2017 IL App (1st) 143623-U

FOURTH DIVISION
June 22, 2017

No. 1-14-3623

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 8636
	)	
CHARLES SERRANO,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's dismissal of defendant's postconviction petition in part on the State's motion to dismiss and in part following an evidentiary hearing where his petition failed to make a substantial showing that his constitutional rights were violated.

¶ 2 Following a jury trial, defendant Charles Serrano was found guilty of the first-degree murder of Andre Barba and sentenced to 55 years' imprisonment. On direct appeal, this court affirmed defendant's conviction. *People v. Serrano*, No. 1-08-1789 (2010) (unpublished order

under Supreme Court Rule 23). Defendant subsequently filed a petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)), which the circuit court dismissed in part on the State's motion to dismiss and in part following an evidentiary hearing.

¶ 3 Defendant appeals those dismissal orders, contending that the circuit court erred in granting the State's motion to dismiss where his appellate counsel had been ineffective for failing to challenge the trial court's denial of: (1) his pretrial motion to suppress based on *Georgia v. Randolph*, 547 U.S. 103 (2006) and (2) his pretrial motion concerning the admissibility of palm print evidence. Defendant also contends that the circuit court erred in dismissing his petition following an evidentiary hearing where: (3) his trial counsel had been ineffective for failing to interview eyewitness Linda Arriaga; (4) the State withheld evidence that Arriaga testified to during the evidentiary hearing; and (5) Arriaga's testimony during the evidentiary hearing constituted newly discovered evidence. For the reasons that follow, we affirm.

¶ 4 I. PRETRIAL

¶ 5 A grand jury indicted defendant with several felonies, including multiple counts of first-degree murder, in connection with the March 1, 2000, shooting that resulted in the death of Andre Barba.

¶ 6 On April 24, 2001, defendant filed a motion to suppress, through private counsel, arguing that his brother, Jose Serrano, did not have the mental capacity to give his voluntary consent to the police to search the family's garage where incriminating evidence had been found.[1] Defendant therefore asserted that all of the evidence found in the garage should have been suppressed. The suppression hearing included testimony from: Jose; Officer George Letten, the

[1] Due to multiple members of the Serrano family being involved in this case, we will use their first names.

officer who obtained Jose's consent; Maria Serrano, Jose and defendant's mother; and Dr. Bruce Malcolm, a clinical psychologist who conducted an examination of Jose to assess his intellectual function. Following the hearing, the trial court denied the motion, finding that Jose had the capacity to, and ultimately did, voluntarily consent to the search of the garage. The court further found that Jose had the authority to consent to the search and the police did not use any subterfuge in obtaining his consent.

¶ 7 On December 17, 2001, defendant, who was out on bond, failed to appear for court. As a result, the trial court issued a warrant for his arrest. Nearly four years later, the police arrested him. Defendant obtained new private counsel, through which he filed another motion to suppress. In that motion, defendant argued that his mother expressly denied the police's request to search the family garage, but they prevented her from accompanying Jose to the garage, where Jose ultimately gave them consent to search. Defendant asserted that, in light of the United States Supreme Court's decision in *Georgia v. Randolph*, 547 U.S. 103 (2006), the police unlawfully searched the garage and the evidence from that search should have been suppressed. The trial court's memorandum of orders states that, on September 19, 2007, it heard argument on, and subsequently denied, defendant's motion to suppress. The record, however, does not contain a transcript from that court date.[2]

¶ 8 Defendant also filed a motion *in limine* to exclude palm print evidence attributed to him, requesting that a hearing be conducted pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or, in the alternative, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Defendant asserted that the State intended to introduce evidence that his palm prints

[2] The record on appeal contains an affidavit from a supervisor of the Criminal Division of the Illinois Official Court Reporters Office of Cook County, certifying that, after a diligent search of their records, she could not find the stenographic notes from September 19, 2007, and therefore no transcript could be produced.

matched latent prints found on a pistol and a firearm magazine recovered by the police shortly after Barba's murder. Defendant argued that the methodology used by the forensic scientist to arrive at her opinion that the latent prints matched defendant's palm prints was not generally accepted in the relevant scientific community. The trial court denied defendant's motion, finding that Illinois had adopted the *Frye* test concerning the admissibility of scientific evidence and the methodology used with regard to the palm print evidence was generally accepted in the relevant scientific community. The case proceeded to a jury trial.

¶ 9 II. TRIAL

¶ 10 At trial, Tabbatha Reyes testified that, at approximately 7:30 p.m. on March 1, 2000, she and her 12- or 13-year-old cousin, Linda Arriaga, were walking near the intersection of 33rd Place and Paulina Street in Chicago. They ran into Andre Barba, one of Reyes' best friends and a member of the Satan Disciples street gang. As they were talking, Reyes observed a dark-colored van with a white stripe stop about 10 feet away from them. She recognized the driver of the vehicle as defendant, a former classmate and a member of the Latin Counts street gang. Reyes heard defendant yell out, "Count love, B***" and observed him pull out a firearm and begin shooting. Barba turned to run away, but immediately fell to the ground. Defendant initially drove away, but then made a U-turn, drove past Barba and fled. Reyes ran to Barba's aid but observed that he was unresponsive and had a gunshot wound to his face and a bullet hole in his jacket. An autopsy revealed that Barba died as a result of multiple gunshot wounds.

¶ 11 Janina Monrial testified that she heard gunshots from directly outside of her residence. When she looked outside her window, she observed a dark-colored Astrovan with a white stripe driving away from the scene. She knew it was an Astrovan because she had previously owned one. The van turned around, drove back to the scene and its occupants "laugh[ed] at the girls and

[Barba]" who "were on the corner." Although Monrial did not see the van's occupants, she heard what she believed were two people inside. Monrial, however, also testified that she did not see "the girls," whom she identified as Reyes and Arriaga, but rather heard them screaming. The van subsequently fled the scene, and Monrial called 911. At trial, she identified People's Exhibit No. 7 as an Astrovan that "look[ed] like" the one she saw on the night in question, recognizing the van's "stripe."

¶ 12 Approximately three minutes after being alerted to the shooting, Chicago police officer Kathleen McCann arrived to the scene. There, Reyes told McCann that "Chaos" had driven by in a van and begun shooting. McCann knew Chaos was defendant's nickname and was familiar with him. She immediately drove to the nearby grocery store that defendant's family owned, which took no more than two minutes. McCann knocked on the backdoor of the store, and defendant answered holding a mop and wearing an apron, appearing as if he had been working in the store. She could not recall him being out of breath or covered in sweat. Defendant's brother, Jose Serrano, was also in the back of the store, but McCann focused on defendant and handcuffed him.

¶ 13 Chicago police officer George Letten and his partner followed McCann to the grocery store. Letten spoke with Jose while his partner spoke with Jose and defendant's mother. Letten asked Jose if defendant had left the store that day. Jose told Letten that defendant left to take their sister to a dance class using his van, which Jose thought was still parked outside the front of the store. Letten and Jose walked to the front, but the van was not there. Jose stated that defendant must have parked the vehicle at their house, approximately a half block away from the store. Letten and Jose walked to the Serrano house, where both Jose and defendant lived with their mother. On the way, Jose stated that defendant usually parked the van in the shared family

garage. Letten informed Jose that defendant might have been involved in a shooting and asked if Jose had a key to the garage, which he did. Letten asked if he could search the garage, and Jose replied that he had "no problem with that." Letten showed Jose a consent-to-search form and explained the document to him. Letten did not sense that Jose had any trouble understanding the document. Jose printed his name on the form, but did not sign it because he did not know how to sign his name.

¶ 14 In the garage, the police found a Chevrolet Astrovan, a semi-automatic pistol, a firearm magazine and three fired cartridge casings, including one inside of the van on the driver's floor. The police brought Reyes to the garage, and she identified the vehicle inside as the one defendant had been driving earlier. At trial, she identified People's Exhibit No. 7 as that vehicle. Additionally, the police found a bullet in a vehicle on the street near the crime scene. A forensic scientist, who testified as an expert in the field of fingerprint identification and fingerprint comparisons, determined that a latent print found on top of the pistol directly above the handle matched defendant's right palm and a latent print found on the firearm magazine matched defendant's left palm. The forensic scientist testified that another forensic scientist verified these findings. A firearms identification expert concluded that all three fired cartridge casings found in the garage, the bullet found in the vehicle on the street and a bullet recovered from Barba's body had been fired from the pistol. The police did not perform a gunshot residue test on defendant or his clothes.

¶ 15 Later, Reyes went to the police station, viewed defendant and identified him as the shooter. Additional evidence showed that, on December 17, 2001, defendant had a scheduled court date in this case, but failed to appear. The trial court subsequently issued a warrant for his arrest. Approximately four years later, a border patrol agent for the Department of Homeland

Security arrested defendant after he attempted to enter the United States from Mexico. At the conclusion of the State's case, it introduced into evidence a certified vehicle record establishing that defendant owned the vehicle pictured in People's Exhibit No. 7.

¶ 16 In the defense's case, Maria Serrano, the mother of defendant and Jose, testified that, at approximately 7:20 p.m. on March 1, 2000, defendant left the family grocery store in his van to drive his sister to her ballet class. Defendant returned 20 to 25 minutes later and began cleaning the store. When the police arrived at the store, Maria, Jose and defendant were inside. After officers arrested defendant, another officer took Jose toward the family home, but would not let Maria accompany him. Maria stated that Jose had "a mental disability," and although he was 38-years-old at the time of trial, he functioned at the level of a 7- or 8-year-old child and had attended special education classes to help him learn how to perform basic daily tasks. Jose could not read or sign his name, but he could print it. At trial, Maria identified People's Exhibit No. 7 as defendant's van.

¶ 17 The parties stipulated that Monrial spoke to Officer Henry at the scene and told him that, after she heard gunshots, she opened a window and observed a black Astrovan with a red stripe speed away from the scene. She also told Henry that Reyes "yelled to call" an ambulance, which Monrial subsequently did. The parties also stipulated that Arriaga and Reyes spoke with Officer Keating at the scene, and Reyes told him that she observed the offender driving a "maroon Chevy van."

¶ 18 Following closing arguments, the jury found defendant guilty of first-degree murder. The trial court subsequently sentenced him to 55 years' imprisonment, which included a 25-year enhancement for personally discharging the firearm.

¶ 19 III. DIRECT APPEAL

¶ 20 On direct appeal, private counsel, different than the ones appearing on defendant's behalf in the trial court, represented him. Defendant argued that the trial court erred in denying: (1) his initial pretrial motion to suppress based on Jose's inability to voluntarily consent to the search of the garage due to his mental capacity; (2) his pretrial motion *in limine* concerning the palm print evidence; and (3) his pretrial motion *in limine* to exclude the use of his nickname, "Chaos," at trial. Regarding defendant's first contention, this court reviewed the testimony adduced during the suppression hearing, in particular that of Officer Letten, Jose, Maria and Dr. Malcolm. We observed that the trial court found Letten to be credible, and Jose and Maria to be incredible. Given the deference afforded to the trial court on credibility determinations, this court found that Letten's testimony supported the trial court's finding that he reasonably believed Jose had the mental capacity to consent to the search of the garage. Regarding defendant's second contention, we found that he had "waived" review of this claim of error because he did not include in the record on appeal the transcript from the trial court's ruling on the motion *in limine* and also because he failed to object to the testimony concerning the palm print evidence and failed to raise the issue in a posttrial motion. Regarding defendant's final contention, this court found the trial court did not abuse its discretion in allowing the use of his nickname at trial. Accordingly, we affirmed defendant's conviction. *People v. Serrano*, No. 1-08-1789 (2010) (unpublished order under Supreme Court Rule 23).

¶ 21 IV. POSTCONVICTION PROCEEDINGS

¶ 22 On February 28, 2013, defendant, through private counsel different than his previous ones, filed the instant postconviction petition, contending that: (1) his appellate counsel had been ineffective for failing to challenge the trial court's denial of his second motion to suppress, which had been based on *Randolph*, 547 U.S. 103; (2) his appellate counsel had been ineffective when

he challenged the trial court's denial of his motion *in limine* on the palm print evidence, but failed to include a transcript from the court's ruling in the record on appeal; (3) his trial counsel had been ineffective for failing to object to the qualifications of the forensic scientist who testified on the palm print evidence; (4) his trial counsel had been ineffective for failing to interview Linda Arriaga; (5) the State failed to disclose the identity of Arriaga as *Brady* material; and (6) the State used known perjury to obtain defendant's conviction.

¶ 23 Defendant attached to his petition two notarized affidavits from Arriaga, one handwritten dated October 2011 and one typed dated June 2012. In the affidavits, Arriaga averred that both she and Reyes arrived to the crime scene after the shooting of Barba. They observed him lying on the ground unresponsive and stayed with him until the police arrived. Officer McCann spoke to them and asked if the Latin Counts had shot Barba. McCann insisted that they implicate the Latin Counts and asked Reyes to say that "Chaos" was the shooter, even though they told her they did not observe the actual shooting. During their conversation with McCann, Reyes was "hysterical" and "crying," and insisted that she did not know who shot Barba. A short time later, Arriaga's father arrived to the scene and informed the police that he did not want Arriaga to become involved. Arriaga averred that she was never contacted by any defense attorneys, but if she had been, she would have told them that neither she nor Reyes observed the shooting. She stated she would have testified to this information in court, as well.

¶ 24 The circuit court advanced defendant's petition to second-stage proceedings. The State filed a motion to dismiss, and defendant filed a response. Following argument on the motion, the court stated it would not "advance this case in its entirety" but wanted "to hear from Linda." It subsequently advanced defendant's petition to a third-stage evidentiary hearing "just for that

limited purpose." The court granted the State's motion on the remaining claims without comment.[3]

¶ 25 On November 6, 2014, the circuit court held an evidentiary hearing, in which Arriaga was the sole witness. Arriaga testified that, on March 1, 2000, the day of the shooting, she was 12 years old. While she and Reyes were walking in the middle of a park, she heard popping noises. They walked through the park, reached 33rd Place and began to walk toward Paulina Street when they saw Barba lying on the ground. Arriaga stated that she did not see the shooting and did not see a van fleeing from the scene. Once they reached Barba, who was unresponsive, Reyes began crying "hysterically" and yelling for someone to call 911. The police arrived, and Officer McCann pulled Reyes and Arriaga aside and asked them if they saw what happened. Arriaga and Reyes repeatedly told McCann that they did not see the actual shooting, but McCann "rais[ed] her voice a little" and asked Reyes if the Latin Counts had done the shooting. McCann further asked Reyes if "Chaos" was the shooter. Reyes never brought up the Latin Counts or Chaos. Arriaga remained on the scene for another 20 or 30 minutes until her father arrived and they left. Her father told the police that he did not want his family to be involved. Reyes, meanwhile, went with the police. Arriaga testified that she would have told any attorney or investigator the same facts if she had been asked.

¶ 26 A few months after the shooting, Arriaga's family moved, and they continued to move every year or so for the next eight years. At some point in 2011, Arriaga decided to come forward in defendant's case when she learned from a since-deceased friend, Taylor Flores, that Reyes had testified against defendant and he was ultimately convicted of murder. Arriaga "didn't

[3] Although the circuit court did not explicitly state which of defendant's claims had been dismissed and which had been advanced to the evidentiary hearing, the parties agree that the court only advanced his petition for an evidentiary hearing on the claim of ineffective assistance of trial counsel for failing to interview Arriaga.

feel that it was fair for somebody to be sentenced to 30 something years of their life for something that [Reyes] said that wasn't true." After Arriaga spoke to defendant's uncle at the family grocery store, she wrote a handwritten affidavit, had it notarized and signed it. She gave the affidavit to defendant's uncle.

¶ 27 Later, she was contacted by either an investigator or secretary of postconviction counsel and gave another statement, which was typed up by that person. Although Arriaga agreed there were some details in the typewritten affidavit that were not included in her handwritten affidavit, she stated the content of both were "pretty much *** the same."

¶ 28 Following Arriaga's testimony, the State moved for a directed finding, which the circuit court granted. The court noted that it presided over defendant's case in the trial court, albeit his trial was by jury, and it was "extremely curious" to hear Arriaga's testimony because her affidavits "give[] one pause." The court asserted that, during Arriaga's testimony, it observed "her mannerisms" and "her responses to the questions," but as she testified, "[t]hings started to fall apart." The court further stated:

> "First of all, she does leave the scene. Her father shows up [and] could infer it is a gang shooting with a killing. His daughter may potentially be a witness to this. He scoots out of there with her, says she is not talking to anybody. Any father would make that move. Subsequent to that we don't hear about [Arriaga] anymore. She indicated, although she is at the scene of a murder and her cousin is also at the scene of a murder, she has no idea what happened subsequent to that. Although she lives in the neighborhood and she gave the various addresses, she remained in that area. That is really tough to swallow in this matter.

> I will tell you that the cumulative testimony of Ms. Arriaga, this Court had great difficulty with that testimony and believing that testimony. She is the lynchpin to this motion."

The court thereafter dismissed the petition, and this appeal followed.

¶ 29 V. ANALYSIS

¶ 30 On appeal, defendant raises various contentions of error with the circuit court's dismissal of his postconviction petition at various stages of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)).

¶ 31 The Act provides a three-stage process for defendants who allege that they have suffered a substantial deprivation of their constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage of the Act, the circuit court must determine whether the petition's claims are frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Cotto*, 2016 IL 119006, ¶ 26. If the court does not dismiss the petition at the first stage, it advances the petition to the second stage. *Cotto*, 2016 IL 119006, ¶ 26.

¶ 32 At the second stage, the State has the option to either move to dismiss or answer the defendant's petition. 725 ILCS 5/122-5 (West 2012). All well-pled facts in the petition that are not positively rebutted by the trial record must be accepted as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). At this stage, the circuit court must determine whether the petition and its supporting documentation make a substantial showing of a constitutional violation. *Cotto*, 2016 IL 119006, ¶ 28. A substantial showing is a measure of the legal sufficiency of the petition's allegations, which, if proven at an evidentiary hearing, would entitle the defendant to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. The defendant bears the burden to demonstrate a substantial showing. *Id.* If he fails to make this showing, the court will dismiss his petition.

Cotto, 2016 IL 119006, ¶ 28. If, however, the court determines that the petition has made a substantial showing, it will advance the petition to the third stage, where an evidentiary hearing is held. *Id.* We review the circuit court's decision to dismiss a petition's claims without an evidentiary hearing *de novo*. *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 33 Defendant's first two contentions of error concern the circuit court's dismissal of his petition on the State's motion to dismiss during second-stage proceedings. He argues that his petition made a substantial showing that his appellate counsel had been ineffective for failing to challenge the trial court's denial of his second motion to suppress, which had been based on *Randolph*, 547 U.S. 103, and for failing to challenge the introduction of the palm print evidence.

¶ 34 To establish that appellate counsel was ineffective, the defendant must satisfy the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010). Under this standard, the defendant must show that his counsel's performance was deficient and the deficiency prejudiced him. *Id.* at 496. To show that his counsel's performance was deficient, the defendant must demonstrate that counsel's conduct was objectively unreasonable under prevailing professional norms. *Domagala*, 2013 IL 113688, ¶ 36. To show that he was prejudiced, the defendant must demonstrate "that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *Petrenko*, 237 Ill. 2d at 497. If a claim of ineffective assistance of counsel can be disposed of because the defendant cannot demonstrate he suffered prejudice, we need not determine whether his counsel's performance was deficient. *People v. Peeples*, 205 Ill. 2d 480, 532 (2002).

¶ 35 A. MOTION TO SUPPRESS

¶ 36 Defendant first contends that he made a substantial showing that his appellate counsel was ineffective for failing to challenge the trial court's denial of his second motion to suppress

based on *Randolph*, 547 U.S. 103. Defendant asserts that, had his appellate counsel challenged the court's denial based on *Randolph*, this court on appeal would have resolved that challenge in his favor.

¶ 37 Generally, the fourth amendment prohibits the warrantless search of a home and its curtilage, which has been defined as the land immediately surrounding and associated with the home, such as a garage. U.S. Const., amend. IV; *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *People v. Pitman*, 211 Ill. 2d 502, 516-18 (2004); *People v. Valle*, 2015 IL App (2d) 131319, ¶ 19. However, a warrantless search is constitutional if it is conducted with the voluntary consent of the person whose property is searched or of a third party who possesses common authority over the premises. *Rodriguez*, 497 U.S. at 181. When an individual who has common authority over a premises consents to a search of those premises, his consent is valid against an absent, non-consenting person who shares that authority. *United States v. Matlock*, 415 U.S. 164, 170 (1974). "Common authority may be either actual or apparent." *People v. Lyons*, 2013 IL App (2d) 120392, ¶ 24. In *Randolph*, 547 U.S. at 106, the United States Supreme Court held that, when the police receive permission to search a premises from one occupant but a physically present co-occupant refuses to give his consent, the warrantless search of those premises is unreasonable and invalid as to the co-occupant who did not consent.

¶ 38 In this case, the uncontroverted facts show that, when Jose gave Officer Letten consent to search the garage, defendant was not present, generally taking the facts of this case beyond the ambit of *Randolph*. Recognizing this, defendant argues that his case falls within two alleged exceptions enumerated in *Randolph*. The first exception defendant highlights is the *Randolph* court's language that "there will be instances in which even a person clearly belonging on premises as an occupant may lack any perceived authority to consent [such as] 'a child of eight

[years of age].' " *Id.* at 112 (quoting 4 Wayne R. LaFave, Search and Seizure § 8.4(c), at 207 (4th ed. 2004)). Defendant asserts that, due to Jose's mental capacity, he should not be considered as having the actual or apparent authority to consent to the search. Even assuming *arguendo* that, due to Jose's mental capacity, he did not have the actual authority to consent to the search of the garage, we must reject defendant's claim of error concerning Jose's apparent authority.

¶ 39 Under the apparent authority doctrine, a warrantless search is lawful when the police obtain the consent of a "third party whom the police *reasonably believe* possesses common authority, but who, in fact, does not." (Emphasis in original.) *People v. Burton*, 409 Ill. App. 3d 321, 328 (2011). In order for an officer's belief to be reasonable, the facts available to the officer must "cause a reasonable person to believe that the consenting party had authority over the premises." *Id.* at 329. The reasonableness standard is objective. *Id.* at 328-29. If the officer's belief is reasonable, the search based on that consent is lawful. *Id.* at 329. If not, the search is unlawful. *Id.* On review of motions to suppress, reviewing courts use a bifurcated standard of review. *People v. Lee*, 214 Ill. 2d 476, 483 (2005). Findings of fact are given deference and will not be disturbed unless they are against the manifest weight of the evidence. *Id.* Such a deferential standard of review is necessary because the trial court "is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve conflicts in their testimony." *Id.* at 483-84. The ultimate issue, however, of whether the law was applied correctly to the established facts is reviewed *de novo*. *Id.* at 484; *People v. Fox*, 2014 IL App (2d) 130320, ¶ 11.

¶ 40 In defendant's initial motion to suppress, he argued that Jose could not have voluntarily consented to the search of the garage due to his mental capacity. At the suppression hearing,

several witnesses testified to the circumstances surrounding Jose's consent and his mental capacity, including Jose himself, Officer Letten, Maria and Dr. Malcolm. In particular, Letten testified that he explained the consent-to-search form to Jose "simply and concretely" and it appeared that Jose understood the document. Dr. Malcolm testified that Jose's IQ "was in the mild range of retardation" and that his ability to read was "barely measurable." Dr. Malcolm further testified that, although Jose would not have been able to read and comprehend the search-to-consent form, he would have been able to understand the form if an officer explained the form to him in a "very simple, calm environment." Based on the evidence from the hearing, the trial court denied the motion, finding that Jose had the capacity to, and ultimately did, voluntarily consent to the search of the garage.

¶ 41 Appellate counsel challenged the trial court's denial of defendant's initial motion to suppress. On appeal, this court extensively reviewed the evidence adduced at the suppression hearing and observed that the pertinent issue was "whether the officers reasonably believed Jose had the mental capacity to consent to the search of the garage." *Serrano*, No. 1-08-1789 (2010) (unpublished order under Supreme Court Rule 23). We reviewed the trial court's findings, noting that it "expressly found Officer Letten's testimony to be credible" and such credibility determinations were entitled to great deference. We therefore found that Letten's "testimony support[ed] the finding he reasonably believed Jose had the mental capacity to consent to the search of the garage" and rejected defendant's contention. *Id.*

¶ 42 As previously mentioned, the transcript from the trial court's denial of defendant's second motion to suppress based on *Randolph* is unavailable. However, during the trial court's ruling on defendant's initial motion to suppress, it found that Jose had the authority to consent to the search and the officers did not use any subterfuge in obtaining his consent. Critically, in

making this finding, the trial court had the ability to observe Jose testify, view his mannerisms and hear him talk.

¶ 43 Defendant's argument here that, due to Jose's mental capacity, he was more akin to a child than an adult, and did not have the apparent authority to consent to the search of the garage is a factual question. Quite similar to the pertinent question on direct appeal regarding Jose's ability to voluntarily consent to the search due to his mental capacity, the pertinent question regarding apparent authority is whether Officer Letten reasonably believed Jose had the common authority to consent to the search of the garage. See *Burton*, 409 Ill. App. 3d at 328. These two questions essentially involve the same factual analysis of what Letten believed as a result of his interactions with Jose based upon the testimony adduced at the suppression hearing from Letten, Jose himself, Maria and Dr. Malcolm. See *United States v. Grap*, 403 F.3d 439, 445 (7th Cir. 2005) (stating that the "approach to the question of mental capacity to consent to a search may be analogized to the issue of apparent authority"). Given a reviewing court's high level of deference to the trial court's factual findings and this court's resolution of defendant's challenge to his initial motion to suppress on direct appeal, there is no reasonable probability that, had appellate counsel challenged defendant's second motion to suppress based on this alleged exception in *Randolph*, his appeal would have been successful. See *Petrenko*, 237 Ill. 2d at 497.

¶ 44 Defendant further argues that his case falls within a second alleged exception enumerated in *Randolph*, 547 U.S. at 121, where the United States Supreme Court suggested that the consent of one occupant may not be sufficient if "there is *** evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." Defendant asserts that, when the police chose to isolate Jose away from Maria, this conduct negated the consent Jose provided.

¶ 45 Initially, we note that this language from *Randolph* was only dictum. See *Fernandez v. California*, 571 U.S. ____, ____ 134 S. Ct. 1126, 1134 (2014) ("In *Randolph*, the Court suggested in dictum that consent by one occupant might not be sufficient if 'there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.' ") (quoting *Randolph*, 547 U.S. at 121). Nevertheless, in this case, Jose accompanied Officer Letten to the family garage, leaving behind Maria at the grocery store. When Jose gave his consent to Letten, Maria was not at the garage and thus could not have been "removed *** from the entrance for the sake of avoiding a possible objection." *Randolph*, 547 U.S. at 121. Although defendant argues that Maria likely would have objected to the police's search of the garage had she been present, defendant has provided us with no case law with facts analogous to those of the instant case. The appellate court is not a "repository" of research (*People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005)), and it is defendant's burden to show that his appellate counsel had been ineffective. *Pendleton*, 223 Ill. 2d at 473. In light of the above, there is no reasonable probability that, had appellate counsel challenged defendant's second motion to suppress based on this alleged exception in *Randolph*, his appeal would have been successful. See *Petrenko*, 237 Ill. 2d at 497.

¶ 46 Additionally, to the extent defendant argues that Jose could not have given his consent to search defendant's van in the garage based on Jose not having an interest in the van, this argument has been forfeited, as defendant has failed to cite any case law for that point. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 47 Accordingly, defendant has failed to demonstrate he suffered prejudice as a result of his appellate counsel's allegedly deficient performance and has failed to make a substantial showing that his appellate counsel had been ineffective with regard to challenging his second motion to

suppress based on *Randolph*. The circuit court therefore properly dismissed this claim on the State's motion to dismiss.

¶ 48 B. PALM PRINT EVIDENCE

¶ 49 Defendant next contends that he made a substantial showing that his appellate counsel was ineffective for failing to challenge the introduction of the palm print evidence on direct appeal. Defendant asserts that, given the evidence at his trial was "underwhelming," appellate counsel's failure to challenge the palm print evidence was objectively unreasonable and resulted in prejudice to him.

¶ 50 Initially, we note that this issue had been raised by appellate counsel on direct appeal. In defendant's opening appellate brief, which was attached to his postconviction petition, appellate counsel argued on defendant's behalf that "the trial court erred by denying defendant's motion *in limine* to exclude palm print evidence because the prosecution failed to show palm print analysis is sufficiently established to have gained general acceptance." In response to this contention, this court found that defendant had "waived" review of the contention because he failed to include the transcript from the trial court's ruling on the motion in the record on appeal. This court further found he "waived" review because his trial counsel did not object to the palm print expert's testimony and failed to raise the issue in a posttrial motion. Given that appellate counsel challenged the trial court's ruling on defendant's motion *in limine*, it is axiomatic that appellate counsel cannot be deemed ineffective for failing to challenge the ruling.

¶ 51 However, defendant also notes that appellate counsel failed to include the transcript from the trial court's ruling on the motion in the record on appeal. As demonstrated in this case on direct appeal, a defendant's failure to provide a complete record in support of a claim of error on appeal will generally result in that claim being affirmed. See *Foutch v. O'Bryant*, 99 Ill. 2d 389,

391-92 (1984). An appellate counsel's performance may therefore be objectively unreasonable for failing to include the necessary record in support of a claim of error. However, to demonstrate ineffective assistance of appellate counsel, the defendant also must show prejudice resulting from counsel's error. See *Petrenko*, 237 Ill. 2d at 496-97. In other words, the defendant must demonstrate "that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *Id.* at 497.

¶ 52 Even assuming that defendant's appellate counsel had provided this court with the transcript of the trial court's ruling to avoid an unsuccessful appeal on that basis, we also found defendant had "waived" the claim of error because he did not object to the expert's testimony at trial and did not include the issue in a posttrial motion. See *Serrano*, No. 1-08-1789 (2010) (unpublished order under Supreme Court Rule 23). Consequently, in order for defendant's appeal to have been successful on this claim of error, he would have had to satisfy the plain-error doctrine. See *People v. McDonald*, 2016 IL 118882, ¶ 48 (the plain-error doctrine allows review of unpreserved claims of error). In order to demonstrate plain error, defendant first would have had to show a clear or obvious error occurred in the trial court's ruling on the admissibility of the palm print evidence. *Id.*

¶ 53 In *People v. Luna*, 2013 IL App (1st) 072253, ¶ 49, a defendant argued that the trial court erred in denying his motion *in limine* to exclude expert testimony that his palm print matched a partial latent print found on a napkin. The defendant asserted that the method used by the expert to match his known print to the latent print was not generally accepted in the relevant scientific community and thus, under *Frye*, the expert testimony should have been excluded. *Id.* He alternatively argued that the trial court should have held a *Frye* hearing to determine whether the method was generally accepted within the relevant scientific community. *Id.* This court

subsequently reviewed the denial of the defendant's motion and held that the trial court did not err when it found that the methodology used by the expert had general acceptance within the relevant scientific community. *Id.* ¶¶ 50-84.

¶ 54 Given this court's holding in *Luna*, defendant would have been unable to show a clear or obvious error occurred and therefore unable to show plain error. See *McDonald*, 2016 IL 118882, ¶ 48. Consequently, even if his appellate counsel had provided this court with the transcript of the trial court's ruling on his motion *in limine*, there is no reasonable probability that his appeal would have been successful. See *Petrenko*, 237 Ill. 2d at 497. Accordingly, defendant has failed to demonstrate he suffered prejudice from his appellate counsel's allegedly deficient performance and has failed to make a substantial showing that his appellate counsel had been ineffective with regard to challenging the admissibility of the palm print evidence. The circuit court therefore properly dismissed this claim on the State's motion to dismiss.

¶ 55 C. FAILURE TO INTERVIEW LINDA ARRIAGA

¶ 56 Defendant next contends that the circuit court err in dismissing his petition's claim following a third-stage evidentiary hearing that his trial counsel had been ineffective for failing to interview Linda Arriaga. Defendant asserts that, at the evidentiary hearing, Arriaga testified that Officer McCann pressured Reyes into identifying him as the shooter even though Reyes never actually saw the shooter. Based on Arriaga's testimony that she would have told trial counsel this information, defendant posits that counsel's failure to interview her was objectively unreasonable and he suffered prejudice as a result because of counsel's "missed opportunity to cast serious doubt on the testimony of" Reyes.

¶ 57 At a third-stage evidentiary hearing, the circuit court hears evidence and determines based on that evidence whether the defendant is entitled to relief. *People v. Gonzalez*, 2016 IL

App (1st) 141660, ¶ 24. The evidence may include "affidavits, depositions, [or] oral testimony." 725 ILCS 5/122-6 (West 2012). At this stage, like the second stage, the defendant bears the burden to demonstrate a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. At the evidentiary hearing, the circuit court acts as the trier of fact and it is the court's duty "to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts." *Domagala*, 2013 IL 113688, ¶ 34. When fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous. *People v. Beaman*, 229 Ill. 2d 56, 72 (2008). "Manifest error is error that is 'clearly evident, plain, and indisputable.' " *Id.* at 73 (quoting *People v. Morgan*, 212 Ill. 2d 148, 155 (2004)).

¶ 58 As with claims of ineffective assistance of appellate counsel, we review claims of ineffective assistance of trial counsel under the standard set forth in *Strickland*, 466 U.S. 668. *Domagala*, 2013 IL 113688, ¶ 36. The defendant must show that his counsel's performance was deficient and the deficiency prejudiced him. *Id.* In showing prejudice with regard to trial counsel's performance, the defendant must demonstrate there is a reasonable probability that, but for trial counsel's alleged errors, the result of his trial would have been different. *People v. Enis*, 194 Ill. 2d 361, 376 (2000). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Id.* at 376-77. If a claim of ineffective assistance of trial counsel can be disposed of because the defendant cannot demonstrate he suffered prejudice, we need not determine whether his trial counsel performed deficiently. *Peeples*, 205 Ill. 2d at 532.

¶ 59 Here, we need not address whether defendant's trial counsel performed deficiently by failing to interview Arriaga because defendant has failed to establish any resulting prejudice. Although when the circuit court rejected this claim of ineffective assistance of trial counsel following the evidentiary hearing, it did not specify whether it was doing so based on a lack of prejudice or because trial counsel had not performed deficiently, or both, the critical finding from the court was that it did not believe Arriaga's testimony. While defendant had a jury trial, the judge presiding over his postconviction proceedings was the same judge who oversaw his trial. The circuit court therefore had the ability to observe Reyes testimony firsthand during trial and Arriaga's testimony firsthand during the evidentiary hearing. Given that the court was in the best position to determine the credibility of Arriaga and our review of her testimony is on a "cold" record, we see no basis to find the court's credibility determination was against the manifest weight of the evidence, *i.e.*, clearly wrong. See *People v. Coleman*, 183 Ill. 2d 366, 384 (1998) (finding "the post-conviction trial judge is able to observe and hear the witnesses at the evidentiary hearing and, therefore, occupies a 'position of advantage in a search for the truth' which 'is infinitely superior to that of a tribunal where the sole guide is the printed record' ") (quoting *Johnson v. Fulkerson*, 12 Ill. 2d 69, 75 (1957)).

¶ 60 In light of Arriaga being an incredible witness, we cannot say there is a reasonable probability that, had counsel interviewed her and subsequently called her as a witness, the result of defendant's trial would have changed. The evidence at his trial would have pitted Reyes, an ostensibly credible witness based on the jury's guilty finding, against Arriaga, an incredible witness based on the circuit court's finding. However, the State did not prove defendant's guilt exclusively based on Reyes' testimony, but rather supplemented her identification of defendant with additional evidence of his guilt. The State presented Janina Monrial, who testified that the

shooter fled in a dark-colored van with a white stripe. Although she initially described the van to the police as a black Astrovan with a red stripe, at trial, she identified People's Exhibit No. 7 as a vehicle that looked like the one she saw fleeing from the scene. The State entered into evidence a certified vehicle record proving that defendant owned the vehicle in People's Exhibit No. 7. Moreover, although there was conflicting evidence about whether Monrial observed or only heard Reyes and Arriaga outside her window after the gunshots, Monrial placed both of them at the scene of the shooting prior to the van fleeing.

¶ 61 What's more, the State presented forensic evidence linking defendant to the shooting, including testimony from a firearms expert that the bullet recovered from Barba's body and the bullet found in the vehicle on the street near the shooting had been fired from the pistol found in defendant's garage. Additionally, the firearms expert testified that the fired cartridge casing found inside of defendant's van on the driver's floor had been fired from the pistol. The State also presented testimony from a fingerprint expert showing that defendant's palm prints were found on the pistol and a firearm magazine in the garage. Furthermore, defendant fled prosecution and went missing for nearly four years, demonstrating a consciousness of guilt. See *People v. Harris*, 225 Ill. 2d 1, 23 (2007).

¶ 62 In light of this evidence, the State overwhelmingly proved defendant's guilt for the first-degree murder of Barba. We are not convinced that trial counsel's failure to interview Arriaga rendered the result of defendant's trial unreliable. See *Enis*, 194 Ill. 2d at 376-77. In other words, there is no reasonable probability that, had counsel interviewed Arriaga and presented her as a witness, the result of his trial would have been different. *Id.* at 376. Accordingly, defendant has failed to demonstrate he suffered prejudice from his trial counsel's allegedly deficient performance and has failed to make a substantial showing that his trial counsel had been

ineffective for failing to interview Arriaga. The circuit court therefore properly dismissed this claim following the evidentiary hearing.

¶ 63 D. *BRADY* VIOLATION

¶ 64 Defendant alternatively contends that the State had an obligation to tender the defense the information that Officer McCann had put pressure on Reyes to identify defendant as the shooter and information that neither Arriaga nor Reyes actually saw the shooting. Defendant asserts that this evidence "is classic exculpatory and/or impeaching evidence" that should have been disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963).

¶ 65 In *Brady*, the United States Supreme Court held that the prosecution must disclose evidence favorable to the defendant and material to his guilt. *People v. Harris*, 206 Ill. 2d 293, 311 (2002) (citing *Brady*, 373 U.S. at 87). The *Brady* rule "encompasses evidence known to police investigators, but not to the prosecutor." *Beaman*, 229 Ill. 2d at 73. As such, to comply with the *Brady* rule, a prosecutor has a duty to learn of evidence favorable to the defendant and known to other members of government, including the police. *Id.*

¶ 66 Following Arriaga's testimony during the evidentiary hearing, the circuit court determined that she was incredible and expressly stated that it did not believe her testimony. As discussed, we have no basis to find that determination to be manifest error. Given the finding that what Arriaga alleged was unbelievable, it is axiomatic that the State could not have tendered the defense information about something that did not occur. The State therefore did not commit a *Brady* violation.

¶ 67 E. NEWLY DISCOVERED EVIDENCE

¶ 68 Defendant alternatively contends that Arriaga's "testimony was newly discovered evidence," citing to *People v. Ortiz*, 235 Ill. 2d 319 (2009). Although defendant does not

expressly cloak this claim as one of actual innocence, we note that, in *Ortiz*, our supreme court discussed newly discovered evidence as it related to a postconviction claim of actual innocence. *Id.* at 333 ("The due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence.") Regardless, in defendant's postconviction petition, he never raised a claim related to Arriaga's potential testimony, as exhibited through her affidavits, being considered newly discovered evidence of actual evidence.

¶ 69 The Act has a forfeiture rule. See *People v. Williams*, 2015 IL App (1st) 131359, ¶ 14. Under this rule, if the defendant does not include a claim of a substantial denial of his constitutional rights in his postconviction petition or an amended petition, he forfeits raising that claim on appeal. 725 ILCS 5/122-3 (West 2012). In *People v. Jones*, 213 Ill. 2d 498, 505-06 (2004), our supreme court held that this forfeiture rule is not merely a suggestion for appellate courts and observed that appellate courts had "repeatedly overlooked the [forfeiture] language of section 122-3 and ha[d] addressed claims raised for the first time on appeal for various and sundry reasons."

¶ 70 Given that defendant's postconviction petition, which he did not amend, made no claim concerning Arriaga's potential testimony being considered newly discovered, following section 122-3 of the Act and the strict directive in *Jones*, defendant has forfeited this claim. 725 ILCS 5/122-3 (West 2012); *Jones*, 213 Ill. 2d at 505-06. We therefore need not address this claim further.

¶ 71 VI. CONCLUSION

¶ 72 For the foregoing reasons, we affirm the circuit court of Cook County's dismissal of defendant's postconviction petition.

¶ 73 Affirmed.