2013 IL App (1st) 110905-U

FIFTH DIVISION
December 20, 2013

No. 1-11-0905

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	00 CR 19149
	)	
LEANDER CARTER,	)	
	)	Honorable
Defendant-Appellant.	)	Luciano Panici,
	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 HELD: The trial court properly dismissed defendant's postconviction petition at the second stage of proceedings because defendant failed to set forth a substantial showing of ineffective assistance of trial and appellate counsel and actual innocence.

¶ 2 Defendant Leander Carter appeals *pro se* the second-stage dismissal of his postconviction petition proceedings, arguing that he has made a substantial showing of ineffective assistance of trial and appellate counsel and a claim of actual innocence. Specifically, defendant asserts that (1) his trial counsel was ineffective for failing to investigate and raise an alibi defense, including

calling Willie Earl Smith as a witness; (2) his trial counsel was ineffective for failing to properly investigate and prepare his mother and brother for their testimony at trial; (3) his appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel for failing to object to hearsay statements admitted during the testimony of three police officers and the State's reliance on that hearsay in closing arguments; and (4) actual innocence based on newly discovered evidence from an affidavit of a former codefendant. Defendant appeared *pro se* on direct appeal.

¶ 3 Following a bench trial, defendant was found guilty of two counts of aggravated kidnaping, two counts of kidnaping, four counts of aggravated unlawful restraint, and four counts of unlawful restraint. At the subsequent sentencing hearing, the trial court sentenced defendant to a term of 25 years for the aggravated kidnaping of Basil McClain and concurrent terms of five years' imprisonment for the aggravated unlawful restraint of McClain, Franko Bovino, Matthew Patoska, and Janoit Cameron. Defendant's conviction and sentence were affirmed on direct appeal. *People v. Carter*, No. 1-01-4012 (May 13, 2003) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 We review only those facts relevant to the issues raised on appeal. Basil McClain testified that on July 10, 2000, he was at his home in Blue Island and having a barbeque in his garage with his friends Franko Bovino, Matthew Patoska and Janoit Cameron. At around 10:45 p.m., he was cooking food on the grill when a tall black man entered the garage. The man, later identified as Theodore Parish, had a badge around his neck and was holding a gun. Parish told the men to freeze and get down. As McClain was getting down, he saw a second man enter the

garage. He recognized this man as Donald Johnson, a man McClain had known for 10 years. Johnson walked up to McClain, pointed a gun at him, and told him to lie flat. Johnson then handcuffed McClain. A third man then entered the garage. McClain identified this man as defendant. McClain had never met defendant, but had seen him in the neighborhood. He knew defendant by his nickname "Hook."

¶ 5 McClain stated that he called to defendant, begging, "Hook, don't do this. You don't know the situation." Defendant said, "Let's go." Johnson picked up McClain and left with him, Parish and defendant. They walked to the alley next to the garage. Johnson put McClain in the back seat of a Chevy Blazer and they drove away.

¶ 6 While Johnson drove, McClain heard him talking on a Nextel cellular phone, used as a walkie-talkie. McClain recognized the voice of the person on the other end as Ricky Walker, a man he had known all his life. Johnson told Walker to get behind him and Walker responded, "I'm on you." After driving for approximately 10 minutes, Johnson stopped the vehicle. McClain recognized the area as 147th in Harvey. Defendant then got into the passenger seat of the Blazer. McClain pleaded with defendant, saying, "you don't have to do this. You don't know the situation." Defendant responded by saying that he wanted to know what was going on and telling McClain to hold his head down or he would "blow the top of it off." Johnson drove away. Defendant then put duct tape around McClain's eyes, but McClain stated that the tape was placed too high and he could still see. Johnson drove for another 15 minutes and then stopped.

¶ 7 McClain testified that they were in an alley at a garage. McClain saw the men trying to make space in the garage. He heard defendant said that his brother had a car parked inside.

Several minutes later, McClain saw a spotlight from a police car on them. He heard defendant say, "pull off." Johnson was in the driver's seat of the Blazer and he drove away. Johnson drove down the alley, made a left turn, then another left turn, and then parked the vehicle and ran into the bushes. McClain jumped into the passenger seat and the police found him in the Blazer.

¶ 8 On July 11, 2000, McClain viewed a lineup at Area 2. He identified Parish and Johnson in that lineup. In a second lineup, he identified Walker as "Sleepy." Later, he viewed a third lineup and identified defendant.

¶ 9 On cross-examination, McClain denied saying "Kale, you know me, you know my uncle." He stated that he did not know anyone named Kale and said he called defendant "Hook" when he was pleading for his life. He said he had known of defendant for 12 years, through his mother's boyfriend, but he had never been introduced to him. McClain had seen defendant multiple times in the month prior to the kidnaping.

¶ 10 Franko Bovino, Matthew Patoska and Janoit Cameron each testified about the incident in McClain's garage. At around 10:45 p.m., Bovino was on the couch, Patoska was fixing a weight bench, and Cameron was at the refrigerator. They saw three men enter the garage, one had a gun and told them to freeze. Bovino laid on the couch with his head facing McClain. Cameron said he got down on the ground. Patoska saw that all three men had guns. Patoska stated the lighting was good in the garage and he looked directly at defendant's face for 30 seconds to a minute. Bovino saw that other man had a police badge around his neck and had a gun and he went toward McClain. Patoska and Cameron stated that they heard the sound of handcuffs and McClain pleading. A man came up behind Patoska and told him to look down at the ground. Bovino saw

a third man go to Cameron. Cameron testified that a man told him to put his hands behind his back and then he put duct tape around his hands. The men took McClain out of the garage. After the men left, Patoska ran home to call the police and Cameron ran out of the garage and over to Patoska's house. Later, all of the men identified Johnson in a lineup. Patoska also identified defendant in a lineup.

¶ 11 On cross-examination, Bovino did not recall hearing McClain call anyone "Hook" and was unsure if McClain called one of the men "Kale." Patoska stated that he heard McClain use the name "Kale," but did not hear him say "Hook." Cameron also said that he heard McClain use the name "Kale."

¶ 12 Officer Cleggitt of the Chicago police department testified that he was working with a partner, Officer Whitehead, on July 10, 2000. They were in uniform and in a marked patrol car. At approximately 11:30 p.m., they were in area of 92nd and Dauphin. Officer Cleggitt noticed a Chevy Blazer in the alley between Cottage Grove and Dauphin attempting to get into a garage. As he drove down the alley toward the vehicle, it sped off without its lights on. He followed the vehicle until he found it parked at 90th Place and Dauphin. As he approached the vehicle, Officer Cleggitt saw McClain inside. He noticed that McClain was handcuffed and had duct tape over his eyes. McClain told him that the men had kidnaped him and tried to kill him. Officer Cleggitt stayed with McClain while Officer Whitehead returned to the alley.

¶ 13 Officers Kenneth Wessel and Robert Garcia both testified that they responded to a call of an officer needing assistance in the area of 91st and Dauphin at around 11:30 p.m. on July 10, 2000. Officer Wessel drove to the alley at that location and saw Officer Whitehead running.

Officer Garcia left the car to join Officer Whitehead. Officer Wessel continued in the car and parked in front of 9146 South Dauphin. Officer Wessel saw defendant exit the front door of the house. The officer identified himself and ordered defendant to stop, but defendant took off running. Officer Wessel noticed something black in defendant's hand and thought it might be a weapon. He radioed to the officers that defendant was running toward them with something in his hand. Officer Wessel heard the officers tell defendant to stop and then a gunshot. He took cover, but when there were no more shots, he went to the backyard of 9146 South Dauphin. Officer Wessel heard a noise and "rustling" in the bushes in the yard next door. He found Parish laying on the ground with a gun near his hand. Wessel arrested Parrish and noted that Parish was wearing a security badge around his neck and had a police scanner.

¶ 14 Officer Robert Garcia stated that after he left the police car, he joined Officer Whitehead in the backyard of 9146 South Dauphin. He heard Officer Wessel's message that defendant was running toward them and might have a weapon. He then saw defendant running in their direction and he saw a black object in his hand that the officer thought was a weapon. The officers identified themselves and told defendant to stop. When defendant did not stop, Officer Whitehead fired once, hitting defendant in the groin area. After taking defendant into custody, Officer Garcia discovered that the black object in defendant's hand was a cell phone. Officer Garcia then went to the lot next door to help search. He heard rustling in the bushes and found Johnson. The officer recovered duct tape, a Nextel phone, and a set of handcuff keys from Johnson.

¶ 15 Forensic evidence presented at trial included a piece of duct tape from McClain's garage.

The tape was analyzed and a forensic scientist testified that a print recovered from the tape matched a palm print taken from defendant.

¶ 16 Detective John McSweeney testified for the defense. He stated that on July 10, 2000, he responded to McClain's garage in Blue Island to interview witnesses. He said that Bovino, Patoska and Cameron all told him that McClain said to one of the men, "you know me, Cal. You know my uncle."

¶ 17 Defendant's brother Anthony Carter also testified for the defense. He stated that he was confined to a wheelchair and did not own a car, nor was one parked in the garage on July 10, 2000. Rosemary Carter, defendant's mother, also testified. She said that on July 10, 2000, she lived at 9146 South Dauphin and defendant lived there. She stated that the house has a four-car garage. She said that on July 10, 2000, there were two cars in the north garage and one car in the south garage, but there was no room for a second car because other items were in the space. She testified that defendant came home around 11 p.m. that night and he was talking on his cell phone.

¶ 18 After considering the evidence presented at trial, the trial court found defendant guilty of two counts of aggravated kidnaping, two counts of kidnaping, four counts of aggravated unlawful restraint, and four counts of unlawful restraint. The trial judge noted that he found the evidence sufficient to prove defendant's guilt beyond a reasonable doubt without the use of the fingerprint evidence and declined to consider the fingerprints in his ruling. At the sentencing hearing, the trial court sentenced defendant to a term of 25 years for the aggravated kidnaping of McClain and concurrent terms of five years' imprisonment for the aggravated unlawful restraint of McClain,

Bovino, Patoska, and Cameron.

¶ 19 Defendant appeared *pro se* on direct appeal, arguing that (1) the trial court erred in admitting the handgun, badge, police scanner and Nextel cell phone recovered from a codefendant at the time of his arrest; (2) the trial court erred by allowing witnesses to testify about prior identifications of codefendants to bolster their credibility; and (3) his trial counsel was ineffective for failing to file a motion quash arrest and suppress evidence. This court affirmed defendant's conviction and sentence. See *Carter*, No. 1-01-4012.

¶ 20 In September 2003, defendant filed his first *pro se* postconviction petition. He filed his first supplemental petition in December 2003, a second supplemental petition in November 2005, a third supplemental petition in January 2006, an amendment to his third supplemental petition in July 2008, and a second amendment to his third supplemental petition in January 2009. In August 2009, postconviction counsel filed defendant's amended postconviction petition with the memorandum of law from defendant's *pro se* third supplemental petition and numerous exhibits. The amended postconviction petition alleged: (1) the 15-year enhancement of his aggravated kidnaping sentence violated the proportionate penalties clause of the Illinois Constitution; (2) his trial counsel was ineffective for failing to locate and interview an alibi witness, Willie Earl Smith, for failing to file notice of his alibi defense, for failing to prepare Rosemary Carter and Anthony Carter for their trial testimony; (3) ineffective assistance of appellate counsel (himself) for failing to raise an issue regarding the inadmissible hearsay testimony from the police officers about a radio call; and (4) a claim of actual innocence based on new evidence, supported by an affidavit from codefendant Parish.

¶ 21 In April 2010, the State filed a motion to dismiss defendant's amended petition, and defendant filed a response in September 2010. In November 2010, the trial court heard arguments on the motion and granted the State's motion to dismiss. The court found that the claims of ineffective assistance of appellate counsel were nonmeritorious and there was "no basis whatsoever." The court did not "believe there [was] any merit" to defendant's alibi claim. Finally, the court found that defendant's claim of ineffective assistance of trial counsel lacked "any basis."

¶ 22 This appeal followed.

¶ 23 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2004)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2004); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill.

2d 427, 443-47 (2005).

¶ 24 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2002). If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage. Counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2002)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2002)). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. See *Coleman*, 183 Ill. 2d at 381. If no such showing is made, the petition is dismissed. "At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2002).

¶ 25 First, defendant raises claims of ineffective assistance of trial and appellate counsel on appeal. 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 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, 163 (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. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 26 A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant. *Rogers*, 197 Ill. 2d at 223. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Thus, the inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue, for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal. *Simms*, 192 Ill. 2d at 362. Appellate counsel's choices concerning which issues to pursue are entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223.

¶ 27 Defendant contends that his trial counsel was ineffective for failing to investigate an alibi witness and to file notice of an alibi defense. Defendant asserts that his attorney failed to investigate the potential testimony of Willie Earl Smith, whom defendant had disclosed as an alibi witness. According to defendant, this failure constituted deficient performance and caused defendant prejudice. Defendant attached an affidavit from Smith to his petition. In the affidavit, Smith stated that at around 10:40 p.m., he saw defendant standing on the 8300 block of Racine near a barbeque restaurant where Smith had purchased food. Smith then gave defendant a ride home at 10:45 p.m. and dropped defendant off in front of 9146 South Dauphin at around 10:50 p.m. Smith stated that he told a friend that he would be a witness for defendant, but defendant's lawyer never contacted him.

¶ 28 The State maintains that trial counsel made a tactical decision not pursue an alibi defense. Defense counsel's strategy was to challenge the witness's testimony to create reasonable doubt. Specifically, defense counsel repeatedly questioned the eyewitnesses about whether they saw defendant in the garage, noting that other than Patoska, none described defendant to the police and defense counsel called the police in the defendant's case to support this line of questioning. Defense counsel highlighted that McClain originally did not tell the Blue Island police about defendant's involvement, despite testifying that he recognized him. Counsel also highlighted that Bovino, Patoska and Cameron all told police they heard McClain call one of the offenders "Kale," and did not hear him call someone "Hook." Defense counsel also thoroughly cross-examined the fingerprint expert regarding the number of points of identification in order for a print to be considered a match. The trial court, in its ruling, did not consider the fingerprint

evidence in finding defendant guilty.

¶ 29 The State asserts Smith's proposed testimony conflicts with defendant's *pro se* additional answer to discovery in which he stated that a witness named Cornelius Walters would testify that defendant was signing out of work at 10:45 p.m. According to defendant, Walters worked with defendant at the barbeque restaurant and he looked at the clock when defendant signed out and per defendant's request, he mailed defendant his time sheets from that time period and retained a copy for himself. The time sheets were not made part of the record. In his *pro se* motion for a new trial, defendant argued that the State "attack[ed" Walters by issuing a subpoena for his business records and the trial court tried to compel Walters to acknowledge whether his business records supported defendant's alibi. Walters invoked his right against self-incrimination. Defendant asserted that Walters was "bullied" by the State and this had " 'chilling effect' " on his decision to use Walters as an alibi witness.

¶ 30 "Decisions concerning what witnesses to call and what evidence to present on a defendant's behalf are viewed as matters of trial strategy. Such decisions are generally immune from claims of ineffective assistance of counsel." *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002). "A defendant is entitled to reasonable, not perfect, representation, and mistakes in strategy or in judgment do not, of themselves, render the representation incompetent." *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). Given the potential problems of conflicting alibi witnesses, trial counsel's strategy to pursue a reasonable doubt defense was not deficient performance. As noted, trial counsel aggressively cross-examined the State's eyewitnesses and focused on the lack of description of defendant and inconsistency in McClain referring to defendant as "Kale."

Defendant has failed to make a substantial showing that defense counsel's representation was objectively unreasonable and cannot sustain a claim of ineffective assistance.

¶ 31 Moreover, defendant has not demonstrated a reasonable probability that the result of the proceedings may have been different if Smith testified. Two witnesses, McClain and Patoska, identified defendant in a lineup as one of the perpetrators. The police encountered the Blazer with McClain in the alley outside the garage at defendant's house. Defendant fled when the police identified themselves and his codefendants were found in the bushes of the lot next to his house. While the trial court did not consider the fingerprint evidence, we point out that an expert matched defendant's palm print to a piece of duct tape found in McClain's garage. Since defendant had previously listed a different alibi witness, the State would have had ample grounds for cross-examination of the alibi. Defendant has not shown sufficient prejudice to satisfy the *Strickland* test.

¶ 32 Next, defendant contends that his trial counsel was ineffective for failing to introduce alibi testimony from his mother Rosemary and his brother Anthony or prepare them for their trial testimony.

¶ 33 We first point out that neither Rosemary or Anthony's affidavits describe any additional testimony than what they gave at trial. Anthony stated that prior to July 10, 2000, he was confined to a wheelchair and was not able to drive, nor did he own a car. He also said he never learned to drive and never had a driver's license. He further stated that defense counsel never questioned him or told him that he would be called to testify at trial. However, Anthony testified consistent with these statements at trial and he has not set forth any testimony that he could have

offered beyond that which he already gave at trial.

¶ 34 In her affidavit, Rosemary stated that on July 10, 2000, she saw defendant in the house at 9146 South Dauphin at 10:50 p.m. before she took a bath. She knew the time because she remembered looking at a clock. She also stated that the home had a four-car garage. The north garage contained two cars that were nonoperational on July 10, 2000. She said that defense counsel never questioned her or informed her that she would testify at defendant's trial. However, like Anthony, she gave testimony consistent with this affidavit at trial.

¶ 35 The record from the trial does not support defendant's claim that his attorney was ineffective for failing to prepare his mother and brother for trial. There is nothing in the affidavits from both witnesses that was not introduced at trial. Nothing in the record indicates that trial counsel was unaware or ill-prepared regarding what either witness's testimony would be. The affidavits do not contain any exonerating evidence or other alibi evidence that was not presented at trial. Accordingly, defendant has not shown how his defense counsel's representation was deficient when the statements in the affidavits were introduced at trial. Additionally, defendant cannot establish any prejudice because the proposed testimony from the affidavits was actually testified to by both Rosemary and Anthony at trial. Thus, this claim for ineffective assistance of counsel fails.

¶ 36 Next, defendant argues that he was deprived of ineffective assistance of appellate counsel. We observe that defendant appeared *pro se* on direct appeal and is asserting his own ineffectiveness. Defendant contends that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to object to hearsay statements introduced during the

testimony of the police officers and the failure to object to the State's reliance on these statements in closing arguments. Specifically, defendant asserts that inadmissible hearsay testimony was admitted at trial during the testimony of Officers Cleggitt, Wessel, and Garcia regarding statements that McClain made to police officers and the contents of a radio call that Officer Wessel made to officer Garcia.

¶ 37 The hearsay rule generally prohibits the introduction of an out-of-court statement used to prove the truth of the matter asserted. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007). However, "[d]efense counsel's failure to object to testimony may be a matter of sound trial strategy, and does not necessarily establish deficient performance." *People v. Evans*, 209 Ill. 2d 194, 221 (2004).

¶ 38 Defendant asserts that Officer Cleggitt gave improper hearsay testimony when he described finding McClain in the Blazer and McClain told him that he had been kidnaped and the offenders tried to kill him. Defendant also contends that inadmissible hearsay testimony was admitted through Officers Wessel and Garcia's testimony regarding Officer Wessel's radio call that defendant was running toward Officers Garcia and Whitehead and defendant had an object in his hand. The State responds that the testimony in both instances was proper because it related to the officers' investigative procedure.

¶ 39 A police officer's testimony about his investigative procedure " 'is not hearsay because it is based on the officers' own personal knowledge, and is admissible although the inference logically to be drawn therefrom is that the information received motivated the officers' subsequent conduct.' " *People v. Gacho*, 122 Ill. 2d 221, 248 (1988) (quoting *People v. Hunter*,

124 Ill. App. 3d 516, 529 (1984)). " 'To establish [his] course of conduct, a police officer may testify that [he] had a conversation with an individual and that [he] subsequently acted on the information received.' " *People v. Mims*, 403 Ill. App. 3d 884, 897 (2010) (quoting *People v. Johnson*, 199 Ill. App. 3d 577, 582 (1990). " 'However, the officer cannot testify as to the substance of [his] conversation with the individual because that would be inadmissible hearsay.' " *Mims*, 403 Ill. App. 3d at 897 (quoting *Johnson*, 199 Ill. App. 3d at 582).

¶ 40 First, McClain statements to Officer Cleggitt that he had been kidnaped were admissible. These statements were not admitted for the truth of the matter asserted, but to show the effect on the listener, *i.e.*, the actions of the police in response. Officer Cleggitt did not testify about McClain's statement as evidence that McClain had been kidnaped, but to show the course of the police investigation as a result of the statement. Additionally, Officer Cleggitt's statements were cumulative because McClain had already testified that he told the police he had been kidnaped and the offenders threatened to kill him. Since the testimony was properly admitted, a claim of ineffective assistance of appellate counsel lacks merit.

¶ 41 Next, the testimony regarding the radio call was also properly admitted. "At times, the contents of a radio call may be admitted where 'necessary to fully explain the State's case to the trier of fact.' " *People v. Warlick*, 302 Ill. App. 3d 595, 599 (1998) (quoting *People v. Williams*, 181 Ill. 2d 297, 313 (1998)). Similarly, the radio call made by Officer Wessel and heard by Officer Garcia explained the officers' course of conduct. Specifically, Officer Garcia testified that after the call he then saw defendant running toward his position with Officer Whitehead. The officers told defendant to stop, but he continued toward them and Officer Whitehead fired

one shot which struck defendant in the groin area. This testimony detailed the course of conduct for the police in apprehending defendant and was properly admitted.

¶ 42 Further, even if the statement was hearsay, we note that this case was a bench trial and we "must presume that a trial judge knows and follows the law unless the record demonstrates otherwise." *People v. Jordan*, 218 Ill. 2d 255, 269 (2006). There is nothing in the record to indicate that the trial judge relied on this testimony for any improper purpose. Accordingly, defendant has not set forth a substantial showing of a claim of ineffective assistance of appellate counsel.

¶ 43 Finally, defendant has asserted a claim of actual innocence based on newly discovered evidence. Specifically, defendant relies on an affidavit from codefendant Theodore Parish. In his affidavit, Parish stated that a week before July 10, 2000, he was driving with codefendant Ricky Walker in his vehicle when Walker asked him to stop. As Parish stopped, he saw Walker take a roll of duct tape from defendant, who appeared to be doing construction work outside someone's home. Walker then left the duct tape in Parish's vehicle. However, defendant's palm print on the duct tape was not material evidence because the trial court specifically stated in its findings that it did not consider the print in finding defendant guilty.

¶ 44 On the evening of July 10, 2000, Parish loaned his vehicle to a man he knew by the name "Kal." Between 11 p.m. and midnight, he walked to defendant's residence on the 9100 block of Dauphin to see defendant while he waited for "Kal" to return his vehicle. Before Parish could enter defendant's front yard, he saw defendant exit the front door of the house the same time that a man with a gun in his hand exited a vehicle in front of the house. Parish sought cover in the

bushes of defendant's neighbor's yard. He was arrested for the aggravated kidnaping of McClain and at the police station, he learned that the individual he knew as "Kal" had used Parish's vehicle to participate in the aggravated kidnaping of McClain. "Kal" was never arrested to his knowledge.

¶ 45 Defendant also attached two pages of the transcript from McClain's testimony at Parish's trial. In that excerpt, McClain stated that he had never seen defendant prior to the events of July 10, 2000, which is in contrast to his testimony from defendant's trial that he had seen defendant several times but had never met him.

¶ 46 In *People v. Washington*, 171 Ill. 2d 475, 489 (1996), the supreme court held that a postconviction petitioner may pursue a claim of actual innocence based on newly discovered evidence. To succeed under that theory, the supporting evidence must be new, material, and noncumulative, and it must be of such conclusive character that it would probably change the result on retrial. *Washington*, 171 Ill. 2d at 489. Newly discovered evidence must be evidence that was not available at defendant's trial and that the defendant could not have discovered sooner through diligence. *Barrow*, 195 Ill. 2d at 541. "Generally, evidence is not 'newly discovered' when it presents facts already known to the defendant at or prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative." *People v. Barnslater*, 373 Ill. App. 3d 512, 523-24 (2007). As the Illinois Supreme Court observed, "[w]e deem it appropriate to note here that the United States Supreme Court has emphasized that such claims must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.' "

People v. Edwards, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).

¶ 47 The term "actual innocence" does "not concern whether a defendant had been proved guilty beyond a reasonable doubt." *Barnslater*, 373 Ill. App. 3d at 520 (citing *People v. Savory*, 309 Ill. App. 3d 408, 414 (1999)). "Rather, the *Savory* court concluded, 'actual innocence' meant 'total vindication,' or 'exoneration.' " *Barnslater*, 373 Ill. App. 3d at 520 (quoting *Savory*, 309 Ill. App. 3d at 514-15)).

¶ 48 While the brief portion of McClain's testimony at Parish's trial appears to differ from his testimony at defendant's trial, the excerpt is not sufficient for us to fully consider this issue. Defendant included two pages from McClain's testimony and we are unable to review this portion in context with McClain's entire testimony. This exhibit is insufficient to support a claim of actual innocence and we will not consider it any further.

¶ 49 We are left with Parish's affidavit to support defendant's actual innocence claim. The State observes in its brief that Parish was acquitted at his trial. Most of defendant's claim of actual innocence capitalizes on the testimony at his trial regarding whether McClain referred to one of the perpetrators as "Hook" or "Kale" during the kidnaping. However, the trial court heard evidence on this issue and concluded that the identifications by McClain and Patoska were credible.

¶ 50 Further, we do not believe that the information in Parish's affidavit constitutes newly discovered evidence to support a claim of actual innocence. Defendant would have been aware that Parish happened to arrive at his house at the same moment as the police with the borrowed Blazer parked nearby. Also, Parish's statements do not exculpate defendant. He stated that his

friend "Kal" borrowed the car, but his affidavit does not offer an alibi or offer any additional information to exclude defendant from participation in the crimes. Parish did not explicitly deny his or defendant's participation in the crime. Significantly, Parish stated in his affidavit that he arrived at defendant's house as defendant was exiting the front door. Parish offered no information as to defendant's whereabouts prior to his arrival and did not exonerate defendant. As noted above, newly discovered evidence must be of such a conclusive character that it would probably change the result on retrial. Parish's affidavit is not sufficient to establish the probability that the result of defendant's trial would be different, nor does it meet the actual innocence test of total vindication. Because the statements in the affidavit were either known to defendant or could have been discovered through due diligence and because the substance of Parish's affidavit fails to exonerate defendant, defendant's claim of actual innocence must fail and the trial court properly dismissed his postconviction petition.

¶ 51 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 52 Affirmed.