

2012 IL App (1st) 093401-UB

FIRST DIVISION  
Rule 23 Order filed March 12, 2012  
Modified upon denial of rehearing August 6, 2012

No. 1-09-3401

**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 JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 95 CR 12124
	)	
DWAYNE BRUCE,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

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

**ORDER**

- ¶ 1 *Held:* The trial court properly denied defendant leave to file a *pro se* successive postconviction petition because the petition failed to establish either a claim of actual innocence or meet the requirements of the cause-and-prejudice test.
- ¶ 2 Defendant Dwayne Bruce appeals from an order denying him leave to file a *pro se* successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant contends the trial court erred because newly discovered evidence established that he was actually innocent of first degree murder and armed robbery. In the

alternative, he contends that the petition met the requirements of the cause-and-prejudice test because his first postconviction proceeding was deficient, *i.e.*, postconviction counsel failed to locate Robert Seals and obtain his affidavit. We affirm.

¶ 3 In 1997, defendant was convicted of first degree murder and armed robbery. The evidence at defendant's jury trial established, through the testimony of Robin Cherry, that after she and her boyfriend Dwayne Taylor<sup>1</sup> attended a party, they met up with defendant and a group consisting of "Kenny," Courtney Donelson, "Troy," and Robert Seals. At some point, Taylor suggested that they stick someone up. Ultimately, Taylor pointed a gun at the window of the victim Tedrin West's vehicle. Defendant, Taylor, and Robert Seals then entered the vehicle.

¶ 4 After going to several locations, the vehicle was driven to a deserted street. Defendant and Taylor, who were both armed, exited the vehicle with the victim. Defendant ordered the victim to lie down on the ground and then shot him in back of the head. Taylor later showed the group jewelry taken from the victim including a "flip-flop" chain. Defendant also displayed a gold ring with a diamond-encrusted six-point star as a proceed of the robbery.

¶ 5 Cherry, in exchange for a reduction in the charges against her, told detectives about the events surrounding the victim's death and that defendant was the shooter. Officers then located and arrested defendant. At the time of the arrest, defendant had in his possession a "flip-flop" chain and a ring with a diamond-encrusted six-point star. Although defendant told the police that he owned these items and advanced this theory at trial, the victim's mother testified that the ring belonged to her son. Over defendant's hearsay objection, Detective James Boylan testified that the victim's "family members" identified the ring as belonging to the victim. During cross-examination, Boylan identified the victim's brother Kelly West as the family member who made the identification. The trial court later determined that the admission of Boylan's testimony

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<sup>1</sup>The record indicates that Taylor is also known as Larry McGee.

regarding the substance of his conversation with West was in fact hearsay and instructed the jury that it was not evidence. Ultimately, the jury convicted defendant of first degree murder and armed robbery, and he was sentenced to consecutive terms of 100 and 6 years' imprisonment.

¶ 6 Defendant then appealed contending, *inter alia*, that he was denied a fair trial because the trial court admitted hearsay testimony that members of the victim's family identified jewelry worn by defendant at the time of his arrest as belonging to the victim. Although this court found that the trial court erred when it admitted Boylan's testimony regarding the identification because West was not available for cross-examination, we determined that this error was harmless because the trial court had later recognized the error and took steps to correct it. *People v. Bruce*, 299 Ill. App. 3d 61, 66-67 (1998). Thus, this court affirmed defendant's convictions and sentences.

¶ 7 In 1999, defendant filed a *pro se* petition for postconviction relief alleging that Robin Cherry had lied at trial and that trial counsel was ineffective for a failure to, *inter alia*, file a motion to suppress certain jewelry seized from defendant. In an attached affidavit, defendant averred that Cherry had a vendetta against him and that he was the actual owner of the jewelry. Defendant then filed a supplemental *pro se* postconviction petition alleging, in pertinent part, that trial counsel's failure to present any "potential witnesses" on defendant's behalf constituted ineffective assistance of counsel. Defendant identified potential witnesses Deadra Banks, Kelly West, and assistant State's Attorney (ASA) Kelecus. Attached to the petition was the affidavit of Deadra Banks, who averred that she tried to give defense counsel photographs, taken before the robbery, of defendant wearing certain jewelry.

¶ 8 The record indicates that the petition was docketed and counsel was appointed. In 2001, postconviction counsel filed a partial supplemental postconviction petition raising a claim

pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Postconviction counsel also indicated that she continued to investigate other potential claims. The State then filed a motion to dismiss.

¶ 9 At some point, replacement postconviction counsel was appointed. In 2002, replacement postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating that she had consulted with defendant by telephone and letter, reviewed the trial record and sentencing proceedings, and planned to file a supplemental postconviction petition. However, at a subsequent hearing on the State's motion to dismiss, replacement postconviction counsel indicated that she would stand on defendant's *pro se* filings and the supplemental petition filed by the initial postconviction counsel. After hearing argument, the trial court granted the State's motion to dismiss. That judgment was affirmed on appeal. See *People v. Bruce*, No. 1-02-3361 (2004) (unpublished order under Supreme Court Rule 23).

¶ 10 In 2009, defendant filed the instant *pro se* motion for leave to file a successive postconviction petition alleging, among other claims, that he was actually innocent. The petition also alleged that he was denied reasonable assistance of postconviction counsel because replacement postconviction counsel did not adopt the "concerns" of postconviction counsel. Attached to the petition were the affidavits of defendant, his mother Essie Jackson, Robert Seals, and the victim's brother Kelly West, as well as correspondence to defendant from postconviction counsel and Robin Cherry.

¶ 11 In his affidavit, defendant averred that when Cherry visited him in prison she apologized for testifying falsely against him, but explained that she had to do so in order to avoid going to prison herself. Defendant further averred that Cherry told him she was instructed to identify certain jewelry as belonging to the victim and a certain weapon as the one used to shoot the victim. Defendant also averred that Cherry had indicated her willingness to prepare an affidavit, but that he subsequently lost touch with her. When defendant's private investigator later located

Cherry, she indicated she did not want to be involved and that defendant knew what had happened. Jackson averred that when she spoke with Cherry in 2004, Cherry apologized for causing defendant's family pain and stated she was going to send a notarized letter to the court "admitting to what she [had] done." Jackson further averred that Cherry never admitted that she had lied.

¶ 12 In his 2006 affidavit, Seals averred that he pleaded guilty to participating in the events surrounding the victim's death. He further averred that if he had been called to testify at defendant's trial, he would have testified that (1) defendant was not involved, (2) Cherry's testimony was a lie, and (3) the gold six-pointed star ring and gold link bracelet allegedly taken from the victim were not the items actually taken from the victim. Kelly West, the victim's brother, averred that the victim had a lot of jewelry and he was not able to "positively identify" the jewelry at the police station as belonging to the victim. He further averred that he told the police that "the jewelry looked like" the victim's jewelry, but he was "not sure."

¶ 13 Also attached to the petition were letters to defendant from postconviction counsel and Cherry. The first letter from postconviction counsel inquired how Seals's testimony would impact the proceeding, and the second thanked defendant for information regarding Cherry and Seals while also advising him that a claim of actual innocence could be asserted in a postconviction proceeding. Cherry's handwritten letters to defendant stated that she (1) wanted to help defendant, (2) "would love" to be a friend and confidant to defendant, (3) was having difficulty finding pictures to send defendant, (4) could use her extra money to retain an attorney for defendant, and (5) would work on preparing a letter for the courts.

¶ 14 The trial court denied defendant leave to file the successive *pro se* postconviction petition.<sup>2</sup> In rejecting defendant's claim of actual innocence, the court highlighted that defendant filed the instant proceeding three years after obtaining Seals's affidavit, defendant failed to provide the court with Cherry's affidavit, and West's uncertainty about his identification of the victim's jewelry did not, in and of itself, exonerate defendant.

¶ 15 The Act contemplates the filing of only one postconviction petition and a defendant must obtain leave of court before filing a successive postconviction petition. See 725 ILCS 5/122-1(f) (West 2008) (only "one petition may be filed \*\*\* without leave of the court"). Leave to file a successive postconviction petition may be granted when a defendant has established cause and prejudice, or when fundamental fairness so requires. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Pursuant to the cause-and-prejudice test, the defendant must show good cause for failing to raise the claimed error in a prior proceeding and that actual prejudice resulted from the error. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). However, our supreme court has held that the cause-and-prejudice requirement for a successive postconviction petition is excused when a defendant sets forth a claim of actual innocence in a successive postconviction petition. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). This court reviews the trial court's denial of leave to file a successive postconviction petition *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010).

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<sup>2</sup> In 2010, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). On appeal, this court determined that the 40-year extended-term portion of defendant's 100-year sentence for murder was not statutorily authorized and therefore void when none of the aggravating factors listed in section 5-5-3.2(b) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(b) (West 1994)) were present. *People v. Bruce*, 2012 IL App (1st) 1101109 (unpublished order under Supreme Court Rule 23).

¶ 16 Under the due process clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 2), a defendant can raise a "free-standing" claim of actual innocence based on newly discovered evidence in a postconviction proceeding. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). Our supreme court recently determined that when a defendant seeks to relax the "bar" against successive postconviction petitions based upon a claim of actual innocence, "leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided \* \* \* that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *People v Edwards*, 2012 IL 111711, ¶ 24. In other words, "leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.'" *Edwards*, 2012 IL 111711, ¶ 24, quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

¶ 17 Although our supreme court did not articulate a standard of review for actual innocence claims, the court determined that the relevant question was "whether the petitioner set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶¶ 30-31 (declining to determine whether to apply an abuse of discretion standard as opposed to one of *de novo* review). The court then reiterated that the elements of a successful claim of actual innocence required that the evidence supporting the claim must be newly discovered, material and not cumulative, and "of such conclusive character that it would probably change the result upon retrial." *Edwards*, 2012 IL 111711, ¶ 32, citing *Ortiz*, 235 Ill. 2d at 333. A claim of actual innocence must be supported with " 'new reliable evidence' " such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at the defendant's trial. *Edwards*, 2012 IL 111711, ¶ 32, quoting *Schlup*, 513 U.S. at 324. However, the court cautioned that " [b]ecause such evidence is obviously unavailable in the vast majority of cases, claims of

actual innocence are rarely successful.' " *Edwards*, 2012 IL 111711, ¶ 32, quoting *Schlup*, 513 U.S. at 324.

¶ 18 Here, defendant claims that he has established a claim of actual innocence because (1) Cherry recanted her trial testimony, (2) the jewelry presented at trial did not belong to the victim, and (3) Seals averred that defendant was not involved in the events surrounding the victim's death.

¶ 19 Although defendant acknowledges that Cherry's affidavit is not included in the record, he avers in his affidavit that Cherry told him that she had testified falsely and was willing to prepare an affidavit to that effect. Defendant also highlights Jackson's affidavit in which she avers that Cherry apologized for causing defendant's family pain and stated that she only did what the police told her to do.

¶ 20 Generally, hearsay affidavits are insufficient to meet the evidentiary threshold necessary to warrant a hearing on a freestanding claim of actual innocence. *People v. Morales*, 339 Ill. App. 3d 554, 564-65 (2003). In any event, Jackson acknowledges in her affidavit that Cherry never admitted that she lied; Jackson just made this assumption because defendant has always maintained his innocence. Although the record contains letters from Cherry to defendant indicating that she was willing to help defendant by preparing a letter for submission to the court, there is no indication in the record that she ever did so. In the absence of an affidavit or any other document indicating that Cherry wishes to recant her trial testimony, this court rejects defendant's self-serving allegation that had Cherry submitted such an affidavit, it would reveal that she lied at trial. See *People v. Guest*, 166 Ill. 2d 381, 402 (1995) (absent affidavits, the court could not determine whether witnesses could have provided information or testimony favorable to the defendant, and, consequently, would not consider the matter further).

¶ 21 Here, the facts contained in West's affidavit constitute newly discovered evidence. Although Boylan named West as the family member who identified jewelry recovered from defendant as belonging to the victim, this identification was later determined to be hearsay and West did not testify at trial. Thus, defendant had no way to know the facts of West's identification of the jewelry until defendant located West and obtained his affidavit. However, even accepting that the facts surrounding West's identification of the jewelry were "newly discovered," in order to support a claim of actual innocence, evidence must also be material, noncumulative, and of such a conclusive nature that it would probably change the result of a retrial. *Edwards*, 2012 IL 111711, ¶ 32. Evidence is considered cumulative when it does not add anything to what was previously before the jury. *Ortiz*, 235 Ill. 2d at 335.

¶ 22 At trial, the ownership of the jewelry was a point of contention. Testimony from the victim's brother that he thought the jewelry looked like the victim's jewelry, but was just "not sure" because his brother owned a lot of jewelry is not conclusive enough to ensure a different result on retrial as it merely casts doubt on the credibility of the victim's mother's identification of the ring and provides limited support for the defense theory that the jewelry did not belong to the victim. At best, West's affidavit establishes that defendant was not wearing the proceeds of the robbery when he was arrested over a year after the victim's death.

¶ 23 Turning to Seals's affidavit, defendant contends that he has set forth a "colorable" claim of actual innocence, because Seals averred that defendant was "never present or involved," in the victim's death and that witness Robin Cherry lied when she identified defendant as the person who shot the victim in the back of the head. Defendant argues that Seals's affidavit constitutes "new evidence" because Seals was not available to testify at defendant's trial.

¶ 24 In *Ortiz*, our supreme court defined newly discovered evidence as "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due

diligence ." *Ortiz*, 235 Ill. 2d at 334. A codefendant's affidavit may be considered "new evidence" although the codefendant was previously known to a defendant when "no amount of diligence could have forced the codefendants to violate their fifth amendment right to avoid self-incrimination." See *People v. Molstad*, 101 Ill. 2d 128, 135 (1984), but see *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (2010) (Emphasis added.) (it is "well established that evidence is not 'newly discovered' when it presents facts already known to a defendant at or prior to trial, even if the source of these facts may have been unknown, *unavailable*, or uncooperative").

¶ 25 In *Edwards*, our supreme court determined that the evidence contained in a codefendant's affidavit was "newly discovered" when that codefendant was not available at trial. *Edwards*, 2012 IL 111711, ¶ 38. There, although the codefendant had initially been charged, the case against him was later dismissed. *Edwards*, 2012 IL 111711, ¶ 10, n. 2. The court reasoned that the codefendant had a right to avoid self-incrimination and no amount of diligence could have forced him to incriminate himself against his will. *Edwards*, 2012 IL 111711, ¶ 38. Thus, *Edwards* seems to suggest that a codefendant against whom charges are dismissed is "unavailable" at trial, and his subsequent affidavit would constitute "newly discovered" evidence. Here, Seals admitted to his participation in the events surrounding entered a plea of guilty to participating in the kidnaping and shooting, therefore, it is unclear whether he was actually "unavailable" at the time of defendant's trial. However, even assuming that Seals's affidavit constitutes "newly discovered" evidence, defendant has still failed to plead a colorable claim of actual innocence because the facts contained in Seals's affidavit are not of such a conclusive character that they would change the result if defendant was retried.

¶ 26 In the instant case, as in *Edwards*, the "newly discovered" evidence "does not raise the probability that, in light of this new evidence, it is more likely than not that no reasonable juror would have convicted" defendant. *Edwards*, 2012 IL 111711, ¶ 40. In *Edwards*, the court

highlighted that a defendant's claim of actual innocence should be supported by new reliable evidence, which could include a trustworthy eyewitness account of the crime. *Edwards*, 2012 IL 111711, ¶ 32.

¶ 27 *People v. Lofton*, 2011 IL App (1st) 100118, is instructive. In that case, this court determined that the defendant's petition made a substantial showing of actual innocence based on the affidavit of a person purporting to be the actual shooter who stated that the defendant was not present at the shooting. There, the affidavit constituted "newly discovered" evidence because, accepting as true that the defendant was not at the scene of the shooting, the defendant could not have known the identity of the shooter until that man contacted the defendant and made such an admission. *Lofton*, 2011 IL App (1st) 100118, ¶ 37. This court then determined that evidence indicating someone else shot the victim and that the defendant was not present was "certainly" material. *Lofton*, 2011 IL App (1st) 100118, ¶ 38. Finally, this court noted that because the hallmark of actual innocence was total vindication, it would not have been "enough" for the witness to state that he was the shooter if the defendant was still actively involved in that version of events. *Lofton*, 2011 IL App (1st) 100118, ¶40.

¶ 28 In the case at bar, although Seals avers that defendant was not involved, he does not give an alternative version of the events surrounding the victim's death or identify who shot the victim. Unlike *Lofton*, where the newly discovered evidence exonerated the defendant and identified the actual shooter, Seals merely stated that defendant was not involved in the shooting and that Cherry lied when she identified defendant as the shooter. This is not to say that this court requires defendant to identify the "real killer;" rather, it is a commentary on the trustworthiness of Seals's account of the crime. Presumably, as Seals was present, he knows who actually shot the victim but has declined to identify that person.

¶ 29 The facts contained in Seals's affidavit do not raise the probability that it is more likely than not that no reasonable juror would have convicted defendant in light of this "new evidence." See *Edwards*, 2012 IL 111711, ¶ 33 ("supporting documentation must set forth a colorable claim of actual innocence, *i.e.*, they must raise the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence"). Here, the jury convicted defendant of first degree murder and armed robbery. Although Seals avers that defendant did not take participate in the victim's death and that eyewitness Cherry lied, at best, the information contained in Seals's affidavit could be used to impeach Cherry. In other words, the information contained in Seals's affidavit could be used to argue to the jury that Cherry lied about defendant's involvement in the crime—an argument that the jury would be free to reject. While the information contained in Seals's affidavit would provide a basis from which to assert a "reasonable doubt argument, \*\*\* that is not the standard; the standard is *actual innocence*." *People v. Green*, 2012 Il App (4th) 101034, ¶ 36 (June 7, 2012) (Emphasis in original.) Although defendant contends that Seals's affidavit casts doubt upon Cherry's testimony, allegations of actual innocence should seek to establish a defendant's actual innocence of the crime rather than question the strength of the State's case. See *People v. Coleman*, 381 Ill. App. 3d 561, 568 (2008). This court has previously held that evidence which merely impeaches a witness is typically not of such a conclusive nature as to justify postconviction relief. *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007).

¶ 30 Ultimately this court concludes, based upon the documents presented in support of the *pro se* successive postconviction petition, that defendant has failed to state a claim of actual innocence. Other than defendant's affidavit, there is nothing in the record to indicate that Cherry has actually recanted her identification of defendant as the shooter. See *Ortiz*, 235 Ill. 2d at 336-37 (finding that the newly discovered evidence would probably change the result upon retrial

when it directly contradicted the recanted testimony of the State's witnesses). Thus, the addition of Seals's testimony that defendant was not involved would require the fact finder to determine which version of events and which witness was most credible. See *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001) (a fact finder faced with conflicting versions of events is entitled to choose among those versions; it need not accept the defendant's version from those competing versions). Therefore, as the "newly discovered" facts contained in Seals's affidavit do not raise the probability that it is "more likely than not that no reasonable juror would have convicted [defendant] in the light of the new evidence" (*Edwards*, 2012 IL 111711, ¶ 33), defendant has failed to plead a colorable claim of actual innocence, and was properly denied leave to file the successive *pro se* postconviction petition.

¶ 31 In the alternative, defendant contends that the trial court erred in denying him leave to file the instant *pro se* successive postconviction petition because his claim that he was denied effective assistance of counsel by trial counsel's failure to investigate Seals and present Seals's testimony at trial has never been previously addressed. While defendant admits that this claim could have been raised in his first postconviction proceeding, he contends that replacement postconviction counsel's failure "to follow through" on postconviction counsel's investigation and, ultimately, procure Seals's affidavit prevented him from amending his *pro se* postconviction petition to include this claim in his first postconviction proceeding.

¶ 32 Pursuant to the cause-and-prejudice test, a defendant must show good cause for failing to raise the claimed error in a prior proceeding and that actual prejudice resulted from the error. *Morgan*, 212 Ill. 2d at 153. "Cause" is defined as an objective factor external to the defense that prevented the claim from being raised in an earlier proceeding. *Pitsonbarger*, 205 Ill. 2d at 460. "Prejudice" is defined as an error so infectious to the proceedings that the resulting conviction violated due process. *Pitsonbarger*, 205 Ill. 2d at 464. The failure to establish either prong of

the cause-and-prejudice test is a statutory bar to the filing of a successive postconviction petition. *People v. Lee*, 207 Ill. 2d 1, 5 (2003).

¶ 33 Here, defendant contends that he established "cause" pursuant to the cause-and-prejudice test because postconviction counsel's failure to locate Seals and obtain Seals's affidavit constituted unreasonable assistance of counsel rendering the first postconviction proceeding deficient. He also contends that he has established prejudice because had Seals testified at trial there is a reasonable possibility that the outcome of the trial would have been different.

¶ 34 The Act requires only a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). In order to ensure this reasonable level of assistance, Supreme Court Rule 651(c) (eff. Dec. 1, 1984), requires appointed counsel to: (1) consult with the defendant by mail or in person to determine the defendant's claims of constitutional deprivation; (2) examine the record of the challenged proceedings; and (3) make any amendments that are "necessary" to the petition previously filed by the *pro se* defendant to present the defendant's claims to the court. See also *People v. Johnson*, 154 Ill. 2d 227, 237-38 (1993) (the attorney appointed will ascertain the basis of the defendant's claims, shape those claims into appropriate legal form and present the defendant's constitutional contentions to the court). However, while postconviction counsel has a duty to attempt to obtain supporting affidavits from witnesses identified by a defendant in his *pro se* petition in order to shape allegations included in the postconviction petition into appropriate legal form, postconviction counsel has "no obligation to actively search for sources outside the record that might support general claims" raised in a postconviction petition. *Johnson*, 154 Ill. 2d at 247-48; see also *Moore*, 189 Ill. 2d at 542 (counsel has no duty under Rule 651(c) to locate witnesses not specifically identified by defendant or to conduct an investigation to discover the identity of witnesses who would provide evidence to support a claim in the postconviction petition).

¶ 35 Here, based upon this court's examination of the totality of the assistance received by defendant during his first postconviction proceeding, we reject defendant's contention that postconviction counsel failed to comply with Rule 651(c) because she did not obtain an affidavit from Seals when Seals was not identified as a potential witness in either of defendant's *pro se* filings in the first postconviction proceeding. The record reveals that defendant raised the issue of trial counsel's alleged ineffectiveness for failing to investigate and present the testimony of certain witnesses in his first *pro se* postconviction proceeding. However, defendant only identified potential witnesses Deadra Banks, Kelly West, and ASA Kelecious. Although the record indicates that defendant later gave "information" about Seals to postconviction counsel, the record does not contain that correspondence or any indication that defendant alleged on the record during the initial proceeding that he was denied effective assistance of counsel by trial counsel's failure to present the testimony of Seals. See *People v Jones*, 399 Ill. App. 3d 341, 370-71 (2010) (a claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness, and in the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to defendant). Defendant was not denied reasonable assistance of postconviction counsel when Seals was not identified as a potential witness in either of defendant's *pro se* pleadings and postconviction counsel had no obligation to locate a source that might support a general claim of ineffective assistance of counsel. See *Johnson*, 154 Ill. 2d at 247. Accordingly, as defendant has failed to establish that postconviction counsel's failure to obtain Seals's affidavit was unreasonable his contention that his initial postconviction proceeding was deficient must fail.

¶ 36 Defendant, however, argues that his postconviction counsel's failure to locate Seals and obtain Seals's affidavit constituted "cause" as defined by *Martinez v. Ryan*, 566 U.S. \_\_\_, 132 S. Ct. 1309 (2012).

¶ 37 In *Martinez v. Ryan*, 566 U.S. \_\_\_, 132 S. Ct. 1309, 1315 (2012), the Supreme Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." A defendant may establish cause when either (1) the state did not appoint counsel in the initial collateral proceeding during which a claim of ineffective assistance of trial counsel could be raised for the first time or (2) appointed counsel in the initial collateral proceeding was ineffective pursuant to the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). *Martinez*, 132 S. Ct. at 1318.

¶ 38 Defendant argues that *Martinez* imposes duties "akin to those of trial counsel" upon postconviction counsel rather than the "narrow" duties of Rule 651(c). However, "[t]here is no constitutional right to the assistance of counsel in postconviction proceedings; the right to counsel is wholly statutory \*\*\*, and petitioners are only entitled to the level of assistance provided for by the Post-Conviction Hearing Act." *People v. Suarez*, 224 Ill. 2d 37, 42 (2007); see also *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Our supreme court has determined that the Act only requires a reasonable level of assistance during postconviction proceedings. *Moore*, 189 Ill. 2d at 541. Although defendant argues that the applicable lens through which to view postconviction counsel's performance has been modified, this court disagrees. The propriety of our supreme court's interpretation of the Act is not before this court because, as always, all lower courts, including the appellate and trial courts, are bound by supreme court decisions. See, e.g., *People v. Artis*, 232 Ill. 2d 156, 164 (2009); *People v. Malloy*, 374 Ill. App. 3d 820, 822 (2007).

¶ 39 Ultimately, whether defendant has established cause is irrelevant where he cannot establish how he was prejudiced by counsel's failure to investigate and present Seals's testimony at trial. To establish prejudice, defendant must show that the claim not raised in his initial postconviction petition so infected the trial that the resulting conviction violated due process. *Pitsonbarger*, 205 Ill. 2d at 464.

¶ 40 Defendant's underlying claim is ineffective assistance of trial counsel. Pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant alleging that he received ineffective assistance of counsel must show not only that his counsel's performance was deficient but that he suffered prejudice as a result. *People v. Houston*, 226 Ill. 2d 135, 143 (2007). Here, defendant has not established that he suffered any prejudice from his trial counsel's alleged failure to call Seals as a witness.

¶ 41 Whether defense counsel was ineffective for failure to investigate is determined by the value of the evidence that was not presented and the closeness of the evidence that was presented. *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). Generally, the decision whether to present a certain witness is a tactical one which cannot support a claim of ineffective assistance of counsel (*People v. Lacy*, 407 Ill. App. 3d 442, 466 (2011)), however, defense counsel has a professional obligation to explore and investigate potential defenses for his or her client. *Morris*, 335 Ill. App. 3d at 79; *Strickland*, 466 U.S. at 691 (counsel's "decision not to investigate must be directly assessed for reasonableness in all the circumstances" and this judgment is afforded a "heavy measure" of deference).

¶ 42 As explained above, Seals's statement does not completely exonerate defendant or indicate who, if defendant was not present, actually shot the victim. Seals's affidavit also reveals that he pleaded guilty to participating in the events surrounding the victim's death and that Cherry was present for those events, while also asserting that she lied about defendant's involvement.

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Trial counsel could have reasonably chosen not to present Seals as a witness at trial because Seals had already admitted to his involvement in the victim's death and his testimony would have presumably corroborated portions of Cherry's testimony. Even had trial counsel presented the testimony of Seals at trial, there was no requirement that the jury accept defendant's version of the events as opposed to the version put forward by the State. See *Villarreal*, 198 Ill. 2d at 231. Consequently, defendant cannot establish prejudice under the cause-and-prejudice test and the trial court properly denied defendant leave to file his successive postconviction petition. *Lee*, 207 Ill. 2d at 5.

¶ 43 Accordingly, the judgment of the circuit court is affirmed.

¶ 44 Affirmed.