

2011 IL App (2d) 100137-U  
No. 2-10-0137  
Order filed September 16, 2011

**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  
SECOND DISTRICT

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|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE | ) | Appeal from the Circuit Court |
| OF ILLINOIS,            | ) | of Lake County.               |
|                         | ) |                               |
| Plaintiff-Appellee,     | ) |                               |
|                         | ) |                               |
| v.                      | ) | No. 01-CF-4108                |
|                         | ) |                               |
| AMBROCIO MORALES,       | ) | Honorable                     |
|                         | ) | Theodore S. Potkonjak,        |
| Defendant-Appellant.    | ) | Judge, Presiding.             |

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JUSTICE HUDSON delivered the judgment of the court.  
Presiding Justice Jorgensen and Justice Birkett concurred in the judgment.

**ORDER**

*Held:* Postconviction counsel provided defendant with a reasonable level of assistance: counsel's supplemental (rather than amended) petition incorporated defendant's *pro se* allegations supporting counsel's oral argument that the limitations period should not bar his claims; defendant pointed to no facts to indicate that counsel did not consult with him; counsel was not required by section 122-2 of the Act to obtain defendant's affidavit, as section 122-2 did not apply at the second stage and/or defendant's affidavit would not have satisfied section 122-2.

¶ 1 Defendant, Ambrocio Morales, appeals from an order of the circuit court of Lake County granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq.* (West 2008)) seeking relief from his conviction of first-degree murder (720

ILCS 5/9-1(a)(1) (West 2000)). On appeal, defendant argues that he did not receive a reasonable level of assistance from counsel appointed to represent him in connection with the proceedings on his petition. We affirm.

¶ 2 Defendant's conviction was predicated on a negotiated guilty plea entered on July 23, 2002. Pursuant to defendant's agreement with the State, he was sentenced to a 60-year prison term. As the factual basis for the plea, it was stipulated that, if the matter proceeded to trial, the State would present evidence that on December 8, 2001, police were dispatched to a home at 916 Hillwood Circle in Round Lake Beach and they placed defendant in custody as he emerged from the home with a bloody knife. Defendant's estranged wife, Maria Angelica Morales, was found inside the home. She had been stabbed and would later die from her wounds. Defendant's 14-year-old niece Jesenia Morales would testify that she observed defendant stab Maria. Defendant also stabbed Jesenia. It was further stipulated that the evidence would show that defendant told the police that he had stabbed his wife and her boyfriend. In recounting the circumstances leading to the stabbings, defendant related to the police, *inter alia*, that his wife had left him late in September, that he suspected infidelity on her part, and that he had observed her with a man named Javier. Defendant believed that Javier was his wife's boyfriend. Prior to the stabbings, defendant had traveled to 916 Hillwood Circle on at least four occasions in order to "finish" his wife and Javier. In addition to the charge of first degree murder, defendant had been charged with several other offenses stemming from the stabbings of Jesenia and Javier Perez and from the death of Maria's unborn child. Those charges were nol-prossed pursuant to defendant's plea agreement.

¶ 3 On September 17, 2002, without first moving to withdraw his guilty plea pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), defendant filed a notice of appeal. The trial court

appointed counsel to represent defendant on appeal. However, defendant later wrote to the trial court requesting that the court “stop my notice of appeal and cancel it.” On December 26, 2002, this court allowed a motion to dismiss the appeal. On March 25, 2009, defendant filed a *pro se* postconviction petition. Defendant alleged that he had not received the effective assistance of counsel in the trial court. He contended that his attorney should have moved to suppress his statement to police. Defendant alleged that, although he supposedly gave police a very detailed account of the murder, he was not capable of relating the events in detail because: “1) [he had] a learning disability; 2) [he had] Down Syndrome; 3) he can barely speak Spanish let alone English; 4) he suffers from mental instabilities and/or impairments; and 5) [he] did not have an attorney present during questioning by authorities, and therefore, he was coerced and/or influenced to make a confession, [*sic*] unknowingly.” Defendant noted that his attorney did not “inform the [trial] court that it was *impossible* for [defendant] to make such a statement due to his aforesaid conditions.” (Emphasis in original.) Defendant further alleged that he was born in Mexico and had lived there until he was 12 years old. According to the petition:

“As a child [defendant] had complications at home and at school. Those complications consisted of [defendant] being far slower than the norm of his compeers. His ability to learn, understand, [and] comprehend \*\*\* was extremely subaverage. [Defendant] had also been in several accidents, including but not limited to car accidents, thus worsening his conditions. Mexican educators had been evaluating [defendant] as a youth due to his conditions and his abnormal behavior; these school officials had even concluded that [defendant] had *also*, what was called characteristics, features, and symptoms of Down Syndrome, or that he was, to some extent, retarded.

After departing from Mexico \*\*\*, [defendant's] family moved to America. During his first four years of American schooling, educators stated that it was a lost cause to school [defendant] because several disorders and impairments. Thereafter, family and friends of his family managed to show [defendant] small tasks for employment purposes (such as cleaning or helping around in a factory)." (Emphasis in original.)

¶ 4 Defendant also alleged that, while incarcerated, he had been in trouble with prison officials because of his inability to understand their orders and that he had been involved in altercations with other prisoners as a result of his inability to "comprehend things well." Defendant contended that his attorney should have obtained records from Mexico documenting defendant's intellectual impairment and should have requested "that a medical expert evaluate [defendant] to determine what all disorders and mental impairments that he had and how those abnormal conditions may have, or did, affect [defendant] when the crime transpired."

¶ 5 Defendant also claimed that he was deprived of the effective assistance of counsel on direct appeal because appellate counsel did not file a brief. In connection with this claim, defendant alleged:

"[Defendant's] conditions would make it extremely difficult for a person with his disorders and impairments to be able to litigate. \*\*\* [Defendant] **MUST** have other inmates assist him; this includes reading to him, writing for him, and trying to explain things to him. [Defendant is strickly [*sic*] **dependent!** He cannot do for himself as normal persons."

¶ 6 Along with his petition, defendant submitted copies of Department of Corrections records indicating, *inter alia*, that he exhibited strange behavior, heard voices, had vague suicidal thoughts, and suffered from speech and language problems.

¶ 7 The trial court concluded that the petition stated the “gist” of a constitutional claim and appointed counsel to represent defendant. Thereafter, defendant, acting *pro se*, filed affidavits from two fellow inmates who averred that defendant has difficulty understanding both English and Spanish; that he has trouble understanding what he is and is not permitted to do in prison; that his mail must be read to him; and that prison personnel and other inmates have a “difficult time” with defendant because of his mental issues. Defendant also filed an affidavit of his own, verifying the *pro se* petition.

¶ 8 Postconviction counsel subsequently filed a supplemental petition. Defendant’s *pro se* petition and the supporting documents were attached to the supplemental petition and expressly incorporated into the supplemental petition by reference. The supplemental petition provided, in pertinent part:

“3. The Defendant alleges that his constitutional rights were violated in the following ways:

- a. His trial counsel rendered ineffective assistance of counsel.
- b. His appellate counsel rendered ineffective assistance of counsel.
- c. There was not a knowing o [*sic*] voluntary entry of his negotiated plea.

4. In addition to the facts already stated to support his claim in the Defendant’s Post Conviction Petition, the Defendant argues that his Trial Counsel failed to request a fitness evaluation and/or a mental health evaluation including but not limited to any Neurological Testing.”

Postconviction counsel also filed a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

¶ 9 The State moved to dismiss the petition on the grounds that the applicable limitations period was three years from the date of defendant's conviction and that his petition, filed roughly 6½ years after the date of his conviction, was untimely. At the hearing on the motion to dismiss, postconviction counsel argued as follows:

“Judge, two of the main arguments that the defendant makes in his originally-filed petition, one involves a motion to suppress statements which he indicates should have been filed which would have been in his opinion suppressed the confession that he had given which was a major factor in his pleading guilty on this case.

What he outlines in his petition is some pretty significant mental health issues that he continues to suffer and suffered certainly back then in 2001 and 2002 when this case was pending. I did speak with him via a conference call to the Department of Corrections with the assistance of a court interpreter.

He indicated to me that, first of all, and this is also outlined in his reports, some of the learning disabilities that he suffers from also include, and this is not a learning disability, also alleges he suffers from Down Syndrome.

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\*\*\* I know counsel's point that he made with respect to the time, and counsel's right, we are past the three-year time limit. However, there are some exceptions to that.

One is actually—the delay is not due to the culpable negligence of the defendant. I would argue first of all that he is arguing actual innocence in his motion [*sic*] although he doesn't say it in those words, but he indicates there is no way he could have given the

statement to the police that the police said he gave because at the time he spoke no English and had some very severe mental impairments.

Secondly, with respect to culpable negligence, it is for those same reasons he was not timely in filing his motion [*sic*]. His original motion [*sic*] \*\*\* essentially he is working with the assistance of, for lack of a better word, jail-house lawyers in the Department of Corrections who helped him draft this motion [*sic*]. He is not able to draft the motion [*sic*] like this on his own. I had a very difficult time speaking with him when I spoke with the assistance of an interpreter.”

¶ 10 The trial court continued the matter and subsequently granted the motion to dismiss.<sup>1</sup> This appeal followed.

¶ 11 Under the Act, a person imprisoned for a crime may mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Erickson*, 183 Ill. 2d 213, 222 (1998). Except in cases where the death penalty has been imposed, proceedings under the Act are divided into three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). During the first stage, the trial court independently examines the petition. If the petition is frivolous or patently without merit, it will be summarily dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2008). If the

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<sup>1</sup>Prior to announcing its ruling, the trial court invited the parties to present further argument. Postconviction counsel indicated that he would stand on his prior argument and offered a summary of the argument that focused on the theory that defendant’s petition advanced a claim of actual innocence and was therefore exempt from the three-year limitations period. See 725 ILCS 5/122-1(c) (West 2008). Counsel did not reiterate the argument that the delay was not due to culpable negligence.

petition survives first-stage review, it proceeds to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *Gaultney*, 174 Ill. 2d at 418. At the second stage, the petition may be dismissed “when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation.” *People v. Alberts*, 383 Ill. App. 3d 374, 376 (2008). A petition that is not dismissed at the first or second stage advances to the third stage, at which an evidentiary hearing is held. *Gaultney*, 174 Ill. 2d at 418.

¶ 12 The right to counsel in a postconviction proceeding is statutory, not constitutional. *People v. Davis*, 382 Ill. App. 3d 701, 709 (2008). Under the Act, “defendants are entitled to a reasonable level of assistance, but are not assured of receiving the same level of assistance constitutionally guaranteed to criminal defendants at trial.” *People v. Kegel*, 392 Ill. App. 3d 538, 541 (2009). The duty to provide reasonable assistance requires compliance with the specific obligations in Rule 651(c). See *Davis*, 382 Ill. App. 3d at 711. That rule provides, in pertinent part, that “[t]he record [on appeal] shall contain a showing, which may be made by the certificate of 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 the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). “[T]he purpose of Rule 651(c) is to ensure that counsel shapes the petitioner’s claims into proper legal form and presents those claims to the court.” *People v. Perkins*, 229 Ill. 2d 34, 44 (2007).

¶ 13 Section 122-1(c) of the Act provides, in pertinent part:

“When a defendant has a sentence other than death, no proceedings under [the Act] shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

This limitation does not apply to a petition advancing a claim of actual innocence.”

725 ILCS 5/122-1(c) (West 2008).

¶ 14 It is undisputed that defendant did not file his postconviction petition within the applicable period. Defendant argues on appeal that postconviction counsel did not properly amend the *pro se* petition to allege that the delay in filing the petition was not due to defendant’s culpable negligence. “An adequate or proper presentation of a petitioner’s substantive claims necessarily includes attempting to overcome procedural bars, *including timeliness*, that will result in dismissal of a petition if not rebutted.” (Emphasis added.) *Perkins*, 229 Ill. 2d at 44. Defendant contends that postconviction counsel’s performance fell short in this respect. According to defendant, allegations in the *pro se* petition concerning his intellectual functioning and his mental or emotional problems were sufficient “to inform counsel that it would be possible and necessary to amend the petition to demonstrate a lack of culpable negligence.” Defendant further contends that “[t]he petition contained attachments suggesting [defendant’s] lack of culpable negligence.” Specifically,

defendant points to documents from the Department of Corrections attesting to his “bouts with auditory and visual hallucinations, black-outs, suicidal ideation, memory loss, poor communication, and strange behavior during incarceration.” He points also to affidavits from fellow inmates attesting to his “deficits.” Defendant complains that “counsel made no visible effort to incorporate these allegations into an amended petition.”

¶ 15 The argument might have been persuasive if counsel had filed an amended petition that omitted such allegations. “[A]s a general rule, an amendment which is complete in itself and which makes no reference to the prior pleading supersedes it, and the original pleading ceases to be a part of the record, being in effect abandoned or withdrawn.” *People v. Cross*, 144 Ill. App. 3d 409, 412 (1986). However, counsel did not file an amended petition that was complete in itself; he merely filed a supplemental petition that specifically incorporated defendant’s *pro se* petition by reference. The supplemental petition did not supersede the *pro se* petition, and all of the allegations of the *pro se* petition (and the facts set forth in the supporting documents) were before the court to the same extent as if they had been restated in an amended petition. Although it is fair to say that the *pro se* petition lacked polish, its allegations regarding defendant’s intellectual capacity and his mental or emotional health are readily comprehensible.

¶ 16 In *Perkins*, our supreme court held that “Rule 651(c) requires counsel to amend an untimely *pro se* petition to allege any *available* facts necessary to establish that the delay was not due to the petitioner’s culpable negligence.” (Emphasis added.) *Perkins*, 229 Ill. 2d at 49.<sup>2</sup> Because the

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<sup>2</sup>Interestingly, although postconviction counsel in *Perkins* did not amend the defendant’s *pro se* petition, the court concluded that he discharged his duties under Rule 651(c) in his oral argument on the State’s motion to dismiss. *Id.* at 51.

supplemental petition did not have the effect of abandoning or withdrawing defendant's *pro se* petition, counsel's duty here was to allege any additional available facts necessary to establish the absence of culpable negligence. However, defendant points to no such facts.

¶ 17 It is true that defendant's *pro se* petition did not expressly state that his intellectual and mental or emotional problems established that the delay in filing the petition was not due to culpable negligence, but defendant cites no authority that a petition is required to recite the specific words of the statute. As the State points out, section 122-1(c) requires the petition to allege *facts* showing the absence of culpable negligence. Defendant protests that merely stating the salient facts without identifying their legal significance "throw[s] legal reasoning into the breach." However, postconviction counsel rectified any such problem during his argument on the State's motion to dismiss. Noting that there are "some exceptions" to the time limit for filing a postconviction petition, counsel argued:

"One is actually—the delay is not due to the culpable negligence of the defendant. I would argue first of all that he is arguing actual innocence in his motion [*sic*] although he doesn't say it in those words, but he indicates there is no way that he could have given the statement to the police that the police said he gave because at the time he spoke no English and had some very severe mental impairments.

Secondly, with respect to culpable negligence, it is for those same reasons he was not timely in filing his motion [*sic*]. His original motion [*sic*] which was filed on March 25 of this past year, 2009, essentially he is working with the assistance of, for lack of a better word, jail-house lawyers in the Department of Corrections who helped him draft this motion [*sic*].

He is not able to draft the motion [*sic*] like this one on his own. I had a very difficult time speaking with him when I spoke with him with the assistance of an interpreter.”

Despite defendant’s argument to the contrary, we believe that these remarks were sufficient to alert the trial court that the allegations concerning defendant’s intellectual capacity and mental or emotional problems were germane not only to his substantive constitutional claims but also to the question of culpable negligence.

¶ 18 Defendant asserts that counsel did not fulfill his duty to consult with defendant about his failure to timely file the petition. See *id.* (“counsel must inquire of the petitioner whether there is any excuse for the delay in filing”). However, defendant cites nothing in the record to substantiate that assertion.

¶ 19 Defendant also argues that postconviction counsel was obligated to submit an affidavit from defendant in support of the postconviction petition. In *People v. Johnson*, 154 Ill. 2d 227 (1993), our supreme court held that postconviction counsel failed to provide a reasonable level of assistance, noting, *inter alia*, that counsel had not obtained affidavits, records, or other evidence in support of the petition and that the trial court was therefore obligated to dismiss it. *Id.* at 244-45. In light of more recent decisions, however, it is not altogether clear whether the absence of affidavits is grounds for dismissal at the second stage, and even if it is, there is reason to doubt that the defendant’s own affidavit will be sufficient to avoid dismissal.

¶ 20 Defendant submitted an affidavit averring that the allegations of the *pro se* petition were true and correct to the best of his knowledge and belief. In *People v. Collins*, 202 Ill. 2d 59 (2002), our supreme court held that a similar sworn statement might have satisfied the Act’s requirement that a petition be “verified by affidavit” (725 ILCS 5/122-1(b) (West 2000)), but did not satisfy the

separate requirement set forth in section 122-2 (725 ILCS 5/122-2 (West 2000)) that the petition “shall have attached thereto affidavits, records, or other evidence supporting its allegations.” The *Collins* court reasoned as follows:

“[U]nder the plain language of the Act, the sworn verification described in section 122-1 serves a purpose wholly distinct from the ‘affidavits, records, or other evidence’ described in section 122-2. The former, like all pleading verifications, confirms that the allegations are brought truthfully and in good faith. [Citation.] The latter, by contrast, shows that the verified allegations are capable of objective or independent corroboration. To equate the two is not only to confuse the purposes of subjective verification and independent corroboration but also to render the ‘affidavits, records, or other evidence’ requirement of section 122-2 meaningless surplusage. We will not adopt such a reading [citation].” *Id.* at 67.

The *Collins* court further held that “the failure to either attach the necessary ‘affidavits, records, or other evidence’ or explain their absence is ‘fatal’ to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal. [citation].” *Id.* at 66.

¶ 21 In *People v. Hall*, 217 Ill. 2d 324 (2005), the defendant filed a postconviction petition alleging that the guilty plea underlying his aggravated kidnaping conviction was involuntary. The offense stemmed from the theft of a motor vehicle at a gas station. The vehicle’s owner had left the engine running and had left her 21-month-old daughter in a car seat in the back seat. In support of his petition, the defendant submitted an affidavit in which he averred that when he took the car he was unaware that there was a child inside. He further averred that his attorney had told him that it was no defense to the charge of kidnaping that he was unaware of the child’s presence. The petition advanced to the second stage, at which the State successfully moved for its dismissal. Citing *Collins*,

the State argued that the dismissal should be affirmed based on the defendant's "failure to attach sufficient supporting documentation" to the petition. *Id.* Rejecting the argument, the *Hall* court stated as follows:

"We find *Collins* is not applicable in this case. *Collins* involved summary dismissal of the defendant's petition at the first stage of the proceedings for failure to comply with section 122-2. In contrast, this case has proceeded beyond the first stage of the proceedings. Moreover, *Collins* is factually distinguishable. Unlike the defendant in *Collins*, defendant here supported his petition with the transcript of the guilty plea hearing, a copy of the charging instrument, and an affidavit setting forth in detail the alleged misrepresentations of his attorney.

We recognize this court has stated [in *Collins*] that the purpose of section 122-2 is to show a defendant's postconviction allegations are capable of objective or independent corroboration. [Citation.] Failure to attach independent corroborating documentation or explain its absence may, nonetheless, be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney. [Citations.]

Here, defendant's explanation for the absence of additional documentation can easily be inferred from the allegations of his petition and affidavit. In these filings, defendant described in detail his consultations with his attorney. Defendant referred only to himself and counsel in these descriptions and did not mention the presence of anyone else. These allegations indicate counsel's legal advice was rendered within the bounds of a private consultation between defendant and his attorney. This implication is strengthened because

attorney-client consultations generally occur in private to protect the confidentiality of privileged information. [Citation.] Thus, the circumstances of this case permit a reasonable inference that the only people present during this consultation were defendant and his attorney. Given these circumstances, the only affidavit defendant could have furnished to support his allegations, other than his own, was that of his attorney. As noted in [*People v. Williams*, [47 Ill. 2d 1 (1970),] the ‘difficulty or impossibility of obtaining such an affidavit is self-apparent.’ [Citation.] Accordingly, we conclude the documentation attached to defendant’s petition is sufficient to comply with the Act.” *Hall*, 217 Ill. 2d at 332-34.

¶ 22 In *People v. Barkes*, 399 Ill. App. 3d 980 (2010), this court cited *Hall* for the proposition that “*Collins* does not apply ‘beyond the first stage of the proceedings.’” *Barkes*, 399 Ill. App. 3d at 989 (quoting *Hall*, 217 Ill. 2d at 332). *Hall* and *Barkes* appear to hold that the absence of section 122-2 affidavits is not grounds for dismissal once a postconviction petition has advanced to the second stage. Interestingly, in both *Hall* and *Barkes*, the defendants executed affidavits substantiating their postconviction claims. We have previously described the defendant’s affidavit in *Hall*. In *Barkes*, the defendant claimed ineffective assistance of counsel because his attorney usurped his right to decide whether to testify and whether to waive a jury trial. In his affidavit, the defendant recounted conversations in which his attorney informed him that he had no choice in these matters. A necessary implication of both *Hall* and *Barkes* is that a defendant’s own affidavit does not satisfy the requirements of section 122-2; if such affidavits were sufficient under section 122-2, there would have been no reason to consider whether *Collins* applied at the second stage of a postconviction proceeding. In *People v. Teran*, 376 Ill. App. 3d 1 (2007), we characterized *Hall* as a case in which

“our supreme court considered whether the [defendant’s own] affidavit satisfied the requirements of section 122-2.” *Id.* at 3. According to *Teran*:

“[T]he *Hall* court did not determine that the defendant’s affidavit provided objective or independent corroboration of his claim; indeed, common sense dictates that a defendant’s own affidavit is not at all objective or independent. What the *Hall* court determined was that, in light of the allegations in the defendant’s affidavit (and the petition), his failure to attach such objective or independent corroboration was excused.” *Id.* at 3-4.

¶ 23 Thus, *Hall* would appear to stand for at least one (if not both) of the following propositions: (1) that the absence of section 122-2 affidavits is grounds for dismissal only at the first stage and/or (2) that a defendant’s own affidavit does not satisfy section 122-2. In either case, the failure to obtain an affidavit from defendant—an affidavit that would have been either unnecessary or ineffectual—did not represent a breach of counsel’s obligation to provide a reasonable level of assistance to defendant.

¶ 24 We therefore conclude that defendant received a reasonable level of assistance from counsel. Accordingly, the judgment of the circuit court of Lake County is affirmed.

¶ 25 Affirmed.