2019 IL App (2d) 170422-U
No. 2-17-0422
Order filed March 15, 2019

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 Robert A. Wilbrandt Jr.,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: We affirmed the trial court's denial of defendant's postconviction petition following a third-stage evidentiary hearing; the court did not err in denying defendant's motion to change venue, the court's fact-finding and credibility determinations were not against the manifest weight of the evidence, the court was not obligated to enter a written order detailing its findings, and defendant received reasonable assistance from his appointed postconviction counsel.

¶ 2 Defendant, Victor Bandala-Martinez, acting *pro se*, appeals the denial of his postconviction petition following a third-stage evidentiary hearing. The hearing was focused on defendant's claim that his trial counsel was ineffective for advising him that he could not have a jury trial unless he agreed to testify. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2008, defendant was charged with the first-degree murder of Yair Cabrera. The record reflects that defendant executed a Spanish-translated jury waiver on May 7, 2010. That same day, the trial court duly admonished defendant of his right to a jury trial and accepted the waiver "as having been understandably made." Although the written waiver was translated into Spanish, there is no indication in the record of whether a Spanish-speaking interpreter was present when defendant was verbally admonished.

¶ 5 Defendant's three-day bench trial began on May 10, 2010. It was conducted with the assistance of a Spanish-speaking interpreter. The State's witnesses testified that defendant punched Cabrera in the ribs and then ran away while possibly holding something in his hand. During an interview with a Spanish-speaking police officer, defendant admitted that he had grabbed a kitchen utensil before he confronted Cabrera. He first said he was unsure whether it was a knife or a fork, but he later insisted that it was a fork. He claimed he poked Cabrera with the fork and then became frightened and left when he realized that Cabrera was seriously injured. The doctor who performed the autopsy testified that Cabrera had two stab wounds in his upper body. The fatal wound penetrated approximately five inches into Cabrera's heart. The doctor opined that Cabrera's wounds were caused by a "knife-like object" and did not believe the fatal wound could have been caused by a fork. Defendant elected not to testify and no witnesses were called to testify on his behalf. The trial court found that defendant stabbed Cabrera with a "metallic object" while knowing that his acts created a strong probability of great bodily harm. Accordingly, defendant was convicted of first-degree murder and sentenced to 30 years' imprisonment.

¶ 6 The Office of the State Appellate Defender (OSAD) was appointed to represent defendant on direct appeal. The only issue raised by appellate counsel involved the circuit clerk's improper assessment of certain fines. We agreed with appellate counsel and reduced defendant's monetary assessments. *People v. Bandala-Martinez*, 2012 IL App (2d) 101147-U (summary order).

¶ 7 Thereafter, on October 12, 2012, defendant filed a *pro se* postconviction petition raising numerous claims. The trial court advanced the petition to a second-stage hearing and defendant's appointed postconviction counsel filed an amended petition on his behalf. The State filed a motion to dismiss the amended petition, arguing that defendant's claims were each barred by the doctrine of *res judicata*. The court agreed with the State and dismissed defendant's petition. Defendant appealed and OSAD was again appointed to represent him.

¶ 8 In *People v. Bandala-Martinez*, 2016 IL App (2d) 140370-U, we held that one of the claims raised in defendant's amended postconviction petition was erroneously dismissed. Specifically, defendant claimed 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." He alleged that counsel "manipulated" him by telling him this was "what the law requires." Defendant claimed that counsel warned him that he would be at a disadvantage during a jury trial because the jurors would "probably be racist" and the case would therefore be decided on the basis of his "illegal status in this country." In our analysis, we first noted that the claim in question was not barred by the doctrine *res judicata*, because it relied on evidence outside the record, meaning that it could not have been raised on direct appeal. *Id*. ¶ 28. Next, we noted that the claim involved two of defendant's fundamental constitutional rights: his right to testify and his right to a jury trial. *Id*. ¶ 29. We rejected the State's argument that defendant failed to demonstrate prejudice

under the two-prong test for ineffective assistance of counsel claims established in *Strickland v. Washington*, 466 U.S. 668 (1984). We noted that the question was not whether defendant showed a reasonable probability of a more favorable result if he had opted for a jury trial; rather, "[w]here 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.' " *Id.* ¶ 30 (quoting *People v. Todd*, 178 Ill. 2d 297, 318 (1997)). Accordingly, we reversed the dismissal of defendant's amended petition and remanded the matter 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." *Bandala-Martinez*, 2016 IL App (2d) 140370-U, ¶ 30.

¶ 9 On remand, the matter was placed on the call of Judge Michael W. Feetterer. When the parties appeared on March 3, 2017, Judge Feetterer observed that defendant's former trial counsel was Judge Christopher M. Harmon, who was currently serving as an associate judge in the Circuit Court of McHenry County. Judge Feetterer noted that Judge Harmon was going to testify during an evidentiary hearing that would essentially turn on a credibility determination. Judge Feetterer stated, "I was a circuit judge when [Harmon] was appointed to the bench. And it just seems to me that although obviously I haven't talked to him about this case, there's the appearance of impropriety if it comes down to a credibility determination, and that concerns me more than anything else." After announcing that he was recusing himself, Judge Feetterer added, "[t]here might be another judge that feels differently than I do about this particular matter. You'd still get your hearing. But I just think that—Well, I've said what I thought so—and I apologize for bringing you in here this morning."

¶ 10 On March 6, 2017, defendant petitioned for a substitution of judge, citing section 144-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/144-5 (West 2016)). Defendant alleged that the matter had been placed on the call of Judge Sharon Prather, and that Judge Prather was prejudiced against him. He therefore asked that the matter be placed on the call "of a judge other than the Honorable Sharon Prather." Defendant's petition was granted and the matter was reassigned to Judge Robert A. Wilbrandt, Jr.

¶ 11 When the parties appeared for the evidentiary hearing on May 5, 2017, defendant presented a written motion seeking a change of venue. He alleged that "any Judge from the Twenty-Second Judicial Circuit who presides over the evidentiary hearing for this post-conviction petition will be forced to weigh the credibility of another judge sitting in the Twenty-Second Judicial Circuit." In the alternative to a change of venue, defendant requested the appointment of a judge from a different circuit. Defendant attached a sworn affidavit to his motion, stating his belief that "all Judges of the Twenty-Second Judicial Circuit [would] be prejudiced against [him] and that [he] [would] not receive a fair hearing of the issues involved in [his] case." The State objected to defendant's motion, asserting that it was ready to proceed and that the trial court was capable of being fair and impartial.

¶ 12 In denying defendant's motion, the trial court acknowledged that "one of the witnesses in this particular case would be one of the associate judges of this circuit." The court stated, however, that it had "no basis to believe that [it] could not be fair and impartial in that regard." The court additionally noted that defendant's motion "certainly was not particularly timely."

¶ 13 The first witness to testify at the evidentiary hearing was Lisbeth Mendez. She testified that she met defendant in 2008 and married him in 2009, but that the two had not been in contact since they were married. When Mendez spoke with defendant prior to their marriage, they spoke

only in Spanish. Mendez testified that defendant's understanding of the English language was "really low." According to Mendez, the only words that defendant spoke in English were the "basic words" like "hi" and "bye."

¶ 14 The next witness was defendant. He testified through a Spanish-speaking interpreter. He explained that he came to the United States in 2006, at age 17. At that time he spoke only Spanish; he did not speak any English. Defendant proceeded to describe three conversations that he had with Harmon in the weeks leading up to his bench trial in May 2010. Each conversation took place in the same holding cell at the McHenry County courthouse. Defendant maintained that, in each instance, there was no interpreter present and there were no other people in the cell.

¶ 15 Defendant testified that the first conversation took place on April 28, 2010, when Harmon said that he was ready for trial. According to defendant, this was the first time that the subject of his testimony had arisen. Harmon said that he did not want defendant to testify because he feared the questions that might be asked by the prosecutor. Defendant testified, "[Harmon] told me that [the prosecutor], he was desperate that I—for me to testify and that I was not ready to testify; that [the prosecutor] was going to put a lot of pressure. He was going to make me cry. He was going to confuse me, and that I was going to end up saying things that could hurt my case." Defendant claimed that he had intended to testify, but that Harmon "made [him] scared of the prosecutor, and that made [him] change [his] mind." Defendant also claimed that, when the conversation ended, he was under the impression that he only could have a jury trial if he testified.

¶ 16 Defendant testified that his second conversation with Harmon took place following a court appearance on May 6, 2010. Before Harmon departed, he told defendant to think about whether he wanted a jury trial or a bench trial. Defendant testified that he still did not

understand the difference between a jury trial and a bench trial. He added that this was the first time he was made aware that he could have a trial before a judge.

¶ 17 Defendant's third conversation with Harmon took place on May 7, 2010, the same day that he executed his Spanish-translated jury waiver. Defendant testified that, when Harmon asked him whether he had decided between a jury or bench trial, he told Harmon that he "did not have an answer because [he] was confused, [and] that [he] did not know what the difference was between a jury trial and a trial in front of a judge." According to defendant, Harmon responded by telling him that, if he chose a jury trial, then he would be required to testify, but that he would *not* be required to testify if he chose a bench trial. Defendant maintained that Harmon never explained to him that it was his right to testify regardless of whether he chose a jury trial or a bench trial.

¶ 18 The defense rested at the conclusion of defendant's testimony. The transcript from May 7, 2010, and defendant's Spanish-translated jury waiver were both admitted into evidence. The trial court accepted the parties' stipulation that, although an interpreter was present during defendant's bench trial, there were no records of which interpreters, if any, were used during the court proceedings on April 28, March 6, and March 7, 2010.

¶ 19 The State's only witness was Harmon. He testified that, at the time of defendant's bench trial, he had been working as an assistant public defender for approximately 14 years. It was his practice to always explain to his clients: (1) the difference between a jury trial and a bench trial; (2) that it was the client's right to choose between the two options; and (3) that it was the client's right to decide whether to testify. Harmon remembered having these conversations with defendant "numerous times" and he specifically remembered having them in the days and weeks leading up to the trial. Harmon also testified that defendant spoke "limited" or "partial" English.

He acknowledged that, depending on the "nature of the conversation," there were times when he met with defendant in the absence of an interpreter. However, Harmon believed that an interpreter was present in the holding cell for their discussions on the days in question. He also recalled that an interpreter was present when defendant signed his Spanish-translated jury waiver on May 7, 2010. Harmon explained that these were "important discussions," and he "wanted to make sure that [defendant] understood what was going on." Harmon denied ever telling defendant that he would have to testify if he chose a jury trial.

¶ 20 On cross-examination, Harmon admitted that most of his conversations with defendant were conducted with a Spanish-language interpreter, but he maintained that defendant's English was "proficient enough that we could speak with one another without the necessity of the interpreter." Harmon recalled that it was *defendant* who had raised the issue of racism, as he was concerned about jurors focusing on his immigration status. Harmon testified that, in response to defendant's concerns, he acknowledged the possibility of encountering racist jurors. Harmon also acknowledged having told defendant that juries "sometimes" want to hear testimony from the accused. Harmon testified that he advised defendant, as he advised all of his clients, "that if he did testify, he would be subject to cross-examination." However, Harmon denied telling defendant that the prosecutor would make him cry or confuse him to the point that he would make false admissions. Harmon also stood by his testimony that he never told defendant that he would be required to testify if he chose a jury trial.

¶ 21 When defendant was called to testify in rebuttal, he elaborated on his claim that Harmon scared him into waiving his right to a jury trial. He said Harmon told him that he would be at a disadvantage based on his immigration status and that the jurors would find him guilty because

they were going to be tired of sleeping in hotels and eating "fast food." The following colloquy ensued:

"Q. [Defense Counsel] And how did that conversation affect your desire for a jury trial?

A. [Defendant] More fear.

Q. [Defense Counsel] More fear of what?

A. [Defendant] To go to a jury trial.

Q. [Defense Counsel] And as a result of that, what, if anything, did you do?

A. [Defendant] I don't understand the question.

Q. [Defense Counsel] As a result of the fear that you had, what election with respect to trial did you make?

A. [Defendant] Well, I was scared. He put fear into me, and it formed a small part of—of the decision.

Q. [Defense Counsel] And what was your decision?

A. [Defendant] A trial before a judge."

¶ 22 In announcing its ruling, the trial court first noted that defendant had been duly admonished regarding the terms of his Spanish-translated jury waiver. The court then read aloud from the corresponding portion of the transcript from May 7, 2010:

"THE COURT: Are you Victor Bandala-Martinez?

DEFENDANT BANDALA-MARTINEZ: Yes.

THE COURT: Mr. Martinez, do you understand that you have the right to have the issue of your guilt decided either by a jury or by a judge sitting without a jury? Do you know you have that right?

DEFENDANT BANDALA-MARTINEZ: Yes.

THE COURT: And do you also understand that only you can make that decision whether it is a jury or a judge? Do you know that you have that power?

DEFENDANT BANDALA-MARTINEZ: Yes.

THE COURT: Your lawyer has handed me a jury waiver in writing in the Spanish language. And by doing so, he's telling me that you have decided to give up your right to have your guilt decided by a jury and you have chosen to have the issue decided by a judge. Is that your decision?

DEFENDANT BANDALA-MARTINEZ: Yes.

THE COURT: Would you please look at the written jury waiver and tell me, first of all, do you read and write Spanish?

DEFENDANT BANDALA-MARTINEZ: Yes.

THE COURT: Did you sign the waiver?

DEFENDANT BANDALA-MARTINEZ: Yes."

After reading this portion of the transcript from May 7, 2010, into the record, the court proceeded to make the following findings:

"In weighing the credibility of the evidence, the Court finds that Mr. Harmon's testimony was credible. The court notes that he indicated that he had conversations with the Defendant most of the time in the presence of an interpreter and that he went over with the Defendant the difference between a jury trial and a judge trial and the Defendant's right to testify or not to testify. Those things were explained to the Defendant.

The Court notes that the Defendant testified to certain things which the Court does not necessarily find to be credible at this time.

> The Court believes that the Defendant was advised of his right to testify or not to testify and was advised of his right to have a jury trial or a trial by a judge.
>
> The Court feels that it will rule on the issue of whether the Defendant's counsel was ineffective. The Court states that based on the—all the evidence in front of the Court, the Court does not believe that the Defendant was advised that he would be able to have a jury trial—that he would not be able to have a jury trial because he would have to testify. And, therefore, the Court, in weighing the evidence in this third-stage post-conviction [hearing] does not believe that the defense has made the burden of proof by a preponderance of the evidence that [defendant's] constitutional rights were violated, and, therefore, will respectfully deny the petition under the Post-Conviction Act."

¶ 23 Defendant filed a timely notice of appeal and OSAD was again appointed to represent him. 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 subsequently granted the motion and allowed defendant to proceed *pro se*. In turn, defendant filed a 75-page *pro se* brief. We later denied the State's motion to strike defendant's brief for exceeding the allowable page limit.

¶ 24 II. ANALYSIS

¶ 25 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) "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 postconviction 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 2012). If the petition is not summarily dismissed at the first stage, then 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 2012). 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, then 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 2012).

¶ 26 Here, defendant contends that the trial court committed several errors in denying his petition following the third-stage evidentiary hearing. He also contends that he received unreasonable assistance from his appointed postconviction counsel under Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

¶ 27 We begin with defendant's contention that the trial court erred in denying his motion for a change of venue. By filing the motion, defendant sought to have the evidentiary hearing conducted by a judge from a different judicial circuit. The parties agree that this issue should be reviewed for an abuse of discretion, but they disagree over whether it is governed by the Code of Criminal Procedure of 1963 or the Code of Civil Procedure.

¶ 28 Defendant notes that, by the time he filed the motion, there had already been two judicial substitutions. First, Judge Feetterer recused himself *sua sponte* and the matter was assigned to Judge Prather. Second, defendant successfully petitioned to substitute another judge for Judge Prather under section 144-5 of the Code of Criminal Procedure of 1963. Defendant now argues that nothing in the Code of Criminal Procedure of 1963 establishes a specific timeline for

seeking multiple judicial substitutions. Thus, according to defendant, the trial court abused its discretion by factoring the timeliness of his motion in determining whether he was entitled to have the evidentiary hearing conducted by a judge from a different judicial circuit.

¶ 29 The State counters by noting that postconviction proceedings are considered civil in nature. *People v. Bailey*, 2017 IL 121450, ¶ 29. Thus, the general civil practice rules and procedures apply to the extent they do not conflict with the Act. *People v. Bailey*, 2017 IL 121450, ¶ 29. The State notes that the Code of Civil Procedure provides for the substitution of judges both as a matter of right and for cause. 735 ILCS 5/2-1001(2), (3) (West 2016). The Code of Civil Procedure also provides for a change of venue. 735 ILCS 5/2-1001.5 (West 2016). The State cites cases in the civil context to argue that defendant failed to satisfy the requirements for any of these statutory provisions.

¶ 30 Both parties have overlooked our supreme court's controlling decision in *People v. Thompkins*, 181 Ill. 2d 1 (1998). The *Thompkins* court reversed the dismissal of the defendant's postconviction petition and remanded the matter for a third-stage evidentiary hearing on the sole issue of whether he was denied effective assistance of counsel at his sentencing hearing. *Id*. at 6. On remand, the defendant requested a change of venue or the assignment of a judge from a different judicial circuit. He alleged that he could not receive a fair evidentiary hearing in Cook County because his original trial counsel had since become a Cook County circuit court judge. He argued that it would be improper for one judge to evaluate the prior conduct of another judge sitting in the same judicial circuit. The trial court denied the defendant's request, conducted the evidentiary hearing, and denied the defendant's postconviction petition. *Id*. at 9, 21.

¶ 31 On appeal, our supreme court noted the defendant's concession that "the Illinois statutory provisions relating to substitutions of judges and changes of venue *do not apply in post-*

conviction proceedings." (Emphasis added.) *Id*. at 22 (citing *People v. Wilson*, 37 Ill. 2d 617, 619 (1967) (observing that, although postconviction proceedings are civil in nature, the remedy provided by the Act "does not fall strictly into the category of either a criminal or civil proceeding")). The *Thompkins* court went on to note that, "only under the most extreme cases is disqualification on the basis of bias or prejudice constitutionally required." *Thompkins*, 181 Ill. 2d at 22. However, the defendant's bare assertion that one circuit court judge could not sit in judgment over a fellow circuit court judge did not satisfy the foregoing principle. *Id*. The *Thompkins* court concluded in relevant part:

> "Judges are constantly called upon to evaluate the conduct of professional persons such as doctors, business executives, and, of course, attorneys. More specifically, circuit judges in Cook County are routinely called upon to rule on similar claims of ineffective assistance of counsel. There was nothing remarkable about defendant's ineffectiveness claim which would warrant a venue change. Defendant submits that the fact that his defense attorney was elevated to the bench after his representation of defendant caused defendant to be subjected to an unacceptable risk of bias or prejudice. We do not agree. This fact alone simply does not present a situation where the average person, acting as a judge, would not be able to hold the proper balance between defendant and the State." *Id*. at 22-23.

¶ 32 Here, defendant asserted that "any Judge from the Twenty-Second Judicial Circuit who presides over the evidentiary hearing for this post-conviction petition will be forced to weigh the credibility of another judge sitting in the Twenty-Second Judicial Circuit." In his sworn affidavit, defendant stated his belief that "all Judges of the Twenty-Second Judicial Circuit [would] be prejudiced against [him] and that [he] [would] not receive a fair hearing of the issues

involved in [his] case." These are the same types of bare assertions that were considered and rejected in *Thompkins*. Hence, following *Thompkins*, we find no error in the trial court's denial of defendant's motion for a change of venue.

¶ 33 Defendant next raises a series of arguments supporting his contention that the trial court erred in denying his postconviction petition. Although the arguments are presented under different labels, the common theme is that the court's credibility determinations were against the manifest weight of the evidence.

¶ 34 During the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If a petition advances to a third-stage evidentiary hearing that turns on fact-finding and credibility determinations, then the trial court's decision will not be reversed unless it is manifestly erroneous. *Id*. A decision is manifestly erroneous when the opposite conclusion is clearly evident, plain, and indisputable. *People v. Coleman*, 2013 IL 113307, ¶ 98.

¶ 35 Here, the bulk of defendant's arguments on the issue of credibility have no merit. He simply notes the contradictions between his own testimony and Harmon's testimony, arguing that he was telling the truth and Harmon was lying. However, defendant does raise one valid point. He notes the trial court's reliance on the portion of the transcript from May 7, 2010, when he was duly admonished regarding the terms of his Spanish-translated jury waiver. Although Harmon believed an interpreter was present when defendant signed the written waiver, defendant correctly notes that there is no indication in the transcript of whether an interpreter was actually present when the parties appeared in open court for the entry of the waiver. The State argues that "it is simply not clear from the report of proceedings who was present" because the trial court did not ask any of the participants to identify themselves for the record. Thus, according to the

State, there can be no reasonable inference that defendant waived his right to a jury trial in the absence of an interpreter. We agree with the State, but by that same token, there can also be no reasonable inference that an interpreter *was* present.

¶ 36 The record reflects that defendant appeared in court 21 times before his first disputed conversation with Harmon on April 28, 2010. The presence of an interpreter was noted for the record on 13 of those court dates: 9 times by the court reporter, 3 times by Harmon, and once by the State. With respect to the dates of the disputed conversations, there is no indication that an interpreter was present for the status check on April 28, 2010, when the parties set a date to argue their pretrial motions. There is also no indication that an interpreter was present during the morning session on May 6, 2010, when the parties agreed to set their arguments over to the afternoon session. However, when the parties returned for the afternoon session on May 6, 2010, Harmon noted for the record that an interpreter had just arrived.

¶ 37 Given the careful attention that was paid to the presence of an interpreter throughout the course of these proceedings, it is noteworthy that no one thought to identify an interpreter's presence on May 7, 2010, when defendant was duly admonished—in English—regarding the terms of his Spanish-translated jury waiver. Because no reasonable inference can be drawn as to whether an interpreter was or was not present, we agree with defendant that the trial court should not have relied on the transcript from May 7, 2010, in making its credibility determinations. We will therefore disregard the fact that defendant was verbally admonished about his right to a jury trial in determining whether the court's ruling was against the manifest weight of the evidence.

¶ 38 The trial court could have reasonably found that Harmon's testimony was consistent and inherently believable. He denied ever telling defendant that he would be required to testify if he chose a jury trial. He testified that he had developed a practice of explaining his clients' rights to

them during his 14 years working as an assistant public defender. He remembered discussing these rights with defendant "numerous times." Harmon also recalled that *defendant* had raised the issue of racism because he was concerned about jurors focusing on his immigration status. Harmon acknowledged that, in responding to defendant's concerns, he confirmed the possibility of encountering racist jurors. He also acknowledged telling defendant that jurors "sometimes" want to hear testimony from the accused, but that he would be subject to cross-examination if he chose to testify. Finally, although Harmon believed that an interpreter was present when he discussed defendant's rights to testify and to a jury trial, he also maintained that defendant's English was "proficient enough that [they] could speak with one another without the necessity of the interpreter."

¶ 39 By contrast, the trial court could have reasonably found that defendant's testimony was inconsistent and inherently unbelievable. Defendant claimed that he intended to testify before his first conversation with Harmon on April 28, 2010, but that Harmon "made [him] scared of the prosecutor, and that made [him] change [his] mind." This indicates that, regardless of what Harmon allegedly said to defendant about the prosecutor's prowess, defendant was aware of his right to choose whether or not to testify. Defendant also claimed that, when he waived his right to a jury trial on May 7, 2010, he was still unsure of the difference between a jury trial and a bench trial. However, by signing the Spanish-translated jury waiver, defendant acknowledged his understanding that he was entitled to a trial by a jury consisting of 12 people. He also acknowledged his understanding that, by waiving his right to a trial by jury, he was agreeing to have the matter tried by a judge. Thus, even disregarding the transcript from the proceeding on May 7, 2010, there is no doubt that defendant was accurately admonished—in Spanish—of his right to choose between a jury trial or a bench trial.

¶ 40 The inconsistencies in defendant's testimony have been carried forward in his *pro se* brief. Defendant argues that he was "coerced" into "involuntarily" waiving his rights to testify and to have a jury trial. He also states that, after his conversation with Harmon on February 28, 2010, "his thought about testifying was different and now he was afraid to testify." However, defendant testified on rebuttal that the fear he felt formed only a "small part" of his "decision" to have a "trial before a judge." Defendant cannot have it both ways. He cannot claim to have been coerced into making an involuntary decision while at the same time admitting that he made the decision based partially on his fear of testifying in front of racist jurors.

¶ 41 In *People v. Simon*, 2014 IL App (1st) 130567, ¶ 73, the defendant filed a postconviction petition claiming that he initially wanted to have a jury trial, but that he changed his mind based on his trial counsel's advice that he would be at a disadvantage, because the State would introduce evidence that he was a gang-member. The defendant further alleged that his counsel promised him an acquittal if he chose a bench trial because the judge would make a decision based on the law. The *Simon* court noted that, although the decision of whether to choose a bench or jury trial belongs to the defendant, "advice on waiving a jury trial constitutes the type of trial strategy and tactics that cannot support a claim of ineffectiveness." *Id*. ¶ 74 (quoting *People v. Elliott*, 299 Ill.App.3d 766, 774 (1998)). The *Simon* court held in relevant part:

> "It is clear from the entirety of defendant's affidavit that trial counsel was advising defendant to waive a jury trial because counsel knew that the judge would base his decision on the law instead of on the fact that defendant was a gang member, as a jury might do. This type of advice does not constitute ineffective assistance of counsel." *Simon*, 2014 IL App (1st) 130567, ¶ 74.

¶ 42 The State argues that, accepting the trial court's credibility determinations, the reasoning from *Simon* applies here. We agree. Following *Simon*, even if Harmon's advice persuaded defendant to choose a bench trial and elect not to testify, this is not the type of advice that constitutes ineffective assistance of counsel.

¶ 43 In sum, the sole focus of the evidentiary hearing was whether Harmon "was ineffective for advising defendant that he would not be able to have a jury trial because he would have to testify." *Bandala-Martinez*, 2016 IL App (2d) 140370-U, ¶ 30. The trial court was therefore tasked with determining whether defendant established a "reasonable likelihood that [he] would not have waived his jury right in the absence of the alleged error." *Todd*, 178 Ill. 2d at 318. After considering all of the evidence, the court concluded that defendant had not met this burden. For the reasons stated above, we cannot say that the court's ruling was against the manifest weight of the evidence.

¶ 44 Defendant's next contention of error with respect to the trial court is that the court erred in failing to issue a written order upon the denial of his petition. In support, defendant notes that there must be a written order specifying the court's findings and conclusions of law if a petition is summarily dismissed at the first stage of the postconviction proceedings. 725 ILCS 5/122-2.1(a)(2) (West 2016). He argues that this requirement should be extended to apply to a dismissal following a third-stage evidentiary hearing. Otherwise, defendant argues, he will be deprived of the opportunity to highlight the extent of the trial court's errors.

¶ 45 We agree with the State that these arguments have no merit. A question involving statutory interpretation is reviewed *de novo*. *People v. Conick*, 232 Ill. 2d 132, 138 (2008). Defendant has pointed to nothing in the plain language of the Act that would require a written order of dismissal unless the petition is summarily dismissed at the first stage of the

postconviction proceedings. Moreover, the trial court's reasoning was clear from its verbal findings and defendant had ample opportunity to highlight the extent of any erroneous rulings based on the complete record from the evidentiary hearing.

¶ 46 We now turn to defendant's contention that he received unreasonable assistance from his appointed postconviction counsel under Rule 651(c). Because the right to counsel during postconviction proceedings is a "matter of legislative grace," a postconviction petitioner is entitled only to a "reasonable level of assistance." *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 18. To ensure that postconviction petitioners receive a reasonable level of assistance, Rule 651(c) requires that postconviction counsel: (1) consult with 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. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 47 Defendant first argues that postconviction counsel failed to recognize, develop, and present his claims of constitutional violations. He asserts that postconviction counsel improperly focused on whether trial counsel was ineffective for advising him that he could not have a jury trial unless he agreed to testify. According to defendant, postconviction counsel should have been more focused on the issue of whether Harmon's advice constituted coercion. This argument has no merit. Consistent with our instructions in *Bandala-Martinez*, 2016 IL App (2d) 140370-U, ¶ 30, postconviction counsel argued that "[Harmon] advised [defendant] that if he were to have a jury trial, that the law of the State of Illinois would require him to testify." Postconviction counsel went on to discuss defendant's testimony that Harmon made him afraid of being cross-examined by the prosecutor. In closing, postconviction counsel argued that defendant "was convinced that his [trial] counsel had advised him that if he wanted a jury trial,

he was going to have to testify." Thus, even accepting defendant's position that Harmon's coercive tactics are part and parcel of whether he gave erroneous advice, the record reflects that postconviction counsel's argument was clearly reasonable under Rule 651(c).

¶ 48 Defendant's final argument is that postconviction counsel failed to "properly prepare and timely file" his motion for a change of venue. However, beyond making this statement, defendant says nothing about what the motion should have included or how it could have been filed sooner. We therefore agree with the State that the issue has been forfeited. *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010) (observing that an issue is forfeited when it is "merely listed or included in a vague allegation of error").

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we affirm the judgment of the circuit court of McHenry County denying defendant's amended post-conviction petition following an evidentiary hearing.

¶ 51 Affirmed.