2013 IL App (2d) 110305-U
No. 2-11-0305
Order filed January 4, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 98-CF-535
ARMANDO AMAYA,	)	Honorable Thomas E. Mueller,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant could not establish a *Brady* violation where State's failure to disclose a police report of a witness's tape recorded statement was not material to defendant's guilt; the trial court's dismissal of defendant successive postconviction petition is affirmed.

¶ 2 Defendant, Armando Amaya, appeals from the judgment of the trial court dismissing his amended successive postconviction petition after an evidentiary hearing. On appeal, defendant argues that: (1) the trial court erred by finding that the State did not commit a *Brady* violation (see

Brady v. Maryland, 373 U.S. 83 (1963)); and (2) defendant was denied effective assistance of postconviction counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 1999, defendant was convicted of the first-degree murder (720 ILCS 5/9-1(a), (a)(2) (West 1996)) of Jermaine Lambert, two counts of the attempted murder (720 ILCS 5/8-4(a) (West 1996)) of Alonzo Matthews and Tara Harris, and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 1996)). Defendant was sentenced to consecutive prison terms of 40 years for the first-degree murder conviction, 12 years and 10 years for the two attempted murder convictions, respectively, and a concurrent 9 year sentence for aggravated discharge of a firearm (720 ILCS 5/12-4.2(a)(1) (West 1996)). The court sentenced defendant to a total of 62 years' imprisonment.

¶ 5 This matter is now before this court for the fourth time. Other issues were addressed by this court in our decision on direct appeal in *People v. Amaya*, 321 Ill. App. 3d 923, 930, 931 (2001) (Amaya I) (this court vacated defendant's conviction of aggravated discharge of a firearm because it violated the one-act, one-crime doctrine and we affirmed defendant's convictions of first-degree murder and attempted murder). In the second appeal, we affirmed the trial court's denial of defendant's postconviction petition after an evidentiary hearing. *People v. Amaya*, No. 2-05-0706, (June 22, 2007) (unpublished order under Supreme Court Rule 23) (Amaya II) (we affirmed the trial court's denial of defendant's postconviction claim of ineffective assistance of trial counsel based on defense counsel's failure to present alibi witnesses at trial).

¶ 6 In the third appeal, we reversed the trial court's order denying defendant's motion for leave to file a successive postconviction petition and remanded the case for further proceedings. *People v. Amaya*, No. 2-07-0519, (July 2, 2009) (unpublished order under Supreme Court Rule 23) (Amaya

III). For this appeal, we will provide only those facts necessary for an understanding of the issues raised on appeal.

¶ 7 On October 29, 1997, two shootings occurred in Aurora at two separate locations within an hour and a half of each other. Defendant was charged for offenses related to both shootings in separate cases. The first shooting occurred at approximately 8:45 or 9 p.m. behind an apartment building at 309 East New York Street in Aurora near Lincoln Avenue. A man fired gunshots where a crowd had gathered to watch an argument between two women. Lambert, Matthews, and Harris were struck by the gunshots and Lambert died as a result. The second shooting occurred later that evening in Aurora at approximately 10:17 p.m.

¶ 8 About fifteen minutes later, defendant was arrested while riding in a white Chevy Celebrity with two other Hispanic men. At the time of the arrest defendant wore blue jeans a black T-shirt, a hooded coat and a black hooded sweatshirt. Defendant had a mustache, a sparse and closely trimmed beard and, perhaps, a soul patch. Romero Sandoval was also in the car and wore a dark hooded pullover and a black leather jacket. The third man in the car, George Gamboa, wore a Green Bay Packers jacket.

¶ 9 Immediately following his arrest, defendant was charged with attempt murder and other offenses relating to the second shooting in case number 97-CF-2326. Defendant was initially represented by the Kane County Public Defender's (KCPD) Office. However, on December 11, 1997, Kathleen Colton filed an appearance for defendant in case number 97-CF-2326 and the trial court granted KCPD leave to withdraw. Defendant's trial on the charges in case number 97-CF-2326 resulted in a hung jury in March 1998.

¶ 10 On March 12, 1998, the State charged defendant for the first shooting in case number 98- CF-535, the case now before us. On April 16, 1998, the trial court appointed the KCPD to represent defendant. David Kliment appeared in court on defendant's behalf. On April 30, 1998, Kliment filed a discovery motion.

¶ 11 On May 7, 1998, the State filed a discovery answer listing both case numbers, 98-CF-535 and 97-CF-2326, on the caption. Paragraph 15 of the State's discovery answer states:

> "Attached is Aurora Police report number 97-24441 (Homicide investigation) labeled SAO-1 to SAO-177. Also enclosed is Aurora Police report number 97-24443 labeled SAO-1 to SAO-111 and JG-1 to JG-111."

¶ 12 Also on May 7, Kliment appeared in court on behalf of defendant on case number 98-CF-535 and an attorney from Colton's office appeared in court on behalf of defendant on case number 97-CF-2326. In open court, the assistant State's Attorney stated, "I tendered discovery to both parties today." Kliment then stated, "That's correct."

¶ 13 A jury trial in case number 98-CF-535 began on January 25, 1999. Tracy Johnson testified that at about at about 8:30 p.m. on the night of the shooting, he saw a white Chevy Celebrity sedan drive around the apartment building on New York Street and Lincoln Avenue. The car had three Hispanics in it who were making gang signs that Tracy recognized as being insulting to members of the Gangster Disciples. Shayla Johnson and Nicole Pearson testified that sometime before 9 p.m. on the night of the shooting, defendant was an occupant in a white four-door Celebrity that drove past the apartment building. Shayla and Pearson also testified that the occupants of the car shouted slogans such as "King Love" and "Kings Rule." Shayla, Pearson, Harris and Matthews testified that

sometime before 9 p.m. they were watching an argument between two or three women outside of the apartment building. There was a crowd of about 15 to 20 people gathered to watch the argument.

¶ 14 Shayla also testified that she was at the apartment building watching the argument when she saw a "Hispanic" man "walk up from the Lincoln side." He was wearing black or navy clothing. The man moved a girl out of the way and "started shooting." Shayla testified that she saw the shooter's face. Although the lighting was dim, Shayla recognized the shooter from her previous contacts with him. In the courtroom Shayla identified defendant as the shooter. She testified that she had seen the defendant five or six times before the night of the shooting with friends around the neighborhood. Shayla also testified that she had identified defendant as the shooter in a police lineup.

¶ 15 Pearson testified that she was involved in an argument with some girls outside the apartment building on New York Street. After the argument ended, a "Mexican man" approached the crowd from Lincoln and "just started shooting." The shooter wore a black hoodie, black jacket and a black hat. He looked like he was in his teens. Pearson testified that she had a good look at the shooter's face. In the courtroom Pearson identified defendant as the shooter. Pearson testified that she saw defendant before the night of the shooting near a local restaurant. Pearson also testified that she had identified defendant as the shooter in a police lineup.

¶ 16 Harris, one of the surviving victims, testified that, as she went outside of her apartment to throw away a diaper, she stopped to watch an argument between two girls. A "Mexican" or "Spanish" man came into the area from the Lincoln side of the apartment. The man was about five-feet-six inches tall, in his late teens or early twenties and he was wearing a hoodie covering his head and a jacket. It was dark outside and not very bright where the shooting occurred. Harris testified

that she heard two gunshots and realized that she was shot. She went back into her apartment and then to the hospital.

¶ 17 Matthews, the other surviving victim, testified that, as he was watching some girls argue outside the apartment building, a "Hispanic" or "Mexican" man came into the crowd of onlookers from the Lincoln Street side of the building. The man then crept up behind him and shot him in the stomach. The shooter wore all black, including a black hoodie covering his head. The shooter was about five-foot-eight inches tall. Matthews was taken to the hospital.

¶ 18 William McCallister testified that, as he was watching the women argue, he saw a "Hispanic" man cross New York Street and stand behind him. The man was five-feet-ten or -eleven inches tall, "sort of thin maybe, maybe a light goatee a little bit, with a [*sic*] dark hooded clothing on." McCallister did not see whether the man had gun. After about five to eight minutes, McCallister heard gunshots from the area where the girls were arguing and McCallister ran. McCallister did not see the man shoot anyone, did not see the man walk toward the area where the argument was occurring, and did not see where the man went after the shooting.

¶ 19 Tracy also testified that he stayed in the same place after he saw the three Hispanic men in the white Chevy Celebrity making gang signs. Soon after, he heard three gunshots and saw the three men who were in the Chevy run from the direction of the gunshots, the area of Lincoln Avenue and New York Street. One man wore a black leather jacket and another wore a Green Bay Packers jacket. The three men crossed Galena, ran toward the laundromat on Lincoln and got into the white Chevy Celebrity. Soon after, Tracy heard that "they" had killed his friend Lambert. About an hour and a half later, several blocks away, Tracy saw the same white Chevy at the side of the street

stopped by the police. The three men were lying on the ground near the car. Tracy spoke to the police.

¶ 20 Police officers testified that the laundromat, at the corner of Lincoln and Galena, was southwest of the scene of the shooting.

¶ 21 The jury found defendant guilty on all counts. The court sentenced defendant to consecutive terms prison terms of 40 years for the murder of Lambert, and 12 years and 10 years for the two attempted murders of Matthews and Harris, respectively, plus a concurrent term of 9 years for the aggravated discharge of a firearm conviction. Defendant filed a timely appeal. On appeal, the defendant argued that he was entitled to a new trial because the trial court erroneously instructed the jury regarding the accountability theory. In the alternative, defendant argued that there was insufficient evidence to support a guilty verdict on a theory of accountability because the evidence supported a guilty verdict based only on defendant's acting as a principal.

¶ 22 The State *nolle prossed* the charges against defendant in case number 97-CF-2326 on September 8, 1999.

¶ 23 On May 10, 2001, this court filed *Amaya* I, 321 Ill. App. 3d 923, addressing defendant's appeal of his convictions and sentences in case number 98-CF-535. We held that "there was ample evidence to support a guilty verdict based on the defendant's acting as a principal." *Id*. at 929. Further, we vacated defendant's conviction of aggravated discharge of a firearm because it violated the one-act, one-crime doctrine and we affirmed defendant's convictions of first-degree murder and attempted murder. *Id*. at 930-31. The supreme court denied defendant's motion for leave to appeal. *People v. Amaya*, 196 Ill. 2d 547 (2001).

¶ 24 On March 15, 2002, Colton, the attorney who represented defendant in case number 97-CF-2326, filed a postconviction petition on behalf of defendant for case number 98-CF-535. Defendant alleged that trial counsel Kliment was ineffective by failing to raise an alibi defense and to call witnesses to support that defense. After an evidentiary hearing, defendant's petition was dismissed. This court affirmed that order. *Amaya II*, at 7.

¶ 25 On April 7, 2007, defendant filed *pro se* a motion for leave to file a successive postconviction petition. The motion was accompanied by the successive postconviction petition seeking relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2006)) and section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)). Defendant attached his affidavit, a memorandum of law and various exhibits. Defendant alleged in his petition that he had recently become aware of a statement that Sharona Weakly had given to the police that "will/would cast doubt on the State[']s case in which the State presented that the subject whom [*sic*] committed the crime * * * ran southbound * * *[and] had facial hair." Defendant stated that Weakly's statement conflicted with the State's case because Weakly stated that the shooter ran northbound and had no facial hair.

¶ 26 Defendant further alleged that defendant was not provided with Weakly's statement in relation to this case. Defendant stated that Weakly's police statement bore the police incident report number 97-24443 which related to the charges in case number 97-CF-2326 and not incident number 97-24441, the police report number relating to the charges in case number 98-CF-535.

¶ 27 Defendant also alleged that he was unable to determine whether defense counsel Kliment had been aware of Weakly's statement prior to trial. Defendant alleged that his due process rights were

violated because the State failed to disclose the Weakly report to Kliment, or Kliment was ineffective because Kliment had the Weakly report "but failed to interview her or call her as a witness."

¶ 28 On May 9, 2007, the trial court denied defendant motion for leave to file a successive postconviction petition. This court reversed the trial court's order and remanded the case for further proceedings. *Amaya* III, at 16-17.

¶ 29 On remand, Colton filed an amended successive postconviction petition in this case on behalf of defendant, incorporating the memorandum and other documents defendant had filed in support of his *pro se* petition. In defendant's amended successive postconviction petition, he alleged that: (1) the Aurora police department had destroyed Weakly's taped statement in 2008; (2) the State's Attorney's file for case number 97-CF-2326 had been destroyed in 2009; and (3) the State's Attorney's file for case number 98-CF-535 did not contain a copy of Weakly's taped statement. Defendant further alleged that the State deprived him of his right to due process under *Brady* (*Brady*, 373 U.S. 83), by not providing defense counsel Kliment with either the police report summarizing Weakly's taped statement or the taped statement itself prior to trial. Defendant also alleged that the State also violated *Brady* by destroying the tape recording of Weakly's statement. Defendant's amended successive postconviction petition was supported by an attached copy of the police report summarizing Weakly's statement, marked "Incident #97-24443" and "SAO 13." Weakly's statement states that the shooter "ran northbound" after the shooting and had "no facial hair."

¶ 30 The State filed a motion to dismiss, arguing, in pertinent part, that defendant forfeited the *Brady* violation claim because it could have been raised in defendant's first postconviction petition filed in 2002 by Colton, and that no *Brady* violation occurred because the State had disclosed the

police report summarizing Weakly's statement when it tendered discovery answer on May 7, 1998. The trial court held an evidentiary hearing.

¶ 31 At the hearing on the State's motion to dismiss, Rachele Conant, an assistant public defender with the KCPD's office, testified as follows. Conant had recently searched the KCPD's office file of case number 98-CF-535 and found a discovery answer from the State indicating that two police reports had been tendered. She found no documents or tapes containing Weakly's name. The file contained a report bearing incident report number 97-24441, but it did not contain a report bearing incident report number 97-24443. Conant would not know if a document was tendered to Kliment and had been subsequently destroyed or misplaced.

¶ 32 The trial court granted the State's motion to dismiss because "the Weakly report was clearly available to the defendant's attorney (Colton) in time for said issue to have been raised in the defendant's [2002] Post-Conviction." Defendant filed a motion to reconsider the trial court's order dismissing his successive postconviction petition. The trial court granted defendant's motion to reconsider "in part." The trial court then heard additional testimony and considered additional evidence.

¶ 33 At the hearing on the motion to reconsider, Kliment testified as follows. He was in court on May 7, 1998, representing defendant in the case at issue, and the State filed its answer to discovery indicating that it tendered to Kliment discovery documents containing, "SAO-1 through SAO-177" from incident number 97-24443. During cross-examination, the following colloquy occurred between postconviction defense counsel Colton and Kliment:

> "Q: And based upon those documents, would you be able to acknowledge that you received that document on that day?

A: No. I can say what the documents say, and I can say that report is not in the box that I reviewed that has the reports related to [defendant] in it. That's what I can say.

Q: Is it possible that you received that report number, looked at the number on the police report and said; that is the other case that had previously had a hung jury that's not being tried now?

A: Absolutely.

Q: And is it possible that you then disposed of that document or put it somewhere else?

A: Yes, that's entirely possible."

¶ 34 On March 21, 2011, the trial court denied defendant's successive postconviction petition. It first reversed its prior ruling that defendant had forfeited its *Brady* claim by failing to raise it in his 2002 postconviction petition, stating:

"[I]t was just happenstance or coincidence, if you will, that Miss Colton happened to be the attorney, and the court cannot rely on the fact that she happened to be the attorney in 97 CF 2326 and, therefore, would have been in possession of the Sharona Weakly statement and, therefore, chargeable with the knowledge of it for purposes of 98 CF 535."

The court then found that, based on the testimony and evidence, "there was disclosure to the Kane County Public Defender's Office, who represented Mr. Amaya in 98 CF 535." The trial court also stated, "I want to make the record that[,] assuming *arguendo*, for the sake of the ruling, that this Court found that there was a failure to disclose by the State, as I said earlier." The trial court continued by stating:

"[B]ased upon my reading the entire trial transcript [this Court], cannot find that [Weakly's statement] would have been material to the point that a different outcome would have been

> likely reached by a jury if they had heard testimony consistent with the statement that she gave to the Aurora Police Department."

The trial court concluded by stating:

> "So it will be the order of the Court that the successive Post-Conviction petition is [dismissed], as the information was disclosed to the defense through normal discovery channels."

¶ 35 On March 21, 2011, defendant filed a notice of appeal.

¶ 36 II. ANALYSIS

¶ 37 A. *Brady* Violation

¶ 38 On appeal, defendant argues that the trial court erred by finding that the State did not commit a *Brady* violation. A trial court's ruling on a postconviction petition following an evidentiary hearing is entitled to substantial deference. *People v. Scott*, 194 Ill. 2d 268, 276 (2000). Where, as here, a trial court conducts an evidentiary hearing, pursuant to the Act, the trial court's decision will be affirmed unless it is manifestly erroneous. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). A trial court commits a manifest error only when the error is clear, plain, evident and indisputable. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 39 To establish a *Brady* violation, a defendant must show that: (1) the State failed to disclose exculpatory or impeaching evidence to the defendant; and (2) the defendant was prejudiced because the evidence was material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 74 (2008).

¶ 40 Defendant argues that the trial court manifestly erred by finding that: (1) the State disclosed the Weakly statement; and (2) the Weakly statement was not material. Assuming *arguendo* that the

trial court erred by finding that the State properly disclosed the Weakly statement, defendant failed to establish that the Weakly statement was material under *Brady*.

¶ 41 Evidence is material " ' "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ' " *People v. Barrow*, 195 Ill. 2d 506, 534 (2001) (quoting *People v. Coleman*, 183 Ill. 2d 366, 393 (1998), quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). A reasonable probability is "a 'probability sufficient to undermine confidence in the outcome.' " *People v. Hobley*, 182 Ill. 2d 404, 433 (1998) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). What is at issue is whether there was a reasonable probability that the result of the trial would have been different had the evidence been disclosed to the defense.

¶ 42 In this case, we are asked to determine whether a report summarizing Weakly's taped statement to the police is material. A police report summarizing a taped statement is not evidence that would be admissible at trial and, thus, it could not have changed the result of the proceeding. See *People v. Rivera*, 409 Ill. App. 3d 122, 147-48 (2011) ("Police reports are generally inadmissible hearsay"). Other than the hearsay report, there is no evidence of what might have been or would now be presented to change the result of the proceedings. The record is bereft of evidence that would enable this court to adequately review the materiality of what has presently only been presented as hearsay.

¶ 43 Further, even if we were to assume that Weakly would have testified consistently with the police report of her taped statement, the State's failure to disclose such does not amount to a *Brady* violation because such testimony would not have been material. The evidence at trial established that defendant's guilt was derived from the eyewitness testimony of Shayla and Pearson. They both

testified that the night of the shooting, they witnessed defendant shoot into the crowd. Further, both Shayla and Pearson testified that they saw the shooter's face, and they identified defendant as the shooter in a lineup and in court. This evidence was not contradicted by Weakly's statement. Neither Shayla nor Pearson testified regarding which direction defendant ran after he shot his weapon or whether he had facial hair. We note that the Weakly's statement corroborates Shayla's and Pearson's testimony in many respects. Like Shayla's and Pearson's testimony, Weakly's statement indicates that the shooter came from the Lincoln side of the building, he was Hispanic, and was dressed in black clothes. In addition, like Pearson's testimony, Weakly's statement indicates that the shooter wore a hat. Thus, the evidence against defendant was ample and much of Weakly's statement corroborated eyewitness identification testimony.

¶ 44 Defendant argues that the Weakly statement contradicts McCallister's testimony that a Hispanic man with a light goatee was at the scene and Tracy Johnson's testimony that three men ran in a southwest direction after the shooting. However, neither McCallister nor Tracy actually saw the shooting or the shooter. Thus, even when the Weakly statement is considered in its most favorable light, we cannot say that there is a reasonable probability that the outcome of defendant's trial would have been different.

¶ 45 B. Ineffectiveness of Postconviction Counsel

¶ 46 Next, defendant argues that he was denied effective assistance of postconviction counsel, Colton, because she failed to include defendant's *pro se* contention of ineffective assistance of trial counsel in his amended successive postconviction petition. Specifically, defendant argues that Colton failed to argue that Kliment was ineffective by failing to interview or call Weakly prior to trial.

¶ 47 A defendant's right to postconviction counsel is statutory and not constitutional. See 725 ILCS 5/122-4 (West 2010); *People v. Moore*, 189 Ill. 2d 521, 541 (2000). A postconviction petitioner is entitled to only a reasonable level of assistance. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). To ensure that postconviction petitioners receive a reasonable level of assistance, Supreme Court Rule 651(c) imposes specific duties on postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). The rule requires that postconviction counsel consult with the defendant to ascertain his contentions of the deprivation of constitutional rights, examine the record of the proceedings at trial, and make any amendments to the defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. Ill. S.Ct. R. 651(c) (eff. Dec. 1, 1984). The filing of a Rule 651(c) certificate gives rise to a presumption that postconviction counsel provided reasonable assistance. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Defendant must overcome this presumption by demonstrating counsel's failure to substantially comply with the duties mandated by Rule 651(c). *Id*.

¶ 48 We note that postconviction counsel is not required to amend a defendant's *pro se* postconviction petition (*People v. Turner*, 187 Ill. 2d 406, 412 (1999)) but, rather, is only required to investigate and present the defendant's claims (*People v. Pendleton*, 223 Ill. 2d 458, 475 (2006)). Although counsel may raise additional issues if he or she chooses, counsel is not required to do so. *Id*. at 476. In addition, counsel is not required to advance frivolous or spurious claims. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Counsel's decision not to amend a defendant's *pro se* petition does not constitute a deprivation of adequate representation where his claim lacks a sufficient factual basis. *People v. Johnson*, 17 Ill. App. 3d 277, 279 (1974).

¶ 49 In this case, postconviction counsel filed a Rule 651(c) certificate on January 6, 2010, thereby creating a presumption that defendant received the representation required by the rule. See *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010). Defendant does not allege that counsel failed to examine the record of the proceedings at trial or consult with him to ascertain his contentions of deprivation of constitutional rights, but he argues that counsel failed to incorporate defendant's *pro se* claim that trial counsel was ineffective.

¶ 50 However, defendant presumes, without offering any support, that Weakly would have been available to testify at trial and that she would have testified consistently with the report of her taped statement. However, there is nothing in the record to support defendant's assumption. To the contrary, counsel's 651(c) certificate states:

> 3. I hereby certify and affirm that I personally conferred with the Defendant *** to ascertain his contentions or error in the trial court proceedings and the sentence imposed and that I have made any amendments necessary to his *pro se* pleadings for adequate representation any of defects in those proceedings based on deprivation of his constitutional rights.
>
> 4. I hereby certify and affirm that I have examined the trial court file and report of proceedings of the trial and sentencing hearing, that I have examined the Rule 23 Order of the Appellate Court, Second district, dated July 2, 2009 [*Amaya III*], and consulted with the Defendant to ascertain his contentions therein."

In *Amaya III*, we stated:

> "We point out that a *Brady* claim should not be confused with a claim that a defendant's lawyer was ineffective for failing to call a particular witness. If a defendant is

> claiming that his or her lawyer *should* have called a witness, he or she naturally needs to show that the lawyer *could* have called the witness." *Amaya* III, at 15.

¶ 51 In this case, the record shows that before counsel amended defendant's *pro se* successive postconviction petition she attempted to locate Weakly. The report of proceeding reveals that counsel told the trial court that she was trying to locate Weakly by ordering a "skip trace on her." Subsequently, counsel filed the amended successive postconviction petition, omitting the ineffective assistance of counsel claim. Counsel also filed the 651(c) certificate stating the above. Here, counsel filed a Rule 651(c) certificate, giving rise to a rebuttable presumption that she performed the duties required by that rule. *Jones*, 2011 IL App (1st) 092529, ¶ 23. As our supreme court stated in *People v. Greer*, 212 Ill. 2d 192 (2004):

> "Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf. If amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule." *Id*. at 205.

In light of the above, defendant has failed to overcome the presumption that, after attempting to locate Weakly, counsel reasonably determined that defendant's ineffective assistance of trial counsel claim was frivolous. Further, defendant has not supplemented the record on appeal with any document indicating that Weakly would have been available at the time of trial. Thus, defendant has not overcome the presumption that postconviction counsel acted reasonably by failing to raise a claim of ineffective assistance of trial counsel in defendant's amended successive postconviction petition.

¶ 52 III. CONCLUSION

¶ 53 For these reasons, the judgment of circuit court of Kane County is affirmed.

¶ 54 Affirmed.