



5-07-0351 (2009) (unpublished order pursuant to Supreme Court Rule 23). On November 6, 2008, the defendant filed *pro se* a petition for postconviction relief pursuant to the Act, challenging the aggravated-discharge-of-a-firearm conviction and stating that "the alleged victim that had stated that the defendant had pointed his gun at her" had recanted her statement, which "was recorded [and was] in possession of the defendant's mother." The trial court dismissed the petition pursuant to section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)) as failing to clearly set forth the respects in which the petitioner's constitutional rights were violated. However, this court reversed and remanded for second-stage proceedings because the dismissal was entered more than 90 days after the *pro se* petition was filed. *People v. Clover*, No. 5-09-0365 (2011) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 On remand, the defendant was appointed counsel, and on July 13, 2011, his counsel filed a supplemental petition to the defendant's *pro se* petition, stating that the aforementioned witness was Danita Gates, that the defendant did not know Gates's current address, and that based on fundamental fairness, the defendant was entitled to a new trial as he was actually innocent of the charges. Attached to the supplemental petition was a purported transcription of Gates's tape-recorded recantation. In the transcription of the recantation, Gates stated that she did not see the defendant shoot a small-caliber gun and that her door was "wide open when [the defendant] went in there first." The State subsequently filed a motion to dismiss the amended petition, arguing that "nowhere in this alleged affidavit does Ms. Gates assert that the information contained on the purported tape recording is true and correct," and that the defendant did not have a cognizable claim under the Act because he did not allege that the State had actual knowledge that Gates's testimony was false. See *People v. Brown*, 169 Ill. 2d 94 (1995).

¶ 5 At the hearing regarding the supplemental petition, defense counsel noted that the

defendant was not alleging that the State knowingly used false testimony, and stated that the defendant was not proceeding under the due process argument per *People v. Brown*. Rather, defense counsel cited *People v. Morgan*, 212 Ill. 2d 148 (2004), as requiring a hearing concerning the recanted testimony based on fundamental fairness. When asked by the court whether the defendant was in a position to present Gates's evidence and testimony, counsel noted that he was unable to find her. At the conclusion of the hearing, the court stated that it was not ruling on the State's motion to dismiss, but rather denying the defendant's supplemental petition "based strictly on the filing of the recantation," which the court found was "not under oath, nor [was] it even pursuant to an affidavit." In its docket entry, the court noted: "[The] recantation is neither under oath or in any way an affidavit. It is the only evidence provided in support of the original *pro se* or the supplemental petition as to a constitutional violation. All the rest of [the allegations contained in the defendant's] *pro se* petition were ruled upon by the Fifth Dist[ri]ct in appeal of [his] conv[iction] and sentence." The court found that under the authority of *People v. Brown*, there had not been a showing sufficient to indicate a due process violation. The defendant now appeals from the trial court's denial of his supplemental petition for postconviction relief.

¶ 6 On appeal, the defendant argues that his case should be remanded because (1) his postconviction counsel provided an unreasonable level of representation by failing to recast his postconviction petition into a petition for postjudgment relief under section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2008)), or alternatively, (2) equity and justice required that the trial court consider the defendant's amended pleading under the Code instead of as presented, because the court was aware that the claim as set forth in the defendant's petition was not cognizable under the Act.

¶ 7 The Post-Conviction Hearing Act provides a postconviction remedy to criminal defendants who claim that substantial violations of their constitutional rights occurred at trial.

*People v. Brown*, 169 Ill. 2d 94, 101 (1996). Both the Act and the Code allow for collateral relief from judgments, though the Act provides relief in criminal cases only for constitutional violations. *People v. Vincent*, 226 Ill. 2d 1, 11 (2007). The defendant first argues that his counsel acted unreasonably by failing to recast his petition into a section 2-1401 pleading, because unlike a petition presented under the Act, the Code does not require that the petitioner demonstrate a due process violation in order to obtain relief from the judgment. The defendant agrees that the allegation in his amended petition regarding Gates's testimony, without the additional allegation that the State was aware at the time of her testimony that she was committing perjury, did not state a due process claim under the Act. Thus, the defendant argues, his counsel's failure to recast his claim into a section 2-1401 petition under the Code was unreasonable in that it left the court no choice but to dismiss the petition.

¶ 8 The petitioner's right to postconviction counsel is statutory, not constitutional; under the Act, the petitioner is entitled only to a reasonable level of assistance. *People v. Davis*, 382 Ill. App. 3d 701, 711 (2008) (citing *People v. Greer*, 212 Ill. 2d 192, 204 (2004)). Postconviction counsel's specific duties are outlined in Supreme Court Rule 651(c), which requires that the record in postconviction proceedings reflect that the appointed counsel "has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Greer*, 212 Ill. 2d at 205. Under this definition of "reasonable representation," we cannot say that the defendant's appointed counsel acted unreasonably in not proceeding under the Code. The record shows that the requirements of Rule 651(c) were satisfied: counsel's Rule 651 certificate reflects that he consulted with the defendant and examined the record, and both the certificate and the supplemental petition demonstrate that he made amendments to the

original *pro se* petition that were necessary for adequate presentation of the defendant's claims. As demonstrated at the hearing, the defendant's counsel was aware that a due process claim based on the State's use of false testimony, without alleging that the State knew of the supposedly perjured testimony, was fatal to that particular due process claim. See *People v. Brown*, 169 Ill. 2d 94, 106 (1995) (finding that in a claim of the State using false testimony to convict a defendant, an allegation of knowing use of false testimony is required to establish a constitutional violation). Thus, counsel had specifically amended the defendant's petition to allege actual innocence based on newly discovered evidence—reframing the issue of Gates's purported recantation into a potentially meritorious due process claim under a theory of fundamental fairness. See *People v. Morgan*, 212 Ill. 2d 148, 154 (2004) (stating that the conviction of innocent persons violates the due process clause of the Illinois Constitution, and thus our courts recognize the right of postconviction petitioners to assert a claim of actual innocence based on newly discovered evidence). For our purposes, it is immaterial whether recharacterizing the claim under section 2-1401 of the Code would have given the defendant a greater likelihood of success—all that is required is that counsel provided reasonable representation for the defendant. Counsel was appointed pursuant to the Act, and we find that he acted reasonably within the parameters of the Act.

¶ 9 The defendant's alternative argument is that the trial court erred when dismissing the defendant's petition, because in the interests of equity, the court had a duty to recharacterize the defendant's petition into a cognizable claim under the Code. The defendant argues in his reply brief that the trial court should have recharacterized his petition before summary dismissal, in the first stage of the postconviction proceedings; he also argues that the trial court was still not prevented from recharacterizing his petition in the second stage of the proceedings, even after the appointment of counsel.

¶ 10 The defendant cites *People v. Cheeks*, 318 Ill. App. 3d 919 (2001), where the Third

District considered whether the trial court should have considered the petitioner's claim under the Act as a perjury claim under the Code. In *Cheeks*, the trial court had summarily dismissed the petitioner's *pro se* postconviction petition because he did not assert that the State knowingly used perjured testimony. *Id.* at 920. The appellate court remanded the cause for consideration of the perjury claim because "it would be inappropriate to deny [the defendant] an opportunity to pursue the applicable remedy merely because he did not understand the law well enough to bring his claim under the Code rather than the Act." *Id.* at 922. However, the rationale underlying *Cheeks* makes it inapposite to the defendant's argument. The *Cheeks* court reached its conclusion by noting that the courts do not expect *pro se* petitioners to have the legal knowledge required to ascertain the most effective method for collaterally attacking their convictions. Thus, recharacterizing a petitioner's pleading at this early stage gives him a "boost," helping the claim to survive so that it may be heard on its merits. Here, however, the defendant's petition has already survived past this initial stage. At the second-stage proceedings, the defendant had already been appointed counsel, his counsel had filed an amended postconviction petition, and the State had responded with a motion to dismiss. Such a "boost" is now inappropriate, as it would supercede the appointed counsel's decisions regarding the presentation of the defendant's claims. See *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) (stating that the court's role is neutral arbiter of the matters the parties present, and as a general rule, our adversary system is designed around the premise that the parties know what is best for them). Thus, we find *Cheeks* inapplicable to the instant case.

¶ 11 Instead, we note that section 122-1(d) of the Act provides that "[a] trial court that has received a petition complaining of a conviction or sentence that fails to specify in the petition or its heading that it is filed under [the Act] need not evaluate the petition to determine whether it could otherwise have stated some grounds for relief under [the Act]." 725 ILCS

5/122-1(d) (West 2008). Illinois courts have repeatedly held that a trial court has no obligation to recharacterize a *pro se* pleading on its own pursuant to section 122-1, and thus it cannot be error for a trial court to fail to do something it is not required to do. *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010) (citing *People v. Shellstrom*, 216 Ill. 2d 45, 53 n.1 (2005)); *People v. Harris*, 391 Ill. App. 3d 246, 249 (2009) (finding that circuit courts have "unfettered discretion" to refuse to recharacterize a petition so as to qualify under the Act). As a court has no obligation to recharacterize a plainly labeled section 2-1401 petition into a postconviction petition under the Act, it follows that a court would also be under no obligation to recharacterize a plainly labeled postconviction petition into a section 2-1401 petition under the Code, which would transform the petitioner into a civil plaintiff that must operate outside of the Act. While the trial court may have had the discretion to recharacterize the defendant's claim, we cannot find that such an obligation exists. The decision of the trial court to hear the petition under the Act for which it was clearly labeled was neither improper nor inequitable.

¶ 12 As an alternative to the previous two arguments, the defendant argues in his supplemental brief that the trial court erred by denying his postconviction petition, as he made a substantial showing of actual innocence based on the newly discovered evidence of Gates's recantation. Thus, the defendant contends that Gates's recantation of her trial testimony, transcribed and attached to the defendant's amended postconviction petition, made a sufficient showing of a due process violation so as to warrant an evidentiary hearing.

¶ 13 At the second stage of postconviction proceedings, the sufficiency of the allegations contained in a postconviction petition is subject to *de novo* review. *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). The defendant is not entitled to an evidentiary hearing on his postconviction petition unless the allegations of his petition make a substantial showing that his constitutional rights have been violated. *People v. Johnson*, 183 Ill. 2d 176, 187 (1998).

The allegations in the petition must be supported by affidavits, records, or other evidence, or must contain an explanation by the petitioner's own sworn statements as to why they are not attached. 725 ILCS 5/122-2 (West 2008); *Coleman*, 183 Ill. 2d at 380 (citing *People v. Jennings*, 411 Ill. 21, 26 (1952)). The purpose of the "affidavits, records, or other evidence" requirement is to establish that the petition's allegations are capable of objective or independent corroboration. *People v. Collins*, 202 Ill. 2d 59, 67 (2002).

¶ 14 However, we need not reach the merits of the defendant's claims, because we find that the defendant's proposed affidavit was insufficient to meet the requirements of the Act. A petition which is not properly supported by affidavits or other evidence is dismissed without an evidentiary hearing unless the petitioner's allegation stands uncontradicted and is clearly supported by the record. *Johnson*, 183 Ill. 2d at 191. An affidavit is "a declaration, on oath, in writing sworn to before some person who has authority under the law to administer oaths." (Internal quotation marks omitted.) *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493 (2002). Statements in writing to which the signer has not sworn before an authorized person cannot be considered affidavits. See, e.g., *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003) (holding that affidavit filed pursuant to the Act must be notarized to be valid). A deficient affidavit has no legal effect, and therefore a trial court may properly dismiss the petition. *Id.* (citing *Johnson*, 183 Ill. 2d at 191).

¶ 15 In support of his claim of actual innocence based on newly discovered evidence, the defendant attached a document entitled "Transcription of Tape." Following the purported transcription of Gates's recantation were statements by Jan Farmer, Nancy Ward, and Gates.

¶ 16 Gates's statement reads:

"I Danita Gates recorded a statement on cassette tape on October 28, 2008 and gave it to Jan Farmer for her son Dustin Clover. I made this statement of my own free will. I wanted to make things right."

Gates's statement is signed. Below Gates's statement, Ward acknowledged Gates's statement as a notary public:

"On this 4th day of December, 2008, before me personally appeared Danita Gates to me known to be the person who executed the foregoing instrument, and she thereupon duly acknowledged to me that she executed the same to be her free act and deed."

Ward's signature and stamp appear below the acknowledgment.

¶ 17 Jan Farmer's statement reads:

"I, Jan Farmer, am in possession of an audiotape with a statement by Danita Gates due to the fact that my son, Dustin Clover, is incarcerated. I gave the tape to Nancy Ward for transcription."

Farmer's statement is signed by her and notarized by Linda Hagler.

¶ 18 Ward's statement reads:

"I, Nancy Ward, accepted the said audio tape from Jan Farmer and provided, to the best of my ability and knowledge, a transcription of a statement by Danita Gates."

Ward's statement is signed by her and notarized by Linda Hagler.

¶ 19 Here, the documents attached to the defendant's supplemental postconviction petition do not meet the minimum formalities required of an affidavit. Gates's statement does not swear to the truth of the contents of recantation, only that she made it of her own free will. Farmer's statement is also unsworn. No statement avers to who actually recorded the audiotape, and there is no indication as to how Farmer came into possession of the audiotape. Further, the exhibit actually submitted by the defendant—the transcript of the audiotape—is also unsworn to and unverified; all that is available is a signed statement by Ward indicating that she transcribed "a statement by Danita Gates" from the audiotape in Farmer's possession. These documents, the only support that the defendant offers for his claim, simply do not meet the courts' definition of an affidavit and therefore do not meet the documentation

requirements of section 122-2 of the Act. We also note that the defendant's allegations are not otherwise supported by the record, as Gates's statement was attempting to recant her trial testimony, which was sworn under oath. Thus, we find that the defendant's petition was not supported by affidavits or other evidence under section 122-2 of the Act and was properly denied without progressing to a third-stage evidentiary hearing.

¶ 20 For the foregoing reasons, we affirm the decision of the circuit court.

¶ 21 Affirmed.