2016 IL App (2d) 140370-U
No. 2-14-0370
Order filed June 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-1423
VICTOR BANDALA-MARTINEZ,	)	Honorable Gordon E. Graham,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred by dismissing defendant's amended post-conviction petition without holding an evidentiary hearing on defendant's claim that his trial counsel was ineffective for advising him that he would not be able to have a jury trial because he would have to testify. We reversed and remanded the cause for a third-stage post-conviction evidentiary hearing.

¶ 2 Defendant, Victor Bandala-Martinez, appeals the trial court's second-stage dismissal of his post-conviction petition. He contends that his appointed post-conviction counsel violated Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), and that the trial court erred in dismissing

his petition at the second stage of the post-conviction proceedings. For the following reasons, we reverse the trial court's decision and remand the cause for a third-stage evidentiary hearing.

¶ 3 I. BACKGROUND

¶ 4 Following a bench trial, defendant was convicted of first-degree murder and sentenced to 30 years' imprisonment. Defendant signed a Spanish-translated jury waiver prior to the trial, and the trial was conducted with the assistance of a Spanish-speaking interpreter. The State's witnesses testified that defendant was at a house party in the city of McHenry during the early hours of December 14, 2008, when he became engaged in an altercation with the decedent, Yair Cabrera. The men began arguing inside the house and then went outside where they began physically fighting. The fight was initially broken up and the men returned inside. Shortly thereafter, defendant and Cabrera went outside again. A man known only as "Lobo" alerted the people inside that defendant and Cabrera were fighting for a second time. Lobo was laughing because the men were slipping and falling on the ice. Francisco Maldonado testified that the men appeared to be hugging each other at one point during the fight. Maldonado said that defendant was punching Cabrera in the ribs, then Cabrera fell on his back and defendant ran away. Adrian Elias testified that defendant may have been holding something as he ran away, because his hand was shaped into a fist. The bystanders later moved Cabrera inside the house and police officers responding to the scene found Cabrera unconscious on the floor. The bystanders were attempting cardiopulmonary resuscitation (CPR) with the assistance of a 911 operator. Cabrera appeared to be bleeding from a wound in his chest. Cabrera was taken to a hospital, where Dr. Oscar Habhab pronounced him dead at 3:15 a.m.

¶ 5 McHenry County sheriff's deputy Daniel Danczyk and detective Ed Maldonado received information that defendant lived at a residence at 1615 North Park Street in McHenry. When

they arrived at the residence, they were met outside by Ruben Vera, who identified himself as the homeowner. Danczyk testified that Vera led them inside the house to an upstairs bedroom. The door was closed. Danczyk knocked loudly. He heard a moan or thump coming from inside the room. Fearing that someone may be injured, Danczyk opened the door and announced the police presence. He noticed defendant through the slightly opened doors of a wardrobe closet. Danczyk placed defendant in custody and took him to the McHenry County police station. He did not notice that defendant had any visible injuries.

¶ 6 Detective Maldonado testified that he was Spanish speaking, that defendant signed a Spanish-translated Miranda waiver, and that defendant agreed to participate in an interview with Maldonado that was conducted largely in Spanish. Rafael Arellano testified that he was a licensed translator and that he transcribed the interview into English at the State's request. Defense counsel declined to ask any questions of Arellano on cross-examination. The videotapes and transcriptions were admitted into evidence. During the interview, defendant explained that he began arguing with Cabrera because Cabrera had been telling people that defendant had cheated on his girlfriend. Defendant said he grabbed a utensil from the kitchen before he and Cabrera went outside the second time. Defendant initially claimed he was unsure whether it was a knife or a fork, but he later insisted that it was a fork. He said he slipped on the ice and poked Cabrera with the fork as he was getting up. He then became frightened and left because he thought he had hurt Cabrera badly. Later in the interview, Maldonado repeatedly used the phrase "lo puyaste," which was translated as "you stabbed him," and defendant responded with "lo piqué," which was translated as "I poked him."

¶ 7 Dr. Larry Blum testified that he performed an autopsy on Cabrera, who had two stab wounds in his upper body. One of the wounds penetrated Cabrara's rib cage and made a small

incision in his spleen. The other wound, which was the fatal wound, penetrated approximately five inches into Cabrera's heart. Blum did not believe that the fatal wound could have been caused by a fork. Blum believed that both wounds were caused by a "knife-like object."

¶ 8 Defendant elected not to testify and no witnesses were called to testify on his behalf. During closing arguments, defense counsel asserted that certain portions of the interview with detective Maldonado had been "mis-transcribed," and that Maldonado had, at times, "put words in [defendant's] mouth." Defense counsel argued that defendant's conduct was justified because he had a reasonable belief that he needed to defend himself. Defense counsel argued in the alternative that defendant had acted recklessly, and that he was therefore guilty only of involuntary manslaughter. The trial court rejected these arguments, finding that defendant was not afraid of Cabrera, and that he had stabbed Cabrera with a "metallic object" while knowing that his acts created a strong probability of great bodily harm.

¶ 9 The Office of the State Appellate Defender (OSAD) was appointed to represent defendant on direct appeal. The only issue raised by appellate counsel related to the circuit clerk's improper assessment of certain fines. We agreed with appellate counsel and accordingly reduced defendant's monetary assessments. *People v. Bandala-Martinez*, 2012 IL App (2d) 101147-U (summary order). Defendant subsequently filed a *pro se* post-conviction petition in which he raised nine enumerated issues containing several redundant allegations. The trial court appointed counsel to represent defendant and assist him in preparing an amended petition for a second-stage post-conviction proceeding. Post-conviction counsel filed an amended petition[1] on defendant's behalf which raised three claims. The first claim is that defendant received

[1] We note that the amended petition was titled only as a "Post Conviction Petition." Nothing in the title indicated that it was an "amended" petition.

ineffective assistance of trial counsel because trial counsel: (1) told defendant that he would not be able to have a jury trial because he would have to testify; (2) told defendant that he could not seek a plea agreement; (3) failed to inform defendant as to whether the State had made any plea offers; and (4) did not attempt to rebut Arellano's transcription of defendant's interview with detective Maldonado or cross-examine Arellano regarding his credentials. The second claim is that defendant received ineffective assistance of appellate counsel for failure to challenge the effectiveness of trial counsel on direct appeal. The third claim is that defendant was denied due process because the State failed to tender the 911 tape from the night of Cabrera's death.

¶ 10 The State filed a motion to dismiss the amended petition, arguing that all three of defendant's claims were "barred by the doctrine of *res judicata* because they could have been raised on direct appeal as all the information necessary to support these claims was known to the Defendant at the time of taking appeal." Following a hearing on the matter, post-conviction counsel filed a certificate stating his compliance with Rule 651(c). The trial court later issued a written decision in which it concluded that defendant's claims "are forfeited or barred by *res judicata* since they could have been raised for failing to establish any prejudice on the part of appellate counsel." Defendant filed a timely notice of appeal and OSAD was appointed.

¶ 11 Post-conviction appellate counsel moved to withdraw from representation pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending that an appeal would be frivolous. We denied the motion and ordered counsel to file a brief addressing whether post-conviction counsel violated Rule 651(c) by inadequately considering and presenting the issues raised in defendant's *pro se* petition, as well as any other non-frivolous issues. Post-conviction appellate counsel accordingly filed a brief, raising contentions that post-conviction counsel violated Rule 651(c),

and that the trial court erred in dismissing defendant's amended petition at the second stage of the post-conviction proceedings.[2]

¶ 12 II. ANALYSIS

¶ 13 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) "provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Tate*, 2012 IL 112214, ¶ 8. The Act creates a three-stage process for the adjudication of post-conviction petitions in non-capital cases. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). At the first stage, the circuit court must review the petition within 90 days of its filing and determine whether it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If the petition is not summarily dismissed at the first stage, it advances to the second stage, where an indigent petitioner is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. 725 ILCS 5/122-4 (West 2014). The circuit court must then determine whether the petition and any accompanying documentation make a "substantial showing" of a constitutional violation. *Tate*, 2012 IL 112214, ¶ 10. If the hearing advances to the third stage, the circuit court must conduct an evidentiary hearing and enter any appropriate orders with respect to the judgment or sentence in the former proceedings. 725 ILCS 5/122-6 (West 2014).

¶ 14 Because the right to counsel during post-conviction proceedings is a "matter of legislative grace," a post-conviction petitioner is only entitled to a "reasonable level of assistance." *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 18. To ensure that post-conviction petitioners receive a reasonable level of assistance, Rule 651(c) requires that post-conviction counsel: (1) consult with

[2] We note that the *Finley* motion and defendant's brief were filed by different attorneys.

the defendant to ascertain his contentions of the deprivation of constitutional rights; (2) examine the record of the proceedings at trial; and (3) make any amendments to the defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 15 Our concern here is whether post-conviction counsel provided adequate representation under Rule 651(c), and whether the trial court erred in dismissing defendant's amended post-conviction petition at the second stage of the proceedings. We review both of these issues *de novo*. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19.

¶ 16 We first note that post-conviction counsel's Rule 651(c) certificate gives rise to a presumption that defendant received the required representation during second-stage proceedings, although this presumption may be rebutted by the record. See *People v. Hayes*, 2016 IL App (3d) 130769, ¶ 12. Moreover, post-conviction counsel's duty under Rule 651(c) to make the necessary amendments to defendant's *pro se* petition does not require that he advance frivolous or spurious claims. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). We have reviewed defendant's *pro se* petition, and we believe that all but one of his claims were frivolous. We will discuss the frivolous claims first.

¶ 17 The majority of defendant's *pro se* allegations relate to his claim that trial counsel was ineffective. To prevail on such a claim, defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). First, defendant must show that trial counsel's performance fell below an objective standard of reasonableness. Second, he must show that counsel's performance was prejudicial, meaning there is a reasonable probability that the result of the proceeding would have been different absent counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 691-

94 (1984). "The failure to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *People v. Enis*, 194 Ill. 2d 361, 377 (2000). Courts may therefore resolve ineffectiveness claims by reaching only the prejudice component of *Strickland*, "for lack of prejudice renders irrelevant the issue of counsel's performance." *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998).

¶ 18 Defendant repeatedly argues in his *pro se* petition that trial counsel was ineffective for failing to file motions to quash his arrest and suppress evidence. This relates to his allegations that the police illegally forced entry into his rented room and searched the room without a warrant. However, the record reflects that the police had probable cause to arrest defendant and search his room based on eye-witness accounts that defendant had inflicted Cabrera's wounds. See *People v. Montgomery*, 112 Ill. 2d 517, 525 (1986) ("Probable cause exists when the totality of the facts and circumstances known to the officers is such that a reasonably prudent person would believe that the suspect is committing or has committed a crime."). Given the circumstances surrounding the crime, exigent circumstances justified the officers' actions. See *People v. Wear*, 229 Ill. 2d 545, 577 (2008) (noting that the seriousness of the crime is a factor to be considered in deciding whether exigent circumstances exist to justify an officer's warrantless entry into a private residence to effectuate an arrest). Therefore, it was not unreasonable for trial counsel to refrain from moving for the suppression of evidence.

¶ 19 Defendant also alleges that trial counsel was ineffective for failing to communicate clearly through a licensed translator, failing to call "Lobo" as a witness to testify that Cabrera's death was an accident, and failing to obtain medical records to show that defendant was under the influence of cocaine at the time of the killing. We find no merit to any of these allegations. Even if defendant were able to show that trial counsel performed unreasonably by failing to act

accordingly, we do not believe he can show that the result of the trial would have been different, and therefore he cannot satisfy the *Strickland* prejudice prong.

¶ 20 Turning to the issues that were raised in the amended petition, we find no merit to the claims that trial counsel was ineffective for advising defendant that he could not seek a plea agreement and by failing to inform defendant as to whether the State had made any plea offers. A defendant has no constitutional right to a plea bargain, and the right to effective assistance of counsel attaches only to plea negotiations that the State actually chooses to enter. *People v. Crenshaw*, 2012 IL App (4th) 110202, ¶ 13. Thus, even if trial counsel in fact advised defendant that the plea negotiation process was not available, defendant cannot show a violation of his constitutional rights. Moreover, to show that he was prejudiced by ineffective assistance of counsel in plea bargaining, a defendant must generally establish "a reasonable probability that, but for deficiencies in his legal counsel, he would have accepted a plea carrying a lesser sentence than he received." *Id*. Here, defendant cannot make any such showing because he has not alleged that the State ever made a plea offer, and the record contains no indication that the parties ever engaged in plea negotiations.

¶ 21 We also find no merit to defendant's allegations that trial counsel was ineffective for failing to rebut Arellano's transcription of his interview with detective Maldonado or cross-examine Arellano regarding his credentials. Defendant attached an affidavit to the amended petition in which he claims that Maldonado "spoke Spanish very badly," and he had to guess what Maldonado was saying. Defendant further challenged Maldonado's use of the word "puyaste," claiming that this was "not a word in Spanish." As noted, Maldonado repeatedly used the phrase "lo puyaste," which was translated as "you stabbed him." Defendant claims he thought Maldonado was actually saying "empujaste," for "you pushed." However, defendant

stated early in the interview, without any prompting from Maldonado, that he had grabbed a knife ("cuchillo") or a fork ("tenedor") from the kitchen before he and Cabrera went outside the second time. He later insisted that it was only a fork, and that he had only poked Cabrera ("lo piqué"). When Maldonado asked whether defendant left the fork inside Cabrera, defendant responded, "no, ye me recuerdo que lo saqué," which was translated as "no, I remember that I took the fork out." Defendant also said that he became frightened and left because he thought he had hurt Cabrera badly. Thus, Cabrera unequivocally admitted to poking Cabrera with a fork, then pulling the fork out of Cabrera and leaving the scene because he thought that Cabrera was badly injured. Given the eyewitness testimony, the medical evidence, and defendant's own admissions, we do not believe that the outcome of defendant's trial would have been different even if trial counsel had challenged Arellano's transcription or cross-examined Arellano regarding his credentials.

¶ 22 Because we find no merit to any of the claims discussed above, we similarly find no merit to defendant's claim that appellate counsel was ineffective for failing to raise the same issues on direct appeal. Furthermore, several of the claims relied on facts and evidence outside the trial record, meaning that appellate counsel could not have brought the claims in the first instance. See *People v. Youngblood*, 389 Ill. App. 3d 209, 214 (2009) (noting that matters outside the record may not be raised on direct appeal).

¶ 23 Finally, we find no merit to defendant's claim that he was denied due process because the State failed to tender the 911 tape from the night of Cabrera's death. We first note that the record is unclear as to whether the State ever actually failed to tender a copy of the 911 tape to defendant's trial counsel. The only reference to the tape during defendant's trial came from an officer who testified that he responded to the scene to find the bystanders attempting CPR with

the assistance of a 911 dispatcher. Post-conviction counsel provided nothing to demonstrate that he attempted to locate the tape or that he was unable to do so. Moreover, defendant's amended petition alleges only that the State failed to tender the tape; it provides no basis for the claim that this amounted to a due process violation. Regardless of post-conviction counsel's questionable performance, which we will address below, we can discern the basis for defendant's claim from his *pro se* petition: defendant alleged that the tape would have shown that the bystanders exacerbated Cabrera's injury by performing CPR, thereby serving to reduce defendant's culpability for Cabrera's death.

¶ 24 "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "Relief is not available pursuant to *Brady* unless the defendant can establish that evidence material to his guilt or punishment was improperly withheld." *People v. Thomas*, 364 Ill. App. 3d 91, 101 (2006). "Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *People v. Beaman*, 229 Ill. 2d 56, 74 (2008).

¶ 25 Turning to defendant's allegations, we note that an intervening cause relieves a defendant of criminal liability only where it is completely unrelated to the defendant's acts, and there is no requirement that the defendant's acts be the sole and immediate cause of death. *People v. Brackett*, 117 Ill. 2d 170, 176 (1987). The State must prove only that the defendant's criminal acts proximately contributed to the victim's death, meaning a defendant will be found criminally liable where his or her criminal acts set in motion a chain of events culminating in the victim's death. *People v. Amigon*, 388 Ill. App. 3d 26, 33 (2009). Here, the State presented

overwhelming evidence that defendant's criminal acts' proximately contributed to Cabrera's death. Therefore, even if we were to find that the State failed to disclose the 911 tape, we do not believe that defendant would be entitled to relief under *Brady*. This is because we do not believe there is a reasonable probability that the result of the trial would have been different even if the tape had been admitted into evidence. See *Beaman*, 229 Ill. 2d at 74.

¶ 26 This brings us to the claim in the amended petition that trial counsel was ineffective for advising defendant that he "would not be able to have a jury trial because he would have to testify." In an affidavit attached to the amended petition, defendant alleged that trial counsel "manipulated" him by telling him that this was "what the law requires." According to defendant, trial counsel also said that he would be at a disadvantage during a jury trial because the jury would "probably be racist," and the case would likely be decided on the basis of defendant's "illegal status in this country." Because these allegations are not rebutted by the trial record, they must be taken as true. See *People v. Hall*, 217 Ill.2d 324, 334 (2005). The trial court is foreclosed from engaging in any fact finding at the second stage. *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009). The relevant question is whether the allegations in the petition and accompanying affidavits demonstrate a substantial showing of a constitutional deprivation, which mandates a third-stage evidentiary hearing. *People v. Goodwin*, 2012 IL App (4th) 100513, ¶ 32. It is also worth noting that courts should excuse the absence of affidavits in which attorneys must confess error, due to the obvious difficulty involved with obtaining such affidavits. *People v. Barghouti*, 2013 IL App (1st) 112373, ¶ 16.

¶ 27 Here, the trial court concluded that defendant's claims failed to make a substantial showing of a constitutional deprivation, finding that defendant's "fanciful affidavit is not support in any fashion and amounts to pure conjecture." The trial court acknowledged that well-pleaded

facts are "generally" taken as true during second-stage proceedings, but found that defendant's "unsupported allegations are not well pleaded facts." Finally, the trial court found that defendant's claims were all "forfeited or barred by *res judicata* since they could have been raised for failing to establish any prejudice on the part of appellate counsel."

¶ 28 We first note that, although partial summary dismissals are not permissible during first-stage post-conviction proceedings (*People v. Rivera*, 198 Ill. 2d 364, 374 (2001)), it is permissible for the trial court to partially dismiss a post-conviction petition at the second stage and advance only certain claims for a third-stage evidentiary hearing. *People v. Lara*, 317 Ill. App. 3d 905, 908 (2000). We also note that, contrary to the trial court's determination, the claims in defendant's amended petition were not forfeited or barred by *res judicata*. "The doctrine of *res judicata* bars consideration of issues that were previously raised and decided on direct appeal." *People v. Blair*, 215 Ill. 2d 427, 443 (2005). Here, the only issue that was raised on direct appeal related to the circuit clerk's improper assessment of certain fines. Moreover, an issue is "forfeited" if it could have been raised on direct appeal, but was not. *Id*. Accordingly, the forfeiture rule applies only where it was possible to raise an issue on direct appeal. *Youngblood*, 389 Ill. App. 3d at 214. Here, aside from the claim that appellate counsel was ineffective, each of the claims raised in defendant's amended petition relied on evidence outside the record, meaning they could not have been raised on direct appeal.

¶ 29 Turning back to the claim at issue, we note that defendant has called into question whether two of his fundamental constitutional rights were compromised: his right to testify and his right to a jury trial. See *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997); *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). The State argues that the claim was properly dismissed because defendant signed a Spanish-translated jury waiver and the trial court properly admonished him

that it was his decision whether to proceed with a jury trial or a bench trial. However, a valid jury waiver must be knowingly and understandingly made, and a determination of whether a jury waiver is valid depends on the facts and circumstances of each particular case. *In re R.A.B.*, 197 Ill. 2d 358, 364 (2001). Moreover, a defendant's in-court statements and written jury waiver do not show whether the waiver was free of coercion on the part of his counsel. See *People v. Smith*, 326 Ill. App. 3d 831, 848 (2001) (holding that the defendant's jury waiver did not positively rebut the defendant's allegation that his trial counsel caused him to waive his jury right by advising him that the judge owed him a favor).

¶ 30 The State next argues that defendant failed to demonstrate prejudice under *Strickland* by failing to show that he would have obtained a more favorable result if he had opted for a jury trial. Defendant points out, however, that this is not the correct standard. Where a defendant's challenge to a jury waiver is predicated on a claim of ineffective assistance of counsel, the relevant question under the *Strickland* prejudice prong is "whether there exists a reasonable likelihood that the defendant would not have waived his jury right in the absence of the alleged error." *People v. Todd*, 178 Ill. 2d 297, 318 (1997) (quoting *People v. Maxwell*, 148 Ill.2d 116, 142 (1992)); *People v. Hobson*, 386 Ill. App. 3d 221, 242 (2008). Defendant further asserts that he indicated such a reasonable likelihood in his affidavit by alleging that he was "manipulated" by trial counsel into choosing a bench trial. We agree with defendant, and we therefore remand the cause for a third-stage evidentiary hearing on the sole issue of whether trial counsel was ineffective for advising defendant that he would not be able to have a jury trial because he would have to testify.

¶ 31 In closing, we feel compelled to note our concerns with the representation provided by post-conviction counsel. As discussed above, defendant's amended petition included a number

of frivolous claims. We understand that these claims were likely added in an effort to be responsive to defendant, as defendant had written letters to the trial court expressing his frustration that post-conviction counsel did not intend to advance all of the claims from his *pro se* petition. However, we remind post-conviction counsel that he cannot file an amended petition in good faith containing claims which he has determined to be meritless. *Greer*, 212 Ill. 2d at 205; Ill. S. Ct. R. 137 (eff. July 1, 2013). Moreover, if post-conviction counsel determines in good faith that the claims have merit, he is obligated present the claims in an appropriate legal form. *People v. Johnson*, 154 Ill. 2d 227, 247 (1993). On this point, defendant's amended petition left something to be desired. Finally, we note that the amended petition contained an incorrect assertion that defendant needed only state the "gist of a claim" to survive; as we have discussed, this is not the correct standard for a second-stage proceeding. These shortcomings notwithstanding, we believe defendant's amended petition adequately stated the only non-frivolous claim from defendant's *pro se* petition, and we therefore decline to hold that post-conviction counsel provided inadequate representation under Rule 651(c).

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we reverse the judgment of the circuit court of McHenry County dismissing defendant's amended post-conviction petition, and we remand the cause for an evidentiary hearing on the sole issue of whether trial counsel was ineffective for advising defendant that he would not be able to have a jury trial because he would have to testify.

¶ 34 Reversed and remanded with directions.