2021 IL App (1st) 191139-U

SIXTH DIVISION
September 30, 2021

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 22501
	)	
KASEY GUYTON,	)	
	)	Honorable
Petitioner-Appellant.	)	Steven Watkins,
	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justice Johnson concurred in the judgment.
Justice Mikva specially concurred.

ORDER

¶ 1 *Held*: The circuit court did not err in denying petitioner postconviction relief following a third stage evidentiary hearing where appellate counsel was not ineffective.

¶ 2 Petitioner, Kasey Guyton, appeals from the denial of his postconviction petition following an evidentiary hearing. On appeal, he argues that the circuit court erred when it dismissed his petition because he established that appellate counsel was constitutionally ineffective (1) for failing to challenge the admission of the entire video-recorded statement and (2) for failing to challenge that statement under *Missouri v. Seibert*, 542 U.S. 600 (2004), where the police engaged in an improper question-first, ask-later tactic. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Before trial, petitioner filed a motion to bar his video-recorded statements pursuant to 725 ILCS 5/103-2.1 (West 2006), generally alleging that portions of this statement were inaudible and therefore inadmissible under the statute. After hearing argument, the trial court found that the statute was "inadvertently" violated and granted the motion in part as to the portions of the statement which were inaudible but denied it as to audible portions.

¶ 5 Petitioner was charged by way of indictment with first degree murder, attempted first degree murder, aggravated discharge of a firearm, and unlawful use of a weapon by a felon. At trial, Edner Flores testified that at 7:30 p.m. on August 22, 2006, he was a passenger in a van being driven by Adam Saldivar, which collided with petitioner's Grand Marquis at the intersection of Leclaire and Augusta in Chicago. Both Saldivar and the driver of the Grand Marquis, whom Flores identified as petitioner, exited their cars. Flores remained in the passenger seat. Although Flores could hear their voices, he could not hear what Saldivar and

petitioner were saying. He could hear that they were yelling. After a few minutes, Saldivar got back into the van and they drove south on Leclaire, while petitioner returned to his car and drove east on Augusta.

¶ 6 Saldivar followed several one-way streets to get back around to Augusta. There, he stopped briefly to assess the damage to the van. Saldivar then drove to the intersection of Augusta and Lawler, one block east of the initial accident. Saldivar stopped at the stop sign and then proceeded through the intersection. Flores then heard six or seven shots but could not tell where they were coming from. He felt a burning sensation in his upper back and looked at Saldivar. Saldivar appeared to be in "shock" and lost control of the van, hitting an oncoming car and crashing into a brick building.

¶ 7 Flores jumped out of the van and ran toward a young woman on a nearby front porch. He asked her to call the police. Flores went home, changed his shirt, went to Saldivar's house to tell Saldivar's family what had happened and returned to the scene with Saldivar's family. Flores spoke to the police and then went to the police station where he saw a little burn mark in the middle of his back. Flores identified petitioner in a photo array and a lineup as the man from the accident.

¶ 8 David Johnson testified that he lived near the intersection of Augusta and Leclaire and was outside at 7:30 p.m. on August 22, 2006. He witnessed a collision between a maroon van and blue car. He walked toward the scene and heard the drivers of the two vehicles arguing over who was at fault. Johnson saw a passenger in the van, but the passenger never got out. After

they were done arguing, the men got into their cars and drove away. Johnson then saw the van as it returned to the area. As the van made a left turn from Lawler onto Augusta, Johnson saw petitioner, who was standing by a tree on the southwestern corner of the intersection holding a semiautomatic pistol, step out and shoot at the van. He heard four or five shots. The van then struck another car and crashed into a building. The driver of the van was slumped over the steering wheel and the passenger fled west on Augusta. Johnson saw petitioner get into a car and drive east. Johnson had seen petitioner in the neighborhood several times and knew that he lived on the corner of Leclaire and Augusta. Johnson did not see anyone in the van shoot at petitioner.

¶ 9 Johnson did not talk to the police until three days later, when he flagged down an officer he knew. He identified petitioner as the shooter in a photo array and in a lineup. Johnson admitted that he had three prior convictions for drug offenses and admitted that he was a heroin addict. He also testified that although he worked as a confidential informant for the police in other cases, he was not paid in this case.

¶ 10 Eric Smith testified that he knew petitioner from the neighborhood and knew that he drove a sky-blue Grand Marquis. On August 22, 2006, he saw petitioner twice at the intersection of Augusta and Lawler. The first time he saw petitioner, petitioner pulled up, parked his car, got out and knocked on the window of a building, got back in his car and drove off. About an hour later, Smith saw petitioner, who had a young woman in his car, park in the same location. Smith left and returned a few minutes later. When he came back, he heard a commotion on the corner. When he approached, he saw that petitioner's car had been hit. He heard petitioner say, "this

motherfucker is going to pay." Petitioner went into his car and returned with a gun in his hand. Smith saw petitioner walk southbound on Lawler. Petitioner stopped, and "tucked" himself behind a big tree on the corner. Smith saw a maroon van approach the stop sign on the corner and as the van was about to turn westbound on Leclaire, Smith heard a gunshot from behind the tree and saw petitioner with a gun in his hands. Smith saw petitioner bang on the gun and fire several more shots. The shots were fired at the passenger side back window of the van. Smith did not see anyone in the van point anything out of the window. The van struck another car and crashed into a building. The passenger of the van jumped out and ran. He had nothing in his hands.

¶ 11 Petitioner jumped into the passenger side of his car and took off. Smith talked to police on August 30, 2006, after he was stopped by the police when he ran from them. Smith had a prior felony conviction for delivery of a controlled substance.

¶ 12 Eardia Basset was driving eastbound on Augusta at approximately 7:45 p.m. on August 22, 2006. She was on her way to her son's house and her granddaughter sat in the backseat of her car. As she was about to turn onto Lawler, she heard a "pow" and then heard it again. She told her granddaughter to get low in the seat. She then saw a van come around the corner, heard another shot and saw the van crash into her car on the driver's side.

¶ 13 She looked to where she heard the shots coming from and saw petitioner standing on the southeast corner of Lawler and Augusta with a gun in his hand, firing at a maroon-colored van. Neither the driver nor the passenger in the van had a gun, and they were not yelling. The

passenger got out of the van and ran west, then north. Eardia identified petitioner as the shooter in a photo array and in open court.

¶ 14 Forensic investigator Donald Fanelli arrived at the scene at about 8:30 p.m. and took video and photographs of the area. Investigator Fanelli observed a white painted tree on Lawler and saw four fired cartridge cases and a live unfired bullet on the ground by the tree. All five cartridges were Winchester .9-millimeter Luger. He also observed a bullet hole in the house on the corner of Lawler and Augusta, as well as a hole in the fence.

¶ 15 Investigator Fanelli also observed that the window on the passenger side of the maroon van was broken, and that Saldivar was still inside the van, lying between the seats. A baseball bat was found under the front passenger seat of the van. A bullet was recovered from the back of the front passenger seat.

¶ 16 Detective Anthony Noradin arrived at the scene and saw Saldivar lying in the front seat of the van. On August 25, 2006, Detective Noradin showed Eardia Bassett and Edner Flores a photo array and both witnesses identified petitioner. Bassett, Flores, Smith and Johnson all identified petitioner from lineups.

¶ 17 Assistant Cook County Medical Examiner Michel Humilier conducted an autopsy on Saldivar on August 23, 2006, and observed an irregular gunshot wound entrance to the back of petitioner's head. Dr. Humilier opined that the cause of death was a gunshot wound and the manner of death was homicide.

¶ 18 Petitioner's girlfriend Stephanie Sims testified that petitioner arrived at her apartment in

Calumet City between 9 p.m. and 10 p.m. on August 22, 2006. He drove his Mercury Marquis. After petitioner spent the night, Sims drove petitioner to work in the morning because his car had a flat tire. Petitioner's car remained in the parking lot.

¶ 19 On September 1, 2006, she found a gun under some mattresses in the second bedroom of her apartment. Sims put the gun in a plastic bag and called police. When officers arrived, Sims gave written consent for officers to search her apartment. The officers recovered the loaded Beretta 9-millimeter black handgun that Sims had found. The weapon and nine bullets were inventoried the following day by Chicago police. Chicago police detective DeSalvo also observed a blue Mercury Marquis in the parking lot of Sims' apartment building and had the vehicle towed.

¶ 20 Marc Pomerance, a firearm and tool expert, examined the firearm recovered, and after test firing the weapon, concluded that all four fired cartridge cases recovered at the scene were fired from the weapon recovered from Stephanie Sims' apartment.

¶ 21 The State rested. Petitioner's motion for a directed verdict was denied.

¶ 22 Petitioner testified that on August 23, 2006, he lived with his mother at 5105 West Augusta and owned a blue Grand Marquis. He had taken his son Maliek to get something to eat and as they approached the intersection of Augusta and Leclaire going east, a van turned right in front of him, and they collided. The passenger, who was hanging out of the van's window and the driver of the van, told him to "pull the fuck over."

¶ 23 Petitioner and the driver of the van got out of their vehicles. Petitioner testified that the

van's driver said, "[w]here the fuck you come from? I didn't see you." The van's driver told petitioner that the collision was petitioner's fault and the two men argued. The van's driver was standing in a fighting stance. Petitioner told the driver that he had insurance and the driver should call the police. While they were arguing, Flores got out of the van and started yelling at petitioner. Flores told petitioner that he caused the accident and pulled a black gun out from his shirt. Flores told petitioner that either petitioner would pay, or Flores would take his car. Flores repeated that statement a second time.

¶ 24 Saldivar and Flores got back into the van but told petitioner, "[t]his shit ain't over with, on nation" and that they were coming back. Saldivar drove off. Petitioner took his son to his mother's house and parked his car on Augusta and Lawler. He took his gun from his car and began to walk home. As he was walking, he saw Saldivar's van approaching and feared the van would hit him, so he walked south on Lawler. When he was near a tree, he saw Flores reach down with his right arm. As Flores put his arm back up, petitioner fired his gun at the van. Petitioner testified that he thought Flores was going to shoot him. After he shot into the van, he ran to his car and drove to his girlfriend's house in Calumet City. He spent the night and left his gun there.

¶ 25 On cross-examination, petitioner admitted that he had told police that he had not been in an accident.

¶ 26 Pursuant to *People v. Lynch*, 104 Ill. 2d 194 (1984), Flores was recalled in petitioner's case in chief. Flores testified that he was convicted of battery in 2009. In May 2005, Flores was

outside of a gas station putting his son in a car seat when a car pulled in quickly and almost hit him. A man got out of the car and came directly at Flores. Flores punched him in the face, knocking the man to the ground. Flores testified that he did not know the man was blind. He was subsequently arrested by the case was ultimately dismissed.

¶ 27 Aaron Pawlow, the blind man that Flores punched, testified that his was considered legally blind but did have partial vision in one eye. He testified that on May 14, 2005, he was with his 82-year-old mother, who was trying to pull into a parking spot in a gas station when she said that someone was standing too close to the spot. His mother spoke to the person through her open car window and asked him to move over so she could pull in. That person was later identified as Edner Flores. Flores responded that she had plenty of room. His mother felt uncomfortable, so she asked Flores to move again. The third time she asked, Flores started screaming at her. Pawlow got out of the car, tried to unfold his cane, and walked up to Flores. Pawlow told Flores that he was blind and then felt something hit him on the head. Pawlow fell to the ground and Flores sat on his chest and punched him in the eye. Pawlow was treated at the hospital for a hemorrhage in his eye.

¶ 28 Isaias Casteneda also testified also pursuant to *Lynch*. On June 9, 1997, he was in a car of several people when a car pulled up next to them and a guy named "Low Rider" got out and started shooting at them. Castaneda could not remember "Low Rider's" name and when defense counsel showed Casteneda a picture, the court sustained the State's objection. Petitioner was unable to establish that Saldivar was "Low Rider."

¶ 29 Petitioner then introduced a certified copy of Adam Saldivar's conviction for aggravated discharge of a firearm in October 1997 and a certified copy of Edner Flores' conviction for battery causing bodily harm in May 2009.

¶ 30 In rebuttal, the State played a portion of the videotape of petitioner's interrogation following his arrest. In that portion of the videotape, petitioner denied being involved in a car accident on August 22, 2006. and stated that his car was in the shop on that date. The State presented a certified copy of a vehicle record showing a 1990 Mercury registered to petitioner.

¶ 31 Following deliberations, the jury returned a verdict of guilty of second degree murder, attempted first degree murder, and aggravated discharge of a firearm. The jury found that petitioner had personally discharged a firearm during the attempted murder. Petitioner was also found guilty of unlawful use of a weapon by a felon. Petitioner was sentenced to a total of 54 years' imprisonment. He appealed.

¶ 32 On direct appeal, we vacated petitioner's conviction for aggravated discharge of a firearm under the one-act, one-crime doctrine where the evidence established that he fired a series of shots into the van, but the State did not apportion those shots in the indictment. *People v. Guyton*, 2014 IL App (1st) 110450, ¶¶ 32-33. We rejected petitioner's other arguments that: (1) his convictions for second-degree murder and attempt first-degree murder were inconsistent; (2) the trial court improperly limited his presentation of *Lynch* material; (3) his sentence for attempt first-degree murder shocked the conscience and violated equal protection and due process; (4) his sentence for attempt first-degree murder violated due process where it included a 20-year

firearm enhancement which was not reasonably related to the aim of deterring firearm use; (5) his sentences for second-degree and attempt first-degree murder were excessive; and (6) trial counsel was ineffective for failing to request that petitioner's sentence for attempt first-degree murder be reduced based on provocation. *Id*. at ¶¶ 34-88.

¶ 33 On June 29, 2016, petitioner filed a *pro se* postconviction petition alleging that: (1) appellate counsel was constitutionally ineffective for failing to challenge the trial court's ruling on petitioner's motion to suppress statements where the recorded statement contained inaudible portions in violation of 725 ILCS 5/103-2.1 (West 2016); (2) appellate counsel was constitutionally ineffective for failing to raise an issue regarding "late *Miranda* warnings" pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004); and (3) the prosecutor committed error in closing arguments. The State filed a motion to dismiss on December 20, 2017. In an April 23, 2018, written order, the circuit court found that the closing argument claims were meritless but ordered an evidentiary hearing on the ineffectiveness claims.

¶ 34 At the evidentiary hearing, petitioner testified on his own behalf that he had been incarcerated for about 12- and one-half years. He alleged that appellate counsel was constitutionally ineffective for failing to challenge the police tactic of questioning him before reading his *Miranda* warnings and for failing to challenge the recorded statement under the statute. Petitioner testified that he told the truth at trial regarding his interrogation. Petitioner testified that he was at work when he was arrested by the police. The detective who arrested him did not read him his *Miranda* warnings but asked him questions about his car and whether he

was involved in an accident. Based on the questions they asked him, the police took petitioner to Molina's shop, where his car was located. Once they got there, a detective went inside for about five or ten minutes and then came back, and they proceeded to the police station. At the police station, the detectives provided him with *Miranda* warnings, questioned him, and the conversation was video recorded. Petitioner admitted a copy of the video-recorded statement and published it to the court, specifying timestamps at 14:02:14, 13:58:24 to 14:00:06, and from 14:02:14 to 14:02:30.

¶ 35 Petitioner testified that he spoke with his trial counsel, Ruth McBeth, who filed a motion to suppress statements based on a problem with the video recording. Petitioner did not testify in support of the motion, and he did not testify prior to trial about the conversation he had with the police before arriving at the police station. Petitioner stated that it was his understanding that the judge allowed the statements to be introduced for impeachment purposes. He testified that, at trial, when the prosecutor asked him about his statement to the police that he was not involved in a car accident on the night of the shooting, his answer to the police was not a lie because the police had told him that they had questions about his gray car, not his blue car.

¶ 36 Jonathan Krieger was appointed to represent petitioner on direct appeal. His first contact with Krieger was through a letter in 2011. He subsequently spoke Krieger over the phone about three times, but they never met in person. Krieger never discussed challenging the late *Miranda* warnings, and petitioner thought he mentioned being picked up by the detectives to Krieger, and he did not authorize Krieger not to raise that argument. Petitioner mentioned the motion to

suppress the video and Krieger asked about the missing parts of the video, but they did not discuss any legal issues, and petitioner did not agree that Krieger should not raise that issue. Krieger did not send him a draft of the opening brief before he filed it. When petitioner did see the opening brief, he never complained to Krieger that there was an issue missing. Petitioner rested.

¶ 37 The State called Jonathan Krieger who testified that he was a lawyer licensed to practice in the State of Illinois and was employed by the State Appellate Defender's Office. He had worked for that office since 2005. When he is assigned to an appeal, he reads the record once broadly, then a second time taking detailed notes about possible issues. He then drafts an issues conference form to give to his supervisor listing all possible issues and his thoughts on whether they should go ahead with it or not. He followed that procedure in this case and determined that a brief should be filed.

¶ 38 Krieger testified that the central issue for the case on appeal was petitioner's sentence. Petitioner's attempt first degree murder sentence was twice as long as the sentence he received on second degree murder. He argued that since the law does not provide for a conviction of attempt second-degree murder, his attempt first-degree murder case should be vacated in light of the finding on second-degree murder. He also discussed this issue with petitioner and his supervisor and formulated an argument. He also successfully challenged petitioner's conviction for aggravated discharge of a firearm on one-act, one-crime grounds, although he characterized this as "paper relief" since petitioner received a concurrent sentence on that conviction. Krieger

also argued that trial counsel was improperly limited in introducing the *Lynch* testimony regarding Flores.

¶ 39 Krieger testified that the charges in this case came after Illinois passed a statute requiring that statements be video recorded in homicide cases. Krieger looked at the record to see if there was an issue regarding the trial court's compliance with the rules. The trial court in this case had ruled that only those portions of the video which were audible would be admissible for impeachment purposes, although the exhibit he received had both audio and video recording. He did not consider the rationale for the court's ruling but looked to see whether it had been violated. Krieger noted that petitioner injected the fact that he made the statement during his own direct examination and that the video-recorded statements were admitted in rebuttal. Based on defense counsel's questioning of petitioner in their case-in-chief, he found no violation of the trial court's order, where the statement was only offered for impeachment purposes. He did not spend a lot of time working on this issue because he "didn't think that they were terribly inculpatory." He later testified that he "didn't consider it important at all."

¶ 40 Krieger reviewed the pretrial record, which contained motions to admit *Lynch* evidence and to bar the video-recorded statements, but he found no pretrial motion to suppress statements based on a *Miranda* violation. He read petitioner's testimony where petitioner said the police questioned him on the ride from his job to the police station, but "[t]here was no indication either way" as to whether petitioner had received *Miranda* warnings before that questioning. Since there was no basis to raise a "late *Miranda*" issue, "there would certainly be no plain error."

¶ 41 Krieger explained that his representation is limited to the record from below and he is not allowed to allege facts not in the record. He also listened to the *Miranda* warnings on the video recording and concluded that a reviewing court would find that those warnings were adequate. Krieger testified that he had read *Seibert* and *People v. Lopez*, 229 Ill. 2d 322 (2008) (which adopted *Seibert* in Illinois) and was aware that petitioner testified at trial that he was questioned while on the way to Molina's. He further testified that he raises forfeited issues under the plain error doctrine in about one out of every three or four briefs he files. He further testified that he is aware of the *Strickland* standard and the obligations it imposes on appellate counsel. Krieger did not send petitioner a draft copy of the opening brief before he filed it because a client does not direct the specifics of the appellate brief.

¶ 42 After arguments, the case was continued for petitioner to file a post-hearing brief, which he filed on February 4, 2019. On April 17, 2019, the postconviction court entered an order denying the petition. Initially, the court found the following portions of the video-recorded statement relevant:

"Q. Okay. Were you involved in a car accident on the 22nd of August?

A. 22nd of August I got off work –

Q. We're talking the 22nd of August between 7:30 and 8:00 o'clock.

A. 7:30,8:00 o'clock?

Q. Yeah, at night. Okay, put it this way. Were you – did you have a car accident in the last month?

A. No.

Q. Did you have a car accident on the 22nd of August?

A. (inaudible)

Q. The 22nd of August, specifically that day with the – let me get it for you – okay, last Tuesday night, you driving your Grand Marquis?

A. No, cause I had Marquis in the shop.

Q. Okay, how long has it been in the shop?

A. For about a month.

[questions and answers about the shop]

Q. Do you have any other vehicles?

A. That Grand Marquis, that's, that's pretty much it.

Q. That's the only vehicle you had? Now, you were driving that car on Tuesday, we know that.

A. What car, the gray one?

Q. Yeah.

A. Tuesday.

Q. What car were you driving Tuesday night?

A. I wasn't driving no car Tuesday night.

[Guyton asks where the detective is "going with this" and explains he is worried about losing his job]

> Q. But at this time, I'm telling you this. You – it is alleged that you were involved in a car accident on Tuesday night, 22nd of August, okay. There's people out there, people who know you, people who live on the block, they know you by name. * * * You're involved in a traffic accident. That's what we're talking about now, okay. Were you involved in a traffic accident, that simple?
>
> A: No." (brackets and asterisks in original)

¶ 43 The court noted that the statement was video and audio recorded, but that the audio quality was "poor" and that much of the video had no sound. The court also noted that petitioner testified that he owned two cars and said that he thought the police were asking him questions about the gray car, which was in the shop, not the blue car, but that petitioner also stated that he was not driving a car on the night of the shooting.

¶ 44 The court concluded that petitioner's appeal would not likely have been successful where the Illinois Appellate Court held in *People v. Stolberg*, 2014 IL App (2d) 130963, that a recorded interview may be admissible even if partially inaudible, and even an improperly admitted video-recorded statement is subject to harmless-error review. The court further found that petitioner's statement was not critical evidence where "[s]everal factors" in the record diminished petitioner's claim of self-defense, including physical evidence that petitioner shot both victims in the back, that petitioner fled to his girlfriend's house immediately after the shooting despite living nearby and that he hid the firearm at her house. The court found that petitioner had "ample time between the accident and the shooting" to call the police but did not. Instead,

petitioner dropped off his son but returned to the area. Furthermore, the court noted that petitioner "admitted on cross- examination that he initially told police he wasn't driving a car the night of the incident – the very import of the statement introduced in rebuttal."

¶ 45 With respect to petitioner's *Seibert* argument, the court was "not convinced" of petitioner's account of being questioned and stopping at the auto shop before arriving at Area 5 actually occurred. Petitioner had claimed that the transcript of his statement showed that the detectives were the first to mention Molina's. However, the court noted that petitioner stated that his car had been in the shop for about one month and there were inaudible words associated with that answer. Finally, the court noted that petitioner had ample time to discuss this issue with trial counsel, who did not include that claim in a pretrial motion, and that "appellate counsel could not have raised an issue dependent on facts outside the record."

¶ 46 The court denied petitioner's postconviction petition finding that neither of the issues identified in the postconviction petition would have been meritorious on direct appeal and therefore petitioner suffered no prejudice as a result of appellate counsel's failure to raise these issues. Petitioner now appeals.

¶ 47 ANALYSIS

¶ 48 Petitioner argues that he should have been granted postconviction relief because appellate counsel was constitutionally ineffective (1) for failing to challenge the admission of the entire video-recorded statement and (2) for failing to challenge that statement under *Missouri v. Seibert*, 542 U.S. 600 (2004), where the police engaged in an improper question-first, ask-later

tactic.

¶ 49 The Act provides a three-stage process for adjudicating petitions alleging that a conviction resulted from a constitutional violation. 725 ILCS 5/122-1 et seq. (West 2016); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). In the instant case, the petition advanced to a third-stage evidentiary hearing. See 725 ILCS 5/122-6 (West 2016). A circuit court's decision following an evidentiary hearing, where fact-finding and credibility determinations are involved, will not be reversed unless it is manifestly erroneous (*People v. English*, 2013 IL 112890, ¶ 23), that is, unless the opposite conclusion is clearly evident (*People v. Coleman*, 2013 IL 113307, ¶ 98). However, whether a circuit court applied a proper legal standard is a question of law, which is subject to *de novo* review. *People v. Mandarino*, 2013 IL App (1st) 111772, ¶ 47.

¶ 50 Postconviction relief must be based on evidence that is found to be reliable after a third-stage hearing. *People v. Sanders*, 2016 IL 118123, ¶ 42. Evidence that is not credible would not place the trial evidence in a different light and undermine the court's confidence in the judgment of guilt. *People v. Robinson*, ¶ 56 ("the conclusive-character element requires only that the petitioner present evidence that places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt").

¶ 51 Claims of ineffective assistance of appellate counsel are governed by the same test used in assessing claims of ineffective assistance of trial counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011). A petitioner challenging appellate counsel's effectiveness must show both that appellate counsel's performance was

deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful. *Id.* Appellate counsel need not appeal every conceivable issue and may refrain from developing non-meritorious issues without violating *Strickland*. *People v. Guerrero*, 2018 IL App (2d) 160920, ¶ 43. Therefore, unless the underlying issue is meritorious, a petitioner suffers no prejudice if counsel does not raise it on appeal. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). In other words, in order to assess the merit of petitioner's argument, we must determine whether a challenge to the admissibility of the evidence would have been successful had it been raised on direct appeal.

¶ 52 Petitioner argues that appellate counsel was ineffective for failing to challenge the trial court's ruling admitting only the audible portions of petitioner's video-recorded statement. Petitioner argues that the statement violated the Illinois Video-Recording Act, 725 ILCS 5/103-2.1(b) (West 2006), which requires recordings to be substantially accurate. Petitioner claims that approximately two minutes of his seven-minute conversation were inaudible, so the statement is "untrustworthy as a whole." Prior to trial, the trial court found that the although the audio recording did not capture the entire conversation, the violation was inadvertent "because we're seeing the tape and we're seeing the talking but we're not having any audio" so the court ruled that "since the police would not be able to mention any statement that is not videotaped or audiotaped it's granted in part and it's denied on the part where there is audio here in this limited amount taken by the State's Attorney will be granted."

¶ 53 Section 103-2.1 of the Code of Criminal Procedure of 1963 provides that an oral

statement made during a custodial interrogation during a murder investigation is inadmissible unless an electronic recording of that interrogation is made, and the recording is both substantially accurate and not intentionally altered. 725 ILCS 5/103-2.1(b)(1), (b)(2) (West 2012). If a court finds, by a preponderance of the evidence, that the petitioner was subjected to a custodial interrogation in violation of section 103-2.1(b), then any statements made by the petitioner during or following that non-recorded custodial interrogation, even if otherwise in compliance with the statue, are presumed to be inadmissible in any criminal proceeding against the petitioner except for the purposes of impeachment. 725 ILCS 5/103-2.1(d) (West 2012). The presumption of inadmissibility of a statement made by a suspect at a custodial interrogation at a police station or other place of detention may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances. 725 ILCS 5/103-2.1(f) (West 2012).

¶ 54 In *People v. Harper*, 2013 IL App (4th) 130146, the trial court suppressed the petitioner's statements because 30 minutes of a 100-minute interrogation were inaudible due to an unintentional equipment malfunction. *Id*. ¶¶ 7, 15. We reversed noting that section 103-2.1(f) (725 ILCS 5/103-2.1(f) (West 2012)) provides that the State can overcome inadmissibility if it can show by a preponderance of the evidence that the statements were voluntary and reliable given the totality of the circumstances. *Harper*, 2013 IL App (4th) 130146, ¶ 19. The court concluded that the petitioner's statements were voluntary and reliable because the petitioner did not contend that he was mentally ill, lacked average intelligence, or was under the influence of a

substance that could affect the reliability of the statements. *Id.* ¶ 30.

¶ 55 In this case, although the court found an inadvertent violation of section 103-2.1, the court went on to admit only the audible portions of the interview. The court's actions cured any possible error with respect to a section 103-2.1 violation. Furthermore, our supreme court has held that a partially inaudible recording is admissible "unless the inaudible portions are so substantial as to render the recording untrustworthy as a whole." *People v. Manning*, 182 Ill.2d 193, 212 (1998). The decision to admit a partially inaudible recording rests within the trial court's discretion and we will not reverse unless the trial court abused that discretion. *Id.* We cannot say that the trial court abused its discretion when in only allowed the audible portions to be admitted. Petitioner has not argued that the audible portions admitted were not trustworthy. Therefore, the court did not err in dismissing this claim following the third-stage evidentiary hearing where the court's decision was not manifestly erroneous.

¶ 56 Petitioner next argues that the circuit court erred when it denied his claim that appellate counsel was ineffective for failing to raise the argument that police used "question first, warn later" interrogation tactics on him. Petitioner claims that at the time of his trial in October 2010, *Missouri v. Seibert*, 542 U.S. 600 (2004), and *People v. Lopez*, 229 Ill. 2d 322 (2008), prohibited the question first, warn later, then question again tactic used by police in his case to undermine *Miranda*. Petitioner claims this was an "obvious" issue to raise on direct appeal and had appellate counsel raised the issue, this court would have reversed his conviction.

¶ 57 The State argues that petitioner's *Seibert* claim is not now properly brought as a stand-

alone ineffective assistance of appellate counsel claim. In his petition for postconviction relief, petitioner argued that based on the record, which showed that police may have used an opportunity to question him before he was afforded his *Miranda* warnings, his appellate counsel should have pursued this issue on appeal. Specifically, in his postconviction petition petitioner argued that appellate counsel:

> "should have pursued the facts on this record as a potential *ineffective assistance of trial counsel claim* and constitutional violation of Guyton's Fifth and Fourteenth Amendment Miranda rights. Had Guyton's direct [appeal] counsel pursued this possibility, there would be a reasonable probability that a *Miranda* violation would have warranted striking the entirety of Guyton's custodial interrogation as inadmissible. Such a result would have thereby substantially protected his credibility, and his chances of acquittal based on self-defense." (Emphasis added.)

¶ 58 The foregoing clearly shows the petition asserts that trial counsel was ineffective for failing to raise the *Seibert* issue and appellate counsel should have raised this on direct appeal. However, in this appeal petitioner is not arguing that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness. Rather, petitioner's argument is something entirely different: that appellate counsel should have raised the *Seibert* claim independently on direct appeal and the court erred in denying postconviction relief on this basis. This argument only relates to appellate counsel's purported ineffectiveness and omits any mention of trial counsel ineffectiveness. In short, petitioner's petition does not clearly set forth the claim of ineffective

assistance of appellate counsel now raised on appeal, resulting in forfeiture of this claim. Nor is any argument for plain error review of the *Seibert* claim made in the petition. A claim not raised in a postconviction petition itself cannot be raised on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004). Where, as here, petitioner fails to raise an issue in his petition for postconviction relief but, rather, raises an issue for the first time on appeal of the dismissal of the post-conviction petition, the issue is forfeited. 725 ILCS 5/122-3 (West 2000).

¶ 59 CONCLUSION

¶ 60 Based on the foregoing, the judgment of the circuit court is affirmed.

¶ 61 Affirmed.

¶ 62 MIKVA, J., specially concurring:

¶ 63 I disagree with the majority's finding, *supra* ¶ 57-58, that Mr. Guyton's post-conviction claim that his appellate counsel was ineffective for failing to raise his *Seibert/Lopez* claim on direct appeal has been forfeited. However, because I believe that, on the merits, that claim was properly rejected by the circuit court, I concur fully in the judgment.

¶ 64 Mr. Guyton claimed in his post-conviction petition that his appellate counsel provided ineffective assistance by not seeking to reverse his conviction based on the trial court's error in admitting his video-taped statement to the police following his arrest. On appeal from the denial of Mr. Guyton's postconviction petition, we have two separate claims of ineffective assistance of appellate counsel based on two possible avenues for challenging the admissibility of the statement that Mr. Guyton asserts should have been made on direct appeal: that his statement violated (1) his

rights under the Illinois Video Recording Act and (2) his fifth amendment rights, on the basis that the police used a technique which the United States Supreme Court and our supreme court have found to be an impermissible "question first and warn later" tactic in violation of *Miranda v. Arizona*, 86 S. Ct. 1602 (1966) (see *Missouri v. Seibert*, 542 U.S. 600 (2004), and *People v. Lopez*, 229 Ill. 2d 322 (2008)). I will refer to the latter as the *Seibert/Lopez* claim.

¶ 65 The majority addresses the Illinois Video Recording Act claim but finds that the *Seibert/Lopez* claim has been forfeited. The majority's reasoning is that Mr. Guyton claimed in his post-conviction petition that his appellate counsel should have raised the *Seibert/Lopez* issue before this court on direct appeal by arguing that trial counsel was ineffective but in his appellate arguments, Mr. Guyton argues instead that his appellate counsel could have raised the *Seibert/Lopez* claim as a matter of plain error. In my view, these were two methods of overcoming a procedural bar that would otherwise have prevented the court from considering the issue. In each instance, however, the essence of the claim is the same: appellate counsel should have raised the *Seibert/Lopez* claim on appeal.

¶ 66 As our supreme court has made clear, "[w]e require parties to preserve issues or claims for appeal; we do not require them to limit their arguments [on appeal] to the same arguments that were made below." *Brunton v. Kruger*, 2015 IL 117663, ¶ 76. And as this court is well aware, appellate counsel is often in a position where they must assert a claim that was not made in the trial court. There are two well-worn paths to bringing such claims before this court. One is ineffective assistance of trial counsel and the other is plain error.

¶ 67 The fact that Mr. Guyton has argued two different avenues that appellate counsel could have used to get this issue before the appellate court on direct appeal does not in my view mean that he is making different claims or raising different issues. The claim and the issue remain the same: appellate counsel was deficient because he failed to make a *Seibert/Lopez* claim on direct appeal. I do not think there has been any forfeiture of this claim or issue.

¶ 68 However, I concur with the majority that there is no ground for reversing the circuit court's denial of Mr. Guyton's petition. I agree with the State that the necessary facts to support a *Seibert/Lopez* claim were simply not in the trial record. As appellate counsel noted at the evidentiary hearing on Mr. Guyton's post-conviction petition, there was no indication in that record as to whether the police read Mr. Guyton his *Miranda* warnings when they initially arrested him. Moreover, it was not clear from the trial record whether Mr. Guyton was in custody for *Miranda* purposes when any particular question was asked or that the police employed a deliberate tactic to question Mr. Guyton first and warn him later as required to make out a *Seibert/Lopez* claim. In short, the trial record offered scant support for the *Seibert/Lopez* claim and certainly the necessary facts were not so apparent that it was ineffective assistance for Mr. Guyton's appellate counsel to have failed to raise the issue on direct appeal. Thus, I would reach the merits of this second claim and affirm the circuit court on this basis.