2011 IL App (1st) 080921-U

THIRD DIVISION
September 28, 2011

No. 1-08-0921

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 89 CR 7496
	)	
DANIEL MAKIEL,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

O R D E R

HELD: Where the circuit court's findings that trial and appellate counsel did not render ineffective assistance were not manifestly erroneous, the denial of defendant's postconviction petition following an evidentiary hearing will be affirmed.

¶ 1 Defendant, Daniel Makiel, appeals from an order of the circuit court entered on April 4, 2008, denying his postconviction petition following an evidentiary hearing.* On appeal, defendant contends that the circuit court erred in denying him relief because the evidence at the hearing showed that his trial counsel was ineffective when she failed to interview and present testimony at trial from an exculpatory witness. Defendant also contends that the circuit court erred when it found that his appellate counsel on direct appeal was not ineffective when she failed to raise issues challenging the trial court's decisions to bar evidence that one of the State's witnesses had a pending forgery charge, and to bar testimony that two witnesses had reputations in the community for being untruthful. In addition, defendant claims that the circuit court's decision denying his petition for relief misapplied the law and misread the facts. We affirm.

¶ 2 Following a 1991 jury trial, defendant was convicted of first degree murder and armed robbery for shooting Katherine Hoch, the manager of a Mobil gas station, in Calumet City, Illinois. Defendant was sentenced to natural life in prison for the murder, consecutive to an extended term of 60 years' imprisonment for the armed robbery, both sentences consecutive to a 40-year sentence for attempted murder in Indiana.

¶ 3 On direct appeal, defendant argued that the trial court should have granted his motion to suppress his statement to an assistant State's Attorney, that the court erred when it excluded testimony from a particular witness, and that the prosecution made improper remarks during closing argument. This court found that the denial of the motion to suppress and the State's remarks during argument were proper, but remanded the case to the trial court for an inquiry to determine the competence of the proffered witness, an 11-year-old psychiatric patient, and the relevance of his

*Defendant has two additional appeals pending in this court under case numbers 1-09-3430 and 1-10-0718.

testimony. *People v. Makiel*, 263 Ill. App. 3d 54 (1994) (*Makiel I*). Our supreme court denied defendant's petition for leave to appeal. *People v. Makiel*, 157 Ill. 2d 514 (1994).

¶ 4 On remand, the trial court conducted the hearing and determined that the witness' testimony was not relevant. We affirmed that judgment on appeal. *People v. Makiel*, No. 1-97-2140 (1998) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal. *People v. Makiel*, 179 Ill. 2d 604 (1998).

¶ 5 In June 1995, defendant, through private counsel, filed a petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 1994)) raising several claims of ineffective assistance of both his trial and appellate counsel. Defendant's petition was initially stayed pending completion of his direct appeal. Thereafter, the petition was supplemented, and the State moved to dismiss. In April 2002, defendant again supplemented his petition, and the State filed a supplemental motion to dismiss. The circuit court granted the State's motion and dismissed defendant's postconviction petition during second-stage proceedings under the Act.

¶ 6 On appeal, defendant argued that his petition should have been advance to an evidentiary hearing because the circuit court improperly relied on evidence outside the record when considering his claim that trial counsel rendered ineffective assistance when she failed to interview or call Sam Ilich as a witness. Defendant also argued that an evidentiary hearing was necessary to determine if appellate counsel was ineffective when she failed to raise issues on direct appeal challenging (1) the trial court's exclusion of evidence that one of the State's witnesses lied when he denied having a pending forgery charge, and (2) the trial court's exclusion of character testimony regarding two of the State's witnesses.

¶ 7 Upon review, this court noted that defendant attached to his postconviction petition an affidavit from Sam Ilich which indicated that his testimony would have directly contradicted that of Todd Hlinko, the State's key witness. *People v. Makiel*, 358 Ill. App. 3d 102, 106-07 (2005)

(*Makiel II*). Hlinko testified at trial that he, defendant and Ilich drove to the gas station together in a blue Oldsmobile Cutlass owned by their friend, John Miller, who had loaned the car to defendant for transmission repair work. *Makiel I*, 263 Ill. App. 3d at 55-56. Hlinko testified that he and defendant entered the gas station while Ilich remained in the car. Hlinko testified that defendant took the manager, Katherine Hoch, into the back room and demanded money from her. Hlinko heard a single gunshot. Defendant then exited the back room holding a gun and a purse, grabbed cigarettes and an envelope from the cash register, and the men returned to the car and left the gas station. *Id.* at 56.

¶ 8 We further noted that Ilich was tried for murder and acquitted. *Makiel II*, 358 Ill. App. 3d at 106. Afterwards, the State dismissed the murder and armed robbery charges against Hlinko in exchange for his testimony against defendant. The State also agreed to a five-year sentence on Hlinko's pending drug charge, which would run concurrent with a five-year sentence he was serving for a violation of conditional discharge for an unrelated aggravated battery. *Id.*

¶ 9 In his affidavit, Ilich stated that he would have testified that he was not with defendant or Hlinko on the night of the shooting. *Id.* at 107. He also would have testified that the Cutlass was inoperable. Ilich further averred that he never saw defendant with a gun, and that defendant never indicated to him that he committed the robbery-murder. *Id.* Ilich stated that he was never contacted by trial counsel. *Id.* at 110.

¶ 10 In reviewing defendant's postconviction petition, the circuit court found that trial counsel was aware of a statement made by Ilich that he was at the scene with defendant and Hlinko at the time of the murder, and that counsel determined that if Ilich testified at trial, his testimony could be detrimental to defendant's case. *Id.* at 110. Upon review, we found that the circuit court's conclusion was not based on the record. *Id.* Instead, the court had engaged in fact-finding and relied on matters outside the record in dismissing defendant's allegation. *Id.* at 112. We noted that Ilich

had been acquitted, and found that there were factual questions regarding the court's reasoning that trial strategy regarding the detrimental effect of Ilich's testimony motivated defense counsel's decision not to call Ilich as a witness. *Id.* at 107. We concluded that factual questions existed as to whether trial counsel's failure to interview and call Ilich as a witness rendered defendant's trial fundamentally unfair, and we remanded the case for an evidentiary hearing under the Act. *Id.* at 109.

¶ 11 In addition, we determined that an evidentiary hearing was necessary to determine if appellate counsel rendered ineffective assistance when she failed to raise two challenges on appeal. First, defendant alleged that appellate counsel should have challenged the trial court's exclusion of evidence that one of the State's witnesses, Allen Martin, had a forgery charge pending against him. During cross-examination, Martin expressly denied that such a charge was pending, and the trial court precluded defense counsel from introducing a certified copy of that charge. *Id.* at 113. On review, we found that the record raised "questions of fact as to whether cross-examination of Martin regarding his pending forgery charge would reasonably tend to show that his testimony was influenced by bias, interest, or motive to testify falsely." *Id.* at 115. Specifically, we found that there was a factual question as to what strategy motivated appellate counsel to not raise this challenge on appeal. *Id.* at 116. We also found there were questions as to whether the State had "leverage over Martin justifying defendant's allegation that Martin had a possible bias or motive to fabricate due to the pending forgery charge." *Id.* We determined that these questions could only be answered at an evidentiary hearing. *Id.*

¶ 12 Second, defendant alleged that appellate counsel should have challenged the trial court's ruling that precluded defense witness Brian Spodach from testifying that two of the State's witnesses, Allen Martin and Shane Miller, had reputations in the community for being untruthful. Martin and

Miller were called by the State to corroborate Hlinko's testimony. Martin testified that he saw defendant and Hlinko at the gas station at the time of the murder, as testified to by Hlinko. *Id.*

¶ 13 Hlinko had also testified that after the robbery, the men picked up Shane Miller from his house, and he sat in the rear seat of the car with Ilich. *Id.* Hlinko testified that the men drove to the Calumet Expressway, defendant handed a gun to Hlinko and told him to get rid of it, and Hlinko threw the gun out the car window into the Cal-Sag River. *Makiel I*, 263 Ill. App. 3d at 57. Hlinko said Miller asked him what he threw out the window, and he told Miller it was a gun. *Id.*

¶ 14 Shane Miller testified that he was told about the robbery and shooting while at defendant's house. *Makiel II*, 358 Ill. App. 3d at 116. Miller further testified that he saw Hlinko throw an object out the car window and, when he asked Hlinko what it was, Hlinko told him it was a gun. *Id.* at 116-17. Miller also said Spodach picked him up from defendant's house. *Id.* at 117.

¶ 15 Testifying for the defense, Spodach denied ever picking up Miller from defendant's house. *Id.* When defense counsel asked Spodach about Miller and Martin's reputations in the community for truthfulness and veracity, the trial court sustained the State's objections and refused to allow the testimony. *Id.* On review, we found that there were factual questions as to "whether the trial court's refusal to allow the reputation evidence deprived the jury of information regarding the credibility of Martin and Miller, thereby depriving defendant of the right to a fair trial." *Id.* at 119. We found that there were factual questions as to what strategy motivated appellate counsel to not raise this challenge on appeal, and whether counsel's failure to do so constituted ineffective assistance of counsel. *Id.* We determined that these questions could only be answered at an evidentiary hearing and remanded the case for third-stage proceedings under the Act. *Id.*

¶ 16 At the evidentiary hearing, Sam Ilich testified for defendant that he had been living in California since 1985, but returned to Illinois briefly in 1988. On March 17, 1989, Ilich was called to a sheriff's police station in California in regards to a traffic violation. While there, he was

interviewed by Calumet City police detective David Macudzinski regarding the armed robbery and murder that occurred at the Mobil gas station in October 1988. Pursuant to the detective's request, Ilich handwrote a statement summarizing their discussion regarding his knowledge about the murder. Ilich testified that the information contained in his handwritten statement was true and correct. Ilich was detained at the sheriff's station, and two days later waived extradition to Illinois.

¶ 17 On March 21 and 22, 1989, Ilich was questioned at the Calumet City police station by Assistant State's Attorney (ASA) Patrick Quinn, and police officers Daniel McDevitt and Kelly Mathews. At 3 a.m., in the presence of these three individuals, Ilich signed a typewritten statement that had been prepared by one of them. Under the typewritten portion of the statement, Ilich handwrote "[t]here is nothing further that I can add." Ilich testified that the information in that statement was "absolutely not" true.

¶ 18 Ilich was subsequently charged with the first degree murder and armed robbery in this case. Pursuant to a motion to quash his arrest, Ilich's first handwritten statement was suppressed and not allowed at his trial. Ilich also moved to suppress the typewritten statement and testified at the hearing on that motion. At his trial, Ilich testified about the circumstances surrounding his signing of the typewritten statement and presented an alibi defense. Ilich testified that he was not with defendant on the night of the murder. The jury found Ilich not guilty.

¶ 19 At the evidentiary hearing, Ilich further testified that in March 1990, while incarcerated prior to his trial, he signed an affidavit denying any involvement in this case. Ilich's cell mate prior to his trial was his codefendant at that time, Todd Hlinko. Ilich and Hlinko discussed the case, but Hlinko never told Ilich that he was involved in the case. Ilich saw Hlinko sign an affidavit also. Ilich identified a letter dated April 28, 1989, written to defendant by Hlinko, as dictated by Ilich, and signed by Ilich. Hlinko added some of his own comments to the letter and signed it also. No one had asked them to write this letter to defendant.

¶ 20 In May 2000, about 10 years after his acquittal, Ilich prepared another affidavit to be submitted with defendant's postconviction petition. Ilich testified that the information stated in that affidavit was the truth.

¶ 21 Ilich testified that Shane Miller was Hlinko's friend whom Ilich had met only a couple of times. Allen Martin was Ilich's friend and had visited him four times in jail. Ilich and Hlinko had many joint visits and nearly always went to the visitation area together. Ilich discussed the case with Martin, and he believed Miller had been there during one of the visits.

¶ 22 Following his acquittal, Ilich returned to California. He was never contacted by anyone about testifying at defendant's trial. Ilich acknowledged that his mother testified to his alibi at his trial, and that she subsequently came to Illinois from California and testified at defendant's trial. Ilich denied knowing that his mother was coming to Illinois at that time. In 2006, postconviction counsel contacted Ilich, who willingly agreed to testify at this hearing. Ilich acknowledged that in 1999 he was found guilty of felony domestic violence in California and placed on probation.

¶ 23 Defendant's exhibits, being Ilich's statements, affidavits, letter and the transcript of Ilich's testimony from the hearing on his motion to suppress, were admitted into evidence. Defendant then rested.

¶ 24 Assistant State Appellate Defender Maria Harrigan testified that she had been an appellate defender for over 19 years and represented defendant on direct appeal. In preparing the appeal, she read defendant's trial record, including the documents in the common law record and the transcripts of the report of proceedings, and made notes of issues she could possibly raise. Defendant's motion for a new trial had raised 54 issues. She discussed the case and the potential issues with her supervisor. She also discussed the appeal with defendant by letter and over the telephone, and sent him a copy of her brief. Defendant wrote her several letters during this time. Counsel noted the

three issues she raised on appeal and this court's disposition on those issues. She further noted that she filed a petition for leave to appeal with our supreme court after losing two of the issues.

¶ 25 Harrigan acknowledged that she did not raise the issues regarding Brian Spodach's character testimony or Allen Martin's pending forgery charge. Counsel could not explain why she did not raise those issues on appeal. Harrigan recalled reading their trial testimony, but testified that she had no memory of specifically considering and rejecting those issues.

¶ 26 Harrigan identified a letter defendant wrote to her dated December 7, 1992, asking why she did not raise certain issues on appeal. He specifically asked "[c]ouldn't you find anything on the sanctions that were placed against the defense concerning cross examination of State's witness Alan Martin?" Harrigan also identified a letter she wrote to defendant in response in which she stated "as I explained to you in October, I raised all possible issues." Counsel's letter further stated:

> "It is the appellate attorney's job to determine which issues have true legal merit. I spent a great deal of time researching the issues in your case and conferenced with the supervisor on all decisions. We both came to the conclusion that the issues raised were the only legally sound non-frivolous issues."

Harrigan explained that she told defendant that the reason she did not raise an issue regarding Allen Martin, as well as the other issues he questioned, was because they were frivolous and not legally sound. Counsel acknowledged that she did not recall any sanctions against the defense due to a discovery violation regarding Martin, and that, at this time, she was not certain what defendant was referring to in his letter.

¶ 27 Harrigan reviewed defendant's motion for a new trial in court and noted that issue number 15 stated "[i]t was error for the Court not to allow the defense to prove up Alan Martin's pending

forgery charge, which he denied in court." Harrigan testified that she had reviewed that issue in defendant's posttrial motion while preparing defendant's direct appeal, and did not raise it on appeal.

¶ 28 Debra Niesen, defendant's trial counsel, testified that she has been employed by the Cook County Public Defender's Office for over 27 years and is the chief of the multiple defendant division where she supervises attorneys who do felony work, including capital litigation. The State sought the death penalty against defendant. The assistant public defenders (APD) who assisted with the case were Gary Copp and Brian Dosch. In preparation for trial, Niesen filed numerous motions, interviewed witnesses, and visited the crime scene. Pursuant to defendant's wishes, she presented an alibi defense. According to that alibi, Ilich was not with defendant on the night of the murder.

¶ 29 In addition to the discovery in defendant's case, Niesen also received discovery for Ilich and Hlinko's cases, which included police reports and statements the men made. Ilich was tried prior to defendant, and Niesen attended the hearing on Ilich's motion to quash his arrest. Ilich also filed a separate motion to suppress a statement he made to police. Niesen could not recall if she attended the hearing on that motion, but she read the transcript from it prior to defendant's trial. Niesen did not attend Ilich's trial, but read the transcript from it.

¶ 30 Prior to defendant's trial, Niesen reviewed the typewritten statement Ilich gave to ASA Quinn. In that statement, Ilich stated that one night in October 1988, he went to the Mobil gas station with defendant and Hlinko, and remained inside the car while defendant and Hlinko entered the station. When they returned to the car, one of them tossed a pack of cigarettes to Ilich, and they drove around in the car. Counsel noted that this part of Ilich's statement corroborated information contained in the charges that cigarettes were taken from the gas station. Hlinko also testified to that fact at defendant's trial. Ilich's statement further indicated that the men picked up Shane Miller, then stopped to use a bathroom in the same area where Katherine Hoch's purse was found in a trash bin.

¶ 31 Niesen testified that Ilich's statement said the men drove across a bridge over the Cal-Sag Channel and an item was tossed into the river. Ilich asked what the item was, and Hlinko told him "a gun." The men returned to the Mobil gas station and were told by police that they could not enter the station because it was a crime scene. Niesen identified the typewritten statement, noting that it contained a lot more detail than what she had just mentioned. She also identified the transcript from the hearing on Ilich's motion to suppress that statement, noting that the witnesses at that hearing included Ilich, ASA Quinn, and officers McDevitt and Mathews. Ilich had testified at the motion hearing that he did not read the statement before signing it, that the police manipulated him into making the statement, and that its contents were not true. Niesen also reviewed the initial statement Ilich gave when he was interviewed in California in which he denied any knowledge of the armed robbery and murder.

¶ 32 Niesen testified that prior to defendant's trial, she reviewed "everything regarding Mr. Ilich and his trial and his motions and his statements that he made to police, everything about Mr. Ilich." Niesen acknowledged that she did not call Ilich to testify at defendant's trial. She explained that she and her partners discussed having him testify. They decided not to call Ilich as a witness because they believed the impeachment that would be brought out by his testimony regarding the statement he gave to ASA Quinn "was so damaging" to defendant because it had defendant entering the gas station on the night of the murder with a gun in the car. Niesen further explained that defendant "had not given any incriminating or inculpatory statements that put him at the gas station, and so this would be one extra person to put my client at the gas station that we didn't need."

¶ 33 Ilich presented an alibi at his own trial. His mother, Carol Ilich, and other witnesses testified to that alibi at his trial. Niesen called Carol Ilich as a witness at defendant's trial. Niesen planned to ask Carol about her son's alibi because it would have been a good way to present the fact that Ilich had an alibi without having the negative effects of impeachment which placed defendant at the gas

station. Niesen, however, was not allowed to present that testimony because the trial court granted the State's motion *in limine* barring that testimony. The court also barred any testimony that Ilich was acquitted.

¶ 34 Niesen testified that she never contacted Ilich prior to defendant's trial because she did not think anything good could come from his testimony due to the damaging statement he had given to ASA Quinn regarding defendant. Niesen read an affidavit Ilich signed prior to defendant's trial averring that the statement he gave Quinn was false, that he was not with defendant on the day of the murder, and that he did not see defendant with a gun. Ilich claimed he made the false statement because he was threatened by police. Niesen had this affidavit prior to defendant's trial and still decided not to call Ilich as a witness. She explained that, regardless of the affidavit, the impeachment would be presented through the statement Ilich made to Quinn which placed defendant at the gas station.

¶ 35 Niesen also read the affidavit Ilich signed in 2000 claiming that if he had been called as a witness at defendant's trial, he would have testified that he was not with defendant or Hlinko on the night of the murder, and that the Cutlass was inoperable. Niesen testified that even if she would have received this affidavit prior to trial, she still would not have called Ilich as a witness because he would have been impeached by his statement to ASA Quinn that defendant was at the murder scene with a gun on the night of the murder. One reason that Ilich's trial had been severed from defendant's was because of the statement Ilich made to ASA Quinn that incriminated defendant.

¶ 36 Niesen acknowledged that she was aware that the State had made a deal with Hlinko in exchange for his testimony against defendant and characterized it as the "deal of the century." She further acknowledged that Ilich had claimed that his statement to ASA Quinn was not true and that he testified contrary to that statement at his motion hearings and trial. She noted, however, that Ilich told Quinn that his statement was true.

¶ 37 Niesen also acknowledged that defendant's trial transcript showed that the day before jury selection, Mark Miller, a supervisor in the public defender's office, asked the court for funds to procure Ilich's presence "for purposes of giving trial testimony." Niesen did not recall the request and did not recall if she was in the courtroom when it was made. Miller was not part of the defense team, and she did not know why he appeared in the courtroom to speak on the case. Miller did not make the request pursuant to any discussions with Niesen. In addition, Niesen did not recall APD Brian Dosch telling the court that Ilich's alibi was critical to defendant's case. Niesen was the first chair counsel responsible for making all final decisions, and Dosch was the third chair counsel. Niesen acknowledged that the State argued that if Carol Ilich was allowed to testify to her son's alibi, it would attempt to use Ilich's statement to impeach his mother's testimony. Niesen again testified that she never contacted Ilich because she did not need to do so and it would have been "to no avail." Niesen believed Ilich's testimony would be "ineffective," and his statement to ASA Quinn would be "detrimental" to the defense.

¶ 38 Niesen confirmed that Ilich never said he planned the robbery or murder with defendant and Hlinko, never said he had any knowledge that they were going to commit an armed robbery or murder, and never said he entered the gas station. Ilich removed himself from any involvement in the offense, and said he did not know defendant and Hlinko committed the robbery or murder when they returned to the car. Ilich did not know what was thrown away in the garbage can in the alley, and did not know that the item thrown out the car window was a gun until after Hlinko told him. All of this testimony was presented at Ilich's trial.

¶ 39 The parties stipulated that if the State called Patrick Quinn as a witness at the evidentiary hearing, his testimony would be consistent with his prior testimony from the hearing on Ilich's motion to suppress and from Ilich's trial. Quinn would also identify the written statement he took from Ilich.

¶ 40 In rebuttal, defendant presented a certified copy of Allen Martin's forgery charge and conviction. The charge was pending against Martin when he testified at defendant's trial. The parties also stipulated that Niesen made an offer of proof at trial that Brian Spodach would testify that Shane Miller and Allen Martin were liars, and that was their reputation in the community where they lived. Counsel's offer of proof was quoted in *Makiel II.* 358 Ill. App. 3d at 118.

¶ 41 The circuit court noted that 54 issues had been raised in defendant's posttrial motion which technically could have been raised on direct appeal. It further noted that appellate counsel Harrigan had raised three major issues on appeal, which had some success with a remand to consider one issue and a dissent on another issue. The court found that the impeachment of Allen Martin with his pending forgery charge was an extrinsic type of issue because it was not direct impeachment of a fact at issue in the case. The court found that, considering all the factors, Harrigan's failure to raise this issue on appeal was not enough to establish ineffective assistance of counsel. The court remarked that the issue could have been raised on appeal and found to be an error, but instead, that the major matters in the case were raised in other issues. The court further commented that there could have been some value in any of the other 53 issues raised in the posttrial motion.

¶ 42 In regards to Brian Spodach's character testimony, the circuit court read trial counsel's offer of proof, as quoted in our opinion in *Makiel II* (358 Ill. App. 3d at 118) and found that counsel was attempting to have Spodach give his individual opinion of the witnesses' reputations rather than explaining the witnesses' reputations for truthfulness in the community. The court found that in light of the entire record and the performance of appellate counsel, defendant did not present evidence which indicated a level of ineffectiveness that established a constitutional violation of his right to counsel.

¶ 43 Regarding trial counsel Niesen's performance, the court found that Ilich was a participant in this case, and that either his testimony could be believed that he had an alibi and was not present,

or the State's evidence could be believed that he was present. The court noted Niesen's testimony that she observed Ilich testify at his motion hearing and read all of his other transcripts, documents and statements. The court found that Ilich's statement to ASA Quinn mostly implicated defendant in the offense and that it was "rather damning." The court further found that there was no question that if Ilich had been called to testify, that his statement to ASA Quinn would have been used to impeach him, and that such impeachment would "certainly" have implicated defendant "greatly" and corroborated Hlinko's testimony. The court concluded that this was an issue of strategy and that Niesen was not ineffective for failing to call Ilich as a trial witness. Based on its findings, the circuit court denied defendant's petition for postconviction relief.

¶ 44 On appeal, defendant first contends that the circuit court erred in denying him postconviction relief because the evidence presented at the evidentiary hearing showed that Niesen, his trial counsel, was ineffective when she failed to interview and present testimony at his trial from Sam Ilich. Defendant argues that the evidence failed to show that Niesen had a credible strategic reason for ruling Ilich out as a witness, and that she needed to interview him to assess his credibility. Defendant claims that Niesen's testimony that she did not call Ilich as a witness because she was concerned about his statement to ASA Quinn is not credible because it is contradicted by the trial record which shows that the defense requested funds to procure Ilich's appearance the day before jury selection. Defendant further argues that it was unreasonable for Niesen to not interview Ilich because she was not informed of the relevant testimony he had to offer, which would have rebutted Hlinko's testimony. Defendant asserts that the jury could have believed Ilich over Hlinko, and therefore, this case must be remanded for a new trial so Ilich can testify.

¶ 45 To receive postconviction relief, defendant must show that he suffered a substantial deprivation of his constitutional rights in the proceedings which resulted in his conviction and sentence. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). During the third stage of postconviction

proceedings, it is defendant's burden to establish that he suffered a constitutional violation. *Id.* at 473. Following a third-stage evidentiary hearing that involved fact finding and credibility determinations, the circuit court's ruling on defendant's postconviction petition will not be disturbed on review unless it is manifestly erroneous. *Id.* Manifest error is error that is plain, indisputable, and clearly evident. *People v. Taylor*, 237 Ill. 2d 356, 373 (2010).

¶ 46 During an evidentiary hearing, the circuit court is responsible for determining the credibility of the witnesses, weighing their testimony, resolving any conflicts in the testimony, and drawing reasonable inferences from the evidence. *People v. Rovito*, 327 Ill. App. 3d 164, 172 (2001). The credibility of the witnesses is not a question for the reviewing court. *Taylor*, 237 Ill. 2d at 378. The circuit court was able to observe and hear the witnesses testify, and therefore, was in a better position than the reviewing court to engage in fact-finding and make credibility determinations. *Id.*

¶ 47 Claims of ineffective assistance of counsel are evaluated using the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Graham*, 206 Ill. 2d 465, 476 (2003). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that (1) counsel's representation was deficient, and (2) as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Graham*, 206 Ill. 2d at 476. If defendant cannot prove that he suffered prejudice, this court need not determine whether counsel's performance was deficient. *Id.* The decision of whether to call a witness to testify on defendant's behalf is a matter of trial strategy that rests in counsel's discretion, and such decisions are generally immune from claims of ineffective assistance of counsel due to the strong presumption that they reflect sound strategy, not incompetence. *People v. Enis*, 194 Ill. 2d 361, 378 (2000).

¶ 48 Here, we find that the circuit court's determination that Niesen did not render ineffective assistance was not manifestly erroneous. The circuit court concluded that Niesen credibly testified that her decision not to call Ilich as a witness at defendant's trial was a matter of trial strategy. The court noted that Niesen testified that she personally observed Ilich testify at his motion hearing, and that she read all of the other transcripts, documents and statements related to Ilich. The court found that Ilich's statement to ASA Quinn was "rather damning" because it mostly implicated defendant in the offense. The court further found that there was no question that if Ilich had been called to testify, that his statement to ASA Quinn would have been used to impeach him, and that such impeachment would "certainly" have implicated defendant "greatly" and corroborated Hlinko's testimony.

¶ 49 Our review of the record reveals that the evidence presented at the third-stage postconviction hearing supported the circuit court's conclusions. Niesen testified that she attended the hearing on Ilich's motion to quash his arrest where she had the opportunity to personally observe him testify. She also read the transcripts from Ilich's hearing on his motion to suppress and from his trial. The witnesses at the suppression hearing included Ilich, ASA Quinn, and officers McDevitt and Mathews. From reading the transcript, Niesen knew that defendant claimed that his statement to Quinn was not true and that the police had manipulated him into making the statement. However, she also knew how Quinn and the two police officers testified.

¶ 50 The record shows that Niesen repeatedly and consistently testified that she did not call Ilich as a witness at defendant's trial because she was extremely concerned about the damaging effect of his statement to ASA Quinn. Niesen expressly noted that Ilich's statement corroborated Hlinko's testimony and information that was contained in the charges against defendant. Niesen explained that defendant "had not given any incriminating or inculpatory statements that put him at the gas station, and so this would be one extra person to put my client at the gas station that we didn't need."

She noted that Ilich's statement also put defendant in the same area where Hoch's purse was found in the trash bin. Niesen testified that she and her partners did discuss having Ilich testify and decided against it because they weighed his testimony against the impeachment that would be brought out by his statement to Quinn and determined that the statement "was so damaging" because it had defendant entering the gas station on the night of the murder with a gun in the car.

¶ 51 The record further shows that Niesen repeatedly testified that it was not necessary for her to personally interview Ilich. Niesen testified that she reviewed "everything about Mr. Ilich" and decided not to contact him because she had determined that nothing good would come from his testimony due to the damaging statement he had given to ASA Quinn. Niesen testified that contacting Ilich would have been "to no avail" because his testimony would be "ineffective" and his statement to ASA Quinn was "detrimental" to defendant's defense.

¶ 52 In addition, Niesen testified that she did not recall Mark Miller's request for funds to procure Ilich's presence to testify the day before jury selection. Niesen testified that she did not discuss any such request with Miller, that he was not part of the defense team, and that all final decisions in defendant's case were made by her as first chair counsel. Presiding over the evidentiary hearing, it was the circuit court's responsibility to determine the credibility of the witnesses, resolve any conflicts in the evidence, and draw reasonable inferences from the evidence. We find no reason to disturb the circuit court's determination that Niesen credibly testified that she did not call Ilich as a witness as a matter of trial strategy. Based upon our review of the record before this court, we conclude that the circuit court's finding that trial counsel did not render ineffective assistance was not manifestly erroneous.

¶ 53 Defendant next contends that the circuit court erred when it found that Harrigan, his appellate counsel on direct appeal, was not ineffective when she failed to raise issues challenging the trial court's exclusion of evidence that Allen Martin had a pending forgery charge, and the court's

barring of Brian Spodach's testimony that Martin and Shane Miller had reputations in the community for being untruthful. Defendant correctly notes that Harrigan testified at the evidentiary hearing that she had no recollection of considering these specific issues when she prepared his appeal. He argues that the issues had merit, that the State would not have been able to prove the trial court's erroneous rulings harmless on direct appeal, and therefore, that he was prejudiced by Harrigan's failure to raise the issues.

¶ 54 Defendant acknowledges that there was no evidence that Allen Martin had made a deal with the State in exchange for his testimony, but argues that a reasonable inference could have been made that Martin believed he would not be charged because he was providing testimony that was favorable for the State. In regards to the trial court's ruling which barred Spodach's character testimony, defendant argues that the evidence in this case was close, that the State relied solely on the credibility of Hlinko, Martin and Miller and the corroborative nature of their testimony, and that damage to the credibility of any one of them would have impacted the believability of the others. Defendant asserts that if Harrigan decided not to raise these two issues on appeal because she thought they were frivolous, she was wrong.

¶ 55 As stated above, following a third-stage evidentiary hearing that involved fact finding and credibility determinations, the circuit court's ruling on defendant's postconviction petition will not be disturbed on review unless it is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473. Claims of ineffective assistance of appellate counsel are also reviewed under the two-prong test announced in *Strickland*. *People v. Harris*, 206 Ill. 2d 293, 326 (2002). To succeed, defendant must show that counsel's failure to raise the issues on direct appeal was objectively unreasonable, and that he was prejudiced by this decision. *Id.* In other words, defendant must establish that, but for counsel's errors, there is a reasonable probability that his appeal would have been successful. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). Appellate counsel is not required to raise every conceivable

issue on direct appeal, and if counsel concludes that an issue is without merit, then counsel's decision to refrain from raising it is not incompetence. *People v. Barrow*, 195 Ill. 2d 506, 522-23 (2001). Generally, counsel's decision not to raise an issue on appeal is given substantial deference (*Harris*, 206 Ill. 2d at 326), and unless the underlying issue is meritorious, defendant was not prejudiced by counsel's failure to raise it on direct appeal. *Barrow*, 195 Ill. 2d at 523. During the third stage of postconviction proceedings, it is defendant's burden to establish that he suffered a constitutional violation. *Pendleton*, 223 Ill. 2d at 473.

¶ 56 We remanded this case to the circuit court for an evidentiary hearing to determine, in part, what strategy motivated appellate counsel to not raise these two challenges on appeal. At that hearing, Harrigan testified that she could not explain why she did not raise the issues on appeal, and that she had no memory of specifically considering and rejecting these two issues. She testified that she read the record, including defendant's posttrial motion, which raised 54 issues. One of the issues raised in that motion was that the trial court erred when it did not allow the defense to prove up Martin's pending forgery charge. Harrigan testified that she discussed the potential issues with her supervisor, discussed the appeal with defendant, and raised the three issues she believed had merit on appeal.

¶ 57 The State then produced a letter Harrigan had written to defendant shortly after she filed his appellate brief in 1992 in which she informed him that she had "raised all possible issues." In her letter, Harrigan explained that she had spent a lot of time researching the issues and discussed her decisions with her supervisor. Counsel stated "We both came to the conclusion that the issues raised were the only legally sound non-frivolous issues." Based on this evidence presented at the evidentiary hearing, it appears that counsel did not raise the two impeachment issues on appeal because she deemed them frivolous. Generally, we would give substantial deference to Harrigan's

decision. *Harris*, 206 Ill. 2d at 326. However, we must further determine whether defendant was prejudiced by counsel's decision.

¶ 58 Here, we find that the circuit court's ruling that appellate counsel did not render ineffective assistance was not manifestly erroneous because defendant failed to show that he was prejudiced by counsel's failure to raise these two challenges on direct appeal. In regards to Allen Martin's pending forgery charge, the only evidence defendant presented at the evidentiary hearing was the certified copy of Martin's forgery charge and conviction. This evidence showed that the charge was pending against Martin when he testified at defendant's trial, which directly contradicted Martin's denial of the charge. The defense should have been allowed to introduce this evidence at defendant's trial to show that Martin's testimony may have been influenced by bias, interest or a motive to testify falsely. *People v. Triplett*, 108 Ill. 2d 463, 475-76 (1985). Defendant has thereby demonstrated that the trial court erred when it barred defense counsel from introducing the certified copy of the pending charge at trial. However, although the trial court erred, appellate counsel was not required to raise this issue on appeal if she determined that it was not meritorious. *Barrow*, 195 Ill. 2d at 522-23.

¶ 59 The purpose of introducing evidence of the pending forgery charge would have been to show the jury that Allen Martin had just lied on the stand when he denied that such a charge was pending. The charge also would have shown that the State had leverage over Martin which may have influenced him to testify favorably for the State, causing the jury to question the veracity of his testimony. The record shows, however, that although Martin was not impeached with this pending charge, the defense extensively impeached him by other means. For example, Martin testified that he was not drunk on the night of the murder, and he denied telling APD Bill Ward, one of defendant's attorneys, that he got into a fight with defendant and Hlinko at the gas station. Ward subsequently testified that Martin had told him that he was drunk that night and that he got into a

fight with the two men at the station. Martin also admitted that APD Ward had asked him if he was Allen Martin because he wanted to speak with him about the case, and Martin denied who he was three times before finally admitting that he was Allen Martin.

¶ 60 The record thus shows that the jury had been presented with other evidence that impeached Martin's testimony and would have caused the jury to question his veracity. Nevertheless, the jury found the evidence, which included testimony from many other witnesses, sufficient to find defendant guilty beyond a reasonable doubt. Based on this record, appellate counsel reasonably could have determined that challenging the trial court's exclusion of Martin's pending charge would not have been a meritorious issue on appeal. Defendant has not established that his conviction would have been reversed on appeal if counsel had raised this issue. He therefore has not met his burden of showing that he was prejudiced by counsel's failure to raise the issue on appeal. Accordingly, the circuit court's ruling that appellate counsel was not ineffective for failing to raise the issue was not manifestly erroneous.

¶ 61 Defendant also contends that appellate counsel rendered ineffective assistance because she failed to raise an issue on appeal challenging the trial court's ruling which barred Brian Spodach's character testimony that Allen Martin and Shane Miller had reputations in the community for being untruthful. When this court remanded this case for the evidentiary hearing, we found that there was a factual question that needed to be answered as to "whether the trial court's refusal to allow the reputation evidence deprived the jury of information regarding the credibility of Martin and Miller, thereby depriving defendant of the right to a fair trial." *Makiel II*, 358 Ill. App. 3d at 119.

¶ 62 At the evidentiary hearing, the only evidence defendant presented related to this issue was a stipulation that trial counsel Niesen had made an offer of proof at trial that Spodach would testify that Miller and Martin were liars, and that was their reputation in the community where they lived.

This offer of proof was already in the record, and was quoted by this court in our opinion remanding the case for the evidentiary hearing. *Id.* at 118.

¶ 63 At the third-stage evidentiary hearing, it was defendant's burden to prove that he was prejudiced by appellate counsel's failure to raise this issue on appeal. *Pendleton*, 223 Ill. 2d at 473. The hearing was defendant's opportunity to present evidence to prove his claim, such as testimony or an affidavit from Brian Spodach regarding what he would have testified to at defendant's trial. Trial counsel's offer of proof merely preserved the issue for appeal. The offer of proof, itself, is not evidence. Defendant presented no evidence at the hearing in support of this claim. Accordingly, we find that defendant failed to establish that he was prejudiced by appellate counsel's failure to raise the issue on appeal. Therefore, we hold that the circuit court's finding that appellate counsel did not render ineffective assistance was not manifestly erroneous.

¶ 64 Finally, defendant contends that the circuit court misapplied the law and misread the facts of the case when it denied him postconviction relief at the third-stage proceedings. Specifically, defendant claims that the circuit court misstated the law when it referred to Allen Martin's pending forgery charge as "collateral impeachment." Defendant argues that a witness' bias is never "collateral." Our review of the record reveals no misunderstanding of the law by the circuit court. The record shows that the court used the term "collateral impeachment" as a characterization when it explained that the pending charge was not "direct impeachment regarding the facts of the case itself."

¶ 65 Second, defendant claims that the circuit court misinterpreted the record when it said that Brian Spodach was attempting to testify to his "individual opinion" rather than presenting testimony regarding Martin and Miller's reputations in the community. Based upon our finding above that defendant failed to present any evidence on this issue at the evidentiary hearing and failed to

establish that he was prejudiced by appellate counsel's failure to raise the issue on appeal, the trial court's characterization of Spodach's testimony is of no import.

¶ 66 Defendant further claims that the circuit court found that an attorney can only be ineffective is she fails to interview or subpoena a "major witness" who would "greatly impact the case." He also claims the circuit court mistakenly believed it was being directed to determine if it could find counsel "not to be ineffective." In addition, defendant argues that the circuit court believed that under *Strickland*, it was allowed to consider its own hindsight opinion as to why appellate counsel did not raise the two issues on direct appeal. This court has thoroughly read the record and we find that defendant's claims are simply wrong and a misinterpretation of the circuit court's words.

¶ 67 Lastly, defendant argues that the circuit court mistakenly found that trial counsel had observed Sam Ilich testify at the hearing on his motion to suppress when counsel actually testified that she could not recall if she attended that hearing, but she did attend the hearing on Ilich's motion to quash his arrest. We find no import in the circuit court's misstatement. The record shows that at the hearing on Ilich's motion to quash, his initial statement made to the detective in California was suppressed. In addition, counsel testified that, although she could not recall if she attended the hearing on Ilich's motion to suppress, she read the transcripts from the hearing. The record thus shows that counsel had observed Ilich testify at a motion hearing where a statement was suppressed, and she had read the transcripts from all of his other hearings and trial. Accordingly, the circuit court's misstatement was irrelevant.

¶ 68 For these reasons, we affirm the judgment of the circuit court of Cook County denying defendant's petition for postconviction relief following an evidentiary hearing.

¶ 69 Affirmed.