

FOURTH DIVISION
September 30, 2015

No. 1-13-1415

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 95 CR 23506
)	
JIMMIE TURNER,)	Honorable
)	Frank Zelezinski,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting postconviction counsel's motion for leave to withdraw because defendant's *pro se* postconviction petition set forth frivolous claims and defendant received reasonable assistance in his postconviction proceedings.

¶ 2 Defendant Jimmie Turner appeals the trial court's granting his postconviction counsel leave to withdraw as well as the second-stage dismissal of his *pro se* postconviction petition. Defendant argues that (1) the trial court erred in granting his postconviction counsel leave to withdraw because counsel did not address the issue of the untimeliness of defendant's postconviction petition; and (2) postconviction counsel provided unreasonable assistance by

failing to conduct a sufficient investigation into defendant's claims and amend his petition to adequately present meritorious claims, specifically that counsel failed to sufficiently investigate a witness named in defendant's petition and counsel failed to amend the petition to present defendant's claim of ineffective assistance of trial counsel for failing to present the grand jury testimony of Detective Sergeant Daniel Martin.

¶ 3 In September 1995, defendant was charged with home invasion, aggravated criminal sexual assault, armed robbery, criminal sexual assault, aggravated kidnapping, kidnapping, and robbery arising from the June 1995 sexual assault and home invasion of Connie Pierce.

Following a jury trial, defendant was convicted of two separate counts of aggravated criminal sexual assault, home invasion, and armed robbery. He received an aggregate sentence of 75 years.

¶ 4 The following evidence was presented at defendant's trial.

¶ 5 Connie Pierce testified that in June 1995, she lived in a single family home in Country Club Hills, Illinois. She met defendant when a neighbor recommended defendant to Pierce as an individual who could perform some yard work. She estimated that she had met with defendant eight times in daylight and had conversations with him.

¶ 6 On June 25, 1995, Pierce went to bed around 11 p.m. She stated that she left the bedroom and dining room windows open to allow air to flow through the screens. At approximately 2:30 a.m., she awoke because she heard a noise. She saw that her bedroom door was open and a man was standing in the doorway. When the man lit a cigarette lighter, she saw the man's face and recognized him as defendant. Pierce screamed and tried to grab the lamp on her bedside table. Defendant pushed her against the bed and pulled the lamp away from her. He

held her down with his knees on her chest and holding her wrists. Defendant then ripped a pillowcase and blindfolded and gagged her with the pieces from the pillowcase.

¶ 7 Pierce testified that defendant said he had a knife and wanted her money. She told him her purse was in the dining room downstairs. Defendant pulled her from her bed and led her downstairs. Defendant found Pierce's purse and took her back to her bedroom. He pushed her onto the bed. Pierce testified that she was crying and defendant kept telling her to stop crying and that he had a knife. Defendant then ripped her underwear off. Pierce testified that defendant then put his mouth on her vagina and performed oral sex. Defendant then put his penis in her vagina. Pierce remained blindfolded at this time.

¶ 8 After defendant stopped, he got her purse. When he could not find her money, defendant told Pierce to find the money. She found her wallet and gave it to him. Defendant told her again that he had a knife, pressed an object to her arm, and had her feel the handle. Pierce stated that she felt a metal handle, but did not feel anything sharp. She felt something pressed to her skin. Defendant told her that he cut her telephone wires. He said he was leaving, and not to call the police because he would be watching. Pierce identified defendant in court as the perpetrator.

¶ 9 Pierce stated that she heard the front door open and close. She waited until she was sure defendant had left, and then she called her friend Gloria Randolph. She told Randolph what happened. Randolph and her husband drove to Pierce's home while Pierce remained on the phone with their son. The door was unlocked and they entered the home. Randolph went upstairs while her husband called the police.

¶ 10 Randolph testified that she found Pierce on the bed in the fetal position and crying. Pierce told Randolph that defendant had entered her house, sexually assaulted her, and took her money. When the police arrived at Pierce's house, she gave a description of defendant. Pierce

was taken to South Suburban Hospital and a sexual assault kit was performed, including blood samples, vaginal swabs, oral swabs, and her underwear.

¶ 11 When Pierce returned to her home, she noticed that the window screen in her dining room had been cut. It was not in this condition when she went to bed. She also stated that a pair of gloves photographed in her dining room did not belong to her and were not there when she went to bed. Pierce found a cigarette lighter in her bedroom.

¶ 12 In the morning of June 26, Detectives Randal Rockaitis and Daniel Martin came to Pierce's house. They presented a photo array to Pierce of six photographs. The photographs were of black men in their forties of similar builds with facial hair. Pierce identified defendant in one of the photographs. Detective Rockaitis testified at trial that they attempted to locate defendant at his mother's house and other locations he was known to frequent. On July 5, 1995, Detective Rockaitis spoke with Investigator Billy Joe Estes in Bolivar, Mississippi to look for defendant in that area.

¶ 13 Investigator Estes testified that he received a faxed copy of a warrant for defendant's arrest from Detective Rockaitis. He knew defendant and defendant's uncle. On July 19, 1995, he spoke with defendant's uncle and learned where defendant was staying. Investigator Estes drove to that location in Cleveland, Mississippi and placed defendant under arrest. Investigator Estes notified Detectives Rockaitis and Martin that defendant had been arrested. Defendant waived extradition the following day. Detectives Rockaitis and Martin made arrangements to take defendant into custody and transport him to Cook County. They took him into custody on July 26, 1995. On July 26, 1995, Pierce came to the Country Club Hills police station to view a lineup. She identified defendant as the perpetrator in the lineup.

¶ 14 Assistant State's Attorney (ASA) Brian Holmes testified that he spoke with defendant on July 26 at the police station. He advised defendant of his *Miranda* rights, and defendant waived his rights and agreed to give a statement. When the statement was finished, defendant refused to sign it. ASA Holmes testified that defendant told him the statement was correct, but he did not want to sign it. Defendant was told that if he changed his mind, then he could let the detectives know. Later, defendant indicated that he was willing to sign the statement and then did so.

¶ 15 ASA Holmes read defendant's statement into the record. In the statement, defendant admitted to the robbery and sexual assault of Pierce. He stated that he was introduced to Pierce on June 12, 1995, by his friend. He performed odd jobs in Pierce's yard over the course of a week for \$50.

¶ 16 On June 26, 1995, defendant went to Pierce's house. He used his pen to cut a slit in the window screen in the dining room and crawled through the window. He then looked for money in the house. When he opened the door to one bedroom, he saw Pierce in bed. He entered and looked around. He saw Pierce move and he went to the door. When she moved again, he "figured she knew someone was in the house," so he entered the room. He lit a cigarette lighter. Pierce asked who was there, and defendant responded that he wanted money. He walked toward her and tried to pull the telephone wires, but pulled the lamp cord by mistake. He cut her pillowcase and tied pieces over her eyes and mouth.

¶ 17 Defendant asked where the money was, and Pierce said it was downstairs. He took her downstairs and found her purse. He then took her back upstairs into the bedroom. He told Pierce to take the money out of the purse for him. Pierce found her wallet and said the money was in there. Defendant took around \$60.

¶ 18 After he took the money, defendant said he "lost control." He "pulled her panties off and had oral sex with her." He then unzipped his pants and put his penis in her vagina. Between the acts of sexual assault, defendant said that Pierce "mumbled" not to hurt her. Defendant then took his pen and pressed it to her arm and told her not move and he would not hurt her. After the vaginal sex, he told Pierce he was leaving. He took her wallet and left through the front door. He went to a field, took the money from the wallet, and then threw the wallet in the field. The next day, defendant took a train to Mississippi.

¶ 19 Dennis Aubuchon testified that he was a forensic biologist and he tested the sexual assault kit collected in this case. He stated that the semen identified in Pierce's vaginal swabs could have originated from defendant. The profile matched 21.6 percent of the African-American population. A full DNA test was not requested. The parties stipulated that no fingerprints were suitable for comparison on the lamp or the cigarette lighter.

¶ 20 After the State rested, defendant moved for a directed verdict, which the trial court denied. The defense consisted of two witnesses, Officer Don Nowak and Sergeant Werosh. The officers responded to the scene, but the police reports did not indicate that Pierce identified defendant as the perpetrator. Officer Nowak stated that Pierce initially identified the perpetrator as "Jimmie," but did not know his last name. He said the police report did not identify the perpetrator because he did not have the full name. Sergeant Werosh testified that Pierce was positive about the identity of the perpetrator, but by the time he spoke with her, the investigation had been turned over to Detective Rockaitis.

¶ 21 Following closing arguments, the jury found defendant guilty of two separate counts of aggravated criminal sexual assault, home invasion, and armed robbery. The trial court subsequently imposed consecutive 30-year terms for each of the aggravated criminal sexual

assault convictions, and two 15-year terms for home invasion and armed robbery. The home invasion and armed robbery sentences were entered to run concurrent to each other, but consecutive to the aggravated criminal sexual assault sentences. Defendant received a total sentence of 75 years.

¶ 22 On direct appeal, defendant argued that the trial court erred in declining to instruct the jury on his proposed definition of reasonable doubt. The reviewing court affirmed defendant's conviction and sentence. *People v. Turner*, No. 1-97-4242 (Sept. 1, 1999) (unpublished order pursuant to Supreme Court Rule 23).

¶ 23 On October 12, 2001, defendant filed his *pro se* postconviction petition. In his petition, defendant raised multiple claims, including: (1) actual innocence based on newly discovered evidence; (2) the State knowingly offered perjured testimony from police officers at trial; (3) the State suppressed evidence favorable to defendant; (4) defendant never signed his statement; (5) there was no physical evidence against defendant; (6) the State impaneled a conviction prone jury including jurors who did not speak English; (7) ineffective assistance of trial and appellate counsel; (8) prosecutorial misconduct; (9) his sentence was improper; and (10) he was indicted illegally.

¶ 24 The public defender entered an appearance for defendant on August 8, 2003. In May 2004, the State moved to dismiss defendant's petition, arguing that the petition was untimely, lacked supporting documents, and issues were barred by *res judicata* and waiver.

¶ 25 Over the ensuing years, the case was continued many times. Postconviction counsel investigated the evidence impounded after defendant's trial, including the sexual assault kit. She filed motions seeking a subpoena to locate the missing kit, which was thought to have been destroyed. Counsel located the sexual assault kit, and in November 2010, moved for forensic

testing of the sexual assault kit. In April 2011, the Illinois State Police issued its laboratory report, showing that the semen found in Pierce's vaginal swab matched defendant's DNA profile.

¶ 26 In July 2012, postconviction counsel filed her Supreme Court Rule 651(c) certificate, stating that (1) she has communicated with defendant by letter, "as he is refusing to accept [her] phone calls, to ascertain his claims of a deprivation of his constitutional rights," (2) she has examined defendant's transcript of his trial and sentencing in the case, and (3) she has examined defendant's *pro se* postconviction petition and "a supplemental petition will not be presented."

At the same time, postconviction counsel filed a motion for leave to withdraw as appointed counsel in postconviction proceedings. Counsel addressed each of defendant's claims in his postconviction petition and determined that "there are no meritorious issues which can be raised" on defendant's behalf and sought leave to withdraw pursuant to *People v. Greer*, 212 Ill. App. 3d 192 (2004).

¶ 27 In September 2012, the trial court granted postconviction counsel's motion to withdraw. The court then held a hearing on defendant's postconviction petition. After considering the merits of defendant's petition, the trial court granted the State's motion to dismiss. Defendant filed a motion for reconsideration, which the trial court denied in March 2013.

¶ 28 This appeal followed.

¶ 29 On appeal, defendant argues that the trial court erred in allowing his postconviction counsel to withdraw. Specifically, defendant contends that his postconviction counsel failed to address the untimeliness of his *pro se* postconviction petition, and she provided unreasonable assistance when she failed to conduct sufficient investigation into defendant's claims of ineffective assistance of trial counsel for failing to call Detective Sergeant Daniel Martin at trial to impeach the State's witnesses and to subpoena Clifford Giles, who would have testified that he

saw "Michael Mattson" with Pierce's property. Defendant has not challenged the dismissal of his postconviction on the merits.

¶ 30 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2012)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2012); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. “A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment.” *People v. Evans*, 186 Ill. 2d 83, 89 (1999). “The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal.” *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶ 31 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether “the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2002). If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage. Counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2002)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2002)). At this stage, the circuit court must determine whether the petition and any

accompanying documentation make a substantial showing of a constitutional violation. See *Coleman*, 183 Ill. 2d at 381. If no such showing is made, the petition is dismissed. “At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard.” *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2002).

¶ 32 Here, the trial court did not rule on defendant's postconviction petition within 90 days of filing so it was advanced to the second stage and counsel was appointed. “Counsel's duties, pursuant to Rule 651(c), include consultation with the defendant to ascertain his contentions of deprivation of constitutional right, examination of the record of the proceedings at the trial, and amendment of the petition, if necessary, to ensure that defendant's contentions are adequately presented.” *Pendleton*, 223 Ill. 2d at 472; see also Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

However, postconviction counsel is not required to advance frivolous or spurious claims and “ ‘is only required to investigate and properly present the *petitioner's* claims.’ ” (Emphasis in original.) *Pendleton*, 223 Ill. 2d at 472 (quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993)). Under Rule 651(c), postconviction counsel is only required “to examine as much of the record ‘as is necessary to adequately present and support those constitutional claims raised by the petitioner.’ ” *Pendleton*, 223 Ill. 2d at 475-76 (quoting *Davis*, 156 Ill. 2d at 164). Postconviction counsel may conduct a more thorough examination of the record and raise additional claims, but he or she is under no obligation to do so. *Pendleton*, 223 Ill. 2d at 476. Further, defendant in

postconviction proceedings is only entitled to a “reasonable” level of assistance, which is lower than the standard given under federal or state constitutions. *Pendleton*, 223 Ill. 2d at 472.

¶ 33 In this case, postconviction counsel was appointed and over several years, investigated the allegations contained in defendant's postconviction petition. This investigation included locating the missing sexual assault kit and moving for forensic testing on the assertion that the results would exclude defendant. However, the DNA testing results were a match to defendant. The forensic report indicated that “[a]pproximately 1 in 100 quadrillion Black, 1 in 180 quadrillion Hispanic or 1 in 230 quadrillion White unrelated individuals cannot not be excluded as having contributed to this male DNA profile.” In July 2012, counsel filed her Rule 651(c) certificate and a motion for leave to withdraw as appointed counsel because defendant's postconviction allegations lack merit. Counsel based her motion on the supreme court's decision in *People v. Greer*, 212 Ill. 2d 192 (2004).

¶ 34 In *Greer*, the defendant pled guilty to first degree murder in 1993 and received a 60-year sentence. His conviction and sentence were affirmed on direct appeal. In December 2000, defendant filed his *pro se* postconviction petition, but the trial court did not act on it within 90 days and counsel was appointed. *Id.* at 194-95. Postconviction counsel later moved to withdraw as counsel because there were no meritorious issues to present and filed a brief complying the procedures set forth in *Anders v. California*, 386 U.S. 738 (1967). The trial court granted the attorney's motion and dismissed defendant's postconviction petition *sua sponte*. *Id.* at 195.

¶ 35 On direct appeal, the appellate court affirmed that the counsel can seek to withdraw if no meritorious issues can be presented, but found that the trial court erred in dismissing the petition *sua sponte*. *Id.* (citing *Greer*, 341 Ill. App. 3d 906, 910 (2003)).

¶ 36 The supreme court noted "at the outset, that the defendant in this case arrived at the second stage of postconviction proceedings without there ever having been a determination that his *pro se* petition presented the gist of a meritorious claim." *Id.* at 202. Nonetheless, the court recognized that "sections 122-2.1 and 122-4 of the [Post-Conviction] Act require appointment of counsel for an indigent defendant desiring representation when his or her *pro se* postconviction petition is not summarily dismissed by the circuit court within 90 days of filing, irrespective of whether the circuit court has actually considered the merits of the petition." *Id.* at 202-03.

¶ 37 "Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf. If amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule. Moreover, the mere filing of an amended petition by counsel under such circumstances would appear to violate the proscriptions of Supreme Court Rule 137 (155 Ill. 2d R. 137)." *Id.* at 205. "An attorney who is appointed to represent a defendant after the 90-day default provision of the [Post-Conviction] Act is applied may well find that he or she represents a client attempting to advance arguments that are patently without merit or wholly frivolous, a client whose petition would have been summarily dismissed had the circuit court timely considered the merits of the petition." *Id.* at 207.

¶ 38 The defendant in *Greer* asserted that his attorney could not move to withdraw because such action is not specifically authorized under the Post-Conviction Act. The supreme court considered and rejected this argument, noting that "[l]egislative silence is not dispositive." *Id.* at 208. First, the court found that section 122-4 of the Post-Conviction Act seeks to penalize a defendant filing a frivolous petition and is consistent with the defendant's argument that the legislature intended for a defendant filing a frivolous petition to have the benefit of appointed

counsel. *Id.* Next, the court observed the Post-Conviction Act's grant of statutory power for the trial court to dismiss frivolous petitions at the first stage. "The fact that the legislature has required appointment of counsel for indigent defendants when the circuit court has not considered a postconviction petition in a timely manner does not, in our opinion, indicate that the legislature intended that such a defendant have continuing representation throughout the remainder of postconviction proceedings, where counsel later determines that the petition is frivolous or clearly without merit." *Id.* at 209. The court found that the legislature did not intend to give a benefit to a defendant who files a frivolous petition, but was not considered in a timely fashion over a defendant whose frivolous petition was dismissed at the first stage. *Id.* Finally, the court concluded that it was "inconceivable" that the legislature intended to confer a statutory right to counsel in postconviction proceedings that would be of greater duration than defendants on direct appeal, where counsel are permitted to withdraw under *Anders* procedures. *Id.* The court observed that postconviction defendants are only entitled to a reasonable level of assistance whereas defendants on direct appeal are entitled to constitutional provisions and a greater level of assistance. *Id.*

"We are confident that the legislature did not intend to require appointed counsel to continue representation of a postconviction defendant after counsel determines that defendant's petition is frivolous and patently without merit. Nothing in the [Post-Conviction] Act requires the attorney to do so, and the attorney is clearly *prohibited* from doing so by his or her ethical obligations." (Emphasis in original.) *Id.*

¶ 39 The *Greer* court then reviewed the defendant's claims and agreed with counsel that the claims were refuted by the record and meritless. *Id.* at 210-11.

"Although we hasten to emphasize that the inability of postconviction counsel to 'properly substantiate' a defendant's claims is *not* the standard by which counsel should judge the viability of a defendant's postconviction claims, and that an attorney moving to withdraw should make some effort to explain *why* defendant's claims are frivolous or patently without merit, it nonetheless appears that counsel fulfilled his duties as prescribed by Rule 651(c), and the record before us supports counsel's assessment that the defendant's postconviction claims were frivolous and without merit." (Emphasis in original.) *Id.* at 211-12.

¶ 40 Here, postconviction counsel filed her motion for leave to withdraw pursuant to *Greer* and detailed why each of defendant's claims lacked merit. Defendant's first claim was of newly discovered evidence that his trial attorney failed to speak with Clifford Giles, who would have testified that "Michael Mattson" was in possession of Pierce's property. Postconviction counsel stated that an investigator from the public defender's office located Giles, who stated that he did not know defendant and did not want to be involved in this case. Counsel noted that there was no mention of "Michael Mattson" in the police reports, but there was an address and phone number for a Michael Madison in trial counsel's notes. Postconviction counsel verified the name and address. She called and left messages for Madison, but received no response.

¶ 41 Defendant next alleged perjured testimony by police, but counsel stated that defendant failed to specify which testimony was perjured and there is no evidence to show perjury by the officers in this case. Defendant next contended that he never signed his statement to the ASA. Counsel stated that the signature on defendant's waiver of extradition appeared to be similar and defendant was not contesting that signature as "false."

¶ 42 Next, defendant claimed that there was no physical evidence and no fingerprints inside Pierce's house. Counsel responded that Pierce testified that gloves found in her dining room were not hers and were not there prior to the home invasion. The gloves were not tested. At defendant's request, a motion for forensic testing was filed and the lab results found that the swabs from the sexual assault kit were a DNA match to defendant.

¶ 43 Defendant next asserted that the State suppressed evidence favorable to him, but counsel stated that defendant did not specify what evidence the State suppressed. Defendant also contended that the jury was conviction prone and included non-English speakers. Counsel responded that there was no evidence to show that the jury was conviction prone. Counsel also pointed out that one juror who seemed confused by the questions in *voir dire* was excused.

¶ 44 Defendant also raised claims of ineffective assistance of trial counsel, including failure to investigate the case, including the previous claim of Giles, and failure to subpoena Detective Martin, whose testimony would have impeached the other officers at trial. Postconviction counsel restated her investigation of Giles. She also reviewed Detective Martin's grand jury testimony and found that it would not have impeached any of the officers who testified at trial.

¶ 45 Defendant further alleged ineffective assistance of appellate counsel, asserting that counsel only filed an *Anders* brief on direct appeal. Postconviction counsel responded that counsel on appeal did file a brief, raising a jury instructions issue. Defendant next claimed that

the State committed prosecutorial misconduct because the prosecutor knew the officers were perjuring themselves and that the prosecutor engaged in shifting the burden of proof. Counsel responded that there was no evidence of either claim in the record. Defendant also contended that his 75-year sentence was based on his refusal to plead guilty and a 1980 conviction, but counsel observed that there is no evidence to support either claim in the record and the trial court did not mention the prior conviction when the sentence was imposed. Finally, defendant asserted that he was indicted illegally. Counsel stated that an examination of the indictment does not indicate an illegality.

¶ 46 Postconviction counsel concluded her motion by stating she has determined that there are no meritorious issues which can be raised on defendant's behalf, and accordingly, she sought to withdraw under *Greer*.

¶ 47 We find that postconviction counsel's motion and Rule 651(c) certificate adhered to the provisions of *Greer*. Counsel stated that in court that after reviewing defendant's postconviction petition and in light of the results of the DNA testing, it was "imperative" to withdraw. Counsel addressed each of defendant's claims and recognized that the record either refuted the claim or that defendant lacked evidence to support his allegations. We find no error in the trial court's granting of postconviction counsel motion for leave to withdraw, and as discussed below, defendant has failed to show that he received unreasonable assistance of postconviction counsel under Rule 651(c).

¶ 48 Defendant argues on appeal that his postconviction counsel failed to fulfill her obligations under Rule 651(c) and her certificate was inadequate because she did not amend his petition to assert that his untimely filing was not due to his culpable negligence. It is uncontested that defendant's postconviction petition was due in April 2000 and thus, was untimely when filed

in October 2001. See 725 ILCS 5/122-1(c) (West 1998). Defendant contends that the record shows that defendant may have had an argument that the delay was not due to culpable negligence.

¶ 49 Defendant points to a *pro se* petition for an extension of time filed in November 2000. The motion consists of general language for an extension of time with blank spaces to be filled in with defendant's name, convictions, sentence, and relevant dates. The motion sought an extension to January 1, 2001, to file his postconviction petition. The motion stated that defendant "have sought [sic.] the assistance of fellow inmate to help him prepare this petition." It further stated, "Due to Petitioner/Deft. condition [sic.] eg. institutional [sic.] lock down, segregation detention, and his lacking legal skills. He was unable to present a timely appeal to the Illinois Supreme Court." The trial court denied defendant's request for an extension of time. Defendant asserts that based on the language in this motion, his counsel had some material to argue that the delay was not due to his culpable negligence because evidence of institutional lockdowns has been held to rebut culpable negligence when the defendant has shown that he was deprived of a meaningful opportunity to timely prepare his postconviction petition. See *People v. Van Hee*, 305 Ill. App. 3d 333, 337 (1999) and *People v. Mitchell*, 296 Ill. App. 3d 930, 933 (1998). We point out that defendant's motion offers no evidence of institutional lockdowns nor does the record contain any further explanation of the untimely filing. When considering defendant's petition, the trial court noted that defendant's postconviction petition was untimely, and asked defendant for his response and defendant failed to provide a reason for the untimely filing.

¶ 50 However, even if postconviction counsel's conduct failed to satisfy Rule 651(c), we observe that defendant suffered no prejudice because the trial court considered and dismissed

defendant's postconviction petition on the merits. While the trial court did note that defendant's petition was untimely, the court explicitly stated that defendant's claim of actual innocence "does not prevail," and that his other claims were "without merit." Defendant was not precluded from a consideration of the merits of his petition by any action of his postconviction counsel. Further, at the hearing on defendant's motion for reconsideration, the trial court reiterated that it "did, in fact, consider the defendant's post-conviction petition as it was. Upon consideration of it, The Court [*sic*] did, in fact, find that there were no viable issues to be presented for this court to allow it to go to any further stages." It would be fruitless to remand and allow defendant to present an argument that he was not culpably negligent in filing his untimely petition when the trial court already considered the merits of the petition and dismissed it on that basis. Therefore, we find that defendant has failed to show that he received unreasonable assistance from his postconviction counsel.

¶ 51 Defendant further argues that his postconviction counsel failed to conduct a sufficient investigation because his petition raised viable postconviction claims. First, defendant contends that his postconviction counsel failed to conduct a reasonable investigation regarding defendant's claim that his trial counsel was ineffective for failing to subpoena Giles to testify at trial. We disagree.

¶ 52 Postconviction counsel investigated defendant's allegations involving Giles. According to defendant, Giles told members of his family and trial counsel that he saw "Michael Mattson" with Pierce's property after the offense. An investigator from the public defender's office located Giles, who stated that he did not know defendant and did not want to be involved in the case. Counsel also stated that there was no mention of a "Michael Mattson" in the police reports, but trial counsel's notes included a Michael Madison. After she verified his address and phone

number, counsel called and left messages for Madison, but her calls were not returned.

Defendant asserts that counsel should have sent an investigator to Madison's address to speak with him in person and also could have inquired into the identity of defendant's family member who was present for a conversation between Giles and trial counsel.

¶ 53 Defendant's claims lack merit. Postconviction counsel attempted to verify defendant's allegations. An investigator spoke with Giles, but he denied knowing defendant and did not want to be involved in the case. Counsel also verified the address and phone number of a Michael Madison, leaving messages, but did not receive a response. Defendant asserts that counsel did not amend his petition with an affidavit from Giles and Mattson/Madison to support his claim. The supreme court in *People v. Johnson*, 154 Ill. 2d 227, 245 (1993), observed that "[a]t a minimum, counsel had an obligation to attempt to obtain evidentiary support for claims raised in the post-conviction petition." Counsel did so here, as she attempted to contact both Giles and Mattson/Madison. Giles disavowed any knowledge and Mattson/Madison did not return messages. Defendant suggests that counsel should have done more regarding Mattson/Madison, but cites no authority requiring any further research and investigation than what was performed by postconviction counsel. See *People v. Broughton*, 344 Ill. App. 3d 232, 240 (2003) ("Although Rule 651(c) requires counsel to consult with defendant either by mail or in person, counsel is not required to correspond with defendant's unavailable relatives to pursue redundant, nonexculpatory evidence").

¶ 54 Moreover, none of defendant's allegations involving Giles or Mattson/Madison would have been exculpatory. First, we point out that DNA testing of the vaginal swabs from the sexual assault kit collected from Pierce after the home invasion matched defendant. Defendant's argument ignores this significant fact. Nothing Giles or Mattson/Madison could have said would

have negated the fact that defendant's DNA was found in the semen collected from Pierce. Further, Pierce knew defendant, immediately named defendant as the perpetrator, and identified him in a photo array, lineup, and in court. Also, defendant never specifies what "property" of Pierce's was involved. The facts of the case establish that defendant took Pierce's wallet and his own statement to the ASA indicated that he threw the wallet in a field after he took the money. The possession of the wallet by a third party after the commission of the crime does not exculpate defendant. Defendant fails to argue how either of these witnesses would have provided exculpatory evidence. Neither trial counsel nor postconviction counsel erred in failing to pursue witnesses that would not have provided exculpatory evidence.

¶ 55 Defendant next contends that postconviction counsel provided unreasonable assistance by failing to amend his postconviction petition to present a claim of ineffective assistance of trial counsel for failing to subpoena Detective Martin. In his petition, defendant argued that Detective Martin's grand jury testimony would have impeached police officers who testified at trial. Postconviction counsel reviewed the testimony and determined that it lacked merit. Defendant concedes that Detective Martin's grand jury testimony would not impeach any of the police officers. On appeal, defendant asserts that Detective Martin's grand jury testimony would have impeached Pierce and his postconviction counsel should have amended his petition to include this claim.

¶ 56 During his grand jury testimony, Detective Martin was asked by an assistant State's Attorney, "And at that time did the defendant put the victim on her back and place a pen to her neck stating that he had a knife on her?" Detective Martin answered, "Yes." Defendant argues that this testimony would have impeached Pierce's testimony that defendant had a knife and that

postconviction counsel should have reshaped his petition to assert that his trial counsel was ineffective for failing to impeach Pierce with Detective Martin's testimony.

¶ 57 However, Pierce never testified that defendant had a knife. Pierce's testimony was that defendant told her had a knife. When asked what happened after defendant blindfolded and gagged her, Pierce stated, "I think he told me had a knife, and he wanted some money, he said he knew I had some money." Later, when asked what happened after defendant took her back to her bedroom after getting her purse, Pierce testified, "He pushed me back on the bed, and he said – I was crying, he kept saying stop crying, and he said he had a knife, and he ripped my panties off." Pierce later testified as follows when defendant was trying to find her money in her purse.

"Q: What happened then?

A: I got kind of confused because I sometimes put part of my money in my coin purse, part of my money in my wallet, I kept thinking I didn't know what he was going to do if he didn't find the money because he said he had a knife and asked me to feel the handle of it –

Q: When he asked you to feel the handle of the knife, could you tell the ladies and gentlemen of the jury, did you feel anything?

A: I felt the handle, I felt the handle that felt like the handle of a knife –

Q: What did it feel like?

A: Like metal, but I didn't feel anything sharp.

Q: Where was this handle put to your body?

A: My arm.

Q: So you say you felt what you thought was the handle of
a knife?

A: Yes.

Q: Was the blade ever put to your skin?

A: I felt something."

¶ 58 We further note that ASA Holmes read defendant's statement into the record, which included that defendant said he held a pen to Pierce's arm and told her not to move and he would not hurt her. Nothing in Detective Martin's grand jury testimony would have impeached Pierce's testimony. Contrary to defendant's argument, Pierce never testified that defendant had a knife, rather her testimony was that defendant told her he had a knife, and nothing in the record impeaches this testimony. Postconviction counsel did not err in failing to amend defendant's petition to include this meritless claim.

¶ 59 Defendant finally argues that the nine-year delay between the filing of his petition and the filing of the motion for forensic testing underscores his claims of unreasonable assistance. While we do not condone such delays in the adjudication of postconviction petitions, there is nothing in this record to support a claim of unreasonable assistance. Postconviction counsel searched for and located the missing sexual assault kit by following multiple motions and obtaining a court order. Counsel then filed a motion for forensic testing on defendant's behalf. Counsel, as previously discussed, also investigated both Giles and Mattson/Madison to determine if they could support defendant's allegations. The record shows that counsel actively investigated defendant's claims in his postconviction petition and cannot support a claim of unreasonable assistance. We find that counsel properly filed a Rule 651(c) certificate and the trial court did

not err in granting counsel leave to withdraw where defendant's postconviction petition set forth frivolous claims.

¶ 60 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 61 Affirmed.