2016 IL App (1st) 131188-U

Fifth Division
Modified order filed March 31, 2016

No. 1-13-1188

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County.
v.	)	No. 01 CR 17942
JOHNNY HUGHES,	)	The Honorable Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court dismissed defendant's claim on an erroneous legal basis, we affirm the trial court's dismissal of defendant's postconviction petition at the second stage, because we may affirm on any basis

found in the record, and we find that defendant failed to make the substantial showing which would require a third-stage evidentiary hearing.

¶ 2 Defendant Johnny Hughes was convicted on April 16, 2003, after a jury trial, of first degree murder and attempted armed robbery (720 ILCS 5/9-1(a)(1), 18-2(a) (West 2000)), and sentenced on May 29, 2003, to a total of 55 years with the Illinois Department of Corrections (IDOC). On direct appeal, this court affirmed defendant's conviction on February 2, 2005, but remanded so that the trial court could clarify its sentence and could resentence.[1] On June 25, 2009, defendant was again sentenced to a total of 55 years with IDOC.[2]

¶ 3 Prior to the resentencing, defendant filed on May 17, 2006, a *pro se* postconviction petition which alleged, among other claims, that his trial counsel was ineffective for failing to object to testimony by an assistant State's Attorney (ASA) about her claimed interview of defendant, where defendant swore in a supporting affidavit that he asserted his right to remain silent, and where the record contains no signed statement or *Miranda* waiver form.

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[1] The appellate court held that, since it was unclear from the record whether the trial court had added a sentence enhancement as required for personally discharging a firearm, defendant's sentence for first degree murder was vacated and the matter was remanded to the trial court for clarification and resentencing.

[2] On June 25, 2009, the trial court stated "the *mitt*[*imus*] should have broken it down. [Defendant], the total is 55 years. That is not being changed today. It is simply being clarified. It is 25 years required by law because the murder was committed with the use of a firearm. It is an additional 30 years for the first degree murder itself. The corrected *mittimus* should so reflect."

¶ 4 On July 20, 2006, the trial court appointed postconviction counsel, who filed a 651(c) certificate almost six years later without amending defendant's postconviction petition. On January 9, 2013, the State moved to dismiss on the ground that the ASA's trial testimony about the interview rebutted defendant's affidavit. At the hearing on the State's motion on March 26, 2013, the State explicitly stated that it "abandon[ed]" its claims concerning deficiencies in defendant's affidavit.

¶ 5 On March 26, 2013, the trial court granted the State's motion to dismiss without an evidentiary hearing, holding that defendant could not assert a *Miranda* violation when he claimed no statements were made. However, this holding is legally incorrect, and the State does not claim otherwise on this appeal. *People v. Wrice*, 2012 IL 111860, ¶ 53 ("The law is settled that a defendant's assertion that he did not confess does not preclude the alternative argument that any confession should be suppressed.")

¶ 6 On this appeal, defendant asks this court to remand this case to the trial court for a third-stage evidentiary hearing, on the ground that he made a substantial showing (1) that his trial counsel was ineffective for failing to object to the ASA's testimony about her claimed interview with defendant, where defendant submitted an affidavit in which he swore that he had asserted his right to remain silent and where there was no signed statement or *Miranda*

form. Defendant also argues (2) that his postconviction counsel provided unreasonable assistance by failing to amend his *pro se* postconviction petition to include a *Napue* claim that the ASA testified falsely. *Napue v. Illinois*, 360 U.S. 264 (1959).

¶ 7 For the reasons explained more fully below, we affirm.

¶ 8 BACKGROUND

¶ 9 I. Evidence at Trial

¶ 10 The evidence at trial established that Alex Bradley, age 69 and a junk dealer, was shot and killed immediately after defendant and Arnold Elliott, a.k.a. "Blue," attempted to sell Bradley some items which Bradley refused to buy. The State argued that it was defendant who shot Bradley, while the defense argued it was Elliott. The police were led to Elliott, after a bystander identified the license plate numbers of a fleeing vehicle, and the police traced the vehicle to Elliott's father. At trial, Elliott testified that defendant was the one with the gun. Defendant exercised his right not to testify, and the State introduced two oral statements by defendant: one in which he stated Elliott had the gun; and one in which he stated he had the gun. The State introduced evidence of defendant's fingerprint on the bag containing the items for sale, but the fingerprint on the bag did not establish the shooter's identity.

¶ 11 The State's case consisted of 11 witnesses: (1) Ruth Bradley, the victim's ex-wife; (2) Tawana Smith, the victim's neighbor who observed the license plate numbers of the fleeing vehicle; (3) police officer James Duffy, who investigated the crime scene; (4) police sergeant James Sanchez, who traced the license plate numbers provided by the victim's neighbor; (5) police detective Gus Vasilopoulos, who also investigated the murder; (6) Dr. Joseph Cogan, the assistant medical examiner who performed the autopsy; (7) Julie Wessel, a fingerprint analyst; (8) Arnold Elliott, who was with defendant on the night of the shooting; (9) Leon Tanna, defendant's friend; (10) an ASA who questioned Tanna before a grand jury; and (11) an ASA who testified about her oral interview of defendant, and whose testimony is the subject of this appeal.

¶ 12 The State's case also consisted of stipulations to the testimony of: (1) police sergeant Cogley,[3] who found certain evidence at the crime scene; (2) police officer Kopina, who performed a gunshot residue test on a suspect who was not defendant; (3) police detective Hughes, who found this other suspect near the crime scene; and (4) Linda Engstrom, a fingerprint analyst.

[3] The stipulations do not give the first names of Cogley, Kopina, and Hughes.

¶ 13 A. Ruth Bradley

¶ 14 Ruth Bradley testified that she was the ex-wife of the decedent, Alex Bradley, and that she lived across the street from him. In June 2001, Alex[4] was employed as a "scavenger," meaning that he bought and sold junk out of the backyard of his house. On June 12, 2001, at 6:30 a.m., Bradley heard a gunshot, exited her house and observed a white automobile driving away from the alley next to Alex's house. After Bradley observed Alex walking along his fence, with one of his hands in the air, she asked him what was wrong and he responded "Ruth, Ruth, I've been shot." Bradley ran back inside her house, woke up one of her granddaughters, and they both ran back to Alex's yard. After they entered his yard, Alex was near death and died shortly thereafter.

¶ 15 B. Tawana Smith

¶ 16 Tawana Smith testified that in June 2001, she was a neighbor of Alex Bradley. On June 12, 2001, at 6:35 a.m., Smith was exiting her house when she heard a bang, but at the time she believed that it was a noise from a nearby factory. Smith observed a white automobile exiting an alley. After the automobile nearly hit Smith, she instinctively looked at the license plate. Smith observed the numbers on the license plate and that the license plate was a handicapped license plate. The automobile was a white Ford Tempo and there

[4] Since both Ruth and Alex share the last name of Bradley, we refer to Alex Bradley by his first name in this paragraph.

were two middle-aged African American males in it. Later that day, Smith received a telephone call from a police detective, and she informed the detective of the automobile's license plate numbers and the handicapped designation of the license plate, as well as the automobile's color, make, and model. She later identified a picture of the automobile for the detective. In court she identified the automobile again, in a photograph presented to her by the State. This photograph was later admitted into evidence. Smith testified that, when she talked to the detective on the phone, she gave the detective the numbers of the license plate out of sequence, because she could not remember the correct sequence of the numbers.

¶ 17 C. Officer James Duffy

¶ 18 Police Officer James Duffy testified that he was a forensic investigator with the Chicago police department. On June 12, 2001, at 7 a.m., Duffy and his partner, Officer Victor Rivera, were assigned to investigate a crime scene at the victim's house. At the crime scene, Duffy recovered a spent cartridge of a bullet and a "gold bag" that was filled with miscellaneous items. This bag had been moved under a tarp by other unidentified officers, in order to protect it from rain that was beginning to fall.

¶ 19 On cross-examination, Duffy testified that the officers at the scene who moved the gold bag informed him that the bag was found in the alley, near the

victim's body. Duffy and Rivera searched the scene for a bullet and for a handgun, but were unable to find either item. Duffy testified that he and Rivera swabbed Jerry Pirtile[5] for gunshot residue (GSR).

¶ 20 D. Stipulations of Cogley, Kopina, and Hughes

¶ 21 The State then submitted the following three stipulations without objection from the defense.

¶ 22 It was stipulated that if Sergeant Cogley were called to testify, he would testify that when he arrived at the victim's house on June 12, 2001, he found a gold bag containing miscellaneous items on the ground near the location where the shell casing was found. Since it was raining, he directed officers to place the bag underneath a nearby tarp.

¶ 23 It was stipulated that if Officer Kopina were called to testify, she would be qualified to testify as an expert in the field of gunshot residue analysis. Kopina performed tests on the GSR sample taken from Jerry Pirtile, which came back negative. This indicated that Pirtile either did not fire a gun, or that the particles were removed by activity or by some other method.

¶ 24 It was stipulated that if Detective Hughes[6] were called to testify, he would testify that he was assigned to investigate the murder of the victim.

[5] At this point in the proceedings, it was not clear who Pirtile was. However, in the subsequent stipulations it was revealed that Pirtile was initially a suspect in the investigation.

Hughes found Jerry Pirtile sleeping in a vehicle near the victim's house, and no gun was recovered from Pirtile.

¶ 25 E. Sergeant James Sanchez

¶ 26 Police Sergeant James Sanchez testified that, on June 13, 2001, he was assigned to investigate the victim's murder. As part of the investigation, Sanchez was given the license plate and vehicle information that was given to the police by Smith.[7] Sanchez called Smith on her telephone to confirm that the information he had been provided was accurate, and Smith confirmed the information. Using a police computer, Sanchez performed a search and found a registered white Ford Taurus with a handicapped license plate and the same numbers as those that Smith gave to the police. After learning that the vehicle was owned by John Neal, Sanchez went to the residence of John Neal, where he observed a white 1991 Ford Tempo with a handicapped license plate. Neal informed Sanchez that the automobile was often driven by Arnold Elliott, Neal's son. Sanchez took photographs of the automobile, and identified the photographs as depicting the same automobile that he observed on the morning of June 12, 2001.

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[6] The record does not reflect if Detective Hughes has any familial connection to defendant.

[7] The record does not reflect which officer collected the vehicle and license plate information from Smith, or which officer provided this information to Sanchez.

¶ 27 F. Detective Gus Vasilopoulos

¶ 28 Gus Vasilopoulos testified that he was currently a police sergeant, but on June 26, 2001, he was a detective and assigned to investigate the victim's murder. Vasilopoulos received information from Arnold Elliot regarding a vehicle that defendant may have been driving. Vasilopoulos and Sanchez drove around the area Elliot indicated defendant could be found until they located his vehicle. The driver of the vehicle stopped the vehicle and began running from the detectives on foot. The detectives pursued him on foot and apprehended the driver. The driver originally told detectives that his name was Jeffrey Tanna; however, detectives later learned that his real name was Leon Tanna.

¶ 29 Vasilopoulos testified that he had a conversation with Leon Tanna, who claimed to be the nephew of defendant. Tanna identified defendant from a photo array and confirmed that the vehicle he was driving belonged to defendant. Vasilopoulos ran a computer search on Tanna and discovered that he was wanted on a homicide warrant. Vasilopoulos also learned that defendant was, at that time, in the Jasper County jail in Indiana. He testified that, on June 27, he drove with Detective Pat Feeney and an ASA to the Jasper County jail, but he was not asked any further questions about that trip.

¶ 30 On cross-examination, Vasilopoulos confirmed that Leon Tanna had an outstanding warrant for his arrest in relation to a homicide.

¶ 31 G. Dr. Joseph Cogan

¶ 32 Dr. Joseph Cogan testified that he was a forensic pathologist currently working as an assistant medical examiner for the Cook County Medical Examiner's Office. Dr. Cogan was admitted as an expert in the field of forensic pathology without objection. Dr. Cogan testified that on June 13, 2001, he performed an autopsy on the victim, and that the victim appeared to be around 69 years of age and had died from a gunshot wound that resulted from a bullet which had penetrated and exited the victim's body.

¶ 33 H. Julie Wessel

¶ 34 Julie Wessel testified that she was a forensic scientist employed by the Illinois State Police in the Forensic Science Center in Chicago, and that she specialized in the area of latent fingerprints. Wessel was accepted as an expert in the area of latent fingerprints and comparisons without objection. Wessel compared (1) a photograph of a latent fingerprint impression that was removed from the gold bag found near the victim to (2) an ink fingerprint card that contained a fingerprint impression from defendant, and concluded that the fingerprints were a match.

¶ 35 On cross-examination, Wessel testified that she could not be certain of when defendant's fingerprint was left on the bag.

¶ 36 I. Stipulation of Linda Engstrom

It was stipulated without objection that if Linda Engstrom were called to testify, she would testify that in July 2015, she was working as a forensic scientist in the Illinois State Police Crime Lab. Engstrom recovered a latent print from the gold bag that was recovered near the victim.

¶ 37 J. Arnold Elliott

¶ 38 Arnold Elliott testified that, on June 12, 2001, at 3 a.m., he was driving a Ford Tempo belonging to his father, John Neal, when he stopped to give defendant a ride. Elliott and defendant purchased heroin and cocaine and began imbibing both drugs. Defendant was carrying a "little shiny bag" containing miscellaneous items that defendant wanted to sell in order to purchase more drugs. Elliott and defendant eventually drove to the alley next to the victim's house in order to sell the bag and its belongings. Defendant exited the vehicle and entered the victim's backyard, at which point the victim's fence obscured Elliott's vision of defendant. Elliott heard a gunshot and then defendant came back from the victim's yard and entered the vehicle. Elliott asked defendant what had occurred, to which defendant responded "just drive."

¶ 39 After Elliott drove away from the victim's house, he again asked defendant what had occurred. Defendant stated that he tried to take the victim's money using a handgun, and the victim grabbed defendant, which caused the

handgun to fire. Elliott had not been aware that defendant was carrying a handgun. Elliott then dropped defendant off at a street corner. Elliott later had a conversation with defendant in which Elliott informed defendant that he should leave town because the police had spoken to Elliott's father about his vehicle and there was a murder investigation associated with the vehicle. Defendant replied "OK."

¶ 40 Elliott testified that he was currently in custody for a retail theft charge, to which he pled guilty. Elliott was then asked about his sentence for the retail theft charge and whether he had received any promises in connection with his testimony. The following exchange occurred:

"ASA: And what sentence did the judge tell you you would receive on that [retail theft] charge?

ELLIOTT: Two years.

ASA: Did anyone ever make any promises to you at all about your testimony in this case as it relates to that charge?

ELLIOTT: I don't understand.

ASA: Did anyone make any promises to you before you pled guilty to that charge about your testimony here?

ELLIOTT: Here?

ASA: Right.

ELLIOTT: No."

¶ 41 Elliott further testified that he pled guilty to an armed robbery charge in 1994 and received a 12-year sentence; and that he pled guilty in 1990 to "a possession charge and two gun charges" and received a total of 7 years.

¶ 42 On cross-examination, Elliott testified that he "did business" with the victim on one other occasion. Elliott testified that when he first talked to the police he denied having any information regarding the victim's murder. Elliott testified that he had testified in front of a grand jury. During this grand jury testimony, Elliott testified that he had, earlier in the evening but after picking up defendant, given a ride to a third individual. Elliott also testified in front of the grand jury that defendant did not have the gold bag until after Elliott had stopped at a restaurant, at which point defendant entered the restaurant and spoke to some individuals, and then returned to the vehicle with the bag. Elliott further testified that when he spoke to defendant after the police questioned his father, he told defendant that he was not going to "take the weight" for the homicide that defendant had committed. Elliott testified that he had never told detectives that he loaned defendant his father's vehicle. He also testified that he never told detectives that he was not present when the homicide occurred.

¶ 43 K. Leon Tanna

¶ 44 Before testifying, Leon Tanna asked if he could address the court. The trial court excused the jury, and Tanna stated that his police statement contained falsehoods, which Tanna gave to the police only after he was physically abused by the police officers. The trial court informed Tanna that he should tell only the truth during his testimony, and if his testimony was that the police forced him to give a false statement, he could so testify.

¶ 45 Leon Tanna testified that he knew defendant, and that while he often referred to him as "uncle," defendant was actually just a friend. Tanna testified that he was currently incarcerated for first degree murder. Tanna testified that he could not recall if he was driving defendant's vehicle on June 13, 2001, or if he was arrested by the police on that day. Tanna was pursued on foot by police officers at some time in June. Tanna denied ever speaking to police officers about defendant; however, detectives did question Tanna about defendant. Tanna testified that he had never had a conversation with defendant regarding a homicide. Tanna did speak to a "woman" while he was in prison, but could not testify that she was an ASA. Tanna testified that at this meeting, a detective would tell the ASA what to write down, the ASA would write it, and Tanna would reply "yeah" when asked if what the detective had stated was the truth. Tanna testified that he recalled signing something, but could not recall the ASA

"showing" him anything. The State presented Tanna with the statement that was written by the ASA, and Tanna identified that his signature was on every page.

¶ 46 Tanna testified that he had previously testified in front of a grand jury. Tanna testified that there was a police officer in the room when Tanna testified before the grand jury. Tanna testified that he never testified before the grand jury that defendant had stated that he had "stuck up the old man at [victim's street]" or that "he said he had took his money [*sic*] and got his money [*sic*] and everything from him, and the old man had took a swing at him in his reaction, [*sic*] he had pulled the trigger. And he said he didn't know if he killed him or not."

¶ 47 On cross-examination, Tanna testified that when the police asked him about defendant they "slapped him around." Tanna testified that he only agreed to what the police were forcing him to state because of this abuse.

¶ 48 On redirect examination, Tanna testified that when he was processed for entry into prison for his first degree murder charge he did not report any injuries. Tanna testified that he never testified before the grand jury that he had not been abused or coerced into giving his testimony against defendant.

¶ 49 L.The ASA Who Interviewed Tanna

¶ 50 The ASA who questioned Tanna during the grand jury proceedings testified that, when Tanna testified before the grand jury, he testified that on

June 12, 2001, defendant and Tanna had a conversation at Tanna's aunt's house. Defendant was smiling and when Tanna asked him what he was smiling about, defendant stated that he had robbed an old man on the victim's street and when the old man hit defendant, defendant shot him. Defendant was not aware if the old man had died. Tanna testified that he had not been threatened or given any promises in order to solicit his testimony. There were no police officers in the room when Tanna testified before the grand jury.

¶ 51 On cross-examination, the ASA testified that when he spoke to Tanna in the ASA's office, before the grand jury, there were police officers present in the room with Tanna.

¶ 52 M. Detective James Sanchez

¶ 53 Police Detective James Sanchez was recalled by the State and testified that he never struck Tanna during their interview. Sanchez did not observe any other officer strike Tanna, nor did he observe any bruising or red marks on Tanna's face.

¶ 54 N. The ASA Who Interviewed Defendant

¶ 55 The ASA who interviewed defendant testified that she had been employed with the State's Attorney's Office of Cook County for seven years.

On June 27, 2001,[8] she traveled with Detective Gus Vasalopoulos and Detective Pat Feeney to a jail in Jasper, Indiana, where defendant was being held on unrelated charges. It is this ASA's testimony which is at issue on this appeal.

¶ 56 The witness testified that, after she and the detectives arrived, the sheriffs brought defendant to an interview room. She waited outside the interview room, while the detectives entered and interviewed defendant for 20 minutes. Then she entered the interview room and met with defendant, in the presence of the detectives. She informed defendant that she was a prosecutor and not his attorney, and he indicated that he understood that. Then she advised defendant of his *Miranda* rights from memory, rather than reading them from a pre-printed card. *Miranda v. Arizona*, 384 U.S. 436 (1966). The State did not specifically ask the witness if defendant indicated that he understood his rights, asking instead:

> "THE STATE: And after you advised the Defendant of his rights, and after he indicated that he understood those rights, did he agree to speak to you about what had had [*sic*] happened on June 12th of 2001?
>
> THE WITNESS: Yes."

[8] This is approximately four years before the Illinois law took effect requiring the electronic recording of custodial interrogations in homicide cases. Pub. Act 93-206,§25 (eff. July 18, 2005) (adding 725 ILCS 5/103-2.1).

¶ 57 The witness then testified that defendant told her that, in the morning of June 12, 2001, at around 2 to 2:30 a.m., his friend "Blue" arrived to pick him up in a white Ford, and they drove around. At some point, they picked up some "merch" or "merchandise" which was a yellow bag with greeting cards and candles in it. As they drove around, they smoked crack cocaine and snorted heroin. Since he was high, defendant could not recall where they obtained the merchandise or where they drove. However, they kept driving until it was daylight, when they went to sell the merchandise. When the witness was asked where defendant indicated they went to sell the merchandise, the witness testified that she did not recall. Her recollection was refreshed by People's exhibit No. 20, which was a memorandum which the witness testified that she wrote "after the case." The witness did not indicate how long after the case she wrote the memo; and the exhibit was not offered into evidence and is not part of the record on appeal.

¶ 58 After reading the memo, the witness testified that defendant stated that they drove to the corner of 16th Street and Kostner Avenue and parked the vehicle in a nearby alley. As Blue and defendant exited the vehicle, defendant was carrying the yellow bag and defendant noticed that Blue had a gun in his waistband. They approached an old man, and Blue showed the old man the contents of the bag, but the old man did not want the merchandise. Defendant

then walked away, back towards Blue's vehicle, and placed the bag on top of a garbage can. As defendant was walking away, Blue was still talking with the old man. As defendant approached the vehicle, he heard a gunshot.

¶ 59 The witness testified that, when she asked defendant for details about where people were standing, defendant explained that he could not remember because he was "high" at the time. After defendant related that he was a drug user, the witness asked him: "Well, isn't it true that the more you use drugs you become more like [*sic*] your tolerance gets higher?" Defendant became angry and asked her if she had ever smoked crack. Then he stated "You know what? That's my story. I'm done talking." The witness then left the interview room with the detectives, and they entered a room immediately outside of the interview room where she had waited before. That first interview lasted about an hour

¶ 60 The witness testified that, while they were waiting in the other room, an Indiana sheriff[9] informed them that defendant wanted to speak with them again, and they reentered the interview room. Defendant then stated: "I'm going to tell you the truth now." The witness advised defendant of his *Miranda* rights again and defendant indicated that he understood those rights.

[9] This sheriff's name is not reflected in the record.

¶ 61 The witness testified that, during this second interview, defendant stated that Blue picked defendant up between 2 and 2:30 a.m., and that, when Blue picked him up, Blue had a gun with him. Defendant observed the gun immediately, and Blue handed it to defendant, stating that they were "going to do a lick." Defendant explained that "a lick" was a robbery. Defendant stated that he was supposed to point the gun during the robbery, since Blue was driving the vehicle. They drove around all night and could not find anyone to rob. They decided to wait until it became light out, since that is when the drug dealers come out and they usually have money.

¶ 62 The witness testified: "he told me that the whole thing about getting the merchandise that he had previously told me was the same thing, that they had driven around, that they did pick up this merch, as he called it, at some point, but, again, couldn't remember where they did it or where they went to get it."

¶ 63 The witness testified that, at some point, they decided to sell the "merch" in order to obtain money for gas, so that they could continue driving around looking for someone to rob. To sell the merchandise, they drove to 16th Street and Kostner Avenue, parked in the alley and exited the vehicle together. At this point, defendant had the gun. They approached the old man and defendant showed him the items, but the old man was not interested in them. Defendant became angry, pointed the gun at the old man and started to rifle through the

old man's pockets looking for money. Defendant had his hand in the victim's "front shirt chest pocket," when the victim tried to push defendant's arm away from his pocket and the gun went off, causing the victim to fall backward. Defendant did not obtain any money from the victim. Blue and defendant then fled back to the vehicle and drove away. The witness testified that defendant stated that Blue dropped him off, but she could not recall where. Defendant also stated that he had told his nephew, Leon Tanna, about what had happened.

¶ 64 The witness then offered defendant options for memorializing his statement, such as her handwriting a summary for him to sign, or calling a court reporter who would transcribe his words *verbatim*, or videotaping her questions and his responses. He declined these options stating that he was not making a confession, he did not trust court reporters, and videos lie.

¶ 65 The witness then testified that defendant demanded that she offer him a deal for his testimony, which she refused. Defendant then stated that he would not give a statement. Indicating that he was finished talking, defendant lifted his shirt over his head and put his head down. The witness then left defendant and did not have any further contact with him.

¶ 66 The witness further testified that, on July 3, 2001, she interviewed Leon Tanna, who was in custody. Although Detective Feeney was also present, the interview was primarily a conversation between the witness and Tanna, who

told her that he had a conversation with defendant on June 12, 2001. Defendant was smiling and told Tanna that he had robbed an old man, that the old man had attempted to hit defendant, and that defendant had shot him. Defendant was not sure if he had killed the old man. Defendant told Tanna that he shot the old man on "reflex." Tanna stated that he was treated well by the police. The witness did not notice any injuries or marks on Tanna, and she documented the interview in a handwritten statement, which Tanna reviewed. Tanna was allowed to make changes or corrections, and then he signed each page.

¶ 67 On cross-examination, when asked where the Jasper jail was, the witness replied: "It's far. It is about a two-hour drive, I would say." After she and the detectives arrived, the detectives talked to defendant by themselves for about 15 minutes before she entered the room. During her first interview with defendant, he stated that Blue or Arnold Elliott had the gun. After the first interview, she was not sure how long the Indiana sheriff spent with defendant before the sheriff told her that the defendant would like to speak to her again. Although she obtained statements from both Leon Tanna and Arnold Elliott, there never was any written statement from defendant. The witness never offered defendant paper and pencil and the chance to write down his statement in his own words.

¶ 68 The State then rested its case, and the defense moved for a directed verdict, which the trial court denied. Defendant exercised his right not to present any witnesses and rested. During closing argument, the State argued that defendant was the shooter, while the defense argued that the shooter was "Blue" or Arnold Elliott. The State argued in closing that, if at one time, you observe a ham on the kitchen counter and then, shortly after, you observe an empty ham pan and the dog in the corner licking his lips, you know what happened. The defense responded: "What if you got two dogs?" The defense then argued: "Who did the State bring to meet their burden to convince you beyond a reasonable doubt *** that [defendant] is the person, that he is the dog, instead of, say, Arnold Elliott, maybe?"

¶ 69 II. Conviction and Sentencing

¶ 70 On April 16, 2003, the jury returned a verdict of guilty against defendant for first degree murder and two counts of attempted armed robbery.

¶ 71 On May 29, 2003, defendant argued his posttrial motion for a new trial, which was denied. After hearing factors in aggravation and mitigation, the trial court sentenced defendant to 55 years for the first degree murder and 10 years for the attempted armed robbery, to run concurrently.

¶ 72 III. Direct Appeal

¶ 73 On direct appeal, defendant claimed that: (1) the circuit court erred in admitting a witness's prior inconsistent statement as substantive evidence; (2) prosecutorial misconduct during the trial and in closing argument deprived him of a fair trial; (3) he received an unconstitutional sentence when the court imposed the 25-to-life sentence enhancement mandated by section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2000)); (4) one of his convictions for attempted armed robbery must be vacated under one-act one-crime principles; and (5) the mittimus should be corrected to reflect that attempted armed robbery is a Class 1, rather than a Class X offense.

¶ 74 On February 2, 2005, the appellate court concluded that: (1) Tanna's prior inconsistent statement to the ASA was properly admitted into evidence for impeachment purposes; (2) there was no prosecutorial misconduct; and (3) the 25-year firearm enhancement did not violate defendant's due process rights, did not create a disproportionate sentence, and did not create an impermissible double punishment. *People v. Hughes*, No. 1-03-1898 (2005) (unpublished order under Supreme Court Rule 23).

¶ 75 However, the appellate court also concluded that: (1) the mittimus must be corrected to reflect a conviction of only one count of attempted armed

robbery as a Class 1 felony; and (2) the case must be remanded for resentencing in order to clarify whether defendant's 55-year sentence included the 25-year mandatory enhancement for the use of a firearm. *People v. Hughes*, No. 1-03-1898 (2005) (unpublished order under Supreme Court Rule 23).

¶ 76 IV. Postconviction Petition

¶ 77 On May 17, 2006, and prior to resentencing, defendant filed a *pro se* petition for postconviction relief. In the petition, defendant claimed: (1) ineffective assistance of trial counsel for failing to object to an ASA's testimony about claimed oral statements by defendant after he asserted his right to remain silent; (2) ineffective assistance of trial counsel for failing to object to improper hearsay testimony; (3) prosecutorial misconduct during closing arguments; (4) ineffective assistance of trial counsel for failing to challenge the chain of custody for certain evidence; and (5) ineffective assistance of appellate counsel on appeal for failing to raise the first four claims on direct appeal.

¶ 78 Attached to defendant's petition was a signed affidavit by defendant in which he stated that, while he was in jail in Indiana, he was approached by an ASA, who read him his *Miranda* rights. After hearing his rights, he "did not waive" them, and he "refuse[d] to answer any questions," except to say that he "did not have any information to offer because [he] did not know about the case." After defendant "asked to remain silent," the ASA "continued the

interrogation," so defendant "simply pulled [his] shirt over [his] head" and placed his "head down."

¶ 79 On July 20, 2006, counsel was appointed to represent defendant for his postconviction proceedings. On February 19, 2009,[10] the ASA informed the trial court that "there is an issue with sentencing that we need to discuss with you before we can proceed on the PC." As directed by the appellate court, the trial court then clarified defendant's sentence on June 25, 2009, stating: "the *mitt*[*imus*] should have broken it down. [Defendant], the total is 55 years. That is not being changed today. It is simply being clarified. It is 25 years required by law because the murder was committed with the use of a firearm. It is an additional 30 years for the first degree murder itself. The corrected *mittimus* should so reflect."

¶ 80 On February 29, 2012, defendant's postconviction counsel filed a 651(c) certification. On January 9, 2013, the State filed a motion to dismiss defendant's postconviction petition. On the same day, the trial court met with counsel to discuss scheduling. During this meeting, defendant's postconviction counsel informed the court that she had located two of the witnesses defendant had asked her to locate, but neither witness would be of assistance.

[10] During the postconviction process, defendant filed a motion to have his postconviction attorney removed, and then retracted the filing. Defendant's case was at one point dropped off the call, and had to be reinstated.

¶ 81 On March 26, 2013, the trial court heard the State's motion to dismiss. Defense counsel informed the court that he had filed a motion asking for leave to file a notarized affidavit. Defense counsel explained that the State had observed in its motion to dismiss that defendant's original affidavit, attached to his *pro se* petition, was not properly notarized, and so counsel had the affidavit retyped and properly notarized to cure this defect. The State had no objection, and the trial court permitted defendant to file the new affidavit.

¶ 82 After the trial court allowed the filing of the new affidavit, the State informed the court that it was abandoning any arguments that it had previously made with respect to the deficiencies in the notarization and the allegations of defendant's affidavit. The ASA stated:

> "ASA: And, Judge, as counsel noted, I did make arguments in my motion related to the deficiencies in the notarization of the verification affidavit, as well as [defendant's] affidavit in support of his allegations. I'm going to abandon those arguments."

The trial court stated that the ASA's representation would be "[s]o indicated," and the parties proceeded to argument.

¶ 83 With respect to defendant's claim that his trial counsel was ineffective for failing to object to the ASA's testimony on *Miranda* grounds, the State argued that, since defendant's affidavit was rebutted by the ASA's trial testimony,

defendant was not entitled to an evidentiary hearing. In addition, the State argued that appellate counsel was not ineffective for failing to raise defendant's postconviction claim, since it lacked merit. The State did not argue that defendant's affidavit failed to allege any necessary facts.

¶ 84 With respect to this claim, the trial court ruled:

> "The difficulty with that claim though is that [defendant's] affidavit says he never made any such statements. It's very clear in that regard. 'I told the [ASA]' — in paragraph — 'I told the [ASA] I did not have any information to offer because I did not know about the case. After I asked to remain silent, the [ASA] continued the interrogation and I simply pulled my shirt over my head placing my head down. Even though I refused to give up my right to remain silent, I was still continuously interrogated.' That's the end of the affidavit. Accepting just for the purpose of this motion to dismiss, which I do accept the truth of those allegations, it may well be that [defendant's] testimony, if believed, would establish a violation perhaps of *Edwards v. Arizona*, but according to his own testimony, had it been presented by his trial counsel, there would be nothing to suppress because there are no fruits accumulating or accrediting to the State's benefit, so to speak, or in your end to [defendant's] detriment in light of his claim — because he claims to have

> not confessed or made any statements to [the ASA], other than telling her pursuant to paragraphs 5 and 6, he refused to answer questions, and told her he did not have any information to offer because he does not know about the case.
>
> The upshot of that or its import is that, even assuming its truth and presuming that trial counsel was ineffective for failing to litigate that issue that [defendant] claims should have been litigated, even had it been satisfied to the trial court's satisfaction, if [defendant] was believed in that regard and he would have to have been believed for the trial court to reach that conclusion, there would be nothing for the trial court to suppress because [defendant] claims not to have made any statements. It's circuitous reasoning. It's certainly not something that trial counsel would reasonably be anticipated to put forth. And I do not believe that as stated, the claims raised by [defendant] in paragraph 1 of his petition, or paragraph A as he styles it, constitutes a substantial showing of ineffective assistance of counsel that would motivate the court to go on to a third stage hearing."

¶ 85 As we observed above, the trial court's holding, that a defendant cannot assert a *Miranda* violation if he claims no statements were made, is legally incorrect, and the State does not argue otherwise on this appeal. *E.g.*, *Wrice*,

2012 IL 111860, ¶ 53 ("The law is settled that a defendant's assertion that he did not confess does not preclude the alternative argument that any confession should be suppressed.")

¶ 86 In addition, the trial court rejected defendant's claim of ineffective assistance of appellate counsel, stating:

> "THE COURT: For all these reasons, the last claim that Appellate Counsel was ineffective for having raised these issues, simply fail, because for the reasons I've expressed, even had Appellate Counsel raised those issues, they would not have substantially changed the outcome of [defendant's] appeal. That is to say his appeal still would have been denied. "

¶ 87 After the trial court dismissed defendant's petition, defendant filed a notice of appeal on the same day. On this appeal, defendant raises a claim that he made below, namely, that his trial counsel failed to raise a *Miranda* violation. He also added a second claim, namely, that his postconviction counsel provided unreasonable assistance by failing to add a *Napue* claim that the ASA testified falsely.

¶ 88 ANALYSIS

¶ 89 On this appeal, defendant asks this court to remand this case to the trial court for a third-stage evidentiary hearing, on the ground that he made a

substantial showing that his trial counsel was ineffective for failing to object to the ASA's testimony about her claimed interview with defendant, where defendant submitted an affidavit in which he swore that he had asserted his right to remain silent and where the record contains neither a written statement nor a *Miranda* waiver form. Defendant also argues that his postconviction counsel provided unreasonable assistance by failing to amend defendant's *pro se* postconviction petition to add a *Napue* claim that the ASA testified falsely. For the following reasons, we affirm.

¶ 90 I. Stages of a Postconviction Petition

¶ 91 Under the Post-Conviction Hearing Act (Act), individuals convicted of a criminal offense may challenge their convictions if there was a violation of their constitutional rights (725 ILCS 5/122-1 *et seq*. (West 2012)). See also *People v. Domagala*, 2013 IL 113688, ¶ 32. The Act provides for three stages of review by the trial court. At the first stage, the trial court may summarily dismiss a petition that is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Domagala*, 2013 IL 113688, ¶ 32.

¶ 92 If the trial court does not dismiss a petition at the first stage, the petition advances to the second stage, where counsel is appointed if a defendant is indigent. After counsel determines whether to amend the petition, the State may file either a motion to dismiss or an answer to the petition. 725 ILCS

5/122-4, 122-5 (West 2012); *Domagala*, 2013 IL 113688, ¶ 33. At the second stage, the trial court must determine whether the petition and any accompanying documents make a "substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 93 If the defendant makes this showing at the second stage, then the petition advances to a third-stage evidentiary hearing. At a third-stage evidentiary hearing, the trial court acts as factfinder, determining witness credibility and the weight to be given particular testimony and evidence, and resolving any evidentiary conflicts. *Domagala*, 2013 IL 113688, ¶ 34.

¶ 94 II. Standard of Review

¶ 95 In this appeal, the trial court dismissed defendant's postconviction petition at the second stage. During a second-stage dismissal hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *Domagala*, 2013 IL 113688, ¶ 35.

¶ 96 At this stage, the trial court accepts as true all well-pled facts that are not positively rebutted by the record. *Domagala*, 2013 IL 113688, ¶ 35 (citing *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)). There is no fact finding or credibility determination at this stage. *Domagala*, 2013 IL 113688, ¶ 35 (citing *Coleman*, 183 Ill. 2d at 385). As a result, the State's motion to dismiss raises solely the issue of whether the petition is sufficient as a matter of law.

Domagala, 2013 IL 113688, ¶ 35 (citing *Coleman*, 183 Ill. 2d at 385). The question before the court is whether the petition's well-pled allegations, "*which if proven* at an evidentiary hearing," would entitle the defendant to relief. (Emphasis in original.) *Domagala*, 2013 IL 113688, ¶ 35. Since this is a purely legal question, our review at the second stage is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-89 (1998). *De novo* consideration in the case at bar means that we perform the same analysis that the trial judge would have performed, if we had been sitting during the second-stage dismissal hearing. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25 (citing *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011)).

¶ 97 III. Dismissal of the Postconviction Petition

¶ 98 Defendant claims that the trial court erred in dismissing his postconviction petition claim of ineffective assistance of trial counsel, and he is correct that the trial court did err. The trial court granted the State's motion to dismiss on the ground that defendant could not assert a *Miranda* violation when he claimed no statements were made. As we observed above, this holding is legally incorrect, and the State does not claim otherwise on this appeal. *Wrice*, 2012 IL 111860, ¶ 53 ("The law is settled that a defendant's assertion that he did not confess does not preclude the alternative argument that any confession should be suppressed." (citing *People v. Norfleet*, 29 Ill. 2d 287, 289-91

(1963))); see also *Ashcraft v. Tennessee*, 322 U.S. 143, 152 n.7 (1944) ("The use in evidence of a defendant's coerced confession cannot be justified on the ground that the defendant has denied he ever gave the confession.").

¶ 99 However, the trial court's error does not end our inquiry, since our review is *de novo* and we may affirm on any basis established by the record. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 62 ("we may affirm the trial court's judgment on any basis established by the record"); *In re K.B.*, 314 Ill. App. 3d 739, 751 (2000) ("we may affirm the trial court's decision on any basis established by the record").

¶ 100 IV. *Strickland* and Ineffectiveness of Counsel

¶ 101 Thus, we will consider *de novo* whether defendant made a substantial showing to support his ineffectiveness claim.

¶ 102 Every Illinois defendant has a constitutional right to the effective assistance of counsel under the sixth amendment to the United States Constitution and the Illinois State Constitution. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I., § 8; *Domagala,* 2013 IL 113688, ¶ 36. Claims of ineffective assistance are judged against the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Domagala*, 2013 IL 113688, ¶ 36 (citing *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting *Strickland* for Illinois)). To prevail on a claim of ineffective assistance, a defendant must

show both: (1) that counsel's performance was deficient; and (2) that this deficient performance prejudiced defendant. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 687).

¶ 103 To establish the first prong, that counsel's performance was deficient, a defendant must show "that counsel's performance was objectively unreasonable under prevailing professional norms." *Domagala*, 2013 IL 113688, ¶ 36. To establish the second prong, that this deficient performance prejudiced the defendant, 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. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 694). "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome – or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Colon*, 225 Ill. 2d 125, 135 (2007); *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 104 Although the *Strickland* test is a two-prong test, our analysis may proceed in any order. Since a defendant must satisfy both prongs of the *Strickland* test in order to prevail, a trial court may dismiss the claim if either prong is missing. *People v. Flores*, 153 Ill. 2d 264, 283 (1992). Thus, if a court finds that defendant was not prejudiced by the alleged error, it may dismiss on

that basis alone without further analysis. *People v. Graham*, 206 Ill. 2d 465, 476 (2003); *People v. Albanese*, 104 Ill. 2d 504, 527 (1984).

¶ 105 V. Not Raised on Direct Appeal

¶ 106 Before we proceed to the question of whether defendant made a substantial showing, we must address the State's claim that defendant forfeited this issue by failing to raise this ineffective assistance claim on direct appeal. Questions of ineffective assistance of trial counsel are often "best reserved for postconviction proceedings," since the trial record was not developed for that purpose. *People v. Coleman*, 391 Ill. App. 3d 963, 975 (2009). If the record on appeal affords the means of raising a claim, then the defendant must raise that claim on direct appeal or the claim will be forfeited. *People v. English*, 2013 IL 112890, ¶ 22. "However, the doctrines of *res judicata* and forfeiture are relaxed [(1)] where fundamental fairness so requires, [(2)] where the forefeiture stems from the ineffective assistance of appellate counsel, or [(3)] where the facts relating to the issue do not appear on the face of the original appellate record." *English*, 2013 IL 112890, ¶ 22 (citing *People v. Williams*, 209 Ill. 2d 227, 233 (2004)); *People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010) ("where a defendant relies on matters outside the record, forfeiture does not apply").

¶ 107 In the case at bar, since defendant exercised his constitutional right not to testify, there was no evidence at trial that the ASA violated his *Miranda* rights.

Thus the claim relies on facts outside the trial record which could not have been raised on direct appeal. See *People v. Harris*, 206 Ill. 2d 1, 13 (2002) ("where the facts relating to the claim do not appear on the face of the original appellate record," the forfeiture rule is relaxed); *Barkes*, 399 Ill. App. 3d at 86 (ineffective assistance of counsel claim in postconviction petition was not forfeited where claim was based on conversations between counsel and defendant which were outside the record). In *People v. Jones*, 364 Ill. App. 3d 1, 5 (2005), for example, this court held that an ineffective assistance of counsel claim was not forfeited when the defendant claimed his trial counsel failed to present exculpatory testimony from witnesses that his counsel had interviewed. This claim was not based on the record, since the exculpatory testimony was available only through affidavits attached to defendant's postconviction petition. *Jones*, 364 Ill. App. 3d at 4. Similarly, in the case at bar, no evidence was presented at trial concerning the claimed *Miranda* violation, due to counsel's claimed ineffectiveness for failing to object and defendant's exercise of his constitutional right not to testify. Accordingly, defendant's claim is based on information outside the record and is not forfeited.[11]

[11] The State also argues that, since defendant failed to claim ineffective assistance of appellate counsel on this appeal, defendant's claim is doubly forfeited. However, this argument is dependent on concluding that his claim *could* have been brought on appeal. If the claim could not have been brought on direct appeal in the first place, then appellate counsel cannot possibly be ineffective for

¶ 108 VI. Not Raised in Court Below

¶ 109 The State also argues, for the first time on appeal, that defendant's affidavit was insufficient for failing to allege that defendant informed his trial counsel about the *Miranda* violation. In response, defendant argues that the State waived this argument by failing to raise it below.

¶ 110 However, we may affirm the trial court on any ground established by the record and, as we explain below, we affirm on other grounds. *Burney*, 2011 IL App (4th) 100343, ¶ 62; *In re K.B.*, 314 Ill. App. 3d at 751.

¶ 111 VII. Substantial Showing

¶ 112 Defendant argues that he made a substantial showing of a *Miranda* violation, where he submitted a signed and notarized affidavit stating that he refused to waive his *Miranda* rights and exercised his right to remain silent; where there was no signed *Miranda* waiver form; and where his claimed statement was not memorialized in a signed or videotaped confession. In essence, defendant argues that there is a credibility dispute between himself and the ASA, and that credibility disputes may not be resolved at the second stage but may be resolved only at a third-stage evidentiary hearing. *Domagala*, 2013 IL 113688, ¶¶ 34, 35 (the trial court is barred from engaging in "any fact-

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disregarding it. Since we conclude that this claim could not have been raised on direct appeal, this argument is not persuasive for the same reasons.

finding or credibility determinations" at the second stage; those issues are reserved for the third stage).

¶ 113 In response, the State argues that there is no need for an evidentiary hearing because the record affirmatively rebuts defendant's claim, since the ASA's testimony conflicts with defendant's allegations, and there is no other evidence in the trial record to support him. However, this reasoning overlooks defendant's claim. The reason that there is no evidence in the trial record to support his claim, according to defendant, is that his trial counsel was ineffective for failing to object to the ASA's testimony and for failing to raise the issue. This is the very essence of defendant's ineffectiveness claim.[12]

¶ 114 However, we may resolve defendant's ineffectiveness claim on either prong of the *Strickland* test, and the evidence against defendant was overwhelming, as we discuss below. *Graham*, 206 Ill. 2d at 476 (if a court finds that defendant was not prejudiced by the alleged error, it may dismiss on that basis alone); *Albanese*, 104 Ill. 2d at 527.

[12] Fortunately, this kind of dispute will become a rare occurrence, since Illinois law has required the electronic recording of custodial interrogations in homicide cases since 2005. Pub. Act 93-206,§25 (eff. July 18, 2005) (adding 725 ILCS 5/103-2.1). The interview at issue here occurred approximately four years before that law took effect.

¶ 115 VIII. Overwhelming Evidence

¶ 116 The State argues that the evidence at trial was so overwhelming that defendant suffered no prejudice, which is the second prong of the *Strickland* test. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 687). This is also an argument that the State failed to make below. However, we will exercise our discretion and address it, since consideration of this issue requires us to review only the already-existing and completed trial record and not any additional evidence, and forfeiture is a limit on the parties not the court. *People v. Perry*, 2014 IL App (1st) 122584, ¶ 20 (forfeiture limits the parties' ability to raise an issue, not the appellate court's ability to consider an issue (citing *People v. Donoho*, 204 Ill. 2d 159, 169 (2003))).

¶ 117 To establish the second prong of *Strickland*, that counsel's deficient performance prejudiced the defendant, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 694). "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome – or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Colon*, 225 Ill. 2d 125, 135 (2007); *People v. Evans*, 209 Ill. 2d 194, 220 (2004). At the

second stage of a postconviction proceeding, defendant must make only a substantial showing of a reasonable probability. See *Domagala*, 2013 IL 113688, ¶ 35.

¶ 118 The State argues that the evidence at trial was overwhelming that defendant personally discharged the firearm which proximately caused the death of Alex Bradley, the robbery victim. Defendant responds that there were two men present. One man testified that he was not the shooter, while the other exercised his right to remain silent.

¶ 119 The evidence at trial established that Bradley, a junk dealer, was shot and killed immediately after defendant and Arnold Elliott, a.k.a. "Blue," attempted to sell Bradley some items he refused to buy. The State argued it was defendant who shot Bradley, while the defense argued it was Elliott. Elliott chose to testify after a bystander identified the license plate numbers of a fleeing vehicle, which traced back to Elliott's father. On cross, Elliott admitted he "did business" with the victim before. Although Tanna, defendant's friend and a convicted first-degree murderer, completely recanted his prior statements, the jury had in front of it both Tanna's prior statements and Elliott's testimony identifying defendant as the shooter. There was no dispute at trial that the

shooter was one of the two men;[13] and there was no testimony at trial exonerating defendant as the shooter. Given Tanna's prior statements and Elliott's testimony identifying defendant as the shooter and the lack of any contradictory evidence on this point, we cannot say that the ASA's testimony about a confession tipped the scales against defendant and persuaded the jury to conclude that defendant was the shooter rather than Elliott. As a result, we do not see a need for a third-stage evidentiary hearing on defendant's claim, and we affirm the trial court's second-stage dismissal.

¶ 120 IX. Ineffective Assistance of Postconviction Counsel

¶ 121 Defendant's second claim is that he received ineffective assistance of postconviction counsel because she failed to amend his *pro se* postconviction petition to add a claim that the ASA testified falsely. Specifically, defendant claims that the ASA testified falsely about defendant's alleged *Miranda* waiver and statement and thus violated defendant's due process rights under *Napue v. Illinois*, 360 U.S. 264 (1959).

¶ 122 In *Napue*, the United States Supreme Court held that "the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment

[13] In closing at trial, the defense argued: "What if you got two dogs?" The defense then asked the jury to consider: "Who did the State bring to meet their burden to convince you beyond a reasonable doubt *** that [defendant] is the person, that he is the dog, instead of, say, Arnold Elliott, maybe?"

to the Constitution of the United States." *Napue*, 360 U.S. at 264; U.S. Const., amend. XIV. " 'A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict.' " *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 58 (quoting *Olinger*, 176 Ill. 2d 326, 349 (1997)); *People v. Mitchell*, 2012 IL App (1st) 100907, ¶ 66.

¶ 123 "In order to establish a violation of due process, the prosecutor actually trying the case need not have known that the testimony was false; rather, knowledge on the part of any representative or agent of the prosecution is enough." *Olinger*, 176 Ill. 2d at 347 (citing *People v. Brown*, 169 Ill. 2d 94, 103 (1995)). " '[T]he prosecution is charged with knowledge of its agents, including the police.' " *People v. Mitchell*, 2012 IL App (1st) 100907, ¶ 66 (quoting *People v. Smith*, 352 Ill. App. 3d 1095, 1101 (2004)). Thus, in *Mitchell*, for example, this court held that: "Even if the prosecutors did not know the police officers coerced [a witness] into lying at trial, the use of the perjured testimony violated [defendant's] right to due process" since the police knew. *Mitchell*, 2012 IL App (1st) 100907, ¶ 66.

¶ 124 In the case at bar, the witness was an ASA who had been employed for seven years with the Cook County State's Attorney's Office, which is the same office where the prosecutor was employed. The ASA was also accompanied

during the interview by two Chicago police detectives. Whether or not the testifying ASA or the accompanying detectives actually informed the prosecuting ASA of certain information is not material; the knowledge of the testifying ASA and the accompanying detectives is imputed to their colleague.

¶ 125 During the postconviction process, a defendant is "only entitled to a third-stage evidentiary hearing [on a *Napue* claim] if there is a substantial showing of a reasonable likelihood that the false testimony could have affected the judgment of the jury." *People v. Lucas*, 203 Ill. 2d 410, 424 (2003).

¶ 126 However, what we are asked to consider here is not a *Napue* claim but a claim that defendant's postconviction counsel did not provide reasonable assistance, because of her failure to recognize that defendant's factual allegations also alleged a *Napue* claim and to add that legal claim to defendant's refiled petition.

¶ 127 Defendant claims that this omission constituted unreasonable assistance of counsel, in violation of Illinois Supreme Court Rule 651. Defendant asks that his petition be remanded to allow defendant to plead this legal cause. As we already noted, the trial court never reviewed this issue.

¶ 128 Whether postconviction counsel provided the reasonable level of assistance required by Supreme Court Rule 651 is a question we review *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007). We use *de novo* review

both because the question involves the proper interpretation of a supreme court rule and because, when a postconviction petition is dismissed without an evidentiary hearing, our review is *de novo*. *Suarez*, 224 Ill. 2d at 41-42. *De novo* consideration means we perform the same analysis that a trial judge would have performed, if the issue had been presented to the trial court. See *Tolefree*, 2011 IL App (1st) 100689, ¶ 25 (citing *BDO Seidman, LLP*, 408 Ill. App. 3d at 578).

¶ 129 While "[t]here is no constitutional right to the assistance of counsel in postconviction proceedings," our supreme court has held that the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)) "provides for a reasonable level of assistance." *Suarez*, 224 Ill. 2d at 42. The supreme court has explained that: " 'The statute cannot perform its function unless the attorney appointed to represent an indigent petitioner ascertains the basis of his complaints, shapes those complaints into appropriate legal form and presents them to the court.' " *Suarez*, 224 Ill. 2d at 46 (quoting *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968)). "To ensure that postconviction petitioners receive this level of assistance, Rule 651(c) imposes specific duties on postconviction counsel." *Suarez*, 224 Ill. 2d at 42. Our supreme court " has consistently held that a remand is required where the postconviction counsel failed to fullfill the duties of consultation, examining the record and amendment of the *pro se*

petition, regardless of whether the claims raised in the petition had merit." *Suarez*, 224 Ill. 2d at 47.

¶ 130 Supreme Court Rule 651(c) provides that the record in a postconviction appeal "shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 131 Where postconviction counsel files a certificate as described in the rule, a rebuttable presumption exists that the defendant received the representation required for second-stage proceedings. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19; *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23; *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010); see also *People v. Perkins*, 229 Ill. 2d 34, 52 (2007) ("We do not intend to suggest that an attorney's Rule 651(c) certificate is conclusive of compliance and never be rebutted."). Defendant may rebut the presumption if the record shows that defendant failed to comply with any of the duties required by Rule 651(c), such as amendment. *Profit*, 2012 IL App (1st) 101307, ¶ 19. The question is whether "the record on appeal

contradicts counsel's certificate asserting that there were no amendments necessary for adequate presentation of petitioner's claims." *Perkins*, 229 Ill. 2d at 52.

¶ 132 In this appeal, defendant claims that his postconviction counsel should have amended his *pro se* petition to state that his factual allegations also presented a *Napue* claim, and thus counsel failed to make "an adequate presentation" of his contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). In other words, counsel failed to " 'shape [his] complaints into appropriate legal form.' " *Suarez*, 224 Ill. 2d at 46 (quoting *Slaughter*, 39 Ill. 2d at 285); see also *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 36 (postconviction counsel did not provide reasonable assistance by failing to amend defendant's *pro se* petition to include a legal claim).

¶ 133 However, like a *Napue* claim, defendant's *Strickland/Miranda* claim would require proof that the ASA had lied. In addition, defendant would have had to show a " 'reasonable likelihood' " that her allegedly false testimony affected the jury's verdict. *Hensley*, 2014 IL App (1st) 120802, ¶ 58 (quoting *Olinger*, 176 Ill. 2d at 349). As we discussed in the section above, the evidence at trial was overwhelming. Thus, we cannot find that the attorney's decision not to add a *Napue* claim means a failure to provide a "reasonable level of

assistance." *Suarez*, 224 Ill. 2d at 42.

¶ 134 CONCLUSION

¶ 135 For the foregoing reasons, we affirm the second-stage dismissal of defendant's postconviction petition.

¶ 136 Affirmed.