

No. 1-11-0824

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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. 03 CR 26732
)	
JULIAN MARTINEZ,)	Honorable
)	Douglas J. Simpson,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defendant cannot meet the prejudice prong of the *Strickland* test for ineffective assistance of counsel, the dismissal of his postconviction petition claiming ineffective assistance of trial counsel will be affirmed. Where defendant cannot show that the outcome of his postconviction petition would have been different if he had reasonable assistance of postconviction counsel, this court will not reverse the dismissal of his postconviction petition based on a claim of unreasonable assistance of postconviction counsel.
- ¶ 2 Defendant Julian Martinez appeals from the second-stage dismissal of his postconviction petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2002)) (the Act). Defendant was convicted after a bench trial of two counts of felony murder predicated

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respectively on (1) attempted aggravated discharge of a firearm and (2) attempted aggravated battery with a firearm, in connection with the death of Jesus Rosales. Since there was a single death, the trial court at the sentencing hearing merged the count predicated on attempted aggravated battery with a firearm into the count predicated on attempted aggravated discharge of a firearm. After hearing factors in aggravation,¹ the trial court sentenced defendant to 30 years in the Illinois Department of Corrections for the felony murder conviction (720 ILCS 5/9-1(a)(3) (West 2002)), and sentenced defendant to an additional 25 years pursuant to a firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2002)), for a total of 55 years. On direct appeal, this court affirmed defendant's convictions. *People v. Martinez*, No. 1-06-2209 (2008) (unpublished order under Supreme Court Rule 23).

¶ 3 On this postconviction appeal, defendant claims, first, that the trial court erred in dismissing his postconviction petition because he made a substantial showing of ineffective assistance of trial counsel where his counsel denied him his constitutional right to testify on his own behalf. Second, defendant claims that his postconviction counsel failed to provide defendant with a reasonable level of assistance, as required by Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), when he (1) failed to file a verification affidavit as specified in the Act, (2) failed to have defendant's existing statement notarized, (3) failed to amend the petition, and (4) conceded that the State made "excellent points" on two of defendant's three claims. For the following reasons, we affirm.

¹ Defense counsel did not present any factors in mitigation.

¶ 4

BACKGROUND

¶ 5

I. Evidence at Trial

¶ 6 Defendant was convicted of felony murder, due to his accidental shooting of a friend as the two of them drove together in the same vehicle to commit a drive-by shooting of rival gang members. The predicate felony for felony murder was the attempted discharge of a firearm at the rival gang members. At trial, the State called assistant State's Attorney Denise Tomasek to testify that defendant gave a videotaped statement, which was given after defendant voluntarily, and on his own initiative, appeared at the police station. The videotaped statement established the following facts:

¶ 7 In his statement, defendant, who is a member of the Satan Disciples gang, stated that on the night of the shooting, he attended a gang meeting, at which defendant and other Satan Disciples discussed problems they were having with the Latin Kings, a rival gang. After the meeting, defendant and the leader of the gang went to the gang leader's home to procure a gun.

¶ 8 At the gang leader's home, defendant met with fellow gang member Jesus Rosales, who asked defendant if he was ready to "put [the gun] to work," which meant "[r]eady to do a drive-by, basically." Defendant responded that he was ready. Defendant and Rosales informed the gang leader that they were going to do a drive-by shooting, and the gang leader approved the plan. Before leaving to do the drive-by, defendant, Rosales, and other gang members consumed alcohol for about two hours. Eventually, the gang leader gave defendant a \$20 bill and told him to purchase alcohol from a liquor store after performing the drive-by shooting. The gang leader instructed defendant to tell people that he was going to the liquor store and omit the fact that he

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and Rosales were going to do a drive-by shooting.

¶ 9 Rosales demonstrated to defendant how to "cock" the gun, because defendant had only held a gun on two occasions prior to the events of the case at bar. Defendant and Rosales left the gang leader's home and entered a vehicle, intending to drive to the Latin Kings' territory. Rosales was the driver and defendant, who sat in the passenger seat, held the gun. As defendant and Rosales were driving, Rosales decided that before attacking the Latin Kings, they would first attack members of a second rival gang, which was closer. Rosales informed defendant where he should aim when they arrived in the rival gang's territory and told defendant to "cock" the gun. As defendant cocked the gun, the vehicle hit a bump and the gun discharged, shooting Rosales in the face. Defendant stated that, as the vehicle went over the bump, his finger was on the trigger and it was pointed at Rosales. Rosales died while the vehicle was still moving, so defendant had to place the vehicle in park. The next morning, a friend drove defendant to the police station, where he provided the above statement.

¶ 10 The State called seven other witnesses to testify. Only one witness, Victoria Webster, directly observed the events at issue in the case. Webster testified as follows. On the night of the shooting, Webster was in bed when she "heard what [she] thought was a firecracker," so she got out of bed and approached her window. At the window, she heard tires screech and observed a vehicle approach the dumpster in her parking lot. She observed the vehicle strike the dumpster and a tree, at which point it stopped moving. Webster then walked away from her window and called 911 to report what she had observed. Webster did not observe anyone inside the vehicle, and she did not identify defendant in court.

¶ 11 The State called as witnesses three acquaintances of defendant and Rosales. The State called Marisa Esparza, Rosales' girlfriend, to testify to Rosales' whereabouts prior to his going to the gang leader's residence; her knowledge of gang culture; and the fact that Rosales was a Latin King prior to being a Satan Disciple. The State called Manuel Barrientos, a Satan Disciple, to testify to what he observed at the gang meeting and at the gang leader's apartment. Barrientos testified that he observed the gun defendant used and that, after defendant returned to the apartment, defendant engaged in a private conversation with the gang leader and then proceeded to change his clothes. Barrientos testified that he drove defendant home and that defendant was "quiet." The State called Joshua Taylor, the gang leader, to testify to his observations during the gang meeting, at which he and other Satan Disciples discussed purchasing a gun. Taylor testified that defendant indicated to him that he intended to do a drive-by shooting in order to "prove himself." Taylor testified that he heard a gunshot about 10 to 15 minutes after defendant and Rosales left his apartment. Upon defendant's return to Taylor's apartment, defendant appeared shaken up and told Taylor that he "thought he accidentally shot [Rosales]."

¶ 12 The State also called three police officers to testify. The State called Officer James Morrissy of the Oak Forest police department. Officer Morrissy testified that he responded to a dispatch call reporting of a "vehicle that had struck some garbage dumpsters and also a possible shots fired." Officer Morrissy observed Rosales inside the vehicle and described his injuries. The State called Special Agent Tim Gainer of the Illinois State Police, who testified that he was assigned to investigate Rosales' death. Gainer spoke with defendant at the Oak Forest police department and defendant stated that he shot Rosales. The State called Officer Timothy Kristin

of the Oak Forest police department, who testified that he also was assigned to the investigation into Rosales' death. Kristin spoke with defendant at the Oak Forest police station and defendant informed him where he had hidden the gun used in the shooting. Defendant led Kristin to the location where the weapon was recovered. Inside the weapon, there was one spent shell casing.

¶ 13

II. Postconviction Petition

¶ 14 After defendant's direct appeal, he filed a *pro se* postconviction petition alleging that his constitutional rights were violated due to three claims of ineffective assistance of trial counsel. In his *pro se* petition, defendant first alleges that trial counsel was ineffective for failing to hire a gang expert to testify that the shooting was not in the rival gang's territory. In the second claim, defendant alleges that his counsel failed to inform him that he had a right to testify at trial.

Defendant claims that if he had been given the opportunity, he would have testified that he and the victim were not en route to commit a shooting, but rather doing a practice run of what would have happened had they found rival gang members. He would have also clarified his videotaped statement to police by stating that neither he nor the victim observed any rival gang members in the area where the shooting occurred. The third claim raised in the *pro se* petition alleges that trial counsel failed to investigate and present mitigating evidence at sentencing. In support of his petition, defendant included an unnotarized affidavit from his father and an unnotarized document signed by defendant. The affidavit included statements made by defendant's father regarding defendant's intent and desire to testify at trial. The other document stated that defendant wanted to testify on his own behalf at trial; that he believed he would be called as a witness but during trial his attorney told defendant that he would not be called as a witness; and

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that his attorney never informed defendant that it was his decision whether or not to testify. This writing was not notarized but defendant included a statement of verification pursuant to 28 U.S.C. § 1746, 18 U.S.C. § 1621, and Section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2002)).

¶ 15 Postconviction counsel was appointed to represent defendant for a second-stage proceeding. Counsel subsequently filed a Rule 651(c) certificate without amending or supplementing defendant's initial *pro se* petition. In the certificate, counsel explained that the *pro se* petition adequately presented defendant's claims. Postconviction counsel did not have the father's affidavit or defendant's document notarized, and did not submit a verification affidavit as required by the Act.

¶ 16 At the second-stage proceeding, the State moved to dismiss the petition, arguing that all three of defendant's claims were meritless. In regards to the right-to-testify claim, the State argued that it should have been raised on direct appeal and was therefore forfeited. It further claimed that counsel's failure to call defendant as a witness was sound trial strategy given defendant's prior convictions and videotaped statement. In response, defense counsel argued that this claim could not have been true trial strategy and that this issue could not be raised on appeal as it relied on evidence outside the trial record. Defense counsel did not present any arguments in response to the two additional claims in the petition but rather stated that "[the prosecutor] makes excellent points in her first and third arguments."

¶ 17 The trial court granted the State's motion and dismissed the petition. In regards to the first claim, the trial court found that defendant failed to establish ineffective assistance of trial counsel

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based upon counsel's failure to call an unnamed gang expert because the testimony would have been speculative and would not have changed the outcome of the trial. In regards to the second claim, concerning the right-to-testify, the trial court found that defendant forfeited this claim, and failed to satisfy both prongs of the *Strickland* test. As to the third claim, that trial counsel failed to investigate and present mitigation at sentencing, the trial court found that defendant also forfeited this claim, and, further, that affidavits from the defendant's mother and father supporting the mitigation would have little effect where defendant was looking at a significant period of time in prison.

¶ 18 Defendant now appeals and asks us to remand for a third-stage evidentiary hearing or, in the alternative, remand for second-stage proceedings with reasonable assistance of counsel.

¶ 19 ANALYSIS

¶ 20 On this appeal, defendant claims, first, that the trial court erred in dismissing his postconviction petition because he made a substantial showing of ineffective assistance of trial counsel, where his counsel denied him his constitutional right to testify on his own behalf. Second, defendant claims that his postconviction counsel failed to provide defendant with a reasonable level of assistance, as required by Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), when he (1) failed to file a verification affidavit as specified in the Act, (2) failed to have defendant's existing statement notarized, (3) failed to amend the petition, and (4) conceded that the State made "excellent points" on two of defendant's three claims. For the following reasons, we affirm.

¶ 21

I. Stages of a Postconviction Proceeding

¶ 22 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2002)) provides that a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). To be entitled to postconviction relief, a defendant bears the burden of establishing that a substantial deprivation of his constitutional rights occurred at his original trial. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004); 725 ILCS 5/122-1(a) (West 2002).

¶ 23 In noncapital cases, the Act provides for three stages. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2002); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the petition within that 90-day period, the trial court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2002); *Pendleton*, 223 Ill. 2d at 472.

¶ 24 If the petition survives initial review, the process moves to the second stage, where the trial court appoints counsel for the defendant when a defendant cannot afford counsel. 725 ILCS 5/122-4 (West 2002). Appointed counsel may make any amendments that are "necessary" to the petition previously filed by the *pro se* defendant. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). After defense counsel has amended the petition, the State may file a motion to dismiss or an answer. 725 ILCS 5/122-5 (West 2002); *Pendleton*, 223 Ill. 2d at 472.

¶ 25 To withstand dismissal at the second stage, the defendant must make a "substantial showing of a violation of constitutional rights," which can be accomplished by relying on the

record in the case or by supplying supporting affidavits. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). The trial court is foreclosed from engaging in any fact-finding, because all well-pleaded facts must be taken as true at the second stage of the proceedings. *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009) (citing *Coleman*, 183 Ill. 2d at 380-81). "[W]hen a petitioner's claims are based upon matters outside the record, the Postconviction Act does not intend such claims be adjudicated on the pleadings." *Coleman*, 183 Ill. 2d at 381.

¶ 26 Unless the trial court allows further pleadings, the proceeding then advances to the third stage, which is an evidentiary hearing. 725 ILCS 5/122-6 (West 2002); *Pendleton*, 223 Ill. 2d at 472-73. An evidentiary hearing is held only where the allegations of the postconviction petition make a substantial showing that a defendant's constitutional rights have been violated and those allegations are supported by affidavits, records, or other evidence. *Waldrop*, 353 Ill. App. 3d at 249. The affidavits that accompany a postconviction petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting a defendant's allegations. *Waldrop*, 353 Ill. App. 3d at 249. At the evidentiary hearing, the trial court "may receive proof by affidavits, depositions, oral testimony, or other evidence," and "may order the [defendant] brought before the court." 725 ILCS 5/122-6 (West 2002).

¶ 27 The dismissal of a postconviction petition at the second stage is reviewed *de novo*. *Coleman*, 183 Ill. 2d at 387-89. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 28 We will now consider *de novo* defendant's claims of (1) ineffective assistance of trial counsel and (2) unreasonable assistance of postconviction counsel.

¶ 29

II. Ineffective Assistance of Trial Counsel

¶ 30 Defendant first claims that his petition should not have been dismissed because he made a substantial showing that he was denied his right to effective assistance of trial counsel where his trial counsel refused to allow him to testify and did not inform defendant that the decision to testify was defendant's decision to make.

¶ 31 As an initial matter, we will address the State's claim that defendant forfeited review of this issue by failing to raise this claim on direct appeal. In the context of a postconviction proceeding, issues that could have been raised on direct appeal, but were not, are considered forfeited and therefore barred from consideration. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). The forfeiture rule applies only where it was possible to raise an issue on direct appeal; thus, a postconviction claim that depends on matters outside the record is not ordinarily forfeited, because matters outside the record may not be raised on direct appeal. See *People v. Jones*, 364 Ill. App. 3d 1, 5 (2005). Defendant's claim regarding his right to testify could not have been raised on direct appeal as the claim was based on off-the-record conversations between defendant and his counsel. Accordingly, the forfeiture rule does not bar consideration of defendant's claim.

¶ 32 Forfeiture aside, defendant's claim still fails on its merits. In reviewing a claim of ineffective assistance of counsel, we apply the two-part test established by the United States Supreme Court in the case of *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Curry*, 178 Ill. 2d 509, 518 (1997). "To prevail under *Strickland*, a defendant must show that his attorney's assistance was both deficient and prejudicial." *Curry*, 178 Ill. 2d at 519. "More precisely, a defendant must show (1) that his attorney's assistance was objectively unreasonable

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under prevailing professional norms, and (2) that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Curry*, 178 Ill. 2d at 519 (quoting *Strickland*, 466 U.S. at 687). The failure of a defendant to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 76.

¶ 33 With regard to the deficiency prong, defendant asserts that defense counsel denied defendant his fundamental constitutional right to testify on his own behalf. Certain decisions regarding the conduct of the case are ultimately for the defendant to make, after full consultation from counsel, while other decisions are ultimately for defense counsel. *People v. Bannister*, 232 Ill. 2d 52, 74-75 (2008). The decision whether to take the witness stand and testify on one's own behalf at trial ultimately belongs to the defendant. *Bannister*, 232 Ill. 2d at 75; *People v. Brown*, 54 Ill. 2d 21, 23-24 (1973). The *Bannister* court quoted the ABA Standards for Criminal Justice, which state that:

" [i]n making each of these decisions *** the accused should have the full and careful advice of counsel. Although it is highly improper for counsel to demand that the defendant follow what counsel perceives as the desirable course or for counsel to coerce a client's decision through misrepresentation or undue influence, counsel is free to engage in persuasion and to urge the client to follow the proffered professional advice. Ultimately, however, because of the fundamental nature of decisions such as these, so

crucial to the accused's fate, the accused must make the decisions himself or herself.' " (Emphasis in original.) *Bannister*, 232 Ill. 2d at 75 (quoting ABA Standards for Criminal Justice 4-5.2, at 199-200 (3d ed. 1993)).

Advice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests that counsel refused to allow the defendant to testify. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009).

¶ 34 When a defendant asserts in a postconviction petition that trial counsel was ineffective for refusing to allow the defendant to testify at trial, he must allege that he "made a 'contemporaneous assertion *** of his right to testify.' " *Youngblood*, 389 Ill. App. 3d at 217 (quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973)). The State argues that because defendant made no assertion on the record that he wished to testify, he forfeited his right. We do not find this argument persuasive. The *Youngblood* court distinguishes two cases, *People v. Davis*, 373 Ill. App. 3d 351 (2007), and *People v. Brown*, 54 Ill. 2d 21 (1973). *Davis* is a First District case in which the defendant argued *on direct appeal* that his constitutional rights had been violated because he was denied his right to testify at trial. *Davis*, 373 Ill. App. 3d at 353. This court found that the " 'record [must contain] *** evidence that [the] defendant alerted the trial court that he wanted to testify.' " *Youngblood*, 389 Ill. App. 3d at 217 (quoting *Davis*, 373 Ill. App. 3d at 361). *Brown* is an Illinois Supreme Court case in which the defendant *filed a postconviction petition* alleging that his trial counsel was unreasonable because counsel refused to permit the defendant to testify. *Brown*, 54 Ill. 2d at 22. The *Brown* court "required only that the defendant

inform his attorney, rather than the court, of his desire to testify." *Youngblood*, 389 Ill. App. 3d at 217-18 (citing *Brown*, 54 Ill. 2d at 24). The *Youngblood* court reconciled these cases by highlighting the different procedural stage at which each case occurred. *Youngblood*, 389 Ill. App. 3d at 218. "This difference [*Davis* being a direct appeal and *Brown* being the appeal of the dismissal of a postconviction petition] is significant because a defendant can introduce evidence in a postconviction proceeding but not a direct appeal." *Youngblood*, 389 Ill. App. 3d at 218. The court further found that the defendant's claim in *Brown* related to the performance of counsel, and thus "statements the defendant made to counsel were relevant." *Youngblood*, 389 Ill. App. 3d at 218. "*Davis*, on the other hand, did not concern the performance of counsel. Instead, it involved a general claim that the defendant's right to testify had been abridged, which, in turn, implicated the trial court. Therefore, a statement on the record in open court was necessary to inform the trial court of defendant's desire to testify." *Youngblood*, 389 Ill. App. 3d at 218.

¶ 35 In *Youngblood*, the defendant failed to allege in his postconviction petition that he had made a contemporaneous assertion of his right to testify. *Youngblood*, 389 Ill. App. 3d at 217. In the case at bar, however, defendant alleges in his *pro se* postconviction petition and in the attached document that he informed his attorney of his desire to testify. Defendant alleges that trial counsel did not inform him that it was ultimately defendant's decision whether or not to testify. A counsel's incomplete or inaccurate information to a defendant regarding the right to testify "is arguably a factor in consideration of whether counsel was ineffective." *People v. Nix*, 150 Ill. App. 3d 48, 51 (1986).

¶ 36 However, that is not the end of our analysis. Defendant must also satisfy the second prong of the *Strickland* test by demonstrating that he was prejudiced by the denial of his right to testify in order to make out a claim of ineffective assistance of counsel. *Youngblood*, 389 Ill. App. 3d at 218. "To demonstrate prejudice resulting from an alleged deficiency in counsel's performance, 'the 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.' " *People v. Edwards*, 195 Ill. 2d 142, 164 (2001) (quoting *Strickland*, 466 U.S. at 694).

¶ 37 Defendant argues that, had he been called to testify, he would have supported the defense theory at trial that he and Rosales were practicing what they would do if they encountered rival gang members, and that there were no rival gang members in the area; thus, the State failed to prove beyond a reasonable doubt the predicate felony of attempted aggravated discharge of a firearm. To commit aggravated discharge of a firearm, the defendant

"knowingly or intentionally

(1) [d]ischarges a firearm at or into a building he or she knows or reasonably should know to be occupied and the firearm is discharged from a place or position outside that building;

(2) discharges a firearm in the direction of another person or in the direction of a vehicle he or she knows or reasonably should know to be occupied by a person." 720 ILCS 5/24-1.2(a)(1), (2) (West 2002).

Although defense counsel presented no evidence, he did argue in closing arguments that there were no rival gang members in the area, and defendant therefore could not have been in "immediate preparation" for committing the drive-by shooting when the gun went off. *People v. Martinez*, No. 1-06-2209 (2008) (unpublished order under Supreme Court Rule 23). Defendant also argues that, had he been able to testify, he would have "clarified" his videotaped statement to police. Although in his statement, defendant informed police that his friend Rosales told defendant to cock the gun, defendant's statements did not address whether there were any visible or nearby rival gang members when the gun discharged. Defendant argues that he believed that he and Rosales were doing a "dry run" of what they would do if they found the rival gang members.

¶ 38 The State argues that defendant cannot show prejudice because the evidence against him was overwhelming. We agree. In defendant's videotaped statement, he stated that the gang leader gave him a \$20 bill and told him "to go on the drive-by first and then go get the liquor and then come back." Defendant stated that the other gang member told him to tell people that he was going to the liquor store, but defendant understood that he was going to perform the drive-by shooting. Defendant next stated that he and Rosales discussed the plan for the drive-by shooting. Defendant stated that Rosales drove the vehicle while he sat in the passenger seat and that they "were supposed to go in Blue Island [to shoot at members of rival gang the Latin Kings], but then [Rosales], he, he [brought] up [another rival gang]. So basically we were gonna [*sic*] go get the [other rival gang members] too." Defendant stated that they planned to go after the other rival gang members before finding members of the Latin Kings because the other rival gang members

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would be closer. Defendant also made the following statements on the videotape:

"Q. Okay. So when you were approaching – well, first did [Rosales] tell you where the [other rival gang members] normally hang out?

A. No, he was telling me l[i]ke basically, like when we got to the corner, he basically told me to cock the gun.

* * *

Q. Okay. So when you start approaching a location where the [other rival gang members] are supposed to be, what happens?

A. [Rosales] told me to cock the gun so I cocked the gun. And I don't know if I cocked it hard that that – the gun went off."

Defendant's statement indicates that he was not on a "dry run," but rather that he was in the process of executing the drive-by shooting approved by the gang leader. The gang leader gave him money with which to purchase liquor after completing the drive-by shooting, he and Rosales discussed the drive-by shooting before entering the vehicle, and Rosales decided to take a detour to target a different rival gang before seeking out and shooting at the original intended targets.

¶ 39 The facts of this case are similar to those of *People v. Johnson*, 128 Ill. 2d 253 (1989), a case in which the defendant argued that his attorneys were ineffective. In *Johnson*, the defendant was convicted of, among other things, "knowing murder," attempted murder, felony murder,

aggravated battery, and armed robbery. *Johnson*, 128 Ill. 2d at 258. During the trial, the two surviving victims testified against the defendant. *Johnson*, 128 Ill. 2d at 259-61. The defendant gave a written statement to police, in which he admitted to shooting the victims, and this statement was admitted into evidence. *Johnson*, 128 Ill. 2d at 261-62. The defendant did not present any evidence on his own behalf. *Johnson*, 128 Ill. 2d at 262.

¶ 40 The defendant raised an ineffective assistance of counsel claim, but the court found that the defendant could not meet the prejudice prong of the *Strickland* test. *Johnson*, 128 Ill. 2d at 271. Specifically, the court determined that even if the defendant's counsel's performance was deficient, in light of the evidence against him, including testimony from two eyewitnesses and the defendant's own confession, it did "not believe to a reasonable probability that the trial court would have found the defendant not guilty of the felony murder charge if the defendant had testified at trial." *Johnson*, 128 Ill. 2d at 271.

¶ 41 Similarly, in the case at bar, although there were no eyewitnesses, defendant's videotaped statement, by itself, indicates that defendant was on his way to commit the drive-by shooting. Even if there were no rival gang members in the area, defendant was not on a "dry run," but rather had taken steps to commit the drive-by shooting. It is not reasonably probable that, had defendant testified, the trial court would have found him not guilty. Therefore, defendant has not satisfied the prejudice prong of the *Strickland* test.

¶ 42 III. Unreasonable Representation of Postconviction Counsel

¶ 43 Defendant next argues that his postconviction counsel failed to provide a reasonable level of representation. Specifically, defendant argues that his postconviction counsel failed to satisfy

the basic requirements of Rule 651(c) when he (1) failed to provide a verification affidavit as required by the Act; (2) failed to have defendant's existing statement notarized; (3) failed to amend his *pro se* petition; and (4) conceded two of defendant's claims during the hearing for the State's motion to dismiss. With respect to the third ground, defendant argues that his postconviction counsel was unreasonable for failing to amend the petition to include supporting documentation for his claim that his trial counsel was ineffective for failing to hire an expert on Chicago gangs. An expert could have testified that those particular gang members would not have been at that location, and defendant's brief to this court provides examples of easily accessible documentation.

¶ 44 "The right to reasonable assistance of post conviction counsel is derived from the Act, rather than the Constitution." *People v. Rossi*, 387 Ill. App. 3d 1054, 1059 (2009) (citing *People v. Greer*, 212 Ill. 2d 192, 204 (2004)). As such, defendants are "not constitutionally entitled to the effective assistance of counsel at a post-conviction proceeding." *People v. Guest*, 166 Ill. 2d 381, 412 (1995). However, our Illinois Supreme Court has held that the Act "entitles a defendant to a *reasonable* level of assistance." (Emphasis added.) *Guest*, 166 Ill. 2d at 412 (citing *People v. Flores*, 153 Ill. 2d 264, 276 (1992)).

¶ 45 Illinois Supreme Court Rule 651(c) (eff. Jan. 1, 1967) "imposes specific obligations on postconviction counsel to assure the reasonable level of assistance required by the Act." *People v. Lander*, 215 Ill. 2d 577, 584 (2005). "Rule 651(c) requires that the record show counsel has: (1) consulted with the defendant either by mail or in person to ascertain his claims of deprivation of constitutional rights; (2) examined the record of the trial court proceedings; and (3) made any

amendments to the *pro se* petition necessary for adequate presentation of the defendant's contentions." *Lander*, 215 Ill. 2d at 584. Compliance with the duties set forth in Rule 651(c) is mandatory. *Lander*, 215 Ill. 2d at 584.

¶ 46 The State argues that defendant's claim of unreasonable assistance of postconviction counsel is not cognizable as a freestanding claim. The State argues that the purpose of postconviction proceedings is to consider matters affecting a defendant's constitutional rights, and because the assistance of postconviction counsel is granted by the Act, not the Constitution, unreasonable assistance of counsel cannot be a valid postconviction claim. We do not find this argument persuasive. In *People v. Turner*, 187 Ill. 2d 406, 410 (1999), the defendant's "only argument on appeal is that he was denied his right to reasonable assistance of counsel during the proceedings on his post-conviction petition." The defendant argued that his postconviction counsel failed to make any amendments to the *pro se* petition, and in doing so, violated Rule 651(c). *Turner*, 187 Ill. 2d at 412. Our Illinois Supreme Court held that, while postconviction counsel is not required to amend a *pro se* petition in every case, "Rule 651(c) plainly requires that appointed post-conviction counsel make 'any amendments to the petitions filed *pro se* that are necessary for adequate presentation of petitioner's contentions.'" *Turner*, 187 Ill. 2d at 412 (quoting Ill. S. Ct. R. 651(c) (eff. Jan. 1, 1967)). Furthermore, the supreme court held that "[o]n a more fundamental level, it is improper to affirm the dismissal of a post-conviction petition when this court finds that post-conviction counsel's performance was so deficient that it amounts to virtually no representation at all." *Turner*, 187 Ill. 2d at 415-16.²

² We note that *Turner*, unlike the case at bar, was a capital case. However, this does not

¶ 47 Defendant first argues that his postconviction counsel failed to provide a verification affidavit as required by the Act; failed to have his own statement notarized; and failed to amend the petition. Defendant cites *People v. Nitz*, 2011 IL App (2d) 100031, in which the Second District reversed the dismissal of a postconviction petition and remanded for further proceedings. In *Nitz*, the defendant filed a *pro se* postconviction petition, which did not include a notarized affidavit. *Nitz*, 2011 IL App (2d) 100031, ¶ 6. The trial court appointed counsel, who filed an amended petition and a second amended petition, "neither of which included an affidavit." *Nitz*, 2011 IL App (2d) 100031, ¶ 6. The State moved to dismiss on grounds other than the lack of an affidavit, and the trial court granted the State's motion. *Nitz*, 2011 IL App (2d) 100031, ¶ 8.

¶ 48 The defendant appealed, arguing that his postconviction counsel unreasonably represented him, pursuant to Rule 651(c), because, by not filing a notarized affidavit, the defendant's petition failed to satisfy the minimum requirements for the format of postconviction petitions. *Nitz*, 2011 IL App (2d) 100031, ¶ 17.

¶ 49 The Second District found that the defendant's postconviction counsel unreasonably represented the defendant because he failed to make "any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions," as required by Rule 651(c). *Nitz*, 2011 IL App (2d) 100031, ¶¶ 17-18. The court stated that postconviction counsel

render *Turner* distinguishable. In *Turner*, the court stated that "[w]hether or not a *pro se* petitioner has a right to appointed counsel, once counsel is appointed, his or her obligations under Rule 651(c) are the same in every case regardless of whether the petitioner has been sentenced to death." *Turner*, 187 Ill. 2d at 412.

"has an obligation to present a defendant's postconviction claims in the appropriate legal form, and the failure to do so constitutes unreasonable assistance." *Nitz*, 2011 IL App (2d) 100031, ¶ 18. The Second District concluded that when the trial court moved the petition to the second stage and appointed counsel, the defendant's counsel "should have sought to remedy the lack of a notarized affidavit." *Nitz*, 2011 IL App (2d) 100031, ¶ 19. In failing to do so, the defendant's postconviction counsel did not make all amendments necessary to ensure that the petition was proper. *Nitz*, 2011 IL App (2d) 100031, ¶ 19.

¶ 50 However, one year later, the Second District decided the case of *People v. Kirkpatrick*, 2012 IL App (2d) 100898. Like in *Nitz*, the defendant in *Kirkpatrick* appealed the second-stage dismissal of his postconviction claim, asserting unreasonable assistance of postconviction counsel. *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 1. Also similar to *Nitz*, the defendant argued that his postconviction counsel failed to satisfy Rule 651(c) because postconviction counsel failed to add supporting evidence to counsel's amended petition, and failed to include any notarized affidavits. *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 25. The defendant "ask[ed] that [the court] remand for appointment of new counsel, which is what the reviewing court did in *Nitz*." *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 25.

¶ 51 In *Kirkpatrick*, the court affirmed the dismissal, finding, first, that defendant did "not identify the additional evidence that needed to be submitted with the amended petition" to further support its allegations. *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 23. Second, the court held: "[i]nsofar as we have already upheld the trial court's second-stage dismissal of [the] defendant's postconviction petition on the merits, we need not seek out an alternative, procedural defect on

which to substantively decide the appeal." *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 26. The court "recognize[d]" *Nitz*, but stated that it believed that the notarization and certification issues were not justiciable because, "[o]nce the State moved to dismiss on the merits and did not challenge the alleged procedural defects, and once the trial court conducted a hearing, during which neither party raised the alleged procedural defects, and presented its ruling based on the merits, the purported notarization and certification issues became moot." *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 27.

¶ 52 The *Kirkpatrick* court stated that our Illinois Supreme Court has advised against seeking out alternative procedural defects on which to substantively decide the appeal. *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 26 (citing *People v. Petrenko*, 237 Ill. 2d 490, 505 (2010)). In *Petrenko*, the supreme court stated that it "has long expressed its reluctance to consider issues where they are not essential to the disposition of the cause or where the result will not be affected regardless of how the issue is decided." *Petrenko*, 237 Ill. 2d at 505. Since we earlier determined that defendant failed to prove that his trial counsel was ineffective, whether or not defendant's postconviction counsel provided unreasonable representation is immaterial because it would not have changed the outcome.

¶ 53 Defendant next argues that postconviction counsel provided unreasonable assistance when he conceded two of defendant's three claims during the hearing on the State's motion to dismiss. At the motion hearing, postconviction counsel made no arguments regarding defendant's claims that trial counsel was ineffective for failing to have a gang expert testify at trial and for failing to present witnesses to testify in mitigation at the sentencing hearing.

Regarding those claims, postconviction counsel stated that "[the prosecutor] makes excellent points in her first and third arguments," and chose to stand on defendant's unamended *pro se* petition. Although we do not believe it was sound strategy for postconviction counsel to compliment the strength of the State's arguments before choosing not to respond, we cannot find that postconviction counsel *conceded* the points. Postconviction counsel did not withdraw the two claims; rather, he chose not to argue, and the record indicates that the trial court still considered the arguments. The trial court made specific findings on those two claims. For example, the trial court found that the testimony of a gang expert "would have been speculation, and that wouldn't have had any impact [at trial]." With regard to trial counsel failing to present witnesses to testify in mitigation, the trial court determined that claim was an issue that should have been argued on direct appeal. The trial court also rejected part of the State's argument on this claim, further indicating that it considered the arguments rather than treating them as conceded.

¶ 54

CONCLUSION

¶ 55 Based on the foregoing, we affirm the decision of the trial court dismissing defendant's postconviction petition at the second stage.

¶ 56 Affirmed.