2016 IL App (1st) 140647-U
No. 1-14-0647 & 1-14-2010 (cons.)

THIRD DIVISION
December 21, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07 CR 1691
	)	
DEREC BELL,	)	
	)	The Honorable
Defendant-Appellant.	)	Charles P. Burns,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing the defendant's postconviction claims that he received ineffective assistance of trial counsel when trial counsel failed to call certain alibi witnesses and coerced defendant into taking a jury trial, because the defendant made a substantial showing of constitutional violations and was entitled to an evidentiary hearing on his claims. The defendant's sentence was affirmed because he waived his claim that the 20-year firearm sentencing enhancement was not statutorily authorized for failing to raise it in the trial court.

¶ 2 The defendant, Derec Bell, appeals from the second-stage dismissal of his postconviction petition under section 122-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-5

(West 2012)). On appeal, the defendant argues that the trial court should have granted him an evidentiary hearing on his claims that he received ineffective assistance of trial counsel when counsel failed to call certain alibi witnesses to testify at trial and coerced defendant into taking a bench trial rather than a jury trial. The defendant also raises for the first time on appeal the contention that the 20-year firearm sentencing enhancement imposed by the trial court was unauthorized. For the reasons that follow, we conclude that the defendant was entitled to an evidentiary hearing on his postconviction claims of ineffective assistance of trial counsel, but that the defendant waived his argument with respect to the firearm sentencing enhancement.

¶ 3 BACKGROUND

¶ 4 The underlying facts of this case were adequately set forth in the order on the defendant's direct appeal. *People v. Bell*, No. 1-09-1648 (2011) (unpublished order under Supreme Court Rule 23). Accordingly, we restate only those facts necessary to the disposition of this postconviction petition.

¶ 5 The defendant and his co-defendant, Durrell Davis, were charged with various offenses related to the fatal shooting of Lamont Loggins and the non-fatal shooting of Thomas Barfield on November 18, 2006.

¶ 6 At trial, Marcel Burns testified that on November 18, 2006, at approximately 9:30 p.m., he parked across the street from Anna's Food & Liquor, located at the corner of 13th Street and Kedzie Avenue in Chicago. After making a purchase, Burns returned to his vehicle. As he was sitting in his car, Thomas Barfield, whom he knew as "Little Tone," knocked on the drivers'-side window and Burns lowered the window. Burns then heard six or seven gunshots, saw Barfield fall to the ground, and Burns ducked down in his vehicle. After the shots stopped, Burns looked out of his rear window and observed two men enter a white four-door Chevrolet that was parked

facing eastbound on 13th Street. Both of the men were wearing hooded sweatshirts and one was holding a gun. The men turned left on Kedzie Avenue and drove away from the scene. Once the men left, Burns exited his vehicle and called 911. He spoke to Barfield, who informed him that his friend, Lamont Loggins, had also been shot. Burns looked and observed Loggins, whom he knew as "Ray-Ray" lying on the curb. Barfield and another man pulled Loggins into the backseat of Barfield's car, which was parked behind Burns' vehicle, and the men left the scene and drove to the hospital. Burns testified that he did not observe the faces of either of the shooters and did not identify the defendant or co-defendant Davis as the perpetrators of the crime.

¶ 7 The State next called Thomas Barfield, who acknowledged that he was a convicted felon with a 2007 felony conviction for possession of a controlled substance and a 2006 weapons conviction. He further admitted that he was currently in police custody because he had failed to appear in court in this case. Barfield testified that on November 18, 2006, at approximately 9:40 p.m., he parked his Buick Regal on Kedzie Avenue behind his friend Marcel Burns' vehicle. Barfield knew Burns as "Chris." Lamont Loggins (also known as "Rayshawn") and Darius Finley were passengers in Barfield's car. After parking his vehicle, Barfield observed a white Chevrolet Caprice stop nearby. He approached Burns' car and knocked on the window, but before Burns had an opportunity to roll down his window, a man wearing a hooded sweatshirt, skullcap and blue jeans exited the white Chevrolet from the front passenger-side door. The man was holding a silver gun in his hand. Barfield indicated that he had observed the man on one prior occasion two to three years earlier, but he did not "know" him. The man stayed by the Chevrolet and fired two or three shots. Barfield was shot in his right hip and fell to the ground in front of Burns' vehicle. He heard four more shots fired and then heard tires squealing as the

Chevrolet left the scene. Barfield stood up and observed Loggins lying on the ground. Barfield and Finley put Loggins in the backseat of Barfield's vehicle, and Finley drove them to Mount Sinai Hospital. After receiving treatment for his gunshot wound, several police officers came to talk to Barfield about the shooting. Barfield characterized their demeanor as "aggressive" and "told them what they wanted to hear" because he had just been shot and he felt they were "harassing" him.

¶ 8 The State was permitted to treat Barfield as a hostile witness and conducted an inquiry into prior statements Barfield had given in connection with the case, in which he definitively identified the defendant and co-defendant Davis as the shooters. On December 18, 2006, Barfield spoke with a detective and Assistant State's Attorney (ASA) Lauren Brown about the shooting and he provided a statement, which he signed. In the statement, Barfield indicated that he had known the defendant, who he knew as "Cuz," and co-defendant Davis, who he knew as "Double-D," since 2001. Barfield wrote in the statement that on the day of the shooting, he went over to talk to Burns who was sitting in his vehicle. At that time, he observed the defendant, co-defendant Davis, and another man who he did not know exit a white Chevrolet with guns in their hands. The defendant had a .9 mm gun in his hands and co-defendant Davis was holding a silver weapon. They started shooting at Barfield and his vehicle. Barfield was hit in the hip and fell to the ground and observed Loggins being shot. After they finished shooting, the defendant and co-defendant Davis entered the rear of the Chevrolet and the vehicle drove away. Barfield helped to put Loggins in the backseat of his vehicle and Finley drove the two of them to the hospital to receive medical treatment.

¶ 9 During his conversation with the detective and ASA Brown, Barfield was shown photographs of the defendant and co-defendant Davis and identified them as the shooters. Later,

on January 7, 2007, Barfield provided grand jury testimony in connection with the case. His grand jury testimony was consistent with the account of the shooting that he provided to ASA Brown, and he identified the defendant and co-defendant Davis as the shooters.

¶ 10 Barfield acknowledged identifying the defendant and co-defendant Davis as the shooters in his written statement and in his grand jury testimony, but testified that he only provided those accounts of the shooting because police threatened to "put cases on" him and one of the officers pointed a gun at him. Barfield indicated that he was forced to provide those statements implicating the defendant and co-defendant Davis in the shooting and was also forced to identify their pictures. When he provided his statement to ASA Brown, Barfield lied and told her that he had been treated "fine" by the police and did not inform her of the threats because he was "scared."

¶ 11 On cross-examination, Barfield testified that the first statement he made to detectives in the hospital after receiving medical treatment was the truth. In that account, Barfield informed them that the shooting was performed by one man. The shooter was between 20 and 25 years' old, and was wearing a black "hoody" and skullcap, which made it hard for Barfield to observe his face. On December 12, 2006, the day he viewed the photo array, Barfield was handcuffed and brought to the police station by four police officers. Once they arrived at the station, Barfield was handcuffed to a rail in a holding room. The officers circled the pictures of the defendant and co-defendant Davis that were in the photo array and instructed him to identify them as the shooters. On the occasion that he spoke to ASA Brown, Barfield denied that he had been handcuffed or threatened by police because the officers informed him that if he did not say what they wanted him to say, Barfield would receive a lot of jail time. The threats had been made in the police vehicle as he was transported to the police station. His grand jury testimony

was also the result of police threat. Barfield denied that he ever observed the defendant or co-defendant Davis at the time of the shooting.

¶ 12 On redirect examination, Barfield acknowledged that the photo array that he initialed on December 12, 2006, did not contain any circles.

¶ 13 Marcus Beck testified next. He acknowledged that he was a convicted felon, with 2004 and 2007 drug convictions, and admitted that he had been arrested the previous night for a DUI. He denied he was present in the area of the shooting on November 18, 2006, at approximately 9:40 p.m.; rather, he was staying in a hotel with two females at that time. Beck further denied that he met with Detectives Crane and Raschke on December 6, 2006. He indicated he did not remember signing his name and identifying two pictures from a photo array and explained that he "pop[ped] pills," which affected his memory. Beck acknowledged that he was arrested and placed in custody on a drug charge on December 14, 2006.

¶ 14 Despite denying his presence at the shooting scene at trial, Beck testified that, prior to trial, he provided a handwritten statement and grand jury testimony in which he stated he was present at the time of the shooting and identified the defendant and co-defendant Davis as the shooters. Specifically, on December 18, 2006, Beck viewed a physical lineup and identified the defendant and co-defendant Davis as the shooters. Thereafter, he met with ASA Brown and a detective and, after speaking with them, he signed a handwritten statement. In the statement, Beck stated that on November 18, 2006, he was in the area of 13th Street and Kedzie visiting family. He went to the liquor store and observed a white Chevrolet driving around in the area. Beck then observed the white Chevrolet stop at the corner of 13th Street and Kedzie. Co-defendant Davis exited the vehicle from the front passenger door and the defendant exited from the rear passenger seat. Beck indicated that he knew the defendant "from the neighborhood for

several years" and knew co-defendant Davis from high school. The defendant and co-defendant Davis both had guns and Beck observed them shoot at a green Buick Regal parked on the street. Beck signed each page of the written statement as well as pictures of the defendant and co-defendant Davis, whom he identified in a photo array. Beck's grand jury testimony, delivered on January 10, 2007, was consistent with the written statement he provided ASA Brown the prior month. Before the grand jury, Beck denied that he was forced or threatened to provide that statement to ASA Brown. He also denied he was promised leniency on his drug charge in exchange for his statement.

¶ 15 On cross-examination, Beck indicated that he never voluntarily talked to police about the case against the defendant and co-defendant Davis. All of the information in the written statement and his testimony before the grand jury were lies. Beck indicated that he lied because the detectives were "[t]rying to put a murder case on [him.]" He testified that he was handcuffed and locked in a room before he met with ASA Brown. Beck testified that he never observed the defendant at the scene of the shooting and that he only identified the defendant and co-defendant Davis as the shooters because he was ordered to do so.

¶ 16 Kurt Murray, a forensic scientist employed by the Illinois State police, testified that he received the firearm evidence recovered from the crime scene and conducted firearm identification testing on that evidence. He concluded all of the recovered bullets and other pieces of firearm evidence were not all fired from the same weapon; rather, more than one firearm was used at the crime scene.

¶ 17 Detective Tom Crane testified that he was assigned to investigate the murder of Lamont Loggins. He spoke to Darius Finley a few days after the murder, and based on the information that Finley provided, Detective Crane put together a photo spread and made sure to include

pictures of the defendant and co-defendant Davis in the photo array. He showed the photo spread to Marcus Beck on December 6, 2006, and Beck identified the defendant, who he referred to as "Cuz" and co-defendant Davis, as the shooters who fired weapons at the intersection of Kedzie and 13th Street. Detective Crane did not tell Beck whom to identify out of the photo array and he did not circle any of the pictures ahead of time to influence Beck's ability to identify the suspects in the shooting. The defendant and co-defendant Davis were subsequently taken into custody and were both present in a physical lineup shown to Beck and Barfield on December 18, 2006. Beck and Barfield viewed the lineup separately and both identified the defendant and co-defendant Davis as the shooters. Detective Crane did not instruct Beck or Barfield whom they should identify from the lineup, nor did he threaten either man physically or verbally.

¶ 18 On cross-examination, Detective Crane acknowledged that he did not know precisely when Beck arrived at the police station on December 6, 2006, to view the photo spread. Detective Crane speculated that Beck had probably waited a few hours at the station before they met to view the photographs. Detective Crane denied that he had threatened to charge Beck with a homicide if he did not make identifications from the photographs. Detective Crane acknowledged that he was also present when Beck signed a written statement on December 18, 2006, and denied that Beck was ever handcuffed in an interview room prior to giving his statement. Beck was not in police custody when he came to view the photo spread but was in custody at the time he provided his statement.

¶ 19 Detective Edward Carroll testified that he and his partner, Detective John Haniacek, conducted a photo array viewing with Thomas Barfield on December 12, 2006. Prior to giving Barfield photographs to view, Detective Carroll explained the process, informed Barfield that the

individuals involved in the crime were not necessarily pictured and had Barfield sign a photo spread advisory form. Barfield identified the defendant and co-defendant Davis as the men who shot at him. Detective Carroll never told Barfield whom to identify, never circled photographs in the array prior to showing them to Barfield, and never threatened Barfield in any manner.

¶ 20 ASA Lauren Brown testified that she was assigned to assist in the investigation of the fatal shooting of Lamont Loggins. As part of her investigation, she met with Barfield. She explained her role and informed Barfield that she did not represent him or any of the suspects involved in the shooting. Barfield indicated that he understood and was willing to speak with her about the shooting. He also agreed to let her transcribe his statement and she documented what he said during the course of their conversation. After she completed the statement, she provided Barfield with an opportunity to review the statement and make corrections and asked him to sign his name to each page if the information contained therein was "true and correct." Barfield did so.

¶ 21 ASA Brown testified that, in his statement, Barfield indicated he was in the vicinity of 13th Street and Kedzie and observed the shooting and observed the victim fall to the ground. A few days after the shooting, Barfield was shown photographs and identified the defendant and co-defendant Davis as the persons who shot him and shot and killed Loggins. ASA Brown showed Barfield pictures of the defendant and co-defendant Davis and he confirmed that they were the shooters. Detective Crane was also present in the room when Barfield provided his statement, but ASA Brown indicated that she had an opportunity to speak with Barfield privately. At that time, ASA Brown asked Barfield how he had been treated by the police and inquired whether he had been hurt or threatened in any way. Barfield denied that he had been mistreated or threatened. He told her that he had been given food and had been allowed to use

the bathroom freely. According to ASA Brown's testimony, Barfield denied that he had been handcuffed at any time.

¶ 22 After speaking with Barfield, ASA Brown conversed with Marcus Beck. Detective Crane was also present for this discussion. Beck also agreed to speak with her about the shooting and to permit her to memorialize his statement. ASA Brown testified that, in his statement, Beck admitted he was on his way to the liquor store located at Kedzie and 13th Street when he observed a white Chevrolet Caprice circle the block several times. Shortly thereafter, a green Buick Regal parked across the street from the store. Approximately three to five minutes later, the Chevrolet appeared again and Beck observed the defendant and co-defendant Davis in the vehicle. Beck grew up with co-defendant Davis, who he referred to as Double-D, and indicated that he was familiar with the defendant, but that he did not know his name. The Chevrolet stopped, and the defendant and co-defendant Davis exited the vehicle and began shooting at the Regal. After Barfield and the victim were shot, the defendant and co-defendant Davis fled in the Caprice toward Roosevelt Road. As with Barfield, ASA Brown had an opportunity to speak with Beck privately and inquired as to his treatment by the police. He indicated that the officers had treated him "well" and that he had been provided with food, drink, and bathroom access. ASA Brown testified that Beck also denied that he had been handcuffed or that he had been threatened in any manner. Beck signed the statement, confirming the accuracy of his written account.

¶ 23 ASA Sabra Ebersole testified that she presented evidence before the grand jury in this case. Barfield appeared before the grand jury and acknowledged the statement he had provided to ASA Brown. He testified in accordance with that statement and confirmed that the defendant and co-defendant Davis were the shooters. Barfield denied that he had received threats or

promises in exchange for his handwritten statement and further denied that his grand jury testimony was the result of any threats or promises. Marcus Beck also testified before the grand jury. ASA Ebersole testified that Beck also confirmed the accuracy of his prior written statement and that Beck denied that his cooperation with the police was the result of threats or promises. The defendant, co-defendant Davis, and the detectives involved in the case were not present in the room when Barfield and Beck testified before the grand jury.

¶ 24 The State then proceeded by way of stipulation. The parties stipulated that the three discharged cartridge cases tested for fingerprints did not contain any latent fingerprint impressions suitable for comparison and that the autopsy conducted on Loggins revealed that he died from a single gunshot wound to the chest. The State then rested its case-in-chief.

¶ 25 Marcel Burns testified for the defense and confirmed that he knew Marcus Beck and was aware that Beck's nicknames included Little Marcus and Pookie Slim. Burns further confirmed that he was present at the scene when the victim was shot and killed. At no time did Burns observe Beck at the scene.

¶ 26 Lajuan Bridges, a convicted felon currently serving a sentence for attempt murder and aggravated discharge of a firearm, testified that he was friends with Loggins. Bridges was in the vicinity of 13th Street and Kedzie at approximately 9:30 p.m. on November 18, 2006. He observed Barfield exit his vehicle and observed Loggins and Darius Finley in the car. Bridges approached the vehicle and began conversing with Loggins, who asked Bridges if he had a "swisher," which Bridges testified was like a small cigar. At that time, a dark-colored vehicle appeared and two men wearing hooded sweatshirts exited the vehicle. Both men had the hoods of their sweatshirts over their heads but Bridges was still able to observe their faces. Neither the defendant nor co-defendant Davis were present at the scene that evening. Bridges heard five or

six gunshots and observed Barfield fall to the ground. He also observed the shooting of Loggins and was within a couple of feet of Barfield's car when that occurred. Bridges indicated that he had known the defendant three or four years before that incident and denied that the defendant was the shooter.

¶ 27 On cross-examination, Bridges indicated that approximately one year after Loggins' death, he was incarcerated and learned that defendant had been charged with the shooting. Bridges decided to contact defendant's attorney and disclosed that he had been present at the crime scene, observed the shooting, and knew that defendant was not the shooter. Bridges never discussed what happened on the night of the shooting with Barfield or Finley at any time after the offense.

¶ 28 The jury found the defendant and co-defendant Davis guilty of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 2006)). The trial court sentenced the defendant to 40 years' imprisonment for the first degree murder conviction and 6 years' imprisonment for the aggravated battery with a firearm conviction, with the sentences to run consecutively. Although the trial court did not specifically break down the 40 years for the murder conviction between the base sentence and firearm enhancement, the trial court did state that it wanted to impose the minimum sentence, which, after application of the firearm enhancement, it found to be 40 years. After an unsuccessful posttrial motion, the defendant appealed, and we affirmed. *People v. Bell*, No. 1-09-1648 (2011) (unpublished order under Supreme Court Rule 23).

¶ 29 On February 29, 2012, the defendant filed a *pro se* petition for postconviction relief. In the petition, the defendant raised, among others, the arguments that he was denied effective assistance of trial counsel when his attorney failed to call certain alibi witnesses and when his

attorney coerced him to take a jury trial instead of a bench trial. Attached to the *pro se* petition were affidavits from the defendant, Sandie Norman, and Shakeya Norman. In his affidavit, the defendant averred that on more than one occasion, he informed his trial attorney that he spent the entire evening of November 18, 2006, with Sandie, the mother of his children, and his children, including Shakeya Norman, who was 15 years old at the time the defendant was sentenced. According to the defendant, he arrived at Sandie's home between 5:30 and 6:00 p.m. that evening to speak with her about their children and how they were doing in school. Thereafter, the defendant spent some time with his children, talking and playing cards. He eventually decided to spend the night and left Sandie's home sometime the next day. The defendant claimed in his affidavit that his attorney never contacted Sandie or his children and instead told the defendant that juries do not find girlfriends and family members to be credible. The defendant also averred in his affidavit that he told his trial attorney that he wanted a bench trial, but that his attorney said he (the attorney) would withdraw. Because the defendant's family had already paid the attorney, the defendant felt that he had no choice but to go along with his attorney's decision to pursue a jury trial. The defendant also claimed that he did not know that it was his decision whether to take a jury or a bench trial.

¶ 30 Sandie's affidavit corroborated the defendant's account of events on the evening of November 18, 2006. Sandie also stated, however, that she did speak to the defendant's trial attorney about that evening and the attorney decided that the jury would not believe her because she was the mother of the defendant's children. Sandie told the attorney that she thought that the defendant wanted a bench trial, who responded, "[N]ot if I am his lawyer he won't in front of this judge." Like Sandie, Shakeya's account of events on the evening of November 18, 2006, were consistent with the defendant's. She also averred that Sandie spoke with the defendant's trial

attorney one day at court and that the attorney told Sandie that family members were not good witnesses because the jury would not believe them and that the attorney would not let them testify.

¶ 31 The trial court appointed the public defender to represent the defendant on his petition, and on July 17, 2013, postconviction counsel filed a supplemental postconviction petition, alleging that trial counsel was ineffective for failing to investigate and present the defendant's alibi defense. The State filed a motion to dismiss the defendant's petitions, which the trial court granted on January 22, 2014, after hearing the arguments of the parties. The trial court found, in relevant part, that the defendant's claim that he wanted a bench trial was contradicted by the fact that he remained silent during jury selection and that the recommendation to take a jury trial was a matter of strategy, thereby negating the defendant's claim of ineffective assistance in this regard. The trial court also found that the defendant was not denied effective assistance of counsel when defendant's trial attorney failed to call Sandie and Shakeya to testify at trial because the decision of what witnesses to call at trial is a strategic one to be made by the attorney and because other trial witnesses testified that the defendant was not present at the scene of the shooting. A notice of appeal was filed on February 19, 2014, and appeal number 1-14-0647 was assigned.

¶ 32 The defendant then filed a motion to reconsider the dismissal of his postconviction petition. Although the trial court file stamped the motion as of April 14, 2014, the defendant's affidavit of service reflects that it was placed in the mail on February 19, 2014, and thus it is considered filed as of that date. See *People v. Shines*, 2015 IL App (1st) 121070, ¶ 31 ("Under the mailbox rule, pleadings, including posttrial motions [citation], are considered timely filed on the day they are placed in the prison mail system by an incarcerated defendant."). The trial court

denied the defendant's motion to reconsider on May 14, 2014, and on June 10, 2014, the defendant filed a notice of appeal. That appeal was assigned appeal number 1-14-2010.

¶ 33 The defendant moved to consolidate the two appeals, which we granted.

¶ 34 ANALYSIS

¶ 35 On appeal, the defendant argues that the trial court should have granted him an evidentiary hearing on his claims that he received ineffective assistance of trial counsel when counsel failed to call certain alibi witnesses to testify at trial and coerced the defendant into taking a bench trial rather than a jury trial. He also argues for the first time on appeal that the 20-year sentencing enhancement imposed by the trial court was unauthorized. We address each of these contentions in turn.

¶ 36 With respect to the defendant's postconviction claims of ineffective assistance of trial counsel, they were dismissed at the second stage of review. At that stage, the defendant bears the burden of demonstrating that the petition, with its accompanying documentation, makes a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 33-35. If the defendant carries his burden, he is entitled to move onto the third stage and receive an evidentiary hearing. *Id.* at ¶34. It is there, at the evidentiary hearing and not during the second stage that evidentiary questions are to be resolved. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). At the second stage, the trial court is to take as true all well-pleaded facts alleged in the postconviction petition and not positively rebutted by the trial record. *Id.* Thus, there is no need for the trial court to make any credibility determinations or factual findings at this stage. *Id.* As a result, the standard of review for dismissals at the second stage is *de novo*. *Id.*

¶ 37 I. Ineffective Assistance—Alibi Witnesses

¶ 38 The defendant argues that he made a substantial showing that he was denied effective assistance of trial counsel when his attorney failed to call Sandie and Shakeya Norman as alibi witnesses at trial. We agree that the defendant carried his second-stage burden and that he was entitled to an evidentiary hearing on this issue.

¶ 39 To establish a claim of ineffective assistance of counsel, the defendant must show both that counsel's representation fell below an objective standard of reasonableness and that the defendant was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999). With respect to the first element—objectively deficient performance—the defendant must overcome the presumption that trial counsel's actions (or inactions) were the product of sound trial strategy. *People v. King*, 316 Ill. App. 3d 901, 913 (2000). Generally speaking, trial counsel's decision of whether to present a witness at trial is considered to be a strategic decision exempt from attack. *Id.* Attorneys have, however, been found to be ineffective where they have failed to present exculpatory evidence, including witnesses who would corroborate the defendant's defense. See, *e.g.*, *id.*; *People v. O'Banner*, 215 Ill. App. 3d 778, 790 (1991); *People v. Garza*, 180 Ill. App. 3d 263, 269 (1989).

¶ 40 In this case, the defendant alleged in his postconviction petition that Sandie and Shakeya would have testified that on the day of Loggins' murder, the defendant was at their home from approximately 5:30 or 6:00 p.m. that afternoon until sometime the next day, thereby making it impossible for him to have been present at Loggins' shooting. The affidavits of Sandie and Shakeya confirm that they would have testified as the defendant claims. This evidence undoubtedly would have supported the defendant's selected trial defense, which was that the defendant was not present at the scene of the murder and that any identification of him by witnesses was unreliable and the result of undue influence by law enforcement. In support, the

defendant presented the testimony of Lajuan Bridges, who testified that the defendant was not present at the time of the shooting. The exculpatory testimony of Sandie and Shakeya would not only have corroborated the defendant's contention that he was absent from the scene of the shooting, but would also have affirmatively placed him somewhere else—something no other evidence presented at trial did.

¶ 41 The State argues that the decision by trial counsel not to call Sandie and Shakeya was a sound strategic decision because the jury would not have assigned any weight to their testimony, given their close relationships with the defendant. In support of this position, the State cites a number of cases in which the appellate court held that trial counsel had not been ineffective for failing to call alibi witnesses. In most of those cases, however, the concern about the exculpatory testimony was not just that it was coming from a potentially biased witness, but that it was affirmatively harmful to the case or was otherwise unreliable. See *People v. Lacy*, 407 Ill. App. 3d 442, 466-67 (2011) (trial counsel was not ineffective in failing to call the defendant's aunt because in addition to being related to the defendant, the aunt's statements in her affidavit were inconsistent with other, indisputable evidence in the case); *People v. Barcik*, 365 Ill. App. 3d 183, 192-93 (2006) (the defendant was not prejudiced by trial counsel's failure to call the defendant's fiancé to testify that the defendant was not intoxicated at the time he was arrested for DUI, not only because she was his fiancé, but also because she was intoxicated at the time of the defendant's arrest); *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003) (trial counsel was not ineffective for failing to call the defendant's claimed alibi witnesses, not just because they were the defendant's cousins, but because their testimony would have contradicted the defendant's theory of the case). But see *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992) (trial counsel was

not ineffective for failing to call alibi witnesses because the witnesses might have been related to the co-defendant and, accordingly, the jury might have afforded their testimony little weight).

¶ 42 Here, there is no reason cited in the record or in the State's argument for not calling Sandie and Shakeya as witnesses on behalf of the defendant other than that they have personal and familial relationships with the defendant and, thus, a jury *might* discount their testimony. We do not agree, however, that it is appropriate at the second stage of postconviction proceedings for us or the trial court to assess the weight to be given to witness testimony or to speculate as to how much weight a jury might give their testimony, especially when those witnesses have not yet had the opportunity to actually testify. After all, the allegations in the defendant's postconviction petition are to be taken as true and in the light most favorable to the defendant (*People v. Jones*, 358 Ill. App. 3d 379, 384 (2005)), and credibility determinations are to be made only at the third stage (*Coleman*, 183 Ill. 2d at 385).

¶ 43 Taking the defendant's allegations and supporting affidavits as true and leaving aside all credibility determinations, and given that Sandie's and Shakeya's testimony would have supported the defendant's defense and affirmatively placed him away from the crime scene, we can conceive of no objectively reasonable strategy that was served by trial counsel's decision to forego presenting the exculpatory testimony of Sandie and Shakeya at trial. Accordingly, we conclude that trial counsel's performance fell below an objective standard of reasonableness. See, *e.g.*, *Garza*, 180 Ill. App. 3d at 269 (stating that the court could not find any sound tactical reason to forego calling witnesses, including the defendant's sister, to corroborate the defendant's alibi).

¶ 44 Numerous cases support our conclusion that counsel's actions fell below an objective standard. In *Tate*, like in this case, the defendant's defense to the murder charges was based on

his claim of misidentification. *Tate*, 305 Ill. App. 3d at 612. The defendant argued during second-stage postconviction proceedings that his trial counsel was ineffective for failing to call three alibi witnesses, one of whom was the defendant's mother, who would have testified that he could not have committed the murder because he was with them. *Id.* at 610. This court agreed that the defendant was entitled to an evidentiary hearing on his claim, because the witnesses' testimony would have supported the defendant's misidentification defense and there was no strategic reason apparent on the face of the record for not calling the witnesses to testify at trial. *Id.* at 612.

¶ 45 Similarly, in *O'Banner*, this court held that trial counsel was ineffective for failing to call the defendant and her son to testify that it was her son and not the defendant who shot the victim. *O'Banner*, 215 Ill. App. 3d at 791. And in *People v. Skinner*, 220 Ill. App. 3d 479, 485 (1991), this court held that the defendant was entitled to an evidentiary hearing on his postconviction claim that trial counsel was ineffective for failing to call his parents in support of his defense that he did not live where he was arrested. In both of these cases, this court found that the testimony of the witnesses would have supported the defendants' defenses, which were otherwise uncorroborated. *Id.*; *O'Banner*, 215 Ill. App. 3d. at 791.

¶ 46 As in the above-discussed cases, the defendant's defense in the present case would have been corroborated by Sandie's and Shakeya's testimony. Not only would it have supported the claim that the defendant was not at the scene of the murder and thus must have been misidentified, but it would have gone one step further and affirmatively placed the defendant at a location separate and apart from the murder scene. Although Bridges testified that he did not see the defendant at the scene, such testimony establishes only that Bridges personally did not see

the defendant there. In contrast, Sandie and Shakeya's testimony that the defendant was at their home would have made it impossible for the defendant to have been at the murder scene.

¶ 47 Having concluded that the defendant has made a substantial showing that trial counsel's failure to call Sandie and Shakeya fell below an objective standard of reasonableness, we must consider whether the defendant was prejudiced by this failure. In the context of ineffective assistance of counsel, this court has described the prejudice component as follows:

> "To meet his burden under *Strickland*, defendant must show that the probability that counsel's errors changed the outcome of the case is sufficient to undermine confidence in the outcome. [Citation.] It is not necessary for defendant to prove by a preponderance of the evidence that the outcome would have been different; rather, defendant need only demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [Citation.] Indeed, prejudice may be found even when the chance that minimally competent counsel would have won an acquittal is significantly less than 50 percent, as long as a verdict of not guilty would be reasonable. [Citation.] In weighing the impact of counsel's errors, the reviewing court should consider the totality of the evidence before the finder of fact. [Citation.] That is, instead of viewing the improper evidence in isolation, the reviewing court must look to the ramifications the improper evidence might have had on the factfinder's overall picture of events. [Citation.]" (Internal quotation marks omitted.) *People v. McCarter*, 385 Ill. App. 3d 919, 935-36 (2008).

¶ 48 We conclude that the defendant made a substantial showing that absent trial counsel's failure to call Sandie and Shakeya, there is a reasonable probability that the defendant would have been acquitted. None of the purported eyewitnesses put on by the State testified at trial that

they observed the defendant at the scene, much less firing a gun. Rather, the State had to impeach its own witnesses with their prior statements to the police and grand jury testimony to establish that the witnesses had, at one time, identified the defendant as one of the shooters. Those impeached witnesses—Barfield and Beck—testified, however, that their prior statements and grand jury testimony were coerced by threats and violence on the part of law enforcement. Bridges, who was called in the defendant's case, testified that he knew the defendant and that the defendant was not present at the scene at the time of the shooting. Further complicating the jury's task of assessing guilt was the fact that Barfield, Beck, and Bridges were all convicted felons. Taken with the proposed testimony of Sandie and Shakeya that the defendant was with them all night, the jury could very well have foregone the contradictory and ever-changing testimony of convicted felons in favor of Sandie's and Shakeya's testimony and could have found the defendant not guilty. See *King*, 316 Ill. App. 3d at 918-19 ("In light of the inconsistent, contradictory testimony presented at trial, along with the clearly questionable credibility of the State's occurrence witnesses, we cannot say that evidence of defendant's guilt in this case was overwhelming. As such, we believe that the absence of Matthews' alibi testimony at trial is sufficient to undermine confidence in defendant's conviction."); *Garza*, 180 Ill. App. 3d at 269-70 (holding that where the identification evidence against the defendant had debilities, the jury's crediting of that evidence could have been different if trial counsel had presented witnesses in support of the defendant's defense theory).

¶ 49 The State argues that the defendant could not have been prejudiced by trial counsel's actions in failing to call Sandie and Shakeya as witnesses, because the jury would not have afforded any weight to their testimony. For the same reasons as discussed above, it is not

appropriate for us, at this stage in the proceedings, to assign a credibility value to testimony that has not yet been given. Accordingly, we reject this argument.

¶ 50 The State also argues that the defendant cannot be said to have been prejudiced because we previously rejected the defendant's contention on direct appeal that the evidence in this case was closely balanced for purposes of assessing plain error. The question for us here is not whether the evidence was closely balanced, but whether the defendant made a substantial showing that absent trial counsel's deficient performance, the result would have been different. These are two distinct analyses. Moreover, in considering on direct appeal whether the evidence was closely balanced, we did not take into consideration what effect the testimony of two alibi witnesses might have had on the outcome. Thus, although we concluded that the evidence was not closely balanced without Sandie and Shakeya's testimony, it is not inconsistent to now conclude that the result might have been different with their testimony. See *People v. Gibson*, 244 Ill. App. 3d 700, 704 (1993) (stating that although it found on direct appeal that the trial evidence was overwhelming, "[h]ad defendant presented Wilford's alibi testimony, the evidence might not have been overwhelming").

¶ 51 In sum, we conclude that the defendant made a substantial showing of ineffective assistance of trial counsel for failing to present the testimony of Sandie and Shakeya Norman at trial, and that the trial court erred in dismissing this claim without an evidentiary hearing.

¶ 52 II. Ineffective Assistance—Bench Trial

¶ 53 The defendant also argues that the trial court erred in dismissing his claim that trial counsel was ineffective for coercing the defendant into taking a jury trial. According to the defendant, he was coerced into foregoing a bench trial when his attorney threatened to withdraw if the defendant did not select a jury trial. We disagree that trial counsel's actions amounted to

coercion and instead conclude that trial counsel's recommendation that the defendant proceed with a jury constituted trial strategy.

¶ 54 Both the United States Constitution and the Illinois Constitution guarantee a criminal defendant the right to a trial by jury. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). That right includes the right to waive a trial by jury. *Id.* The ultimate decision of whether to waive a jury trial, and thus proceed to a bench trial, belongs solely to the defendant. *People v. Ramey*, 152 Ill. 2d 41, 54 (1992) ("[T]hree decisions are ultimately for the defendant in a criminal case after full consultation with his attorney: what plea to enter; whether to waive a jury trial; and whether to testify in his behalf."); *People v. McCarter*, 385 Ill. App. 3d 919, 943 (2008) ("[T]he prerogative to choose a bench trial over a jury trial belongs to the defendant and not to his counsel."); *People v. Holley*, 377 Ill. App. 3d 809, 813 (2007).

¶ 55 In the context of claims for ineffective assistance of counsel, courts have previously held that advice from counsel to their clients on whether to choose a jury or bench trial falls within the scope of trial strategy and is exempt from claims of ineffective assistance. See *People v. Simon*, 2014 IL App (1st) 130567, ¶ 74 (advice from counsel to take a bench trial because the judge would base decision on the law instead of the defendant's gang member status was trial strategy); *People v. Hobson*, 386 Ill. App. 3d 221, 243 (2008) (it was not ineffective assistance for trial counsel to recommend that the defendant take a bench trial with a judge counsel knew to be sympathetic as opposed to proceed to trial with an unknown and unpredictable jury); *People v. Elliott*, 299 Ill. App. 3d 766, 774 (1998) ("advice on waiving a jury trial constitutes the type of trial strategy and tactics that cannot support a claim of ineffectiveness").

¶ 56 The defendant claims that he was not advised to take a jury trial but that he was instead *forced* to take a jury trial by way of trial counsel's threats to withdraw from the case. According

to the defendant's affidavit attached to his postconviction petition, when he told his attorney that he would prefer a bench trial, counsel responded by threatening to withdraw from the case, and because his family had already paid the attorney, the defendant did not feel that he had any choice but to go along with his attorney's decision. Sandie averred in her affidavit that when she told defendant's attorney that she believed the defendant wanted a bench trial, counsel responded, "[N]ot if I am his lawyer he won't in front of this judge." Even assuming, as we must, that counsel did, in fact, make these statements, we do not agree that they resulted in the defendant being forced into taking a jury trial.

¶ 57 Counsel's statements that he would withdraw if the defendant did not choose to pursue a jury trial did not deprive the defendant of his choice between a jury and a bench trial. Even assuming that counsel would have followed through and actually withdrawn from the case had the defendant elected a bench trial, the defendant would still have been afforded his right to a bench trial. At no point was he deprived of that option. The defendant's claim that he did not believe he had any choice but to acquiesce to counsel's wishes because his family had already paid counsel is belied both by what is in the record and by what is not in the record. First, the record indicates that following trial, the defendant fired counsel and was assigned a public defender for sentencing. It is difficult to believe that defendant felt coerced by counsel's threats to withdraw but then later felt free to discharge counsel before sentencing. Second, the defendant makes no allegations in his postconviction petition or affidavit that his family would not have been entitled to a refund of any overpayment of legal fees had the defendant chosen to pursue a bench trial and counsel withdrawn.

¶ 58 In support of his position that he received ineffective assistance of counsel, the defendant relies on *McCarter* and *People v. Barkes*, 399 Ill. App. 3d 980 (2010), but we find the

defendant's reliance to be misplaced. First, in *McCarter*, the trial court denied the defendant's claim that trial counsel was ineffective for failing to allow him a bench trial on the basis that the result would have been the same had the defendant actually received a bench trial. *McCarter*, 385 Ill. App. 3d at 943. Although this court concluded that the trial court's basis for denying the defendant's claim was improper, it did not determine the merits of the defendant's claim, choosing instead to remand the matter to the trial court for further consideration. *Id.* at 944. In *Barkes*, the defendant's attorney completely refused to permit a bench trial and told the defendant that he (counsel) was running the show and that the defendant would be getting a jury trial. *Barkes*, 399 Ill. App. 3d at 988. In the present case, counsel did not refuse to allow the defendant to pursue a bench trial, but instead told him that he would withdraw as the defendant's counsel. Unlike in *Barkes*, the choice remained with the defendant, even assuming that counsel would have actually withdrawn.

¶ 59 Absent allegations that the defendant was completely deprived of the choice between a bench and a jury trial, we conclude that the defendant failed to make a substantial showing of ineffective assistance of counsel in this regard. Rather, this case falls within the scope of cases in which an attorney's advice on whether to take a bench or a jury trial constitutes trial strategy.

¶ 60 III. Sentencing Enhancement

¶ 61 Finally, the defendant argues on appeal that the 20-year firearm sentencing enhancement imposed by the trial court was unauthorized because the jury found only that the defendant was armed with a firearm at the time of the offense, allowing for a 15-year enhancement under section 5-8-1(a)(1)(d)(i) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2006)), and not that he personally discharged a firearm during the commission of the offense,

which would have provided for a 20-year enhancement under section 5-8-1(a)(1)(d)(ii) (730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2006)).

¶ 62 The defendant did not raise this issue in his postconviction petition and, as a result, the State argues that he has waived review of it in this appeal. In so arguing, the State points out that the Illinois Supreme Court recently abolished the rule that a sentence that does not conform to statutory requirements is void and, thus, may be challenged at any time. See *People v. Castleberry*, 2015 IL 116916, ¶ 19. The defendant responds that the holding of *Castleberry* does not apply retroactively and, even if it did, this court nevertheless has the power to review the defendant's contention under Supreme Court Rule 615(b). Because we conclude that *Castleberry* does apply retroactively and Rule 615(b) does not provide us authority to overlook waiver, we decline to review the defendant's claim regarding the firearm enhancement.

¶ 63 As the State points out, the Illinois Supreme Court recently abolished the rule announced in *People v. Arna*, 168 Ill. 2d 107, 113 (1995), that a sentence entered without statutory authority is void and, thus, may be challenged at any time. *Castleberry*, 2015 IL 116916. According to the defendant, because *Castleberry* created a new rule, it cannot be applied retroactively to convictions that were final at the time the new rule was announced, *e.g.*, the defendant's conviction. See *People v. Smith*, 2015 IL 116572, ¶ 24 (stating that generally a "new rule will not apply retroactively to convictions which are already final at the time the new rule is announced"). The defendant also relies on this court's decision in *People v. Smith*, 2016 IL App (1st) 140887, in which a division of this court concluded that the holding in *Castleberry* did not apply retroactively.

¶ 64 In *Smith*, the defendant argued that his extended term sentences were void because the trial court imposed them without finding the presence of any of the statutory factors that

authorize the imposition of an extended term sentence. *Smith*, 2016 IL App (1st) 140887, ¶ 2. He raised this issue for the first time in his appeal from the trial court's denial of his request for leave to file a successive postconviction petition, and the holding in *Castleberry* was announced while his appeal was pending. *Id.* ¶ 1. In addressing whether *Castleberry* applied retroactively, the *Smith* court concluded that instead of announcing a new rule, *Castleberry* simply abolished the old rule under *Arna* and reinstated the previous rule that sentences that did not comply with statutory guidelines were only void if the court lacked personal or subject matter jurisdiction. *Id.* ¶29. Despite the conclusion that *Castleberry* did not announce a new rule and despite previously acknowledging that the prohibition against retroactive application applies only to *new* rules, the *Smith* court nevertheless held that the *Castleberry* holding could not be applied retroactively. *Id.* ¶ 30.

¶ 65 We agree with the *Smith* court's conclusion that *Castleberry* did not announce a new rule, but instead only abolished the *Arna* rule, resulting in the reinstatement of the rule that existed prior to *Arna*, *i.e.*, that a sentence is only void if the court lacks personal or subject matter jurisdiction. While we agree with that conclusion, however, we cannot also agree that the *Castleberry* rule does not apply retroactively. The prohibition against retroactive application applies only where a new rule is announced, and because there was no new rule announced in this situation, retroactive application of the *Castleberry* holding is not prohibited.

¶ 66 Accordingly, under the pre-*Arna* rule, the defendant's sentence is void only if the trial court lacked personal or subject matter jurisdiction at the time it entered the order. The defendant makes no argument to that effect and, thus, the defendant's sentence is not void, even if it was not authorized by statute, and is thus subject to the waiver doctrine.

¶ 67 The defendant argues that even if *Castleberry* applies here, we nevertheless have the ability to review and modify his sentence pursuant to the power provided to us under Supreme Court Rules 615(b)(1) and (b)(4). Those rules provide that on appeal, a reviewing court may "reverse, affirm, or modify the judgment or order from which the appeal is taken" or "reduce the punishment imposed by the trial court." Although we do not dispute that we have such powers in issues properly before us, we do not find any support in the language of Rule 615 for the proposition that we are permitted to overlook waiver in order to exercise the powers granted by Rule 615.

¶ 68 Moreover, the Illinois Supreme Court made clear in *People v. Jones*, 213 Ill. 2d 498, 508 (2004), that we, unlike the Illinois Supreme Court, are not free "to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition." Although the defendant attempts to distinguish *Jones* on the ground that it involved a "trial issue" while the present case involves a "sentencing issue," we conclude that, to the extent such a distinction exists, it is a distinction without a difference. The Illinois Supreme Court was clear in its directive and, as an appellate court, we are bound to follow it. Accordingly, we conclude that the defendant's failure to raise this issue in his postconviction petition results in its waiver on appeal.

¶ 69 We note that because of the decision in *Castleberry*, even if the defendant's sentence is not authorized by statute, we are unable to do anything to remedy it due to the defendant's failure to raise the issue on direct appeal or in his postconviction petition. Nevertheless, there is nothing to prevent the defendant from seeking leave from the trial court to file a successive postconviction petition, provided that he can meet the cause-and-prejudice test established in section 122-1(f) of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-1(f) (West 2016)).

¶ 70 CONCLUSION

¶ 71 For the reasons stated above, we conclude that the defendant made a substantial showing of ineffective assistance of trial counsel on the basis that trial counsel failed to call certain alibi witnesses. The defendant is entitled to an evidentiary hearing on this issue. We further conclude, however, that the defendant did not make a substantial showing of ineffective assistance of counsel on the claim that trial counsel coerced the defendant into taking a jury trial, and, therefore, he is not entitled to an evidentiary hearing on this issue. Finally, we conclude that the defendant waived his contention with respect to the firearm enhancement to his sentence to be waived.

¶ 72 Affirmed in part, reversed in part, and remanded for further proceedings.