2012 IL App (1st) 102516-U

FIFTH DIVISION
May 4, 2012

No. 1-10-2516

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. 98 CR 24751
	)	
BRIAN JONES,	)	Honorable
	)	Joseph M. Claps,
Petitioner-Appellant.	)	Judge Presiding.
	)	

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court properly dismissed post-conviction petition at the second stage of proceedings where defendant failed to demonstrate a substantial showing that his right to effective assistance of trial and appellate counsel was violated.

¶ 2 Following a direct appeal of his conviction for murder and attempted murder, Brian Jones filed a post-conviction petition, alleging denial of his constitutional right to effective assistance of trial and appellate counsel. The circuit court dismissed the petition at the second stage. We affirm.

¶ 3 BACKGROUND

¶ 4 In the early morning of August 17, 1998, Kenneth Dunn (also known as Kenneth Perez) was fatally shot in front of a liquor store at 91st and Ashland in Chicago. At a bench trial, Lance Priest, who was standing with Dunn when the shooting began, testified that defendant, who Priest knew as "Bird," was the shooter. Around 1:45 a.m., Priest heard defendant say, "what's up, folks," referring to Priest's gang, the Gangster Disciples. Priest explained that he saw defendant, a member of the rival Blackstones gang, about 75 feet away. When defendant, who was wearing jeans and a blue and white checkered shirt, reached into his waistband for a gun, Priest and Dunn started running. Priest looked back and saw defendant shooting at them. Dunn was shot and fell to the ground. When Priest tried to help Dunn get up, a red car drove up and Priest ran several blocks farther before again returning to Dunn. After officers arrived to talk with Priest, the same red car drove by. Priest saw defendant in the driver's seat and alerted the police, who started running toward the car. Defendant put the car in reverse and then turned, losing the officers. The officers later took Priest to Lasandra Mathies' apartment, where they had apprehended defendant, and Priest identified him as the shooter.

¶ 5 Several officers at the scene corroborated Priest's account of the incident with the red car. The car, with engine still warm, was located at a nearby vacant lot. Police found defendant at LaSandra Mathies' apartment; he was bare-chested, running down the back stairs. Two of the officers identified defendant as the driver of the red car. A blue and white checkered shirt was recovered from the apartment, and an officer identified it as the shirt that defendant was wearing as he drove by in the car.

¶ 6 Raleigh Prichett testified that he was sitting in his car outside the liquor store, and he spoke with Priest and Dunn. As they were talking, a man walked up, said "what's up, folks," and fired shots. Prichett did not know the man and did not see his face, but described the shooter as a brown-skinned black man wearing blue jeans and a blue and white checkered shirt.

¶ 7 Sharee Jackson testified that she was with her cousin, LaSandra Mathies, at her cousin's apartment on the night of the incident. Defendant, dressed in a blue and white checkered shirt, arrived later with Byron Manson and Quasi Lester. Jackson saw that defendant had a black gun in his pants, and she testified that defendant and Manson left the apartment about 1 a.m. to get cigarettes. Jackson testified that when defendant returned, she heard him say, "I shot a moe, him moe." A "moe" is a member of the Blackstones gang. On cross-examination, Jackson acknowledged that she did not initially tell police what defendant had said when he returned to the apartment. She testified that when defendant returned to the apartment, he said, "I shot a moe." When asked on redirect examination what defendant's exact words were, Jackson said, "I shot him, moe."

¶ 8 LaSandra Mathies testified that she was with defendant and friends at her apartment on the night of the shooting. She and defendant left together around midnight to get beer from a store on 89th and Loomis, and they immediately returned to the apartment. Mathies admitted lying to police when she told them that she was the last person to drive the red car and had parked it at 7 p.m. On cross-examination, Mathies admitted that she told the grand jury that when she went with defendant to buy beer, she dropped him off and returned to her apartment alone. She claimed that the assistant State's Attorney had threatened her with charges and that

she lied to the grand jury when she told them that she had not been threatened. The assistant State's Attorney that questioned Mathies denied threatening her.

¶ 9 Defendant testified that he owned a blue and white checkered shirt and wore the shirt often, but he explained that several other people in the neighborhood wore identical shirts. Defendant testified that he left the apartment with Mathies about 1 a.m. to buy beer and returned to the apartment immediately after. Defendant admitted that he later drove by the scene of the shooting, but he immediately left to return to Mathies' apartment because he heard one of the Gangster Disciples say, "There go Bird right there." Defendant took off his shirt because it was hot inside the apartment. He also went on the back porch when police arrived, but defendant testified that he did so to dispose of marijuana. Defendant admitted that he had a tattoo stating his nickname was "Bird."

¶ 10 Robert Berk, an expert in trace evidence analysis, testified that he examined the results of defendant's gunshot residue test, which was performed on defendant's hands four hours after the shooting. In Berk's opinion, the test results were inconclusive. Berk testified that gunshot residue can be transferred from hands to clothing through normal activity like changing a shirt.

¶ 11 The trial court found defendant guilty of first degree murder and attempted first degree murder and sentenced him to concurrent prison terms of 45 years and 20 years, respectively. Defendant appealed, arguing that the State failed to prove him guilty beyond a reasonable doubt. This court affirmed defendant's conviction. See *People v. Brian Jones*, No. 1-01-0947 (2002) (unpublished order under Supreme Court Rule 23).

¶ 12 Defendant them initiated the present post-conviction proceedings. Through counsel, defendant filed a post-conviction petition. Defendant then filed an amended post-conviction petition and a supplemental amended post-conviction petition, and the State moved to dismiss. Following written submissions and oral argument, the circuit court granted the State's motion. In its written order, the court concluded that defendant failed to establish a substantial showing of a constitutional violation. Defendant filed this appeal.

¶ 13 ANALYSIS

¶ 14 The Post-Conviction Hearing Act sets out a three-stage process by which criminal defendants can assert that their constitutional rights were substantially violated in their original trial. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). An action for post-conviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal, and thus a post-conviction petition is generally limited to those claims that could have been adjudicated on direct appeal. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). To survive dismissal at the second stage of a post-conviction proceeding, defendant must make a substantial showing that his constitutional rights were violated. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). If the petition makes such a showing, then the petition advances to stage three, at which the circuit court holds an evidentiary hearing on the petition's claims. See 725 ILCS 5/122-6 (West 2008); *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). We review a second stage dismissal of a post-conviction petition *de novo*. *People v. Harris*, 206 Ill. 2d 1, 13 (2002).

¶ 15 In his post-conviction petition, defendant primarily contends that he was denied the right to effective assistance of trial counsel and appellate counsel. The right to counsel guaranteed by

both the United States and Illinois Constitutions includes the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8. To prevail on a claim of ineffective assistance of counsel, defendant must satisfy the familiar two-part test set forth in *Strickland v. Washington*: first, "defendant must show that counsel's performance fell below an objective standard of reasonableness," and second, defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). To establish deficient performance under the first prong, " 'the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy.' " *Id.* at 326-27 (quoting *People v. Smith*, 195 Ill. 2d 179, 188 (2000)).

¶ 16 Defendant points to four specific acts or omissions by trial counsel to support his ineffective assistance claim. We note that while a defendant normally cannot raise case claims in post-conviction proceedings that could have been raised on direct appeal, defendant now claims that his appellate counsel was ineffective for failing to raise the claims set forth in his post-conviction petition. See *People v. Williams*, 209 Ill. 2d 227, 233 (2004) (noting that the doctrine of waiver will be relaxed where "the waiver stems from the ineffective assistance of appellate counsel"). Accordingly, we will consider defendant's arguments on the merits to determine whether defendant has made a substantial showing of a constitutional violation.

¶ 17 *Failure to Impeach Sharee Jackson*

¶ 18 Defendant first argues that the failure to impeach Sharee Jackson with two prior inconsistent statements constitutes ineffective assistance of counsel. "Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). "Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable." *Id.* On direct examination, Jackson testified that she saw defendant with a gun prior to the shooting and that defendant said, "I shot him, moe" after the shooting. Defense counsel then elicited the following testimony on cross-examination:

"Q. I want to direct your attention back to the early part of June. You remember receiving a call from someone who identified himself as Steven Kramer?

A. Yes.

Q. And do you recognize that person's voice as being my voice?

A. Yes.

Q. And you answered the phone?

A. Huh?

Q. You answered the phone?

A. I did.

Q. And identified you [sic]—telling you my name and who I was representing?

A. Yes.

Q. You understood I was Brian's attorney, is that correct?

A. Yes.

Q. And I asked if you would mind speaking to me about certain things that you had said to the police officers, is that correct?

A. Yes.

Q. And one of those things I asked you about was whether or not you had seen a gun on Brian's person, is that correct?

A. Yes.

Q. Do you remember what your response was?

A. I said yeah.

Q. You said you did.

A. Right.

Q. And did I aks you whether or not Brian had ever made a statement to the effect that he had shot the moe or something to that effect?

A. Yes.

Q. And what did you tell me?

A. I said yes.

Q. You said yes.

MS. BIGANE [assistant State's Attorney]: I think as this point I have to interject. Mr. Kramer's making himself a witness. Mr. Kramer has just I think made himself a witness. Thereby rendering him unable to be the lawyer.

MR. KRAMER [defense attorney]: I may have at this point, Judge.

THE COURT: I would agree. Although it's a little different than a jury.

MR. KRAMER: Exactly. That's what I would ask court to consider. It is a bench trial.

MS. BIGANE: Then again we are going to have to object to discovery on behalf of defense. We had no knowledge of this alleged phone call, or statement that were made to Mr. Kramer rendering him a witness. Had we had that in June when evidently this happened, perhaps something else could have been done.

MR KRAMER: Judge, I am taken by surprise by her response to be honest with this court. I didn't know it would be necessary to even get into asking that question. I am surprised by what her testimony is this afternoon."

¶ 19 After a break, Mr. Kramer's co-counsel addressed the court:

"MR. MAHONEY: As a preliminary matter, housekeeping matter, I [would] like to spread something of record. I have had an opportunity to discuss the issue of Miss Jackson's testimony with both defendant Brian Jones and my co-counsel Steven Kramer. And at this time I can represent to the court that we do not intend to call Mr. Kramer in any sort of fashion to impeach Miss Jackson.

THE COURT: You understand then impeachment will not be perfected so I cannot consider it.

MR. MAHONEY: I understand you.

MR. KRAMER: We discussed with fully with Mr. Jones.

THE COURT: Okay. All right."

¶ 20 As an initial matter, the State argues that defendant cannot now complain about defense strategy because he agreed to the strategy at trial. See, *e.g.*, *People v. Anderson*, 272 Ill. App. 3d 566, 571 (1995) ("Where a defendant knowingly and intelligently consents to defense counsel's strategy, he normally cannot claim ineffective assistance of counsel for the actions of defense counsel in furtherance of that strategy."). We agree with this general principle, but here defendant claims that he did not knowingly and intelligently consent to this strategy because his counsel did not "fully discuss" the issue with him. The State additionally argues that defendant's affidavit supporting his petition is inadequate to substantiate his claims. We disagree. In this particular case, defendant does not need to secure an affidavit from the attorney he now accuses of ineffective assistance. See *People v. Hall*, 217 Ill. 2d 324, 333 (2005) ("Failure to attach independent corroborating documentation or explain its absence may *** be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney.") We therefore turn to the merits of defendant's argument regarding trial counsel's handling of Jackson's impeachment.

¶ 21 Defendant contends that the cross-examination of Jackson was "incompetently handled" in light of his attorney's decision not to perfect the impeachment by testifying to what Jackson told him on the phone. Defense counsel's cross-examination did not consist of the single unperfected impeachment recounted above, however; the record reveals that defense counsel extensively cross-examined Jackson on many issues, including her prior statements regarding defendant's statement and defendant's possession of a gun. Defense counsel established that when Jackson gave a statement to an assistant State's Attorney on the night of the shooting, she

had left out the important detail about defendant's statement, "I shot him, moe." Counsel also established inconsistencies in Jackson's testimony as to whether defendant said "I shot a moe" or "I shot him, moe." Following Jackson's cross-examination, defense counsel called detective Robert Lane, who was present when Jackson gave a statement in the early morning after the shooting, the next day at the police station, and later with the assistant State's Attorney. Lane testified that on all three occasions, Jackson never stated that defendant said, "I shot him, moe." As to defendant's possession of a gun, defense counsel established that Jackson did not tell the officers that defendant had a gun at the apartment and only later told them when giving a statement at the police station. As to her statement at the police station, defense counsel pursued a line of questioning regarding the officers' possible suggestions to Jackson that defendant had a gun, and counsel questioned Jackson about the what she saw of the gun.

¶ 22 After cross-examination, defendant's attorney explained to his client that he thought it was unnecessary for him to testify and perfect the impeachment regarding Jackson's statements to him. But defense counsel did perfect the impeachment regarding Jackson's prior inconsistent statements to police and an assistant State's Attorney. At worst, with the benefit of hindsight, we could classify counsel's decision not to perfect the impeachment regarding Jackson's statements to him as a mistake in trial strategy or an error in judgment. This does not render his representation constitutionally defective, however. See *People v. Perry*, 224 Ill. 2d 312, 355 (2007). In light of counsel's otherwise competent cross-examination, we cannot conclude that counsel failed to conduct "meaningful adversarial testing of the State's case." *Id.* at 355-56.

¶ 23 Defendant also has not shown that but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different. See *Manning*, 241 Ill. 2d at 326. Defendant places too much emphasis on the importance of perfecting Jackson's impeachment. As noted above, defense counsel did impeach Jackson on various points, including her prior inconsistent statements regarding defendant's statement. We cannot agree with defendant that once counsel perfected the impeachment of Jackson regarding her statements to counsel, the trial court would have completely dismissed Jackson's testimony as incredible. See *People v. Douglas*, 2011 IL App (1st) 093188, ¶ 47 ("[A] court of review will not upset a verdict *** on the possibility, not probability, that with a little bit more impeachment, the witness would have been found totally incredible.").

¶ 24 Defendant also overstates the importance of Jackson's testimony in light of all the evidence presented at trial. While defendant contends that Jackson was the only witness who "provided the State a connection between defendant and a firearm," the record does not support his claim. Lance Priest testified that defendant pulled a gun from his waistband and opened fire at him and Dunn. Raleigh Pritchett corroborated this testimony, explaining that he saw a brown-skinned black man wearing blue jeans and a blue and white checkered shirt approach Priest and Dunn, say "what's up, folks," and then fire a gun at them.

¶ 25 Beyond testimony of witnesses who saw defendant fire the gun, there was considerable evidence of defendant's guilt. Priest testified that defendant drove by in a red car just after the incident, and several police officers later identified defendant as the man who drove by and then sped away. When the police car found the red car in a vacant lot, with engine still warm, Mathies

eventually admitted that she was in the car with defendant around the time of the shooting. When police later found defendant, he was bare-chested, running down the back stairs of Mathies' apartment. Defendant's blue and white checked shirt was found abandoned in the apartment. While defendant contends that there was no apparent motive for the shooting, the trial court heard testimony that defendant was a member of the Blackstones gang (*i.e.*, a "mo" or "moe"), and Priest was a member of the rival Gangster Disciples (*i.e.*, "folks"). Even if we assume that defense counsel's decision not to perfect Jackson's impeachment constitutes deficient performance, there is no reasonable probability that the result of the proceedings would have been different if the impeachment had been perfected.

¶ 26 *Failure to Call Byron Manson and Quasi Lester as Defense Witnesses and Failure to Adequately Present Alibi Defense*

¶ 27 Defendant next contends that his trial attorneys were ineffective for failing to interview and call Byron Manson and Quasi Lester as defense witnesses. The decision to present a particular witness is generally a strategic choice which cannot support a claim of ineffective assistance of counsel. *People v. Richardson*, 189 Ill. 2d 401, 414 (2000). The failure to investigate, however, can constitute ineffective assistance if it did not conform to minimal professional standards and is prejudicial. *People v. Kelley*, 304 Ill. App. 3d 628, 635 (1999); *People v. Makiel*, 358 Ill. App. 3d 102, 107-08 (2005). Whether a failure to investigate amounts to incompetence depends on the value of the evidence to the case. *People v. Marshall*, 375 Ill. App. 3d 670, 676 (2007) (citing *People v. Steidl*, 177 Ill. 2d 239, 256 (1997)). Defendant argues that Manson and Lester would have provided valuable testimony corroborating defendant's claim

that he was in the apartment at the time of the shooting, and he claims that his trial attorneys were ineffective for failing to interview and call them as witnesses.

¶ 28 Prior to trial, Manson and Lester both spoke to police and told them that defendant left the apartment alone around 1:30 a.m. and returned about an hour later. Manson provided a handwritten statement with the same information. These statements were in obvious conflict to defendant's claims that he left with Mathies around 1 a.m. to get beer and returned shortly thereafter, and the State sought to present Manson's and Lester's testimony as part of its rebuttal case. When the men failed to appear in response to the State's subpoenas, the State requested a continuance, over defense counsel's objections. The trial court granted the continuance, but after Manson and Lester again failed to appear, the court denied the State's request for another continuance. In support of defendant's post-conviction petition, Manson and Lester provided affidavits denying their statements to the police. Both men now state that they would have testified that defendant was at the apartment at the time of the shooting, but they were never contacted by defense counsel and were never served with any subpoenas.

¶ 29 The facts in this case are remarkably similar to those in *People v. Guest*, 166 Ill. 2d 381 (1995). In *Guest*, the defendant argued that trial counsel was ineffective fo failing to investigate a potential witness, John Marlow, and call him to testify at trial. 166 Ill. 2d at 399. Prior to defendant's murder trial, Marlow provided a statement to police that identified defendant as the gunman. *Id.* at 389. In post-conviction proceedings, Marlow provided an affidavit in which he denied making a statement to police, established that someone else was the gunman, and stated that he was never contacted by counsel. *Id.* at 399-400. The Illinois Supreme court concluded

that defense counsel's decision not to investigate or call Marlow as a witness was reasonable. *Id.* at 400. The court reasoned that the proposed testimony would have been of questionable value, if not harmful to defendant, based on Marlow's statement to the police. *Id.* Moreover, any favorable testimony from Marlow would have been subject to "very damaging impeachment." *Id.* The court also concluded that, even if the trial counsel was unreasonable, there was no prejudice to defendant because Marlow's testimony would have been severely impeached, and other identification evidence in the case was "substantial." *Id.* at 401.

¶ 30 Similarly, defense counsel's decision not to interview Manson and Lester and call them as witnesses cannot support defendant's claim of ineffective assistance, where their statements to police indicated that their testimony would contradict defendant's testimony and defense counsel's theory of the case. See *id.*; *Marshall*, 375 Ill. App. 3d at 676-77 (trial attorney was not ineffective for failure to interview where the trial attorney was "aware of the substance of the testimony that [the potential witness] would have offered" based on prior statement, and even if witness testified in defendant's favor, the State would have undermined the testimony by impeaching witness with prior statement). Although Manson and Lester have now provided affidavits with a description of events favorable to defendant, it was reasonable for defense counsel to forgo further investigation of Manson and Lester in light of their unfavorable statements to police. In fact, based on Manson's and Lester's prior statements, it was the State that viewed their testimony as essential to its case. When Manson and Lester failed to appear in response to the State's subpoenas, the state's attorney commented at trial, "We feel the witnesses

are material and significant in the People's rebuttal case because the defendant is claiming he was never let out of their sight ***. We believe that would not be the testimony."

¶ 31 While defendant concedes that Manson and Lester gave unfavorable prior statements to police, he contends that "the contents of police reports are not dictates from the Bible and whatever a police report records a person said does not necessarily mean it is true." Defendant claims that he informed his trial attorneys about the existence and exculpatory value of these two witnesses, but that his counsel told him that these witnesses were "not needed." We acknowledge that it is possible that Manson and Lester would have recanted their earlier statements during an interview with defense counsel. But even so, a decision not to call them would have been reasonable. Although interviewing Manson and Lester would have given defense counsel a better view of the *substance* of the testimony they would give at trial, their prior statements gave defense counsel a clear view of the *value* of Manson's and Lester's testimony. The best case scenario for defense counsel would have been for Manson and Lester to testify in support of defendant's alibi defense, only then to be severely impeached based on their multiple prior inconsistent statements and their relationship with defendant. Based on the possibility of such damaging impeachment, it was not unreasonable for trial counsel to forgo calling them as witnesses. See *Guest*, 166 Ill. 2d at 400; *People v. Kubat*, 114 Ill. 2d 424, 433 (1986) (decision not to present testimony of alibi witnesses reasonable where "cross-examination could severely damage their credibility"). We conclude that defense counsel's strategic decision at trial regarding Manson and Lester cannot support defendant's ineffective assistance claim.

¶ 32 As a supplement to his claims regarding defense counsel's failure to call Manson and Lester, defendant argues that trial counsel failed to adequately consult with defendant regarding the theory of defense prior to trial, and he contends that trial counsel amended the answer to discovery to include the alibi defense after the trial began. According to defendant, these actions show that his defense was conducted in an "indecisive and inept manner" and his attorneys were "ill prepared to deal with a case of this magnitude." As to the late filing of the alibi defense, defendant contends, without discussion, that this "diminish[ed] the credibility of that defense, as it appeared to be presented as an afterthought." Even if we agree with defendant's unsupported contentions that these actions lend support to his claims of deficient performance, defendant must show that there is a reasonable probability that the result would have been different but for counsel's incompetence. *Manning*, 241 Ill. 2d at 326. Other than the fact that the defense was unsuccessful, defendant presents no evidence to demonstrate prejudice. There is no indication that the trial court sanctioned defendant because of counsel's amendment to the answer to discovery; the court did not prevent defense counsel from presenting evidence on the alibi theory. Trial counsel did present an alibi defense, offering three witnesses on behalf of defendant and cross-examining those witnesses that contradicted defendant's testimony. There was considerable evidence of defendant's guilt presented at trial, and defendant has failed to present any basis on which to conclude that the result would have been different if counsel had acted differently.

¶ 33 Defendant offers one additional example of trial counsel's "sloppy" presentation of his defense: counsel's reservation of an opening statement. The decision to waive or reserve an

opening statement is a matter of trial strategy, and only the most egregious strategic blunders will support an ineffective assistance claim. *People v. Penrod*, 316 Ill. App. 3d 713, 724 (2000). In this particular case, a bench trial with relatively simple facts, the trial attorneys' decision to reserve (but not waive) an opening statement allowed them to tailor their comments to the specific evidence presented in the State's case. See *People v. Davis*, 228 Ill. App. 3d 123, 127 (1992). We conclude that defendant's additional contentions regarding the presentation of his alibi defense provide no support for his ineffective assistance claim.

¶ 34 *Failure to Test Defendant's Shirt for Gunshot Residue*

¶ 35 Defendant next argues that his trial counsel was ineffective for failing to have his shirt tested for gunshot residue (GSR). We disagree. Trial counsel made a sound tactical decision to forgo GSR testing for defendant's shirt. Most importantly, testing the shirt for GSR could have proven detrimental to defendant's case, with little, if any, potential for improving it. A positive test result would have contradicted defendant's claim that he was not in possession of a gun and did not fire a gun the night of the shooting. By contrast, where the GSR test for defendant's hands were inconclusive, trial counsel could credibly argue that no GSR evidence existed to link defendant to the shooting. In fact, the inconclusive test result allowed defense counsel to attack the State's case during closing arguments: "Why isn't the shirt tested. It can be tested. Why isn't it tested? Because the State knows that it's going to come back inconclusive, negative." Where testing the shirt would have posed an unreasonable risk to defense counsel's strong position regarding the GSR evidence, the decision not to have the shirt tested was a reasonable strategic choice.

¶ 36 *Failure to Impeach Lance Priest*

¶ 37 Defendant contends that his trial attorneys were ineffective for failing to impeach Lance Priest. Priest testified that the decedent, Kenneth Dunn, was not a member of any gang, but he initially told police that Priest was a member of the Gangster Disciples. As noted above, "the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel." *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). Defendant must show that counsel's approach to cross-examination was objectively unreasonable.

¶ 38 At trial, defense counsel argued that there was no evidence of motive for defendant to shoot at Priest and Dunn. This argument was largely in response to the State's claim that defendant, a member of the Blackstones gang, shot at Priest and Dunn because he believed they were members of a rival gang, the Gangster Disciples. Priest's testimony supported the State's theory only in part; he confirmed that he was a member of the Gangster Disciples, but testified that Dunn was not a member of that gang. Once Priest testified to that fact, defense counsel was faced with a choice: he could impeach Priest on a relatively minor point, or he could forgo impeachment and avoid emphasizing a prior statement that, if taken as substantive evidence, would have supported the State's theory of the case. In this situation, we cannot fault defense counsel for his strategic choice not to highlight Priest's prior statement regarding Dunn's gang affiliation. The value of impeachment was likely minimal, as the record shows that defense counsel extensively cross-examined, and impeached, Priest on many other issues. Moreover, without Priest's prior statement, trial counsel could, and did, rebut the State's theory by arguing

that defendant had no motive to shoot at Dunn. While this strategy was ultimately unsuccessful, it was certainly reasonable. We therefore conclude that defendant's trial counsel was not ineffective because of the decision to forgo impeaching Priest regarding Dunn's gang membership.

¶ 39 *Ineffective Assistance of Appellate Counsel*

¶ 40 Defendant also claims that his appellate counsel was ineffective for failing to raise the deficiencies of his trial counsel on direct appeal, including the failure to impeach Jackson and Priest, failure to interview and call Manson and Lester as defense witnesses, and failure to have defendant's shirt tested for gunshot residue. In other words, defendant argues that his appellate counsel on direct appeal should have made the same arguments he is making now. We agree with the trial court's determination that because defendant has not made a substantial showing that his trial counsel was ineffective, he has not made a substantial showing that appellate counsel was ineffective. See, *e.g.*, *People v. Enis*, 194 Ill. 2d 361, 377 (2000) ("A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating that such failure was objectively unreasonable and that counsel's decision prejudiced defendant. If the underlying issue is not meritorious, then defendant has suffered no prejudice.").

¶ 41 *Lance Priest Recantation*

¶ 42 Defendant finally argues that the trial court improperly dismissed his post-conviction petition in light of new evidence relating to Lance Priest's identification of defendant as the

shooter. In his amended petition for post-conviction relief,[1] defendant attached an affidavit from Lance Priest that stated "I am not certain whether Brian Jones was the person I saw shoot my cousin." According to his affidavit, Priest could not see the shooter's face when he was asked to identify him because the lights from the police car were too bright; he could only see that "the person had a similar build to the shooter and was wearing a similar shirt." He identified defendant as the shooter because police told him that there was other evidence implicating him. The amended petition, however, explained that Priest had recanted this recantation. The amended petition alleged that it was "defense's understanding" that Priest had recanted the statements in his affidavit after police had threatened Priest and his father.

¶ 43 To the extent that defendant's claim is based on Priest's affidavit (*i.e.*, his recantation of his trial testimony), we find that the recantation alone does not present a constitutional claim, as required by section 122-1 of the Post-Conviction Hearing Act. See 725 ILCS 5/122-1(a)(1) (West 2008). "In the absence of an allegation of the knowing use of false testimony, or at least some lack of diligence on the part of the State, there has been no involvement by the State in the false testimony to establish a violation of due process." *People v. Brown*, 169 Ill. 2d 94, 106 (1995); *People v. Deloney*, 341 Ill. App. 3d 621, 632 (2003). In his affidavit, Priest stated that he was unsure that it was defendant who shot his cousin, but he identified him because he "was influenced by the police and State's Attorneys telling me that there was so much other evidence implicating Brian Jones." There is no suggestion that Priest ever mentioned to the police or

[1] In his supplemental petition, defendant adopted the arguments presented in his amended petition, which was filed by previous counsel on March 23, 2005.

assistant State's Attorneys that he was uncertain of his identification, nor is there a suggestion that any representative of the State pressured, intimidated, or coerced Priest into identifying Jones or testifying at trial. Without any allegation that the State knew that Priest's testimony was false, Priest's inaccurate testimony is simply "an action of a private individual for which there is no remedy under the due process clause." *Brown*, 169 Ill. 2d at 106.

¶ 44 Defendant's claim fares no better in light of Priest's recantation of his affidavit. We acknowledge that police intimidation may support a claim of knowing use of false testimony because the prosecution is charged with the knowledge of its agents, including the police. See *People v. Ellis*, 315 Ill. App. 3d 1108, 1112 (2000) (citing *People v. Martin*, 56 Ill. 2d 322, 325, (1974)). But even if we accept defendant's unsubstantiated claim that Priest recanted his affidavit because of police intimidation, we are still left with an affidavit from Priest that fails to raise a constitutional claim. The alleged intimidation and coercion related to the recantation of the affidavit does nothing to advance defendant's claim that the State knowingly used false testimony at his trial.

¶ 45 Defendant relies on *People v. Steidl*, 177 Ill. 2d 239 (1997). In *Steidl*, a witness whose testimony at trial implicated the defendant recanted her testimony, withdrew her recantation, and then recanted her testimony again. 177 Ill. 2d at 260. Where there was no evidence regarding the circumstances of the final recantation, our supreme court held that the "specific situation warrant[ed] a review of [the witness's] new recantation at an evidentiary hearing." *Id.* at 261. We acknowledge that *Steidl* did not discuss whether the post-conviction petition alleged that the State knew the witness's testimony was false. The Supreme Court went on to discuss allegedly

false testimony from another witness, however, and specifically found that an evidentiary hearing was not required where the post-conviction petition failed to state or support a claim that the State knowingly used false testimony. *Id.* at 262 (finding that while petition alleged that witness received money for testimony, defendant failed to raise a due process violation where there was no evidence that witness lied about any anticipated compensation or that the prosecution relied on any false testimony). We therefore conclude that our supreme court in *Steidl* did not recognize, *sub silentio,* an exception to the requirement that the petition must state a constitutional violation. See *id.* at 249. Where Priest's affidavit and his recantation of that affidavit fail to state a constitutional claim based on knowing use of perjured testimony, the circuit court properly dismissed the petition.

¶ 46 CONCLUSION

¶ 47 We conclude that, viewed separately or together, defendant's claims are inadequate to demonstrate that he was denied his right to effective assistance of trial or appellate counsel. The post-conviction petition also fails to allege a constitutional violation based on the recantation of Lance Priest. Because defendant's post-conviction petition does not make a substantial showing of a constitutional violation, the circuit court properly dismissed it at the second stage.

¶ 48 Affirmed.