2011 IL App (4th) 100582-U

Filed 10/14/11

NO. 4-10-0582

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Douglas County
LEVI C. GAST,	)	No. 06CF16
Defendant-Appellant.	)	
	)	Honorable
	)	Michael G. Carroll,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* Unless a witness's testimony is so flawed or so improbable that it would be positively irrational to believe that testimony, we will refrain from second-guessing the trier of fact in its conclusion that the witness testified truthfully.

¶ 2 It is not ineffective assistance to refrain from making an unmeritorious objection.

¶ 3 An expert opinion cannot be based on conjecture.

¶ 4 Defendant, Levi C. Gast, who is serving a 25-year sentence of imprisonment for first-degree murder (720 ILCS 5/9-1(a)(2) (West 2004)), appeals from the second-stage dismissal of his petition for postconviction relief. The office of the State Appellate Defender (OSAD), which was appointed to represent defendant in this appeal, has filed with us a motion to withdraw from representing him, because, in OSAD's opinion, this appeal is so clearly unmeritorious that any

argument made in support of it would be frivolous. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). We notified defendant of his right to respond to OSAD's motion, by a certain date, with additional points and authorities, but he has not done so. Nevertheless, we have thoroughly reviewed the record, and we are convinced that OSAD is correct in its assessment of the merits of this appeal. In our *de novo* review, we conclude that the postconviction petition fails to make a substantial showing of a constitutional violation. See *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Therefore, we grant OSAD's motion to withdraw from representing defendant in this appeal, and we affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 A. Evidence in the Bench Trial

¶ 7 Defendant's father, Loren Gast, testified that he was a truck driver and that at 1:30 a.m. on September 29, 2005, he had just returned home in Mattoon when he received a voice-mail message on his cell phone. The message was from defendant, and the gist of the message was that "this was it" and that defendant did not want Loren to "be so hard on [himself]."

¶ 8 Defendant lived with Loren, and a few days earlier, he explicitly told Loren that he was going to kill himself and that he had written a couple of parting letters. At the time, Loren's response was, " [']Well, *** if you've made up your mind, I can't stop you.' "

¶ 9 Loren did not look for the letters immediately. It was not until September 29, 2005, that he found them in the house. In fact, he found three handwritten messages. On the back of an envelope, which had blown off a coffee table and onto the floor, defendant had written, "Help me!!!" In defendant's bedroom, Loren found two handwritten letters, both addressed to him ("Pops"). One letter said: "Hey, man, I really am sorry I fucked up but don't worry, I promise I'm gonna make

things right. Hope you had a good trip." The other letter read as follows:

> "By the time you get this, I will already be gone.
>
> I am ready to get busy dying. Sorry for everything.
>
> Call my mom and tell her I love her and I'm sorry I'm a fuckin' loser.
>
> You know? You were right about that dad. I'm a crackhead loser mother fucker. I'm sorry for everything. Please give my mom the stuff she bought for me. All of us are gonna be better off this way.
>
> You'll see."

¶ 10 In the early morning hours of September 29, 2005, Loren had not discovered these letters as of yet, but from his previous conversation with defendant, he had a good idea what "this is it" meant. So, he called the Mattoon police, told them about the voice-mail message, and asked them to check on his son, who, he said, would be driving a white van bearing the logo of Mediacom, his son's employer.

¶ 11 It is unclear from where, or by what means, defendant sent this voice-mail message to his father. He could not have called from the Mediacom van, so it would seem, because according to Loren's testimony, defendant had no cell phone and the walkie-talkie in the van could not have been used as a phone. Nevertheless, defendant called not only Loren's cell phone but also his mother's residence around the same time, 1:39 a.m. on September 29, 2005. Defendant's mother, Karen Silotto, who likewise lived in Mattoon, was asleep when defendant left a message on her answering machine. Somehow the message got erased before trial, but Karen testified it was along these lines: "He said that he loved me[] and he didn't want me to blame myself and that he knew I didn't think he would do it[–]I even laughed when he said it[–]but I wouldn't be laughing in the

morning because he'd just taken 90 [T]ylenol."

¶ 12 The remark about laughing referred to a previous occasion when defendant threatened suicide, two weeks earlier, at his father's house. Karen Silotto testified that on this previous occasion, defendant remarked "that if he lost his job[,] he should just kill himself." At the time, Karen responded by laughing and by telling him that people did not kill themselves over a job.

¶ 13 There would be no laughing this time, defendant said on the answering machine, because he had overdosed on Tylenol. Karen's husband, Aubrey Silotto, recalled defendant's mentioning, in the recorded message, that not only had he swallowed 90 Tylenol tablets but he also had slit his wrists.

¶ 14 Defendant's mother and stepfather did not listen to the message on their answering machine until much later. Because defendant's father, however, happened to be awake at 1:30 a.m. on September 29, 2005, he heard defendant's message right away and called the police. The Mattoon police sent out a radio message to watch for a white Mediacom van and to stop the van for a "welfare check" because the driver possibly was suicidal. A Mattoon police officer, Brad Gabel, spotted the van at 2:33 a.m. in a residential area of Mattoon. He came up behind the van, to within 15 or 20 yards, and turned on his emergency lights. Instead of pulling over, though, the van increased its speed and ran a red light and several stop signs. On the instructions of his shift commander, Gabel discontinued the pursuit as too dangerous. He turned off his emergency lights and followed the van at a distance until it left Mattoon, heading north on United States Route 45.

¶ 15 At about 2:39 a.m., an Arcola police officer, Inga Jones, heard on the radio that the Mattoon police had terminated its pursuit of a white Mediacom van, the driver of which was thought to be suicidal. According to the radio message, the van was heading north on Route 45, and the

driver possibly was under the influence of methamphetamine. Jones parked her police car at the intersection of Route 45 and Illinois Route 133, in case the van went by.

¶ 16 Jones testified that the van drove through the intersection at a high rate of speed, ignoring the stop sign. The speed limit at that location, within the Arcola city limits, was 35 miles per hour, and she estimated that the van was going 60 to 70 miles per hour. She turned on her emergency lights and siren and pursued the van.

¶ 17 They left the Arcola city limits, heading north on Route 45. Except for when Jones drew up close enough to read the license-plate number of the van, she kept a quarter of a mile behind the van, which was traveling 75 to 80 miles per hour (the speed limit on Route 45 was 55 miles per hour).

¶ 18 They encountered no oncoming traffic on Route 45. The van repeatedly crossed and straddled the yellow dividing line, but it never crossed the white fog line on either side of the highway. It never stopped or lost control. The weather was clear and dry. According to Jones, the van went from one lane to the other evidently as a result of deliberate steering; the lane changes did not appear to her to be involuntary swerving. Her perception was that the driver was in control at all times. She saw the van's brake lights come on twice: once when the van was negotiating the S-curves just north of Arcola and again when the van turned from Route 45 onto United States Route 36.

¶ 19 The van accessed Route 36 by crossing into the wrong lane and disobeying a do-not-enter sign. Then the van went west on Route 36, toward Atwood, with Jones still following. Again the van reached and maintained speeds of 75 to 80 miles per hour, crossing and straddling the yellow dividing line of this two-lane highway but never driving off the highway or crossing the fog lines.

¶ 20 For the first time, as the van and Jones were going west on Route 36, they encountered an oncoming vehicle. This was at the east edge of Atwood, near Sloan Implements. Michael D. Mann was driving east on Route 36, in his red Dodge pickup truck; he was on his way to deliver newspapers for the Decatur Herald. Mann pulled off to the right, so that his right tires were on the shoulder and his left tires were on the highway. The westward-traveling van crossed over the eastbound lane, and hit him head-on.

¶ 21 A Monticello police officer, Norman Meeker, testified that the collision happened only 10 to 15 feet to the left of his squad car. Having heard on the radio that Jones was chasing the van, Meeker went to the east edge of Atwood and parked in the driveway of a business that abutted the south side of Route 36. Then he got out of his squad car and stood on the south side of Route 36, looking east and waiting for the van to approach. He intended to follow Jones, in case the van decided to pull over and she needed help with the traffic stop. The emergency lights of Meeker's squad car were on, and his headlights, set on normal brightness, were shining on Route 36. There were also streetlights in the vicinity.

¶ 22 Soon, Meeker saw the van approaching from the east (his right), being pursued by a police car, and from the west (his left), he saw a red pickup truck approaching. The pickup truck slowed down and pulled to the side of the highway. When the van went by Meeker, about 15 feet away from where he was standing, Meeker saw that the driver's-side window of the van was down, and he and the van driver made eye contact. Meeker testified that just as the van went by him, its driver made a sharp turn to the left, toward Mann's pickup truck. Meeker saw the driver of the van gripping the steering wheel with both hands, and he saw the left hand go down and the right hand come up over the left on the steering wheel. The van turned "sharply" to the left and hit the red

pickup truck "in the left front." Meeker estimated that the van was traveling 60 to 80 miles per hour. The force of the collision ripped the cab from the bed of the pickup truck.

¶ 23 The prosecutor asked Meeker:

> "Q. About how long took place, between the time you describe the driver of the white van turning the wheel, before impact occurred?
>
> A. No more than–I'd say 10 seconds. It was real quick. When I saw him turn, I mean it was the–the red pickup truck was right there.
>
> Q. Okay. You could count to 10, or–
>
> A. No, it would be–now that I think about it, it would definitely be less than that.
>
> Q. Would you have been able to count to five?
>
> A. No, no it was maybe two, I could possibly count to two, but–
>
> MR. NOLAN [(prosecutor)]: I have nothing further, Your Honor, at this time."

¶ 24 Mann, the driver of the pickup truck, died instantly in the collision. Defendant was pinned in the van, bleeding from the head and struggling to breathe with two collapsed lungs. Meeker testified: "He was saying that he had been smoking crack and he didn't want to go to jail, and he was slapping himself in the head while he was talking."

¶ 25 Two volunteer firefighters/first responders of the Atwood fire department, Joseph Herschberger and Don Gerkin, arrived in a fire truck. Herschberger testified: "[W]hen I approached

the van, [defendant] was screaming [']get me out of the van, get me out,['] and then I was talking to him, I was trying to calm him down, he was saying that he was using crack and he just swallowed two bottles of Tylenol. And then he stated that he just talked to his Dad and he wanted to kill himself and he said he was going to hit the first car he seen."

¶ 26 At first, according to Herschberger, defendant said, " [']I just want to die, I just want to die[,] " and then, a little later, he said, " [']I don't want to die, can you get me out of here[?]" " ['W]e're doing the best we can,['] " Hershberger told him, as they cut through the back of the driver's seat. Herschberger did not recall defendant's wearing a seatbelt, but a photo of the interior of the van showed that the seatbelt had been cut.

¶ 27 On cross-examination, Herschberger admitted he might have told the State Police, in October 2005, that defendant said he had called his father while actually being pursued by the police. Herschberger agreed that his memory of what defendant said would have been better in October 2005 than at the time of the trial, in July 2006. He could not be certain now, but he was inclined to believe that defendant had indeed stated he called his father from the van.

¶ 28 Dale Wiens, another volunteer first-responder of the Atwood fire department, testified he held the bag of intravenous fluid that was being administered to defendant and that he talked with defendant for 10 to 15 minutes while others worked at extricating him from the van. Wiens testified: "He was coherent enough that we visited back and forth. He seemed to know what was going on ***." Defendant told Wiens "he had been in Mattoon and that he had crack on him" and that when a police car approached from behind and turned on its lights, "he had just punched it and got out of there." Defendant asked Wiens if he knew who the other driver was, and defendant expressed the hope that he had not hurt him.

¶ 29 Ryan Fuoss was an Illinois state trooper and a certified traffic-crash reconstruction officer. On the basis of his investigation of the wreckage and of the skid marks and gouges in the highway, he opined that the focus of the impact was the front driver's side of the white van and the driver's-side corner of the red pickup truck and that the "point of maximum engagement" was in the eastbound lane, 2 feet, 10 inches, north of the south fog line. He saw no evidence that the van ever applied its brakes.

¶ 30 After Fuoss's testimony, the State rested, and the defense called Darren J. Hall, a flight nurse with Air Life Helicopter at Carle Foundation Hospital. He testified he was dispatched by helicopter to the scene of the crash on September 29, 2005, and that he arrived at 3:33 a.m. Hall observed that defendant had "fast and shallow breathing and decreased oxygen saturation." Nevertheless, defendant was talking and was "alert." By "alert," Hall meant that defendant's "eyes were open" and that he "was talking and he was cognizant of his surroundings." He was answering questions. He complained of pain in his leg and shortness of breath. Hall sedated him with a paralytic in order to intubate him, and then defendant was flown to the hospital.

¶ 31 Defense counsel asked Hall:

> "Q. Did Levi Gast tell you that he was trying to commit suicide?
>
> A. No, not that I recall.
>
> Q. Was there evidence of injuries to his wrist?
>
> A. I did note that he had lacerations to his wrist.
>
> Q. Did Levi Gast say he was trying to commit suicide by slashing his wrist?

A. He did not tell me that.

Q. Did he tell you anything about the slashing of his wrist?

A. No I did not discuss that with him.

Q. How about taking Tylenol?

A. I did not discuss that with him either.

Q. Did Levi Gast tell you that he was trying to commit suicide by running into another automobile?

A. No."

¶ 32 On cross-examination by the prosecutor, Hall testified he did not go over the facts and circumstances of the accident with defendant. The prosecutor asked him:

"Q. Now when you deliver someone and hand them over to a doctor at a hospital, if the patient, as in this case, intubated and paralyzed and sedated, you and/or your partner give the doctor a history, is that correct?

A. Yes, that's correct. We give a verbal report.

Q. So if a doctor was given a history of Tylenol overdose, or suicide attempt, it could have come from you or your partner, or another first responder that went to the hospital?

A. Yes, that's correct."

¶ 33 The defense next called Brian Scott, an Illinois state trooper, who testified he issued several tickets to defendant as a result of the vehicular collision. One ticket was for failing to wear a seatbelt, another was for driving under the influence of drugs, another was for failing to have a

driver's license on his person, and another was for improper lane usage.

¶ 34 At 9 a.m. on September 29, 2005, Scott witnessed a nurse extracting two tubes of blood from defendant at the hospital. Scott sent the two tubes of blood to the crime laboratory, which found the presence of a cocaine metabolite. Neither cocaine nor cocaine paraphernalia was found in the van or on defendant's person, however.

¶ 35 The next witness for the defense was Shannon George, a toxicologist at the Illinois state police crime laboratory in Springfield. George testified that he had tested the samples of blood taken from defendant in the hospital and that he had found (1) benzalacyimine, an inactive metabolite of cocaine, *i.e.*, a broken-down product of cocaine, which did not affect the body centrally; (2) lydocaine, which typically was given in hospitals; and (3) acetaminophen, *i.e.*, Tylenol. Hall found no "volatiles," *e.g.*, ethanol, acetone, talyagleen.

¶ 36 The defense also presented the evidence deposition of James S. Gregory, the surgeon who treated defendant when he was flown to Carle Foundation Hospital. Gregory testified that the standard procedure of a trauma surgeon was not only to perform a physical examination of the patient but also to obtain the patient's history. This history, he explained, should be taken into account when making a diagnosis and determining treatment. Gregory could not obtain a history from defendant personally because when defendant arrived via helicopter, he already was sedated and intubated. Consequently, Gregory obtained a history from the air-transport paramedics. He testified:

> "The flight team related to me that he was the driver of a van, he purportedly told the Medix that he was trying to commit suicide, ran head-on into a car at approximately 80 miles per hour. That 80

> miles an hour was an estimate by the flight team, not by the patient. The other driver was killed in the accident. He was entrapped in the car, he complained of severe shortness of breath but he was alert at that time. They intubated him because of his severe shortness of breath and sedated him and he claimed to take a bottle of Tylenol as well."

¶ 37 Gregory's admitting diagnoses were as follows: collapsed lungs; multiple lacerations to the forehead; shock; a tiny chronic cyst on the brain, which was asymptomatic and unrelated to the accident; and self-inflicted lacerations on both wrists. Also, 10 to 14 days after defendant's admission into the hospital, a CT scan of his head revealed that blood had formed around the brain.

¶ 38 According to Gregory's testimony, Tylenol was found in defendant's urine, along with marijuana and cocaine, but the elevated level of Tylenol would not have affected defendant's judgment. Marijuana and cocaine, Gregory testified, could affect judgment, but the urine test was not designed to measure how much marijuana and cocaine defendant had ingested and how recently he had ingested it.

¶ 39 During closing arguments, defense counsel admitted that driving at such a high speed on a two-lane highway, when another vehicle was approaching, was a "gross deviation from the standard of care." He asked the trial court to find defendant guilty of reckless homicide instead of first-degree murder.

¶ 40 After taking the matter under advisement and reviewing the evidence, the trial court found defendant guilty of "knowing" first-degree murder (720 ILCS 5/9-1(a)(2) (West 2004)).

¶ 41 In a subsequent sentencing hearing, the trial court sentenced defendant to 25 years'

imprisonment.

¶ 42 B. The Direct Appeal

¶ 43 Defendant filed a direct appeal, and his sole argument was that the trial court had erred in allowing the prosecutor, over defense counsel's objection, to question a character witness regarding specific acts of misconduct. *People v. Gast*, No. 4-06-0902, slip order at 1 (Dec. 28, 2007) (unpublished order under Supreme Court Rule 23). We agreed with defendant that the court thereby had erred, but we concluded that the error was harmless beyond a reasonable doubt, and therefore we affirmed the trial court's judgment. *Id.* On March 26, 2008, the supreme court denied leave to appeal. *People v. Gast*, 227 Ill. 2d 588 (2008). Defendant filed no petition for writ of *certiorari*.

¶ 44 C. The Postconviction Proceeding

¶ 45 On December 24, 2008, through his attorneys, Kathleen T. Zellner & Associates, defendant filed a petition for postconviction relief. On June 28, 2010, the trial court granted a motion by the State to dismiss the postconviction petition.

¶ 46 This appeal followed.

¶ 47 II. ANALYSIS

¶ 48 A. The First Claim in the Postconviction Petition: The Asserted Ineffectiveness of Appellate Counsel in Not Arguing the Insufficiency of the Evidence

¶ 49 1. *Meeker's Testimony*

¶ 50 The first claim in the postconviction petition is that the appellate counsel appointed to represent defendant on direct appeal rendered ineffective assistance by failing to argue that the evidence was insufficient to support his conviction. According to the petition, Meeker's testimony was incredible because outside city limits, in the middle of the night, with the van going by at 60

to 80 miles per hour, Meeker could not have made eye contact with defendant and could not have seen him turn the steering wheel.

¶ 51 One must bear in mind, though, that because Meeker's squad car was parked on the south side of Route 36 and was facing north, the headlights of his squad car would have shown on the driver's-side door of the van as it went by. Also, the headlights of Mann's pickup truck would have been shining in the direction of the van. Thus, as the van went by, passing to within 15 feet of where Meeker was standing on the south side of Route 36, the van would have been illuminated by two pairs of headlights as well as by the emergency lights on top of Meeker's police car. Meeker would have been facing the driver's-side window of the van, and according to his testimony, the window was rolled down.

¶ 52 The petition argues, however, that Meeker's testimony suffers from a more glaring weakness in his description of the turn and of the time it took for the collision to occur. As the trial court understood Meeker's testimony, defendant "sharply turned the steering wheel to the left and into Mann's oncoming pickup truck. "Yet," the petition says, "Meeker testified it took *10 seconds* from the time he saw Petitioner turn the wheel until the collision occurred. [Citation to the record.] At that rate of speed, Petitioner would clearly have driven off the road before colliding with the other vehicle had he made such a turn." (Emphasis in original.)

¶ 53 There are two problems with this argument. First, contrary to defendant's assertion, Meeker did not testify that "it took *10 seconds* from the time he saw Petitioner turn the wheel until the collision occurred." (Emphasis in original.) Instead, Meeker testified it took "[n]o more than" 10 seconds. There is a difference. Second, on further reflection, Meeker narrowed the duration to two seconds.

¶ 54 Consequently, we disagree that a reasonable trier of fact would have to find Meeker's testimony to be unbelievable.

¶ 55 2. *Jones's Testimony*

¶ 56 The petition further contends that Jones was unbelievable when she testified that defendant appeared at all times to be in control of the van. The petition argues that defendant "was anything but in complete control of his van," considering that he repeatedly crossed and straddled the yellow dividing line and exited from Route 45 and onto Route 36 via the wrong ramp.

¶ 57 On the contrary, defendant was in complete control of the van if he deliberately crossed and straddled the yellow dividing line and if he deliberately used the wrong ramp. It was Jones's impression that these illegal maneuvers were deliberate. It is possible to draw inferences of intentionality from the way a motor vehicle behaves. If, for example, a vehicle continually weaves all over the road and goes back and forth over the fog lines, one might infer that the driver is not in complete physical control. On the other hand, if, while fleeing a pursuing police car, the driver straddles the yellow dividing line and maintains that position for a while, never crossing either fog line even while traveling 80 miles an hour, or if the driver applies the brakes momentarily, in order to negotiate curves in the road or to go down the wrong ramp, one might reasonably infer that the driver does not have a lack of manual control but that, instead, the driver is indifferent toward traffic laws.

¶ 58 Arguably, if defendant experienced no difficulty navigating the S-curves north of Arcola or navigating the ramp and if he experienced no difficulty staying within the fog lines on Routes 45 and 36, he would have experienced no difficulty avoiding Mann's pickup truck, if he wanted to, which was pulled over on the side of the highway. There was only one oncoming vehicle

during the entire chase on Routes 45 and 36, and defendant zeroed in on that one vehicle, having expressed the intent to commit suicide. And then, while he was being extricated from the wreckage of the van or being carried to the helicopter, he divulged that he had intended to kill himself by ramming the first oncoming vehicle he encountered.

¶ 59 In short, because a reviewing court would have viewed such evidence in a light most favorable to the prosecution and would have refrained from second-guessing the trial court's assessment of the credibility of witnesses (*People v. Ortiz*, 196 Ill. 2d 236, 259 (2001)), a competent appellate counsel could have decided it would be untenable to argue that the evidence was insufficient to support the conviction. In that respect, appellate counsel's performance did not fall below an objective standard of reasonableness. See *People v. Golden*, 229 Ill. 2d 277, 283 (2008).

¶ 60 And we might add that even if appellate counsel had argued the insufficiency of the evidence on direct appeal, we would have rejected the argument because the evidence was not "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Ortiz*, 196 Ill. 2d at 259. When one looks at all the evidence in a light most favorable to the prosecution–resolving all reasonable inferences not in favor of defendant but in favor of the prosecution–a rational trier of fact could find that defendant intended to commit suicide and that he tried to carry out this intent by ramming Mann's truck head-on, as he was reported to have admitted at the scene of the accident; and, of course, the consequence of this course of action for Mann would have been obvious. See *id.* Therefore, defendant ultimately suffered no prejudice from the omission, in his direct appeal, of the futile and unmeritorious argument that the evidence was insufficient to support his conviction. See *Golden*, 229 Ill. 2d at 283.

¶ 61 B. The Second Claim in the Postconviction Petition: The Asserted Ineffectiveness of Trial Counsel in Not Objecting to Alleged Out-of-Court Statements by Defendant

¶ 62 Herschberger testified that when he spoke with defendant at the scene of the accident, defendant told him he had "wanted to kill himself and the first car that he saw he was going to hit." Later, according to Herschberger, defendant stated he "was sorry for everything that he did."

¶ 63 The postconviction petition alleges that trial counsel rendered ineffective assistance by not objecting to these purported out-of-court statements by defendant. According to the petition, these purported statements "lacked the requisite level of competency and reliability to be admitted," given the severity of defendant's injuries and his present inability to remember the accident.

¶ 64 On the contrary–assuming, for the sake of argument, that admissions of a criminal defendant can be excluded from evidence on the ground of an inadequate "level of competency and reliability"–we find no evidence that defendant's injuries incapacitated him from knowing what he was saying at the scene of the accident. Instead, several witnesses described him as alert and capable of carrying on a coherent conversation, notwithstanding his pain and his difficulty breathing. Consequently, if trial counsel had objected to the extrajudicial confession, the objection would have been unmeritorious and would have been overruled. It is not ineffective assistance to refrain from making an unmeritorious objection. *People v. Nieves*, 193 Ill. 2d 513, 527 (2000).

¶ 65 C. The Third Claim in the Postconviction Petition: Trial Counsel's Asserted Ineffectiveness in Not Offering Expert Testimony on the Effects of Drugs on Driving Ability

¶ 66 The third and final claim in the postconviction petition is that trial counsel rendered ineffective assistance by failing to hire an expert to testify regarding "the deleterious effects of Petitioner's drug use on his ability to drive."

¶ 67 To the extent that defendant's drug use caused him to make decisions that he otherwise would not have made, his voluntary intoxication would have been no defense. See 720 ILCS 5/6-3 (West 2004); *People v. Jackson*, 362 Ill. App. 3d 1196, 1201 (2006). It is not

incompetence to refrain from asserting a defense that the law clearly negates. *Jackson*, 362 Ill. App. 3d at 1201.

¶ 68 As for whether defendant's drug use impaired his motor skills such that he did not deliberately steer the van into Mann's pickup truck, we do not see how any expert could have offered an opinion to that effect. True, it is well known that marijuana and cocaine impair motor skills–but they do not do so indefinitely. After a while, the effects wear off. The record does not appear to reveal how much marijuana and cocaine defendant consumed and how recently he consumed it. Defendant has not attached to his postconviction petition an affidavit by an expert explaining how, despite this dearth of information, the expert could arrive at the conclusion that defendant's motor skills were impaired by marijuana and cocaine when, with the intent to commit suicide, he crashed into Mann's pickup truck. See 725 ILCS 5/122-2 (West 2004) ("The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached."). A defense counsel does not render ineffective assistance by refraining from offering an expert opinion that is based merely on speculation–assuming an expert could be found to offer such an opinion. See *In re R.R.*, 409 Ill. App. 3d 1041, 1045 (2011) ("An expert witness may not base his opinion on conjecture or speculation.").

¶ 69 III. CONCLUSION

¶ 70 For the foregoing reasons, we grant OSAD's motion to withdraw, and we affirm the trial court's judgment.

¶ 71 Affirmed.