

2019 IL App (1st) 152408-U

No. 1-15-2408

Order filed June 21, 2019

Fifth Division

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 2341 (01)
	)	
KIJEL GRANT,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, Presiding.
	)	
	)	

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Dismissal of defendant's *pro se* postconviction was proper where defendant failed to make a substantial showing that his constitutional rights were violated and defendant was not denied the reasonable assistance of postconviction counsel nor was counsel required to comply with Rule 651(c) (eff. Dec. 1, 1984) where defendant requested that counsel withdraw.
- ¶ 2 Following a jury trial, defendant Kijel Grant was convicted of first degree murder and

sentenced to 50 years' imprisonment. His conviction and sentence were affirmed by this court on direct appeal. *People v. Grant*, No. 1-01-2159 (2003) (unpublished order under Illinois Supreme Court Rule 23). Defendant's petition for leave to appeal was denied by the Illinois Supreme Court on March 24, 2004. *People v. Grant*, No. 97668, 208 Ill. 2d 545 (2004).

¶ 3 Prior to his sentencing, defendant filed a *pro se* motion for new trial alleging trial counsel's ineffectiveness and other claims. His motion was subsequently re-filed as a *pro se* postconviction petition on June 6, 2001, while his direct appeal was pending. Defendant's *pro se* petition proceeded to the second stage where counsel was appointed. The trial court dismissed all of defendant's postconviction claims at the second stage except for a *Brady* violation claim, which was subsequently dismissed after an evidentiary hearing. Defendant's motions to reconsider his second and third stage dismissals were both denied by the trial court, and this appeal followed.<sup>1</sup>

¶ 4 On appeal, defendant contends that the trial court erred in dismissing his postconviction petition at the second stage because he made a substantial showing of trial counsel's ineffectiveness for failing to call certain alibi witnesses to testify, and the trial court considered materials outside of the record in dismissing his petition. In a supplemental brief, defendant also contends that the trial court erred in granting the State's motion to dismiss with respect to his allegation that trial counsel was ineffective for failing to investigate and call a witness who would have contradicted the testimony of a State's witness. Additionally, defendant contends that his postconviction counsel, attorney Frederick Cohn, failed to comply with Supreme Court Rule

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<sup>1</sup> We note that defendant has two additional, separate appeals pending in case numbers 1-15-3348 and 1-17-1742.

651(c) (eff. July 1, 2017) and rendered unreasonable representation. For the reasons that follow, we affirm.

¶ 5

## BACKGROUND

¶ 6

### A. Defendant's Trial Proceedings

¶ 7 During the pretrial conference prior to jury selection, defendant's trial counsel indicated that he was withdrawing any alibi defense and instead relying on the State's inability to prove defendant guilty beyond a reasonable doubt.<sup>2</sup> The matter then proceeded to jury selection and subsequently to defendant's jury trial.

¶ 8 Briefly stated, the evidence presented by the State at defendant's trial established that on the evening of July 20, 1998, the victim, Terrance Willis, went to the home of Cornelius Poe. Both the victim and Poe were crack cocaine users. While Poe did not sell crack cocaine, he allowed others to sell drugs from his home in exchange for drugs for his personal use. When the victim arrived at Poe's home, defendant was there. During the course of the evening, defendant provided the victim with approximately \$150 worth of crack cocaine. The victim did not pay defendant for the drugs but promised to pay later that evening. When the victim failed to pay after several attempts to retrieve the money, defendant, Mark Franklin and Richard Campbell drove the victim to an alley, where defendant and Campbell fired approximately 14 gunshots into the victim's body, and the victim died from his wounds. His body was discovered in the alley by Preston Shuttlesworth at approximately 11:45 p.m. that night.

¶ 9 In support of its case-in-chief, the State presented the testimony of the victim's wife, Raina Willis; Poe; Franklin's girlfriend, April Henry; William Gore (who testified that he could

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<sup>2</sup> In defendant's answer to discovery, trial counsel noted that defendant may rely on an affirmative alibi defense that defendant was at Sheena Godfrey's house.

not recall anything); assistant State's attorney James Navarre; Franklin; Chicago Police firearms examiner Joseph Thibault; Chicago Police forensic investigator Joseph Bembynista; and assistant medical examiner Dr. Nancy Jones.

¶ 10 Dr. Jones testified that she observed 14 gunshot entrance wounds, 6 gunshot exit wounds, and one graze wound to the victim's body. She also testified that the toxicology report indicated the presence of alcohol and a cocaine metabolite in the victim's blood; however, neither the alcohol nor cocaine contributed to his death. Dr. Jones further stated that it was unlikely that the victim ingested cocaine within an hour or two of his death. Because only cocaine metabolite was found, it was probably approximately 24 hours or so since the parent drug was taken, but she could not be sure without knowing how much cocaine he ingested and the purity of it.

¶ 11 For his case-in-chief, defendant presented a stipulation between the parties regarding a statement made by the victim's wife concerning his intoxication on July 20, 1998. Following closing arguments, the jury retired for deliberations. Following deliberations, the jury found defendant guilty of first degree murder, and the trial court entered judgment on the jury's verdict. Defendant's motion for new trial was denied.

¶ 12 Prior to his sentencing, defendant filed a *pro se* motion for new trial alleging trial counsel's ineffectiveness and other claims. The trial court advised defendant that his claims would be best raised in a postconviction petition and that he would be allowed to file a postconviction petition after sentencing. The matter then proceeded to a sentencing hearing after which defendant was sentenced to 50 years' imprisonment.

¶ 13 B. Defendant's Direct Appeal

¶ 14 Defendant subsequently filed his notice of appeal in the trial court on May 22, 2001. On direct appeal, defendant contended that: (1) the trial court erred when it admitted evidence of a

witness' prior inconsistent statements that had not been properly authenticated; (2) the trial court improperly allowed the introduction of other crimes evidence; (3) the trial court improperly admitted hearsay evidence identifying defendant as the killer; (4) the State made improper comments during closing arguments; (5) the trial court erred when it failed to instruct the jury on the common design theory of accountability; (6) the trial court improperly limited cross-examination of a State witness; and (7) the trial court improperly barred defendant from using a police report to refresh a witness' memory.

¶ 15 At the outset, before addressing defendant's contentions on appeal, this court noted that the evidence of defendant's guilt as a whole was overwhelming. Specifically, the court noted that Franklin, although an accomplice, was a direct witness to the murder and described it in detail. Further, the forensic evidence corroborated Franklin's testimony regarding the weapons used, number of shots fired and the location of the victim's wounds. Additionally, the court noted that Poe's and Henry's testimonies corroborated Franklin's account of defendant's drug sales and the repeated trips with the victim to obtain money for payment. The State also presented evidence, through Gore's prior inconsistent statements, that defendant admitted his involvement in the murder; as well as defendant's statements to Henry that he had denied knowing Franklin, which this court found supported an inference of consciousness of guilt. This court ultimately affirmed defendant's conviction and sentence, noting that defendant failed to preserve several of his issues for review and that plain error did not apply. This court also found that the State's comments during closing argument did not constitute reversible error because they were invited by defendant's closing argument; that any error in limiting his cross-examination of Henry was harmless; and the trial court properly barred defendant from using a police report to improperly

impeach a witness, and that defendant did not meet the proper foundational requirement to refresh the witness' memory.

¶ 16 C. Postconviction Proceedings

¶ 17 On June 7, 2001, defendant filed a *pro se* first amended motion for finding of acquittal or for a new trial or for a new trial of evidentiary hearing. In his motion, defendant alleged that: (1) he was not proven guilty beyond a reasonable doubt; (2) the findings were against the manifest weight of the evidence; (3) he was denied due process of law; (4) he was denied equal protection of the law; (5) the State failed to prove each and every allegation of the indictment/information beyond a reasonable doubt; (6) the findings were based on evidentiary facts that did not exclude every reasonable hypothesis consistent with his innocence; and (7) he received ineffective assistance of trial counsel for counsel's failure to file a motion to suppress evidence when the State's witnesses changed their testimony, failure to impeach witnesses with their inconsistent statements, and failure to investigate alibi witnesses. Attached to defendant's motion were the affidavits of Sheena Godfrey, Deron Wash, Trelissa Mitchell, Marilyn Branch, William Gore and defendant. Also attached was an investigation summary of a police interview with Tommy Harris. The trial court treated defendant's motion as a postconviction petition and subsequently appointed counsel to represent defendant.

¶ 18 The record contains written correspondence from defendant to the trial court after he was remanded to prison. In a letter dated November 5, 2003, defendant wrote to the trial court that he had been unable to communicate with his counsel and that they were unable to "come to one accord" regarding the proper direction for his postconviction petition. Defendant further stated that he had "numerous" public defenders, and they understood his direction. However, defendant

stated that he and his then current public defender, Eun W. Cho (P.D. Cho), had many disagreements, and he wished to relieve P.D. Cho of his duties as his counsel.

¶ 19 P.D. Cho responded to defendant's letter in writing on June 30, 2003, indicating that he previously informed defendant that he would not be able to move further on the postconviction proceeding until he received defendant's trial transcripts and appellate file. He further explained to defendant that if he could supply names, addresses and telephone numbers of any of the witnesses who would sign an affidavit and "be ready, willing and able to testify" on his behalf at an evidentiary hearing, he must do so. P.D. Cho stated that he never asked defendant to obtain the affidavits; rather he asked defendant to think about people whose affidavits could help with his postconviction petition.

¶ 20 P.D. Cho subsequently filed a motion to withdraw as defendant's postconviction counsel on January 12, 2004. In his affidavit in support of the motion to withdraw, P.D. Cho noted that defendant expressed his desire to represent himself in his postconviction proceedings in a letter dated November 5, 2003, in a telephone call on November 17, 2003, and in an affidavit to the court on December 18, 2003. The record does not contain an order granting the motion to withdraw; however, the record indicates that another public defender, Robert Glick (P.D. Glick), was assigned to represent defendant in his postconviction matters. On July 7, 2006, defendant filed a motion to have P.D. Glick withdraw from representing him. The record does not contain an order granting the motion to withdraw.

¶ 21 The State filed an amended motion to dismiss defendant's *pro se* postconviction petition on April 5, 2007, because a supplemental petition was filed by the public defender's office on January 4, 2007. The State noted that in both his *pro se* and supplemental petitions, defendant

made several allegations of ineffective assistance of trial counsel before, during and after defendant's jury trial, and additional claims of appellate counsel's ineffectiveness. The State contended that defendant's allegations were barred by rules of waiver, *res judicata* or because they were inaccurate, incomplete, speculative, unsupported by the required documentation or contradicted by the record. The State accordingly sought to have defendant's postconviction petitions dismissed.

¶ 22 Defendant filed several *pro se* motions contesting his representation by the public defender's office in his postconviction proceedings. On December 6, 2007, the trial court allowed defendant to proceed *pro se* and the public defender's office withdrew from the case.

¶ 23 On March 24, 2008, a private attorney, Scott Sherwin, filed an appearance on behalf of defendant. On September 12, 2008, defendant filed a *pro se* motion for postconviction counsel Sherwin to be dismissed due to a conflict of interest. Additionally, on September 23, 2008, defendant filed a *pro se* petition for writ of *habeas corpus*. On November 14, 2008, another private attorney, Frederick Cohn, filed an appearance on defendant's behalf, and attorney Sherwin withdrew.

¶ 24 On February 25, 2009, attorney Cohn filed a motion for continuance in order to file an amended supplemental petition, because he had a heart attack and surgery in January 2009. He was subsequently hospitalized for pneumonia and transferred to a rehabilitation facility, and was not released until January 31, 2009. Upon his release, attorney Cohn was not allowed to return to work under his physician's order. A second motion for continuance was filed by attorney Cohn on June 16, 2009, after he was unable to appear in court on June 15, 2009, due to his medical

condition. A third motion for continuance was filed by attorney Cohn on October 20, 2009, based on his illness and medical condition.

¶ 25 Attorney Cohn subsequently filed an amended supplementary postconviction petition on defendant's behalf on January 6, 2010. The amended supplemental petition adopted all previously filed petitions, and raised additional bases for his claims of ineffectiveness of trial counsel, namely, that counsel was ineffective for: failing to investigate the law concerning the admissibility at trial of Gore's grand jury testimony that defendant told him he had committed two other murders, citing *People v. Grabbe*, 148 Ill. App. 3d 678 (1986) in support; failing to investigate and present defendant's alibi defense at trial; failing to investigate Gore's claim that his grand jury testimony was coerced by police; failing to investigate witness Tommy Harris; failing to investigate other witnesses named in police reports; and failing to interview Dr. Jones and the toxicologist. Defendant also maintained that he did not need to present an affidavit from his trial counsel in order to sustain his claim that trial counsel was ineffective by abandoning his alibi defense on the eve of trial. Attached to the amended supplementary petition were the same affidavits and police notes that defendant had previously attached to his *pro se* postconviction petition. This petition was stricken on the State's objection on the basis that only one superseding petition shall be filed by defendant. See 725 ILCS 5/122-3 (West 2008).

¶ 26 A second amended supplemental postconviction petition was filed by attorney Cohn on February 9, 2010, along with a Rule 651(c) certificate (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)), to which the following allegations were added: appellate counsel was ineffective for failing to raise the issues of ineffective assistance of trial counsel; trial counsel was ineffective for failing to present exculpatory evidence; a *Brady* violation occurred due to the coerced testimony of Gore; and trial counsel was ineffective for failing to impeach Poe with his prior statement that he

did not know that a homicide occurred until the police informed him. Additional exhibits included a police progress report indicating statements made by Tommy Harris and police interview notes with Doris Hendrick and Cornelius Poe.

¶ 27 The State's amended motion to dismiss the second supplemental postconviction petition was filed on May 4, 2010. Regarding defendant's allegations that trial counsel was ineffective for failing to object to the admission of Gore's grand jury testimony, the State first noted that these claims were presented on direct appeal and were denied, despite defendant's attempt to rephrase them. Additionally, the State contended that these claims were contradicted by the record, which indicated that trial counsel objected to the foundation of the transcript, the prejudicial effect of the transcript and on evidentiary grounds. The State also factually distinguished *Grabbe* as inapplicable to this case.

¶ 28 The State further argued that trial counsel was not ineffective for failing to present an alibi defense because, as this court noted on defendant's direct appeal, the evidence of defendant's guilt was overwhelming. The State maintained that defendant could not prove his allegation that trial counsel was ineffective in abandoning the alibi defense on the eve of trial without an affidavit from trial counsel, and the only support for such allegation came from defendant himself. The State opined that trial counsel probably changed his mind about the alibi defense once he received and reviewed the discovery evidence from the State. Moreover, the State contended that defendant's claim must fail as it was a strategic decision by counsel, and the evidence against defendant was not closely balanced. The State also discussed each of the affidavits attached to defendant's petition and noted why they potentially were not called as alibi witnesses, namely because their interviews immediately after the murder contradicted what was stated in their affidavits, and none of the witnesses' statements precluded defendant from being

present at the scene of the murder at 11:45 p.m. The State concluded that the affidavits submitted by defendant alone were insufficient to support an alibi defense or a claim of ineffective assistance of counsel because none of them were of such a conclusive character that they would create a reasonable probability of a different result on retrial and thus defendant suffered no prejudice. The State included police reports of interviews with Godfrey and Branch with its motion to dismiss.

¶ 29 With respect to defendant's allegation of a *Brady* violation, the State noted that Gore did not sign an affidavit claiming that his statement was coerced until four years after the trial, so it had no duty to disclose facts that had not yet occurred. The State contended that defendant's allegations regarding trial counsel's failure to interview Harris must fail because he failed to include an affidavit from Harris and further that the police investigative summary referenced by defendant omitted that Harris provided several inconsistent statements to the police surrounding his involvement with the victim. The State further asserted that trial counsel was not ineffective for failing to further investigate the pathologist and toxicologist because their reports were favorable to defendant or failing to present exculpatory evidence because those claims were contradicted by the record. Additionally, the State argued that defendant's appellate counsel was not ineffective for not presenting defendant's claims on direct appeal because appellate counsel was limited to the record, and defendant's claims were meritless.

¶ 30 An additional amended supplementary postconviction brief was filed by attorney Cohn on September 24, 2010, asserting that defendant was denied due process when the State failed to inform him prior to trial that Gore received benefits for being a witness against him. A third amended supplementary postconviction petition was filed by attorney Cohn on August 8, 2011, alleging that he was denied due process because the grand jury lacked jurisdiction to deliver a

true bill of particulars against him and that trial counsel was ineffective for failing to challenge the grand jury's jurisdiction. Attorney Cohn filed a new Rule 651(c) (eff. Dec. 1, 1984) certificate on August 25, 2011.

¶ 31 The State filed a supplemental motion to dismiss the new arguments raised in defendant's subsequent amended supplementary postconviction petitions on September 26, 2011, contending that defendant's claims that the grand jury did not have jurisdiction over him were "positively rebutted by the record," therefore trial counsel was not ineffective for failing to challenge such jurisdiction.

¶ 32 On July 13, 2012, defendant filed a motion to have attorney Cohn dismissed as his postconviction counsel due to incompetence and for leave to proceed *pro se*. Attorney Cohn filed a response on October 4, 2012, indicating that while he denied incompetence as alleged in defendant's motion, he agreed that defendant had the right to represent himself in postconviction proceedings and requested that defendant's motion be granted.

¶ 33 Defendant subsequently filed a *pro se* amended postconviction petition on December 13, 2012, in which he adopted all previous claims asserted in his original *pro se* postconviction petition. Additionally, defendant reasserted the lack of grand jury jurisdiction claims; claims that the State failed to disclose that Gore had received benefits in exchange for his "perjured" testimony, and claimed ineffective assistance of trial counsel for failing to investigate and present exculpatory witnesses. Defendant also alleged that trial counsel had a conflict of interest because he admitted to defendant's family that he thought defendant had some liability in the case. Defendant subsequently filed a *pro se* response to the State's supplemental motion to dismiss on February 15, 2013.

¶ 34 The trial court filed a written order addressing defendant's *pro se* amended postconviction petition on July 10, 2013. The court dismissed defendant's allegation that he was not proven guilty beyond a reasonable doubt as frivolous and patently without merit, relying on the disposition of defendant's direct appeal. With respect to defendant's allegations of a *Brady* violation based on Gore's alleged coerced testimony, the trial court concluded that defendant established a substantial showing of a constitutional violation and advanced that claim to a third stage evidentiary hearing. The trial court concluded, however, that defendant's allegation of a due process violation for the State's failure to disclose benefits to Gore for testifying were dismissed because defendant failed to provide an affidavit or any supporting documentation. Likewise, defendant's allegation that the State's failure to correct Harris' "false testimony at trial" was a *Brady* violation was dismissed because he failed to provide any evidentiary support, and Harris did not testify at trial. Regarding defendant's grand jury jurisdiction allegations, namely that the grand jury did not have jurisdiction to indict him, the trial court concluded that they were contradicted by the record and dismissed them.

¶ 35 The trial court next examined defendant's ineffective assistance of trial counsel claims and found that: defendant's claim that he was prejudiced by Gore's statement regarding defendant's participation in two other murders was barred by principles of *res judicata* as it was raised on direct appeal; defendant failed to establish that trial counsel did not investigate his alibi defense and noted that on direct appeal, the evidence of defendant's guilt was found to be overwhelming and the evidence contained in the affidavits would not have altered the outcome at trial; defendant failed to provide support for his claim that trial counsel knew or should have known that Gore committed perjury at the grand jury beyond his conclusory allegation, thus trial counsel was not ineffective; defendant failed to properly support his allegations that trial counsel

failed to investigate and call certain witnesses (Harris and Henderson) and that he failed to present evidence of how the toxicologist's testimony would have changed the outcome of trial. The trial court also found that trial counsel was not ineffective for failing to present testimony from Harris because the record contradicted defendant's assertion that Harris was with him at "crucial times," and Hendricks' observations noted in her police interview were irrelevant to defendant's defense as she did not see defendant after 8:00 p.m. on the date of the murder; trial counsel was not ineffective for failing to impeach Poe because he could have been rehabilitated by his multiple other statements, and it would not have changed the outcome of trial in light of the evidence presented against defendant; trial counsel was not ineffective for failing to challenge the grand jury's jurisdiction because the claim was frivolous and patently without merit; defendant failed to sufficiently set forth facts to support his allegation that trial counsel had a conflict of interest; and defendant's claim that trial counsel failed to file a motion to quash his arrest was waived as it was not raised on direct appeal, and further that defendant failed to show a reasonable probability that such motion would have been granted and that the outcome of trial would have been different if such motion were granted.

¶ 36 With respect to defendant's allegations that appellate counsel was ineffective, the trial court found that all of the claims raised by defendant in his postconviction petition as to the trial were without merit, except for the *Brady* violation with regard to Gore's testimony. However, the court noted that appellate counsel would not have been privy to knowledge of a potential *Brady* violation while preparing defendant's appeal, thus appellate counsel was not ineffective for failing to raise it.

¶ 37 The trial court then advanced petitioner's *Brady* claim as to Gore to a third stage evidentiary hearing and dismissed all of defendant's other claims.

¶ 38 Defendant filed a motion to reconsider on July 31, 2013, which was denied. Additionally, the State filed a motion to reconsider on August 27, 2013, contending that the alleged coercion of Gore was immaterial because Gore's testimony was corroborated by other evidence and witnesses, and thus no *Brady* violation occurred. The State additionally contended that defendant's allegation of a *Brady* violation was contradicted by the record. The State concluded that the claim of coercion made four years after the testimony must fail as defendant did not make a substantial showing that his constitutional rights were violated.

¶ 39 An evidentiary hearing was held in September 2014 on defendant's allegation of a *Brady* violation as to Gore. The trial court entered a written order on December 18, 2014, finding that at the evidentiary hearing, Gore's testimony pertaining to the alleged coercion, threats and deals made by police was inconsistent. The court noted that after observing Gore's demeanor at the evidentiary hearing, it found him entirely incredible due to various inconsistencies in his testimony and his own admission that his affidavit recanting his statements was inaccurate and that he was only trying to help defendant. The court concluded that defendant's claim of a *Brady* violation lacked merit; it was dismissed.

¶ 40 Defendant filed a motion to reconsider the dismissal of the *Brady* claim on December 25, 2014, and a *pro se* notice of appeal on February 24, 2015. The notice of appeal was dismissed as premature on March 6, 2015. Defendant's motion to reconsider was denied on July 17, 2015, and he filed a *pro se* notice of appeal that same day. The State Appellate Defender was subsequently appointed to represent him on appeal.

¶ 41 ANALYSIS

¶ 42 On appeal, defendant contends that the trial court erred in dismissing his postconviction petition at the second stage because he made a substantial showing of trial counsel's

ineffectiveness for failing to call certain alibi witnesses to testify, and the trial court considered materials outside of the record in dismissing his petition. Additionally, defendant contends that his postconviction counsel, attorney Cohn, failed to comply with Supreme Court Rule 651(c) (eff. Dec. 1, 1984) and rendered unreasonable representation. In a supplemental brief, defendant contends that the trial court erred in granting the State's motion to dismiss with respect to his allegation that trial counsel was ineffective for failing to investigate and call a witness who would have contradicted the testimony of a State's witness.

¶ 43 A. Standard of Review

¶ 44 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a method for an individual seeking to challenge a conviction by alleging that it was the result of a substantial denial of federal or state constitutional rights, or both. "The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *People v. English*, 2013 IL 112890, ¶ 22. Postconviction proceedings are not a continuation of, or an appeal from, the original case. *People v. Flowers*, 208 Ill. 2d 291, 303 (2003). Rather, a postconviction petition is a collateral attack upon the prior conviction and affords only limited review of constitutional claims not presented at trial. *People v. Greer*, 212 Ill. 2d 192, 203 (2004).

¶ 45 The Act provides a three-stage process for adjudicating petitions. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage, the trial court determines whether the petition is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If the petition is not dismissed at first-stage proceedings, it advances to the second stage. *Cotto*, 2016 IL 119006, ¶ 26.

¶ 46 During second-stage proceedings, the court may appoint counsel for an indigent defendant, who may amend the petition as necessary, and the State may file a motion to dismiss or an answer to the petition. 725 ILCS 5/122-4, 122-5 (West 2012). If the court appoints counsel at the second-stage, appointed counsel is required to file a certificate showing compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating that appointed counsel has examined the record of trial proceedings and made any necessary amendments. Once amendments, if any, are made to the postconviction petition, the State is allowed to file a motion to dismiss the petition. 725 ILCS 5/122-5 (West 2012). In the second stage of postconviction proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473.

¶ 47 If such a showing is made, then the petition proceeds to the third stage where the trial court conducts an evidentiary hearing on the merits of the petition. 725 ILCS 5/122-6 (West 2012).

¶ 48 Issues that were decided on direct appeal are barred by the doctrine of *res judicata*, and issues that could have been raised on direct appeal, but were not, are deemed waived. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). Waiver is not implicated, however, where a defendant's postconviction petition claim relies on evidence outside of the record. *Enis*, 194 Ill. 2d at 375-76. All well-pleaded facts in the petition and in any accompanying affidavits are taken as true. *Enis*, 194 Ill. 2d at 376.

¶ 49 Here, the allegations of defendant's petition that are the subject of this appeal were dismissed at the second stage.<sup>3</sup> Our review of a trial court's dismissal of a postconviction petition at the second stage without an evidentiary hearing is *de novo*. *People v. Dupree*, 2018 IL 122307, ¶29.

¶ 50 B. Discussion

¶ 51 1. Ineffective Assistance of Trial Counsel

¶ 52 Defendant first contends that his postconviction petition made a substantial showing that trial counsel was ineffective for failing to present alibi witnesses, namely Sheena Godfrey, Deron Wash, Trelissa Mitchell and Marilyn Branch. He contends that each of their affidavits provided him with a complete alibi and taken as true, these witnesses' allegations would establish that defendant could not have murdered the victim because he was with them at the time of the murder. Defendant additionally contends that Wash, Mitchell and Branch all asserted that defendant's trial counsel did not contact them to testify on defendant's behalf. Further, defendant maintains that Wash's and Mitchell's affidavits would have strengthened the alibi, contrary to the trial court's finding that they did not account for defendant's whereabouts at the time of the shooting. Defendant argues that the record does not provide any explanation for trial counsel's failure to present this alibi evidence or his withdrawal of the alibi defense prior to jury selection without reason. He further contends that because there was no physical evidence linking him to the crime, the witnesses would have provided a complete alibi for him and contradicted the

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<sup>3</sup> Defendant makes no argument regarding the third-stage dismissal of his *Brady* violation allegations, thus he has forfeited review of those allegations. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

State's witnesses, and the alibi testimony would have bolstered the medical examiner's testimony that it was unlikely that the victim ingested cocaine in the hours before his death.

¶ 53 Ineffective assistance of counsel claims are reviewed under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). Under this standard, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688; *People v. Dupree*, 2018 IL 122307, ¶ 44. In doing so, a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). Moreover, counsel's strategic choices will not constitute ineffective assistance simply because they were unsuccessful or another attorney may have pursued a different course of action. *People v. Sims*, 374 Ill. App. 3d 231, 264 (2007). The failure to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 377.

¶ 54 Wash's affidavit averred to being in defendant's company between 9 and 10:30 p.m. on the night of the murder and that he dropped defendant at Godfrey's house at approximately 10:30 p.m. Mitchell averred that she saw defendant with Wash at approximately 9:30 p.m. and spoke to him for approximately 10-20 minutes before she left. The victim's body was discovered in the alley at approximately 11:45 p.m., thus neither Wash nor Mitchell could provide an alibi for defendant during the time of the murder.

¶ 55 Godfrey, who was defendant's pregnant girlfriend at the time of the murder, averred that defendant arrived at her home between 10:30 and 10:40 p.m., they fell asleep and defendant left

between 7:30 and 8 a.m. the following morning. Branch, Godfrey's aunt, averred that defendant came to their home to see Godfrey at approximately 10:30 p.m. on the night of the murder. However, both Godfrey and Branch told police a different version of events during their interviews shortly after the murder. Branch stated that Godfrey arrived home at 11 p.m. and she did not see defendant. Godfrey told police that defendant did not arrive to her house until after 12:30 a.m. If Branch and Godfrey had been called as defense witnesses, it is likely that they would have been impeached with their prior contradictory statements to police.

¶ 56 Defendant has failed to demonstrate that there is a reasonable probability that the outcome of his trial would have been different had counsel presented the proffered witnesses' testimony. As this court stated on direct appeal, the evidence overwhelmingly proved defendant's guilt. *People v. Grant*, No. 1-01-2159 (2003) (unpublished order under Illinois Supreme Court Rule 23). Moreover, the proposed testimony would not have provided defendant with an alibi for the time of the murder, nor did it impeach or discredit the testimony of the State's witnesses, including his codefendant. We therefore reject defendant's claim.

¶ 57 We note that the amended postconviction petition filed by attorney Cohn raised the issue of the ineffectiveness of appellate counsel for failing to raise this claim on direct appeal, but defendant did not adopt attorney Cohn's amended petition when he chose to discharge Cohn and proceed *pro se*. Thus, such claim was not considered in his postconviction proceedings, nor is it before this court.

¶ 58 In his supplemental brief, defendant argues that trial counsel was ineffective for failing to investigate and call Marguerite Williams who would have contradicted Henry's testimony. Defendant contends that Williams' 2005 affidavit would have contradicted April Henry's trial testimony that defendant told her that he lied to the police about knowing Mark Franklin, and if



(1998). In determining whether to grant an evidentiary hearing, the court is prohibited from engaging in any fact finding. *People v. Makiel*, 358 Ill. App. 3d 102, 110 (2005). Section 122.2.1(c) of the Act limits the review related to a postconviction petition to the record of that particular proceeding. 725 ILCS 5/122-2.1(c) (West 2012).

¶ 64 Here, the record reveals that defendant included an excerpt from police investigative notes with his postconviction pleadings to support his claims that certain witnesses should have been interviewed by trial counsel because they made potentially exculpatory statements. Thus, it was defendant who injected outside evidence into the postconviction proceedings, and he cannot now complain of invited error. See *People v. Cox*, 2017 IL App (1st) 151536, ¶ 73 (a party cannot complain of error that it brought about or participated in). Moreover, while defendant provided only an excerpt from the police investigative notes, the State provided the full police investigative notes, inclusive of the excerpt provided by defendant. See *People v. Sanders*, 2016 IL 118123, ¶ 45 (where defendant provides a portion of a transcript, the State is always free to provide the trial court with the complete transcript).

¶ 65 We do however agree with defendant that the State improperly included the unrelated police reports related to his alleged alibi witnesses, namely Godfrey and Branch. In reaching the conclusion that defendant's trial counsel's decision not to call Godfrey or Branch was a strategic decision, the court noted that trial counsel would have had access to the police reports of their police interviews shortly after the murder and further noted the contents of those interviews. This was error. See *Sanders*, 2016 IL 118123, ¶ 43. However, we may affirm the judgment on any basis supported by the record (*People v. White*, 2017 IL App (1st) 130882, ¶ 26), and we have already determined that defendant's contentions that trial counsel was ineffective for failing to

investigate and call the purported alibi witnesses fail because there is no reasonable probability that the outcome of his trial would have been different. Although the trial court erred in relying on the police interview reports of Godfrey and Branch, the error did not impact the result. As such, we will not remand for an evidentiary hearing.

¶ 66 We find that defendant failed to make a substantial showing that his constitutional right to the effective assistance of trial counsel was violated and therefore the postconviction petition was properly dismissed at the second stage of the postconviction proceedings on this basis.

¶ 67 3. Postconviction Counsel's Performance

¶ 68 Defendant finally contends that this cause should be remanded for new second stage postconviction proceedings because his postconviction counsel failed to comply with Supreme Court Rule 651(c) (eff. Dec. 1, 1984) and rendered unreasonable representation. Specifically, defendant argues that attorney Cohn failed to file a certificate alleging that he fully complied with Rule 651(c); failed to support all allegations with necessary affidavits and other supporting documents; failed to put the allegations in appropriate legal form; raised frivolous claims that were refuted by the record; and failed to include the required verification affidavit. We disagree.

¶ 69 There is no constitutional right to assistance of counsel during postconviction proceedings. *People v. Cotto*, 2016 IL 119006, ¶ 29. The right to assistance of counsel in postconviction proceedings is a matter of legislative grace, and a defendant is guaranteed only the level of assistance provided by the Act. *Cotto*, 2016 IL 119006, ¶ 29. Our supreme court has concluded that the Act provides a postconviction petitioner with "reasonable" assistance. *Cotto*, 2016 IL 119006, ¶ 30.

¶ 70 Additionally, a defendant may relinquish his right to counsel (*People v. Lesley*, 2018 IL 122100, ¶ 36) and proceed *pro se* in postconviction proceedings (*People v. Heard*, 2014 IL App (4th) 120833, ¶ 10). As long as the defendant knowingly and intelligently relinquishes his right to counsel and his waiver is clear and unequivocal, not ambiguous, the circuit court may allow him to proceed *pro se*. *Heard*, 2014 IL App (4th) 120833, ¶ 10.

¶ 71 Defendant disputes that his decision to proceed *pro se* was voluntary and instead claims that this decision was only motivated by the extensive delays caused by postconviction counsel and his complaint that counsel failed to communicate with him. However, his claim is belied by the record.

¶ 72 The record reveals that several postconviction attorneys represented defendant. Initially, postconviction counsel from the public defender's office, P.D. Cho, was appointed for defendant when his *pro se* postconviction petition was filed. Defendant subsequently requested several times that P.D. Cho be removed for various reasons, including that he and P.D. Cho disagreed about the direction of his postconviction proceedings. Eventually, P.D. Cho was allowed to withdraw and another public defender, P.D. Glick, was appointed to represent defendant. Defendant also requested that P.D. Glick be removed and indicated that he would represent himself. Privately-retained attorney Sherwin was the next to file an appearance on defendant's behalf as postconviction counsel, and shortly thereafter, defendant requested that attorney Sherwin be removed for a conflict of interest. Subsequently, attorney Cohn was retained to represent defendant, and he amended defendant's postconviction petition several times and filed two Rule 651(c) certificates. The record also shows that defendant continued to file documents on his own behalf despite being represented by counsel and after Rule 651(c) certificates were

filed. Defendant sought attorney Cohn's removal in 2012, which was granted, and defendant proceeded to represent himself.

¶ 73 Upon attorney Cohn's discharge, defendant filed an amendment to his *pro se* postconviction petition in which he adopted only his previously filed *pro se* postconviction petition, and he subsequently represented himself through second and third-stage postconviction proceedings. The record is clear that defendant voluntarily waived his right to postconviction counsel when he requested that attorney Cohn be discharged from his case.

¶ 74 The purpose of Rule 651(c) is to ensure that postconviction counsel: (1) ascertains the bases of the postconviction petition petitioner's complaints, (2) shapes those complaints into the proper legal form, and (3) presents those complaints to the court. *People v. Rossi*, 387 Ill. App. 3d 1054, 1058 (2009). Our review of an attorney's compliance with Rule 651(c) is *de novo*. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19. However, upon withdrawal at defendant's request, counsel's performance is not at issue. *Heard*, 2014 IL App (4th) 120833, ¶ 14.

¶ 75 We find that attorney Cohn had no remaining obligations under Rule 651(c) once he had withdrawn. Additionally, we note that defendant, in amending his petition after attorney Cohn's withdrawal, expressly adopted only his *pro se* petition and not any of attorney Cohn's amended petitions and thus did not rely on any of attorney Cohn's work during his tenure as defendant's postconviction counsel. Based on the record, defendant's intention was always to only have his *pro se* claims advanced, and he discharged any attorney who was unwilling to go along with that plan. As this court has held previously, a defendant who discharged his postconviction counsel and elected to proceed *pro se* cannot complain about counsel's representation. See *People v. Richardson*, 2018 IL App (2d) 150737, ¶ 19; *People v. French*, 210 Ill. App. 3d 681, 690 (1991). We conclude that defendant's argument is without merit.

¶ 76

CONCLUSION

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

¶ 78 Affirmed.