2014 IL App (4th) 120761-U

NO. 4-12-0761

FILED
January 13, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
ROBERT E. NICHOLSON,	)	No. 07CF1120
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding postconviction counsel did not render unreasonable assistance.

¶ 2 In June 2008, a jury found defendant, Robert E. Nicholson, guilty of first degree murder. In September 2008, the trial court sentenced him to 30 years in prison. In January 2010, this court affirmed defendant's conviction and sentence. In November 2010, defendant filed a *pro se* petition for postconviction relief. In July 2012, the trial court granted the State's motion to dismiss the petition.

¶ 3 On appeal, defendant argues he failed to receive reasonable assistance of appointed counsel as to his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In August 2007, the State charged defendant with three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2006)) in connection with the death of Donna Nicholson on or about August 1, 2007. The State also charged defendant with one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)). Defendant pleaded not guilty.

¶ 6 In November 2007, defendant filed a motion to suppress statements he made to the police. In April 2008, the trial court denied the motion.

¶ 7 In June 2008, defendant's jury trial commenced on the first-degree-murder charges. Officer Eva Becker testified she responded to a call of "a person down" on August 1, 2007, at approximately 9 p.m. and observed Beulah Johnson and defendant standing on the porch at 1155 East Clay. Upon entering a bedroom, Becker saw a white female lying on the floor. Defendant stated he had returned home from work and found his wife. Becker stated defendant was "intermittently crying" and smelled of alcohol. Upon checking the interior of the residence, Becker did not observe anything out of the ordinary in the living room or the bedroom. She noticed the frame around the back door had been tampered with. Becker asked defendant about the door, and he said he arrived home around 3 p.m. and Donna told him somebody tried to kick in the back door. Defendant and Donna then had an argument. He left, and when he returned, he found Donna on the floor. Defendant later told Becker that he had been at a friend's house prior to 3 p.m.

¶ 8 Kenyotta Mabon testified he worked at the Circle K convenience store and Donna came in on a daily basis. On August 1, 2007, Donna came in between 6 and 7 a.m. and bought a fifth of vodka and two 32-ounce bottles of beer.

¶ 9 Decatur police officer Jason Derbort testified he responded to a call that someone had recovered documents belonging to Donna. Derbort recovered a driver's license, a Kroger card, and a National City card from an area approximately one block south and three blocks west of Donna's residence.

¶ 10 Samuel Carey, a convicted felon, testified he was incarcerated at the Macon County jail in August 2007. He was housed in the same pod with defendant. Carey stated they engaged in a conversation about what happened to Donna. Defendant told him he was at work when Donna was killed. During a second conversation, defendant said he came home and asked Donna for money. When she refused, they had an argument. Defendant then stated he hit her in the head and choked her. Defendant took her wedding ring and purse and hid them. He then kicked in the back door to make it look like a burglary. Carey stated his charge of aggravated domestic battery was dropped but not in exchange for his testimony. Although no promises had been made to him regarding another case, he hoped to get some kind of consideration for his cooperation and truthful testimony.

¶ 11 Decatur police crime-scene technician Randall Chaney testified Donna's body was moved and a "nosepiece to a set of glasses" was found underneath her. Glasses with an eyepiece/nosepiece missing and "apparent blood smearing" on them were located in the top drawer of the dresser. Chaney also noticed suspected blood spatter on a closet door and the bathroom door. Upon kneeling down to examine the closet door, he noticed his pants were wet. Chaney asked other officers if they had noticed cleaning objects such as a mop in other areas of the house. Chaney testified the top mattress of the bed "was a little bit out of whack in alignment" and had layers of coverings and pillows on top. The mattress contained eight

suspected bloodstains.

¶ 12 Decatur police investigator Charles Hendricks testified he found a mop near the detached garage of the residence. He stated the mop head appeared to be "moist." Decatur police officer Troy Kretsinger testified he collected defendant's shoes and clothing on the night of the murder.

¶ 13 Debra Kot, a forensic scientist with the Illinois State Police, testified she examines evidence for the presence of blood, semen, and saliva. On exhibit No. 8, a pair of defendant's shoes, Kot found a stain that tested positive for blood on the inside of the left shoe. Exhibit No. 9, a pair of defendant's socks, did not show the presence of blood. On exhibit No. 10, defendant's shirt, Kot found the presence of blood on the left sleeve and on the front of the shirt.

¶ 14 The parties stipulated that male deoxyribonucleic acid (DNA) was present in the fingernail scrapings (exhibit No. 3) taken from Donna. No blood was found on the mop or on defendant's hands. Prior to trial, the parties agreed DNA testing of the stain on the shirt sleeve, the swabbing from Donna's eyeglasses (exhibit No. 14), and Donna's fingernail scrapings (exhibit No. 3) would consume those samples.

¶ 15 Dr. Jessica Bowman, a forensic pathologist, testified she performed an autopsy on Donna. Toxicology tests revealed marijuana in Donna's system. She also had a blood-alcohol level of 0.258. Dr. Bowman stated Donna had a brain injury and bruises in her deep neck tissue. Based on her professional opinion, Donna's death was caused by strangulation.

¶ 16 Detective Barry Hitchens testified to an interview with defendant, and a recording of the interview was played for the jury. On cross-examination, Hitchens stated

defendant appeared to be intoxicated during the interview. The State then rested.

¶ 17 Anthony Goodwin, a convicted felon, testified for the defense. He stated he was incarcerated in the Macon County jail in August 2007. He heard Samuel Carey was going to make up a story about defendant confessing to killing his wife in hopes that it would help Carey's case. During an interview with the prosecutors, Goodwin stated he heard Carey say he was going to "roll on" defendant.

¶ 18 Defendant testified on his own behalf. He stated his wife of 7 years had not worked in the last 10 years of her life. She had a "severe drinking problem" and visited Circle K two or three times a day. Defendant did not go to work on the night of July 31, 2007. He spent the night at a friend's house and returned to his residence at 8 a.m. He saw an intoxicated Donna "staggering around the front porch." She told him someone had broken into the house on the previous evening, assaulted her, and took her wedding ring. After they both smoked marijuana, defendant left at approximately 1 p.m. When he returned, he found Donna at the sink. He opened a cabinet, found a bottle of vodka, and poured it out in the sink. Donna became angry and wanted defendant to leave. Defendant left, drank some beers down by the lake, and returned home at approximately 9 p.m. Defendant found the front door unlocked, which was unusual. He went toward the kitchen and eventually noticed the back door was "wide open." He then searched for Donna and found her lying on the bedroom floor "in a pool of blood." He tried to call 9-1-1 but the phone had no dial tone. He ran next door to have a neighbor call for help.

¶ 19 On cross-examination, defendant stated he was drunk on the day his wife was murdered, having had six beers over a period of seven hours. He did not recall telling Officer Becker that he had arrived home at 3 p.m. from work and found the damage to the back door.

He also did not recall telling Detective Hitchens that he arrived at the house for the first time at 2 p.m. and Donna told him the door was "busted."

¶ 20 Following closing arguments, the jury found defendant guilty. Defendant filed a motion for posttrial relief, arguing the trial court erred in denying, *inter alia*, his motion to suppress, his motion for a directed verdict, and the defense request to put the victim's 9-1-1 call on July 31, 2007, into evidence. The court denied the motion.

¶ 21 In September 2008, the trial court sentenced defendant to 30 years in prison. Defendant filed a motion to reconsider sentence, which the court denied. On appeal, defendant argued (1) the trial court erred in failing to suppress his videotaped interrogation, (2) the State failed to prove him guilty beyond a reasonable doubt, (3) the court erred in precluding him from presenting evidence, and (4) the prosecutor engaged in misconduct in eliciting certain testimony. This court affirmed defendant's conviction and sentence. *People v. Nicholson*, No. 4-08-0792 (Jan. 6, 2010) (unpublished order under Supreme Court Rule 23). Defendant did not file a petition for leave to appeal to the Illinois Supreme Court.

¶ 22 In November 2010, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). Therein, defendant alleged (1) he did not receive a probable-cause hearing on the murder charges within 48 hours of being charged, (2) the trial court failed to conduct a *voir dire* examination of prospective jurors as required by Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), (3) prosecutors committed misconduct by presenting the perjured testimony of Samuel Carey, (4) the State failed to prove him guilty beyond a reasonable doubt, (5) trial counsel was ineffective, and (6) appellate counsel was ineffective for failing to file a petition for leave to appeal to the

supreme court.

¶ 23 Also in his petition, defendant raised a claim of actual innocence and set forth a request pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/116-3 (West 2010)) for DNA testing of exhibit No. 8 (shoes), No. 9 (socks), No. 10 (T-shirt), and No. 14 (Donna's eyeglasses). Although he did not specify the exhibit number, defendant also mentioned Donna's fingernail scrapings (exhibit No. 3). Defendant alleged DNA testing had the potential to produce new, noncumulative evidence materially relevant to his assertion of actual innocence.

¶ 24 The trial court did not rule on the petition within 90 days. In March 2011, the court appointed counsel for defendant. In January 2012, defendant's appointed counsel filed a first amended postconviction petition, which adopted and incorporated the claims of error raised in defendant's *pro se* petition, and noted defendant claimed actual innocence.

¶ 25 In March 2012, the State filed a motion to dismiss, arguing the petition was untimely and the issues raised were without merit. The case was transferred to new defense counsel, who did not file a second amended motion but did file a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

¶ 26 In July 2012, the trial court held a hearing on the motion to dismiss. The court stated that because the request for DNA testing included a claim of actual innocence, it would not dismiss the amended petition as untimely. However, after finding defendant's claims were without merit, the court granted the motion to dismiss. This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, defendant argues he did not receive the reasonable assistance of

appointed postconviction counsel, where counsel failed to make any substantive amendments to his *pro se* request for DNA testing under section 116-3 of the Procedure Code, resulting in his amended petition failing to make a *prima facie* case for DNA testing. We disagree.

¶ 29 The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 30 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2010).

¶ 31 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2010). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a constitutional violation is

established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the State filed a motion to dismiss, and the court granted that motion. We review the trial court's second-stage dismissal *de novo*. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 32 A. Timeliness

¶ 33 Initially, we note the State argues defendant's postconviction petition should have been dismissed as untimely filed. The Act provides that "[i]f a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2010). The Act also states the timeliness "limitation does not apply to a petition advancing a claim of actual innocence." 725 ILCS 5/122-1(c) (West 2010).

¶ 34 In the case *sub judice*, defendant filed a timely notice of appeal of his conviction and sentence on October 16, 2008. This court affirmed on January 6, 2010. From that date, defendant had 35 days, or until February 10, 2010, to file a petition for leave to appeal to the Illinois Supreme Court. See Ill. S. Ct. R. 315(b) (eff. Oct. 15, 2007). From that date, defendant had six months, or until August 10, 2010, to commence postconviction proceedings. Defendant did not file his postconviction petition until November 1, 2010, beyond the statutory limitations period.

¶ 35 In his petition, however, defendant asserted a claim of actual innocence. To support a claim of actual innocence, the evidence in support of the claim must be (1) newly discovered, (2) material and not merely cumulative, and (3) "of such conclusive character that it

would probably change the result on retrial." (Internal quotation marks omitted.) *People v. Ortiz*, 235 Ill. 2d 319, 333, 919 N.E.2d 941, 950 (2009). "A colorable claim of actual innocence is a claim that raises the probability that it is more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence." *People v. Wideman*, 2013 IL App (1st) 102273, ¶ 14, 994 N.E.2d 546.

¶ 36 Here, defendant's claim of actual innocence is predicated on his belief that DNA testing might show bloodstains in evidence were not consistent with the victim's DNA, which would tend to significantly advance his claim. While speculative, we cannot decide the actual-innocence claim until we determine whether defendant is entitled to DNA testing. See *People v. Shum*, 207 Ill. 2d 47, 67, 797 N.E.2d 609, 621 (2003).

¶ 37 B. Reasonable Assistance of Postconviction Counsel

¶ 38 In postconviction proceedings, a defendant is not entitled to effective assistance of counsel. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Instead, state law dictates the sufficient level of assistance, and our supreme court has held the Act entitles a defendant to reasonable representation. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995). To ensure counsel provides that reasonable level of assistance, Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) imposes specific duties on postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). The rule requires postconviction counsel to (1) consult with the defendant to ascertain his contentions of the deprivation of constitutional rights, (2) examine the record of the proceedings at trial, and (3) make any amendments to the defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Courts have held the " 'failure to make a routine amendment

to a postconviction petition that would overcome a procedural bar constitutes unreasonable assistance in violation of Rule 651(c).' " *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 23, 971 N.E.2d 1204 (quoting *People v. Broughton*, 344 Ill. App. 3d 232, 241, 799 N.E.2d 952, 960 (2003)).

¶ 39 As stated, defendant contends he did not receive reasonable assistance of postconviction counsel where counsel failed to make any substantive amendments to his *pro se* request for DNA testing, thereby resulting in the amended petition failing to make a *prima facie* case for such testing. Section 116-3 of the Procedure Code (725 ILCS 5/116-3 (West 2010)), provides, in part, as follows:

> "(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint, Integrated Ballistic Identification System, or forensic DNA testing, including comparison analysis of genetic marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5-4-3 of the Unified Code of Corrections, on evidence that was secured in relation to the trial which resulted in his or her conviction, and:
>
> (1) was not subject to the testing which is now requested at the time of trial; or
>
> (2) although previously subjected to testing,

can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. Reasonable notice of the motion shall be served upon the State.

(b) The defendant must present a prima facie case that:

(1) identity was the issue in the trial which resulted in his or her conviction; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant;

(2) the testing requested employs a scientific method generally accepted within the relevant

scientific community."

Thus, to establish a *prima facie* case for forensic testing under section 116-3, "the defendant must show that identity was the central issue at trial and that the evidence to be tested was subject to a sufficiently secure chain of custody." *People v. Johnson*, 205 Ill. 2d 381, 393, 793 N.E.2d 591, 599 (2002). Thereafter, the trial court "must determine whether this testing will potentially produce new, noncumulative evidence that is materially relevant to the defendant's actual-innocence claim." *Johnson*, 205 Ill. 2d at 393, 793 N.E.2d at 599.

¶ 40 We note the State argues postconviction counsel could not have amended the petition to allege the evidence was not already subject to DNA testing. At the hearing on the State's motion to dismiss, the prosecutor stated, in part, as follows:

> "Also, if the Court looks at the record in this case, the DNA testing was done and the evidence that was stipulated to at trial between counsel for the State and counsel for the defendant is that the testing was inconclusive. There is [*sic*] some fingernail scrapings that were done and the stipulation was that there was male DNA present, but they could not make a profile or an identification from that."

We also must point out postconviction counsel could not have shown one of the bloodstains on the shirt and the fingernail scrapings from Donna could be subjected to additional testing because the parties agreed the DNA testing that was performed would consume the entire evidence. Thus, evidence of those two items no longer exists for future testing. All that apparently remains are the bloodstains on defendant's shoes and another on his shirt.

¶ 41 Even if counsel could have argued these stains could have been subjected to additional testing utilizing a method that was not scientifically available at the time of trial, under subsection (a)(2), defendant would still have to demonstrate the result of such testing:

> "has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant." 725 ILCS 5/116-3(c)(1) (West 2010).

Our supreme court has stated "evidence which is 'materially relevant' to a defendant's claim of actual innocence is simply evidence which tends to significantly advance that claim." *People v. Savory*, 197 Ill. 2d 203, 213, 756 N.E.2d 804, 810-11 (2001). Such evidence, however, need not exonerate the defendant. *Johnson*, 205 Ill. 2d at 395, 793 N.E.2d at 600. Whether the evidence is materially relevant "requires consideration of the evidence introduced at trial, as well as an assessment of the evidence defendant is seeking to test." *Savory*, 197 Ill. 2d at 214, 756 N.E.2d at 811.

¶ 42 In *Savory*, 197 Ill. 2d at 205, 756 N.E.2d at 806, the defendant was convicted of two murders in 1977. On appeal, the appellate court reversed his convictions, finding his confession was inadmissible. *Savory*, 197 Ill. 2d at 205-06, 756 N.E.2d at 806. At the defendant's second trial, the State's evidence included admissions the defendant made to friends, statements he made to police prior to confessing, and other physical evidence connecting the defendant to the offenses, including a bloodstain found on a pair of trousers recovered from his home that was of the same blood type as one of the victim's. *Savory*, 197 Ill. 2d at 206-07, 756 N.E.2d at 807. The defendant presented testimony from his father, who claimed the trousers

belonged to him and the bloodstain occurred after he cut his leg. *Savory*, 197 Ill. 2d at 208, 756 N.E.2d at 807. A jury found the defendant guilty, and his convictions and sentences were affirmed on appeal. *Savory*, 197 Ill. 2d at 208, 756 N.E.2d at 807-08.

¶ 43 The defendant's postconviction and *habeas corpus* petitions were denied, and he then filed a motion pursuant to section 116-3 of the Procedure Code, requesting DNA testing of the bloodstained trousers. *Savory*, 197 Ill. 2d at 208-09, 756 N.E.2d at 808. The defendant claimed he was innocent of the murders, and he alleged the test results would show the blood did not match the victim and would eliminate one of the pieces of physical evidence introduced by the State. *Savory*, 197 Ill. 2d at 209, 756 N.E.2d at 808. The trial court denied the defendant's motion, and the appellate court affirmed with one justice dissenting. *Savory*, 197 Ill. 2d at 209, 756 N.E.2d at 808.

¶ 44 On appeal, the supreme court considered the evidence introduced at trial and assessed the evidence the defendant sought to test. *Savory*, 197 Ill. 2d at 214, 756 N.E.2d at 811. The court found the testimony regarding the possible source of the bloodstain amounted to only a minor part of the State's strong evidence against the defendant, including his knowledge of certain features of the crime scene and his statements and admissions to others. *Savory*, 197 Ill. 2d at 214-15, 756 N.E.2d at 811. The court concluded "a test result favorable to defendant would not significantly advance his claim of actual innocence, but would only exclude one relatively minor item from the evidence of guilt marshaled against him by the State." *Savory*, 197 Ill. 2d at 215, 756 N.E.2d at 811-12.

¶ 45 In this case, the State presented evidence indicating defendant had the opportunity and motive to commit the murder. John Ronek, a neighbor of defendant, saw defendant and

Donna standing on or near their porch between 7 and 8 a.m. on August 1, 2007. Defendant and Donna lived alone in the house, and defendant admitted there had been instances of domestic violence, although he claimed they were mostly verbal.

¶ 46 The condition of the house also supported the jury's verdict. Decatur police officer John Platzbecker testified he did not notice anything out of place in the house—no tables overturned, no boxes turned open, no dresser drawers opened, nothing strewn on the floor, and no sign of a struggle. Donna's glasses, which contained a blood smear on them, had been placed in a case in the top drawer of a dresser. Chaney testified he moved the bed coverings and found suspected bloodstains. Further, the floor near suspected blood that was spattered and smeared on the bathroom and closet doors was wet as though it had been mopped. Investigator Hendricks testified he found a mop that appeared to be "moist" near the garage.

¶ 47 In addition, the jury heard defendant's evolving statements to the police. Defendant gave conflicting accounts as to his whereabouts on the day of the murder. He initially told police he returned home from work to find his dead wife. He later changed his story to say he had not been at work but was at a friend's house. In the interview, defendant stated he had been home all morning and left after 1 p.m. When he returned after 2 p.m., Donna told him the door had been "busted." He also stated he had visited with a friend named Tina, but Tina Vowell testified defendant was not with her on July 31 or August 1, 2007. At trial, defendant stated he spent the evening of July 31 at the home of a friend named Brenda and returned home at approximately 8 a.m. the next morning. Defendant claimed his evolving statements were the product of confusion, his drunkenness, and the shock of seeing his wife.

¶ 48 The State's evidence also included the testimony of Samuel Carey, a jailhouse

informant. He testified defendant told him he and Donna had an argument. When she refused to give him money, defendant stated he hit her in the head and choked her. He then kicked in the back door to make it look like a burglary.

¶ 49 Here, the blood evidence was not central to the State's case. The State's evidence and closing arguments centered on the jailhouse informant, defendant's inconsistent statements to police officers, and defendant's motive and opportunity to commit the murder. Thus, proof the blood on the shirt and shoes did not come from the victim would not alter the State's case in any significant manner and cannot be deemed materially relevant to defendant's claim of actual innocence. As postconviction counsel could not have amended the petition to successfully make a case for section 116-3 testing, counsel did not render unreasonable assistance. Accordingly, the trial court did not err in granting the State's motion to dismiss defendant's postconviction petition.

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 52 Affirmed.