FOURTH DIVISION
September 3, 2015

1-13-2403

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. 02 CR 09846
	)	
NAJA TRIPLETT,	)	Honorable
	)	Michele M. Simmons,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County's judgment dismissing defendant's postconviction petition alleging ineffective assistance of counsel is affirmed; defendant failed to make a substantial showing of prejudice from trial counsel's alleged failure to inform him the State was proceeding on a theory of accountability prior to defendant waiving his right to testify at his trial, and defendant received reasonable assistance of postconviction counsel.

¶ 2 On May 20, 2005, a jury found defendant, Naja Triplett, guilty of first degree murder. The jury also found that "the additional fact does not exist that, during the commission of the offense Naja Triplett personally discharged a firearm." The circuit court of Cook County sentenced defendant to 40 years' imprisonment. This court affirmed defendant's conviction and sentence on direct appeal. Defendant filed a petition for postconviction relief alleging, among other claims, ineffective assistance of counsel. The petition proceeded to the second stage of postconviction proceedings. The trial court granted the State's motion to dismiss the petition.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 Defendant's conviction for first degree murder arose from the shooting death of Cortez Bell on June 16, 2001. This court has previously discussed the evidence in both defendant's and co-defendant's direct appeals. Only a brief summation of some of the evidence at trial is necessary for an understanding of the issues in this appeal.

¶ 6 The State tried defendant in a separate but simultaneous jury trial with co-defendant Antawan Johnson. On the day of the murder, the victim was playing dice on the street with other individuals including Airrion Smith and Clifton Ross. Smith testified that Johnson approached him and asked if Smith wanted to purchase guns. Smith declined the purchase. Johnson asked to borrow money from Smith to join the game and Smith lent him the money. Johnson won some money in the first game but lost his money when he moved to a different higher-stakes game. At that point, defendant rode up on a bicycle. Defendant and Johnson spoke to each other then left the area. Smith testified that approximately 45 minutes later he

left the area with his friend Clifton Ross to go to the rear of a nearby abandoned house. When Smith and Ross got to the back of the abandoned house, Smith testified, Smith saw defendant and Johnson with two "long guns" on the side of a different house. Smith testified that he saw both men point the guns across the street in the direction of the area of the dice game. Smith and Ross ran. Smith testified he heard three or four gunshots but did not see who fired. After Smith and Ross stopped running, Smith saw defendant and Johnson running away carrying the two "long things" they had earlier. Smith testified these events occurred at approximately 11:00 p.m.

¶ 7 On September 3, 2008, defendant filed a *pro se* petition for postconviction relief. On August 17, 2012, postconviction counsel filed a supplemental postconviction petition. The supplemental postconviction petition alleged defendant received ineffective assistance of counsel at trial because trial counsel (1) did not properly advise defendant of the State's theory he was guilty by accountability resulting in a waiver of defendant's right to testify that was not knowing and intelligent and (2) failed to investigate and present a witness who could have established an alibi defense. Accompanying the supplemental petition was a certification by postconviction counsel that he had examined the record of proceedings at trial and the entire record on appeal and filed a supplement to defendant's *pro se* petition necessary to adequately present defendant's contentions that his constitutional rights were violated.

¶ 8 At the conclusion of the hearing on the State's motion to dismiss, the trial court found that defendant had failed to meet his burden to make a substantial showing of a violation of his constitutional rights.

¶ 9 This appeal followed.

¶ 10 ANALYSIS

¶ 11 The trial court dismissed the postconviction petition at the second stage of postconviction proceedings. This court reviews a second stage dismissal of a postconviction petition *de novo*. *People v. Brown*, 2015 IL App (1st) 122940, ¶ 44. The question for the court is whether the allegations in the petition that are supported by the trial record and any accompanying affidavits make a substantial showing of a deprivation of the petitioner's constitutional rights such that an evidentiary hearing is required to determine the truth or falsity of the alleged violations. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998); *People v. Wegner*, 40 Ill. 2d 28, 32 (1968).

¶ 12 In answering this question, this court will accept all well-pled facts in the petition and affidavits as true. *Brown*, 2015 IL App (1st) 122940, ¶ 44. The petition's allegations of fact are liberally construed in favor of the petitioner and in light of the original trial record. *Coleman*, 183 Ill. 2d at 382.

> "The second stage of postconviction review tests the legal sufficiency of the petition. Unless the petitioner's allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or 'show' a constitutional violation. In other words, the 'substantial showing' of a constitutional violation that must be made at the second stage ([citation]) is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, which if proven at an evidentiary hearing, would entitle

> petitioner to relief." (Emphasis omitted.) *People v. Domagala*, 2013 IL 113688, ¶ 35.

¶ 13 Defendant's allegations of a deprivation of his constitutional rights are both grounded on a claim of ineffective assistance of counsel. Claims of ineffective assistance of counsel in a postconviction petition are judged under the familiar *Strickland* test. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11.

> "There are two prongs to the test: first, the defendant must show that counsel's performance was deficient, and second, the deficient performance must be prejudicial to the defendant. [Citation.] The performance prong is satisfied if counsel's performance was objectively unreasonable under prevailing professional norms, and the prejudice prong is satisfied if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [Citation.]" (Internal quotation marks omitted.) *Id.*

¶ 14 With all of the foregoing principles in mind, we will address defendant's allegations in turn.

¶ 15 1. Failure to Advise Defendant of State's Theory of Accountability

¶ 16 Defendant maintains that trial counsel's failure to advise him that he could be convicted on a theory of accountability[1] resulted in a waiver of his right to testify that was not knowing and intelligent. "The ultimate decision on whether to testify should be made by the defendant, with the advice of counsel." *People v. Knox*, 58 Ill. App. 3d 761, 767 (1978). "The issue of whether the right to testify has been violated is raised by asserting the ineffective assistance of counsel." *People v. Whiting*, 365 Ill. App. 3d 402, 408 (2006). A claim that erroneous advice of counsel caused a defendant to testify or not to testify is sufficient to state a claim of a deprivation of his or her constitutional rights. See *People v. Seaberg*, 262 Ill. App. 3d 79, 84 (1994). However, at the second stage of postconviction proceedings, dismissal is proper if the allegations in the petition are contradicted by the trial record. *Coleman*, 183 Ill. 2d at 382.

¶ 17 In support of his petition, defendant averred that trial counsel never explained to him that he could be convicted based on the theory of accountability. Defendant stated he thought he could only be convicted if the State proved he fired the shot that killed Cortez Bell. Defendant's affidavit states as follows: "I had always told [trial counsel] that I would like to testify. Each time we discussed it, he strongly discouraged me from testifying. [Trial

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[1] "Accountability is not a crime in and of itself but, rather, a mechanism through which a criminal conviction may result. [Citation.] Section 5–2(c) of the Criminal Code of 1961 provides that a person is legally accountable for the conduct of another when either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. [Citation.]" (Internal quotation marks omitted.) *People v. Rodriguez*, 229 Ill. 2d 285, 288-89 (2008).

counsel] said I would be hurt on cross-examination, and things would get messed up. I decided to go with his recommendation."

¶ 18 Defendant further averred that when the trial court admonished him about his right to testify, he "did not understand I was being tried on an accountability theory. I never understood about accountability until I heard the prosecutor discuss it in closing argument. If I had known about accountability, I would have insisted on testifying. I believe it would have been critical to explain to the jury that I had nothing to do with the shooting. I was not present at and had nothing to do with the shooting of Cortez Bell." The postconviction petition is also supported by affidavits from Lushawn Smith, defendant's brother-in-law, and Shannia Smith, defendant's sister.

¶ 19 The State argues that defendant's assertion he did not understand the concept of accountability is belied by the record. The State asserts that defendant was present in court on no less than three occasions when the concept of accountability was discussed by either the assistant state's attorney or defendant's trial counsel: (1) during opening statements when the State asserted defendant and co-defendant acted as a "criminal team," (2) again during opening statements when trial counsel rebutted the State by asserting that defendant's not guilty plea was a statement that defendant "did not abet, *** did not facilitate, *** did not plan [or] help out in any way in the death of Cortez Bell," and (3) when trial counsel argued for a directed verdict by asserting in part that there had not been "any showing of accountability." The State argues it is suspicious that trial counsel would explain accountability to defendant's brother-in-law and not defendant as stated in Lushawn's affidavit, but, regardless, neither affidavit supports defendant's position he was unaware the State was proceeding against him

on a theory of accountability. Alternatively, the State argued that even if defendant could establish that trial counsel's performance was deficient, defendant cannot establish prejudice because his own testimony is unlikely to change the result of the trial.

¶ 20 In reply defendant argues that he was not expected to learn about the theory of accountability by "piecing together comments made by his and opposing counsel in open court." Instead, he had a right to waive his right to testify after full consultation with his attorney, and trial counsel denied him that right by failing to fully consult defendant on the State's theory of accountability. Defendant also asserts it is inappropriate to attack the veracity of Mr. Smith's affidavit because all well-pled facts are taken as true at this stage of proceedings. Finally, defendant argues the denial of the right to make a knowing and intelligent waiver of his right to testify is sufficient prejudice to find ineffective assistance of counsel. Defendant asserts he was prejudiced because his testimony would have created a credibility contest between himself and Airrion Smith that may have resulted in a different outcome.

¶ 21 We agree with the State that the allegation that defendant did not learn he was being prosecuted on a theory of his accountability for the acts of his co-defendant is contradicted by the record. This court would not expect a criminal defendant to piece together comments in court to learn the State's theory of his or her guilt. But where defendant avers that a comment during the State's closing argument alerted him to the fact he could be convicted on a theory of accountability we cannot ignore the many other statements defendant heard that reasonably should have had the same effect. Defendant specifically averred that he did not learn he could be convicted on a theory of accountability "until I heard the prosecutor discuss

it in closing argument." Defendant has not identified for this court what the assistant state's attorney said during closing argument that caused his revelation. The State argued in closing that "If you participate in a crime with somebody else, you are responsible for every single result." Shortly thereafter, the State argued to the jury: "If you believe that Antawan Johnson fired that gun that killed Cortez Bell, Naja Triplett is guilty, because he is just as responsible." Regardless, as the State pointed out, both during opening arguments and in trial counsel's argument for a directed finding, and as conceded in defendant's appellant's brief, "[i]ssues related to accountability were discussed before [defendant] waived his right to testify."

¶ 22 Specifically, during opening the State said the following to the jury: "As you are listening to the testimony, seeing the evidence, look to the criminal teammates. Look for those things that they did together that resulted in the death of Cortez Bell. That will then result in your verdict of guilty of murder for Naja Triplett." We also find informative trial counsel's argument for a directed verdict in which trial counsel contrasted direct responsibility and accountability. Trial counsel argued that the State failed to present evidence that defendant personally fired a gun then referenced the State's earlier arguments about alleged teamwork to argue the State had also failed to prove accountability as an alternate theory of guilt. Defendant's trial counsel argued:

> "The People opened up their trial stating to look for team work. There hasn't been any showing of accountability either, Judge, any showing of aiding, abetting, or solicitation. So both on the stated grounds of actual participation and act, and the unstated

> but argued or intimated grounds accountability, the People, when the evidence is viewed in the light most favorable to the State, fail, Judge, to support a verdict of guilty."

In rebuttal, the State argued: "Under the theory of accountability, the actions of one equal the actions of both. Clearly they acted together. They left together. They came back together. They both had guns. Gunshots rang out." It would strain credulity to find that defendant understood the State's closing argument but failed to grasp the clear distinction drawn by his own attorney as to the various ways the State sought to find defendant guilty of murder or any of the earlier arguments during which the attorneys discussed accountability.

¶ 23 The affidavits in support of the petition add nothing to this inquiry. Defendant's sister Mrs. Smith averred that she spoke with defendant about his case many times and defendant "never said anything about his being tried on an accountability theory." According to Mrs. Smith's affidavit, defendant "said a number of times before trial that he wouldn't be convicted because he didn't do anything." Mrs. Smith also stated that trial counsel did not explain that defendant was being tried based on accountability to her. That trial counsel did not explain to defendant's sister that defendant was being tried under a theory of accountability does not mean trial counsel did not explain that fact to defendant and, more importantly, does not mean that defendant did not understand that fact as early as the State's opening statement. Defendant's statement before trial to his sister as to why he would not be convicted does not establish what defendant did or did not know about the State's theory of the case before trial and, regardless, says nothing to what defendant understood before voluntarily waiving his right to testify after trial began.

¶ 24 Defendant's brother-in-law Mr. Smith averred that one or two months before trial he spoke with trial counsel for approximately five minutes. During that conversation trial counsel explained to Mr. Smith that defendant was being tried on an accountability theory and tried to explain the law. Mr. Smith averred he "understood some of what he was saying but not all of it." Mr. Smith stated that after the trial began, he spoke with defendant and tried to explain to defendant what trial counsel had told him. Mr. Smith stated that based on defendant's responses and tone he could tell that defendant "did not understand the concept at all." Rather, defendant "refused to believe that he could be convicted unless the State proved he fired the shot that killed the victim." Mr. Smith also averred that defendant "did not say anything indicating his trial attorney had discussed accountability with him before." Again, what defendant did not say to Mr. Smith is not evidence of what defendant knew. Mr. Smith's affidavit does not state at what point after trial began he perceived that defendant "did not understand the concept at all." It may have been before trial counsel's argument for a directed verdict, which we find certainly would have put defendant on notice of the State's theory in light of defendant's argument he learned that information from the State's closing argument. Regardless, Mr. Smith's subjective belief that defendant did not understand the concept is insufficient to overcome clear evidence in the record that it was known to defendant that the State was proceeding under a theory of accountability.

¶ 25 "Illinois courts have voiced concern over the ease with which this ineffectiveness of counsel claim can be made." *People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 67 (citing *People v. Brown*, 54 Ill. 2d 21, 24 (1973)). The defendant in *Cleveland* claimed that when his attorney rested the defense case, he informed the attorney that he wished to testify, to which the

attorney allegedly responded "not now, I'm the attorney be patient." *Cleveland*, 2012 IL App (1st) 101631, ¶ 66. The *Cleveland* court held that because the defendant's silence could be taken as acquiescence in his attorney's decision to rest without calling the defendant as a witness, neither the record nor the defendant's affidavit provided substantial support for the defendant's claim he was thwarted from testifying. *Id.*

¶ 26 We recognize that this case is different in that here, defendant does not claim trial counsel prevented him from testifying, but that trial counsel's allegedly deficient performance caused defendant to make a decision he would not have made if trial counsel performed adequately. Nonetheless, *Cleveland* is informative because here, the record supports a finding that defendant acquiesced in trial counsel's advice not to testify rather than making a conscious decision not to testify based on a misconception of the law that was later corrected. See *Cleveland*, 2012 IL App (1st) 101631, ¶ 67 ("While the defendant claims he was unaware that he could address the court at the time of trial to announce his desire to testify, we note that the defendant addressed the court at sentencing. He spoke after counsel had argued for a new trial based on alleged trial errors. At no point did the defendant state or even intimate that he was precluded from testifying before the jury."). In this case, there is nothing to suggest that defendant voiced a concern that he had not testified before defense counsel's closing argument, during sentencing, or during posttrial proceedings. Compare *Whiting*, 365 Ill. App. 3d at 408 ("defendant promptly objected to the waiver of her right to testify, via the motion for new trial").

¶ 27 Some courts have found ineffective assistance of counsel when counsel provides the defendant with incorrect information with respect to the consequences of taking the stand,

such as informing the defendant that his or her testimony can be impeached with prior statements or his or her credibility attacked with prior convictions, when that is not true. See, *e.g.*, *Seaberg*, 262 Ill. App. 3d at 83. In those cases, the defendant's counsel makes an affirmative misstatement of the law which causes the defendant to make a choice, and the record suggests the defendant very likely would have made the opposite choice absent the misstatement of law. This case presents a different situation. Defendant does not allege trial counsel misstated the law and that trial counsel's misstatement caused defendant to choose not to testify. In other words, defendant does not claim he was misled into making a poor choice; rather, defendant claims to have been operating under a subjective misapprehension that counsel failed to correct. Defendant's argument he received ineffective assistance of counsel fails because the record refutes defendant's claim he was not relieved of his misapprehension prior to waiving his right to testify.

¶ 28 The record contains evidence defendant understood the decision of whether to testify was his and his alone, and defendant does not refute that evidence in this appeal. Defendant's claims regarding understanding the proceedings are not supported by the record. We believe defendant must be held to have knowingly waived his right to testify. See *Knox*, 58 Ill. App. 3d at 768. The trial court properly dismissed this claim in the postconviction petition.

¶ 29 2. Failure to Comply with Supreme Court Rule 651(c)

¶ 30 Next, defendant argues postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) because postconviction counsel allegedly failed to investigate a matter that was necessary to present one of defendant's claims. Defendant argues

this failure requires remand for further second stage proceedings. Rule 651(c) provides, in pertinent part, as follows:

> "The record filed in [the trial] court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c).

¶ 31 On appeal, defendant asserts that postconviction counsel failed to examine a police report that was necessary to a presentation of defendant's claim trial counsel failed to investigate and present an alibi defense. According to defendant, the police report "went to the issue of whether [defendant's] alibi covered the time of the incident." When postconviction counsel appeared in court to file the supplemental petition and certification, and after the trial court granted leave to file both, the following exchange with the trial court occurred:

> "MR. HAZE [Postconviction counsel]: Judge, there's one matter I wanted to raise as well. I mentioned it briefly to the state's attorney, but in writing this up, one of our issues deals

with possible alibi defense that could have been looked into and there's an issue exactly what time the shooting took place.

Looking over the transcript and preparing the document, very little in the record of this. Our office does not have the trial file, so I don't have full access to that material.

Just for the sake of completeness, I would like to ask leave to subpoena those just to make sure there is nothing in them under these circumstances that contradict what I got in here.

THE COURT: To subpoena what?

MR. HAZE: The police report.

THE COURT: The police reports.

MS. WALLS [Assistant State's Attorney]: Well, Judge, I can get counsel a copy of police report [*sic*]. Our trial file is held here in the building so that is not really an issue. The subpoena doesn't need to be issued.

My only concern is the fact that a 651C has been filed, a supplemental petition has been filed. Now there's a possibility of an additional claim or supplementing a claim. I thought we were done. I thought this included all the claims completely. So I've got no problem with getting a copy of the police report if

that's what your Honor wants me to do. I just have some concerns as to whether this is going to lead to something else.

THE COURT: Well, I'll deal with that. I made it clear all issues should be in as of this point.

MR. HAZE: This would not be with respect to new issues, all it would be is relating to documentation on the one we have. And as I say, I don't even know if there would be anything in addition.

THE COURT: How about, State, you can tender the police report to counsel. Is that what you're indicating?

MS. WALLS: I can.

THE COURT: Let's take some time, do that, Mr. Haze, look over them, let me know your position, please.

MR. HAZE: That will be fine."

¶ 32 The trial court then set the matter for the parties to return to court to "see where you are on them." The State indicated it needed to review the supplemental petition to file a motion to dismiss and that it could do so by the return date. The court set the next court date as October 19, 2012 for the State to file a motion to dismiss and for the State to tender the police report in the interim. When the parties returned to court on October 19, 2012, the following exchange occurred:

"THE COURT: On August 17th, an order was entered for the State to receive the appellate record. State was to tender additional police reports.

This Court noted all of that on August 17th.

Ms. Walls, what's the status of that?

MS. WALLS: Judge, I don't have any additional reports to tender. But I do ask leave to file my motion to dismiss.

THE COURT: Were you looking for additional reports?

MR. HAZE: Judge, I am not sure what that note referred to. Actually, I am not aware of any police reports I can think of that are outstanding.

* * *

THE COURT: Leave will be granted to file State's petition to dismiss postconviction."

¶ 33 Defendant argues postconviction counsel promised to "retroactively make good on the assertions made in his certificate." He argues that the exchange that occurred on October 19, 2012 proves that postconviction counsel never reviewed the police report at all and, as a result, postconviction counsel failed to adequately present defendant's claim. The State speculates that postconviction counsel likely received the report from the State and thus "had received all of the materials by October 19, 2012." The State further argues that the evidence reveals that postconviction counsel did investigate whether an alibi defense existed and supported that defense with an affidavit by Emma Edmond.

¶ 34 Rule 651(c) requires postconviction counsel to examine only as much of the transcript of proceedings as is necessary to adequately present and support those constitutional claims raised by the petitioner. *People v. Turner*, 187 Ill. 2d 406, 411-12 (1999). Remand is required where postconviction counsel fails to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition have merit. *People v. Suarez*, 224 Ill. 2d 37, 47 (2007). "Rule 651(c) explicitly requires a showing that counsel has examined the trial record. [Citation.] Without a showing that counsel fulfilled the requirements of Rule 651(c), we cannot conclude that petitioner was provided adequate post-conviction representation." *People v. Alexander*, 197 Ill. App. 3d 571, 573-74 (1990). "[S]peculation is obviously insufficient to show that [counsel] provided the level of assistance required by Rule 651(c)." *People v. Jennings*, 345 Ill. App. 3d 265, 272 (2003). Rule 651(c) requires only substantial compliance. *People v. Davis*, 156 Ill. 2d 149, 164 (1993) ("Rule 651(c) does not require, for substantial compliance, that appointed post-conviction counsel examine the entirety of a petitioner's trial proceedings.").

¶ 35 "[T]he purpose of Rule 651(c) is to ensure that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court. [Citations.] Rule 651(c) requires a showing that counsel took the necessary steps to secure adequate representation of petitioner's claims." (Internal quotation marks omitted.) *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). We find that postconviction counsel satisfied those obligations in this case. Defendant alleged trial counsel failed to investigate and present an alibi defense. First, it is clear that postconviction counsel did make a concerted effort to obtain affidavits in support of this postconviction claim. Compare *People v. Waldrop*, 353 Ill. App. 3d 244, 250 (2004). In her

affidavit Edmond averred that defendant and another girl left Edmond's home "around 10:00 p.m." and she saw them walk toward defendant's house. Edmonds averred that defendant was on a curfew and had to be home by 10:00 p.m.

¶ 36 Second, the record also demonstrates that counsel examined as much of the trial record and transcript of proceedings as was necessary to adequately present and support those constitutional claims defendant raised. *Davis*, 156 Ill. 2d at 164. At the argument on the petition, postconviction counsel argued in part as follows:

> "First, dealing with the trial counsel, not investigating Emma Edmonds, Judge, the single most glaring problem in this State's case at trial here was there was next to nothing about the time that this incident occurred.
>
> All there is, is the one sentence that's quoted in my response where Airrion Smith, the State's key witness, was asked--and I have the whole quote here, Judge. Once selected, please.
>
> At what time did this incident occur, and he said something to the effect of around 11:00 o'clock. No other details were given. ***
>
> Furthermore, the investigating police officers, at least one of them testified at trial, there to [*sic*] nothing about the exact time that this incident occurred. So in evaluating whether

> Emma Edmonds' testimony would change the results of the trial, we have to keep that in mind, Judge.
>
> Furthermore, what does about 11:00 o'clock mean? ***
>
> That's in the supplemental petition, Judge. I am quoting from the transcript. Again, what does that mean? Does it mean the ambulance arrived at 11:00 o'clock? Does it mean the police arrived at 11:00 o'clock? Does it mean that the time that the Respondent [*sic*] had supposedly showed up at the scene, along with Antoine Johnson?
>
> We just don't know, Judge. That's why an evidentiary hearing is needed in these cases. ***."

¶ 37 Postconviction counsel's arguments during the hearing on the State's motion to dismiss establish that counsel had examined the record with regard to the timing of the incident as it relates to the viability of defendant's alibi. Postconviction counsel referenced the State's primary witness's testimony as well as that of a testifying police officer to argue that an evidentiary hearing was required to determine if, considering Edmonds' affidavit, defendant had an alibi for this offense because the record evidence of the time the offense occurred is vague. Counsel "clearly establish[ed] familiarity with the trial record." *Alexander*, 197 Ill. App. 3d at 573. Examination of the police report was not necessary to an adequate presentation of defendant's claim and would have provided no additional evidence in support thereof. Police reports are generally inadmissible hearsay. *People v. Long*, 316 Ill. App. 3d 919, 928 (2000). "The rules of evidence are not abandoned during an evidentiary hearing on a

postconviction petition." *People v. Jones*, 2012 IL App (1st) 093180, ¶ 52. See also *People v. Page*, 193 Ill. 2d 120, 138 (2000) (affirming dismissal of postconviction petition without an evidentiary hearing where defendant failed to make a substantial showing that trial counsel was ineffective for failing to present hearsay evidence that likely would not have been admissible at defendant's trial).

¶ 38 Where postconviction counsel reviewed the trial transcript to attempt to determine the time of the offense and the efficacy of defendant's alibi, we hold that postconviction counsel complied with his duty to examine enough of the record to adequately present defendant's claim of a deprivation of his constitutional rights. Defendant urges no other grounds to reverse the trial court's judgment granting the State's motion to dismiss. Issues not raised in the appellate court are waived for purposes of our review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 39 CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 41 Affirmed.