

No. 1-11-2813

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	04 CR 29140
)	
BRYANT ERVES,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE R. GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* In a postconviction petition, a claim of actual innocence by a defendant as to a murder conviction, supported by affidavits of two people who did not testify at trial that shows the identity of another person as the shooter, is a sufficient showing of the deprivation of a constitutional claim to warrant a third-stage evidentiary hearing.

¶ 2 Defendant Bryant Erves appeals the second-stage dismissal of his postconviction petition and asks us to remand for a third-stage evidentiary hearing. For the following reasons, we reverse.

¶ 3 Following a bench trial, the trial court found defendant guilty of first degree murder with

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a firearm enhancement. The case involved a drive-by shooting, and the sole issue at trial was the identity of the shooter. After hearing factors in aggravation and mitigation, the trial court sentenced defendant to 55 years in the Illinois Department of Corrections. On appeal, we affirmed, finding that the trial court did not err in allowing witness Larry Chapman¹, to invoke his fifth amendment privilege. *People v. Erves*, No. 1-07-0333 (September 15, 2008) (unpublished order under Supreme Court Rule 23). In this postconviction petition, defendant claims that he is actually innocent, and that his trial counsel was ineffective for failing to call Carnell Jackson as a witness. The petition is supported by the affidavits of two eyewitnesses who did not testify at trial and who both observed Clarence Lang, rather than defendant, shoot the victim. These two completely exculpatory witnesses are: (1) Tremonte Mack, and (2) Carnell Jackson. In addition, petitioner submitted the affidavit of Antonio Winters, who avers that State witness Brenda Chandler could not have witnessed the shooting as she claimed because she first exited her home after the shot was fired. Jackson also did not testify at trial. After defendant's petition advanced to the second stage, the trial court granted the State's motion to dismiss and later denied defendant's motion to reconsider. For the following reasons, we reverse.

¶ 4

BACKGROUND

¶ 5 The State's evidence showed that, on August 7, 2004, Troy Wilson, the victim, was fatally shot by a drive-by shooter while the victim was standing on a street corner. At trial, although defendant claimed that he was not the shooter, his trial counsel offered no direct evidence to support defendant's claim. Defendant did not testify on his own behalf and no

¹ Also referred to as Chatman by the parties.

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witnesses were called by the defense except an investigating police officer for impeachment purposes. In his postconviction petition, defendant claims that Clarence Lang was the shooter, based on the two affidavits of eyewitnesses who were not called at trial.

¶ 6 I. Evidence at Trial

¶ 7 The State's evidence included the testimony of six witnesses: Michelle Davis, the victim's mother; Clarence Lang, who was in the vehicle from which the shots were fired; Brenda Chandler, who claimed to have observed the shooting while standing in the street; Latrice Smith and Kemecha Ford, who also claimed to have witnessed the shooting; and Larry Cartledge, who loaned the vehicle used in the shooting to defendant. The parties stipulated to the testimony of Wendy Lavezzi, an assistant medical examiner who performed the victim's postmortem examination and who opined that the victim died of gunshot wounds.

¶ 8 The defense case consisted of the testimony of Detective Chris Matias, who interviewed Chandler and Smith. As part of the defense case, the parties also stipulated that Detective David Garcia, Detective Sandoval,² and Officer O'Kendall would have testified to impeaching statements made by eyewitnesses Chandler and Smith. The defense called Larry Chapman as a witness and he asserted his fifth amendment privilege against self-incrimination over the defense's objection.

¶ 9 The State's first witness, Michelle Davis, testified that she was the victim's mother and that the last time she saw her son alive was on August 7, 2004, prior to the shooting. Her

² The record does not indicate Detective Sandoval's first name or the first name of Officer O'Kendall.

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daughter informed her at approximately 10:30 p.m. that her son had been shot, and she walked to the corner of Washington and Oakley and saw her son before he was removed by ambulance.

¶ 10 The State's next witness, Clarence Lang, testified that he and defendant were members of the Traveling Vice Lords street gang and had known each other for two years. Prior to the shooting, he and defendant were involved in a fight with a rival gang, the Black Disciples. The fight occurred at approximately 8 or 9 p.m. on August 7, 2004, at Victor Herbert Park. After the fight, defendant told him that he was going to kill one of the rival gang members.

¶ 11 Lang was in the back seat, defendant was in the front passenger seat of the vehicle, and Byron Logan was the driver when they drove up to a group of people at approximately 10:30 p.m. at Dett Park. Defendant pointed a shotgun out of the passenger window and fired it once at the group. Lang had observed defendant with a shotgun that he received from Carnell Jackson earlier in the week at defendant's house. Lang did not observe if anyone was shot. He testified that defendant told him, "I think I got one of them n***s." Lang did not speak to the police for seven months because he fled to Minnesota for fear that the police were looking for him on an unrelated charge. Lang was apprehended in Minnesota, and in the process jumped out of a window and fractured a leg in an attempt to escape.

¶ 12 The State's next witness, Brenda Chandler, testified that she had known defendant for a year prior to the shooting and had known the victim his whole life. She was in the group of people at whom the shots were fired. She first noticed the shooter's vehicle when it exited an alley at a high rate of speed. She recognized Lang who was sitting in the back seat. She testified that the vehicle stopped near the group, and she observed defendant sitting in the front passenger

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seat with a shotgun. She observed defendant fire the shotgun and observed the vehicle leave the scene at a high rate of speed. The parties stipulated that Chandler told Detective Sandoval during an interview that she observed the shooter with a dark-colored handgun and described the shooter as a male black 18 to 23 years old. It was not until three days later, after she was shown several photographs, that she identified Logan as the passenger in the backseat and defendant as the shooter.

¶ 13 The State's next witness, Latrice Smith, testified that prior to the shooting, she witnessed a fight among rival gang members that involved defendant, Lang, and Logan. She heard Lang shout: "We be back," and then watched their vehicle leave the scene. However, in a written statement to the police she said that defendant was the one who shouted, not Lang. She further testified that Lang, Logan and defendant were all members of the Traveling Vice Lords. She had dated Lang for two years. She recognized the vehicle involved in the shooting as the same vehicle that she observed defendant and Lang in earlier that day. She was standing on the southwest corner of the intersection of Washington and Oakley, when she observed defendant in the passenger seat and Lang in the backseat. When the vehicle slowed down, defendant fired what looked like a long rifle, before the vehicle sped away. Two days later, she identified defendant, Lang, and Logan to the police from a photographic array. Her handwritten statement was admitted into evidence.

¶ 14 The State called Larry Cartledge, who testified that he loaned his vehicle to defendant before the incident and it was never returned. The State called Kemecha Ford, who testified that he was standing across the street from the group and observed only two people in the vehicle,

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including someone in the passenger seat. He testified that the gunshot came from the direction of the passenger seat. Ford was unable to identify the vehicle's occupants.

¶ 15 The parties stipulated that, if assistant medical examiner Wendy Lavezzi were called to testify, she would opine, within a reasonable degree of medical certainty, that the victim died of a shotgun wound to the abdomen and that the manner of death was a homicide. The State then rested.

¶ 16 Defendant called Detective Chris Matias as his only witness, who testified to statements made to him by witnesses Lang, Chandler, and Smith. Detective Matias showed Smith a photographic array on August 10, 2004, and she identified defendant as the shooter, Logan as the driver, and Lang as a backseat passenger. On August 11, 2004, he showed Chandler a different photographic array and she made the same identifications as Smith. During his interview with Lang on March 10, 2005, Lang did not mention that defendant was in the fight with the rival gang. Detective Matias was uncertain if Lang told him that defendant was the shooter, and that information was not in his report.

¶ 17 The parties stipulated to the testimony of Detectives Garcia and Sandoval, and to the testimony of Officer O'Kendall. Detective Garcia would have testified that he interviewed Lang on March 10, 2005, and that at no time during that interview did Lang ever tell him about observing the shotgun used by defendant prior to the shooting. Detective Garcia would also testify that Lang told him that he observed a person named Carnell Jackson give the shotgun to defendant.

¶ 18 When the defense called Larry Chapman, he asserted his fifth amendment privilege

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against self-incrimination. The defense argued as an offer of proof that Chapman would testify to a conversation where Lang admitted to shooting the victim and to receiving the shotgun from Logan. The conversation occurred on March 7, 2006, while both men were waiting for their cases to be called in court. Chapman would also testify to his leadership role in the Traveling Vice Lords and Lang's lower position in the gang. Chapman asserted his fifth amendment privilege because his murder conviction had pending posttrial motions, and his lawyer was concerned that any testimony by him regarding his gang affiliation and leadership role in the gang could be used against him.

¶ 19 In defendant's postconviction petition, defendant claims that his trial counsel was provided with an affidavit by Carnell Jackson which claims that Jackson had observed Lang shoot the victim; however, defendant does not explain how trial counsel was provided with this affidavit. Although Jackson was listed in the defense's answer to discovery as a potential witness, he was not called as a witness to support the defense's theory that Lang was the actual shooter.

¶ 20 During closing argument, the State argued that defendant was the shooter, and defense counsel argued that he was not. Specifically, defense counsel discredited portions of the State's witnesses' testimony and argued that Lang was the actual shooter, not defendant.

¶ 21 II. Conviction, Sentencing and Appeal

¶ 22 As noted, the trial court found defendant guilty of first degree murder and found that a firearm enhancement applied, and sentenced defendant to 55 years. The trial court's judgment was affirmed on appeal. On October 28, 2009, defendant filed a *pro se* postconviction petition, a

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supporting memorandum, and supporting affidavits. When the case was advanced to the second stage, appointed counsel amended the postconviction petition, arguing that Mack, Winters, and Jackson's affidavits constituted newly discovered evidence of actual innocence. The petition also alleges that trial counsel was ineffective for failing to call Jackson as a witness. The parties presented arguments before the circuit court on March 10, 2010, after the State moved to dismiss; and the trial court took the matter under advisement. On May 25, 2011, in a written order, the trial court granted the State's motion to dismiss defendant's postconviction petition at the second stage and later denied defendant's motion to reconsider. This appeal followed.

¶ 23

ANALYSIS

¶ 24 Defendant appeals the second-stage dismissal of his postconviction petition and asks us to remand for a third-stage evidentiary hearing. Defendant claims that he is actually innocent, and that his trial counsel was ineffective for failing to call witnesses who would have shown that defendant was not the shooter. Although trial counsel knew about Carnell Jackson at that time, he did not call Jackson, and Jackson's affidavit says that he observed Lang shoot the victim. Tremonte Mack's affidavit says that he had witnessed Clarence Lang shoot the victim, not defendant. Antonio Winter's affidavit also supports defendant's theory because Winter says that claimed eyewitness Brenda Chandler could not have witnessed the shooting because she exited her home after the shot was fired. Defendant claims that the trial court erred and that his postconviction petition should advance to the third stage for an evidentiary hearing. For the following reasons, we reverse and remand for an evidentiary hearing.

¶ 25 I. Stages of Postconviction Proceeding

¶ 26 The Postconviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a remedy to criminal defendants who have suffered substantial violations of their constitutional rights. *People v. Barcik*, 365 Ill. App. 3d 183, 190 (2006). Under the Act, a defendant bears the burden of establishing that a substantial deprivation of his constitutional rights occurred at his original trial. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004). The Act provides a three-stage process for a defendant who alleges a substantial deprivation of his constitutional rights at trial. At the first stage, the trial court must independently review the petition within 90 days of its filing and determine whether the petition states the gist of a constitutional claim. The gist of a constitutional claim means that a petition that is not frivolous or patently without merit shall survive summary disposition. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). If the petition survives initial review, the process moves to the second stage, where the trial court appoints counsel for the defendant when a defendant cannot afford counsel. 725 ILCS 5/122-4 (West 2010). The defendant's lawyer now has an opportunity to amend defendant's *pro se* postconviction petition. *People v. Slaughter*, 39 Ill. 2d 278, 284-85 (1968). The State may file a motion to dismiss or an answer. 725 ILCS 5/122-5 (West 2010).

¶ 27 At the second stage of the proceedings, “[i]f the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage.” *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009) (citing *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998)). At this stage, to survive dismissal, the petition must make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). The trial court is foreclosed from

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engaging in any fact-finding, because all well-pleaded facts must be taken as true at the second stage of the proceedings. *Wheeler*, 392 Ill. App. 3d at 308 (citing *Coleman*, 183 Ill. 2d at 380-81).

The propriety of a dismissal at the second stage is a question of law that we review *de novo*.

People v. Simpson, 204 Ill. 2d 536, 547 (2001). The *de novo* standard of review applies when the issue presented is purely a question of law. *People v. Chapman*, 194 Ill. 2d 186, 217 (2000). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 28 If the trial court denies the State's motion to dismiss, or if the State chooses not to file a dismissal motion, then the State “shall” answer the petition. 725 ILCS 5/122-5 (West 2010); *Pendleton*, 223 Ill. 2d at 472. Unless the trial court allows further pleadings (725 ILCS 5/122-5 (West 2010)), the proceeding then advances to the third stage, which is an evidentiary hearing. 725 ILCS 5/122-6 (West 2010); *Pendleton*, 223 Ill. 2d at 472-73. An evidentiary hearing is held only where the allegations of the postconviction petition make a substantial showing that a defendant's constitutional rights have been violated and those allegations are supported by affidavits, records, or other evidence. *Waldrop*, 353 Ill. App. 3d at 249. The affidavits that accompany a postconviction petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting a defendant's allegations. *Waldrop*, 353 Ill. App. 3d at 249. At the evidentiary hearing, the trial court “may receive proof by affidavits, depositions, oral testimony, or other evidence,” and “may order the [defendant] brought before the court.” 725 ILCS 5/122-6 (West 2010).

¶ 29 In the case at bar, the relief defendant seeks is a third-stage evidentiary hearing.

¶ 30

II. Actual Innocence

¶ 31 Defendant claims that he is actually innocent, and that Tremonte Mack's affidavit constitutes newly discovered evidence of actual innocence. In order to succeed on an actual innocence claim, a defendant must show that the evidence he now presents is: (1) newly discovered, (2) material and not merely cumulative, and (3) capable of changing the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 32

A. Newly Discovered Evidence

¶ 33 Our supreme court has defined newly discovered evidence as “evidence [1] that has been discovered since the trial and [2] that the defendant could not have discovered sooner through due diligence.” *Ortiz*, 235 Ill. 2d at 334.

¶ 34 The State cites to *People v. Coleman*, 381 Ill. App. 3d 561 (2008), to argue that defendant offers evidence that he discovered before trial because defendant claimed at trial that Lang was the shooter. *Coleman* instructs us that “[e]vidence is not newly discovered if it presents facts already known to the defendant at or prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative.” *Coleman*, 381 Ill. App. 3d at 568. The State argues that, since defendant had already claimed that Lang was the shooter, any evidence that shows Lang was the shooter is not newly discovered. At trial, defendant claimed that Lang was the shooter but presented no direct evidence to prove it. In his current petition, he is now presenting affidavits that support his position. Where a defendant continues to claim actual innocence, and then finds new evidence substantiating that claim, the court must provide an evidentiary hearing in order to determine the validity of that evidence. *Ortiz*, 235 Ill. 2d at 333.

¶ 35 In *Ortiz*, defendant alleged actual innocence in his first two postconviction petitions which were dismissed, but this court and then our supreme court found that his third petition presented a new claim of actual innocence when it offered two additional eyewitnesses who were previously unknown. *Ortiz*, 235 Ill. 2d at 333. “Defendant is not precluded from raising multiple claims of actual innocence where each claim is supported by newly discovered evidence.” *Ortiz*, 235 Ill. 2d at 333. The case at bar presents an analogous set of facts to *Ortiz*. Defendant has continued to claim his actual innocence and that Lang was the shooter, and he now presents Mack, a new eyewitness, who was previously unknown and who claims that Lang was the shooter, not defendant. In Mack's affidavit, Mack had a chance meeting with defendant while both were incarcerated. Therefore, Mack's affidavit constitutes newly discovered evidence.

¶ 36 We have held in post-*Ortiz* cases that when a defendant continues to claim actual innocence, he will be allowed to present new evidence substantiating that claim. For example, in *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 37, defendant “maintained from the beginning that he was not at the scene” in his first and second postconviction petition. His second postconviction petition contained an affidavit from the actual shooter, who claimed that the defendant was not at the scene and that the affiant was the shooter. *Lofton*, 2011 IL App (1st) 100118, ¶ 33. We held that the affidavit constituted newly discovered evidence in support of that claim. *Lofton*, 2011 IL App (1st) 100118, ¶ 37. Like the defendant in *Lofton* who continued to claim he was not at the scene of the crime and was actually innocent, defendant in this case has maintained all along that Lang was the shooter. Thus, Mack's affidavit, which is attached to defendant's petition, also constitutes newly discovered evidence.

¶ 37

B. Material and Noncumulative

¶ 38 Defendant's trial counsel presented no evidence to support defendant's claim that Lang was the shooter. His trial counsel provided only impeachment testimony and a stipulation to affect the credibility of a State's witness. Both Jackson and Mack would testify that Lang, not defendant, was the shooter. The State claims that their testimony is cumulative and that defense counsel knew of Jackson and failed to call him as a witness.

¶ 39 Our supreme court has held that "[e]vidence is considered cumulative when it adds nothing to what was already before the jury." *Ortiz* 235 Ill. 2d at 335. See also *People v. Molstad*, 101 Ill. 2d 128 (1984). The State cites to *People v. Smith*, 177 Ill. 2d 53, 85 (1997). In *Smith*, the defendant was convicted of murder, and on his posttrial motion presented "the statements of nine new witnesses" in an attempt to obtain a new trial. *Smith*, 177 Ill. 2d at 58, 81. At trial, the defendant had argued that the codefendant acted alone and was solely responsible for the murder. *Smith*, 177 Ill. 2d at 81. The trial court denied the defendant's motion for a new trial, finding that the claimed newly discovered evidence merely sought to discredit the trial testimony of the codefendant and was being used only for impeachment purposes. *Smith*, 177 Ill. 2d at 81-82. Our supreme court found that further testimony consistent with the theory that the codefendant acted alone was cumulative. *Smith*, 177 Ill. 2d at 85.

¶ 40 Over a decade later, in *Ortiz*, our supreme court explained that the evidence in *Smith* was considered cumulative because it would have merely impeached a prosecution witness. *Ortiz*, 235 Ill. 2d at 335. By contrast, in the case at bar, Mack's affidavit is completely exculpatory, in that it supports defendant's claim of actual innocence. It is not introduced to merely impeach

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Lang's testimony. Although defendant knew that Chapman and Jackson claimed to be eyewitnesses to the shooting and claim that they would testify that Lang was the shooter, neither Chapman nor Jackson's exculpatory testimony was presented at trial. Chapman took the fifth amendment and refused to testify, while Jackson was not called. Hence, Mack and Jackson's claimed testimony would not be cumulative because there were no witnesses at trial who testified that Lang was the actual shooter.

¶ 41 C. Capable of Changing the Result on Retrial

¶ 42 The State claims that Mack's affidavit would at most impeach Lang's testimony, and that such impeachment could not change the result at a new trial. Mere impeachment evidence will typically not be of such a conclusive character as to justify postconviction relief. *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008). While Mack's affidavit is contrary to Lang's testimony, and could have the effect of discrediting Lang, it is also exculpatory and supports defendant's claim of actual innocence. Where a witness's statement is both exonerating and contradicts a State witness, it can be capable of producing a different outcome on retrial. *Ortiz* 235 Ill. 2d at 336-37. Accordingly, Mack's testimony is capable of changing the result on retrial. The trial court can make that determination by conducting an evidentiary hearing.

¶ 43 III. Ineffective Assistance of Trial Counsel

¶ 44 Defendant's second claim is ineffective assistance of his trial counsel. Specifically, defendant claims that his trial counsel was ineffective for failing to present Carnell Jackson's exculpatory testimony. "A claim of ineffective assistance of counsel is judged according to the two-prong, performance-prejudice test established in *Strickland v. Washington*, 466 U.S. 668

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[(1984)].” *People v. Albanese*, 104 Ill. 2d 504, 526 (1984); *People v. Boyd*, 363 Ill. App. 3d 1027, 1034 (2006). “To obtain relief under *Strickland*, a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused prejudice by creating a reasonable probability that, but for counsel's errors, the trial result would have been different.” *Boyd*, 363 Ill. App. 3d at 1034.

¶ 45 Defendant’s trial counsel focused only on attacking the credibility of the State’s witnesses and provided no direct evidence to support defendant’s claim that Lang shot the victim. We do not know whether trial counsel met with and interviewed Jackson, and we do not know what Jackson told him at that point in time. Defendant has not provided the trial court with an affidavit by trial counsel explaining why he did not call Jackson. It is well established that the decision whether to call a particular witness is a matter of trial strategy. *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989). Defendant claims that his trial counsel was ineffective for not calling Jackson, who was available to testify and who would have testified that he observed Lang shoot the victim. Defendant claims that his counsel was aware of Jackson’s potential testimony because counsel notarized an unsigned affidavit, which stated that Jackson saw Lang shoot the victim, and that Jackson was prepared to testify at trial. Thus, defendant claims that counsel was aware of both Jackson’s potential testimony and his readiness to testify.

¶ 46 The State argues that such awareness can mean only that not calling Jackson was trial strategy, while defendant argues that counsel’s knowledge of such exculpatory evidence and the failure to use it shows counsel was ineffective. If Jackson's testimony is believable, it could produce a different outcome. Mack and Jackson’s combined claimed testimony could reasonably

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produce a different outcome. The issue is whether counsel's decision not to call Jackson as a witness was the product of sound trial strategy. The failure to call Jackson is sufficient for a substantial showing of a constitutional claim. *Boyd*, 363 Ill. App. 3d at 1042. The issue can be decided only by the holding of an evidentiary hearing.

¶ 47 IV. Ineffective Assistance of Postconviction Counsel

¶ 48 Defendant's third claim is ineffective assistance of his postconviction counsel. There is no constitutional right to the assistance of counsel in postconviction proceedings. Since the right to counsel is wholly statutory, defendants are entitled only to the level of assistance provided for by the Act. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Counsel's duties, pursuant to Supreme Court Rule 651(c), include: (1) consulting with the defendant to ascertain his contentions of deprivation of constitutional right, (2) examining the record of the proceedings at the trial, and (3) making any amendments to the *pro se* petition that are necessary for an adequate presentation of petitioner's contentions. Ill. S. Ct. R. 651 (eff. Dec. 1, 1984); *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). Postconviction counsel is required only to investigate and properly present defendant's claims. See *People v. Greer*, 212 Ill. 2d 192, 205 (2004); *People v. Davis*, 156 Ill. 2d 149, 164 (1993).

¶ 49 The Act provides for a reasonable level of assistance to a defendant in postconviction proceedings. *People v. Flores*, 153 Ill. 2d 264, 276 (1992). The legislature anticipated that most of the petitions falling under the Act would be filed *pro se* by prisoners who did not have the aid of counsel in their preparation. *People v. Johnson*, 154 Ill. 2d 227, 237 (1993). The Act imposed duties on postconviction counsel to ensure that a prisoner's complaints would be adequately

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presented, and the statute envisioned that the attorney appointed to represent an indigent person would ascertain the basis of his complaints, shape those complaints into appropriate legal form and present the prisoner's constitutional contentions to the court. *Johnson*, 154 Ill. 2d at 237-38 (citing *People v. Owens*, 139 Ill. 2d 351, 359 (1990), and *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968)). To ensure that defendants receive this level of assistance, Supreme Court Rule 651(c) imposes specific duties on postconviction counsel and requires that the record disclose that counsel has fulfilled his mandatory duties. Supreme Court Rule 651(c) requires postconviction counsel to file an affidavit certifying that he has complied with these requirements. Ill. S. Ct. R. 651 (eff. Dec. 1, 1984).

¶ 50 Our supreme court has held that Rule 651(c) requires the record on appeal to show that counsel made amendments to the *pro se* petition which were necessary for an adequate presentation of defendant's contentions. *Johnson*, 154 Ill. 2d at 243; *Turner*, 187 Ill. 2d at 412. The duty to adequately or properly present defendant's substantive claims “necessarily includes attempting to overcome procedural bars *** that will result in dismissal of a petition if not rebutted.” *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). Postconviction counsel must meet these procedural requirements in order to present a constitutional claim adequately under the Act. See *Johnson*, 154 Ill. 2d at 246; *Perkins*, 229 Ill. 2d at 44.

¶ 51 The State argues that, because postconviction counsel filed a certificate of compliance under Rule 651(c), there is a presumption that defendant received reasonable assistance. However, our supreme court has made clear that the purpose of Rule 651(c) is not merely formal. *People v. Suarez*, 224 Ill. 2d 37, 47 (2007) (quoting *People v. Brown*, 52 Ill. 2d 227, 230 (1992)).

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Our supreme court has “not *** suggest[ed] that an attorney's Rule 651(c) certificate is conclusive of compliance and can never be rebutted.” *Perkins*, 229 Ill. 2d at 52. Counsel cannot fulfill his Rule 651(c) duties simply by filing a certificate if he has not provided adequate assistance.

¶ 52 Defendant argues that, since it is well established that impeachment evidence is not sufficient on its own to support a claim of actual innocence, postconviction counsel provided unreasonable assistance by using Winters’ impeaching affidavit to support a claim of actual innocence. *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008). Instead, defendant argues, his postconviction counsel should have used Winters’ affidavit to plead a claim of ineffective assistance of trial counsel for failing to adequately investigate and obtain that impeachment evidence at trial. Defendant argues that, since Winters' existence as a witness was discoverable five years after the offense, reasonable investigation by trial counsel would have found Winters before trial.

¶ 53 However, there is no evidence in the record to shed light on why defendant's trial attorney did not discover Winters before trial, and the record does not disclose defendant's attorney's trial strategy. Therefore, we cannot know whether Winters would have been easily discoverable prior to trial, and whether defendant's postconviction counsel erred in neglecting to plead a claim of ineffective assistance of trial counsel concerning Winters.

¶ 54 However, we find that the affidavit of Winters supports the affidavits of Mack and Jackson and the fact that we have reversed the trial court and ordered a third-stage evidentiary hearing in this matter shows that postconviction counsel was effective.

¶ 55

CONCLUSION

¶ 56 For the foregoing reasons, we reverse the trial court's second-stage dismissal of defendant's postconviction petition. Defendant satisfied all three prongs of the actual innocence test and is entitled to a third-stage evidentiary hearing. However, defendant's claim for ineffective assistance of postconviction counsel at the first stage is not persuasive where we have advanced the petition to the next stage.

¶ 57 Reversed and remanded with instructions.