2016 IL App (1st) 131626-U

FIFTH DIVISION
May 13, 2016

No. 1-13-1626

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. GERARDO GONZALEZ, Petitioner-Appellant.	)	Appeal from the Circuit Court of Cook County No. 01 CR 29139 (02) Honorable Kenneth J. Wadas, Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's second-stage dismissal of defendant's amended postconviction petition is affirmed where: (1) defendant's evidence in support of his claim of actual innocence failed to be of such a conclusive character as would probably change the result on retrial; (2) no *Brady* violation occurred; (3) defendant was not prejudiced by trial counsel's failure to obtain the 911 flash messages; (4) the circuit court did not abuse its discretion in denying defendant's motion for discovery; and (5) defendant forfeited the argument that the trial court erred when it did not expressly sentence him to a mandatory supervised release term at his sentencing hearing.

¶ 2 Defendant Gerardo Gonzalez appeals the second-stage dismissal of his amended petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, defendant argues that the circuit court erred in dismissing his petition without an evidentiary hearing because: (1) he presented newly discovered evidence that would change the result on retrial; (2) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it suppressed the 911 "flash messages"; (3) trial counsel was ineffective for failing to request the flash messages; (4) the circuit court erred in denying his motion for independent testing of the ballistics evidence; and (5) his right to due process was violated when the trial court did not state it was sentencing him to a mandatory supervised release term at his sentencing hearing. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In November 2001 defendant and his codefendant James Soto (Soto) were charged by indictment with, *inter alia*, attempted first degree murder, aggravated discharge of a firearm, aggravated battery with a firearm, aggravated unlawful use of a weapon based on a previous conviction, and unlawful use of a weapon by a felon. These offenses arose from an incident which occurred outside the residence of George Hernandez (Hernandez) and Miguel Flor (Flor). The evidence at trial established that on the evening of November 17, 2001, Hernandez, Flor, and Joseph Martinez (Martinez) were on the front porch of the house where Hernandez and Flor resided. Defendant, armed with a .12 gauge shotgun, and Soto, armed with a handgun, approached the porch and opened fire in the direction of the three victims. Defendant and Soto elected to be tried at simultaneous bench trials.

¶ 5 A. Pretrial Proceedings

¶ 6 The parties engaged in pretrial discovery. Prior to opening statements, however, the State

indicated it had just received new laboratory information consisting of the firearms examiner's notes. The State tendered the notes to defense counsel and all parties indicated they were prepared to proceed with the trial despite the fact that the examiner's notes were just tendered for the first time that day.

¶ 7 B. Trial Proceedings

¶ 8 The matter proceeded to a bench trial where the State presented the testimony of nine witnesses and along with several stipulations.[1]

¶ 9 1. Testimony of Joseph Martinez

¶ 10 Joseph Martinez testified that on the evening of November 17, 2001, he was visiting Hernandez and Flor at their residence on North Tripp Avenue in Chicago to watch a televised boxing match. When the fight concluded, Martinez stepped outside with Flor and Hernandez to smoke a cigarette on the front porch. Around 11:38 p.m., Martinez observed two men. One was standing across the street and the other was standing directly in front of Hernandez's residence by the fence. The individual across the street said something Martinez could not comprehend. In response, Flor said, " 'Hi.' " Five seconds later, Martinez heard a "big blast" and observed "fire balls *** coming from a gun" being discharged in front of Hernandez's residence. The individual across the street also began shooting at them. Martinez threw himself on the floor and tried to get away. Thereafter, he observed Hernandez bleeding from his head.

¶ 11 At a lineup a few hours later, Martinez identified the shooters. Specifically, Martinez identified defendant as the individual who was on his side of the street and Soto as the individual who was across the street. Martinez further identified defendant in court as the shooter.

¶ 12 On cross-examination, Martinez testified he did not describe the shooters to the police by

[1] We note that Flor did not testify at the trial.

any item of clothing they were wearing.

¶ 13 2. Testimony of George Hernandez

¶ 14 George Hernandez testified that on November 17, 2001, at 11:30 p.m. he was standing on the front porch of his residence on North Tripp Avenue in Chicago with Flor and Martinez smoking a cigarette when a man in a dark hooded sweatshirt walking on the opposite side of the street "yell[ed] something out." Immediately thereafter shots were fired from his side of the street. Upon seeing sparks coming from a weapon, Hernandez ran inside the hallway of the house, followed by Flor and Martinez. Hernandez heard four to five gunshots. Once inside the hallway, Hernandez felt a burning sensation on the top of his head. Upon touching his head, Hernandez noticed blood on his fingers. He did not receive medical attention for the injury.

¶ 15 Hernandez further testified he did not get a good look at the face of the man across the street and testified that if he were to see him today, he would not be able to recognize him. Regarding the individual on his side of the street, Hernandez testified the person was wearing dark colored clothing, but he could not tell if it was a man or a woman.

¶ 16 On cross-examination, Hernandez testified he did not hear a shotgun blast and he could not recall any shots being fired from across the street. Hernandez further testified the individual on his side of the street was 10 to 15 feet north of his property line.

¶ 17 3. Testimony of Anna Rosario

¶ 18 Anna Rosario (Rosario)[2] testified that on November 17, 2001, she lived next door to Hernandez. That evening she was home watching a movie when she heard four or five gunshots. She looked out of a window and observed defendant and Soto walking away carrying weapons and wearing black "hoodies." They walked past her home and into her neighbor's yard. She

[2] At times in the record and briefs on appeal, Anna Rosario's name is spelled "Ana."

identified both men in a police lineup that same evening. Rosario, however, was unable to identify defendant and Soto in court as the shooters.

¶ 19 4. Testimony of Police Officer John Kurtz

¶ 20 Officer John Kurtz (Officer Kurtz) testified that he was on vehicle patrol in the area of North Tripp Avenue in Chicago with his partner, Officer Anthony Jannotta (Officer Jannotta), on November 17, 2001, when he heard multiple gunshots. Officer Kurtz drove to the area where he believed the gunshots originated from. While he was driving his police vehicle in an alley, he observed two individuals at the base of a staircase that led up to the train tracks. Both individuals were male and wearing dark clothing. One individual appeared to have a handgun. The other individual, later identified as defendant, was holding a long, dark object that Officer Kurtz believed to be a rifle.

¶ 21 Officer Kurtz observed the two men run up the staircase and onto the train tracks. He relayed a flash message over the police radio as he and his partner pursued them on foot. After running eastbound on the tracks, the two men suddenly turned southbound, went down an embankment, and through a hole in a fence. The officers followed. Shortly thereafter the individual with the handgun began running in a different direction. Officer Jannotta pursued that individual.

¶ 22 Meanwhile, Officer Kurtz pursued defendant. During the pursuit, Officer Kurtz observed defendant approach a fence, drop the object he was holding, and climb over the fence. Officer Kurtz yelled to the other responding officers who were engaged in the pursuit, to "stay with the gun." Officer Kurtz followed defendant over the fence and into a yard where he apprehended defendant. Upon observing the item defendant had dropped at the fence, Officer Kurtz recognized it to be a shotgun. A search of defendant's person revealed two live .12 gauge

shotgun rounds, which were inventoried and sent to the Illinois State Police crime lab. Officer Kurtz testified he never lost sight of defendant during the pursuit.

¶ 23 5. Testimony of Police Officer Alberto Garza

¶ 24 Officer Alberto Garza (Officer Garza) testified that on November 17, 2001, at 11:40 p.m. he was on patrol in the area of North Tripp Avenue in Chicago with his partners Officer Dave Delpilar and Officer Lou Rangel when he received a flash message from Officers Jannotta and Kurtz. Based on this flash message, Officer Garza drove to the train tracks located at 1800 North Keeler Avenue. Once he had arrived at that location, Officer Garza observed Officers Jannotta and Kurtz pursuing two men in dark clothing. One of the men was holding a chrome handgun. Officer Garza identified Soto in court as the individual holding the handgun and defendant as the other man running from the officers.

¶ 25 Officer Garza joined in the pursuit behind Officers Jannotta and Kurtz. When Soto began running away from the train tracks, Officer Garza followed him. Ultimately, Officer Garza apprehended Soto in the gangway of a residence on North Karlov Avenue and recovered a loaded chrome .45 caliber Colt handgun from Soto's person.

¶ 26 6. Testimony of Police Officer Thomas Slowinski

¶ 27 Officer Thomas Slowinski (Officer Slowinski) testified he was the evidence technician in this matter. On November 18, 2001, he was assigned to process the scene at Hernandez's residence. From the parkway between the sidewalk and the street in front of the house next door to Hernandez's he recovered and inventoried one live .12 gauge shotgun shell and two discharged .12 gauge shotgun shells. From the sidewalk in front of the house across the street from Hernandez's he recovered and inventoried two discharged .45 caliber cartridges. From inside the front hallway of Hernandez's residence, he recovered and inventoried one fired .45 caliber bullet.

Officer Slowinski estimated that the three shotgun shells were located between 75 and 100 feet from Hernandez's residence.

¶ 28 On cross-examination, Officer Slowinski testified that a fired shotgun shell, when ejected from the chamber, would be propelled two to three feet from the location where the firearm was discharged. He also clarified that he did not measure the distance between Hernandez's residence and the location where three shotgun shells were discovered.

¶ 29 7. Testimony of Detective Terence Hart

¶ 30 Detective Terence Hart (Detective Hart) testified that on November 18, 2001, at 3 a.m. he was asked to assist in a lineup that was being conducted regarding the shooting at North Tripp Avenue. Detective Hart's role in the lineup was to bring each individual into the viewing area one at a time to see if they could identify anyone. During the lineup, Martinez and Rosario identified two individuals as the shooters.

¶ 31 8. Testimony of Detective Richard Cerny

¶ 32 Detective Richard Cerny (Detective Cerny) testified he arrived at Hernandez's residence between 2 and 3 a.m. on November 18, 2001. While there, he observed numerous holes in the ceiling of the porch that were in a "blast pattern." He also observed holes in the side of the building next door, although on cross-examination he clarified that it was only one hole.

¶ 33 At 3 a.m., he conducted a lineup at the police station. Prior to the lineup, Detective Cerny was inside the lineup room and overheard defendant ask one of the other individuals in the lineup to wear defendant's black hooded sweatshirt. Defendant then took his sweatshirt off and handed it to the other individual who wore it during the lineup.

¶ 34 On cross-examination, Detective Cerny testified he did not include his observations regarding the sweatshirt switch in any report, nor did he inventory the sweatshirt. Detective

Cerny further testified that Martinez indicated to him that the person across the street with the pistol was the first person to fire. In addition, Detective Cerny testified that no gunshot residue test was performed on defendant in this case.

¶ 35 9. Testimony of Brian Parr

¶ 36 The parties stipulated that Brian Parr (Parr), a forensic scientist employed by the Illinois State Police at the Forensic Science Center, was an expert in firearm identification. Parr testified he examined the recovered .12 gauge pump-action Noble shotgun and the Colt .45 semi-automatic pistol. He further examined the two discharged .12 gauge shotgun shells, the unfired shotgun shell, the two .45 caliber cartridge cases, and the fired .45 caliber bullet recovered by Officer Slowinski. Regarding the shotgun and the shotgun shells, Parr opined that within a reasonable degree of scientific certainty the discharged shotgun shells were fired from the recovered weapon. Regarding the pistol, Parr opined that within a reasonable degree of scientific certainty that the .45 caliber cartridge casings and the recovered .45 caliber bullet were fired from the recovered handgun.

¶ 37 On cross-examination, Parr testified regarding the significance of the word "slug" written on the exterior of the unfired shotgun shell. Parr explained that a fired slug is one piece that "comes out like a bullet" and not in multiple pellets. Upon further questioning, Parr testified that he could make an assumption based on the writing on the exterior of the unfired shotgun shell that the fired shells were also "slugs," but that he could not come to a conclusive determination on that point. Parr further testified he did not make a notation if the discharged shotgun shells said "slug" on them. On recross-examination, Parr testified he did not compare the unfired shotgun shell to the discharged shotgun shells. When asked why he did not compare the shells, Parr explained, "Because there would be no reason to compare the fired and unfired shot shells."

¶ 38 10. Stipulation of Officer Robert Jackson

¶ 39 Officer Robert Jackson (Officer Jackson) testified by way of stipulation. If called as a witness, Officer Jackson would testify that on November 17, 2001, just before 11:50 p.m. he responded to a flash message from Officers Kurtz and Jannotta[3] by going to the location of 1800 North Keystone Avenue in Chicago. While there, he observed two males dressed in dark clothing leaving the train tracks as they were being chased by Officers Kurtz and Jannotta. One individual veered off to the right and was followed by Officer Jannotta. The second individual was followed by Officer Kurtz. Officer Jackson would further testify that he joined in the pursuit with Officer Kurtz. While in pursuit of the second individual, Officer Jackson observed that individual drop a long object to the ground which he later observed to be a shotgun. Officer Jackson watched as Officer Kurtz followed that individual over a chain-link fence and detained that individual. Officer Jackson then recovered the shotgun. The shotgun contained three live rounds of "shot shell ammunition" which he and his partner, Officer R. Kraak (Officer Kraak),[4] inventoried along with the ammunition obtained from Officer Kurtz and submitted them to the Illinois State Police crime lab.

¶ 40 11. Stipulation of Defendant's Prior Conviction

¶ 41 The parties further stipulated to defendant's prior conviction for delivery of a controlled substance. The State rested. Defendant moved for a directed finding, which was denied by the trial court.

¶ 42 12. Defendant's Evidence

¶ 43 Defendant elected not to testify, but presented evidence by way of stipulation. The

[3] Officer Jannotta's name is spelled "Genada" in this portion of the record. No document evidencing the stipulation is included in the record on appeal. We presume, based on context, that the court reporter phonetically spelled Officer Jannotta's name as "Genada."

[4] Officer Kraak's full name is not included in the record.

parties stipulated that Detective Cerny would have also testified that he created progress notes when he interviewed Hernandez and that he wrote that Hernandez reported, " 'Observed male Hispanic walking on opposite side of the street. Stopped and yelled something at Hernandez. Observed second male Hispanic walking on opposite side of street. Turned and fired a weapon, shooting five to six times in his direction.' " In rebuttal, however, the parties further stipulated that Detective Cerny prepared a supplemental report that indicated Hernandez observed one Hispanic male walking on the other side of the street and the other Hispanic male approached Hernandez's side of the street walking south on North Tripp Avenue. He then observed the first male Hispanic point a handgun in his direction and fire five to six rounds.

¶ 44 In addition, the parties stipulated that, if called as a witness, Officer Kraak would have testified that he interviewed Hernandez and subsequently wrote in a report that " 'Two male Hispanics approached walking southbound on opposite sides of the street. Offender one approached *** Tripp. Shouts, "What's up?" Starts firing a handgun. About the same time offender two, standing [at] approximately *** Tripp starts firing a shotgun at them.' "

¶ 45 Defendant and the State agreed to stipulate to the admissibility of the two discharged shotgun shells, the shotgun, and the live shotgun shell. The defense requested the trial judge examine them as part of the evidence. The trial court granted the defense's request.

¶ 46 13. The Verdict

¶ 47 After hearing closing arguments and considering the evidence, the trial court found defendant not guilty of one count of unlawful use of a weapon by a felon due to a lack of a valid firearm owner's identification card. The trial court, however, found defendant guilty of three counts of attempted first degree murder, two counts of aggravated discharge of a firearm, one count of aggravated battery with a firearm, one count of aggravated unlawful use of a weapon

based on a previous conviction, and two counts of unlawful use of a weapon by a felon. The trial court concurrently sentenced defendant to 25, 15, 10, 7 and 5 years in the Illinois Department of Corrections respectively on the aforementioned convictions. Defendant appealed.

¶ 48 C. Direct Appeal

¶ 49 On direct appeal, we found defendant's convictions for attempted first degree murder were proven by the State beyond a reasonable doubt. We further concluded that defendant's convictions for aggravated battery with a firearm and aggravated discharge of a firearm violated the one-act, one-crime rule. We vacated defendant's convictions and sentences for one count of aggravated battery with a firearm and two counts of aggravated discharge of a firearm. *People v. Gonzalez*, No. 1-02-2567 (2004) (unpublished order under Supreme Court Rule 23). Defendant did not raise the argument that he received ineffective assistance of counsel. Defendant's convictions were otherwise affirmed. See *id.*

¶ 50 D. Postconviction Proceedings

¶ 51 1. Defendant's Initial Postconviction Petition

¶ 52 On March 18, 2005, defendant filed his initial *pro se* postconviction petition. Defendant alleged actual innocence and, for the first time, ineffective assistance of trial and appellate counsel. Attached to his petition was his own affidavit, in which he averred that he was speaking to a woman named Vanessa at her home at 11:30 p.m. on November 17, 2001. He continued speaking with her until 11:50 p.m. when he left her house by way of the alley located behind her house where he was apprehended. According to defendant, he was never in possession of a shotgun.

¶ 53 2. Defendant's Motion for Independent Forensic Testing

¶ 54 On March 13, 2009, defendant, through counsel, filed a motion for independent forensic

testing. In the motion, defendant requested the opportunity to have the forensic and ballistic evidence independently tested. Defendant acknowledged that, "Even though the evidence doesn't qualify for testing under 725 ILCS 5/116-3 (DNA), this Honorable Court should err on the side of caution and allow the testing in order to be 'absolutely certain, which is what we are trying to do' in order to avoid erroneous convictions." Defendant further asserted that, "In order to evaluate this potential claim of error, an independent review of the forensic and ballistic evidence introduced at trial is necessary." Such evidence could help defendant support his claim for actual innocence as well as his claim that trial counsel was ineffective for failing to call an expert to testify regarding the shotgun evidence.

¶ 55 Attached to defendant's motion was a January 20, 2009, "preliminary report" from an independent ballistics examiner. The preliminary report, prepared by Bryant Cayton a criminalist employed by Access Forensic Laboratory, recommended that the ballistics evidence be examined in order to evaluate the reported identification of the breech face marks by the State's expert.

¶ 56 The State opposed the motion, arguing that defendant did not demonstrate good cause for the discovery request. The State pointed out that defendant's request was merely to obtain evidence to substantiate his postconviction claim and that such a request was too speculative. According to the State, defendant's request amounted to a "fishing expedition."

¶ 57 After hearing the arguments of the parties, the circuit court denied defendant's motion for independent testing stating, "I don't believe that good cause is shown to go on this fishing expedition for evidence testing, scientific evidence testing, in this case to relitigate in my view factual disputes that were already litigated at trial."

¶ 58 3. Defendant's Amended Postconviction Petition

¶ 59 On October 14, 2011, defendant filed his amended postconviction petition alleging ineffective assistance of trial and appellate counsel and actual innocence. He further asserted the circuit court erred in denying his motion for independent testing.

¶ 60 Defendant asserted that trial counsel was ineffective for: (1) failing to challenge the ballistics evidence; (2) stipulating to the expertise of Parr; (3) failing to move for a mistrial due to the fact Detective Cerny's testimony that defendant exchanged a hooded sweatshirt with another individual in the lineup was not disclosed by the State prior to trial; (4) failing to request the flash messages; and (5) failing to interview an alibi witness. Defendant further maintained appellate counsel was ineffective for: (1) not raising a claim of ineffective assistance of trial counsel; (2) failure to raise the discovery issues (*Brady* violations); (3) failing to obtain an independent forensic examination of the ballistics evidence; and (4) failing to challenge defendant's convictions for unlawful use of a weapon by a felon.

¶ 61 In support of his claims, defendant attached three affidavits to his petition from: (1) defendant; (2) Soto; and (3) Edwin Valentin (Valentin). Defendant attested that on the night of November 17, 2001, he was "attempting to go out drinking with a girl who lived on the street of Karlov," but she did not want to go out with him. After leaving her home, he entered the alley between "Karlov and Keystone" where he was apprehended by police. Defendant denied exchanging clothing with anyone in the lineup and denied wearing any dark clothing or having a hooded sweatshirt. Defendant attested he informed his trial counsel that he had been "previously framed by the same police station for a murder." Defendant also stated he informed trial counsel that he was speaking with a woman while the incident occurred and that he was innocent and the weapon should be tested for fingerprints.

¶ 62 Soto attested to the following. He knows defendant, but defendant was not with him the

night of November 17, 2001, except while participating in the lineup. Soto did not observe defendant wearing a hooded sweatshirt, nor did he observe defendant hand it to any member of the lineup at any time. He overheard defendant asking trial counsel to subpoena the 911 records. He also overheard defendant "mention that he had an alibi to attest that he in fact had no part in the case mentioned."

¶ 63 Valentin averred he was in the same "bullpen" in the Cook County jail waiting to go to court with defendant when he overheard defendant ask his trial counsel to obtain the 911 records, talk to witnesses, and "get finger prints off the gun." According to Valentin, defendant's counsel "kept making up excuses for not doing what Mr. Gonzales asked him to do."

¶ 64 Also attached to defendant's amended postconviction petition were the purported 911 records (or, as defendant calls them, "flash messages") from the evening of defendant's arrest. In addition, a report from Chief Criminalist John Cayton (Cayton), dated July 12, 2010, and Cayton's curriculum vitae were included with the petition. In the July 12, 2010, report, Cayton concluded that it was "not possible by reviewing the reports alone to determine whether the shots were aimed." In addition, Cayton's report stated he needed to examine the ballistics evidence in order to "evaluate the reported identification of the breech face marks by the State's expert."

¶ 65 On July 10, 2012, the State filed a motion to dismiss defendant's amended postconviction petition. After the matter was briefed and argued, the circuit court dismissed defendant's amended postconviction conviction. In dismissing the amended postconviction petition, the trial court found defendant failed to assert an actual innocence claim or a *Brady* violation. Additionally, the circuit court found all of defense counsel's decisions that were challenged by defendant to be a matter of trial strategy. Overall, the circuit court found defendant did not meet his burden and that "the claims outlined are basically speculative and conclusive and do not

trigger relief at this stage." This appeal followed.

¶ 66 II. ANALYSIS

¶ 67 On appeal, defendant argues that the circuit court erred in dismissing his amended petition without an evidentiary hearing because: (1) he presented newly discovered evidence that would change the result on retrial; (2) the State violated *Brady*, when it suppressed the flash messages; (3) trial counsel was ineffective for failing to request the flash messages; (4) the circuit court erred in denying his motion for independent testing of the ballistics evidence; and (5) his right to due process was violated when the trial court did not state it was sentencing him to a mandatory supervised release term at his sentencing hearing.

¶ 68 A. Standard of Review

¶ 69 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a remedy to criminal defendants whose federal or state constitutional rights were substantially violated in their original trial or sentencing hearing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). To be entitled to postconviction relief, the defendant must make a substantial showing of a constitutional violation at the second stage. *Id.* "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. Simpson*, 204 Ill. 2d 536, 551, 560 (2001).

¶ 70 In noncapital cases, the Act creates a three-stage procedure for relief. *People v. Hodges*,

234 Ill. 2d 1, 10 (2009). A defendant, at the first stage, need only present a limited amount of detail in the petition. *Id.* at 9. Since most petitions are drafted at this stage by *pro se* defendants, the threshold for survival is low and a defendant is only required to allege the "gist" of a constitutional claim. *Id.* If the circuit court independently determines that the petition is either "frivolous or is patently without merit" it dismisses the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10. If a petition is not summarily dismissed by the circuit court during the first stage, it advances to the second stage where counsel may be appointed to an indigent defendant and where the State is allowed to file a motion to dismiss or an answer to the petition. *Id.* at 10-11.

¶ 71 To avoid dismissal at the second stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. House*, 2015 IL App (1st) 110580, ¶ 37. At this stage of the proceedings, the circuit court takes all well-pleaded facts that are not positively rebutted by the trial record as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). "Nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act." *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the circuit court denies the State's motion to dismiss, a third-stage evidentiary hearing must follow. *People v. English*, 403 Ill. App. 3d 121, 129 (2010); 725 ILCS 5/122-6 (West 2010).

¶ 72 At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. During the evidentiary hearing, the circuit court "may receive proof by affidavits, depositions, oral testimony, or other evidence," and "may order the [defendant] brought before the court." 725 ILCS 5/122-6 (West 2010).

¶ 73 In this case, the petition advanced to the second stage and was dismissed. Accordingly, our standard of review is *de novo*. *Pendleton*, 223 Ill. 2d at 473; *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 151. *De novo* consideration means that the reviewing court performs the same analysis a trial judge would perform. *Tyler*, 2015 IL App (1st) 123470, ¶ 151.

¶ 74 B. Actual Innocence

¶ 75 With these principles in mind, we now consider defendant's claim of actual innocence based upon newly discovered evidence. As noted, defendant's culpability at trial was premised on: (1) eyewitness testimony; (2) the almost immediate identification of him as one of the shooters in a lineup by multiple witnesses; (3) the evidence of flight where defendant and codefendant were pursued by the officers near the scene of the shooting and were observed holding weapons; and (4) the ballistics evidence linking the discharged shotgun shells to the shotgun defendant was observed discarding while being pursued by the officers. In the postconviction proceeding, defendant maintained he was not present at the crime scene and denied participating in the shooting. As previously mentioned, defendant attached the affidavit of his convicted codefendant Soto in support of his contentions. The only portions of Soto's affidavit relating to defendant's actual innocence claim read as follows: "I do know [defendant] however I was not with him that night except while participating in the line up [*sic*]" and "I was present in this line up [*sic*] and did not see [defendant] wear any hooded sweat shirt [*sic*] nor give it to any member of the line up [*sic*] at any time."

¶ 76 "[I]n order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96. "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Id.*;

People v. English, 2014 IL App (1st) 102732-B. ¶ 36 ("To obtain relief under a theory of actual innocence based on 'newly discovered' evidence, the defendant must offer evidence that was not available at the original trial and that could not have been discovered sooner through diligence."). "Material means the evidence is relevant and probative of the petitioner's innocence[]" and "[n]oncumulative means the evidence adds to what the jury heard." *Coleman*, 2013 IL 113307, ¶ 96.

¶ 77 Regardless of whether defendant presented new, material, noncumulative evidence, the result is the same here because in order to succeed on a claim of actual innocence, defendant's supporting evidence must be "most importantly, of such conclusive character as would probably change the result on retrial." (Internal quotation marks omitted.) *Id.* ¶ 84 (quoting *People v. Washington*, 171 Ill. 2d 475, 489 (1996)). "We must be able to find that petitioner's new evidence is so conclusive that it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt." *People v. Sanders*, 2016 IL 118123, ¶ 47. In determining whether the petitioner's new evidence is conclusive, we take all well-pleaded factual allegations of the amended postconviction petition and its supporting evidence as true unless they are positively rebutted by the record of the original trial proceedings. *Id.* ¶ 48.

¶ 78 We find *People v. Edwards*, 2012 IL 111711, to be instructive. There, the defendant claimed actual innocence, in part, based on newly discovered evidence in the form of an affidavit from a codefendant, Eddie Coleman (Coleman). *Id.* ¶ 10. The *Edwards* court found Coleman's affidavit to be newly discovered evidence, due to the fact no amount of diligence could have forced Coleman to violate his right to avoid self-incrimination if he chose not to do so. *Id.* ¶ 38. The *Edwards* court went on, however, and determined that Coleman's affidavit did not raise the probability that, in light of the new evidence, it was more likely than not that no reasonable juror

would have convicted Edwards. *Id.* ¶ 40. As in this case, Coleman averred in his affidavit that Edwards " 'had nothing to do with this shooting' *** [and] was neither 'a part [of nor] took part in this crime.' " *Id.* ¶ 39. The *Edwards* court noted, Coleman "critically does not assert that petitioner was not *present* when the shooting took place. As the appellate court correctly noted, [Coleman's] averment in his affidavit that he was the principal offender 'does little to exonerate defendant who *** was convicted of the murder under the theory of accountability." (Emphasis in original.) *Id.*

¶ 79 Here, Soto attested, "I was not with [defendant] that night except while participating in the line up [*sic*]." Importantly, the affidavit does not indicate where Soto was that evening, only that defendant was not with him. Soto's affidavit includes no further mention of the events of November 17, 2001. In this regard, Soto's affidavit is even less exonerating than Coleman's affidavit in *Edwards*. In that case, Coleman at least admitted he was involved in the crime of which Edwards had been charged. *Id.* ¶ 39. Here, Soto does not state he was involved in the shooting at all. Therefore, although Soto attests defendant was not with him on the evening of November 17, 2001, Soto's affidavit does not exclude the possibility that defendant was engaged in the shooting.

¶ 80 Similarly, Soto's affidavit states, "I was present in this line up [*sic*] and did not see [defendant] wear any hooded sweat shirt [*sic*] nor give it to any member of the line up [*sic*] at any time." Soto's affidavit does not affirmatively state that defendant was not wearing a hooded sweatshirt earlier in the evening or that defendant was not wearing it at any time prior to when the lineup was being conducted. In fact, Soto's affidavit corroborates Detective Cerny's testimony that defendant was not wearing a hooded sweatshirt during the lineup. The fact Soto did not observe defendant give his hooded sweat shirt to another member of the lineup does not

definitively establish defendant did not give his sweatshirt to another member of the lineup, it merely demonstrates Soto did not observe the exchange take place.

¶ 81 In sum, Soto's averments do not serve to positively rebut the evidence in the record of defendant's guilt. The record reveals Martinez identified defendant in a lineup and in court as the individual on his side of the street who opened fire in the direction of the porch. Rosario also identified defendant in a lineup as one of the men she observed holding a weapon and walking away from the scene. Officer Kurtz testified he engaged in a foot chase in pursuit of defendant who was later discovered to be in possession of a shotgun and shotgun shells. The ballistics expert, Parr, testified the discharged shotgun shells found at the scene were fired from the shotgun defendant had discarded. Even taking the well-pleaded facts of defendant's amended postconviction petition as true, we conclude Soto's affidavit is not of such conclusive character as would probably change the result on retrial. See *Sanders*, 2016 IL 118123, ¶¶ 52-53 (holding evidence presented by the defendant in support of his claim of actual innocence was not so conclusive in character as would probably change the result on retrial). Accordingly, we conclude that defendant failed to carry his burden to make a substantial showing of a claim of actual innocence.

¶ 82 C. *Brady* Violation

¶ 83 In his postconviction petition, defendant raises one *Brady* violation, arguing the State withheld the 911 records or, as defendant refers to them in his briefs, "flash messages." According to defendant, these flash messages contained three favorable pieces of evidence: (1) a caller reported seeing several males running southbound on North Tripp Avenue; (2) the police arrested a man in a green jacket near North Karlov Avenue at the same time Officer Kurtz testified to arresting Gonzalez in the same location; and (3) the police officers were aware of a

possible connection between defendant's arrest and the shooting. Defendant maintains the information contained in these flash messages was material because, if presented at trial, it would have impeached important witnesses and called their credibility into question. In addition, defendant contends the flash messages offer the possibility of alternative suspects.

¶ 84 Defendant's *Brady* violation claim was dismissed at the second stage. Therefore, we review the circuit court's dismissal *de novo*. *Tyler*, 2015 IL App (1st) 123470, ¶ 208. As previously stated, *de novo* consideration means that the reviewing court performs the same analysis a trial judge would perform. *Id.*

¶ 85 In *Brady*, the Supreme Court held that the prosecution violates an accused's constitutional right to due process of law by failing to disclose evidence favorable to the accused and material to guilt or punishment. *People v. Harris*, 206 Ill. 2d 293, 311 (2002) (citing *Brady*, 373 U.S. at 87). This includes evidence known to police investigators, but not to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). To establish a *Brady* violation, a defendant must demonstrate that: "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either wilfully [*sic*] or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *Beaman*, 229 Ill. 2d at 73-74.

¶ 86 The State argues defendant's *Brady* claim fails because the flash messages were not suppressed. According to the State, defendant was aware of the flash messages prior to trial, but failed to acquire them. The State points to defendant's amended postconviction petition, wherein he asserts that, prior to trial, he requested trial counsel obtain the flash messages to prove his innocence. Two additional affidavits in support of the amended postconviction petition, Soto's and Valentin's, indicate that the affiants overheard defendant asking his counsel to subpoena

these 911 records prior to trial. The State further notes that the flash messages were raised at trial during Officer Garza's testimony and in Officer Jackson's stipulation. Thus, because defendant was aware of the flash messages and could have acquired them through reasonable diligence, no *Brady* violation occurred.

¶ 87 We find *People v. Smith*, 46 Ill. 2d 430 (1970), to be instructive. In that case, the defendant was charged with rape. *Id.* at 431. Shortly after his arrest, the defendant's pants and undershorts were taken from him and sent to a crime laboratory for examination. *Id.* at 432. "These articles were never offered in evidence at the trial nor were any reports made as to analysis or findings." *Id.* The defendant asserted that the State's failure to produce this evidence raised a presumption that it was favorable to the defense and that the suppression of this evidence by the State violated due process pursuant to *Brady*. *Id.* at 432-33.

¶ 88 Our supreme court noted that the evidence defendant contended was suppressed was "equally accessible to both parties" and that the defendant "knew that his shorts and pants had been sent to the crime laboratory for examination." *Id.* at 433. According to the court, the defendant "had the right and the opportunity, had he desired to do so, to demand that they be produced in court together with any laboratory reports or findings" and "[h]aving failed to do so, he cannot now be heard to contend that the prosecution is guilty of deliberate suppression of evidence favorable to him which was in its exclusive possession and control." *Id.* While the issue of whether the State *deliberately* suppressed evidence is not relevant to a *Brady* analysis (*Beaman*, 229 Ill. 2d at 73-74 (evidence is suppressed either willfully *or* inadvertently)), *Smith* remains good law in Illinois. See *People v. Doyle*, 328 Ill. App. 3d 1, 6-7 (2002) (finding no *Brady* violation where the defendant was aware of the evidence before trial and defendant was able to cross-examine all of the witness who had knowledge of the evidence); *People v. Ramsey*,

147 Ill. App. 3d 1084, 1091 (1986) (finding no *Brady* violation where the defendant knew about the evidence but did not request testing).

¶ 89 Here, defendant admitted in his amended postconviction petition that he was aware of the flash messages. Defendant also attached the affidavits of two individuals who overheard him asking his trial counsel to subpoena these 911 records. In addition, the record demonstrates Officer Garza was questioned by the State regarding the flash messages. Accordingly, defendant was not only aware of the flash messages prior to trial, but also had ample opportunity to cross-examine Officer Garza, as well as the other officers who testified at his trial, regarding the flash messages. See *Doyle*, 328 Ill. App. 3d at 6-7. Because defendant was aware of the evidence prior to trial and could have acquired this information with reasonable diligence but did not do so, we conclude defendant fails to meet the second prong of *Brady*.

¶ 90 Even if the flash messages were suppressed, defendant fails to establish the third prong of *Brady*, which requires a showing that he was prejudiced because the evidence is material to his guilt. *Beaman*, 229 Ill. 2d at 74. "Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *Id.* To establish materiality, defendant must demonstrate " 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Coleman*, 183 Ill. 2d at 393 (quoting *Kyles*, 514 U.S. at 435).

¶ 91 Defendant contends these flash messages call the credibility of the officers and the eyewitnesses into question. Our review of the record, however, reveals that the flash messages defendant relies upon do not "put the case in such a different light as to undermine the confidence in the verdict." *Coleman*, 183 Ill. 2d at 393. Here, the evidence at trial overwhelmingly established defendant's guilt. Martinez and Hernandez testified they observed

two men approach the house on North Tripp Avenue and open fire. Rosario testified she heard gunfire and shortly thereafter observed two men leave the scene. Both Martinez and Rosario identified defendant and Soto in a lineup a few hours after the shooting occurred. Only Martinez, however, made an in-court identification of defendant as one of the shooters. The testimony of the eyewitnesses, that there were between four to six gunshots, was corroborated by the discovery of two discharged shotgun shells and two .45 caliber casings. In addition, a short time after the shooting, Officer Kurtz and Officer Garza observed defendant and Soto with weapons near the location where the shooting occurred. Defendant and Soto attempted to evade the police by running down the train tracks and later into the yards of nearby residences. Officer Kurtz, who pursued defendant, testified he observed defendant discard the shotgun and, when detained, discovered shotgun shells on defendant's person. Officer Slowinski testified a shotgun was used in the shooting and Parr testified the discharged shotgun shells found at the scene were fired with the same shotgun defendant had in his possession before it was discarded. Moreover, the trial court, in finding defendant guilty, noted that Martinez was a "solid witness and his identification was solid, and left no doubt in my mind that these two individuals were at the scene of the shooting." In addition, the trial court, when considering the photograph of the lineup, found defendant and Soto "were fairly identified in one of the fairest lineups I have ever seen."

¶ 92 In light of the trial record, the flash message that stated "several" males were observed running southbound on North Tripp Avenue does not negate the testimonies of Martinez, Hernandez, and Rosario who observed two men with weapons. Nor does it negate the testimony of the officers who testified that two men were apprehended after a foot chase near the scene of the crime. The next flash message, which defendant contends indicates that a man in a green

jacket was observed with a weapon and apprehended near North Karlov Avenue, similarly does not undermine the verdict. We first note that the flash messages do not indicate whether the jacket was dark green or light green, thus Officer Kurtz's testimony that he observed defendant in dark clothing is not contradicted by the flash message. Second, Detective Cerny testified defendant was wearing a black hooded sweatshirt when he was in custody and asked another individual in the lineup to wear his sweatshirt. The trial court noted that another individual, not defendant or Soto, was wearing a black hooded sweatshirt in the lineup photograph.

¶ 93 Lastly, defendant asserts that the flash messages demonstrate that the police officers were aware of a possible connection between defendant's arrest and the shooting at the time the shooting occurred, despite their testimony that they were unaware of such a connection for hours after the fact. Defendant maintains that had this fact been known at trial, it would have called their credibility into question. Defendant, however, could have attacked the witness's credibility through cross-examination, and, in fact, was provided with ample opportunity to do so. Given the evidence in this case, it is unlikely that this particular flash message, if disclosed, would have provided a reasonable probability that the verdict would have been different. See *Beaman*, 229 Ill. 2d at 74. For these reasons, we conclude defendant has not demonstrated he was prejudiced, as the flash messages do not place the case in such a different light so as to undermine the verdict. Accordingly, defendant has failed to establish the third prong of the *Brady* analysis and has, consequently, failed to make a substantial showing of a constitutional violation entitling him to an evidentiary hearing.

¶ 94 D. Ineffective Assistance of Counsel

¶ 95 Defendant contends, in the alternative, that this matter should still be advanced to third-stage postconviction proceedings due to trial counsel's ineffective assistance for failing to

acquire the flash messages. Defendant claims his affidavit, along with Soto and Valentin's affidavits, support his position that defendant asked his trial counsel to acquire the flash messages from the night of the shooting. According to defendant, trial counsel's failure to investigate those records rendered counsel's performance objectively unreasonable. In addition, defendant generally maintains he was prejudiced by trial counsel's failure to investigate because there is a reasonable probability that, had the evidence in the flash messages been introduced at trial, the outcome would have been different.

¶ 96 Postconviction claims of ineffective assistance of counsel are judged by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Domagala*, 2013 IL 113688, ¶¶ 36-47 (applying *Strickland* to petitioner's postconviction claim of ineffective assistance of counsel). To prevail on a claim that trial counsel was not effective, a defendant must demonstrate both that (1) his counsel's representation fell below an objective standard of reasonableness and (2) "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 694.

¶ 97 "In considering whether counsel's performance was deficient, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *People v. Patterson*, 217 Ill. 2d 407, 441 (2005) (quoting *Strickland*, 466 U.S. at 689). In general, conduct related to trial strategy will not support a claim of ineffective assistance unless counsel failed to pursue any meaningful adversarial testing. *Patterson*, 217 Ill. 2d at 441. Decisions regarding which witnesses to call and what evidence to present at trial are considered matters of trial strategy, and as such, are generally immune from claims of ineffective assistance

of counsel. *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002).

¶ 98 "Establishing prejudice under the *Strickland* inquiry requires a defendant to '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.' " *People v. Barrow*, 195 Ill. 2d 506, 520 (2001) (quoting *Strickland*, 466 U.S. at 694). The failure to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000).

¶ 99 Having previously concluded that the flash messages, even if suppressed, would not have changed the outcome of the trial, it follows that trial counsel's failure to acquire such evidence cannot support defendant's claim of ineffective assistance of trial counsel. Where the errors defendant alleges trial counsel committed did not prejudice defendant, he cannot prevail on his claim for ineffective assistance of counsel. See *People v. Goldsmith*, 259 Ill. App. 3d 878, 889 (1994) (finding a claim of ineffective assistance of counsel based on counsel's failure to adduce certain evidence could not stand where the court previously found no *Brady* violation regarding the same evidence). Therefore, for the reasons previously stated, we find defendant was not prejudiced by trial counsel's failure to request the flash messages.

¶ 100 E. Error in Denying Motion for Independent Testing

¶ 101 Defendant contends the circuit court erred in denying his motion for independent testing of the ballistics evidence. Defendant argues he demonstrated good cause for the discovery request, particularly where he alleged in his postconviction petition that trial counsel was ineffective for failing to obtain independent testing of the ballistics evidence. Defendant maintains that the trial court's denial of his discovery request precludes him from being able to

prevail on his claim of ineffective assistance. According to defendant, without the ballistics evidence, he has "no means by which to demonstrate the prejudice required by *Strickland*."

¶ 102 In response, the State argues the circuit court properly denied the motion as a "fishing expedition," particularly where defendant sought the ballistics evidence to support the prejudice prong of *Strickland*.

¶ 103 The discovery rules for neither civil nor criminal cases apply to proceedings under the Act. *People v. Fair*, 193 Ill. 2d 256, 264 (2000). "A court must exercise this authority with caution, however, because a defendant may attempt to divert attention away from constitutional issues which escaped earlier review by requesting discovery." *People v. Johnson*, 205 Ill. 2d 381, 408 (2002) (citing *People v. Hickey*, 204 Ill. 2d 585, 598 (2001)). Given the potential for abuse of the discovery process in postconviction proceedings, "the trial court should allow discovery only if the defendant has shown 'good cause,' considering the issues presented in the petition, the scope of the requested discovery, the length of time between the conviction and the post-conviction proceeding, the burden of discovery on the State and on any witnesses, and the availability of the evidence through other sources." *Johnson*, 205 Ill. 2d at 408. We do not disturb a circuit court's denial of a request for discovery in postconviction proceedings absent an abuse of discretion. *Fair*, 193 Ill. 2d at 265. A trial court does not abuse its discretion in denying a discovery request which ranges beyond the limited scope of a postconviction proceeding and amounts to a "fishing expedition." *Enis*, 194 Ill. 2d at 415.

¶ 104 We find *Hickey* to be instructive. *Hickey* involved the dismissal of an amended postconviction petition at the second stage. *Hickey*, 204 Ill. 2d at 591. The matter was brought directly before our supreme court due to the fact defendant was sentenced to death for his underlying murder conviction. *Id.* In the circuit court, the defendant brought a motion for

discovery requesting, *inter alia*, DNA evidence that formed the basis of the comparison to the defendant's DNA sample, items of evidence not tested for DNA, the defendant's blood sample from another case, evidence logs, and the forensic examiner's personnel file. *Id.* at 596-97. The circuit court denied the motion. *Id.* at 594. Our supreme court determined the circuit court did not abuse its discretion and found "the requests amounted to nothing more than a fishing expedition." *Id.* at 598. The court noted that postconviction proceedings are limited to constitutional matters that could not have been previously adjudicated, and in this case the evidence requested by the defendant was known to exist at the time of trial. *Id.* at 598-99. In addition, "the questions regarding the evidence raised by defendant in support of his discovery requests were all raised at defendant's trial." *Id.* at 599. Our supreme court similarly rejected the defendant's argument that the discovery was necessary in order for his postconviction counsel to determine whether defendant's trial counsel and appellate counsel were ineffective. *Id.* at 599-600.

¶ 105 Upon review, we find that the circuit court did not abuse its discretion in denying defendant's discovery request. Like the request in *Hickey*, we find defendant's motion essentially amounts to a fishing expedition. Defendant's motion for independent testing expressly requested access to the ballistics evidence in order to have an independent examiner analyze the discharged shotgun shells and the shotgun itself. This evidence was known to defendant prior to trial and could have been examined at that time.

¶ 106 Moreover, in his motion for independent testing, defendant requested the ballistics evidence to support his theory that the type of ammunition used in the shooting was inconsistent with the damage done to the porch ceiling. Defendant's trial counsel, however, extensively cross-examined Parr on this point. Specifically, trial counsel asked Parr about the significance of

the word "slug" written on the exterior of the unfired shotgun shell. Parr explained that a fired slug is one piece that "comes out like a bullet" and not in multiple pellets. Upon further questioning, Parr stated that he could make an assumption based on the writing on the exterior of the unfired shotgun shell that the fired shells were also "slugs," but he could not come to a conclusive determination on that point. Parr's testimony further revealed that he did not make a notation if the discharged shotgun shells said "slug" on them. On recross-examination, defense counsel asked Parr if he compared the unfired shotgun shell to the discharged shotgun shells. Parr responded in the negative. When asked why he did not compare the shells, Parr explained, "Because there would be no reason to compare the fired and unfired shot shells." The record reflects that trial counsel extensively cross-examined Parr regarding the particular issue postconviction counsel sought to address. Accordingly, defendant failed to demonstrate good cause and, for these reasons, we conclude the circuit court did not abuse its discretion in denying defendant's motion.

¶ 107 F. Mandatory Supervised Release

¶ 108 Lastly, defendant argues that his right to due process was violated when the trial court did not expressly sentence him to a term of mandatory supervised release at his sentencing hearing. Defendant admits he failed to raise this issue in his postconviction petition, however, he contends that such an order is void and, thus, may be challenged at any time. Defendant acknowledges that this issue has already been decided in the State's favor by our supreme court in *People v. McChriston*, 2014 IL 115310, but asserts he raises the issue now to preserve it in the event of a change in the law.

¶ 109 Although *McChriston* is directly on point, we conclude defendant has forfeited this issue. Since the briefs in this matter were filed, our supreme court abolished the "void sentence rule" in

People v. Castleberry, 2015 IL 116916, ¶ 19. Accordingly, "[b]ecause 'a circuit court is a court of general jurisdiction, which need not look to the statute for its jurisdictional authority[,]' defendant's argument that his sentence is void because the trial court did not address the mandatory supervised release term at his sentencing hearing fails. *Id.* (quoting *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 530 (2001). As defendant failed to raise this issue in his postconviction petition and in his direct appeal, the argument is forfeited. See *People v. Davis*, 2014 IL 115595, ¶ 13; *People v. English*, 2013 IL 112890, ¶¶ 22, 31; *People v. Reed*, 2014 IL App (1st) 122610, ¶ 63.

¶ 110 III. CONCLUSION

¶ 111 For the reasons stated, defendant has failed to make a substantial showing of a constitutional violation, thus, we affirm the judgment of the circuit court dismissing defendant's amended postconviction petition.

¶ 112 Affirmed.