2017 IL App (1st) 160253-U

FOURTH DIVISION
June 29, 2017

No. 1-16-0253

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. 97 CR 2542
	)	
RICARDO LIMA,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's dismissal of defendant's postconviction petition after an evidentiary hearing was not manifestly erroneous where the court concluded that defendant failed to prove ineffective assistance of trial counsel by a preponderance of the evidence.

¶ 2 Defendant Ricardo Lima appeals the trial court's denial of his postconviction petition following a third stage evidentiary hearing. On appeal, defendant argues that the trial court's denial was manifestly erroneous because he established by a preponderance of the evidence that his trial counsel was ineffective for failing to call witnesses who would have corroborated defendant's claim of self-defense at trial.

¶ 3 Following a jury trial, defendant was found guilty of one count of first degree murder and three counts of attempted first degree murder, and subsequently sentenced to a term of 50 years for the first degree murder and a consecutive 10-year term for attempted first degree murder. The following evidence was presented at defendant's trial.

¶ 4 Ruben Martinez, Rocky Salazar, and Juan Ocon each gave similar testimony about the circumstances surrounding the shooting that led to defendant's convictions. On December 22, 1996, Martinez, Salazar, and Ocon were riding in a van with Armando Rodriguez. Martinez was driving, Salazar was in the passenger seat, Ocon sat in the middle bench seats and Rodriguez was seated on the back bench. Martinez, Salazar, and Rodriguez were all members of the Satan Disciples gang while Ocon was a member of the Latino Jivers. The Satan Disciples and Latino Jivers were on friendly terms. Martinez, Salazar, and Ocon each testified that there were no weapons in the car, but each admitted to smoking marijuana that night.

¶ 5 At around 9 p.m., the men were going to drop Martinez off at his girlfriend's house and then continue on to play laser tag. Martinez's girlfriend lived on the 2200 block of West Erie Avenue in Chicago. Martinez drove by the house heading west to see if his girlfriend's mother's car was in the driveway. Martinez's girlfriend's house was on the border of rival gang territory. He circled around the neighborhood and returned to the block driving east on Erie where several people were on the sidewalk.

¶ 6 Salazar testified that the people were members of the C-Notes gang. The Satan Disciples and C-Notes were involved in an ongoing conflict at the time. Salazar recognized defendant as one of the C-Notes. Salazar stated that defendant left the sidewalk and walked into the street near the passenger side of the van. Salazar said he told Martinez to drive away. He then heard five or

six gunshots from behind the van and one of the bullets traveled past Salazar to strike part of the window. Through the rearview mirror, Salazar saw defendant standing by himself in the street.

¶ 7 Ocon testified that he could not see the face of the shooter, but saw someone jump into the street and shoot at them with a chrome gun. He heard six shots fired . He described the shooter as wearing a "hoodie" and a black coat.

¶ 8 Martinez testified that he had been smoking marijuana that night and did not know what was going on. He remembered seeing several people on the sidewalk and then he accelerated when he heard gunshots. When they realized Rodriguez had been shot in the head, Martinez drove to Norwegian American Hospital. They dropped Rodriguez off, but left to get Rodriguez's parents and bring them to the hospital. Martinez admitted that he identified defendant in the lineup and before the grand jury, but at trial, he denied that defendant was the shooter.

¶ 9 An evidence technician testified that on December 22, 1996, he recovered six .9 millimeter cartridge cases between 2213 and 2209 West Erie. He also recovered a fired bullet near 2204 West Erie. Later, the evidence technician processed the van and found a fired bullet on the front passenger seat, noticed holes in the exterior of the van, and saw that the rear window was shattered and a brake light had a bullet hole through it. The parties stipulated at trial that the cartridge cases came from the same gun. The stipulation also stated that the recovered bullets, including one from Rodriguez's head were fired from the same weapon.

¶ 10 The State also presented a stipulation from the medical examiner indicating that Rodriguez died as the result of single gunshot wound to the back of his head.

¶ 11 Detective Thomas Flaherty testified that he was assigned to investigate the shooting. He, along with his partners, spoke with Martinez at Norwegian American Hospital. Martinez informed the detectives that defendant was the shooter. Detective Flaherty later received a flash

message that defendant had been arrested and taken to the Area Four police station. At the station, Detective Flaherty was present when defendant was identified by Martinez and Salazar in a lineup. Ocon was unable to make an identification.

¶ 12 Assistant State's Attorney (ASA) Michael O'Malley testified that he was assigned to the felony review unit in December 1996 and received the assignment for defendant's case. ASA O'Malley spoke with defendant at Area Four. He advised defendant of his *Miranda* rights and defendant agreed to speak with him. Detective Dennis Walsh and youth officer Mihajlov were also present. After speaking with ASA O'Malley, defendant agreed to give a handwritten statement. He also stated that defendant was given time alone with his mother at the police station.

¶ 13 In the statement, defendant admitted that he was a member of the C-Notes gang and had been a member since he was 10 years old. Defendant was 16 years old in December 1996. He bought a .9 millimeter gun about two months before the shooting. He has known Martinez since he was five years old. He stated that Martinez was a member of the Satan Disciples, which is a rival gang to the C-Notes.

¶ 14 On December 21, 1996, defendant slept at his girlfriend's house, who lived near Ohio and Oakley. He put his gun under a garbage can behind his girlfriend's house. The next day, he took the gun from under the garbage can and put it in his waistband. He went to his friend Tammy's house at 2308 West Grand. He left Tammy's house in the later afternoon to hang out on Oakley, which is C-Note territory. There, he met five of his friends and fellow C-Notes. They decided to go to another friend's house on Erie, near Hoyne. He and his friends were walking on Erie near Leavitt when one of defendant's friends yelled, "Ruben."

¶ 15 Defendant stated that he and Martinez had fought twice in the past month. When defendant heard his friend call "Ruben," defendant turned and saw a van he knew was Martinez's van. Defendant saw Martinez driving and another boy in the passenger seat. The passenger yelled, "f*** you," from the window and one of defendant's friends yelled, "p***" in response. Defendant then "stepped into the street, took the loaded gun from his waistband and shot towards the back of the van about six times." Defendant was approximately three or four houses west of Leavitt and the van was driving east on Erie. The van then sped off on Erie.

¶ 16 Defendant ran toward Leavitt with the gun. He ran south on Leavitt and then through an alley. He went by the Holy Rosary Church on Erie, near Western. He lifted the sewer cover near the church and threw the gun into the sewer. He threw the gun in the sewer because he wanted to get rid of it after having shot it at someone. He replaced the sewer cover and returned to his Tammy's house on Grand and was there when the police arrived about 15 minutes later.

¶ 17 Defendant testified on his own behalf. Defendant admitted to being a member of the C-Notes gang since he was 11 years old. Defendant testified about previous encounters with Martinez. A year earlier, defendant stated that he was standing on Oakley when Martinez started shooting at him. In an incident the previous month, defendant said that he was walking down Oakley when Martinez drove by in a van. They exchanged obscene gestures and then Martinez got out of the van and they got into a fight. The week before the shooting, defendant stated that he was standing on Ohio when Martinez and his friends pulled up in a van, got out, and chased defendant with baseball bats. He did not report these incidents to the police because that is not allowed in the gang. He testified that he knew Martinez was always armed because Martinez's girlfriend lived in rival gang territory.

¶ 18 Defendant stated that on December 22, 1996, he and several other C-Note members were walking down Erie when they saw the van. He listed Franco, Chachi, Jeffo, and two different men named Billy as the individuals with him that night. Defendant said he saw Martinez and Salazar in the van. Defendant was walking a little bit ahead of the group. The van passed them. Defendant started to cross Erie. When he was in the middle of the street, the van started to reverse in his direction at a high rate of speed. Defendant then pulled out his gun and fired at the van to stop them from running him over. Defendant started to run backwards while shooting his gun. The van stopped and drove eastbound on Erie. After the shooting, he went to his friend Tammy Acietuno's house at 2308 West Grand and stayed there until the police arrived.

¶ 19 Defendant testified that he tried to tell ASA O'Malley about the van reversing toward him, but was cut off and not allowed to respond. He said he refused to sign the handwritten statement, but Detective Walsh threw him against a wall and threatened to arrest his brothers. Defendant stated that he was not able to see his mother until after he signed the handwritten statement. Defendant testified on cross-examination that he gave the names of the friends with him that night to Detective Walsh.

¶ 20 Pamela Stiglich testified for the defense that she witnessed the incident in which defendant was chased by other people with baseball bats. She did not report the incident to the police. Defendant's mother and aunt also testified that defendant's mother was not permitted to speak with defendant until after he gave the statement, though they had been waiting at the police station for several hours.

¶ 21 In rebuttal, Detective Walsh and youth officer Mihajlov testified that defendant was able to speak to his mother and defendant was not threatened physically and verbally to sign the

handwritten statement. Mihajlov and Detective Walsh also testified that defendant refused to disclose the names of his friends present at the shooting.

¶ 22 On direct appeal, defendant argued that (1) the trial court erred in denying his motion to suppress, (2) the State violated the trial court's ruling on a motion *in limine* by introducing evidence of another crime for which defendant was not on trial, (3) the State's rebuttal argument inappropriately invoked the integrity of the prosecution to attack the credibility of the defendant, (4) his sentence was excessive, and (5) he was entitled to day-for-day good conduct credit. The reviewing court affirmed defendant's conviction, but modified defendant's 10-year sentences to run concurrent with the 50 year sentence for first degree murder. See *People v. Lima*, 328 Ill. App. 3d 84 (2002).

¶ 23 In July 2009, defendant filed his *pro se* postconviction petition with the trial court. Defendant acknowledged that his petition was untimely, but claimed that this was due to the "lack of financial support in hiring an attorney or investigator." Defendant's petition alleged actual innocence based on newly discovered evidence and numerous claims of ineffective assistance of trial counsel, including a claim that trial counsel failed to interview or subpoena exculpatory witnesses. Defendant attached seven affidavits from friends and family to support his claim. The trial court summarily dismissed defendant's postconviction petition at the first stage. Defendant appealed, and this court reversed the trial court's dismissal of defendant's postconviction petition at the first stage and remanded for further proceedings. See *People v. Lima*, 2011 IL App (1st) 093098-U.

¶ 24 On remand, defendant was appointed counsel, who subsequently filed an amended postconviction petition. In his amended petition, counsel incorporated defendant's previous allegation that his trial counsel was ineffective for failing to call witnesses and added two

additional claims of ineffective assistance of trial counsel for failing to request a fitness evaluation and failing to object to improper comments during closing arguments. The amended petition included the affidavits from defendant's friends and family.

¶ 25 Edwin Acietuno and Tammie Mayfield stated in their respective affidavits that they were standing on the porch of their residence, located at 2118 West Erie, waiting for defendant and other friends to arrive for a party. They saw defendant and other guests walking toward their house when a van passed them. Defendant was crossing the street when the minivan started to reverse at a high rate of speed toward defendant. They saw defendant reach for what appeared to be a gun and then defendant shot at the van while running backwards. The van stopped and sped forward. Acietuno stated he learned from defendant's brothers in 2008 that defendant had been found guilty of first degree murder. Acietuno stated that he was not interviewed "by an officer of the Court" and was willing to testify at trial for defendant. Mayfield also stated that she was willing to testify and "had an investigator or an attorney interviewed [her, she] would have told them the same story."

¶ 26 Francis Hoyt[1] stated in an affidavit that on or about December 22, 1996, she lived at 2213 West Erie. That night, she was sitting on her couch in her apartment when she heard someone scream something. She went to her window that overlooked the street and saw a man, who she later learned was defendant, running backwards while a van was reversing at a high rate of speed toward him "as if trying to run him over." At that point, defendant pulled a gun from his waistband and began shooting. Hoyt also said that she would have said something earlier, but did not want to get involved. She would have stated these facts if questioned by detectives or attorneys and could attest to these matter if called to testify.

[1] The name Francis is spelled both as "Francis" and "Frances" in the record. We will refer to her as "Francis" as stated in her affidavit. We recognize that we previously referred to Hoyt as a male in the previous appeal because the affidavit does not refer to gender, but the transcript clearly shows Hoyt is a female.

¶ 27 Sebastian Mendez, Anthony Diaz, and Rafael Lima stated in their affidavits that they were with defendant on Erie and were on their way to a party. Diaz and Lima stated that they are defendant's brothers. The men each said that they were walking on Erie when a van passed them. Diaz said he recognized the van as Martinez's van. The men stated that words were exchanged with the men in the van. Defendant was crossing the street when the van stopped and began to reverse toward defendant. They saw defendant pull out a gun and shoot while running backwards away from the van. Each of the men stated that they were competent to testify as to these facts.

¶ 28 Defendant also presented the affidavit of one of the passengers of the van. Juan Ocon stated that he "gave false information to the Chicago police detectives and State's attorney's [sic] and [he] testified falsely against Mr. Lima out of fear that [he] would be prosecuted on later date if [he] did not comply with detectives and state's attorney's [sic]." Ocon admitted in his affidavit that he was presently incarcerated in the Illinois Department of Corrections.

¶ 29 Ocon further stated that on December 22, 1996, he with Martinez, Salazar and Rodriguez "decided to look for trouble against rival gang members." When they drove on Erie, they passed some rival gang members and noticed one in the middle of the street. They decided to start trouble and Martinez "placed the van on reverse [sic] and began to pick up a high velocity of speed." Ocon said Martinez's intentions were to run over the guy in the street, who was identified as defendant by Salazar, Martinez and Rodriguez. The guy then began firing a gun toward them in his defense. Martinez stopped the van to avoid gun fire and for them to shoot their guns at the rival gang members. However, they noticed that Rodriguez had been shot and left to take him to the hospital.

¶ 30 Ocon stated that they agreed to "cover up our own tracks." After dropping Rodriguez off at the hospital, they went back to their neighborhood "to drop off [their] own guns and weed."

Ocon, Martinez and Salazar agreed to lie to the police and tell them "a fake story about what happened. So when questioned we all lied and said we were minding out own bussiness. [sic]" They agreed "to point out the first rival gang member that was shown to us that he could pay for [Rodriguez's] death!!"

¶ 31 In May 2014, the State filed a motion to dismiss defendant's amended postconviction petition. The State conceded that defendant had submitted sufficient evidence to warrant a third stage evidentiary hearing on his claim of ineffective assistance for failing to interview or call exculpatory witnesses, but asked the court to dismiss defendant's other claims in his petition. In November 2014, the trial court granted defendant's request for an evidentiary hearing on his claim that his attorney failed to investigate potential witnesses, but granted the State's motion to dismiss the remaining claims. Defendant has not appealed the dismissal of these claims at the second stage.

¶ 32 In January 2015, the trial court conducted an evidentiary hearing. At the hearing, defendant presented the testimony of Hoyt, Acietuno, Mayfield, Diaz, and Ocon.

¶ 33 Francis Hoyt testified that in December 1996, she lived on the 2200 block of Erie Street. She knew defendant at that time, but did not know his brothers until later. At around 9 p.m. on December 22, 1996, Hoyt was at her house when she heard some screaming and yelling. She looked out her window and saw somebody in the middle of the street "kind of running from a van that was reversing." At the time, she could not recognize the individual in the street because it was dark outside. She saw this individual "running in a backwards motion." She did not hear any gunshots right at that time, but "after maybe two seconds of running," she heard one gunshot. Hoyt stated that the sound of gunfire was not unusual for her neighborhood. When Hoyt heard the gunshot, she ducked from the window.

¶ 34 Hoyt testified that she did not talk to the police about what she saw. She also stated that no police came to her door to canvass for information. She was not contacted by defendant's trial counsel. Hoyt said that she heard about defendant's arrest approximately one month later in conversation with people in the area. Hoyt admitted that she has a prior misdemeanor conviction for retail theft.

¶ 35 On cross-examination, Hoyt stated that her apartment was on the second floor of 2213 West Erie Street. She started socializing with one of defendant's brothers about eight to ten years ago, but she did not know his given name. She knew his nickname as "Coo-Coo." Hoyt said that she told "everybody what happened." She estimated that the individual was approximately 10 feet from the van. Hoyt stated that everything happened "so fast. It was less than five minutes." She estimated that the gunshot happened within "maybe 20 seconds" of her looking outside and seeing the individual running backwards. She testified that she was at the window for "maybe a minute, two minutes."

¶ 36 Hoyt testified that she looked outside approximately 15 minutes later, but did not see anything. She did not see any police officers or evidence technicians in the area. She said she found out that someone had been killed about a month later from an older woman in the neighborhood. During this conversation, Hoyt realized that it was defendant in the street that night. Hoyt stated that no one contacted her and she never knew she was listed on defendant's attorney's answer to discovery as a witness for the defense in October 1997.

¶ 37 Edwin Acietuno testified that he was married to Tammie Mayfield. He was friends with defendant and he also knew defendant's older brother Raphael. In December 1996, he lived on the 2100 block of Erie Street.

¶ 38 On December 22, 1996, at approximately 9 p.m., Acietuno and his wife Tammie were on their porch. The porch has a little staircase to go downstairs. They were waiting for friends to come over for a party they were throwing, which included defendant and his two brothers. Acietuno estimated that he and Mayfield were "about 15 houses away from it." He saw a bunch of friends approaching from the west, including defendant and his brothers. Acietuno stated that there were four or five people in that group. As they were approaching, Acietuno saw a vehicle reversing at a high rate of speed toward the group. He saw defendant "grabbing something." Acietuno heard gunshots, but did not know how many. The vehicle then fled forward past Acietuno's house.

¶ 39 Acietuno testified that he continued with his party that evening, but no one from that group came to the party. Acietuno stated that he never spoke with police and they did not come to his house. He also did not see police on the street later that evening. Acietuno could not remember how long after it was that he learned defendant was the person behind the vehicle. He said the Lima brothers were "acquaintances." He was never contacted by defendant's attorney.

¶ 40 On cross-examination, Acietuno stated that in 1996 he was 17 years old. He and Mayfield were not married at that time, but were living together. His apartment was on the second floor and he was "15 to 20 houses away" from the incident. Acietuno did not remember the color or how big the vehicle was. He did not notice the vehicle until it stopped. He admitted that he could not see what was happening behind the van. Acietuno testified that the gunshots happened "instantly" after the vehicle was reversing. He ran as soon as he heard the gun. He came back outside 15 to 20 minutes later. He did not see anything. Acietuno stated that the party still occurred with Mayfield's friends and family. He estimated that 11 or 12 guests were at the party. He did not talk to anyone in defendant's family that night. He stated that he heard rumors that

defendant was in jail for murder, and about one to two years later, he heard from defendant's older brother that defendant had been convicted. Acietuno testified that defendant's brothers did not ask him to sign an affidavit, but a mutual friend asked him. He did not tell anyone in defendant's family what he witnessed until years later.

¶ 41 Tammie Mayfield testified that she is married to Acietuno. She knew defendant because he grew up with her younger brothers. In 1996, she was living at 2118 West Erie with Acietuno. She corroborated Acietuno's testimony that they were standing together on their porch waiting for guests to arrive. Mayfield stated that they were waiting for guests for Acietuno's party. She testified that she did not invite anyone to the party and none of her friends attended.

¶ 42 She stated that she saw the van "flying down Erie." Then the van stopped, and reversed toward defendant. Mayfield said she could see the group approaching, but she did not know "exactly everybody that was there with him." She next heard gunshots, but could not see where they came from. She then went in her house and she never went back outside that night. She later learned defendant had been arrested from Acietuno. She was never contacted by an attorney representing defendant.

¶ 43 On cross-examination, Mayfield stated that her neighborhood had different factions of gangs, including the Latin Kings, Satan Disciplies, and the C-Notes. She admitted that gunshots were not an unusual thing. Mayfield said they had pagers in 1996, and had been paged that the group was coming to the party. She estimated that the group was between 10 and 15 people, but she did not remember. She recognized defendant because he was in front of the group. She estimated that she was eight houses away from where she first saw the group.

¶ 44 Mayfield testified that she saw the van in front of her house, but then heard "screeching." She stated that defendant was in the middle of the street and the van "almost" ran him over. She

then heard gunshots and ran into her house. She did not go outside or look out of her windows. On redirect, she estimated that the van was going 70 miles per hour when it was in reverse.

¶ 45 Anthony Diaz testified that he was defendant's younger brother. He stated that he was 14 years old in 1996. On December 22, 1996, he was walking with defendant and some other individuals down Erie on the way to a party. They were on the 2200 block of Erie when a van passed them, then as defendant was crossing the street, the van reversed at a high speed toward defendant. Defendant then started shooting at the van. Diaz recognized the van as belonging to gang members. Diaz denied being in a gang, but admitted that defendant was in a gang. He estimated that defendant was less than half a block in front of the rest of the group. Diaz stated that words were exchanged with occupants of the van and the group. Diaz denied being armed that night, and was surprised when defendant pulled out a gun and began firing. He said he was in fear for his brother's life. Diaz stated that he did not talk to defendant's lawyer prior to trial.

¶ 46 On cross-examination, Diaz stated that he could not remember who else was in the group walking to the party other than defendant and his other brother. He later said one other individual was "probably this kid named Sebastian." He admitted that he and his other brother were on defendant's witness list. He denied knowing that defendant possessed a gun that night. Diaz testified that he did not see defendant pull the gun, but he heard the shots and saw defendant was shooting. He estimated the van was a couple of car lengths from defendant.

¶ 47 Juan Ocon testified at the hearing that he was currently in the custody of the Department of Corrections following a conviction for first degree murder and attempt murder. Ocon stated that at approximately 9 p.m. on December 22, 1996, he was in a van with Rocky Salazar, Armando Rodriguez, and a man he knew as "Professor." He said they had been smoking marijuana and driving around. They were driving by Professor's house to drop him off. They

saw a group of men, and then they stopped and reversed toward them. Ocon testified that he was not familiar with them, and that they were C-Notes. He was a member of the Latin Jiver gang. He stated that he was laying down in the middle seat, Professor was driving, Salazar was in the passenger seat, and Rodriguez was in the back seat. Salazar noticed the group and called attention to them. Professor put the van in reverse. Ocon said the purpose of going in reverse was to "jump out" and fight. Ocon denied the presence of weapons in the van. He heard gunshots, but did not see who was shooting.

¶ 48 Ocon admitted to testifying for the State at trial. He said he was never asked at trial if the van went in reverse. He stated that he testified to what the detectives told him to say. He also stated that he left a lot of things out of his handwritten statement. On cross-examination, Ocon admitted that he lied at trial.

¶ 49 After defendant rested, the State presented an affidavit from defendant's trial counsel. Trial counsel was currently living in Arizona and unable to attend the hearing. He no longer had his case file, but he reviewed other documents related to the case. Counsel recalled that he spoke with defendant and one other family member about the case and based his defense on those interactions. He remembered "putting [his] best efforts into representing" defendant. He did not remember how he came up with the names listed on the witness list. He stated that he would have created the answer through discussions with defendant and discovery documents. He could not recall who he interviewed and why he chose to call witnesses. Counsel stated it was his practice to interview all witnesses he believed would aid in his client's defense. He knew that his decisions as to what witnesses to call was strategic based on what he thought was best for defendant's case. The decision not to call a witness was strategic and was not "due to inattention or inaction." Counsel stated that the case against defendant was strong and difficult to defend due

to defendant's statement to police. While he remembered defendant's case, he does not remember specific conversations, but he knew that he did his best to provide defendant the best defense possible.

¶ 50 After the hearing, the trial court issued a written order finding that defendant failed to establish the denial of a constitutional right by a preponderance of the evidence.

¶ 51 This appeal followed.

¶ 52 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2012)) provides a tool by which those 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. 725 ILCS 5/122-1(a) (West 2012); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Id*. at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶ 53 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the

second stage. Counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2012)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2012)). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. See *Coleman*, 183 Ill. 2d at 381. If no such showing is made, the petition is dismissed. "At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2012).

¶ 54 At an evidentiary hearing, "the circuit court serves as the fact finder, and, therefore, it is the court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts." *People v. Domagala*, 2013 IL 113688, ¶ 34. Since the trial court makes factual and credibility determinations, the court's decision will not be reversed unless it is manifestly erroneous. *People v. English*, 2013 IL 112890, ¶ 23. " 'Manifest error' is error which is clearly plain, evident, and indisputable." *People v. Taylor*, 237 Ill. 2d 356, 373 (2010).

¶ 55 Defendant argues on appeal that the trial court's finding that defendant failed to establish ineffective assistance of trial counsel by a preponderance of the evidence was manifestly erroneous. Defendant contends that the trial court misapplied the law governing defendant's claim by basing its ruling exclusively on its own conclusion that the witnesses were not credible. The State maintains that the trial court's ruling was not manifestly erroneous.

¶ 56 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 57 "A defendant is entitled to reasonable, not perfect, representation, and mistakes in strategy or in judgment do not, of themselves, render the representation incompetent." *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). "Decisions concerning what witnesses to call and what evidence to present on a defendant's behalf are viewed as matters of trial strategy. Such decisions are generally immune from claims of ineffective assistance of counsel." *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002). "In recognition of the variety of factors that go into any determination of trial strategy, courts have held that such claims of ineffective assistance of counsel must be judged on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review." *Fuller*, 205 Ill. 2d at 330-31 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Strickland*, 466 U.S. at 689).

¶ 58 In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of

sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 59 Here, the trial court issued an extensive written order in which it reviewed the testimony of each witness before concluding that defendant had failed to show a constitutional deprivation, *i.e.*, ineffective assistance of trial counsel, by a preponderance of the evidence. In considering the witnesses, the court found all of the witnesses had "glaring credibility issues which rendered their testimony completely unreliable." The court then detailed its credibility findings as to each witness.

¶ 60 First, the court found Hoyt's testimony that she was drawn to the window moments before the shooting to be "highly suspicious" because Hoyt testified that it was not unusual to hear loud voices at that time, but she went to the window this time. The court also observed that Hoyt's timeframe was inconsistent. First, Hoyt's testimony was that the events occurred within a few seconds. Later, she stated the series of events took place in less than five minutes. Then, she said the shots happened within 20 seconds, and she was at the window for a minute, but then said it was two to three minutes. The court found that these were not "minor inconsistencies," but rather "major discrepancies that paint the picture of a woman who cannot keep her story straight."

¶ 61 The court found additional credibility issues, including Hoyt's recollection of hearing a single gunshot, when trial evidence established several more gunshots were fired. Hoyt also stated that she looked out the window again 15 minutes later and did not see any police activity. However, the trial evidence showed that the police recovered cartridges from the scene. Hoyt further stated that she told "everybody" about what she saw, but also said that she did not tell police because she "didn't think it was a big deal." The court further pointed out that Hoyt

testified about a potential interest as she began socializing with defendant's brothers several years after the shooting.

¶ 62 Next, the trial court found credibility issues with the testimony of Acietuno and Mayfield. Both testified that they were living together and were waiting on their porch for guests to arrive. However, their testimony contradicted each other regarding the party. Acietuno testified that Mayfield's friends and family were invited and attended the party, but Mayfield testified that her friends were not invited and the attendees were Acietuno's friends. The court found that the "entire notion of the party was concocted after the shooting to created a vantage point for Acietuno and Mayfield to view the shooting."

¶ 63 The court also noted discrepancies between Acietuno and Mayfield as to how far away defendant was when the shooting occurred. Acietuno estimated that his house was 15 to 20 houses away, but Mayfield stated that they were 8 houses away. The court observed that this was "not a negligible difference," as Acietuno's distance was more than double what Mayfield stated. The court also expressed doubts that they were on the porch waiting for guests and stated that it "does not believe" this testimony.

¶ 64 The court further found that Acietuno's actions after the shooting show a lack of reliability. Acietuno testified that defendant was a friend he saw regularly and they were close. The court found it "improbable and unbelievable that Acietuno, having just witnessed [defendant's] involvement in a shooting, never checked up on [defendant] to make sure he was okay or to see what had happened." Rather, Acietuno stated that the party took place and he never saw police on the street, nor did he check on defendant. The court also found it improbable that Acietuno did not learn what happened to defendant until "maybe two years later."

¶ 65 The court disregarded Ocon's testimony to support a claim of ineffective assistance because he testified at trial and was subject to cross-examination. Ocon's recantation of his prior testimony was not the fault of trial counsel, and the court noted that it saw "this witness as merely supplementing the testimony of the other witnesses." In reviewing Ocon's testimony, the court found Ocon to be "the least credible" because "his testimony involved an express admission of perjury." The court found Ocon's testimony at the hearing to be "completely incredible," pointing out that despite prior opportunities, this was the first time he stated that the van reversed toward defendant. When confronted about this omission, Ocon stated that it was because no one asked him about the van reversing. The trial court was unpersuaded, "Ocon's excuse is a meaningless jumble of words that provide no legitimate basis for failing to provide police with fact that would be seen as pertinent by any reasonable person." The court specifically noted that Ocon was directly asked about the van going in reverse at trial, which he answered no. Ocon stated at the hearing that he lied, but the trial court was "not persuaded." The court found Ocon to be an "unreliable witness" and believed that Ocon was telling the truth at trial. The court acknowledged defendant's argument that recantation does not automatically render a witness unreliable, but concluded that the court "has made an individualized determination as to Ocon with full consideration of the facts and circumstances. Under this assessment, Ocon is not a credible witness."

¶ 66 Finally, the court considered the testimony of defendant's younger brother, Diaz. The court found that other than "a few minor inconsistencies, Diaz's testimony was the most believable out of all [defendant's] witnesses." However, the court stated that it could not "ignore" that Diaz was defendant's brother with a "keen interest in doing what it takes to ensure [defendant's] release from prison." The court noted Diaz's young age at the time of the shooting,

14 years old, along with Diaz's testimony that he did not understand what was happening at the time of defendant's claim of self-defense. The court believed that Diaz was "simply trying to protect his older brother," and the court ascribed "no weight to Diaz's testimony."

¶ 67 The court summarized the testimony of defendant's witnesses.

> "In sum, all of the witnesses put forth by [defendant] can agree on one thing: that they observed a van reversing at a high rate of speed towards [defendant] as he stood in the middle of the street. However, it is there that their stories diverge, with each witness offering a different account of what happened leading up to that moment. As explained in detail above, some of these accounts are implausible, some are contradictory, and some are downright false. In the end, this Court has carefully reviewed the testimony of all of [defendant's] witnesses – as well as their tone, behavior, and demeanor in open court – and concludes that these witnesses are not worthy of belief. As a result, the Court find that all of [defendant's] witnesses are unreliable."

¶ 68 The court then considered the standard under *Strickland*. Under the performance prong, the court found that "it cannot be said that trial counsel failed to conduct any 'meaningful adversarial testing.' " The court noted that defendant presented his defense of self-defense, including previous acts of violence between defendant and Martinez. Counsel called Pamela Stiglich to corroborate defendant's testimony of these prior incidents. Turning to prejudice, the court observed that "the State presented strong and compelling evidence of [defendant's] guilt,"

which included multiple eyewitnesses, who identified defendant, as well as defendant's confession.

> "Because the evidence of [defendant's] guilt was so strong, this Court has little difficulty concluding that the witnesses that [defendant] faults his trial counsel for failing to interview and call at trial would not have changed the outcome of the proceeding. As explained in great detail above, the testimony of these witnesses was not credible under even the broadest definition of the term, and thus [defendant] did not suffer any prejudice from counsel's failure to interview or call these witnesses. Simply put, considering all of the evidence in its entirety, the witnesses' testimony is not sufficient to undermine confidence in the outcome of [defendant's] trial. Since [defendant] has not demonstrated, by a preponderance of the evidence, that there is a reasonable probability that the testimony would have changed the result of the trial, his claim must fail."

¶ 69 Finally, the trial court noted that it found "nothing particularly noteworthy" in trial counsel's affidavit. The court stated that counsel's "generalized allegations do not really prove anything." The court acknowledged that the lack of detail "can be expected after the passage of nearly two decades," and ascribed "no fault" to counsel "for not offering a more robust affidavit."

¶ 70 We find the trial court's decision to be well reasoned and very detailed. The court thoroughly reviewed the testimony of each witness and noted all inconsistencies. The court

further explained why it considered some inconsistencies to be significant. The court reached its credibility determinations after this thoughtful analysis.

¶ 71 Moreover, as the State points out, several of the witnesses' testimony contradicts defendant's testimony at trial. First, defendant testified at trial that he was with five fellow C-Notes that night, Franco, Chachi, Jeffo, and two different men named Billy. He did not mention that either or both of his brothers were present on Erie the night of the shooting. Next, defendant stated on cross-examination that after the shooting he went to his friend "Tammy's house" at 2308 West Grand Avenue. The prosecutor clarified by asking if it was "Tammy Acietuno's house," and defendant answered, "Yes." He said that her husband let him in the house and he stayed there until the police arrived to arrest him. He also stated in his handwritten statement that he went to Tammy's house after the shooting.

¶ 72 Defendant contends that the trial court's credibility determinations hinged on "collateral matters that did not undermine what they saw from their respective vantage points." According to defendant, "the discrepancies relied on by the court to justify its dismissal order implicated collateral issues and should not receive much weight, if any, under this prejudice prong analysis, especially in light of the fact that the witnesses are testifying about collateral details occurring 20 years ago." In support, defendant relies on *People v. King*, 316 Ill. App. 3d 901 (2000), and *Raygoza v. Hulick*, 474 F.3d 958 (7th cir. 2007).

¶ 73 In *King*, the defendant was convicted of aggravated criminal sexual assault and aggravated kidnapping for the abduction and sexual assault of a minor on the defendant's school bus. The victim testified at trial that the defendant had altered his bus drop-offs and they were alone on the bus when he sexually assaulted her. Two other students testified that the defendant drove the bus into an alley. The witnesses testified that the bus attendant had exited the bus early.

King, 316 Ill. App. 3d at 907-09. In his postconviction petition, the defendant argued that his trial counsel was ineffective for failing to present the testimony of the bus attendant. The defendant attached an affidavit from the bus attendant to his petition. In her affidavit, the bus attendant stated that she was present and the defendant and the victim were never alone that day. She also said that the victim arrived home late that day because they had dropped off an extra group of students. She further stated that she was present at trial and waited outside the courtroom to be called, but was not called to testify. *Id.* at 904.

¶ 74 At the evidentiary hearing, the defendant sought to continue the hearing because the bus attendant was unavailable, but the State stipulated to the witness's affidavit and her credibility. The only witness to testify was trial counsel. Counsel testified that he could not remember why he did not call the witness, but that it was trial strategy. *Id*. at 906. The trial court found that the trial counsel was not ineffective. The court stated on the record that defense counsel " 'doesn't recall specifically why, but I'm assuming that there were good reasons. Obviously, that witness is not going to say something at trial that was going to be helpful to him at that time.' " *Id.* at 911.

¶ 75 On appeal, the reviewing court found the trial court's ruling to be manifestly erroneous because the witness's statements in her affidavit were "unequivocally exculpatory." *Id.* at 914-15. The court further observed that trial counsel admitted at the hearing that

> "he was aware, at the close of his proofs, that he had not presented any evidence to rebut the testimony of the State's witnesses who testified that [the bus attendant] got off the bus early. Because [trial counsel] failed to provide any explanation at the evidentiary hearing and because we cannot conceive of any sound trial strategy that would justify counsel's failure to call an available alibi witness

> who would have bolstered an otherwise uncorroborated defense, we find that [trial counsel's] failure to call [the bus attendant] as a witness was the result of incompetence." *Id.* at 916.

¶ 76 The reviewing court further rejected the State's argument that the defendant could not show prejudice under *Strickland*. After reviewing all the evidence presented at trial, the court could not "say that evidence of defendant's guilt in this case was overwhelming," such that the absence of the witness's testimony was "sufficient to undermine confidence in [the] defendant's conviction." *Id.* at 919.

¶ 77 In *Raygoza*, the defendant filed a petition for *habeas corpus* in the federal court asserting that Illinois courts had erred in rejecting his claim of ineffective assistance of trial counsel. The defendant was convicted after a bench trial of first degree murder and attempted murder. After trial, the defendant obtained new counsel, who raised the claim of ineffective assistance of trial counsel in a motion for a new trial. In the motion, the defendant argued that he had seven alibi witnesses available, including some related and unrelated persons, as well as telephone records and train tickets, but trial counsel failed to present this evidence. Defense counsel had called one alibi witness, the defendant's girlfriend. At the hearing, trial counsel explained his perceived flaws with the alibi witnesses and explained that his trial strategy had been to attack the identification witnesses. *Raygoza*, 474 F.3d at 960-62. The trial court denied the defendant's motion for a new trial, which was affirmed on appeal. *Id.* at 962.

¶ 78 The Seventh Circuit considered the defendant's ineffective assistance claims under a collateral attack, which meant that under 28 U.S.C. § 2254(d)(1), "a federal court may issue a writ of habeas corpus only if the state court reached a decision that was either contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme

Court." *Id.* at 963. Accordingly, the Seventh Circuit considered the ineffective assistance claims under *Strickland* to determine whether the state court erred. The court concluded after an objective inquiry that the defendant "did not receive constitutionally adequate representation," and there was a reasonable probability that the result of the proceeding would have been different if the defendant's attorney had called some or all of the alibi witnesses. *Id.* at 965.

¶ 79 We find these cases distinguishable from the instant case. Unlike *King*, where the alibi witness did not appear and the State stipulated to her affidavit and credibility, the trial court heard the testimony from the witnesses and was able to make observations to reach its credibility determinations. Further, the trial court in *King* improperly afforded deference to the trial counsel's limited explanation without considering the effect of the witness's testimony at trial. In contrast, the trial court here drafted a thorough written decision in which it discussed each witness's testimony. The court also found the affidavit from the trial attorney to be of no value. The court reached its decision based on the witnesses' testimony in light of the evidence at trial. Additionally, unlike *Raygoza*, the witnesses' testimony was not offered for an alibi and conflicted with defendant's own trial testimony and contained many inconsistencies. The defendant's alibi in *Raygoza* was also supplemented with telephone records and train tickets as support. No such evidence exists here to support the witnesses' testimony that the van reversed towards defendant.

¶ 80 Defendant contends that the discrepancies cited by the trial court "implicate collateral issues and should not receive much weight, if any." Defendant also asserts that the trial court improperly usurped the role of the fact finder by weighing the witnesses' testimony at the evidentiary hearing against the trial testimony, and deciding that the latter was true. Defendant cites *King* and *Raygoza* to support this assertion. However, neither case held that it was improper

to consider the trial evidence in light of the defense's new witness testimony. Both cases considered the circumstances at trial, such as, in *King*, the court pointed out that the inconsistencies in trial testimony was sufficient to find that the evidence was not overwhelming and the absence of the alibi witness was sufficient to undermine confidence in the outcome (*King*, 316 Ill. App. 3d at 918-19), and in *Raygoza*, the federal court noted that in its findings the trial court was "heavily influenced" by the lack of evidence to support the defendant's alibi, and that the alibi witnesses "was a significant, if not dispositive, factor" in the guilty finding (*Raygoza*, 474 F.3d at 918-19). The trial court analyzed defendant's witnesses in the same manner as in these cases, but concluded that in light of the State's "overwhelming" evidence, the witnesses lacked credibility and did not undermine confidence in the outcome of defendant's trial. We find no error in this analysis.

¶ 81 In sum, after reviewing the trial court's written order as well as the entire record on appeal, we find that the trial court's decision to deny defendant's postconviction petition was not manifestly erroneous. The trial court comprehensively discussed the witnesses' testimony from the evidentiary hearing and appropriately assessed their credibility, noting many significant inconsistencies within each witness's own testimony as well as other witness testimony and the evidence at trial. The testimony of these witnesses has not undermined this court's confidence in the outcome and there is no reasonable probability that the result of the proceeding would have been different. Defendant has not established by a preponderance of the evidence that his trial counsel was ineffective such that he is entitled to postconviction relief.

¶ 82 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 83 Affirmed.