2019 IL App (1st) 161982-U

No. 1-16-1982

Order filed on June 11, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 16043
	)	
LARRY COLEMAN,	)	The Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in denying defendant's postconviction petition after finding him not credible at an evidentiary hearing. Postconviction counsel did not provide unreasonable assistance in questioning defendant at the hearing.

¶ 2 Defendant Larry Coleman appeals from the denial of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)) following a third-stage evidentiary hearing. Defendant contends that he did not receive a fair evidentiary hearing

because (1) the circuit court misapprehended the evidence and law in determining his credibility and (2) postconviction counsel provided unreasonable assistance by failing to elicit certain testimony from him. We affirm.

¶ 3 Defendant was charged by indictment with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West Supp. 1997)), one count of attempt first degree murder (720 ILCS 5/8-4 (West 1996); 9-1(a)(1) (West Supp. 1997)), one count of aggravated battery with a firearm (Pub. Act 90-115 (eff. Jan. 1, 1998) (amending 720 ILCS 5/12-4.2(a)(1))), and one count of aggravated battery (720 ILCS 5/12-4(a) (West 1998)). All charges arose from defendant's alleged participation in a shooting in Chicago on October 11, 1998. The first degree murder charges alleged that defendant shot and killed Joseph Brown. The remaining counts alleged that defendant shot and wounded Christopher Brown, Joseph's brother, during the same incident.[1]

¶ 4 At trial, Christopher testified that, between 11 p.m and midnight on October 10, 1998, he attended a birthday party at a Chicago nightclub. Joseph arrived shortly after him. Maurice Cosby, Cynthia Jones, and Lauren Mainor were also in attendance. Defendant, whom Christopher identified in court, was at the party with Cary Holoman, Dallas Carter, and Sidney Coleman, defendant's brother.[2] At that time, Christopher had known defendant for 10 to 15 years.

¶ 5 As Christopher left the party, he said "bye, cuz" to Travon Peterson, Sidney's girlfriend. Sidney began arguing with Christopher, and defendant and Joseph joined in. Club employees ordered everyone except the Brown brothers to leave. Joseph and Christopher waited inside the

[1]Because Joseph and Christopher have the same last name, we will refer to them by their first names or, collectively, as the Brown brothers.

[2]Because Sidney and defendant have the same last name, we will refer to Sidney by his first name.

club for 10 to 15 minutes after everyone else went outside. When Christopher exited, he saw a group of people to the east. As the Brown brothers walked eastbound down the street, Christopher heard a gunshot, felt a "sharp pain" in his lower back, and fell to the ground. Joseph helped him to his feet and they ran to a nearby Burger King, where Christopher collapsed in the drive-through. Christopher was taken to the hospital by ambulance and treated for a gunshot wound in his back. On May 31, 2001, some 2½ years after the shooting, he identified defendant in a lineup at a police station.

¶ 6 Carl Clark, one of the partygoers, testified that he was "friends" with both the Brown brothers and defendant, whom he identified in court. After an argument broke out in the club, employees turned on the lights and told everyone to leave. Clark exited and "followed the crowd" as it moved about a block down the street toward the Burger King. There, he observed another argument with "people running and fighting." During this argument, Clark was standing a "[c]ouple feet" behind defendant when he saw defendant draw a gun and point it at Joseph, who was approximately seven feet away. Clark ran "to go get [Joseph] Brown's wife," and returned to the scene to find the Brown brothers lying in the Burger King parking lot. He did not hear any gunshots. On May 31, 2001, Clark identified defendant in a lineup at a police station.

¶ 7 Maurice Cosby testified that, after the initial altercation inside the club, she left with defendant and accompanied him across the street. She had known defendant, who was friends with her husband, for eight or nine years. Cosby "hugg[ed]" defendant and tried to calm him down. However, defendant said that he was "tired of this shit" and pulled away from her. He walked to his car, opened the door, and reached in. Cosby did not see what defendant obtained

from the car or what he did afterwards because she was "focused on the fight" that had erupted outside. She went to the police station in May 2001, but denied viewing a lineup.

¶ 8 Cosby acknowledged that at the trial of Darren Carter,[3] who was also charged in connection with the shooting, she testified that she saw defendant retrieve a gun from his car, point it toward the Brown brothers, and then saw two "flashes" from the gun. Cosby also acknowledged her previous testimony that she saw Carter approach Christopher with a gun, heard a "pow," and saw Christopher fall to the ground. She ran past Christopher to Joseph, who was lying on the ground in "a whole bunch of blood."

¶ 9 At defendant's trial, Cary Holoman testified that defendant is his "friend" who was also dating his sister, the mother of defendant's child, at the time of the shooting. Holoman left the club after the initial argument and talked to the Brown brothers outside. He and Christopher attempted to calm things down, but "chaos broke loose" after someone in the crowd threw a punch. Holoman later heard gunshots, but did not see anything else because he "was on the ground getting stomped" during the fight ouside. Holoman acknowledged that he previously told an assistant state's attorney that the Brown brothers were not involved in the physical fighting.

¶ 10 Lauren Mainor testified that she attended the birthday party with Joseph and Christopher, her god brothers. After the initial argument inside the club, the partygoers went outside and most of the men engaged in another fight. During the second fight, defendant said "fuck that," and ran eastbound toward Burger King. The crowd also migrated in that direction. Mainor heard gunshots as she approached Burger King, but did not see the gunman. However, she saw the

[3]Carter is not a party to this appeal.

Brown brothers lying on ground, covered in blood. On May 31, 2001, Mainor identified defendant in a lineup at a police station.

¶ 11 Cynthia Jones testified that she arrived at the club at approximately 1 a.m. on October 11, 1998 and joined a crowd that was already outside in the middle of the street. Joseph said "Man, forget about this," and the Brown brothers walked off toward Burger King. Defendant said something to the effect of "I'm sick of this shit," and retrieved a gun from his car. He then fired "[a]t least two to three" shots in Joseph's direction from about 12 feet away. The Brown brothers ran to the Burger King and Joseph fell to the ground in the parking lot. Defendant fled.

¶ 12 Evidence technician Jane Michalik testified that she arrived at the murder scene around 1:25 a.m. on October 11, 1998. Michalik photographed the scene, inventoried three blood-stained jackets, and sent them to a lab for testing.

¶ 13 The State entered the stipulated testimony of Dr. Mitra Kalelkar, a Cook County medical examiner. Kalelkar performed Joseph's autopsy and concluded that his death was a homicide due to a gunshot wound to his back.

¶ 14 The State rested, and the court denied defendant's motion for a directed finding. The defense then rested after entering a stipulation that Jones did not appear in the case report prepared by a police officer who canvassed the scene for witnesses on the night of the shooting.

¶ 15 The court asked defense counsel, in defendant's presence, if he had "discussed with your client his right to testify?" Defense counsel replied affirmatively, and a conversation was then held off the record. Defendant did not make any statement on the record. After closing arguments, the court found defendant guilty of first degree murder, aggravated battery with a firearm, and aggravated battery, but not guilty of attempt first degree murder. The court merged

the first degree murder counts, and also merged the aggravated battery count into the aggravated battery with a firearm count.

¶ 16 At sentencing, defendant stated in allocution that:

> "I'm innocent of this crime that they say I committed. And I feel like I want to explain my side of the story, but I didn't get a chance to explain my side of the story. You heard the wrong side of the story, *** I didn't commit the crime that they say I did, your Honor."

The court imposed consecutive sentences of 25 years for murder and 6 years for aggravated battery with a firearm.

¶ 17 On direct appeal, appellate counsel moved to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). *People v. Coleman*, No. 1-05-1060 (2006). Defendant filed a *pro se* response to the *Anders* motion, raising various claims including ineffective assistance of trial counsel. In particular, defendant claimed that trial counsel was ineffective for failing to (1) present the testimony of alibi witnesses as promised in counsel's opening statement; (2) investigate, interview, and cross-examine Clark and Cosby; (3) object to Jones's testimony because she was not named in the State's list of potential witnesses; and (4) cross-examine Jones about her criminal background and potential bias. This court affirmed defendant's conviction and sentence. *Id.*

¶ 18 In September 2006, defendant filed a *pro se* petition for postconviction relief raising numerous claims, including that trial counsel prevented him from testifying. Defendant alleged that trial counsel rebuffed his repeated requests to testify by telling him that his testimony "would not be needed" and that "this is my case and I'm not putting you on." He further alleged

that when he expressed his desire to testify, trial counsel "would get angry and start hollering 'your [*sic*] not testifying' and would walk away." Finally, defendant alleged that trial counsel never informed him of his right to testify, and that, as a consequence, he did not know that he could assert his right despite counsel's wishes. The circuit court docketed the petition and appointed postconviction counsel.

¶ 19 In November 2010, postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), averring that he properly investigated defendant's allegations and concluded that an amended petition was unnecessary. The State moved to dismiss the petition in March 2011, arguing that the right-to-testify issue was nonprejudicial, supported only by defendant's self-serving affidavits, and forfeited because it was not raised on direct appeal. Postconviction counsel responded that defendant's claim was not forfeited on direct appeal because it involved factual issues outside of the trial record, which required an evidentiary hearing to resolve.

¶ 20 The circuit court granted the State's motion to dismiss, finding in relevant part that defendant forfeited the right-to-testify challenge. Defendant appealed the dismissal only with respect to that issue. This court reversed, finding that the claim was not forfeited because it was "based on allegations of fact not contained in the trial record" and was not affirmatively refuted by the record. *People v. Coleman*, 2013 IL App (1st) 112867-U, ¶ 20. Accordingly, we remanded for a third-stage evidentiary hearing on the sole issue of whether trial counsel rendered ineffective assistance by preventing defendant from testifying. *Id.* ¶ 21.

¶ 21 At the evidentiary hearing on November 3, 2015, defendant testified and denied that he and trial counsel ever discussed "the possibility of testifying." When postconviction counsel

asked "Did you ever ask [trial counsel] about whether you could testify," defendant replied that he (defendant) "brought it up" multiple times over the course of five conversations with counsel. Four of these conversations occurred at court, in back of the bullpen, and the other took place in the Cook County Jail. During the first conversation, defendant explained that he wanted to testify because it was "important" to his defense. Counsel loudly and angrily responded "this is my case and I'm not putting you on the stand," but did not give a reason for his refusal. Defendant demonstrated the volume of counsel's voice for the circuit court.

¶ 22 During the second conversation, defendant again expressed his desire to testify, but counsel told him that it "would not be needed." When defendant asked why his testimony was unnecessary, counsel reiterated that "this was his case and he's not putting me on the stand." Defendant further testified that counsel "didn't holler the first time," but did "[a]ll the other four times." When postconviction counsel asked defendant how many of the conversations "were about your right to testify," defendant responded "Four." However, defendant maintained that trial counsel never told him that he could have testified regardless of counsel's desire to the contrary.

¶ 23 On cross-examination, defendant stated that all four conversations involving his right to testify occurred in the court bullpen with multiple people present. Defendant agreed that the location can get noisy, but again denied discussing with counsel whether he was going to testify. Defendant acknowledged that his criminal history included one juvenile conviction and one adult conviction, but stated that his attorneys in those cases never told him that he had the right to testify. Instead, he did not know that he could have testified until he "studied the law and learned [his] rights" after he was found guilty in the present case. He acknowledged remaining silent

when trial counsel informed the court that he would not testify, but explained that he did not know that he was allowed to speak to the judge at that time. On redirect examination, defendant stated that he did not go to trial on his prior juvenile and adult cases, and that the present case was the first time he stood trial. Defendant acknowledged speaking to the court in allocution, but stated that neither the court nor trial counsel ever said anything to him about his desire to testify.

¶ 24 The defense rested, and the State called trial counsel as a witness. Counsel, now retired, testified that he practiced law for 38 years, the last 22 of which he spent as a public defender. At the time he represented defendant, he had tried more than 100 cases, including "dozens" involving homicide. In each case, counsel had "regular conversations" with his client about their right to testify. Counsel informed all of his clients that the right to testify belonged to them, not their attorney. He described admonishing each client on the right to testify as "standard," "a given in every case," and one of only "three or four areas which are the exclusive right of the client."

¶ 25 Counsel was "sure" that he had such a conversation with defendant, but could not specifically recall the details. Counsel testified that he "never refused any defendant his right to testify," or indicated that counsel, rather than the defendant, would make the decision. He denied ever "yelling or hollering" at defendant.

¶ 26 On cross-examination, counsel stated that he handled approximately 15 to 25 murder cases in 2001, the year of defendant's trial. He reiterated that his custom was to advise clients that they had the right to testify, but could not specifically recall the details of his conversations with defendant. Counsel did not remember what was said during the off-the-record conversation that took place after he told the trial court that defendant would not testify.

¶ 27 The State entered a certified copy of defendant's convictions in this matter, and rested.

¶ 28 On January 27, 2016, the circuit court issued a written order denying defendant's petition. The court found defendant not credible, stating that he "contradicted his own testimony" at the evidentiary hearing. Specifically, the court noted that defendant stated both that he did not know of his right to testify until after the trial and that he repeatedly asserted his right in pretrial conversations with counsel. The court also noted that defendant initially claimed that counsel responded angrily during their first such conversation, but later testified that counsel became angry only during the latter four conversations. Lastly, the court noted that defendant contended that neither trial counsel in the present case nor his attorneys in other cases informed him of his right to testify, even though he faced "serious charges."

¶ 29 Conversely, the circuit court found that trial counsel testified "credibly without contradiction or embellishment" in explaining that it was his standard practice to have "repeated conservations" with his clients in which he would advise them that they alone held the right to testify. The court therefore found that defendant "did know of his right to testify [o]n his own behalf at trial and that [trial counsel] did not refuse [defendant] the right to testify [o]n his own behalf."

¶ 30 In addressing defendant's allocution, the circuit court explained that a defendant who claims that he was prevented from testifying must make his desire known before the end of trial because "[i]t is important that the decision to testify be made at the time of trial and that the failure to testify need not be raised as an afterthought after conviction." However, the court found that defendant's allocution did not constitute a contemporaneous assertion.

¶ 31 Finally, the court noted that, even if the allocution could be considered an assertion of his right to testify, he did not establish prejudice "because he failed [at the evidentiary hearing] to provide the side of the story to which he was allegedly prevented from telling." Accordingly, the court found that trial counsel did not provide ineffective assistance, and denied defendant's petition.

¶ 32 Defendant filed a motion to reconsider the dismissal, arguing that the court (1) "misapprehended" his testimony in finding that he contradicted himself, and (2) improperly imputed trial counsel's testimony regarding what he generally told his clients to defendant's case in particular. At a hearing on the motion, postconviction counsel, by proffer, stated that defendant would have testified at trial that "he was in a parking lot, he was surrounded by approximately 30 people. Someone yelled get a gun, he heard shots fired, but [he] did not have a gun and he did not shoot anybody."

¶ 33 In denying the motion to reconsider, the court declined to consider the proffer because it did not allow for the court to evaluate defendant's demeanor or for the State to cross-examine him. The court also stated that:

> "I have not heard anything about [defendant] saying what he wanted to say. He says it was prejudice because he didn't testify because his attorney never told him he had the right to testify. And despite his repeated attempts of telling his attorney he wanted to testify, his lawyer wouldn't let him. He never told me what he wanted to testify to. If the Court would have heard, maybe it would have made a difference. He still wasn't forthcoming at the evidentiary hearing."

¶ 34 Defendant now appeals, arguing that the circuit court erred in (1) failing to "properly assess" his credibility by "incorrectly finding that he contradicted himself" at the evidentiary hearing, and (2) "incorrectly finding that [his] claim was barred" because he did not inform the trial court that he wanted to testify. Defendant additionally contends that postconviction counsel provided unreasonable assistance in failing to elicit at the evidentiary hearing what defendant would have testified to at trial, thereby preventing him from establishing prejudice. Accordingly, defendant asks us to remand the matter for a new third-stage evidentiary hearing before a different judge.

¶ 35 The Act (725 ILCS 5/122-1 *et seq.* (West 2006)) provides a procedural mechanism by which a criminal defendant may assert that his conviction resulted from a substantial denial of his constitutional rights. At the third stage of proceedings under the Act, the phase at issue in the present case, the defendant no longer enjoys the presumption that his allegations are true. *People v. Gacho*, 2016 IL App (1st) 133492, ¶ 13. Instead, it is the circuit court's role to conduct an evidentiary hearing, determine witness credibility, and resolve issues of fact. *People v. Domagala*, 2013 IL 113688, ¶ 34. A defendant is not entitled to relief unless he makes a "substantial showing" that his constitutional rights were violated in light of the court's factual findings. *People v. Pendleton*, 233 Ill. 2d 458, 473 (2006).

¶ 36 Where the circuit court holds an evidentiary hearing, the court's fact-finding and credibility determinations will not be reversed unless they are manifestly erroneous. *Id.* This standard affords great deference to the circuit court because, having seen and heard the witnesses testify, it is in a superior position to evaluate their credibility and resolve conflicts in their testimony. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). A court's decision is manifestly

erroneous only if it contains an error that is "clearly evident, plain, and indisputable." *People v. Hatchett*, 2015 IL App (1st) 130127, ¶ 26.

¶ 37 Here, we cannot say that the court's credibility determinations were manifestly erroneous. Trial counsel testified that he had practiced law for nearly 40 years and had tried more than 100 cases. Although he could not specifically recall the details of his pretrial conversations with defendant, counsel stated that he advised each of his clients that they had a right to testify on their own behalf, and that they, rather than their attorney, controlled that right. He denied ever refusing to allow a client to testify or yelling because a client wished to testify against his advice. The circuit court found trial counsel to be "credible," and defendant offers no reason to suggest otherwise. Thus, the circuit court did not err in crediting counsel's testimony.

¶ 38 Similarly, the court did not err in discrediting defendant's testimony that counsel did not inform him of his right to testify and refused to allow him to do so. Notably, defendant's account was contradicted by trial counsel. Defendant claimed that trial counsel repeatedly refused to allow him to testify, angrily stating that "this is my case and I'm not putting you on" without explaining why. This is contrary to the testimony of trial counsel, who stated that no such conversation—let alone multiple conversations with a single client—occurred during his career. Defendant contends that his testimony was not contradicted because trial counsel spoke only in generalities and admitted to having no recollection of specific conversations with defendant. However, trial counsel unequivocally testified that he "never refused any defendant his right to testify" and "never would indicate to the client that [counsel] was going to be who decides whether they would testify or not." Instead, counsel stated that informing his client of the right to testify was "a given in every case," and he was "sure" that he had such a conversation with

defendant. Thus, although trial counsel did not recall the details of his conversations with defendant, the circuit court could reasonably conclude that counsel's testimony was irreconcilable with defendant's, and credit trial counsel while disbelieving defendant.

¶ 39 Moreover, it was reasonable for the circuit court to infer that defendant was aware of his right to testify by virtue of his criminal history, which included a 1991 felony conviction for possession of a controlled substance with the intent to deliver. See *People v. Chatman*, 357 Ill. App. 3d 695, 704 (2005) (circuit court's finding that the defendant was not credible because, in part, "it seemed unlikely that defendant would not have been aware of his right to testify" in light of prior "criminal prosecution" was not manifestly erroneous). Although defendant denied standing trial in his previous cases, it was not unreasonable for the court to infer that one of his previous attorneys would have informed him of his right prior to a guilty plea. Additionally, although not conclusive on its own, defendant's silence while counsel told the trial court that he would not testify is evidence that he was not prevented from testifying. *People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 66. Thus, we cannot say that the court committed manifest error in discrediting defendant.

¶ 40 Defendant nevertheless argues that the circuit court did not "properly" assess his credibility because the court incorrectly found that he contradicted himself at the evidentiary hearing. In particular, defendant contends that he did not contradict himself by stating both that he discussed testifying with trial counsel and that he did not know that he had the right to testify. Defendant maintains that these statements are consistent because "wanting to testify and knowing that it is ultimately your decision whether to testify are two separate things."

¶ 41 Citing *People v. Mitchell*, 152 Ill. 2d 274 (1992), and *People v. Bowie*, 36 Ill. App. 3d 177 (1976), defendant argues that the circuit court's "misapprehension" of his testimony denied him a fair evidentiary hearing. However, both *Mitchell* and *Bowie* involved a court's clear, objective misunderstanding of the trial evidence. *Mitchell*, 152 Ill. 2d at 321 (trial court denied a motion to suppress, incorrectly stating that the defendant had not testified that officers told him he was not free to leave); *Bowie*, 36 Ill. App. 3d at 180 (trial court found defendant guilty, erroneously stating that the defendant had not testified that he was bleeding after being hit in the head). Thus, the reviewing court in each of those cases found that the defendant was denied a fair trial because the trial court failed to consider all the crucial evidence before rendering a decision. *Mitchell*, 152 Ill. 2d at 323; *Bowie*, 36 Ill. App. 3d at 180.

¶ 42 Here, by contrast, the record does not show that the circuit court misunderstood defendant's testimony. In its written order denying defendant's petition, the court accurately noted that, despite claiming to be unaware that he had a right to testify, defendant alleged that he repeatedly initiated conversations in which he asserted his desire to do so. Then, the court concluded that these statements were in tension. Unlike in *Mitchell* and *Bowie*, this conclusion was not based on clearly inaccurate facts. Rather, the essence of defendant's argument is not that the court failed to consider all of his testimony, but that the court interpreted it in an unfavorable way. However, it is the circuit court's role to decide which conclusions to draw from the evidence, and those conclusions will not be reversed on appeal unless the defendant shows that they are plainly and indisputably erroneous. *Hatchett*, 2015 IL App (1st) 130127, ¶ 26. As defendant has made no such showing here, the court's determination will not be disturbed.

¶ 43 With the facts established, we next turn to the merits of defendant's claim as a matter of law. In order to succeed on a claim of ineffective assistance of trial counsel, a defendant must prove both that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the result of the trial would have been different but for counsel's deficiency. *People v. Enis*, 194 Ill. 2d 361, 366 (2000). The failure to satisfy either prong is fatal to a finding of ineffective assistance. *Id.*

¶ 44 There is a strong presumption that counsel's performance fell within the "wide range" of reasonable strategic choices. *Id.* at 377. However, counsel is obligated to inform the defendant of the right to testify. *People v. Knox*, 58 Ill. App. 3d 761, 765 (1978). Counsel's advice against testifying does not constitute deficient performance unless he actually prevents the defendant from doing so. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009).

¶ 45 Additionally, where a defendant claims that trial counsel prevented him from testifying, he is required to have made a "contemporaneous assertion" of his right. *People v. Brown*, 54 Ill. 2d 21, 24 (1973); see also *Enis*, 194 Ill. 2d at 399-400; *People v. Thompkins*, 161 Ill. 2d 148, 161 (1994). In the postconviction context, the assertion requirement may be satisfied by a showing that defendant informed either the trial court or trial counsel that he wished to testify. *Enis*, 194 Ill. 2d at 399 (finding "defendant acquiesced in counsel's view that defendant should not take the stand" when, "upon learning at trial that he would not be called as a witness, defendant failed to assert his right by informing the trial court that he wished to testify"); *Thompkins*, 161 Ill. 2d at 177-78 (finding the defendant "acquiesced in counsel's view that the defendant should not testify" when the record did not show the defendant "reaffirmed" to defense counsel during trial that he desired to testify). In either case, it is critical that a defendant make his desire known

during the time of trial. See *Brown*, 54 Ill. 2d at 24 (finding assertion requirement not met where the defendant informed trial counsel that he wished to testify "well in advance of the beginning of trial," but did not renew his assertion, and noting that, after conviction,"the lawyer's advice [not to testify] will in retrospect appear to the defendant to have been bad advice, and he will stand to gain if he can succeed in establishing that he did not testify because his lawyer refused to permit him to do so").

¶ 46 Here, in light of the factual determinations noted above, the circuit court did not err in finding defendant's claim procedurally barred. Defendant is correct that his postconviction claim was permissibly based on conversations he allegedly had with trial counsel *de hors* the record. See, e.g., *Youngblood*, 389 Ill. App. 3d at 217-218 (noting that, because a defendant is not constrained to the trial record in postconviction proceedings, he may preserve the right-to-testify issue through an off-record assertion of his right to trial counsel). Following the evidentiary hearing, however, the circuit court rejected defendant's claim that the alleged conversations ever occurred. Moreover, the record is clear that defendant never informed the court during his trial that he wished to testify. Consequently, defendant's postconviction claim of ineffective assistance was procedurally barred because, as a factual matter, the circuit court determined that he never made any contemporaneous assertion of his right to testify to trial counsel or the court, either on or off the record.

¶ 47 In short, the circuit court did not misapprehend either the evidence or the law in denying defendant's postconviction petition. The court also did not commit manifest error in discrediting defendant's testimony at the evidentiary hearing and in finding that trial counsel informed him of

his right to testify. As such, defendant did not make a substantial showing that trial counsel provided ineffective assistance.

¶ 48 Defendant next argues that postconviction counsel provided unreasonable assistance by failing to elicit crucial testimony from him during the evidentiary hearing. In particular, defendant contends that postconviction counsel should have asked him what he would have testified to at trial, information that he maintains was necessary to establish that he was prejudiced by trial counsel's allegedly deficient performance.

¶ 49 The Act provides defendants with a limited right to the assistance of counsel throughout the second and third stages of postconviction proceedings. 725 ILCS 5/122-4 (West 1998). Because the right to such representation is statutory, rather than constitutional, the extent of the representation is determined solely by the Act. *People v. Cotto*, 2016 IL 119006, ¶ 45. It is well-established that a defendant is entitled to a "reasonable" level of assistance in postconviction proceedings, which is a lesser level than that guaranteed at trial. *Id.*

¶ 50 To ensure that a defendant receives reasonable assistance, Illinois Supreme Court Rule 651(c) imposes three specific duties on postconviction counsel: (1) consult with the defendant to ascertain his claims, (2) examine the record of trial proceedings, and (3) amend the defendant's *pro se* petition as necessary to adequately present the defendant's claims. Ill. S. Ct. R. 615(c) (eff. Dec. 1, 1984). Substantial compliance with these duties is sufficient, and the filing of a certificate averring that postconviction counsel complied with them gives rise to a rebuttable presumption that he rendered reasonable assistance. *People v. Profit*, 2012 IL App (1st) 101307, ¶¶ 18-19.

¶ 51 If postconviction counsel fails to substantially comply with Rule 651(c), remand is necessary regardless of whether defendant's underlying claims had merit. *People v. Suarez*, 224 Ill. 2d 37, 47 (2007). However, as we explained in *People v. Zareski*, 2017 IL App (1st) 150836, this standard does not apply where a defendant alleges that postconviction counsel was unreasonable independent of the specific requirements of the rule. In *Zareski*, the circuit court dismissed the defendant's postconviction petition at the second stage of proceedings. *Id.* ¶ 28. The defendant appealed the dismissal, arguing in part that postconviction counsel, who also served as appellate counsel, provided unreasonable assistance in four ways: (1) failing to argue that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to cross-examine a witness, (2) failing to argue that appellate counsel was ineffective for failing argue that trial counsel was ineffective for failing to file a motion to suppress identification, (3) raising several claims that were barred by *res judicata* because they were decided on direct appeal, and (4) failing to raise his actual innocence as a freestanding claim. *Id.* ¶ 46.

¶ 52 In interpreting *Suarez*, this court found that *Suarez*'s key holding—that postconviction counsel's deficiencies are not subject to harmless error review—was limited to situations in which counsel violated Rule 651(c). *Id.* ¶ 55 In rejecting the defendant's request to expand the no-harmless-error standard, we reasoned that limiting the standard to rule violations would avoid (1) the "odd outcome" that, contrary to established precedent, a defendant would be entitled to greater assistance in postconviction proceedings than on direct appeal, and (2) "pointless remands" for the reevaluation of claims "that have no chance of success." *Id.* ¶¶ 54, 59. Thus, we held that a "*Strickland*-like analysis," which requires a defendant to show that he was prejudiced

by postconviction counsel's unreasonable performance, was the appropriate standard under the Act for claims not amounting to violations of Rule 651(c). *Id.* ¶ 59.

¶ 53 Here, defendant does not allege that postconviction counsel violated any of the duties enumerated in Rule 651(c), but instead argues that counsel was unreasonable in failing to elicit certain testimony from him at the evidentiary hearing. Thus, defendant is required to prove both that counsel was deficient and that he suffered prejudice as a result. However, the circuit court determined that trial counsel informed defendant of the right to testify and did not prevent him from exercising it. Trial counsel's performance was therefore not deficient. As this alone is fatal to defendant's underlying claim of ineffective assistance of trial counsel, he was not prejudiced by postconviction counsel's failure to elicit testimony that, based on the circuit court's factual findings, he was not wrongfully precluded from presenting at trial.

¶ 54 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 55 Affirmed.