12013 IL App (1st) 110046-U

SIXTH DIVISION
MARCH 29, 2013

No. 1-11-0046

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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. 95 CR 31813
	)	
HOWARD CARTER,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment and opinion.

ORDER

¶ 1 *Held*: In a postconviction petition, a claim of actual innocence by a defendant as to a murder conviction, supported by affidavits of two people who did not testify at trial that show the identity of another person as the shooter, is a sufficient showing of the deprivation of a constitutional claim to warrant a third-stage evidentiary hearing.

¶ 2 Defendant Howard Carter appeals the second-stage dismissal of his postconviction petition and asks us to remand for a third-stage evidentiary hearing. Following a bench trial, defendant was convicted of two counts of first-degree murder, one count of attempted murder, and one count of aggravated discharge of a firearm. After hearing factors in aggravation and

mitigation, the trial court sentenced defendant to a term of natural life imprisonment in the Illinois Department of Corrections (IDOC) for the two murder convictions, and a consecutive sentence of 15 years' imprisonment for attempted murder. On March 11, 2002, we affirmed defendant's convictions but modified his 15-year sentence to run concurrently with his life sentence, rather than consecutively. *People v. Carter*, No. 1-99-2230 (2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 3 Defendant then filed a *pro se* petition for postconviction relief, alleging multiple claims of ineffective assistance of trial counsel. Defendant's postconviction petition proceeded to a second-stage review where court-appointed counsel filed an amended petition on behalf of defendant, claiming that he is actually innocent and that his trial counsel was ineffective by preventing him from testifying at trial, and attached affidavits from two eyewitnesses that swore that defendant was not present at the time of the shooting and that someone else had shot the victims. The trial court dismissed the postconviction petition, finding that it was untimely, that it was not meritorious, and that defendant forfeited the issue regarding his right to testify.

¶ 4 On this postconviction appeal, defendant claims that the trial court erred because: (1) defendant's petition made a substantial showing of a claim of actual innocence; and (2) defendant made a substantial showing that his trial counsel was ineffective for not allowing defendant to testify at trial. For the following reasons, we reverse.

¶ 5 BACKGROUND

¶ 6 At trial the State argued in its opening that, on October 22, 1995, defendant raised a gun and fired multiple shots into a vehicle, killing two of the three occupants. During its opening

statement, the defense claimed that defendant did not shoot the victims and that he was incapable of firing a gun due to a hand injury. At trial, the State presented 10 witnesses, including the surviving victim, who identified defendant as the shooter. Defendant exercised his right not to call witnesses. In fact, the trial court asked defendant whether he knew he had a right to testify and whether he was choosing to exercise his right not to testify, and defendant answered affirmatively. In his postconviction petition, defendant claims that his trial counsel prevented him from testifying, and that he is actually innocent, supported by the affidavits of two eyewitnesses who also were not called to testify at trial.

¶ 7 I. Kenneth Beecham's Testimony at Trial

¶ 8 The State called Kenneth Beecham at trial, who testified that he is a former member of the Undertaker Vice Lords street gang. In October 1995, he had been a member of the gang for four years and had achieved the rank of "Prince," which is the second-in-command to the "Chief." The gang was divided into two factions separated by age, with the "Fifth Generation" consisting of members in their mid-20s to 30 years old, and the "Sixth Generation" comprised of members under the age of 21. Beecham was a member of the Sixth Generation. Devol Scott, Beecham's cousin and best friend, was the Chief of the Sixth Generation.

¶ 9 Beecham testified that the Fifth and Sixth Generations were "at war" with each other. Defendant, known as "Duck," was the Chief of the Fifth Generation, but defendant did not bear any ill-will against Beecham. Despite the feud between the two generations, defendant and Scott remained friends and met with each other daily. Defendant frequently spent time near the intersection of Ferdinand Street and Lockwood Avenue in Chicago.

¶ 10 Beecham testified that, in May 1995, defendant was shot multiple times, including in his right hand, and that defendant blamed members of the Sixth Generation for the shooting. After defendant was released from the hospital, he had to exercise his hand until he regained strength, though he was able to shake hands normally. Neither Beecham nor Scott ordered the shooting of defendant. On October 17, 1995, defendant told Beecham that a man known as "Mike-Mike" was the person that had shot him. Mike-Mike, a member of the Sixth Generation, was a friend of both Beecham and Scott.

¶ 11 Beecham testified that, on October 21, 1995, he was accompanied by Allen Williams and Scott at the home of Patrick Davis. At the time, Allen Williams was a Prince of the Fifth Generation, and Patrick Davis was a member of another gang, the "Gangster Disciples." While they were visiting, the three men spoke with defendant, who asked them if they were going to take his side in the dispute with the members of the Sixth Generation. Scott replied that he had nothing to do with defendant's feud, and defendant responded that he was going to kill the Sixth Generation. Defendant asked the three men to help him seek revenge on Mike-Mike, but they refused and then left.

¶ 12 On October 22, 1995, Beecham spent the day with Williams and Scott. Around 7 p.m., they drove to the west side of Chicago and dropped off Beecham at his girlfriend's residence. He later learned that Scott had been shot to death. On October 24, 1995, Beecham and Williams went to the police station to talk with the police. The next day, Beecham became employed and told his fellow gang members that he quit the gang.

¶ 13 II. Allen Williams' Testimony

¶ 14 Allen Williams testified that he had been a member of the Undertaker Vice Lords for 13 years. The gang was divided into generational factions separated by age. Williams belonged to the Fifth Generation, which consisted of members between the ages of 20 and 25. Williams had obtained the rank of Prince in the Fifth Generation, just below the rank of "King." Defendant, known as "Chief Duck," was the leader of the Fifth Generation. Paul Carter, also known as "Weasel," was defendant's brother and a member of the Fifth Generation. Williams' half-brother and friend, Devol Scott, was the King of the Sixth Generation. Kenneth Beecham was a friend of Williams and the Prince of the Sixth Generation. Patrick Davis, also a friend of Williams, was a member of another gang, the Gangster Disciples. Williams did not know Tyrone Randolph.[1]

¶ 15 Williams testified that defendant had a personal feud with a man known as Mike-Mike, a member of the Sixth Generation who had shot defendant in the hand. Defendant wanted revenge against Mike-Mike and felt that the Sixth Generation gang was responsible for the shooting. Williams had heard defendant state on a previous occasion that he was going to kill members of the Sixth Generation. Though members of the Fifth and Sixth Generations had been fighting with each other, other members of the Sixth Generation were not involved in the dispute with defendant.

[1] Randolph initially told the police and testified before a grand jury that he was an eyewitness to the murders, but recanted at trial.

¶ 16 Williams testified that, on October 21, 1995, he, Scott, and Beecham visited Davis's home. The three approached defendant, who was also visiting, and defendant asked them if they were going to help him seek revenge against the Sixth Generation members that were involved in his shooting. Scott replied that he, Williams, and Beecham were not involved in defendant's feud. In response, defendant shook his head and said, "Alright, that's cool."

¶ 17 Williams testified that, at 8 p.m. the next day, he and Scott were in their neighborhood near Cicero Avenue and Quincy Street in Chicago, when they learned that defendant's brother had been shot and killed. Scott drove them in Williams' mother's vehicle to pick up Davis at his home. Davis entered the vehicle and sat in the backseat. The three men wanted to offer their condolences to defendant in light of his brother's death, so Scott drove them to the intersection of Ferdinand Street and Lockwood Avenue, where they encountered a man called "Romy," a member of the Fifth Generation gang. Williams asked Romy where they could find defendant, and Romy pointed them to an area in the middle of the block. As Scott drove drown Ferdinand Street, Williams observed defendant standing near the street with five or six fellow gang members.

¶ 18 Williams testified that Scott drove within 15 feet of defendant, who then raised a 9-millimeter pistol and opened fire on the vehicle. Williams ducked in the passenger's seat and heard several gunshots as Scott drove away from defendant. After a short distance, the vehicle crashed into the back of a van and came to a stop. When Williams attempted to pull Scott to the floor of the vehicle and into his lap, he observed bullet holes in Scott's head and neck. As Williams attempted to exit the vehicle, he heard several more shots being fired into the

passenger-side door and window, so he shielded himself underneath the dashboard. Once the gunfire stopped, three men pulled Williams from the vehicle and told him that the gunman was gone. The shooting took place over a span of four to six minutes, and more than 10 gunshots were fired. The police arrived at the scene two minutes after the shooting stopped. Williams refused to talk to the police at first because he felt betrayed and angry and wanted to personally seek revenge on defendant.

¶ 19 Williams testified that two days after the shooting, he decided that the right thing to do was to talk to the police, so he and Beecham drove to the police station together. Williams told detectives that Scott was driving him and Davis on Laramie Avenue, when they observed defendant and several others standing near Ferdinand Street. Williams told Scott to drive the vehicle over to where the men were gathered. As the vehicle approached, defendant jumped back about two feet from the vehicle, raised a nine-millimeter gun, and fired several shots at the vehicle from a distance of 15 feet.

¶ 20 III. Identification Testimony of Tyrone White and Patricia Scott

¶ 21 Tyrone White testified that Patrick Davis was his cousin, and that he had last observed him alive on October 20, 1995. A few days later, White learned that his cousin was dead. Patricia Scott testified that Devol Scott was her son, and that she had last observed him alive on October 22, 1995. Later that evening, the police told her that her son had died.

¶ 22 IV. Detective Richard Maher's Testimony

¶ 23 Detective Richard Maher testified that he is a detective with the Chicago police department and has been a policeman for 12 years. On October 22, 1995, he was assigned to

investigate a homicide near the intersection of Quincy Street and Cicero Avenue in Chicago. The victim in that case was defendant's brother, Paul Carter. Later that evening, Maher was assigned to investigate another homicide on the 5200 block of West Ferdinand Street. When Maher arrived at the crime scene at 9:10 p.m., he observed two ambulances, each containing one victim from the shooting. Maher identified one of the victims as Devol Scott. The other victim was identified the next day as Patrick Davis. Maher learned that a witness, Allen Williams, had been transported from the scene to the Area 5 Detective Division.

¶ 24 Maher testified that he inspected the crime scene and found 11 spent shell casings and a bullet fragment from a 9-millimeter gun. Further down the street where a vehicle had crashed, he found seven additional 9-millimeter shell casings. He observed a bullet hole in the windshield of the vehicle, and all of the side windows except the front passenger-side had been shattered. Maher inspected the inside of the vehicle and found five fired bullets lodged into its interior.

¶ 25 Maher testified that he interviewed Williams at the Area 5 Detective Division later that evening, and Williams told him that he did not observe who shot at the vehicle. On the morning of October 25, 1995, Williams returned to the police station and Maher interviewed him a second time. Williams changed his story and told Maher that he did in fact observe the shooter, and identified him as a man known by the nickname "Duck." Maher presented Williams with a photograph of defendant and Williams identified defendant as the shooter. After he interviewed Williams, Maher drove to the Forest Park neighborhood in Chicago and arrested defendant.

¶ 26 Maher testified that Detective Carothers told him that a man in custody, Tyrone Randolph, was an eyewitness to the shooting. Maher interviewed Randolph later that evening,

and Randolph told him that he observed two men shooting at the vehicle and that one of the shooters was defendant.

¶ 27 V. Officer Jackie Campbell's Testimony

¶ 28 Officer Jackie Campbell testified that she was an officer in the Chicago police department. On the afternoon of October 24, 1995, the police arrested Tyrone Randolph for a drug offense and brought him to the 15th District police station. As Randolph was sitting in an interview room, he called out to Campbell and told her that he had information about two murders. Randolph described the location of the shootings, and Campbell recognized the murders as the two that occurred on October 22, 1995. She told Randolph that she could not do anything for him, but that she would contact a detective to speak with him. She spoke with Detective Carothers and told him that there was a suspect in custody at the police station that claimed to have information about two murders.

¶ 29 VI. Detective Carothers' Testimony

¶ 30 Detective Carothers testified that he has been a detective with the Chicago police department for three years and was assigned to investigate the murder of defendant's brother. On October 24, 1995, Carothers received a telephone call from Campbell, and she told him that a man named Tyrone Randolph was in custody on a drug charge and that he claimed to have information about the shooting. Carothers told her that he would drive over to the police station to interview the suspect.

¶ 31 Carothers testified that he arrived at the 15th District police station to speak with Randolph later that evening. Randolph told him that he had information regarding the murder of

defendant's brother, and that he was an eyewitness to the shooting deaths of Scott and Davis. Randolph asked Carothers if he could arrange a deal on his pending charges, but Carothers told him that he needed to hear the information first. Randolph then told Carothers that he had witnessed gunmen fatally shoot defendant's brother, who Randolph knew as Weasel, in the west alley of Cicero Avenue near its intersection with Quincy Street. He also told Carothers that, later that night, he observed defendant, known as Duck, fire several shots at a vehicle near the intersection of Ferdinand Street and Lockwood Avenue.

¶ 32 Carothers testified that, after this initial conversation, he took Randolph back to an interview room so he could provide a more thorough accounting of the events. Also present during the interview were Assistant State's Attorney James Sanford and Detective John McMurray, who was assigned to investigate the murder of defendant's brother. As Randolph described the shootings in more detail, Carothers took notes and reported the information in a general progress report. He referred to Randolph as a confidential informant because Randolph was concerned that, as a high-ranking member of the "Mafia Insane" street gang, he could face retaliation for providing information to the police.

¶ 33 Carothers testified that Randolph stated that around 7 p.m. on October 22, 1995, he observed defendant's brother running down the block of 210 South Cicero Avenue. A person following him raised a gun and shot at him. Another person appeared, and both offenders walked up to defendant's brother and shot him numerous times as he lay on the ground.

¶ 34 Carothers testified that Randolph told him that, after witnessing the murder, he went looking for defendant to find out if he had heard about his brother's death. Randolph found

defendant at the intersection of Ferdinand Street and Lockwood Avenue. Defendant was with several other black men, but the only person he recognized other than defendant was a man named “Von.” After he spoke with defendant, a vehicle pulled up to defendant and Randolph heard him say, “I’m going to get those n***s,” and “it's going to get ugly now.” Defendant then raised a gun and fired numerous shots at the vehicle. Randolph did not describe the type of gun, and said that he left the scene during the shooting.

¶ 35 Carothers testified that Randolph promised that he would seek out additional information about the other shooting once he learned the names of the other men who were present at the scene. However, Randolph requested to be released first because he could not learn any new information while in custody. Carothers did not grant Randolph’s request, and Randolph then told him that he refused to provide any further information about either of the shootings. Randolph again asked for a deal on his pending charges, and Carothers told him that he could not discuss it.

¶ 36 VII. Assistant State’s Attorney Mike Goldberg’s Testimony

¶ 37 Assistant State’s Attorney (ASA) Mike Goldberg testified that he and Carothers met with Randolph on October 25, 1995. Goldberg Mirandized Randolph who repeated the information he had about the two murders. Goldberg memorialized the information in a written statement and read the statement back to Randolph to make sure it was accurate, and all three men signed it. Randolph told Goldberg that the police treated him fine and that they did not threaten him to obtain the statement.

¶ 38 VIII. Assistant State's Attorney James Sanford's Testimony

¶ 39 ASA James Sanford testified that he was assigned to Judge Porter's[2] courtroom in 1996 and was the first chair for the homicide trial of defendant's brother. The offenders in that case were Dante Branch and Alfonso Caldwell. Sanford was not assigned to defendant's case, which was in Judge James D. Egan's courtroom with a different ASA. Sanford learned from Officer Carothers' general progress notes that a confidential informant had provided information about the murder of defendant's brother.

¶ 40 In the fall of 1996, the attorneys representing Branch and Caldwell filed a motion for the State to disclose the name of the confidential informant. Sanford then met with Carothers, who told him that Randolph was the informant. Sanford then arranged for an interview with Randolph, who was still in custody. Carothers and Detective John McMurray, who was assigned to investigate the Paul Carter homicide, were also present for the interview.

¶ 41 Randolph repeated the same information regarding the murders that he had previously told to Carothers. Sanford had a limited discussion with Randolph about making a deal, and he offered to drop one of Randolph's three pending drug cases in exchange for his testimony concerning the shooting death of defendant's brother. No offer was made to Randolph to testify in defendant's case. The interview had ended abruptly when Sanford told Randolph that he could not drop the drug charge until after Randolph testified.

[2] Judge Porter's first name does not appear in the appellate record.

¶ 42 Sanford later arranged a second meeting with Randolph in an attempt to convince him to accept his offer to drop the drug charge after Randolph testified. However, Randolph would not even speak to Sanford. The murder case went to trial and Randolph did not testify. In April 1997, Randolph pled guilty to all three of his pending drug charges and was sentenced to 12 years in IDOC.

¶ 43 IX. Tyrone Randolph's Testimony

¶ 44 At trial, Tyrone Randolph testified that he did not know defendant. Randolph was a member of the Mafia Insane Vice Lords, which is a faction of the Vice Lords street gang. The Mafia Insane Vice Lords are not affiliated with the Undertaker Vice Lords, and the two gangs were feuding with each other. Despite testifying that he did not know defendant, Randolph testified that he knew defendant was a member of the Fifth Generation of the Undertaker Vice Lords gang. Randolph had also observed defendant in jail, and he identified defendant in court.

¶ 45 The State then refreshed Randolph about his grand jury testimony: Randolph testified before a grand jury that, at 9 p.m. on October 22, 1995, he was walking down Ferdinand Street in Chicago when he observed defendant exiting a vehicle with another man. Randolph approached defendant and informed him that his brother, Weasel, had been murdered. Defendant responded that he had heard the news and that he was "fitting to address the business." Randolph then left defendant and continued walking down Ferdinand Street. At that time, he observed a vehicle drive up to defendant. Both defendant and the other man pulled out black 9-millimeter guns and began shooting at the oncoming vehicle. Randolph observed the shooting for 20 seconds until he left the scene. Randolph was treated well and not threatened by the State's Attorney or the police.

¶ 46 At trial, Randolph testified at trial that he remembered his grand jury testimony, but claimed that his story was a lie. Randolph did not remember being near the intersection of Ferdinand Street and Lockwood Avenue on October 22, 1995, and did not know anything about the shooting.

¶ 47 Randolph testified that ASA Garfinkel[3], who presented him to the grand jury, threatened him. The State presented Randolph with the written statement that he gave to ASA Goldberg on October 25, 1995. Randolph testified that he did not recognize his signature on the statement, and denied ever reading it or knowing what it said.

¶ 48 Randolph testified that he was currently serving 12 years for multiple drug offenses. One of the offenses resulted from an incident on October 24, 1995. That day, Randolph was arrested and taken to the 15th District police station, where Detective Curley[4] questioned him. Randolph did not tell Curley anything about defendant or defendant's brother. Curley told him that the police would drop the drug case against him if he helped them. Curley asked Randolph about the murders in his area because he knew that Randolph was the Chief of the Mafia Insane Vice Lords. Even though Randolph did not have any information on the shootings, he accepted Curley's offer. Curley then placed cocaine in front of Randolph and told him that he would face another drug charge if he did not provide Goldberg an eyewitness account of the shootings.

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[3] ASA Garfinkel's first name does not appear in the appellate record.

[4] Detective Curley's first name does not appear in the appellate record.

Curley then told Randolph exactly what to say and instructed him on how to answer the questions.

¶ 49 Randolph testified that he had lied to the grand jury because Curley threatened to falsely charge him with possession of six ounces of cocaine if he did not cooperate. After he testified before the grand jury, Randolph told Curley and the ASA that he would not lie anymore. At that point, he chose to reject their offer of dropping all of his pending cases in exchange for testifying to a fabricated story about the shootings. Instead, Randolph chose to plead guilty and serve a 12-year sentence.

¶ 50 Detective Curley did not testify at trial. The parties stipulated to and admitted the following into evidence: (1) the transcript of Randolph's testimony before the grand jury; (2) the postmortem examination reports and medical examiner's photos of Scott and Davis; and (3) all of the bullets recovered from both bodies. The parties additionally stipulated that the two bullets recovered from Scott's body, the five bullets recovered from Davis's body, and one bullet recovered from the scene of the crime were all 9-millimeter bullets, but, the results of the Illinois State police crime lab's tests were inconclusive as to whether one or more guns were used in the shooting because the police did not recover a gun to compare with the bullets.

¶ 51 The State rested, and the trial court denied defendant's motion for a directed finding. The defense then rested. The trial court asked defendant whether he understood that he had a right to testify and whether he was exercising his right not to testify, and he replied affirmatively. The following exchange occurred:

> "THE COURT: *** Mr. Carter, your attorney is stating that you are resting. Do you understand you have a right to testify? You also have the right not to testify?
>
> DEFENDANT: Yes, your Honor.
>
> THE COURT: And you are exercising your right not to testify?
>
> DEFENDANT: Yes, I am, your Honor."

¶ 52 X. Closing, Conviction, and Sentencing

¶ 53 During closing arguments, the defense claimed that neither Williams' nor Randolph's testimony was credible. Following closing arguments, the trial court found defendant guilty on both counts of first-degree murder, one count of attempted first-degree murder, and one count of unlawful discharge of a firearm. After considering factors in aggravation and mitigation, the trial court sentenced defendant a term of natural life imprisonment for the two murders, and a consecutive term of 15 years' imprisonment for the attempted murder.

¶ 54 XI. Postconviction Proceedings

¶ 55 Defendant appealed his convictions and sentence, claiming that the State failed to prove him guilty beyond a reasonable doubt, and that his sentence was excessive and violated his due process rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). We affirmed defendant's convictions but modified his consecutive sentences to run concurrently. In affirming defendant's convictions, we found that "the trial court considered Randolph's credibility as well as the circumstances surrounding his testifying and determined that the grand jury testimony was

believable while the in-court testimony was not. The trial court also determined that Williams' explanation for changing his story was reasonable. We agree." *People v. Carter*, No. 1-99-2230 (2002) (unpublished order pursuant to Supreme Court Rule 23). Defendant's petition for leave to appeal was denied on October 2, 2002. *People v. Carter*, 201 Ill. 2d 580 (2002) (table).

¶ 56 As noted, on July 28, 2005, defendant filed a *pro se* petition for postconviction relief. Defendant's postconviction petition proceeded to a second-stage review, and court-appointed counsel filed an amended petition on March 18, 2010. In his amended petition, defendant claimed that trial counsel was ineffective for not allowing him to testify at trial. Defendant claims that he would have testified that he was not present at the time of the shooting and that he was incapable of firing a gun due to a hand injury. Defendant also claimed actual innocence based on affidavits of two newly discovered eyewitnesses, Antonio McDowell and Vaughan Peters, who swore that defendant was not present at the time of the shooting and that another man had shot at the victim's vehicle. Defendant also claimed that he was not culpably negligent for filing his petition late because he relied on counsel on direct appeal to either file his petition for him or provide him with filing deadlines.

¶ 57 In his affidavit, McDowell swore that he observed a man known as "Volli" shoot the victims, and that defendant was not present at the time of the shooting. In 1995, McDowell was a member of the Undertaker Vice Lords gang, and he knew defendant, Williams, Scott, Davis, and Randolph. On October 22, 1995, McDowell spent time with defendant, then with Scott, and later with Scott and Davis at Davis's home. Later that evening, McDowell was standing with several other members of the Undertaker Vice Lords gang near the intersection of Ferdinand Street and

Lockwood Avenue. He did not observe defendant or Randolph, who was a member of the rival Mafia Insane Vice Lords gang, on the corner.

¶ 58 McDowell observed Scott in the front seat of vehicle stopped on Ferdinand Street, but he was unable to observe the other passengers. As Scott drove the vehicle toward the group of men, Volli appeared from behind a tree, pulled a bandana up to cover his face, and fired at the vehicle several times. McDowell fled during the shooting, but later came back to determine who had been shot. He never told the police what he observed. Sometime later, McDowell was convicted of first-degree murder, attempted murder, and aggravated vehicular hijacking – all unrelated to the shooting in the instant case – and was sentenced to prison terms of 59, 29, and 15 years, respectively. In 2003 or 2004, he learned that defendant had been convicted of the murders of Scott and Davis. While he was incarcerated, McDowell met defendant at a prayer meeting at prison where both were confined and told defendant that he observed Volli shoot the victims.

¶ 59 Vaughan Peters swore in his affidavit that defendant was not present during the shooting. Also, in 1995, Peters was a member of the Undertaker Vice Lords. On October 22, 1995, he learned that defendant's brother had been killed. Peters then drove to Ferdinand Street between Lockwood Avenue and Laramie Avenue, but defendant was not there when he arrived. While he was at Ferdinand Street and Lockwood Avenue, Peters called defendant to offer his

condolences.[5] Defendant was at the home of his girlfriend, Lyda, during the telephone conversation.

¶ 60 Peters observed several other gang members standing on the corner, including Volli, who was drunk and "acting crazy." Randolph, a member of the rival Mafia Insane Vice Lords gang, was not on the street. As Peters walked away from the group of men, he heard a gunshot. He turned and observed Volli holding a gun.[6] As Peters ran away, he heard several more shots being fired, and he left the neighborhood. A day or two later, Peters learned that Scott had been shot to death on Ferdinand Street and that defendant had been arrested for the murder. Peters then left town, and he did not talk with the police about what he observed because he thought that defendant would be released since "everybody knew" that defendant was not there. Peters was incarcerated in 1996 and released in 2005. Peters is currently serving a four-year sentence for unlawful possession/use of a weapon by a felon. A photograph of Volli was attached to both affidavits.

¶ 61 The trial court dismissed defendant's postconviction petition on December 9, 2010, finding that the petition was untimely and that defendant forfeited the issue regarding his right to testify because he should have raised the issue on direct appeal. The trial court also found that defendant's claim for ineffective assistance of counsel was without merit because he told the trial

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[5] Peters did not state whose telephone he used to place the call, or whether it was a cellular telephone or a landline.

[6] Peters did not state whether he observed Volli fire the gun.

court that he understood and was exercising his right not to testify. Additionally, the trial court found that defendant's claim of actual innocence was without merit because neither affidavit constituted newly discovered evidence of actual innocence. Defendant now appeals, asking us to remand for a third-stage evidentiary hearing.

¶ 62 ANALYSIS

¶ 63 On appeal, defendant claims that the trial court erred in dismissing his postconviction petition at the second stage and asks us to remand for a third-stage evidentiary hearing. Defendant claims that he is actually innocent and that his trial counsel was ineffective for preventing him from testifying at trial. For the following reasons, we reverse and remand for an evidentiary hearing.

¶ 64 I. Stages of Postconviction Proceeding

¶ 65 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2008)) provides that a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). To be entitled to postconviction relief, a defendant bears the burden of establishing that a substantial deprivation of his constitutional rights occurred at his original trial. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004); 725 ILCS 5/122-1(a) (West 2008).

¶ 66 In noncapital cases, the Act provides for three stages. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it, if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the

petition within that 90-day period, the trial court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2008); *Pendleton*, 223 Ill. 2d at 472.

¶ 67 If the petition survives initial review, the process moves to the second stage, where the trial court appoints counsel for the defendant when a defendant cannot afford counsel. 725 ILCS 5/122-4 (West 2010). Appointed counsel may make any amendments that are "necessary" to the petition previously filed by the *pro se* defendant. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). After defense counsel has amended the petition, the State may file a motion to dismiss or an answer. 725 ILCS 5/122-5 (West 2010); *Pendleton*, 223 Ill. 2d at 472. "If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage." *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998).

¶ 68 To advance to the third stage, a petitioner must make a "substantial showing," which can be accomplished by relying on the record in the case or by supplying supporting affidavits. *Coleman*, 183 Ill. 2d at 381. The trial court is foreclosed from engaging in any fact-finding, because all well-pleaded facts must be taken as true at the second stage of the proceedings. *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009) (citing *Coleman*, 183 Ill. 2d at 380-81). "[W]hen a petitioner's claims are based upon matters outside the record, the Postconviction Act does not intend such claims be adjudicated on the pleadings." *People v. Snow*, 2012 IL 110415, ¶ 15.

¶ 69 If the trial court denies the State's motion to dismiss, or if the State chooses not to file a dismissal motion, then the State "shall" answer the petition. 725 ILCS 5/122-5 (West 2010); *Pendleton*, 223 Ill. 2d at 472. Unless the trial court allows further pleadings (725 ILCS 5/122-5

(West 2010)), the proceeding then advances to the third stage, which is an evidentiary hearing. 725 ILCS 5/122-6 (West 2010); *Pendleton*, 223 Ill. 2d at 472-73. An evidentiary hearing is held only where the allegations of the postconviction petition make a substantial showing that a defendant's constitutional rights have been violated and those allegations are supported by affidavits, records, or other evidence. *Waldrop*, 353 Ill. App. 3d at 249. The affidavits that accompany a postconviction petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting a defendant's allegations. *Waldrop*, 353 Ill. App. 3d at 249. At the evidentiary hearing, the trial court “may receive proof by affidavits, depositions, oral testimony, or other evidence,” and “may order the [defendant] brought before the court.” 725 ILCS 5/122-6 (West 2010).

¶ 70 In the case at bar, the trial court dismissed defendant’s postconviction petition at the second stage. Defendant appeals and asks us to remand for a third-stage evidentiary hearing.

¶ 71 II. Standard of Review

¶ 72 The propriety of a dismissal at the second stage is a question of law that we review *de novo*. *People v. Simpson*, 204 Ill. 2d 536, 547 (2001). The *de novo* standard of review applies when the issue presented is purely a question of law. *People v. Chapman*, 194 Ill. 2d 186, 217 (2000). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 73 III. Actual Innocence

¶ 74 The wrongful conviction of an innocent person violates due process under the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 2) and, thus, a defendant can raise in a

postconviction proceeding a freestanding claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009); *People v. Washington*, 171 Ill. 2d 475, 489 (1996). To assert a claim of actual innocence based on newly discovered evidence, a defendant must show that the evidence is: (1) newly discovered, (2) material and not merely cumulative, and (3) capable of changing the result on retrial. *Ortiz*, 235 Ill. 2d at 333-34. In his postconviction petition, defendant claims that he is actually innocent based on the affidavits of two witnesses who swore that he was not the shooter. The State claims that the affidavits do not contain newly discovered evidence and that they would not change the result on retrial. We will consider each element in turn.

¶ 75 A. Newly Discovered Evidence

¶ 76 As to the first element, defendant claims that the trial court erred when it found that "[n]either affidavit amounts to newly discovered evidence of actual innocence." Our supreme court has defined newly discovered evidence as "evidence [1] that has been discovered since the trial and [2] that the defendant could not have discovered sooner through due diligence." *Ortiz*, 235 Ill. 2d at 334. Defendant argues that the affidavits are newly discovered because he could not have known who witnessed the shooting because he was not there during the crime. The State claims that defendant knew or should have known that McDowell and Peters observed the shooting because he knew them personally.

¶ 77 The information contained in the affidavits, if true, was newly discovered evidence because defendant did not know McDowell and Peters had witnessed the shooting since he was not there at the time. Both witnesses corroborate defendant's version of the events and swore that

defendant was not present at the time of the shooting. Peters further confirmed defendant's alibi when he stated that defendant was at his girlfriend's home before the murders were committed. Furthermore, there is no indication that the witnesses spoke with defendant about what they observed. Neither affiant spoke with the police about the shooting. McDowell was later incarcerated and did not learn that defendant had been convicted until 2003 or 2004. Peters left town after the shooting and was incarcerated from 1996 until 2005.

¶ 78 The State claims that, though defendant found a new source in McDowell and Peters, their affidavits contain evidence that defendant knew at the time of trial. The State argues evidence is not newly discovered when it presents facts already known to defendant prior to trial, even though the source of those facts may have been unknown, unavailable, or uncooperative. *People v. Jones*, 399 Ill. App. 3d 341, 346 (2010). In support, the State cites *People v. Harris*, 206 Ill. 2d 293 (2002), and *People v. Davis*, 382 Ill. App. 3d 701 (2008). In *Harris*, the defendant, convicted of murder, claimed actual innocence in his postconviction petition, supported by the affidavits of his brothers who claimed that he was with them at home watching a movie at the time of the shooting. *Harris*, 206 Ill. 2d at 300-01. Our supreme court found that this evidence was not newly discovered because the defendant was the source of the information and knew it at the time of trial. *Harris*, 206 Ill. 2d at 301. In *Davis*, the defendant challenged his conviction in a postconviction petition in which he claimed actual innocence based on the affidavit of a witness to the defendant's arrest. *Davis*, 382 Ill. App. 3d at 712. The appellate court found that the affidavit was not newly discovered because the defendant knew prior to trial that the witness was present at his arrest. *Davis*, 382 Ill. App. 3d at 712.

¶ 79 However, *Harris* and *Davis* are distinguishable because the defendants in those cases knew about the eyewitnesses prior to trial. In the case at bar, the affidavits support defendant's claim that he did not know who witnessed the shooting because he was not there. As stated, the affidavits do not indicate that defendant knew that McDowell or Peters witnessed the shooting, and instead the witnesses corroborated defendant's alibi because they swore he was not present at the crime scene and they actually provided the name of the shooter.

¶ 80 Defendant also claims that he could not have discovered the witnesses sooner through due diligence. In support, defendant cites our supreme court's holding in *People v. Ortiz*, 235 Ill. 2d 319 (2009). In that case, the defendant was convicted of first-degree murder based on the testimony of two eyewitnesses. *Ortiz*, 235 Ill. 2d at 322. The defendant claimed actual innocence in his postconviction petition, which was supported by the affidavit of a witness who swore that the defendant did not shoot the victim and actually gave the name of the shooter. *Ortiz*, 235 Ill. 2d at 336. In his affidavit, the witness stated that the defendant could not have observed him at the crime scene because he was on the other side of the park. *Ortiz*, 235 Ill. 2d at 334. After the murder, the witness moved out of state and did not come forward with this information until 10 years after the defendant's trial. *Ortiz*, 235 Ill. 2d at 334. The Illinois Supreme Court found that the defendant could not have discovered the evidence any sooner through due diligence. *Ortiz*, 235 Ill. 2d at 334.

¶ 81 In the instant case, defendant could not have known who was on Ferdinand Street at the time of the shooting because he claims he was not there, which is corroborated by the affiants' statements that they did not observe defendant at the crime scene that evening. Moreover, the

evidence does not indicate that defendant had a reason to believe that McDowell or Peters had witnessed the crime. Both witnesses swore that they did not talk to the police about the murder, and the affidavits do not indicate that they spoken with defendant after the shooting. Nor did the witnesses feel they had a reason to tell the police about defendant's innocence. McDowell stated that he did not learn defendant had been accused of the murder until 2003 or 2004, and Peters stated that he thought defendant would be released because many people knew that he was not at the crime scene. Furthermore, both affiants indicate that they were out of touch for some period after the shooting. McDowell stated that he was later incarcerated, though he does not say when he was locked up. Peters left town a day or two after the shooting, and was subsequently incarcerated from 1996 until 2005.

¶ 82 The State claims that *Ortiz* is distinguishable because defendant knew the substance of the affidavits in the case at bar. However, the affidavits do not indicate that defendant knew who was present at the crime scene, and instead support his claim that he was not there. The State also argues that defendant could have discovered the evidence sooner through due diligence because defendant knew the men personally, they were in the same gang as defendant, and they had both spoken with defendant on the day of the shooting. As such, the State argues that the witnesses were known to defendant and were available to be called at trial.

¶ 83 However, though defendant may have known both men personally, he claims he had no reason to believe that they had witnessed the shooting. McDowell stated that he met with defendant on the day of the murders, but that the two had parted ways before the shooting and defendant did not accompany him on Ferdinand Street. The appellate record does not indicate

that defendant knew where McDowell was heading that evening, nor did the two men speak with each other until they met in prison several years later. Peters stated that, before the shooting, he called defendant while he was at the corner of Ferdinand Street and Lockwood Avenue.

¶ 84 However, the affidavit does not indicate that defendant knew where Peters was calling from[7] or that the two spoke afterwards. Peters left town a day or two after the shooting and was incarcerated from 1996 until 2005. Also, neither witness spoke with the police about what he observed. We cannot say that defendant could have discovered through a reasonable exercise of due diligence that McDowell and Peters witnessed the crime.

¶ 85 This case is similar to *People v. Lofton*, 2011 IL App (1st) 100118. In *Lofton*, the defendant filed a postconviction petition challenging his murder conviction. *Lofton*, 2011 IL App (1st) 100118, ¶ 1. Similarly, in his petition, the defendant claimed that he was actually innocent based on an affidavit of a witness who claimed that someone else shot the victims. *Lofton*, 2011 IL App App (1st) 100118, ¶¶ 21-22. The appellate court found that the evidence was newly discovered because the defendant maintained that he was not at the crime scene and did not know who witnessed the crime. *Lofton*, 2011 IL App (1st) 100118, ¶ 37. Similarly, in the instant case, defendant claims that he had no way of knowing who witnessed the murders because he was not

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[7] In addition, Peters' affidavit does not indicate whether he was at a payphone or at a landline in a house, or on a cellular telephone. Since this was in 1995, we cannot assume that he was on a cellular telephone, as opposed to on a landline inside a house located at the corner.

there during the shooting. Thus, as in *Lofton*, the record here supports defendant's claim that the affidavits are newly discovered.

¶ 86 B. Material and Noncumulative

¶ 87 Regarding the second factor, the State does not argue in its brief against defendant's contention that the affidavits provide material and not cumulative evidence. Our supreme court has held that "[e]vidence is considered cumulative when it adds nothing to what was already before the jury." *Ortiz*, 235 Ill. 2d at 335. See also *People v. Molstad*, 101 Ill. 2d 128, 135 (1984). Testimony is not cumulative when it would create new questions in the mind of the trier of fact. *People v. Ortiz*, 385 Ill. App. 3d 1, 11 (2008); *People v. Williams*, 392 Ill. App. 3d 359, 369 (2009).

¶ 88 Viewing the facts alleged in defendant's petition as true, we agree that McDowell's and Peters' affidavits, which stated that they observed Volli shoot the victims and that defendant was not present at the crime scene, were material evidence and not cumulative. Both affidavits concern the ultimate issue of whether defendant was the shooter. There was no other testimony at trial that defendant was not the shooter. The only witness who testified at the trial that defendant was the shooter was Williams, who initially told the police that he did not observe the crime. Randolph testified to a grand jury that defendant was the shooter, but he recanted his testimony at trial. There was no physical evidence presented at trial to implicate defendant. Thus, the affidavits are material to defendant's claim of actual innocence, and are not cumulative.

¶ 89 C. Capable of Changing the Result on Retrial

¶ 90 As to the third element, the evidence in the affidavits is of such a conclusive nature that it would probably change the result on retrial. *People v. Harris*, 206 Ill. 2d 293, 301 (2002). The testimony of Williams and Randolph was crucial to the trial court's finding of guilt beyond a reasonable doubt. Williams testified that he observed defendant shoot at the vehicle, though he initially told the police that he did not observe the crime. Randolph testified to a grand jury that he observed defendant and another man shoot the victims, but he later recanted at trial and testified that he did not observe the crime. The affidavits of McDowell and Peters not only contradict the testimony of Williams and Randolph, but also identify a different shooter, by name and photograph. In his affidavit, McDowell stated that he observed Volli shoot the victims and that defendant was not there during the shooting. Peters additionally swore that he observed Volli holding a gun at the time of the shooting and that defendant was not present at the crime scene. Taking the facts alleged in defendant's petition as true, we find they both raise a question concerning Williams and Randolph's credibility and present an arguably valid defense, which can only be assessed at a third-stage evidentiary hearing.

¶ 91 We again draw a comparison of this case to our supreme court's holding in *Ortiz*, which found that the defendant in that case was entitled to a new trial because the newly discovered witness's testimony directly contradicted the recanted testimony of two witnesses at trial. *Ortiz*, 235 Ill. 2d at 336-37. The Illinois Supreme Court found that the newly discovered evidence would be capable of changing the result on retrial because "the evidence of defendant's innocence would be stronger when weighed against the recanted statements of the State's eyewitnesses,"

and that, on retrial, "[t]he fact finder will be charged with determining the credibility of the witnesses in light of the newly discovered evidence and with balancing the conflicting eyewitness accounts." *Ortiz*, 235 Ill. 2d at 337. Our supreme court noted that " 'this does not mean that [defendant] is innocent, merely that all of the facts and surrounding circumstances, including the testimony of [defendant's witnesses], should be scrutinized more closely to determine the guilt or innocence of [defendant].' " *Ortiz*, 235 Ill. 2d at 337 (quoting *Molstad*, 101 Ill. 2d at 136 (finding that the defendant's newly discovered evidence of five codefendants, who would testify that he was not present at the crime scene, would probably change the result on retrial when balanced against the testimony of a single eyewitness implicating the defendant)).

¶ 92 In the instant case, defendant was found guilty based on the testimony of two eyewitnesses: one who recanted at trial, and another who changed his story after first telling the police that he did not observe the crime. Defendant did not take the stand, nor did he call any witnesses or admit evidence of his innocence. On retrial, defendant could call two new witnesses that would testify that he was not present at the scene of the crime, and that Volli was the shooter. Additionally, Peters would testify that defendant was at his girlfriend's home when they spoke on the telephone prior to the shooting. Defendant claims that he would testify to this alibi on retrial, and also explain his hand injury and how it made him incapable of firing a gun, a claim that he could corroborate with the medical records he attached to his petition. This new evidence of defendant's innocence is much stronger when weighed against the State's witnesses, and defendant's case would be scrutinized more closely to determine his innocence. Thus, defendant's newly discovered evidence would probably change the result on retrial.

¶ 93 The State claims that the affidavits would at most impeach Williams' and Randolph's testimony, and that such impeachment could not change the result at a new trial. Mere impeachment evidence will typically not be of such a conclusive character as to justify postconviction relief. *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008); *People v. Gillespie*, 407 Ill. App. 3d 113, 130 (2010).

¶ 94 The State compares this case to *People v. Morales*, 339 Ill. App. 3d 554 (2003). In *Morales*, the trial court convicted the defendant of murder based on the testimony of two eyewitnesses who identified the defendant in a photographic array. *Morales*, 339 Ill. App. 3d at 557. The defendant's conviction and sentence were affirmed on direct appeal, and the defendant's first and second *pro se* postconviction petitions were dismissed. *Morales*, 339 Ill. App. 3d at 558-59. In dismissing the defendant's second petition, the trial court found that the affidavits were contradictory, insufficient to exonerate the defendant, and contained inadmissible hearsay. *Morales*, 339 Ill. App. 3d at 559. On appeal, the appellate court found that that two of the affidavits were unpersuasive, and that four of the affidavits contained inadmissible hearsay. *Morales*, 339 Ill. App. 3d at 560. The State argues that *Morales* is instructive because, in the case at bar, (1) the affidavits contradict the witnesses at trial, (2) the affidavits do not provide an alibi for defendant, and (3) neither affiant's statements are credible because they are both incarcerated members of the same gang as defendant. However, the affiants did not state whether they belonged to the same faction as defendant and, as noted at trial, the two factions were at war.

¶ 95 *Morales* is distinguishable because, in the case at bar, the affidavits contained new evidence from witnesses who did not testify at trial. While the affidavits are, as the State claims,

contrary to the witnesses' testimony at trial, and will have the effect of discrediting Williams and Randolph, they are also exculpatory and support defendant's claim of actual innocence. Where a witness statement is both exonerating and contradicts a State witness, it can be capable of producing a different outcome on retrial. *Ortiz* 235 Ill. 2d at 336–37. Accordingly, Peters' and McDowell's testimony is capable of changing the result on retrial. The trial court can make that determination by conducting an evidentiary hearing. In addition, the credibility determination that the State seeks is a proper consideration for a third-stage evidentiary hearing. As Illinois courts have held, the trial court is foreclosed from any fact-finding at the second stage but is free to make credibility determinations at a third-stage evidentiary hearing. *Wheeler*, 392 Ill. App. 3d at 308; *Coleman*, 183 Ill. 2d at 380-81. Thus, we remand for a third-stage evidentiary hearing so that the trial court may make the credibility determinations that both parties seek.

¶ 96 We observe that Randolph testified at trial that he lied before the grand jury because Detective Curley threatened him with a false cocaine prosecution if he did not lie. Immediately after his grand jury testimony, Randolph told Detective Curley that he would not lie again. The State failed to call at trial the one witness who could have completely discredited Randolph's testimony about the police's coercive behavior prior to the grand jury, namely, Detective Curley. Without his testimony, Randolph's testimony about being threatened with a false cocaine prosecution went entirely unrefuted. This is yet another reason why we believe that an evidentiary hearing is warranted.

¶ 97 IV. Ineffective Assistance of Counsel

¶ 98 Defendant next claims that his trial counsel was ineffective for preventing him from testifying at trial. A claim of ineffective assistance of counsel is judged according to the two-prong, performance-prejudice test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Albanese*, 104 Ill. 2d 504, 526 (1984); *People v. Boyd*, 363 Ill. App. 3d 1027, 1034 (2006). "To obtain relief under *Strickland*, a defendant must prove [1] that defense counsel's performance fell below an objective standard of reasonableness and [2] that this substandard performance caused prejudice by creating a reasonable probability that, but for counsel's errors, the trial result would have been different." *Boyd*, 363 Ill. App. 3d at 1034 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). A defendant must satisfy both prongs of the *Strickland* test to prevail on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 99 A. Timeliness

¶ 100 As an initial matter, the parties do not dispute that defendant's petition was not timely filed. However, defendant claims that he was not culpably negligent in filing late. If a petitioner files a petition outside the limitations period, the petitioner must "allege[ ] facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2008); *Perkins*, 229 Ill. 2d at 43. Our supreme court has found that the "culpable negligence" standard contained in section 122-1(c) of the Post-Conviction Hearing Act (725 ILCS 5/122-1(c) (West 2008)) "contemplates something greater than ordinary negligence and is akin to recklessness." *People v. Boclair*, 202 Ill. 2d 89, 108 (2002).

¶ 101 In his petition, defendant attached correspondence with his appellate counsel, who explained the postconviction proceedings, but did not inform defendant of a filing deadline. Defendant additionally argues that he was under the impression that his counsel would file the petition on his behalf, and that he immediately filed a *pro se* petition with the assistance of a prison library clerk once he realized that he had to file the petition himself. Taking these allegations in defendant's petition as true, we cannot say that defendant was culpably negligent in filing his petition outside of the limitations period. *Wheeler*, 392 Ill. App. 3d at 308 (all well-pleaded facts are to be taken as true and a trial court is foreclosed from engaging in any fact-finding at a second-stage dismissal hearing).

¶ 102 B. Objective Reasonableness

¶ 103 Defendant claims that his trial counsel's performance fell below an objective standard of reasonableness when he prevented defendant from exercising his right to testify in his own defense. A criminal defendant's decision whether to testify is a fundamental right. *People v. Averett*, 381 Ill. App. 3d 1001, 1016 (2008); *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). "Although an attorney may properly advise a defendant whether to testify, the decision is ultimately for the defendant to make." *People v. Lester*, 261 Ill. App. 3d 1075, 1079 (1994) (citing *People v. Nix*, 150 Ill. App. 3d 48, 51 (1986)).

¶ 104 To prevail on a postconviction challenge based on a denial of the right to testify, the defendant must demonstrate that he did not knowingly waive his right. *People v. Smith*, 176 Ill. 2d 217, 236, n.1 (1997). See *United States v. Edwards*, 897 F.2d 445, 446 (9th Cir. 1990) (to waive his right to testify, all that the defendant needed to know was that the right existed, thereby

implying that if the defendant had not known the right existed he might not have been able to waive it).

¶ 105 At trial, the court asked defendant whether he understood that he had a right to testify and whether he was exercising his right not to testify, and he replied affirmatively. The following exchange occurred:

> "THE COURT: *** Mr. Carter, your attorney is stating that you are resting. Do you understand you have a right to testify? You also have the right not to testify?
>
> DEFENDANT: Yes, your Honor.
>
> THE COURT: And you are exercising your right not to testify?
>
> DEFENDANT: Yes, I am, your Honor."

Based on this exchange we cannot say that defendant was unaware of his right to testify.

¶ 106 Defendant claims that his case is similar to *People v. Nix*, 150 Ill. App. 3d 48, 51 (1986), where the appellate court held that a postconviction petitioner was entitled to an evidentiary hearing when he alleged in his affidavit that his trial counsel did not inform him that he had a right to testify or a right to decide whether to testify. In finding that the defendant's allegations required an evidentiary hearing, the appellate court in *Nix* found that the defendant's "allegation of incompetence of counsel was supported by factors outside the record, particularly by the petitioner's statement that counsel failed to inform him that he had the right to decide whether to testify." *Nix*, 150 Ill. App. 3d at 51. Similarly, in the case at bar, defendant argues that his trial

counsel told him that it was counsel's decision to let him testify and that counsel would not let him take the stand.

¶ 107 However, *Nix* is distinguishable because that opinion does not state that the trial court informed the defendant of his right to testify. Here, the appellate record shows that the trial court explained to defendant that he had a right to testify, and defendant affirmatively responded that he knew of his rights and was exercising his right not to testify. At a second-stage proceeding, the trial court must take all well-pleaded facts in the petition as true, unless they are contradicted by the existing record. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). Though defendant alleges that he was not aware that the decision to testify was his to make, his claim is affirmatively rebutted by the trial record, which shows that defendant acknowledged that he not only knew of his right to testify but that he chose affirmatively to waive that right.

¶ 108 Having found that trial counsel's performance did not fall below an objective standard of reasonableness, we need not address the second prong of the *Strickland* test regarding prejudice to defendant.

¶ 109 CONCLUSION

¶ 110 For the aforementioned reasons, we reverse the trial court's second-stage dismissal of defendant's postconviction petition and remand for a third-stage evidentiary hearing at which credibility determinations may be made. Defendant satisfied all three prongs of the actual innocence test and, thus, is entitled to a hearing on his actual innocence claim. However, defendant's claim for ineffective assistance of trial counsel is not persuasive where defendant

affirmatively responded to the trial court that he was aware of his right to testify and that he chose to waive his right.

¶ 111 Reversed and remanded.