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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 94-CR-3296
)	
LESTER CODWELL,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court was reversed where the defendant's claims of unreasonable assistance of postconviction counsel succeeded and where his second-stage postconviction petition was improperly dismissed on the merits.

¶ 2 The defendant, Lester Codwell, appeals from the circuit court order which dismissed his second-stage postconviction petition, filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq.* (West 2006)). His petition alleged that he was denied a fair trial when the State failed to disclose exculpatory evidence, namely a witness who identified another offender for the police. For the reasons that follow, we reverse and remand the cause for further proceedings.

¶ 3 The defendant was convicted of first-degree murder in 1995 and sentenced to 40 years' imprisonment for the January 4, 1994, shooting death of Donald Rimmer in the Altgeld Gardens complex. The facts relevant to this appeal, adduced at the defendant's bench trial, include the following.

¶ 4 Antoinette Steward, the victim's girlfriend, testified that, around 3:30 p.m. on January 4, 1994, she was holding her baby and walking with Rimmer to her home, when she noticed a group of people standing in a gangway behind her house. She testified that she saw the defendant from a 50-foot distance, wearing blue jeans and white pullover jacket. He then came around the corner and shot Rimmer with a black and brown, long-barrel gun. Steward stated that she believed that Rimmer, a Gangster Disciple gang member, had "messed" with the defendant's sister, but she was not sure. She knew the defendant from the neighborhood and described him as being about 5 feet, 4 or 5 inches tall, medium weight, and appearing younger than 17 or 18 years old. According to Steward, she did not recognize anyone else in the area besides the defendant.

¶ 5 That evening, she identified the defendant for the police from a photo lineup, which she admitted included photos of three adult males, one juvenile whose name "Darryl Casey" was visible in the corner of the photo, and the defendant. She admitted that she was not looking for an adult male or Darryl Casey, so the only photo left for her to select was the defendant's. The next day, she identified the defendant from a physical lineup; she also identified him in court. Steward stated that she never spoke to anyone about the crime, but she admitted that the State's second identification witness, Paul Tiggs, was present when she went over her testimony with an assistant state's attorney before trial.

¶ 6 Tiggs, a long-time friend of Steward and Rimmer, testified that, on the day of the murder, Steward and Rimmer stopped by his home briefly with their baby. According to Tiggs, Deon Newton and Reginald Stone were also at his home during Rimmer's visit. Shortly after Steward and Rimmer left, Tiggs heard a gunshot, ran outside, and saw the defendant, who he knew from grammar school, walking away with a black gun, possibly a .38 caliber revolver, in his hand. Rimmer was on the ground. Tiggs stated that he knew Rimmer was a former Gangster Disciple and that the defendant was a Blackstone. However, to his knowledge, Rimmer and the defendant did not know each other, and he knew of no reason for the defendant to harm Rimmer. The day after the crime Tiggs identified the defendant from a physical lineup at the police station. He denied speaking to Steward about the crime, even though he encountered her on multiple occasions, but he admitted that he was present when she spoke to the State's attorney about her testimony before the trial commenced.

¶ 7 Chicago Police Detective George Karl testified that his investigation on the scene led him to the defendant whose photo he included in a lineup from which Steward identified him as the shooter. At approximately 1:45 a.m. on the morning of January 5, 1994, Detective Karl arrested the defendant. Later that morning Steward and Tiggs identified the defendant from a physical lineup. Detective Karl admitted that, at the time Steward identified the defendant from the photo lineup, he was not in custody. He also admitted that, around 9:15 p.m. on the night of the murder, an officer called a relative of the defendant in Port Huron, Michigan, looking for him. The defendant's aunt had informed the officer that she believed the defendant was visiting relatives in Michigan. According to Detective Karl, Amtrak was unable to provide any passenger manifest for trains traveling from Port Huron to Chicago on January 4, 1994. On

cross-examination, Detective Karl admitted that: someone told him that Larry Bagby admitted to the crime; Bagby was arrested that night; and Bagby was not included in any of the lineups.

¶ 8 The defendant presented several witnesses to prove that he was in Port Huron at the time of the crime. Edwin Codwell, the defendant's brother and admitted Blackstone gang member, testified that the defendant left for Port Huron a few days after Christmas Day 1993 and did not return until the night of January 4, 1994. That night, the police came and arrested him, the defendant, and Charles Foster. Codwell stated that he told the police that Bagby admitted to the crime. On cross-examination, Codwell admitted that he was with Charles Foster the night of the murder, but he denied that they were in the area of the shooting. According to Codwell, he and Foster stood in the lineup with the defendant, but neither he nor Foster was charged in connection with Rimmer's murder.

¶ 9 The defendant's aunt, Nadine Martin, testified that she told the police, who were looking for the defendant, that he was in Port Huron, visiting family. While the police were at her home, she called her cousin, Lois Bates, in Port Huron, who provided the phone number to Martin's uncle, James Smith. Martin further testified that, normally, the Amtrak train left Port Huron around 1 p.m. and arrived in Chicago about five to six hours later.

¶ 10 Bates testified that the defendant arrived in Port Huron a "couple of days after Christmas" of 1993 and that he was at her home in Port Huron on January 3, 1993. Bates stated that the defendant's mother called and told him that he better get on the train so he could get back to school, which had resumed that day. Bates called her father, James Smith, and asked him if he could take the defendant to the train station. The next evening, Bates received a phone call from Martin and told her that Smith had taken the defendant to the train station.

¶ 11 Smith testified that he took the defendant to the train station in Port Huron on January 4, 1994. He saw the defendant get on the train, which left around 1:30 p.m., a little later than its scheduled departure time. Smith testified that, during the early morning hours of January 5, 1994, he received a call from a police officer asking him when he last saw the defendant. He told the officer that he saw the defendant around 1:30 p.m. on the previous afternoon, when he put the defendant on the train to Chicago.

¶ 12 Angela Bradley testified that she, Edward Wilson, and Robert Reynolds drove to Union Station on the evening of January 4, 1994, to pick up the defendant. She stated that they picked him up around 8 p.m. and dropped him off at his mother's home around 9:30 p.m. Bradley stated that she recalled the events of that day because she heard about a murder in Altgeld Gardens from other people a few hours before they left for the train station. Reynolds, a resident of Altgeld Gardens, testified consistently with Bradley. Wilson also testified consistently with Bradley and Reynolds, and he additionally testified that he took the defendant to Union Station on the morning of December 27, 1993, but the train to Port Huron had already departed. According to Wilson, the defendant bought a train ticket for the next day, and he drove the defendant back to Union Station the next morning.

¶ 13 The State called Deon Newton as a rebuttal witness. Newton, a Gangster Disciple and resident of Altgeld Gardens, testified that he saw the defendant in the area of the shooting at the time Rimmer was shot, and he identified the defendant from a lineup which included the defendant's brother and a man named "Charles." At the time, Newton had been at the home of Tiggs. Reginald Stone, a Gangster Disciple, testified consistently with Newton. He also admitted that the Gangster Disciples and the Blackstones were rival gangs.

¶ 14 The parties stipulated that the Chicago police would testify that Edwin Codwell told them that: he was with Foster at approximately 4 a.m. on January 5, 1994; they went to a friend's home at approximately 5 a.m.; and the defendant was present at the friend's home when they arrived. Another stipulation was entered to establish that an Amtrak conductor would testify that, on January 4, 1994, the train left Port Huron at 1:15 p.m. and that there was no passenger manifest for that train.

¶ 15 At the conclusion of the trial, the court stated that it determined that the State's witnesses were credible and found the defendant guilty. After a hearing, the court sentenced the defendant to 40 years' imprisonment.

¶ 16 In 1996, the defendant filed a direct appeal in which he raised an insufficiency-of-the-evidence claim and argued that his sentence was excessive. In a summary order, we affirmed the judgment and the sentence. *People v. Codwell*, No. 1-95-3930 (1997) (unpublished order under Supreme Court Rule 23).

¶ 17 On July 30, 2007, the defendant filed a *pro se* postconviction petition challenging the constitutionality of the mandatory supervised release (MSR) statute (730 ILCS 5/5-8-1(d)(i) (West 1994)) under which he was sentenced, claiming that the judgment entered against him was void. The trial court recharacterized the defendant's petition as a petition filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401) (West 2006)), and the court dismissed it. The defendant appealed from this judgment under appeal no. 1-07-2750.

¶ 18 On November 6, 2007, the defendant filed a *pro se* motion to reconsider the dismissal of his petition, which the circuit court recharacterized as a petition pursuant to the Act. The circuit court dismissed the petition, stating that his MSR claim was waived because it was not raised in the direct appeal and was not a constitutional claim. The defendant appealed from this judgment

under appeal no. 1-08-0112, arguing only that the order should not affect the disposition of appeal no. 1-07-2750. These two appeals were consolidated. Thereafter, we determined that the circuit court erred in recharacterizing the defendant's petition as a section 2-1401 petition, and we remanded the cause for second-stage postconviction proceedings as required under the Act. *People v. Codwell*, Nos. 1-07-2750 & 1-08-0112 cons. (2010) (unpublished order under Supreme Court Rule 23).

¶ 19 Upon remand, the defendant was found to be indigent and the public defender was appointed to represent him. However, the public defender withdrew as the defendant retained private counsel, Frederick Cohn, who, on September 14, 2011, filed a "second post-conviction petition," which claimed that the limitations period in the Act was unconstitutional. On December 13, 2011, Cohn filed an "additional post-conviction petition," which, in relevant part, alleged that the defendant was denied a fair trial when the State failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Attached to the additional petition was an affidavit from Michael Foggie in which he stated that, on January 6, 1994, he told Detective Karl that he saw Charles Foster shoot Rimmer. Foggie stated that he was shown a photo line-up with approximately five men from which he identified Foster. He also told Detective Karl that he knew the defendant and Foster from "growing up in the community of the Golden Gates." He stated that he did not come forward earlier because he was previously unaware that the defendant was incarcerated for Rimmer's murder and had been told that, if he was needed to testify, he would be contacted by a state's attorney. Foggie stated that he was never contacted by authorities after he spoke with Detective Karl.

¶ 20 On December 27, 2011, Cohn filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), indicating that he reviewed the defendant's *pro se* pleadings, the trial

transcripts and prior opinions, and made amendments to the petition after communicating with the defendant concerning his contentions of violations of his constitutional rights. Cohn filed the certificate after the State reminded him that he was required to do so.

¶ 21 On January 18, 2012, the State filed a motion to dismiss the defendant's petition, arguing that it was untimely because it was filed 10 years after the statutory deadline. Alternatively, the State argued that the "second post-conviction petition" should be considered a successive petition and should be dismissed because: the defendant failed to obtain leave to file the successive petition; the petition did not allege a constitutional claim; and the *Brady* claim lacked merit.

¶ 22 Thereafter, Cohn failed to file a response to the State's motion and missed numerous court appearances due to his declining health. At one court appearance, Cohn informed the court that he had not responded or appeared in court because the defendant had failed to pay him. However, Cohn advised the court that he had decided to continue representing the defendant, and he promised to file a response. At another appearance, Cohn attributed his conduct to his age and failing health, but he promised to file a response to the State's motion. Throughout 2012, Cohn never filed a response to the State's motion.

¶ 23 In January 2013, the State asked the court to rule on the motion to dismiss despite the lack of a response from the defendant. On January 31, 2013, the circuit court issued its written order granting the State's motion to dismiss. Regarding the timeliness of the defendant's petition, the circuit court agreed with the State that the petition was untimely and that the defendant failed to demonstrate that the delay in filing was not due to his culpable negligence. The court further rejected the defendant's claim that the limitations period contained in the Act was unconstitutional. Regarding the *Brady* claim, the court determined that the defendant failed to establish that he was prejudiced by the State's alleged suppression of evidence. The court stated

that, "[a]lthough the information was favorable to petitioner and petitioner has alleged that the State allegedly suppressed it, the evidence submitted by petitioner does not create a reasonable probability that its disclosure would have altered the outcome of the proceeding." The court explained that several individuals testified in support of the defendant's alibi that he was in Port Huron, Michigan at the time of the crime, but two witnesses identified the defendant as the shooter from a lineup containing Foster and two others placed the defendant at the scene of the crime that day.

¶ 24 Later that day, Cohn moved for leave to file a response to the State's motion, which the circuit court denied, stating the response was untimely and that the State's motion was granted earlier that day. Cohn then requested that the court allow him to file the response as a motion to reconsider its dismissal order, but the court refused to consider it. The court reiterated that it had given Cohn ample opportunity over the past year to file a response. The defendant now appeals.

¶ 25 The Act provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). At the second stage of postconviction proceedings, the relevant question is whether the allegations in the defendant's petition, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which mandates an evidentiary hearing. *People v. Cheers*, 389 Ill. App. 3d 1016, 1024, 907 N.E.2d 37, 44 (2009). All well-pleaded facts in the petition and affidavits are taken as true, but assertions that amount to conclusions add nothing to the required showing to trigger an evidentiary hearing under the Act. *Id.* A second-stage dismissal of the defendant's petition presents a legal question we review *de novo*. *Id.*

¶ 26 During the second-stage, an indigent defendant is entitled to appointed counsel. 725 ILCS 5/122-4 (West 2006); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007), *as modified on denial of reh'g* (May 27, 2008). The defendant's right to postconviction counsel is wholly statutory in nature and the Act provides for only a "reasonable" level of assistance. *Perkins*, 229 Ill. 2d at 42. To assure the reasonable assistance required by the Act, Rule 651(c) imposes specific duties on postconviction counsel, including: (1) consultation with the defendant to ascertain his contentions of a deprivation of a constitutional right, (2) examination of the record of the proceedings at the trial, and (3) amendment of the petition, if necessary, to ensure that defendant's contentions are adequately presented. Ill. S.Ct. R. 651(c); *Pendleton*, 223 Ill. 2d at 472; *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 40 (applying Rule 651(c) duties to private counsel during second-stage proceedings where initial petition was filed *pro se*).

¶ 27 At the outset, we agree with the defendant's argument that he received unreasonable assistance of postconviction counsel where Cohn failed to allege facts showing that the defendant's delay in filing his petition was not due to his culpable negligence and otherwise failed to address the issue in a response to the State's motion to dismiss. If a postconviction petition is not filed within the limitations period, the Act requires the defendant to allege facts showing the delay was not due to his or her culpable negligence. 725 ILCS 5/122-1(c) (West 2006); *Perkins*, 229 Ill. 2d at 43. "Absent allegations of lack of culpable negligence, the Act directs the trial court to dismiss the petition as untimely at the second stage upon the State's motion." *Perkins*, 229 Ill. 2d at 43.

¶ 28 In *Perkins*, our supreme court held that "the plain language of Rule 651(c), requiring amendments 'necessary for an adequate presentation of petitioner's contentions,' includes alleging any facts that may establish a lack of culpable negligence in the late filing." *Perkins*, 229 Ill. 2d

at 43 (quoting Ill. S.Ct. R. 651(c) (eff. Dec. 1, 1984)). Here, the record clearly demonstrates that, instead of alleging facts that could have established a lack of culpable negligence, Cohn attacked the constitutionality of the Act's limitations provision. Further, Cohn failed to file a response to the State's motion to dismiss, even after the court reminded him to do so on numerous occasions over a one-year time period. Instead, Cohn attempted to file a response only after the court had already dismissed the defendant's petition.

¶ 29 We also agree with the defendant that Cohn's failure to frame the *Brady* claim as an actual innocence claim constituted unreasonable assistance. Foggie's statement, if accepted as true, exonerates the defendant, and actual innocence claims avoid the limitations provision of the Act. See *People v. Washington*, 171 Ill. 2d 475, 489 (1996). Relief under a claim of actual innocence requires that the supporting evidence be "new, material, noncumulative *** and of such conclusive character" that it would probably change the result on retrial. *Id.* Here, Cohn could have alleged the necessary elements of an actual innocence claim, namely that the evidence was new as the State never disclosed Foggie's identification and that Foggie only recently came forward. Although at trial there was evidence that Foster was arrested and included in the lineups, there was no evidence related to Foggie's identification, and thus, his testimony would not have been cumulative of other evidence. It also could have been alleged that Foggie's testimony would have likely changed the outcome of the trial where it would have been presented in conjunction with the defense's alibi witnesses. See *People v. Coleman*, 2013 IL 113307, ¶ 97 (stating that the trial court typically reviews evidence in an actual innocence claim at an evidentiary hearing to determine first whether it was new, material, and noncumulative, and if so, whether that evidence places the trial evidence in a different light such that the outcome would likely change). Under these facts and circumstances, we cannot find that

Cohn rendered reasonable assistance under the Act where he failed to frame the defendant's *Brady* claim as an actual innocence claim. We, therefore, remand the cause for new counsel to be appointed to amend the defendant's petition. See *People v. Turner*, 187 Ill. 2d 406, 417 (1999) (remanding cause to the circuit court with directions that it allow petitioner the opportunity to amend his postconviction petition with the assistance of counsel after receiving unreasonable assistance).

¶ 30 Aside from the untimeliness ground, the State argues that the circuit court's dismissal of the defendant's *Brady* claim was proper on the merits because he failed to adequately allege that the State suppressed the evidence and failed to demonstrate that he was prejudiced by the State's failure to disclose Foggie as a potential exculpatory witness. We disagree.

¶ 31 To establish a *Brady* violation, the defendant must show (1) that the evidence was favorable to him, (2) that the prosecutor failed to disclose the evidence in response to a specific request, and (3) that the evidence was material. *Chears*, 389 Ill. App. 3d at 1028-29; see also Ill. S. Ct. R. 412(c) (eff. Mar. 1, 2001). Similar to the materiality component of an actual innocence claim, favorable evidence is "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Chears*, 389 Ill. App. 3d at 1029.

¶ 32 Regarding the first requirement, the State concedes that Foggie's identification of Foster as the shooter was evidence that was favorable to the defense. As to the second requirement, the State claims that the circuit court did not find that the State suppressed the evidence, referencing the court's statement that the "petitioner has alleged that the State *allegedly* suppressed" the evidence. The State contends that the defendant failed to cite to any document, testimony, police investigation documents, or motions concerning the discovery between the parties in support of

his *Brady* claim. We disagree as the defendant refers to his February 15, 1994, discovery request for the disclosure of any potential witness, regardless of the State's plan to have the person testify. The defendant also refers to the State's July 19, 1994, "Answer to Discovery," which makes no reference to Foggie. Our review of the record does not demonstrate any evidence of the State's disclosure of Foggie. Moreover, during the second-stage, all well-pleaded facts in the petition and affidavits are taken as true, and therefore, we cannot find that the defendant failed to plead that the State failed to disclose Foggie as a potential exculpatory defense witness.

¶ 33 Regarding the third requirement, that the favorable evidence is material, we find that the circuit court's finding was improper at the second-stage, because the conclusion requires a determination of Foggie's credibility. Such fact-finding and credibility determinations are generally matters to be determined during the third stage of postconviction proceedings. See *Pendleton*, 223 Ill. 2d at 473 (stating that fact-finding and credibility determinations are involved in a third-stage evidentiary hearing unless no new evidence is presented and the issues involve pure legal questions or unless "the judge presiding over postconviction proceedings has some 'special expertise or familiarity' with the trial or sentencing of the defendant and that 'familiarity' has some bearing upon disposition" of the petition); see also *People v. English*, 406 Ill. App. 3d 943, 953 (2010) (quoting *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998)) (stating that a "trial court is foreclosed 'from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding' "). Therefore, if the defendant's petition survives the second-stage upon remand and after receiving reasonable assistance of postconviction counsel, credibility determinations should be reserved for a third-stage evidentiary hearing.

¶ 34 Based on the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand the cause for further proceedings consistent with this order.

¶ 35 Reversed and remanded.