2012 IL App (1st) 102690-U

FIFTH DIVISION
October 26, 2012

No. 1-10-2690

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 01 CR 2288
	)	
XAVIER COX,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The trial court's second-stage dismissal of defendant's postconviction petition was affirmed where defendant failed to make a substantial showing that his trial counsel was ineffective for not filing a motion to suppress and for not communicating an alleged plea offer to defendant.

¶ 2 Defendant, Xavier Cox, appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)). He seeks reversal of that order and a remand

for an evidentiary hearing, contending that he made a substantial showing of violations of his constitutional rights. For the reasons that follow, we affirm.

¶ 3 In 2005, defendant was found guilty of murder and aggravated kidnapping on an accountability theory. He was sentenced to 21 years' imprisonment for murder, an additional 20 years' imprisonment for personally discharging a firearm during the commission of that offense and a concurrent term of 10 years' imprisonment for aggravated kidnapping. Defendant did not file a direct appeal from that judgment and we will therefore summarize the evidence presented at defendant's trial.

¶ 4 Defendant was arrested on December 22, 2000, in connection with the September 29, 2000, shooting death of the victim, Pierre Mahone. After his arrest, defendant gave a statement to Chicago police detectives and an assistant State's Attorney (ASA) admitting his involvement in the crime. Defendant was subsequently indicted, along with codefendants Fontaine Lewis and Linnard Kidd, on multiple charges of first degree murder and aggravated kidnaping.

¶ 5 On January 12, 2001, attorney Craig Justin Katz filed an appearance on defendant's behalf. More than four years passed from the time Katz filed his appearance until the start of defendant's trial. During that time, on April 8, 2003, the parties appeared before the court for a status hearing. Katz informed the court the matter would proceed to a motion to suppress defendant's statement to police and he was given a continuance to file a more specific motion. [1]

[1] The parties disagree, and the record is unclear, as to whether Katz filed a motion to suppress on this date or informed the court that he intended to file a motion to suppress. Nevertheless, the parties agree that no such motion is contained in the record and whether a motion was actually filed on this date has no bearing on our resolution of the issues raised on

There is no indication in the record that a more specific motion to suppress was ever filed. At some point after this hearing, Katz's licence to practice law was suspended. At a status hearing on November 13, 2003, the court asked defendant "who is your attorney now," to which defendant responded that Katz informed him that a partner in his firm, "Mr. Friedman," would be handling defendant's case. With defendant's agreement, the trial court continued the case so that Friedman could file an appearance on defendant's behalf. At a subsequent status hearing in December 2003, the court informed defendant that "Mr. Katz as you know has been suspended for a year" and that Friedman had come to court and indicated that he was not going to represent defendant or any of Katz's other clients. The court asked defendant if he could afford an attorney and, when defendant stated that he could not, the court appointed the public defender to represent him.

¶ 6 From December 2003 to June 2004, the public defender continued to represent defendant. On September 21, 2004, Katz appeared at a status hearing and indicated that he would be filing an appearance on defendant's behalf. On November 18, 2004, the trial court informed defendant that "Mr. Katz is suspended again effective October 18, 2004, so Mr. Thomas [the public defender] is back on the case." On November 30, 2004, Katz appeared at a status hearing and informed the court that he had been suspended for a violation of Supreme Court Rule 764, and that he had since filed a certificate of compliance.

¶ 7 On January 5, 2005, Katz appeared before the court on defendant's behalf and informed

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appeal.

the court that he intended to proceed to a hearing at a later date on a motion to suppress defendant's statement. On the day of the hearing on the motion to suppress, February 10, 2005, the prosecutor told the court that Katz had called him the night before to inform him that he would be held on trial in another courtroom and could not proceed on the motion. On the next court date, Katz did not appear and the court stated that it would bring defendant into court every day until Katz appeared. On February 17, 2005, Katz appeared in court on defendant's behalf and informed the court that defendant was withdrawing the motion to suppress. Defendant was then brought into court and Katz reiterated that the motion to suppress was being withdrawn. The court asked Katz if he had discussed withdrawing the motion with defendant, and Katz replied that he had. The case then proceeded to a bench trial, in which defendant's case was severed from that of codefendants Lewis and Kidd.

¶ 8 At defendant's trial, the State presented several eyewitnesses to the victim's abduction, all of whom knew defendant and identified him as one of the offenders. One of those witnesses, Larone Tate, testified that he was a member of the Conservative Vice Lords gang and was familiar with other gangs in the area. He knew the victim from the neighborhood and knew him to be the "Chief" of the Vice Lords. On the day of the victim's murder, Tate was outside of a two-flat building in Chicago when he observed the victim pull up in his vehicle and about seven or eight other vehicles pull up behind or in front of the victim, blocking him in. The victim got out of his vehicle and about 15 or 20 people, armed with baseball bats and guns, exited the other vehicles and approached the victim. Tate identified defendant as one of the men who approached the victim. Tate explained that defendant was in the first car that pulled up across the street from

the victim. When defendant exited the vehicle, he raised a gun into the air and told the others to raise their guns as well. Tate also heard defendant say, "tell them X-man did it," and he testified that defendant is "X-man." An unidentified individual approached the victim and hit him in the head with a pistol, and defendant yelled to the others not to whip the victim. One of the attackers approached Tate and told him to go into the house and "get that ni**** that ran into the house." According to Tate, Smith had just run into the house. Tate watched from the front window as the attackers hit the victim with baseball bats and guns, but he could not see defendant at this time. The victim was trying to break free of the attackers when Tate heard a gunshot and someone else inside the house said "they just shot him." Tate then saw the attackers grab the victim and throw him in the back seat of a Chevy Suburban. After the Suburban drove away, Tate saw defendant shoot his gun two or three times in the air and then direct the remaining vehicles off the block. Tate did not see defendant hit the victim or enter the Suburban with the victim. Although they were in the same gang, Tate did not help the victim because he was unarmed.

¶ 9 Derek Brown and Napolean Smith were outside with Tate and testified to substantially the same sequence of events. Brown added that defendant exited his vehicle, pointed his gun "everywhere" and told the others in his group to "get" the victim. He also identified codefendant Linard Kidd as the person who hit the victim in the head with his gun. Brown was attempting to run into the house when defendant told him not to move and ordered codefendant Fontaine Lewis to "get" Brown. Brown was able to escape and later called the police. Smith added that defendant and codefendant Lewis were members of the "New Breeds" street gang. Smith ran into the house during the attack and through a window saw the victim thrown into the Suburban.

He heard a gunshot and saw Lewis pointing a gun at the victim, although he could not be sure it was Lewis who fired the shot. Subsequently, at the police station, he identified Lewis as the person who shot the victim in the leg before placing him in the Suburban.

¶ 10 Brandi Harrison observed the attack from her living room window. She recognized defendant as one of the men who approached the victim and added that defendant was armed and that he hit the victim. She saw one of the attackers shoot the victim in the leg.

¶ 11 Rudolfo Escalante testified that he was waiting for the bus on September 29, 2000, when he saw a Chevy Suburban pass him on the street. He saw someone who he later identified as the victim hanging out of the Suburban and holding onto the inside of the open car door. Others inside the car were trying to pull the victim in, while the victim was screaming "help me, help me." Someone told him later that day that there was a body in a nearby alley. Escalante went to that location and saw the victim lying in the alley.

¶ 12 In addition to this testimony, the parties stipulated to the testimony of the medical examiner that the victim suffered a through-and-through gunshot wound to the head and a gunshot wound that entered and exited his right leg before lodging in his left leg. The victim also suffered multiple blunt trauma injuries. The cause of death was ruled a homicide. The parties also stipulated that a .38 caliber cartridge was recovered from the alley near the victim and that a .38 caliber bullet was recovered during the autopsy. No latent prints suitable for comparison were recovered from the firearm evidence.

¶ 13 The State also presented the testimony of ASA Irene McNamara. ASA McNamara went to the police station to speak with defendant on December 23, 2000. She gave defendant his

Miranda warnings and explained that she was not his attorney. Defendant agreed to answer the ASA's questions, and the two spoke for approximately one and one-half hours in the presence of Detective Peligrini. After they spoke, defendant agreed to give a statement. ASA McNamara explained the different ways the statement could be memorialized, and defendant elected to give a handwritten statement "because he said it was easier for him to understand because it was in front of him and he can read it, and that was his choice." ASA McNamara then asked Detective Peligrini to leave the room and she spoke to defendant alone. She asked defendant how he had been treated by the police, and defendant said that he had been treated "all right." Defendant also told the ASA that no one was forcing him to give the statement. She asked defendant if he needed anything, such as to use the restroom, and defendant said that he did not. ASA McNamara left the interview room and later returned with Detective Peligrini. She again read defendant his *Miranda* rights, and defendant indicated he understood those rights and wished to give a statement. Defendant signed his name beneath the *Miranda* warnings that were preprinted on the form used to take defendant's statement.

¶ 14 ASA McNamara and defendant then spoke for approximately three hours, during which time defendant spoke and the ASA wrote down defendant's statement. Defendant was sitting next to the ASA and was able to see what she was writing. After ASA McNamara wrote out defendant's statement, she had him read several sentences from it out loud to prove that defendant could read English and read what the ASA was writing. ASA McNamara then read the entire statement out loud while defendant followed along so that defendant knew its contents. Defendant was allowed to make any corrections to the statement, and each correction he made

was initialed by defendant, ASA McNamara and Detective Peligrini. After the ASA read the entire statement, they all signed the bottom of each page as well as the exhibit photos that were used during the statement. ASA McNamara then gave defendant the entire statement so that he could read it himself. Defendant did so and was satisfied with the statement. The ASA described defendant as "relaxed," "fine" and "[v]ery cooperative" during the course of their conversation. At the end of the statement, ASA McNamara added a paragraph indicating that the statement was true, complete and accurate and that defendant had the opportunity to make changes to the statement but that he did not do so. Defendant signed this portion of the statement as well. Defendant's photograph was taken to show how he looked at the time, and the photo was signed by defendant, the ASA and the detective. The ASA then added a section to the end of the statement indicating that she explained to defendant the difference between a videotaped, court-reported and handwritten statement and that defendant chose to give a handwritten statement. ASA McNamara testified that defendant consented to and initialed this addition to the statement.

¶ 15 Defendant's statement was then published to the court. In his statement, defendant indicated that he was 28 years old and had a high school diploma and an electrician's degree from Concordia College. Defendant acknowledged being a member of the New Breeds gang along with codefendants Kidd and Lewis. The victim was a "five star prince" of the Vice Lords, a rival gang. Defendant explained that Kidd had been selling drugs on a street corner that belonged to the Vice Lords and was run by the victim. The corner was a "hot spot" for drug sales, with a lot of business and money to be made. The victim confronted Kidd after discovering him selling drugs on the corner and told him that he could no longer sell drugs there. Kidd was upset and

called Lewis in order to get enough New Breed gang members to stand up to the victim. At approximately noon on September 29, 2000, defendant was standing outside of a housing project when Lewis pulled up with his brother and yelled to defendant that there was "Nation business." Defendant understood this to mean "it was something going down with the New Breeds and they needed his help." Defendant entered his car and followed Lewis until they arrived at a house. Lewis entered the house and came back outside with a "bunch" of guns, which he gave to the people he trusted most, including defendant and eight other people. The group then drove to a vacant lot, where Lewis held a meeting and told the group of approximately 50 people about the dispute between Kidd and the victim over the drug spot. Lewis and Kidd told everyone that the plan was to kidnap the victim and hold him for $50,000 ransom. A portion of this ransom was to go to the men involved in the kidnapping. Defendant estimated that his portion of the ransom would be $500. One of the victim's fellow gang members, "Little Mike," agreed to tip off the New Breeds to the victim's whereabouts in exchange for a portion of the ransom.

¶ 16 Little Mike came to the vacant lot at about 1:30 p.m. on September 29, 2000, and told the New Breeds that the victim would be at 16th Street and Hamlin in one-half hour. Lewis told defendant that he was to act as a lookout and security for Lewis. Defendant and Little Mike would be the first to approach the victim because the victim knew Little Mike and would not be scared off by him. Defendant, Lewis and two others then drove defendant's vehicle to 16th and Hamlin, and the victim soon pulled up in his vehicle. Defendant, Little Mike, Lewis and Kidd approached the victim, and Lewis began to argue with the victim because he would not give up the "drug spot." While Lewis was arguing with the victim, defendant pulled out his gun and

began acting as security for Lewis. Kidd then hit the victim in the head with a bat and Lewis hit him with the butt of his gun. Defendant believed that Lewis' gun fired at this point but did not hit anyone. Defendant, who still had his gun drawn, told Lewis not to kill the victim. Lewis and Kidd forced the victim into the Suburban and drove away without defendant. Defendant shot his gun in the air in order to make the people standing outside go back into their homes. Defendant was then shot in the hand but did not know who shot him. Defendant drove away in his car with another gang member and eventually drove to the hospital. According to defendant, everyone was supposed to meet at the vacant lot, but defendant could not because of his hand. Defendant called Lewis later that night, and Lewis told him that he killed the victim because he would not sit still in the car. Defendant told Lewis he was going to tell the police.

¶ 17 At the conclusion of his statement, defendant said that he had been treated "okay" by the police and the ASA and that he had been given food and drink. He was also given cigarettes to smoke and allowed to use the restroom when he wanted. Defendant was not under the influence of drugs and alcohol and was giving the statement of his own free will. Defendant concluded that he felt "very bad" about what happened and that his statement was "true and accurate."

¶ 18 Defendant did not present any witnesses or testify on his own behalf. The trial court found defendant guilty of aggravated kidnapping and first degree murder. After a sentencing hearing, the court entered judgment on count VI, felony murder, and sentenced defendant to 21 years' imprisonment for the murder, an additional 20 years for the personal discharge of a firearm and a concurrent sentence of 10 years for aggravated kidnapping.

¶ 19 Defendant appeared in court on a later date and informed the court that he had a pending

ARDC complaint against Katz and requested new representation. The trial court appointed the public defender to represent defendant. The public defender filed a motion to reconsider sentence, which the trial court denied. A notice of appeal was then filed, and the court appointed the State Appellate Defender to represent defendant. The appellate defender sought leave to file a late notice of appeal, which this court granted. The appellate defender subsequently filed a motion to dismiss defendant's appeal. Attached to the motion was a declaration signed by defendant stating that he had been informed by his attorney that by dismissing his appeal he would forego any direct appellate attack to his conviction or sentence and that, having been so informed, he wished to dismiss his appeal. On April 7, 2008, this court entered an order granting defendant's motion to dismiss his appeal.

¶ 20 On January 23, 2009, while represented by private counsel, defendant filed a postconviction petition raising numerous allegations of ineffective assistance of counsel. As relevant to this appeal, defendant claimed trial counsel was ineffective for not filing a motion to suppress his statement and for not informing him that the State had made an offer of a reduced sentence in exchange for defendant's testimony against his codefendants. Defendant attached his own affidavit to the petition, in which he stated that the facts alleged in his petition were true and correct to the best of his knowledge. Defendant also attached an affidavit from his mother, who averred that defendant told her that his attorney Katz did not visit him in jail, that Katz repeatedly promised her that he would "beat the case," and that had Katz not made such a promise, she and defendant would have hired new counsel during the two periods that Katz's law license was suspended. Defendant attached an affidavit from his cousin, Edward Strong, who similarly

averred that Katz promised to beat the case, that defendant told Strong that Katz had not visited him in jail to privately discuss the issues in his case, and that defendant's family decided not to replace Katz because of his promises.

¶ 21 In addition to these affidavits, defendant attached transcripts from 15 pretrial court dates, a copy of his handwritten statement and an unrelated ARDC complaint against Katz. Finally, defendant attached a copy of his own ARCD complaint against Katz. In a letter to the ARDC dated January 4, 2006, defendant stated that Katz did not visit him in jail to discuss his case and that he did not inform defendant that he had been suspended by the ARDC. Defendant also stated that Katz never attempted to suppress defendant's statement, which he allowed the State to write in exchange for a promise that defendant would not be charged with murder. Defendant further stated that Katz did not subpoena certain witnesses on his behalf.

¶ 22 Defendant attached to his petition two letters from the ARDC. The first letter, dated January 18, 2006, acknowledged receipt of defendant's letter regarding Katz. The second letter, dated May 2, 2007, stated that the "Administrator has determined to close our investigation of your charge as cumulative."

¶ 23 Defendant's petition was docketed and advanced to the second stage of proceedings. The State filed a motion to dismiss defendant's petition, which the trial court granted. This appeal followed.

¶ 24 At the second stage of proceedings under the Act, the circuit court must determine whether the allegations in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill.

2d 366, 381 (1998). If no such showing is made, the defendant is not entitled to an evidentiary hearing and the petition may be dismissed. *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). Dismissal is also appropriate where the record from the original trial proceedings contradicts the allegations in the defendant's petition. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). Because a proceeding under the Act is a collateral attack on a judgment of conviction, all issues that were decided on direct appeal are *res judicata* and all issues that could have been raised in the original proceeding are subject to forfeiture. *People v. Mahaffey*, 194 Ill. 2d 154, 170-71 (2000). We review the circuit court's second stage dismissal of defendant's postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 378-89.

¶ 25 Defendant first contends that he made a substantial showing that he received ineffective assistance of trial counsel. Defendant claims that counsel should have moved to suppress his statement as involuntary on the basis that it was the result of physical and mental coercion.

¶ 26 In his petition, defendant claimed that he attempted to explain to Katz that his statement was the result of coercion but that Katz assured defendant he would win the case and "therefore no further discussion was necessary." Defendant asserted that had Katz visited him in jail, defendant would have told him that he was extradited from Minnesota to Chicago and brought to the police station, where he was questioned by detectives. Defendant was not advised of his *Miranda* rights and was not provided counsel, despite his request for an attorney. Defendant was also hit and kicked by detectives, who threatened to harm him if he did not provide the statement. Defendant signed the statement only because he was coerced to do so, and he never saw the statement introduced at his trial until it was sent to him by appellate counsel. Finally, defendant

claimed that Katz lied when he told the trial court that he discussed with defendant withdrawing the motion to suppress.

¶ 27 Defendant now claims that trial counsel's failure to file a motion to suppress was objectively unreasonable and prejudicial because the motion would have been granted and he would not have been found guilty had the statement not been admitted into evidence.

¶ 28 We find that this claim was properly dismissed because defendant has failed to make a substantial showing that his trial counsel was ineffective. Claims of ineffective assistance of counsel are resolved under the standard set forth *in Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced the defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 162-63 (2001). In evaluating sufficient prejudice, "[t]he defendant must 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." *Strickland*, 466 U.S. at 694. A defendant must satisfy both prongs of this test in order to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687.

¶ 29 A defendant claiming ineffective assistance of counsel must "overcome the presumption

that the challenged conduct might be considered sound trial strategy under the circumstances." *People v. Giles*, 209 Ill. App. 3d 265, 269 (1991). A decision that involves a matter of trial strategy will typically not support a claim of ineffective representation. *People v. Simmons*, 342 Ill. App. 3d 185, 191 (2003). Decisions such as whether to file a motion to suppress evidence and what theory to rely on are traditionally considered matters of trial strategy that are given deference and generally do not establish ineffective assistance. *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000). To establish prejudice resulting from the failure to file a motion to suppress, a defendant must show that the motion would have been granted and that there is a reasonable probability that the trial outcome would have been different if the evidence had been suppressed. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). The failure to file a motion to suppress does not establish incompetent representation when the motion would have been futile. *Patterson*, 217 Ill.2d at 438.

¶ 30 In this case, defendant has failed to show that a motion to suppress his statement would have been granted because the record contradicts the allegations in his petition. A court must consider the totality of the circumstances surrounding a defendant's statement when determining whether that statement was voluntarily made. *People v. Armstrong*, 395 Ill. App. 3d 606, 624 (2009). Factors to be considered include the defendant's age, education, background, experience, mental capacity and intelligence, as well as the defendant's physical and emotional condition at the time of questioning, the duration of the questioning and whether the defendant was subjected to physical or mental abuse by the police. *Armstrong*, 395 Ill. App. 3d at 624.

¶ 31 The record shows that defendant was approximately 33 years old at the time of his

statement. He was literate and had completed high school and earned an electronics degree from Concordia College. When defendant initially met with ASA McNamara, she read defendant his *Miranda* warnings and explained to him that she was not his attorney. Defendant agreed to answer the ASA's questions and spoke with her for approximately one and one-half hours in Detective Peligrini's presence. Defendant then agreed to give a statement and, after the ASA explained the different ways that statement could be memorialized, defendant elected to give a handwritten statement. The ASA then asked the detective to leave the room so that she could speak to defendant privately about how he had been treated. Defendant told the ASA that he had been treated "okay" by the police and that he was not being forced to give a statement. Shortly thereafter, the ASA again read defendant his *Miranda* rights and defendant indicated he understood those rights. He also signed his name below the *Miranda* warnings that were preprinted on the form used to take defendant's statement.

¶ 32 The ASA then wrote out defendant's statement as he recounted the events leading to the victim's murder. After the statement was completed, the ASA had defendant read portions of it out loud to prove that defendant could read English and what the ASA wrote. ASA McNamara then read the entire statement aloud and allowed defendant to make any changes he wished. Defendant directed the ASA to make changes to the statement and he initialed each change. After ASA McNamara read the entire statement, defendant indicated that each page reflected what he said and he, the ASA and the detective signed each page. Defendant was then allowed to read the entire statement to himself and indicated that he was satisfied with it. At the end of the statement, the ASA added a section indicating that the statement was true, complete and accurate

and that defendant made any changes to it he wished. Defendant signed this portion of the statement as well. At the end of the statement, defendant indicated that he had been treated "okay" by the police and the ASA, that he had been given food, drink and cigarettes and that he was allowed to use the restroom. Defendant also indicated that he was not under the influence of drugs or alcohol, that the statement was true and accurate and that he was giving the statement of his own free will. The ASA testified that defendant was given food and drink and allowed to smoke cigarettes and use the restroom when he wished. She also testified that defendant was "relaxed," "fine" and "[v]ery cooperative" during the course of their conversation. A photograph was taken of defendant to show how he looked at the time of the statement and defendant signed that photograph. Defendant is smiling in the photograph and there are no visible injuries to his face.

¶ 33 This record rebuts defendant's claims that he was not given *Miranda* warnings, that his request for an attorney was denied and that his statement was the product of coercion and physical abuse. Given this record, it is unlikely that a motion to suppress defendant's statement would have been granted. Trial counsel was therefore not ineffective for not filing a motion to suppress and, for this same reason, defendant has failed to establish that he was prejudiced by counsel's decision to not file such a motion. Accordingly, we find that defendant's claim of ineffective assistance of counsel based on counsel's failure to file a motion to suppress was properly dismissed. See *Johnson*, 206 Ill. 2d at 357 (dismissal of a petition is appropriate where the trial record contradicts the allegations in the defendant's petition); *Patterson*, 217 Ill. 2d at 438 (failure to file a motion to suppress does not establish ineffective assistance of counsel when

the motion would not have been granted).

¶ 34 Defendant's second contention is that his trial counsel was ineffective for failing to communicate the terms of a plea offer from the State. In his petition, defendant made the following claim:

> "Mr. Cox learned, after his trial, from Mr. Greenberg, who represented a co-defendant, that the State had made an offer of 18 years IDOC for aggravated kidnapping in exchange for testimony against the co-defendants Kidd and Lewis. Mr. Katz never communicated this offer to Mr. Cox. Had Mr. Cox been made aware of the offer, he would not have taken the case to trial, with all its risks, but would have accepted the offer." [2]

¶ 35 We find that this claim was properly dismissed because it is vague and lacks the supporting documentation required by the Act. To sustain his burden under the Act, defendant must offer more than broad conclusory allegations in his petition and must support those allegations with affidavits, records or other evidence, or explain their absence. See, *e.g.*, 725 ILCS 5/122-2 (West 2008) ("The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached"); *Coleman*, 183 Ill. 2d at 381 (holding that to make a substantial showing of a constitutional violation, "the allegations in the petition must be supported by the record in the case or by its accompanying affidavits," and that "[n]onfactual and nonspecific assertions which merely amount to

[2] The record shows that Greenberg represented codefendant Lewis at trial.

conclusions are not sufficient to require a hearing under the Act); *People v. Delton*, 227 Ill. 2d 247, 258 (2008) (holding that broad conclusory allegations of ineffective assistance of counsel are not allowed under the Act)*; People* v. Turner, 187 Ill. 2d 406, 414 (1999) (holding that the failure to attach the necessary affidavits, records or other evidence or explain why the same are not attached is "fatal" to a postconviction petition); *People v. Ivy*, 313 Ill. App. 3d 1011, 1019 (2000) (allegations in a postconviction petition must be based on factual allegations and not mere conclusory statements).

¶ 36 In this case, defendant's claim consists only of the broad, conclusory allegations that he learned of the plea offer from codefendant's counsel after his trial and that he would have accepted the offer had Katz communicated it to him. However, defendant does not explain how he learned of the alleged plea offer from codefendant's counsel or how this attorney came to learn of the plea offer that was allegedly made to defendant. He also does not allege that the offer was made specifically to Katz or explain how Katz otherwise came to learn of the offer such that he could have conveyed it to defendant. Defendant also failed to attach to his petition an affidavit from Greenberg explaining the circumstances of the alleged plea offer or to explain why he was unable to obtain such an affidavit. Defendant's failure to do so, or to otherwise support his allegations with the record or other evidence, is fatal to his claim that Katz was ineffective for failing to communicate a plea offer from the State.

¶ 37 Defendant claims that he should be excused from attaching an affidavit from Greenberg or Katz. He asserts that because Greenberg represented codefendant Lewis, he was not obligated to inform defendant of the plea offer and doing so at the risk of procuring unfavorable testimony

against his client would have violated Greenberg's professional responsibilities. Defendant asserts that he should not be penalized for failing to obtain an affidavit from Katz because he claimed that Katz was ineffective and he had previously filed an ARDC complaint against Katz.

¶ 38 In *People v. Hall*, 217 Ill. 2d 324, 333 (2005), our supreme court recognized that the purpose of requiring that allegations in a postconviction petition be supported by affidavits, records or other evidence was to show that the allegations are capable of objective or independent corroboration. Nevertheless, the court held the "[f]ailure to attach independent corroborating documentation or explain its absence may, nonetheless, 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." *Hall*, 217 Ill. 2d at 333. The principle underlying this holding was the " 'difficulty or impossibility of obtaining' " an affidavit from the very attorney who the defendant is alleging provided ineffective assistance. *Hall*, 217 Ill, 2d at 333-34 (quoting *People v. Williams*, 47 Ill. 2d 1, 4 (1970)).

¶ 39 Our decision is consistent with *Hall*. Under the circumstances of this case, defendant cannot be expected to obtain an affidavit from Katz and his failure to do so does not defeat his claim. However, the facts alleged in his petition make it clear that Katz is not the only person from whom defendant could obtain an affidavit. Defendant could furnish an affidavit from Greenberg, which would show that the allegation in his petition was capable of independent verification. The reasoning underlying the holding in *Hall* does not apply to the situation with Greenberg and does not excuse defendant's failure to attach an affidavit from him. Contrary to defendant's claim, the issue is not whether Greenberg was obligated to inform defendant of the

offer or the consequences of procuring unfavorable testimony against Lewis. Defendant's and Lewis' trials for the victim's murder are over and therefore attaching an affidavit from Greenberg setting forth his knowledge of the alleged plea offer would not procure unfavorable testimony against Lewis or violate Greenberg's professional responsibilities. Accordingly, we find that defendant cannot be excused from attaching the required affidavit to his petition or explaining his failure to do so.

¶ 40 In reaching this conclusion, we find the cases upon which defendant relies to be procedurally distinguishable. Defendant relies on a line of cases holding that an attorney's failure to disclose a plea offer to a client or an attorney's recommendation that a client reject a plea offer based upon an erroneous understanding of sentencing laws can give rise to a claim of a constitutional violation. See, *e.g.*, *People v. Whitfield*, 40 Ill. 2d 308 (1968) (holding that an attorney's failure to disclose a plea offer to his or her client may give rise to a claim of a constitutional violation, even though the client subsequently receives a fair trial); *People v. Curry*, 178 Ill. 2d 509 (1997) (finding that the defendant established a claim of ineffective assistance of counsel where he rejected a plea offer based upon erroneous advice of his attorney). The issue in this case, however, is not whether a claim of ineffective assistance of counsel can be based on an attorney's failure to communicate a plea offer. This case arises in the context of second-stage postconviction proceedings and, unlike the direct proceedings involved in *Curry*, the issue before us is whether defendant supported his allegations with the necessary affidavits or other evidence or explained his failure to do so such that his claim can be objectively verified. As explained above, we conclude that defendant did not do so and that his claim was properly

dismissed.

¶ 41 For the foregoing reasons, we affirm the dismissal of defendant's postconviction petition.

¶ 42 Affirmed.