono* basis, the record contradicts defendant's allegation that his counsel threatened to not return the fee defendant had paid for representation. But *pro bono* representation is not necessarily limited to free legal services. See *Black's Law Dictionary* 1240-41 (8th ed. 2004) ("pro bono" includes "legal services 'for the public good,' provided at no cost or a reduced fee" (quoting Deborah L. Rhode & Geoffrey C. Hazard, *Professional Responsibility* 162 (2002))). The State has not identified any evidence in the record regarding defendant's financial arrangement with his trial counsel. Absent any evidence that defendant's trial counsel charged no fees or costs to defendant during its representation, we cannot conclude at this stage that his allegations are positively rebutted by the record.

¶ 28 Finally, the State maintains that defendant has not satisfied the prejudice prong of the *Strickland* test because his "narrative is rebutted by the record" and his "account that he was in fear of the victim would not have made much of a difference in this case." We disagree. Defendant's proposed testimony addressed his subjective belief that the use of force was necessary—evidence relevant to the second degree murder and self-defense instructions given to the jury during trial. See *People v. Jeffries*, 164 Ill. 2d 104, 127 n.2 (1995) ("A self-defense and a voluntary manslaughter (now second degree murder) instruction should be given when any evidence is presented showing the defendant's subjective belief that the use of force was necessary."). Indeed, during closing arguments, the prosecutor emphasized the lack of testimony on defendant's subjective belief that the use of force was necessary, stating: "Did you hear any testimony from anyone that he was afraid on that day, that he feared for his life? No." And in rebuttal, the prosecutor again highlighted the lack of evidence on defendant's state of mind:

> "But I don't think I heard one witness testify that the defendant was scared. Did you? *** Did anyone who testified say he was scared? You heard what he said right after the shooting to the police, 'I am tired of this shit.' Not 'I am scared of him.' That's the evidence that you have of what his intent was, besides Mrs. Brown telling you for the couple of hours that he was working himself up prior to the van arriving."

¶ 29 Whether defendant's testimony as to his subjective belief "is contradicted by" other evidence presented at trial "is a matter of resolving evidentiary conflicts, which is inappropriate at this stage of proceedings." *Domagala*, 2013 IL 113688, ¶ 46. As our supreme court has explained, the circuit court is not required "to engage in any fact-finding or credibility determinations[]" during the second stage of a postconviction proceeding. *Coleman*, 183 Ill.2d at 385. Instead, "the Act contemplates that such determinations will be made at the evidentiary stage, not the dismissal stage, of the litigation." *Id.* Consequently, the circuit court should have reserved its resolution of the conflicting evidence presented by defendant and the State in this case until it held a third stage evidentiary hearing.

¶ 30 We further reject the State's other argument concerning the lack of corroborating affidavits. In a footnote and without citation to any authority, the State maintains that defendant "should have presented an affidavit from his attorney or some other person" who could have supported defendant's claim that his "will to testify at trial was overborne." As an initial matter, the State has forfeited this argument based on its failure to cite to any legal authority under Illinois Supreme Court Rule 341(h)(7). Ill. S. Ct. R. 341(h)(7). Notwithstanding this forfeiture, the State's argument lacks merit. In *People v. Hall*, our supreme court explained that where, as here, the alleged facts are "sufficient to infer that the only affidavit the defendant could have

furnished, other than his own sworn statement, was that of his attorney," a defendant's "failure to attach independent corroborating documentation or explain its absence may *** be excused." 217 Ill. 2d 324, 333 (2005). In the case at bar, the threat to withdraw from representation if defendant insisted on testifying at trial was purportedly made by defendant's counsel off the record and in private consultation with defendant. As the supreme court held in *People v. Williams*, where a postconviction petition involves claims alleging ineffective assistance of counsel based on out-of court conversations between the defendant and his counsel, the defendant need not obtain a corroborating affidavit from his counsel because "the difficulty or impossibility of obtaining such an affidavit is self-apparent." 47 Ill. 2d 1, 4 (1970). Consequently, we disagree with the State that defendant was required to provide additional affidavits to support this claim.

¶ 31 Accordingly, we reverse the circuit court's judgment with respect to defendant's claim of ineffective assistance of trial counsel and remand this matter for an evidentiary hearing.

¶ 32 Defendant additionally asks that we assign this case to a different judge on remand, arguing that the court's ruling on his postconviction petition indicates that it has prejudged the merits of defendant's claim. We disagree. In general, a defendant is not entitled to a substitute judge during postconviction proceedings "unless it is shown that the defendant would be substantially prejudiced." *People v. Reyes*, 369 Ill. App. 3d 1, 25 (1st Dist. 2006) (quoting *People v. Hall*, 157 Ill. 2d 324, 331 (1993)). Such prejudice may be shown by demonstrating the court's " 'animosity, hostility, ill will, or distrust,' " (*id.* (quoting *People v. Vance*, 76 Ill. 2d 171, 181 (1979))), or " 'prejudice, predilections or arbitrariness,' " (*id.* (quoting *People v. McAndrew*, 96 Ill. App. 2d 441, 452 (1968))). We find none of these factors present in the record and

disagree with defendant that he will be "substantially prejudiced" by allowing the same judge to address this claim on remand. Accordingly, we deny his request for a substitute judge.

¶ 33 B. Defendant's Sentence

¶ 34 Defendant next argues that he made a substantial showing that his appellate counsel was ineffective for not challenging his 60-year sentence for first degree murder. According to defendant, during sentencing, the trial court improperly considered a factor inherent in the offense in aggravation and failed to take into account certain mitigating evidence. His appellate counsel, he maintains, should have raised these issues on appeal. Defendant accordingly requests that we either reverse the dismissal of his postconviction petition and reduce his sentence to the minimum allowed by law or, alternatively, remand for an evidentiary hearing. We are not persuaded.

¶ 35 We review allegations that appellate counsel was ineffective "under the same standard that governs the performance of trial counsel," discussed above. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). A defendant, therefore, "must show that the failure to raise [an] issue was objectively unreasonable and that the decision prejudiced the defendant." *People v. Easley*, 192 Ill. 2d 307, 328-29 (2000). Appellate counsel need not "brief every conceivable issue on appeal," nor is it "incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit unless counsel's appraisal of the merits is patently wrong." *Id.* at 329.

¶ 36 With respect to the underlying issue of whether defendant's sentence was improper, we review the trial court's imposition of a sentence for an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). The trial court abuses its discretion if "the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id.* (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 37 "The trial court has broad discretionary power in imposing a sentence, and its sentencing decisions are entitled to great deference," (*id.* at 212), because it " 'has a far better opportunity to consider' " the relevant sentencing factors, including " 'the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age,' " (*id.* (quoting *People v. Fern*, 189 Ill. 2d 48, 53 (1999); *People v. Stacey*, 193 Ill. 2d 203, 209 (2000))).

¶ 38 In explaining its sentence, "[t]he trial court has no obligation to recite and assign value to each factor presented at a sentencing hearing." *People v. Hill*, 408 Ill. App. 3d 23, 30 (1st Dist. 2011). And "[w]here mitigating evidence is presented to the trial court during the sentencing hearing, we may presume that the trial court considered it, absent some indication, other than the sentence itself, to the contrary." *Id.*

¶ 39 Here, defendant was sentenced to a total of 60 years' imprisonment: 30 years for the underlying offense and an additional 30 years for personally discharging a firearm that caused the victim's death. Defendant does not dispute that this sentence falls within the statutory guidelines. Under 730 ILCS 5/5-8-1(a) (West 2004), the sentence for a murder conviction "shall be not less than 20 years and not more than 60[.]" Because defendant was found to have personally discharged a firearm which caused the victim's death, he also was subject to a consecutive term of 25 years to natural life under 730 ILCS 5/5-8-1(d)(iii) (West 2004). Thus, defendant's sentence is only ten years longer than the statutory minimum for the murder conviction and only five years longer than the statutory minimum for the firearm enhancement.

¶ 40 Defendant first argues that his appellate counsel should have appealed his sentence because, in discussing the factors in aggravation, the trial court considered a factor inherent in the offense of first degree murder; namely, Branch's death. As support, defendant cites to the trial court's statement during sentencing that "[t]he Court in considering a sentence is to consider

whether or not the accused caused or threatened harm. Yes. First of all, murder, first degree, that comes with the offense itself. This harm, threatened." We disagree that his counsel was ineffective for declining to raise this issue on appeal.

¶ 41 Our supreme court has instructed against relying on a factor inherent in the underlying offense as an aggravating factor during sentencing. In *People v. Saldivar*, 113 Ill. 2d 256 (1986), for example, it held that the trial court abused its discretion when, in considering the factors in aggravation, it "focused primarily on the end result of the defendant's conduct, *i.e.*, the death of the victim," which was "implicit in the offense of voluntary manslaughter." *Id.* at 272; see also *People v. Conover*, 84 Ill. 2d 400, 404 (1981) (holding that "a factor implicit in most burglaries and every theft should not be used as an aggravated factor in sentencing"). The court's ruling in *Saldivar*, however, does not require the trial court to refrain from considering the circumstances of the offense. To the contrary, in *Saldivar*, the supreme court recognized that a trial court's aggravation assessment could consider "the degree or gravity of the defendant's conduct, *i.e.*, the force employed and the physical manner in which the victim's death was brought about or the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant." 113 Ill. 2d at 271-72. As the court explained,

¶ 42 "While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted*." (Emphases in original.) *Id.* at 269.

¶ 43 In this case, the trial court's statements during sentencing looked beyond the offense itself and addressed the events leading up to the shooting as well as the circumstances of Branch's death, including that defendant "ambushed" Branch and shot him in front of his children:

¶ 44 "All right. The Court has considered the evidence brought out in the case. The Court has considered the Victim Impact Statement. The Court has considered the Presentence Investigation.

This was a tragic set of events that resulted in the death of Mr. Branch.

There is no doubt that up until the day of January 14th, 2002, Mr. Smith had led a primarily crime free life, a very respectable life.

On the other hand, the Court has—Mr. Branch is a well loved person by his family, but the tragic events that led up to January 14th, 2002, could have been avoided, first of all, and I'm not considering anything that happened after we set our bond, the use of cocaine or anything like that, but I am considering what happened on the day in question.

Mr. Smith stole the victim's, Mr. Branch's wife, he stole Mr. Branch's family, he subsequently stole Mr. Branch's life.

On the day in question he brewed his anger. There may have been a lot of matters in mitigation affected [*sic*] his anger that preceded that day, but none of those events happened on that day for the trier of fact to consider a lesser included offenses [*sic*].

> He brewed in anger. Because he brewed in anger, he ambushed Mr. Branch on that day, ambushed Mr. Branch right in front of his children and killed him right in front of his children.
>
> The Court in considering a sentence is to consider whether or not the accused caused or threatened harm. Yes. First of all, murder, first degree, that comes with the offense itself. This harm, threatened.
>
> A sentence does need to be imposed to deter others from committing the crime.
>
> This Court has considered his limited criminal history.
>
> Accordingly, the defendant will be sentenced to a period of 30 plus 30, a total of 60 years."

¶ 45 Viewing these statements under the relevant legal standards, including the deferential standard of appellate review of the trial court's sentence, we cannot say that appellate counsel's assessment of the merits of this argument was "patently wrong." *Easley*, 192 Ill. 2d at 329. Counsel reasonably could have concluded that here, unlike *Saldivar*, the court's statements did not "focus[] primarily on the end result of the defendant's conduct," (*Saldivar*, 113 Ill. 2d at 272), but rather permissibly considered the "degree or gravity of the defendant's conduct," including "the nature and circumstances of the offense," (*id.* at 271-72). Again, appellate counsel is not required to address "every conceivable" issue on appeal, and the strategic decision to forego this issue and to instead focus the appeal on other arguments was not "objectively unreasonable." *Easley*, 192 Ill. 2d at 329-29.

¶ 46 Defendant further maintains that his appellate counsel should have challenged the trial court's failure to properly consider the following mitigating factors: (1) defendant was acting

under strong provocation or "substantial grounds" excused his conduct"; (2) his lack of criminal history; (3) his elderly state and health problems; (4) his military service; (5) his service to the country's schools; and (6) the unlikelihood that his conduct would reoccur. Again, we disagree.

¶ 47 The record reveals that these potentially mitigating factors were presented to the trial court and that the court expressly took some of them into account in determining defendant's sentence. Specifically, at the sentencing hearing, defendant's trial counsel argued to the court that "aside from one misdemeanor in 1991, for which he was sentenced to supervision," defendant had "no prior criminal record. There are no felony convictions. He is 60 years old and he has essentially no criminal record." Counsel also emphasized that defendant "had been employed throughout his adulthood" and "served in the military service for four years,*** where he received honors and medals and was honorably discharged, recognizing his service to his country." In addition, counsel highlighted defendant's health problems, explaining that they "have been very well documented" and were "real," "serious," and "ongoing." Finally, defendant's trial counsel asked the trial court to consider "the circumstances that led up to the death of Ronald Branch" in imposing its sentence. And in rendering its sentence, the trial court acknowledged that it considered the presentence investigation; recognized that defendant previously "had led a primarily crime free life, a very respectable life"; and noted that "[t]here may have been a lot of matters in mitigation" which "affected his anger that preceded that day."

¶ 48 Because the "[t]he trial court has no obligation to recite and assign value to each factor presented at a sentencing hearing," (*Hill*, 408 Ill. App. 3d at 30), and it is "presume[ed]" to have considered the presented mitigating evidence "absent some indication, other than the sentence itself, to the contrary," (*id.*), defendant's appellate counsel was not objectively unreasonable in declining to challenge the trial court's sentence based on its alleged failure to properly consider

certain mitigating evidence. For these reasons, defendant has not raised a substantial showing that his appellate counsel was ineffective for failing to challenge his sentence on direct appeal.

¶ 49 C. Mittimus Correction

¶ 50 Lastly, defendant argues—and the State concedes—that the mittimus needs to be corrected to accurately reflect defendant's credit for time served while in pre-sentence custody. The parties, however, disagree on the amount of defendant's credit. Because we are remanding the cause for an evidentiary hearing on defendant's ineffective assistance of trial counsel claim, we decline to address this issue at this time.

¶ 51 CONCLUSION

¶ 52 For the foregoing reasons, we reverse the circuit court's dismissal of defendant's postconviction petition with respect to his ineffective assistance of trial counsel claim, and remand the cause for an evidentiary hearing. We affirm the circuit court's dismissal of defendant's ineffective assistance of appellate counsel claim. .

¶ 53 Affirmed in part and reversed in part. Cause remanded.