2017 IL App (1st) 143537-U

No. 1-14-3537

Order filed December 15, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 23362
	)	
JOVON SCOTT,	)	Honorable
	)	James B. Linn,
Petitioner-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed defendant's postconviction petition at the second stage of postconviction proceedings because defendant failed to make a substantial showing of ineffective assistance of trial counsel based on counsel's alleged failure to (1) inform defendant about consecutive sentencing when they discussed accepting a plea offer, and (2) personally interview a known witness to discover an unknown eyewitness, who would have testified that the shooter did not look like defendant. Defendant's mittimus is amended to give him credit for time spent in presentence custody.

¶ 2 In this proceeding under the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq*. (West 2012)), defendant Jovan Scott appeals the circuit court's order that granted the State's motion to dismiss his petition at the second stage of postconviction proceedings.

¶ 3 On appeal, defendant argues that he made a substantial showing of ineffective assistance of trial counsel based on counsel's alleged failure to (1) inform defendant about mandatory consecutive sentencing when they discussed accepting a plea offer, and (2) personally interview a known witness to discover an unknown occurrence eyewitness, who would have testified that the shooter did not look like defendant. Defendant also argues that his mittimus should be amended to give him credit for 738 days he spent in presentence custody.

¶ 4 For the reasons that follow, we affirm the circuit court's second stage dismissal of defendant's postconviction petition. We also amend the mittimus to give him credit for time spent in presentence custody.

¶ 5 I. BACKGROUND

¶ 6 Defendant was charged by indictment with the October 26, 2007 attempted first degree murder, aggravated battery with a firearm, and aggravated battery of shooting victims Joseph Rice and Lloyd Johnson. Defendant was also charged with aggravated discharge of a firearm for firing into an occupied house and in the direction of Darneisha Moore and LaShanda Davis.

¶ 7 At the 2009 bench trial, the State presented evidence to show that on October 25, 2007, defendant went to Rice's house and told him that his younger brother was involved in a fight. Defendant and Rice knew each other from the neighborhood. When Rice went to the scene of the fight, 20 people, including a person carrying a gun, exited a nearby house and accosted Rice. Rice believed that defendant staged a "set up" so that Rice and his brother would get

"jumped." However, when the police spoke to Rice about the incident, Rice did not mention defendant.

¶ 8 The next day, Rice and his girlfriend LaShanda Davis left their home to go shopping about 3:20 p.m., and Rice saw defendant outside the house next door. Later, Rice and Davis returned home. Rice's friend Lloyd Johnson and Davis's teenage daughter Darneisha Moore were also inside the house. About 4 p.m., Rice went outside and stood on his front porch. Rice saw two people standing on his neighbor's porch and talking to defendant, who stood on the "regular concrete." After a few minutes, defendant approached Rice's porch alone and stood at the bottom of the stairs. They had a verbal altercation about the fight that occurred the previous day, and defendant accused Rice of reporting him to the police. Defendant pulled out a firearm from his coat pocket and fired a gunshot at Rice, who did not have a gun and did not threaten defendant. Rice retreated into his home and closed the door behind him, but defendant continued to fire his gun several more times in Rice's direction. Rice sustained a gunshot wound to his leg by a bullet that went through the door. Also, Johnson sustained a gunshot wound to his spinal area from another bullet defendant fired through the door. As a result of that gunshot wound, Johnson was paralyzed, could not walk and lived in a nursing home.

¶ 9 Darneisha Moore also knew defendant from the neighborhood prior to the incident. Moore corroborated Rice's testimony. Specifically, about 40 minutes before the shooting, Moore stood on the front porch as Rice and her mother entered their car to go shopping. Moore saw defendant, the next door female neighbor, and a male who was that neighbor's "fiancé or whatever," standing outside at that time. Moore heard defendant tell the neighbor that Rice was going to "get it" because he "put [defendant's] name in something." After Rice and Davis had returned home, Rice went outside about 4 p.m. When Moore heard the argument between Rice

and defendant, she looked out the front window. Moore had a clear view of defendant, who was standing by himself. Moore did not see anyone else outside. Moore watched the altercation and saw defendant pull out a gun from his coat pocket and fire at Rice, who ran inside the house. Moore saw Rice push Johnson, who was sitting near the door, down on the floor while Moore heard defendant fire additional gunshots.

¶ 10 Defendant testified that he and Rice were friends. At the time of the incident, altercations were occurring between different street gangs in the area. The day before the shooting, defendant noticed that Rice's younger brother was in a fight, so defendant went to Rice and told him about the fight. Rice ran to the fight and got involved in the altercation. Afterwards, defendant believed that Rice made a statement to the police about that altercation and reported that defendant gave someone a gun. The next morning, defendant was leaving his sister's house because he was locked out. He saw Rice standing on his front porch and approached him to talk about Rice's accusation. When their conversation threatened to become physical, defendant left. As defendant walked up a hill to a high school to play basketball and talk to females, a friend picked him up and drove him to the basketball court. Defendant played basketball for one and one-half hours. He did not know the names of the people with whom he played basketball. He asserted that he was not at the scene at the time of the shooting. When he learned that the police were looking for him, he went to the police station with his uncle. The defense did not present any alibi or occurrence witnesses.

¶ 11 Defendant was convicted of aggravated battery with a firearm of Johnson and aggravated battery with a firearm of Rice, and sentenced to consecutive terms of 24 and 6 years' imprisonment, respectively. Defendant was also convicted of two counts of aggravated discharge of a firearm and sentenced to two concurrent terms of 10 years' imprisonment, to run

concurrently with the 30-year combined sentence for the aggravated battery with a firearm convictions. The remaining counts for which he was found guilty were merged with the counts on which he was sentenced. This court affirmed defendant's convictions on direct appeal. *People v. Scott*, 2011 IL App (1st) 093277-U.

¶ 12 In June 2013, defendant filed a *pro se* petition for postconviction relief, which alleged, *inter alia*, multiple claims of ineffective trial counsel and ineffective appellate counsel for failing to raise on direct appeal claims about trial counsel's "egregious error." Thereafter, defendant supplemented his petition with additional documents and affidavits. In August 2013, the circuit court appointed postconviction counsel for defendant. In October 2014, counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). Specifically, postconviction counsel certified that he had consulted with defendant, investigated his claim about trial counsel's failure to call witnesses, supplemented the petition with an affidavit from defendant's uncle, and stated that defendant's petition adequately set forth his claims.

¶ 13 Relevant to this appeal, the petition alleged two claims of ineffective assistance of trial counsel. First, defendant claimed that trial counsel failed to inform him about mandatory consecutive sentencing when they discussed accepting the State's offer of a plea deal for 12 years of imprisonment. According to defendant's affidavits, trial counsel advised him not to take the State's offer because he had no criminal background and probably would not receive a prison term longer than 12 years. Counsel said that if defendant lost at trial, he would not receive consecutive sentences due to the one-act, one-crime principle, would not receive the maximum penalty, and "was facing a 6 to 30, not 12 to 60." Also, counsel, without investigating Johnson's health status, assumed that Johnson was about to die. Accordingly, counsel would not allow defendant to accept the offer because he would be pleading to murder and receive a more severe

sentence. Defendant complains that counsel knew she should have checked out Johnson's health status but instead misinformed defendant, who "would probably have taken a 12-year plea to avoid a life or seriously long prison sentence" and "probably would seriously consider" the 12 year sentence if he had another chance.

¶ 14 To further support this claim, defendant's uncle Willie Scott averred in an affidavit that defendant told him trial counsel said the State offered him 12 years and he was going to accept it but then trial counsel did not allow him to take the offer because counsel said Johnson was about to die and defendant "would have to plead to murder." Willie Scott asserted that counsel's statement was not true because Johnson was still alive.

¶ 15 Also, Celeste Radcliffe, who was defendant's sister, averred in her affidavit that defendant told her he planned to take the State's 12-year plea deal but opted to go to trial instead "because his attorney told him someone in the case was about to die[.] He refused the plea."

¶ 16 Defendant's second claim of ineffective counsel alleged that trial counsel failed to secure and subpoena witnesses who would have proved defendant's innocence. To support this claim, the petition included affidavits from defendant, Radcliffe, and Brandon Lewis. In his affidavits, defendant averred that he notified trial counsel months before the trial about occurrence eyewitness Chyna, who lived next door to Rice, witnessed the shooting, and was willing to testify that defendant was not the shooter. Defendant gave trial counsel Chyna's contact information and notified Chyna that counsel would contact her. Chyna told defendant to inform trial counsel that Chyna would only talk to trial counsel because Chyna was in fear for her and her children's lives. However, trial counsel never personally went to interview Chyna and secure her as a witness, and defendant was no longer able to locate Chyna.

¶ 17 Radcliffe averred that she advised trial counsel that defendant was falsely accused in this case by Rice and Davis because Radcliffe never got along with them and had been in many altercations with them. Radcliffe also advised trial counsel of defendant's "alibi" witness Brandon Lewis before the trial. Radcliffe alleged that she gave trial counsel's telephone number to Lewis, and Lewis left messages on counsel's answering machine.

¶ 18 In his affidavit, Brandon Lewis averred that about 3:30 p.m. on the date of the shooting, he and his friend Red were with Red's girlfriend Chyna, talking on Chyna's porch. Lewis noticed a male walk out of a gangway, run across the street to the house next door, and shoot at the guy next door. The shooter wore a jacket with a hat pulled low over his eyes. Unlike defendant, the shooter had "dark skin," weighed about 195 pounds, and was 6'2" tall. Lewis was willing to testify prior to defendant's trial but no one ever contacted him. Lewis "was reacquainted" with defendant when they were imprisoned in Stateville Correctional Center and offered to give him an affidavit.

¶ 19 At the hearing on the State's motion to dismiss defendant's petition, the judge asked defendant's postconviction counsel whether defendant knew about Brandon Lewis, and counsel responded that defendant did not know about Lewis but did know about Chyna. When the judge asked whether postconviction counsel talked to trial counsel about Brandon Lewis, postconviction counsel responded that he did talk with trial counsel and she "was never given that name." Moreover, trial counsel had sent an investigator to talk to Chyna before the trial, but Chyna did not want to speak to the investigator. Postconviction counsel's investigator was not able to locate Chyna. The circuit court granted the State's motion to dismiss defendant's postconviction petition, and defendant timely appealed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues that he is entitled to an evidentiary hearing on his claims that his trial counsel was ineffective for (1) failing to tell him about mandatory consecutive sentencing when they discussed accepting the State's plea offer, and (2) failing to personally interview potential witness Chyna, who could have led the defense to discover occurrence eyewitness Brandon Lewis, who would have testified that defendant did not look like the shooter. Defendant also argues that this court should order the circuit court to amend his mittimus to reflect a credit of 738 days for time spent in presentence custody.

¶ 22 A proceeding under the Act is a collateral attack on the defendant's prior conviction and allows only constitutional claims to be heard that were not presented during trial and could not have been raised in the appeal from the conviction. *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007). Therefore, *res judicata* bars any issues previously decided at trial or on direct appeal and issues that could have been presented in the appeal from the conviction but were not. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶ 23 In noncapital cases, the Act provides a three-stage process for hearing a petitioner's constitutional claims. *Harris*, 224 Ill. 2d at 125. A petition that states the gist of a constitutional claim advances from the first stage to the second stage if the trial court examines it independently and determines it is not frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2012). A petition is frivolous and patently without merit when it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 13 (2009). At the second stage of the process, the trial court may appoint counsel for the defendant, the petition may be amended, and the State may either answer the petition or move to dismiss it. 725 ILCS 5/122-4, 122-5 (West 2012); *Harris*, 224 Ill. 2d at 126.

¶ 24 The petition may be dismissed at the second stage "when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At this stage, the court shall focus only on the legal sufficiency of the claims, and all well-pleaded facts in the petition and any accompanying affidavits, which are not positively rebutted by the record, are taken as true. *People v. Domagala*, 2013 IL 113688, ¶ 35. Any fact-finding or witness credibility determinations must await an evidentiary hearing at the third stage of the postconviction proceedings. *Id.* The defendant, however, is not entitled to an evidentiary hearing as a matter of right; the allegations of the petition must be supported by the record or by accompanying affidavits, and nonspecific and nonfactual assertions that merely amount to conclusions are not sufficient to warrant a hearing under the Act. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). When, as here, a petition is dismissed at the second stage of the postconviction process, we review the matter *de novo. People v. Whitfield*, 217 Ill. 2d 177, 182 (2005).

¶ 25 A defendant alleging a claim of ineffective assistance of counsel must satisfy both prongs of the test discussed in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing that "counsel's performance was deficient" and the deficient performance "prejudiced the defense." To satisfy the performance prong, the defendant must show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice prong requires the 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." *Id.* at 694. If an ineffectiveness claim can be disposed of on the ground of insufficient prejudice, then

that course should be taken and the court does not need to consider the quality of the attorney's performance. *Id.* at 697.

¶ 26 In reviewing a claim of ineffective assistance of counsel, this court reviews counsel's actions under the totality of the circumstances of the individual case. *People v. Shatner*, 174 Ill. 2d 133, 147 (1996). Judicial scrutiny of counsel's performance is highly deferential, and counsel's trial strategy is given a strong presumption of reasonable professional assistance. *Strickland*, 466 U.S. at 689. To establish deficient performance, defendant must identify counsel's acts or omissions that allegedly are not the result of reasonable professional judgment and overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007); *Strickland*, 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Counsel's mistakes in trial strategy or errors in judgment "will not render representation constitutionally defective." *Perry*, 224 Ill. 2d at 355. Instead, defendant must show that counsel utterly failed to conduct any meaningful adversarial testing of the State's case. *People v. Patterson*, 217 Ill. 2d 407, 441 (2005); *Perry*, 224 Ill. 2d at 342 ("defendant must show that counsel's errors were so serious, and his performance was so deficient, that he did not function as the 'counsel' guaranteed by the sixth amendment.").

¶ 27 A. Failure to Discuss Mandatory Consecutive Sentencing

¶ 28 First, defendant argues he met his burden to make a substantial showing that trial counsel was ineffective because she failed to inform him about mandatory consecutive sentencing when they discussed whether he should accept the State's offer to recommend a

12 year sentence in exchange for his guilty plea. Specifically, defendant states that counsel had an obligation to advise him about consecutive sentencing and the minimum and maximum terms he could receive. Defendant argues that counsel should have understood that any sentences imposed if defendant was convicted of both Class X offenses of aggravated battery with a firearm would run consecutive to each other because Johnson had suffered a severe bodily injury. Because those offenses carried minimum sentences of six years each, counsel should have informed defendant that if he lost at trial the absolute minimum period of incarceration he faced would be at least 12 years. Defendant admits that the record is "totally silent" as to whether the State ever actually made a plea offer. He argues, however, that his factual assertions are not rebutted by the record and must be taken as true at the second stage of postconviction proceedings. Also, defendant contends he met his burden under the prejudice prong of *Strickland* because there was a reasonable probability that both he and the trial court would have accepted the plea offer and because the 30-year incarceration period he received for the Class X offenses after trial was more severe than the 12-year plea offer.

¶ 29 The State contends that this claim is barred by *res judicata* because it was not raised in defendant's postconviction petition before the circuit court. See 725 ILCS 5/122-3 (West 2012) ("[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."). The State argues that defendant's claim on appeal—*i.e.*, when trial counsel discussed the State's plea offer, trial counsel "failed to inform him that if he were to reject the offer, proceed to trial, and be convicted, two of his sentences would run consecutively together"—is entirely different from the claim in his petition before the circuit court and, thus, is forfeited on appeal.

¶ 30 We do not agree. We find that defendant's claim on appeal was sufficiently included in his petition before the circuit court. Defendant alleged in his petition that he "was not informed a possibility existed he could be sentenced to more than one sentence or that the sentences would be imposed consecutively." He also alleged that trial counsel told him "that any sentences he received would be served concurrently."

¶ 31 The State also contends that we should dismiss this claim because defendant cannot point to any evidence in the record that a 12-year plea offer even existed. Defendant responds that although no mention of a plea offer can be found in the record, at the second stage of a postconviction proceeding all well-pleaded factual allegations not positively rebutted by the trial record must be taken as true for purposes of the State's motion to dismiss. Defendant argues that the affidavits of defendant, Willie Scott, and Radcliffe suffice at the second stage to show that the State offered to recommend a 12 year sentence if defendant pled guilty.

¶ 32 We do not agree with defendant's implication that his allegations about the existence of a sentence recommendation offer by the State were well pled. We also do not agree that the affidavits of defendant, Willie Scott, and Radcliffe, which were hearsay and contained conclusory allegations, constitute sufficient support on this issue to warrant a stage three evidentiary hearing.

¶ 33 Generally, petitions supported by affidavits containing only hearsay are insufficient to warrant postconviction relief. *People v. Cole*, 215 Ill. App. 3d 585, 588 (1991); *People v. Brown*, 2014 IL App (1st) 122549, ¶ 58. Affidavits must be made by a person having "firsthand knowledge of the factual allegations" and must be capable of independent corroboration under the Act. *People v. Perkins*, 260 Ill. App. 3d 516, 518 (1994); *Brown*, 2014 IL App (1st) 122549, ¶ 47. Defendant has the burden of making a substantial showing of a constitutional violation

(*People v. Bailey*, 374 Ill. App. 3d 1008, 1018 (2007)), and the failure to include supporting affidavits, records, or other documents is fatal to a postconviction petition (*People v. Collins*, 202 Ill. 2d 59, 66 (2002)). When a court is presented with a petition claim that is not supported by affidavits or other documents, the court may presume that counsel made a concerted effort to obtain some documentation to support the claim but could not find that support. *People v. Waldrop*, 353 Ill. App. 3d 244, 250 (2004).

¶ 34 Here, postconviction counsel attempted to support defendant's claim about the existence of a plea offer or sentence recommendation from the State, but no affidavit from trial counsel or the prosecution supports that claim. According to the record, postconviction counsel informed the circuit court that he discussed with the assistant State's Attorney the issue of getting information on the nature of the State's plea offer, "if any." Postconviction counsel also informed the court that he discussed defendant's postconviction claims with trial counsel. In addition, the same circuit court judge adjudicated both defendant's bench trial and postconviction petition. The judge stated that he recalled this case and found it hard to imagine that a 12-year plea offer had been made because traditionally the State has authority to make offers to reduce charges and could perhaps make a sentence recommendation, but the State has no authority to reduce a sentence and all plea "offers have to run through the Court." Despite postconviction counsel's concerted effort to obtain some documentation to support defendant's claim about a plea offer or sentence recommendation, it seems postconviction counsel could not find that support. See *id*.

¶ 35 Even assuming the State offered to recommend a 12 year sentence if defendant pled guilty, defendant fails to make a substantial showing of ineffective assistance of counsel based

on their alleged discussion about mandatory consecutive sentencing and the State's alleged sentence recommendation.

¶ 36 In the plea bargain context, counsel performs reasonably by conveying any offers made by the State and informing the defendant of the minimum and maximum sentences he could receive after trial. *People v. Curry*, 178 Ill. 2d 509, 518 (1997). To show prejudice in such cases, the defendant must demonstrate a reasonable probability that (1) he would have accepted the earlier plea offer if he had been afforded effective assistance, (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, and (3) the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a prison sentence of less time. *Missouri v. Frye*, 566 U.S. ——, 132 S.Ct. 1399 (2012); *Lafler v. Cooper*, 566 U.S. ——, 132 S.Ct. 1376 (2012); *People v. Hale*, 2013 IL 113140, ¶ 19. The showing of prejudice must encompass more than the defendant's own subjective and self-serving testimony that he would have accepted the plea offer but for counsel's erroneous advice; there must be objective confirmation that a defendant's rejection of the offer was based upon counsel's erroneous advice, such as a significant disparity between the plea offer and the longer sentence the defendant faced following trial. *Curry*, 178 Ill. 2d at 531-33.

¶ 37 Essentially, defendant complains that trial counsel misinformed him because she should have known that Johnson would live. However, an assessment of counsel's performance certainly does not require counsel to predict the future with complete accuracy, and the record establishes that Johnson's injuries were very serious and the possibility that he would die was not remote. But even liberally construing defendant's allegations in light of the trial record, he fails to make a substantial showing of prejudice under *Strickland* based on counsel's alleged erroneous advice. Defendant equivocated in his own affidavits on whether he would have

accepted the sentence recommendation if he had been afforded effective assistance. Specifically, he stated that he would "probably" have taken the 12 year offer, and "probably would seriously consider" it if he had another chance. Also, while there was a disparity between the alleged 12 year offer and the 30 years of incarceration defendant received, defendant conceded in his affidavits that trial counsel informed him that he would face murder charges if Johnson died from his injury.

¶ 38 Defendant's equivocal affidavits and the murder charges he would have faced if he pled guilty and Johnson died compel the conclusion that defendant's decision to plead not guilty was based on other considerations besides counsel's alleged deficient advice about mandatory consecutive sentencing. Accordingly, defendant has not substantially shown a reasonable probability that he would have accepted the alleged sentence recommendation but for counsel's alleged deficient advice. See *People v. Brown*, 2015 IL App (1st) 122940 ¶ 78 (at the second stage of postconviction proceedings, the defendant's claim that he would have pled guilty if he had known he faced an extended sentence, standing alone, amounted to nothing more than subjective and self-serving testimony and thus was insufficient to satisfy the *Strickland* requirement for prejudice).

¶ 39 Moreover, defendant makes no showing that the alleged offer would not have been cancelled by the State or refused by the trial court. Although the trial court imposed just a 6 year sentence based on defendant's conviction of aggravated battery with a firearm of Rice, the trial court imposed a severe 24 year sentence on defendant for his conviction of the same offense involving Johnson. According to the record, the trial court was particularly affected by the fact that Johnson, "who had nothing to do with anything" and "was just sitting on a couch," was shot and now "his life is destroyed." Considering the severity of Johnson's injury in contrast to Rice's

injury, we cannot agree with defendant's presumption that there was a reasonable probability the trial court would have accepted the minimum sentence of 6 years for the offense against Johnson. Accordingly, defendant failed to make a substantial showing of prejudice based on trial counsel's alleged failure to advise him that mandatory consecutive sentencing would apply to convictions of two counts of aggravated battery with a firearm, as required to support a claim of ineffective assistance of counsel.

¶ 40 Finally, defendant's reliance on *People v. Barghouti*, 2013 IL App (1st) 112373, to support his assertion that he should receive a stage three evidentiary hearing on this issue is misplaced. *Barghouti* held that the circuit court erred by dismissing the defendant's postconviction petition at the first stage of proceedings because the defendant's claim—that he would have accepted a plea bargain if his attorney had informed him accurately about the range of sentences he faced—was not frivolous or patently without merit. 2013 IL App (1st) 112373, ¶ 2. *Barghouti* did not address the substantial showing standard that is applicable in this case at the second stage of postconviction proceedings.

¶ 41 B. Failure to Investigate and Present a Witness

¶ 42 Next, defendant argues that he made a substantial showing that trial counsel was ineffective for failing to personally interview Chyna and thereby discover prior to trial the existence of eyewitness Brandon Lewis, who would have testified that he witnessed the shooting and defendant did not look like the shooter.

¶ 43 "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466

U.S. at 691. Although counsel's decision regarding whether to present a particular witness is generally a matter of trial strategy, counsel may be deemed ineffective for failure to present exculpatory evidence of which he is aware, including the failure to investigate or call to trial witnesses whose testimony would support an otherwise uncorroborated defense. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999).

¶ 44 Defendant argues that his claim is adequately supported by the affidavits from himself, Radcliffe, and Lewis, which must be taken as true. We do not agree. The allegations that trial counsel should have discovered Lewis before the trial were not well-pled and the affidavits supporting this claim were inconsistent with each other and contained hearsay and conclusory allegations.

¶ 45 Defendant fails to make a substantial showing under the *Strickland* performance prong concerning this issue. The record establishes that trial counsel sent an investigator to talk to Chyna, but Chyna refused to cooperate. Although defendant asserts that Chyna told him she would only speak with his trial counsel, defendant's affidavit fails to state that he conveyed that information to trial counsel. Defendant's petition allegations, affidavits, argument before the circuit court, and appellate briefs essentially concede that trial counsel did not know about Lewis, but argue that trial counsel might have discovered Lewis if counsel had personally contacted Chyna. However, it was not unreasonable for trial counsel to send an investigator instead of personally interviewing Chyna (see *People v. Williams*, 147 Ill. 2d 173, 247 (1991) (defense counsel cannot be faulted for failing to pursue a witness who apparently was uncooperative or unavailable)), and trial counsel cannot be deemed ineffective for not investigating Lewis as a potential witness because she was not aware of him.

¶ 46 Furthermore, Radcliffe's affidavit is inconsistent with defendant's general position that neither he nor trial counsel knew about Lewis. Specifically, Radcliffe asserts that she advised trial counsel of "alibi" witness Lewis before the trial, gave trial counsel's telephone number to Lewis, and somehow knows that Lewis left messages on trial counsel's answering machine. Radcliffe's assertions, however, are not supported by Lewis's affidavit, which never mentions Radcliffe. Furthermore, Lewis never states that he had trial counsel's contact information or left her any messages. Rather, Lewis states that he was willing to testify but no one ever contacted him. Accordingly, we conclude that defendant's pleadings and supporting documents fail to make a substantial showing that counsel's representation fell below an objective standard of reasonableness.

¶ 47 In addition, defendant fails to make a substantial showing that there was a reasonable probability that the result of the trial would have been different if trial counsel had discovered Lewis and presented his testimony. Lewis did not offer defendant an alibi; rather, Lewis merely would have testified that the shooter Lewis viewed for a very brief period did not look like defendant. This case, however, did not hinge on whether Rice and Moore mistakenly thought that defendant was the shooter. Rice and defendant knew each other, and Moore testified that she knew defendant from the neighborhood. Rice and defendant faced each other and engaged in a verbal altercation that lasted for several minutes, and Moore testified that she watched that altercation from inside the house.

¶ 48 Although Lewis attempted to place himself on Chyna's porch at the time of the shooting with Chyna and her boyfriend, the testimony of Rice and Moore indicated that only two people—*i.e.*, Chyna and her boyfriend—were on that porch at or around the time of the shooting. Moreover, Lewis did not identify the shooter; he merely stated that the shooter, who ran across

the street and shot Rice, did not look like defendant based on his skin tone, height and weight even though Lewis admitted that the shooter concealed himself somewhat with a hat pulled low over his eyes. Accordingly, defendant fails to make a substantial showing under the prejudice prong of *Strickland* because there was not a reasonable probability that the outcome of the trial would have been different if Lewis had testified. Consequently, we conclude that defendant failed to make a substantial showing of ineffective assistance of trial counsel regarding counsel's alleged failure to investigate witnesses and find Lewis.

¶ 49 C. Mittimus

¶ 50 Defendant argues, the State concedes, and this court agrees that defendant's mittimus should be amended to reflect 738 days of presentence credit. Defendant was in custody from the date of his October 27, 2007 arrest until he was sentenced on November 9, 2009. See 730 ILCS 5/5-4.5-100(b) (West 2012). Accordingly, we order the clerk of the circuit court to amend the mittimus to reflect 738 days of presentence credit. Illinois Supreme Court Rule 615(b) (on appeal the reviewing court may, *inter alia*, modify an order from which the appeal is taken or reduce the punishment imposed by the trial court); *People v. Miller*, 363 Ill. App. 3d 67, 80 (2005).

¶ 51 III. CONCLUSION

¶ 52 For the foregoing reasons, we affirm the circuit court's second stage dismissal of defendant's postconviction petition. We also order the clerk of the circuit court to amend the mittimus to reflect 738 days' credit.

¶ 53 Affirmed; mittimus corrected.