

No. 1-10-2952

**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. 97 CR 12530
	)	
CHRISTOPHER BROCHES,	)	Honorable
	)	John J. Hynes,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Second-stage dismissal of defendant's post-conviction petition affirmed where defendant failed to make a substantial showing of a violation of his right to effective assistance of counsel.
- ¶ 2 Defendant, Christopher Broches, appeals from an order of the circuit court of Cook County dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) at the second stage of proceedings. He contends that the court erred in finding that his failure to timely file his post-conviction petition was due to his own

culpable negligence, and that his appointed postconviction counsel provided unreasonable assistance in failing to amend his petition to assert a claim of actual innocence.

¶ 3 Following a jury trial in 1998, defendant was sentenced to an aggregate term of 30 years' imprisonment on convictions for two counts of armed violence, four counts of aggravated kidnapping, one count of armed robbery, and one count of attempted armed robbery. The evidence adduced at that trial showed that on March 14, 1997, defendant and multiple co-defendants grabbed the victim from a parking lot, threw him into a van, transported and held him at defendant's farmhouse and a motel for 10 days, during which time, they repeatedly beat him and forced him to attempt to access large sums of money. The victim was finally rescued after his captors brought him to a bank so that he could remove money from a safe deposit box, and he alerted a bank employee to his situation.

¶ 4 On direct appeal, this court vacated defendant's convictions for "aggravated kidnapping for purpose of obtaining ransom" and "aggravated kidnapping resulting in great bodily harm" as lesser included offenses of his "armed violence" convictions (720 ILCS 5/33A-2 (West 1996)), and affirmed the remainder of defendant's convictions and the corresponding 20-year sentence. *People v. Broches*, No. 1-99-0055 (2001) (unpublished order under Supreme Court Rule 23).

¶ 5 On May 15, 2002, defendant filed a petition for postconviction relief through retained counsel, in which he noted that his petition for leave to appeal his convictions to the supreme court had been denied. He then alleged that he was denied his right to the effective assistance of trial counsel who failed to make an opening statement and "proper objections[,] failed to file various pre-trial motions, and conducted "confusing and ineffective" cross-examinations. He also asserted that counsel was ineffective for failing to "investigate or interview" several witnesses, including his wife, Betty Broches, and three friends, James Sipla, David Fisk, and

Jason Mitsias, and for failing to present mitigation witnesses at sentencing. He further alleged that appellate counsel was ineffective for failing to assert that trial counsel was ineffective.

¶ 6 In support of his petition, defendant attached the affidavits of the above-named witnesses. In her affidavit, Ms. Broches expressed her dissatisfaction with trial counsel's representation of defendant, and her knowledge of the victim's bad character. She alleged that the victim is involved in the Mafia, that he is a child molester, a polygamist, and a womanizer, and that she knows of someone else who the victim had "beaten and forced to go to his bank in the same manner as this case." Regarding the time period at issue, she stated that "[o]n March 19, 1997 [defendant] canceled his trip to go out of state because he came down with a severe cold and bad allergies. The next day, Thursday March 20th[,] \*\*\* he came home early from work, about 8:00pm and stayed in till [sic] Sunday afternoon [March 23.]" For the next two days, defendant did various things like go to lunch with her, go to work, and sleep. On March 25, defendant went to the farm, where he "saw the police and asked them what they were doing there and they told him that he was under arrest."

¶ 7 In his affidavit, Sipla averred that the victim was involved in the drug trade, and that he was a friend of the victim's son, who "always had access to cocaine through his dad[.]" In September 1995, the victim and a business partner offered Sipla \$20,000 in cash to rent his farm for a year. Sipla agreed, thinking that the victim would be using it for cattle farming, until he talked to defendant who told him that "most likely [the victim] was involved in something very illegal and it didn't involve shipping cattle." He later learned that the farm was being used to unload and store large amounts of cocaine. Sipla also stated that the victim did not like defendant, and the victim's son had told him that "if his dad had a chance, he would burn [defendant] any way he could." Sipla averred that he had talked to defendant's attorney and told him what he knew about the victim, but counsel never called him to testify.

¶ 8 In his affidavit, David Fisk stated that, in the fall of 1995, he obtained a "juice" loan from the victim for 8% interest per week. When he began having difficulty making payments, the victim told Fisk that he would "forget all about the loan if I was willing to help him out when he needed me[.]" Fisk agreed, and became involved in several suspicious activities, including, *inter alia*, collecting "betting debts" and "juice money" from other borrowers, wire transferring large amounts of cash, maintaining gambling machines at various establishments, and driving recreational vehicles to various locations around the country and back. Fisk later realized he had been transporting cocaine when he observed the victim counting large amounts of money and observed "several large plastic bags filled with a white powdered substance."

¶ 9 Fisk also averred that at one point, the victim had a meeting with him, George Athanasiadis, and Andreas Pleasias, in which he elicited their help with a plan "to steal a shipment of drugs from his supplier." Fisk then stated, "Nick was never kidnapped \*\*\* as the police report states. I met with [the victim] in mid March of 1997 with Andreas and George. [The victim] told us he had already stolen a shipment of drugs from his suppliers and hid them. He told us he needed help to conceal and guard them and if it worked out he would pay us enough money to make us very happy. Andreas suggested a 'kidnapping' and to blame everything on [defendant]." Fisk stated that the victim "was very happy with this idea and he decided to do it as soon as possible."

¶ 10 During the "so called kidnapping[.]" Fisk drove the victim's car, while the victim, Andreas and George drove a van to defendant's farm. The group subsequently checked into a motel, but later went back to the farm. During this time, another participant, Efrain Rodriguez, began "helping out" in exchange for promises of money. On March 22, Fisk heard "George and [the victim] arguing at the farm about how they had made a deal and not only did [the victim] lie

to us but he was trying to cheat on us. After awhile, [the victim] had agreed to give us half of the load of cocaine and the money."

¶ 11 Fisk then stated that he was arrested on March 23, 1997, for unlawful use of a weapon. He stated that he "got pulled over and got arrested by the West Chicago Police Department and taken into custody. From this point on I do not know what transpired with George, Andreas, [the victim] and Efrain except what I have read in the police reports." Fisk was transferred to Dupage County jail, and questioned on March 27, 1997, regarding the victim's kidnapping. He was arrested for his involvement in this case and "took a plea bargain" for 10 years' imprisonment so that the Illinois Department of Corrections would treat an injury to his leg. Although he previously maintained that the kidnapping had been faked, Fisk "conclud[ed] this affidavit by stating that [defendant] had no knowledge of [the victim's] abduction or unlawful restraint. All members have either been caught or fled the country. I believe strongly that [defendant] should be fully exonerated of all charges since he had no participation or knowledge of any of our activities in regards to [the victim.]"

¶ 12 Jason Mitsias averred that he regularly purchased cocaine and marijuana from the victim. In exchange for "a better price[.]" Mitsias agreed to engage in multiple trips during which he transported drugs for the victim. The victim also asked him to make money orders in large amounts, and to wire "large amounts of cash" to his bank account in Greece. He then alleged that sometime in late February, Mitsias learned that the victim:

"was going to have us hijack his friends [sic] truck with the cocaine he was bringing from Arizona. [The victim] told everyone if something went wrong to blame it on [defendant]. \*\*\* A few days later I was told [that the victim] had already managed to get the truck without our help but he needed a plan to convince his

cartel friends that he was out of order when the hijacking took place. \*\*\* I was not involved directly \*\*\* but I was told \*\*\* about how [the victim] had instructed them to make everything look like a kidnapping."

¶ 13 On December 20, 2002, the State filed a motion to dismiss the petition, alleging that defendant's claims were untimely and that he had failed to show that the delay was not due to his culpable negligence. Defendant, through counsel, filed a response on March 4, 2005, alleging that postconviction counsel had contacted defendant's appellate counsel, who informed him that "he intended to file a writ of certiorari to the Illinois Supreme Court." Postconviction counsel asked appellate counsel to notify him at the conclusion of the supreme court proceedings, and, after "several months" without notification, postconviction counsel learned that appellate counsel "never filed for a writ to the [s]upreme [c]ourt." As a consequence, postconviction counsel alleged that the delay was not due to defendant's negligence, but was caused by the failure of appellate counsel to notify postconviction counsel of the termination of appellate proceedings.

¶ 14 On May 20, 2005, the State replied that appellate counsel had, in fact, filed a petition for leave to appeal to the supreme court, which was denied on June 6, 2001, and that defendant had not established that the failure to timely file the petition was not due to his culpable negligence. The State also asserted that even if defendant's tardy filing was excused, the court should dismiss the petition because his claims were meritless. In pertinent part, the State asserted that defendant's allegations were contradicted by the record because there were clear reasons why counsel would choose not to present the testimony of the affiants, who admitted participating in various illegal activities, and whose testimony was weak and would not have changed the result on retrial.

¶ 15 On August 5, 2005, defendant, through counsel, filed a surreply, asserting that he was "never notified by the State Appellate Defender that his P.L.A. [petition for leave to appeal] was denied" and, therefore, he could not "be held responsible for culpable negligence[.]" He disagreed with the State's argument on the merits of his claim, calling it "opinion and conjecture[.]" and stating that its argument demonstrated "why an evidentiary hearing in this matter is required."

¶ 16 On October 7, 2005, postconviction counsel withdrew and the court appointed the public defender to represent defendant. On October 30, 2009, appointed counsel filed a certificate, stating that, although compliance with Supreme Court Rule 651(c) (eff. December 1, 1984) was not required because defendant's postconviction petition was not filed *pro se*, counsel had "attempted to fulfill his obligations to [defendant] \*\*\* as set forth within that Rule[.]" Counsel asserted therein that he had consulted with defendant and examined the record, and that no amendments to the petition were necessary to present defendant's claims.

¶ 17 On August 6, 2010, arguments were presented by respective counsel, and on October 1, 2010, the circuit court entered an order granting the State's motion to dismiss. In doing so, the court found that defendant's petition was untimely and that he had failed to demonstrate that the delay was not due to his own culpable negligence. The court also found that even if his claims were not time-barred, they were meritless. The court specifically determined that the affidavits attached to defendant's petition were largely composed of inadmissible hearsay evidence, and that the remainder of the allegations would not have changed the result on retrial. The court observed that the affidavits implicated the affiants, defendant and others in a large criminal conspiracy, and under these circumstances, counsel was "[c]learly" not ineffective as it would be reasonable to choose not to call "witnesses who claim to be colleagues with [defendant, and] who admit to large scale drug dealing, money laundering, and illegal gambling, just to start."

¶ 18 In this appeal, defendant concedes that he filed his petition nearly six months late, but contends that the circuit court erred in dismissing his petition because he demonstrated that he was not culpably negligent for the untimely filing. Defendant maintains that the record shows that counsel was confused about the operable time limitations, and that his reliance on counsel does not constitute culpable negligence.

¶ 19 The State responds that the dismissal was appropriate because defendant failed to allege facts showing that the delay in filing was not due to his culpable negligence. The State asserts that defendant is presumed to know the law, and that his ignorance of the procedures governing postconviction petitions does not excuse his untimely filing.

¶ 20 Postconviction proceedings must be initiated within the time limitations specified in section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2002)), unless defendant alleges facts showing that the delay in filing his petition was not due to his culpable negligence. *People v. Lander*, 215 Ill. 2d 577, 586 (2005). Where defendant does not allege a lack of culpable negligence, the Act directs the circuit court to grant the State's motion to dismiss the petition as untimely during the second stage of postconviction proceedings. *People v. Perkins*, 229 Ill. 2d 34, 43 (2007). Our supreme court has defined "culpable negligence" as conduct greater than ordinary negligence and akin to recklessness (*People v. Bocclair*, 202 Ill. 2d 89, 108 (2002)), and has held that each case must be determined on its own specific facts (*Lander*, 215 Ill. 2d at 589). The circuit court's factual findings as to whether defendant was culpably negligent for the delay in filing his petition will be disturbed only where such findings are manifestly erroneous; however, the circuit court's ultimate conclusion as to whether those facts demonstrated culpable negligence is reviewed *de novo*. *People v. Gerow*, 388 Ill. App. 3d 524, 527 (2009).

¶ 21 Here, we find no error by the circuit court in finding that defendant's postconviction petition was time-barred. When defendant filed his petition in May 2002, the Act provided, in

relevant part, that a postconviction petition had to be filed within six months following the denial of a petition for leave to appeal, or within three years from the date of conviction, whichever is sooner, unless defendant alleges facts showing the delay was not due to his culpable negligence. See 725 ILCS 5/122-1(c) (West 2002). See *People v. Harris*, 224 Ill. 2d 115, 125, n.1 ("The applicable statute of limitations for a postconviction petition is the one in effect at the time the petition is filed").

¶ 22 In this case, defendant's conviction was entered on November 24, 1998, and his petition for leave to appeal was denied on December 6, 2001. The parties agree that the "sooner" time limit applicable for defendant's postconviction filing was November 24, 2001, three years from the date of conviction, and that defendant's petition was filed almost six months later, on May 15, 2002. In order to avoid the procedural bar that accompanies a tardy filing, defendant must allege facts showing that the delay was not due to his culpable negligence. 725 ILCS 5/122-1(c) (West 2010); *People v. Turner*, 337 Ill. App. 3d 80, 86 (2003). The circuit court found that he had not made such a showing, and we therefore focus on whether the allegations defendant presented to the circuit court were sufficient to establish a lack of culpable negligence to avoid the dismissal of his petition as time-barred. *People v. Rissley*, 206 Ill. 2d 403, 418 (2003).

¶ 23 Before the circuit court, defendant asserted that he was not culpably negligent for the untimely filing because postconviction counsel relied on the representation of appellate counsel that a "writ of certiorari" to the Illinois Supreme Court had not yet been filed. Defendant alleged that appellate counsel told postconviction counsel that he would keep him apprised of the status of the "writ" and that, after "several months" without notification, postconviction counsel learned that the writ was never filed. As noted by the circuit court, however, the explanation provided is confusing, because, in his initial postconviction petition, defendant acknowledged the denial of his petition for leave to appeal to the supreme court. This petition for leave to appeal was denied

on June 6, 2001, well before defendant's postconviction petition was filed on May 15, 2002.

Thus, as found by the circuit court, defendant failed to demonstrate that his late filing was not due to anything other than his own culpable negligence. *People v. Walker*, 331 Ill. App. 3d 335, 340 (2002).

¶ 24 In this court, however, defendant claims that he was not culpably negligent because the record reflects that postconviction counsel misunderstood the operable time limitations, and his later appointed counsel failed to assert that postconviction counsel's misunderstanding caused him to provide "ineffective" assistance. He analogizes his situation to defendant in *Rissley*, where this court found defendant's reliance on the specific and erroneous advice of counsel, supplemented by the affidavit of counsel confirming that advice, sufficient to find that his delay in filing was not due to his culpable negligence. *Rissley*, 206 Ill. 2d at 421.

¶ 25 In this case, by contrast, defendant did not raise this contention in an amended postconviction petition, or supplement his allegations with affidavits, nor does he claim that he was actually given erroneous advice by counsel which he relied upon to his detriment. Instead, he merely asserts that his "reliance on his attorney to file a timely postconviction petition does not constitute culpable negligence[.]" We remind that ignorance of the law does not excuse a delay in filing a lawsuit, and that defendant has the obligation to know the time limitations for filing his postconviction petition. *Lander*, 215 Ill. 2d at 588-89. Under these circumstances, we find defendant's petition subject to dismissal because his assertions are legally insufficient to excuse the delay in filing. *Walker*, 331 Ill. App. 3d at 339-40.

¶ 26 Defendant further claims that his appointed counsel provided unreasonable assistance by failing to amend his petition to point out the confusion and assert that the delay was attributable to his reliance on his former counsel's erroneous interpretation of the law governing post-conviction petitions. We disagree; however, even if we were to so find, our *de novo* review

shows that the dismissal was proper (*People v. Coleman*, 183 Ill. 2d 366, 388 (1998)), because the substantive issues raised in the petition were meritless (*People v. Lee*, 344 Ill. App. 3d 851, 853 (2003)).

¶ 27 In his petition, defendant alleged a number of ways in which he claims trial and appellate counsel provided ineffective assistance. However, on appeal, he has abandoned all substantive claims contained in his petition, and argues instead that postconviction counsel provided unreasonable assistance by failing to amend his petition to assert an actual innocence claim based on the affidavit of Fisk.

¶ 28 Defendant acknowledges that there is no constitutional right to the assistance of counsel in postconviction proceedings, but claims that he has a statutory right to reasonable assistance of counsel. 725 ILCS 5/122–4 (West 2000). Defendant observes that, to ensure that postconviction petitioners receive this level of assistance, Supreme Court Rule 651(c) imposes specific obligations on post-conviction counsel and requires counsel to certify, in pertinent part, that he 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). He claims that, in failing to assert a claim of actual innocence based on Fisk's affidavit, his counsel failed to shape his claim into the appropriate legal form. The State responds that Rule 651(c) is inapplicable to this case because defendant did not file a *pro se* postconviction petition.

¶ 29 The supreme court has held that Rule 651(c) applies "when a defendant who files a *pro se* postconviction petition is later represented by retained counsel in the postconviction proceedings," as well as applying to "appointed counsel representing a defendant who originally files a *pro se* postconviction petition," but that "[b]y its own terms \* \* \* the requirements of Rule 651(c) would not have been applicable" where "the initial petition was prepared and filed by counsel." *People v. Richmond*, 188 Ill. 2d 376, 381, 383 (1999). In his reply brief, defendant

concedes that Rule 651(c) is inapplicable to his case, but maintains, without citation of authority, that when a postconviction petition is filed by counsel, he must provide at least the same level of assistance as required by Supreme Court Rule 651. We determine, however, that even we were to resolve this issue in defendant's favor, defendant's claim would fail because Fisk's affidavit does not present a cognizable claim of actual innocence. *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 30 Counsel's decision not to amend a *pro se* petition does not constitute a deprivation of adequate representation where the claim lacks a sufficient factual basis (*People v. Johnson*, 17 Ill. App. 3d 277, 279 (1974) (citing *People v. Stovall*, 47 Ill. 2d 42 (1970))). To assert a claim of actual innocence based upon newly-discovered evidence, defendant must show that the evidence was: (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009).

¶ 31 Defendant contends that a substantial showing of actual innocence was apparent in Fisk's affidavit, where he averred that the victim orchestrated his own kidnapping and that defendant "had no knowledge of [the victim's] abduction or unlawful restraint." The State disagrees, and asserts that the representations made by Fisk in his affidavit are positively rebutted by the record and do not exclude defendant from the offense. We agree.

¶ 32 Fisk did not exonerate defendant from accountability for the crime where he acknowledged that he was not with defendant during the duration of the multi-day offense. Fisk specifically stated that he was arrested for unlawful use of a weapon on March 23, 1997, and was transferred to Dupage County Jail, and questioned on March 27, 1997. As such, Fisk was in custody on March 24, 1997, the day the victim was taken from the farmhouse to the bank for the

purpose of obtaining money from his safe deposit box, and thus, his allegation that defendant was not involved in the offense is purely speculative.

¶ 33 Moreover, the assertions in Fisk's affidavit concerning defendant's lack of knowledge of, or participation in, the offense are confusing, contradictory, and positively rebutted by the record. Although at one point in his affidavit Fisk claimed that the victim "was never kidnapped[,] he later acknowledged the victim's "abduction [and] unlawful restraint[,] but alleged that defendant did not participate and that "[a]ll members have either been caught or fled the country."

¶ 34 Nevertheless, the evidence at trial established that defendant was an active participant in the victim's capture, confinement, and repeated beatings, making Fisk's testimony unlikely to change the result on retrial. The victim testified that, on the day of his abduction, defendant, who he had known for about four years, called him and asked him to come to a restaurant to discuss a debt he owed to the victim. Upon leaving the restaurant, four men with guns jumped out of a white van, threw the victim in the van, put tape on his eyes, and tied his arms and legs. The victim realized defendant was one of his captors when he heard him say that he would be okay if he did what he was told. Over the next 10 days, the men repeatedly beat the victim, causing him to sustain significant injuries.

¶ 35 The victim described a specific incident during which his captors tied his hands with rope, and suspended him by his wrists from a beam on the ceiling of the barn. As he was suspended, his captors beat him with broomsticks. One of the captors suggested that they should remove the duct tape covering his eyes so that he would "remember us on his death." When the duct tape was removed, the victim was able to see the faces of his captors, including defendant.

¶ 36 The victim then told defendant that he had money in a bank safe deposit box that he would give him "to save [his] life." Defendant ordered the other captors to pull him down, and

then talked to the victim about how they were going to access the money. Later, a woman came to the farmhouse and put makeup on the victim's face, and had him change into fresh clothes to cover evidence of the beatings. The captors then taped a device to the victim's chest, and told him that it was a bomb and a recording device, implying that they would be able to hear and detonate the device if he did something wrong.

¶ 37 Thereafter, the woman, two men and the victim drove the victim's car to his house to pick up the safe deposit box key, and then drove to the bank. The woman and the victim entered the bank, but the victim was able to convince the woman to let him go to the bank vault alone. Once there, he took off the device, put it in a garbage can, and alerted a bank employee to the situation. The police were called, and discovered the two men armed and waiting inside the victim's car. The woman was found at a nearby restaurant with handwritten directions from defendant's farm to the victim's house in her purse.

¶ 38 The victim's testimony was extensively corroborated by physical evidence found at multiple locations, telephone records, and by the testimony of other witnesses, including, *inter alia*, bank employees, police officers, detectives, investigators, and the victim's wife. In particular, when the police searched defendant's farmhouse and barn, they found blood, broken broomstick handles, duct tape, and a woman's makeup bag. On one of the ceiling beams in the barn, they discovered bits of yellow nylon fibers that matched rope also found at the scene.

¶ 39 The victim's testimony was further corroborated by the testimony of the doctor who treated the victim after his rescue. The doctor testified that the victim was in critical condition when he arrived in the hospital and was dehydrated and in respiratory failure. The victim had multiple rib fractures, a bleeding and collapsed right lung, a kidney contusion, and a broken left wrist. He also had numerous bruises on his entire body, and the doctor testified that the color

and extent of some of the bruising would cause a person's pain level to be "8 or 9" on a scale of one to 10.

¶ 40 Although defendant argues that the "subsequent dissension among the conspirators" explains these injuries, we disagree. Fisk's affidavit does not explain why, during an alleged "fake" kidnapping, the victim received such extreme injuries; the affidavit merely alluded to an argument between the victim and the others involved about their respective cuts of the profits, after which the victim agreed to give the others "half of the load of cocaine and the money." Given the extensive evidence presented at trial, we find the allegations contained in Fisk's affidavit positively rebutted by the record.

¶ 41 In light of the above, we cannot say that post-conviction counsel provided unreasonable assistance for deciding not to amend defendant's petition to state a nonmeritorious claim of actual innocence (*Greer*, 212 Ill. 2d 192, 205 (2004); *Johnson*, 17 Ill. App. 3d at 279), and we affirm the second-stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 42 Affirmed.