

FIRST DIVISION
February 21, 2012

No. 1-10-0368

Notice: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 99 CR 25318(02)
)	
WILLIE BISHOP,)	Honorable
)	Lawrence E. Flood,
Defendant-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

MODIFIED ON DENIAL OF REHEARING

¶ 1 *Held:* The court did not err in dismissing defendant's postconviction petition following an evidentiary hearing. Defendant did not receive ineffective assistance of postconviction counsel.

¶ 2 Defendant appeals from the dismissal of his postconviction petition following an evidentiary hearing. On appeal, defendant claims the trial court erred in dismissing his claim for ineffective assistance of counsel where he established that counsel failed to

1-10-0368

call an alibi witness. In addition, defendant claims he received ineffective assistance of postconviction counsel. For the following reasons, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 The following summary of the evidence was taken from our order affirming defendant's conviction. *People v. Bishop*, No. 1-02-1900 (2003) (unpublished order pursuant to Supreme Court Rule 23). Defendant's conviction is the result of gang-related events in which the victim, Cory Boston, was shot and killed on June 26, 1998. The first of these events occurred on May 4, 1998. On that date, a group of men who were members of the Black Disciples street gang were standing near the intersection of 111th Place and Aberdeen Street in Chicago. Defendant and codefendant, who were alleged to be members of the Gangster Disciples, a rival gang of the Black Disciples, exited a car driven by defendant and shot at the men. Codefendant approached a car in which Robert Williams was sitting, and attempted to shoot him, but his gun did not fire. Williams testified at trial that as codefendant attempted to shoot him, codefendant said, "This is for my Folks, guy." Williams drove away and defendant and codefendant also drove away. Coincidentally, two blocks away, Williams' car and defendant and codefendant's car crashed into each other. Defendant fled the scene while codefendant remained trapped in the car partially unconscious. A group of men who were Black Disciples approached the car and beat codefendant until police officers arrived. At trial, eyewitnesses to the May 4, 1998, incident, Tyrice Jones and Marvin Dixon, identified defendant and codefendant as the two individuals who shot at the

1-10-0368

group of men. The victim's uncle, Steven Boston, testified at trial that prior to June 26, 1998, he was driving in his car when the vehicle in front of him stopped and codefendant exited the vehicle. Codefendant told Boston that the victim had beat him while he was "down" or had "messed" up his face. Codefendant told Boston that he was going to "come after" the victim and the others who had beaten him.

¶ 5 On June 26, 1998, at about midnight, defendant, codefendant and third individual returned to the area around 112th Place and Racine Avenue. Marvin Dixon was standing nearby and Tyrice Jones was sitting in his car nearby. The victim was sitting in his car, which was parked behind Jones' car. Ed Calmes was standing on the front porch of his home, which was located nearby. Defendant, codefendant and the third individual fired shots at Dixon and then approached the victim's car. They fired their guns into the victim's car, killing him. At trial, Calmes and Dixon were only able to identify codefendant as one of the three men. Jones, however, identified both defendant and codefendant. The third individual was never identified.

¶ 6 Jones further testified that he knew both defendant and codefendant "from around the same neighborhood." Specifically, he had known defendant for a period of about two years prior to the victim's shooting. Jones admitted he had been a member of the Gangster Disciples but not when the shooting occurred. He stated that he knew defendant and codefendant to be Gangster Disciples.

¶ 7 Prior to defendant's trial, Marvin Dixon had been arrested and was in jail awaiting trial. According to Dixon's testimony, when he was transported from the jail to the courthouse to testify at defendant's trial, he was placed in the same "bullpen" or lockup

1-10-0368

area as defendant and codefendant. Defendant and codefendant approached Dixon and codefendant expressed remorse for the shooting and blamed the shooting on his "youthful actions." Codefendant also told Dixon he could help Dixon with his case if Dixon did not testify at codefendant's trial. Codefendant stated he could "hurt" the witnesses in Dixon's case. Dixon understood that "hurt" meant to shoot the witnesses because codefendant then made a shooting gesture like he was pulling a trigger.

¶ 8 Investigator Thomas Ptak testified as the State's gang expert. Ptak stated that codefendant had numerous tattoos that he believed signified defendant was a Gangster Disciple because the tattoos were symbols commonly used to represent the gang. Ptak also testified that defendant had a tattoo of two semiautomatic pistols pointing upward with gunpowder coming out from both barrels and the words, "retaliation is a must."

¶ 9 The jury found both defendant and codefendant guilty of first degree murder based on a theory of accountability and they were each sentenced to a prison term of 40 years.

¶ 10 On appeal, defendant argued: (1) the trial court erred in denying his motion for severance; (2) the trial court erred in admitting a picture of his tattoo into evidence; (3) the trial court erred in admitting other crimes evidence; (4) the trial court erred in admitting gang-related evidence; (5) the trial court erred in restricting defense counsel's cross-examination of the State's witness Tyrice Jones; (6) the trial court's jury instruction regarding eyewitness testimony misstated the law; (7) several of the prosecutor's comments in closing arguments were prejudicial; and (8) he was denied a fair trial by the cumulative effect of the errors. This court affirmed defendant's

1-10-0368

conviction and sentence. *People v. Bishop*, No. 1-02-1900 (unpublished order pursuant to Supreme Court Rule 23).

¶ 11 Defendant filed a *pro se* postconviction petition on March 20, 2006, wherein he alleged: (1) trial counsel was ineffective for failing to call Samantha Crump as an alibi witness; (2) trial counsel was ineffective for failing to file a motion to suppress a suggestive identification process; (3) trial counsel was ineffective for failing to impeach a witness; and (4) appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. Defendant attached a signed and notarized affidavit from Samantha Crump to his petition. In her affidavit, Crump averred that she and defendant were at home on the night of the offense and that she provided this information to defense counsel. The trial court advanced defendant's petition to the second stage and appointed the public defender on September 16, 2006.

¶ 12 While his postconviction petition was pending on second stage review, defendant filed a petition for writ of habeas corpus on February 20, 2007 in the federal district court. In it he alleged: (1) the trial court erred in denying his motion for severance; (2) the trial court erred for admitting photo evidence of his taboo; (3) the trial court erred for admitting other crimes evidence; (4) the trial court erred in admitted gang related evidence; (5) the trial court improperly restricted cross-examination; and (6) and the trial court improperly instructed the jury about eyewitness testimony. The district court denied the petition without prejudice finding that defendant had not exhausted all state remedies. *U.S. ex rel. Bishop v. McCann*, 2007 WL 2893632 (N.D. Ill. 2007).

¶ 13 Defendant retained private counsel on June 8, 2007. On November 15, 2007,

1-10-0368

postconviction counsel filed an amended postconviction petition alleging that defendant was denied due process and a fair trial because: (1) the trial court denied his motion for severance; (2) evidence of his tattoo was improperly admitted; (3) the court allowed improper other crimes evidence; (4) the trial court allowed prejudicial gang evidence to be admitted; (5) trial counsel was ineffective for failing to present known alibi evidence; (6) trial counsel was ineffective for failing to file a motion to suppress; (7) the trial court improperly restricted cross-examination; and (8) the jury instructions were improper. Counsel also filed a Rule 651(c) certificate.

¶ 14 The State filed a motion to dismiss and argued that all of defendant's claims, other than his claim that counsel was ineffective for failing to call an alibi witness, were raised on direct appeal and barred by *res judicata*. Furthermore, the State argued that defendant failed to prove counsel's ineffectiveness. Postconviction counsel filed a response to the State's motion to dismiss in which he conceded that all of the issues, other than counsel's alleged ineffectiveness, were barred by the doctrine of *res judicata*. Thereafter, postconviction counsel withdrew this concession in a supplemental opposition to the State's motion to dismiss. The trial court granted defendant a third stage evidentiary hearing to determine if trial counsel was ineffective for failing to call Samantha Crump, an alleged alibi witness, but dismissed the remaining counts.

¶ 15 At the evidentiary hearing, defendant testified that on June 26, 1998, he was with his girlfriend Samantha Crump at the apartment he shared with her at 12318 South Bishop in Calumet Park. He and Samantha had shared this apartment for a year and a half. Defendant testified that he stayed home from work all day to take care of

1-10-0368

Samantha, who was experiencing complications with her pregnancy.

¶ 16 On June 28, 1998, defendant learned from his grandfather that the police were looking for him in connection with the murder. Rather than surrender to the police, defendant left for Bloomington, Illinois. Defendant was arrested in October 1999.

¶ 17 Defendant was impeached with prior felony convictions for unlawful use of a weapon and possession of a controlled substance. Defendant had been placed on probation in the spring of 1998 for the unlawful use of a weapon conviction. He did not tell pretrial services that he was living at 12318 South Bishop. Instead, he gave pre-trial services his grandfather's address, 11659 South Hale.

¶ 18 Defendant told defense counsel, Mr. Dosch, that he was with Samantha at their apartment at 12318 South Bishop in Calumet Park on June 26, 1998. Defendant gave Dosch Samantha's mother's address, 702 West 117th Place and Samantha's cell phone number and asked Mr. Dosch to contact her. At the time he was arrested, Samantha was no longer living at 12318 South Bishop. Defendant testified that Samantha visited him in jail, and was present in court in April 2000. Defendant informed Dosch that Samantha was present in court and asked him to go speak to her.

¶ 19 Samantha Crump's sister, Tyon Crump, testified that she visited her sister at her sister's apartment at 12318 South Bishop on June 26, 1998. Defendant was present at the apartment during that visit. Samantha was pregnant at that time and was experiencing pregnancy complications. The parties stipulated that Samantha's hospital records from July 10 and July 22, 1998, list Samantha's address as 702 West 117th Place.

1-10-0368

¶ 20 Samantha Crump did not testify because she was incarcerated in Wisconsin for first degree murder. The court considered the content of her affidavit as true. In the affidavit, Samantha stated that she and defendant were home in their apartment at 12318 South Bishop on June 26, 1998. Samantha stated that she was experiencing complications with her pregnancy and defendant had stayed with her for several days. She further stated that she spoke with Dosch at one of defendant's court appearances in the spring of 2000, and told him she was with defendant on the night of the offense. She provided Dosch with her contact information. When she visited defendant in jail, he told her that she would be called as a witness at trial. Samantha further stated that she was present at trial, but was not called as a witness.

¶ 21 Former Assistant State's Attorney (ASA) Dan Tiernan testified that when he interviewed defendant in October 1999, defendant stated that he was with Samantha Crump on 123rd street on the night of the offense, but could not recall anything more specific about that evening, nor did he provide an actual address. Defendant told ASA Tiernan that he could locate Samantha at the address on 117th Street. ASA Tiernan's attempt to locate her there was unsuccessful.

¶ 22 ASA Daniel Reddy testified that he was the lead prosecutor for the State at defendant's trial. Defendant presented an alibi and reasonable doubt defense. Prior to trial, defense counsel Dosch called him and said "he was going to have an alibi defense and it was going to be Samantha Crump." Dosch told ASA Reddy that defendant and Crump were together at 12318 South Bishop on the date of the offense. Dosch provided Samantha's address, 107 West 117th Place and her date of birth. Reddy and

1-10-0368

his investigators searched for Samantha at the address provided by Dosch but could not locate her. Samantha also could not be located at the various addresses given by defendant to pre-trial services. In none of the pre-trial services documents did defendant list his address as 12318 South Bishop. ASA Reddy informed Dosch that he could not locate Samantha.

¶ 23 Brian Dosch testified for the State, without the assistance of his trial file. Dosch testified to the best of his recollection that defendant informed him that he wanted to raise an alibi defense supported by the testimony of Samantha Crump. Dosch testified that he investigated Samantha to determine if she was a viable alibi witness. Dosch testified that he spoke with Samantha in court about being an alibi witness. He took down Samantha's contact information and tried to locate her subsequently but was unsuccessful.

¶ 24 In rebuttal, defendant testified that Samantha was present at trial and that Dosch never told him that he was unable to locate Samantha.

¶ 25 After hearing the testimony and the evidence adduced at the evidentiary hearing, the court found that defendant was not denied effective assistance of counsel. The court found that defendant failed to establish that Dosch's representation fell below an objective standard of reasonableness because Dosch challenged the identification of the sole eyewitness in this case. In addition, the court found that even if Dosch's decision not to call Samantha was unreasonable, defendant could not establish prejudice. Jones, the eyewitness in this case, had known defendant for two years and positively identified him as the shooter. Furthermore, neither defendant nor Samantha

1-10-0368

previously provided 12318 South Bishop as their address. As such, the court denied defendant's third stage postconviction petition. It is from this ruling that defendant now appeals.

¶ 26

ANALYSIS

¶ 27 Defendant first claims that the court improperly denied his petition where he established that defense counsel was ineffective for failing to call Crump as a witness.

¶ 28 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), allows a criminal defendant a procedure for determining whether he was convicted in substantial violation of his constitutional rights. 725 ILCS 5/122-1(a) (West 2008); *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). Where defendant is not sentenced to death, the Act sets forth a three-stage process for adjudicating a defendant's request for collateral relief. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996).

¶ 29 At the first stage, the circuit court must determine whether the petition before it alleges the " 'gist of a constitutional claim.' " *Edwards*, 197 Ill. 2d at 244, quoting *Gaultney*, 174 Ill. 2d at 418 . Taking all well-pleaded facts as true, the court must determine whether the petition alleges a constitutional infirmity that, if proven, would demonstrate a deprivation of petitioner's constitutional rights. 725 ILCS 5/122-2.1(a) (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). If the trial court determines that a petitioner has stated the "gist of a constitutional claim," the petition is advanced to the second stage and counsel is appointed, if necessary, in accordance with sections 122-4 through 122-6 of the Act. 725 ILCS 5/122-2.1(b) (West 2008).

¶ 30 At the second stage, the State is required to either answer the postconviction

1-10-0368

petition or move to dismiss. 725 ILCS 5/122-5 (West 2008). As the State in this case moved for dismissal, the trial court was required to rule on the legal sufficiency of the allegations contained in the petition, taking all well-pleaded facts as true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999).

¶ 31 Throughout of the third stage 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). When a postconviction petition is advanced to the third stage for an evidentiary hearing, and when fact-finding and credibility determinations are involved, this court will not reverse the decision of the trial court unless it is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473. Manifest error is error that is “clearly evident, plain and indisputable.” *Morgan*, 212 Ill. 2d at 155.

¶ 32 The law is clear that a defendant in any criminal case is constitutionally guaranteed effective assistance of counsel. U.S. amend. VI, XIV; ILL CONST., 1970, Art. 1 § 8; *Strickland v. Washington*, 466 U.S. 668 (1984); adopted by *People v. Albanese*, 104 Ill. 2d 504 (1984).

¶ 33 The *Strickland* court set forth the two requirements that a defendant must show to prevail in an ineffective assistance claim; (1) counsel’s performance fell below an objective standard of reasonableness and; (2) there is reasonable probability that, but for counsel’s errors, the result of the trial would have been different. The burden is on the defendant to overcome the strong presumption that defense counsel rendered adequate assistance using reasonable professional judgment pursuant to sound trial strategy. *Strickland*, 466 U.S. at 689-90.

¶ 34 Further, defendant must show there was a reasonable probability that defense counsel's errors *affected* the outcome of the proceeding. *Strickland*, 466 U.S. at 694 (emphasis added). A reasonable probability is one sufficient to "undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. It is the "confidence in" and "reliability of" the outcome that is in question. *Strickland*, 466 U.S. at 694. In making this inquiry, *Strickland* dictates that we must consider the "totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the U.S. Supreme Court explained that the test is not whether the remaining evidence was sufficient to convict, but whether, absent defense counsel's errors, the jury could have viewed the remaining evidence in a different light as to undermine the confidence in the verdict. *Kyles*, 514 U.S. at 434-45.

¶ 35 Given the procedural posture of this case, we must determine whether the trial court's finding that defendant's ineffective assistance claim lacked merit was manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008). "[T]he question of whether defendant's ineffective assistance claims are meritorious is necessarily grounded in the specific facts of the case, so it is appropriate for us to give deference to the finding of the trial court." *McCarter*, 385 Ill. App. 3d at 941; see also *People v. Woodson*, 220 Ill. App. 3d 865, 877 (1991); *People v. Brandon*, 157 Ill. App. 3d 835, 846 (1987).

¶ 36 The court found that defendant could not establish ineffective assistance of counsel under the first prong of *Strickland* because Dosch had contact with Samantha, and spoke with her. After this contact, both defense investigators and the State's

attorney's office were unable to locate her. Furthermore, Dosch presented a defense challenging the identification of the sole eyewitness in the case.

¶ 37 In addition, the court found that even if defendant had met his burden under the first prong of *Strickland*, he could not meet his burden under the second prong. The court determined that the eyewitness in the case knew defendant for approximately two years prior to the murder. Defendant was reporting to pretrial services at the time of his arrest and had given pretrial services several addresses, none of which was the Bishop address. In addition, medical records for Samantha at the time of the murder did not list her address as 12318 South Bishop. Also, Samantha had prior convictions for retail theft, which presented possible issues regarding her impeachment if she were called to testify.

¶ 38 We agree with the trial court's ruling and reject defendant's argument that the trial court's finding was manifestly erroneous. "The credibility of the testimony in a post-conviction case, as in other cases tried by the court without a jury, is a matter for the trial judge to determine." *People v. Bracey*, 51 Ill.2d 514, 517 (1972), quoting *People v. Alden*, 15 Ill. 2d 498, 503 (1959). The trial court properly found that defendant failed to meet his burden under *Strickland*.

¶ 39 The record in this case establishes that Dosch was unable to remember many of the specifics with respect to the contacts he had with Samantha, contact information he had for her, and attempts to locate her given that his file was destroyed in a "fire." However, Dosch testified that defendant informed him that Samantha was a potential alibi witness, that he had contact with her and spoke with her. Dosch remembered

1-10-0368

taking notes of that conversation but could not recall the contents. Dosch testified that he attempted to contact Samantha for trial by using an investigator, but was unable to locate her. Dosch also informed ASA Reedy that Samantha may testify and made an announcement to the jury during *voir dire* that Samantha may testify. Despite all of this, Dosch could not call Samantha at trial because he could not locate her. ASA Reedy testified that Dosch informed him that Samantha was a potential alibi witness. ASA Reedy also attempted to locate Samantha but was unsuccessful.

¶ 40 Although both Dosch and ASA Reedy testified that they could not locate Samantha, defendant testified that Samantha was in court during the trial and so informed Dosch. Defendant testified that he asked Dosch when Samantha was going to be called as a witness. In her affidavit, Samantha averred that she was present in court in the spring of 2000 and spoke with Dosch. She told Dosch that she was with defendant on the night of the murder and defendant "did not commit the crime." Dosch wrote down her contact information and told her he would call her if he needed her. Samantha further stated that she never heard from him, even though she went to court for several of defendant's appearances. She also stated that she was present for trial but was never called to the stand.

¶ 41 Despite defendant's testimony at the hearing and Samantha's affidavit, defendant, who was reporting to pretrial services during the relevant time frame provided several different addresses, none of which was the Bishop address. In addition, defendant gave pretrial services addresses for Samantha, none of which was the Bishop address. Also, the medical records for Samantha at the time of the murder

1-10-0368

do not list her home address as 12318 South Bishop. Furthermore, attempts were made by both defense counsel and the State to locate Samantha at various different addresses provided.

¶ 42 Defendant suggests that Dosch could have subpoenaed Samantha or gotten a continuance to locate her. However, there is no indication that these tactics would have proven successful given that both Dosch and ASA Reedy attempted to locate her at the exact address she had given, as well as at addresses provided by defendant.

Therefore, the trial court's finding that defendant failed to show trial counsel's representation fell below an objective standard of reasonableness was not manifestly erroneous.

¶ 43 Even if Samantha had been located, Dosch would have been under no obligation to call her as a witness. Generally, counsel's decisions on what evidence to present and what witnesses to call are considered matters of trial strategy. *People v. Munson*, 206 Ill. 2d 104, 139 (2002). Dosch had spoken with Samantha and was aware of what her testimony would be. Dosch was arguably in a position to determine whether Samantha's testimony would have been helpful or hurtful to defendant's case given that she was an impeachable witness. These kinds of decisions are traditionally immune from claims of ineffective assistance of trial counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999).

¶ 44 Defendant analogizes the facts of the instant case to those in *People v. King*, 316 Ill. App. 3d 901 (2000). In *King*, the defendant was convicted of aggravated criminal sexual assault and aggravated kidnaping for the abduction and rape of a 17-

1-10-0368

year-old girl on the defendant's school bus route. Defendant maintained that he did not rape the girl and was never alone with her on the bus. In his postconviction petition, defendant alleged that he provided defense counsel the name of the bus attendant who was working on the bus on the date of the alleged incident. The defendant further alleged that his trial counsel never interviewed the bus attendant and never called her as a witness. *King*, 316 Ill. App. 3d at 904. The bus attendant's affidavit stated that she was on the bus the entire time the students were riding home and that the alleged victim was never on the bus alone with the defendant. *King*, 316 Ill. App. 3d at 904. She further stated that she was present in court on the day of trial but never spoke to defendant's counsel. *King*, 316 Ill. App. 3d at 904.

¶ 45 In a hearing on the postconviction petition, the parties stipulated to the facts contained in the bus attendant's affidavit and also to her credibility. Defense counsel initially explained to the court that he did not "recall" why he didn't call the bus attendant. He later testified that he had spoken with her on the phone and had subpoenaed her to court, but chose not to call her as a witness. Counsel explained to the court that his choice not to call her was a matter of "trial strategy". Evidence was also presented showing that the bus attendant was assigned to defendant's bus on the date of the alleged rape. At the close of the hearing, the court found defense counsel was not ineffective because his decision not to call an alibi witness could be considered trial strategy. *King*, 316 Ill. App. 3d at 911.

¶ 46 On appeal, we rejected the State's argument that counsel's decision not to call the bus attendant was mere trial strategy because defense counsel was aware of the

1-10-0368

alibi witness, the alibi witness had been subpoenaed and was present in court and the alibi witness could have rebutted the testimony of the State's three eyewitnesses who testified that the bus attendant got off of the bus early. *King*, 316 Ill. App. 3d at 916.

We noted that we could not 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. *King*, 316 Ill. App. 3d at 916. If believed, the bus attendant's testimony would have established that the rape could not have occurred.

We found that the evidence of defendant's guilt was not overwhelming given the "inconsistent, contradictory testimony presented at trial, along with the clearly questionable credibility of the State's occurrence witnesses" and found that there was a reasonable probability that the result of the trial would have been different had counsel called the bus attendant. *King*, 316 Ill. App. 3d at 919.

¶ 47 This case is distinguishable from *King* because Dosch interviewed Samantha prior to trial and was aware of what she would testify to. Nevertheless, Dosch and ASA Reedy were unable to locate her. In addition, Samantha's testimony would not have been unequivocally exculpatory. The parties in this case did not stipulate to the facts contained in her affidavit or to her credibility. Furthermore, the evidence against defendant was overwhelming. Notably, defendant did not challenge the evidence against him on direct appeal. Hence, even if Samantha had been called to testify, the result of the trial would not have been different. There is nothing in the record to demonstrate that the determination by the trial judge was manifestly erroneous, and therefore the ruling of the trial judge, who had an opportunity to see and hear each

witness, will be upheld. See *Bracy*, 51 Ill. 2d at 517.

¶ 48 Defendant next argues that postconviction counsel provided unreasonable assistance when he failed to amend defendant's *pro se* petition with a claim that appellate counsel was ineffective for failing to present defendant's issues on direct appeal.

¶ 49 As petitioner acknowledges, the right to postconviction counsel is not a constitutional right. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Rather, it is a right granted by Illinois statute and " ' is a matter of legislative grace and favor which may be altered by the legislature at will. ' " *People v. Porter*, 122 Ill. 2d 64, 72 (1998) quoting *People v. Ward*, 124 Ill. 2d 974, 978 (1984). Therefore, unlike the degree of skill and care a lawyer must exercise in representing a criminal defendant, a lawyer representing a post-conviction petitioner must only provide a "reasonable" level of assistance as outlined in the Act. *People v. Wright*, 149 Ill. 2d 36, 64 (1992).

¶ 50 Postconviction counsel appeared in court on this case and filed a Rule 651(c) certification. Rule 651(c) provides:

¶ 51 "Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it shall order that a transcript of the record of the post-conviction proceedings, including a transcript of the evidence, if any, be prepared and filed with the clerk of the court to which the appeal is taken and shall appoint counsel on appeal, both without cost to the petitioner. The record filed in that court shall contain a showing, which may be made by the certificate of the petitioner's attorney, that

the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of the proceedings at trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Illinois Supreme Court Rule 651(c).

¶ 52 Illinois Supreme Court Rule 651(c) is designed to work in conjunction with the Act to ensure that counsel appointed to represent an indigent defendant "ascertains the basis of his complaint, shapes those complaints into appropriate legal form and presents them to the court." *People v. Owens*, 139 Ill. 2d 351, 359 (1990). Indeed, in the Rule 651(c) certificate filed in this case, postconviction counsel indicated that he had consulted with petitioner and had read the reports of the proceedings and had decided not to prepare a supplemental petition because defendant's previous *pro se* petitions adequately set forth claims of deprivation of his constitutional rights.

¶ 53 Petitioner claims that counsel failed to comply with the third provision of Rule 651(c) when he failed to investigate and supplement his *pro se* claims. Defendant claims that postconviction counsel was aware of the district court's decision on his habeas corpus petition that defendant had not "fairly presented" his claims in state court and that his pending postconviction petition provided a "potential avenue" for raising a claim of ineffective assistance of appellate counsel. In short, defendant claims that postconviction counsel should have included his claims of ineffective assistance of appellate counsel in the amended petition so that the claims would be "federalized" for review by the federal district court in conjunction with a possible subsequent federal

habeas corpus petition.

¶ 54 Defendant is operating under the mistaken belief that because the district court identified claims of ineffective assistance of appellate counsel as a way around procedural default and identified defendant's postconviction petition as a "potential avenue for raising the unexhausted claims" that any claim of ineffective assistance of appellate counsel would be meritorious. Even if it could possibly be construed as meritorious, postconviction counsel is not required to raise every conceivable issue. "While postconviction counsel *may* conduct a broader examination of the record [than the issues raised in the *pro se* petition might require] [citation], and may raise additional issues if he or she so chooses, there is no obligation to do so." (Emphasis in original.) *Pendleton*, 223 Ill. 2d at 476. Therefore, we cannot find that postconviction counsel was ineffective for not including a claim of ineffective assistance of appellate counsel in defendant's amended postconviction petition.

¶ 55 CONCLUSION

¶ 56 For the foregoing reasons, we affirm the judgment of the circuit court dismissing defendant's claim of ineffective assistance of counsel.

¶ 57 Affirmed.