2017 IL App (1st) 140723-U
No. 1-14-0723

SECOND DIVISION
December 12, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07 CR 1691
	)	
DURRELL DAVIS,	)	
	)	The Honorable
Defendant-Appellant.	)	Charles P. Burns,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing the defendant's postconviction claims that he received ineffective assistance of trial counsel when trial counsel failed to call certain alibi witnesses and that he received ineffective assistance of posttrial counsel when posttrial counsel failed to attach the required supporting affidavit to the defendant's posttrial motion, because the defendant made substantial showings of constitutional violations and was entitled to an evidentiary hearing on these claims. The defendant's claim of error in the trial court's denial of his request for leave to file a second amended postconviction petition was affirmed where the issue was moot.

¶ 2 The defendant, Durrell Davis, appeals from the second-stage dismissal of his postconviction petition under section 122-5 of the Code of Criminal Procedure of 1963 (725

ILCS 5/122-5 (West 2012)). On appeal, the defendant argues that the trial court should have granted him an evidentiary hearing on his claims that he received ineffective assistance of trial counsel when counsel failed to call certain alibi witnesses to testify at trial and ineffective assistance of posttrial counsel for failing to attach the required supporting affidavit to his motion for a new trial. The defendant also argues that the trial court erroneously denied him leave to file a second amended postconviction petition. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 The underlying facts of this case were adequately set forth in the order on the defendant's direct appeal. *People v. Davis*, 1-09-1819 (2011) (unpublished order under Supreme Court Rule 23). Accordingly, we restate only those facts necessary to the disposition of this postconviction petition.

¶ 5 The defendant and his co-defendant, Derec Bell, were charged with various offenses related to the fatal shooting of Lamont Loggins and the non-fatal shooting of Thomas Barfield on November 18, 2006.

¶ 6 At trial, Marcel Burns testified that on November 18, 2006, at approximately 9:30 p.m., he parked across the street from Anna's Food & Liquor, located at the corner of 13th Street and Kedzie Avenue in Chicago. After making a purchase, Burns returned to his vehicle. As he was sitting in his car, Barfield, whom he knew as "Little Tone," knocked on the drivers'-side window and Burns lowered the window. Burns then heard six or seven gunshots, saw Barfield fall to the ground, and Burns ducked down in his vehicle. After the shots stopped, Burns looked out of his rear window and observed two men enter a white four-door Chevrolet that was parked facing eastbound on 13th Street. Both of the men were wearing hooded sweatshirts and one was

holding a gun. The men turned left on Kedzie Avenue and drove away from the scene. Once the men left, Burns exited his vehicle and called 911. He spoke to Barfield, who informed him that his friend, Loggins, had also been shot. Burns looked and observed Loggins, whom he knew as "Ray-Ray," lying on the curb. Barfield and another man pulled Loggins into the backseat of Barfield's car, which was parked behind Burns' vehicle, and the men left the scene and drove to the hospital. Burns testified that he did not observe the faces of either of the shooters and did not identify the defendant or co-defendant Bell as the perpetrators of the crime.

¶ 7 The State next called Thomas Barfield, who acknowledged that he was a convicted felon with a 2007 felony conviction for possession of a controlled substance and a 2006 weapons conviction. He further admitted that he was currently in police custody because he had failed to appear in court in this case. Barfield testified that on November 18, 2006, at approximately 9:40 p.m., he parked his Buick Regal on Kedzie Avenue behind his friend Marcel Burns' vehicle. Barfield knew Burns as "Chris." Loggins (also known as "Rayshawn") and Darius Finley were passengers in Barfield's car. After parking his vehicle, Barfield observed a white Chevrolet Caprice stop nearby. He approached Burns' car and knocked on the window, but before Burns had an opportunity to roll down his window, a man wearing a hooded sweatshirt, skullcap, and blue jeans exited the white Chevrolet from the front passenger-side door. The man was holding a silver gun in his hand. Barfield indicated that he had observed the man on one prior occasion two to three years earlier, but he did not "know" him. The man stayed by the Chevrolet and fired two or three shots. Barfield was shot in his right hip and fell to the ground in front of Burns' vehicle. He heard four more shots fired and then heard tires squealing as the Chevrolet left the scene. Barfield stood up and observed Loggins lying on the ground. Barfield and Finley put Loggins in the backseat of Barfield's vehicle, and Finley drove them to Mount Sinai Hospital.

After receiving treatment for his gunshot wound, several police officers came to talk to Barfield about the shooting. Barfield characterized their demeanor as "aggressive" and "told them what they wanted to hear" because he had just been shot and he felt they were "harassing" him.

¶ 8 The State was permitted to treat Barfield as a hostile witness and conducted an inquiry into prior statements Barfield had given in connection with the case, in which he definitively identified the defendant and co-defendant Bell as the shooters. On December 18, 2006, Barfield spoke with a detective and Assistant State's Attorney (ASA) Lauren Brown about the shooting and he provided a statement, which he signed. In the statement, Barfield indicated that he had known co-defendant Bell, whom he knew as "Cuz," and the defendant, whom he knew as "Double-D," since 2001. Barfield wrote in the statement that on the day of the shooting, he went over to talk to Burns who was sitting in his vehicle. At that time, he observed the defendant, co-defendant Bell, and another man who he did not know exit a white Chevrolet with guns in their hands. Co-defendant Bell had a .9 mm gun in his hands and the defendant was holding a silver weapon. They started shooting at Barfield and his vehicle. Barfield was hit in the hip and fell to the ground and observed Loggins being shot. After they finished shooting, the defendant and co-defendant Bell entered the rear of the Chevrolet and the vehicle drove away. Barfield helped to put Loggins in the backseat of his vehicle, and Finley drove the two of them to the hospital to receive medical treatment.

¶ 9 During his conversation with the detective and ASA Brown, Barfield was shown photographs of the defendant and co-defendant Bell and identified them as the shooters. Later, on January 7, 2007, Barfield provided grand jury testimony in connection with the case. His grand jury testimony was consistent with the account of the shooting that he provided to ASA Brown, and he identified the defendant and co-defendant Bell as the shooters.

¶ 10 At trial, Barfield acknowledged identifying the defendant and co-defendant Bell as the shooters in his written statement and in his grand jury testimony, but testified that he only provided those accounts of the shooting because police threatened to "put cases on" him and one of the officers pointed a gun at him. Barfield indicated that he was forced to provide those statements implicating the defendant and co-defendant Bell in the shooting and was also forced to identify their pictures. When he provided his statement to ASA Brown, Barfield lied and told her that he had been treated "fine" by the police and did not inform her of the threats because he was "scared."

¶ 11 On cross-examination, Barfield testified that the first statement he made to detectives in the hospital after receiving medical treatment was the truth. In that account, Barfield informed them that the shooting was performed by one man. The shooter was between 20 and 25 years' old and was wearing a black "hoody" and skullcap, which made it hard for Barfield to observe his face. On December 12, 2006, the day he viewed the photo array, Barfield was handcuffed and brought to the police station by four police officers. Once they arrived at the station, Barfield was handcuffed to a rail in a holding room. The officers circled the pictures of the defendant and co-defendant Bell that were in the photo array and instructed him to identify them as the shooters. On the occasion that he spoke to ASA Brown, Barfield denied that he had been handcuffed or threatened by police because the officers informed him that if he did not say what they wanted him to say, Barfield would receive a lot of jail time. The threats had been made in the police vehicle as he was transported to the police station. His grand jury testimony was also the result of police threat. Barfield denied that he ever observed the defendant or co-defendant Bell at the time of the shooting.

¶ 12 On redirect examination, Barfield acknowledged that the photo array that he initialed on December 12, 2006, did not contain any circles.

¶ 13 Marcus Beck testified next. He acknowledged that he was a convicted felon, with 2004 and 2007 drug convictions, and admitted that he had been arrested the previous night for a DUI. He denied he was present in the area of the shooting on November 18, 2006, at approximately 9:40 p.m.; rather, he was staying in a hotel with two women at that time. Beck further denied that he met with Detectives Crane and Raschke on December 6, 2006. He indicated he did not remember signing his name and identifying two pictures from a photo array and explained that he "pop[ped] pills," which affected his memory. Beck acknowledged that he was arrested and placed in custody on a drug charge on December 14, 2006.

¶ 14 Despite denying his presence at the shooting scene at trial, Beck testified that, prior to trial, he provided a handwritten statement and grand jury testimony in which he stated he was present at the time of the shooting and identified the defendant and co-defendant Bell as the shooters. Specifically, on December 18, 2006, Beck viewed a physical lineup and identified the defendant and co-defendant Bell as the shooters. Thereafter, he met with ASA Brown and a detective and, after speaking with them, he signed a handwritten statement. In the statement, Beck stated that on November 18, 2006, he was in the area of 13th Street and Kedzie visiting family. He went to the liquor store and observed a white Chevrolet driving around in the area. Beck then observed the white Chevrolet stop at the corner of 13th Street and Kedzie. The defendant exited the vehicle from the front passenger door and co-defendant Bell exited from the rear passenger seat. Beck indicated that he knew co-defendant Bell "from the neighborhood for several years" and knew the defendant from high school. The defendant and co-defendant Bell both had guns and Beck observed them shoot at a green Buick Regal parked on the street. Beck

signed each page of the written statement as well as pictures of the defendant and co-defendant Bell, whom he identified in a photo array. Beck's grand jury testimony, delivered on January 10, 2007, was consistent with the written statement he provided ASA Brown the prior month. Before the grand jury, Beck denied that he was forced or threatened to provide that statement to ASA Brown. He also denied he was promised leniency on his drug charge in exchange for his statement.

¶ 15 On cross-examination, Beck indicated that he never voluntarily talked to police about the case against the defendant and co-defendant Bell. All of the information in the written statement and his testimony before the grand jury were lies. Beck indicated that he lied because the detectives were "[t]rying to put a murder case on [him.]" He testified that he was handcuffed and locked in a room before he met with ASA Brown. Beck testified that he never observed the defendant at the scene of the shooting and that he only identified the defendant and co-defendant Bell as the shooters because he was ordered to do so.

¶ 16 Kurt Murray, a forensic scientist employed by the Illinois State police, testified that he received the firearm evidence recovered from the crime scene and conducted firearm identification testing on that evidence. He concluded all of the recovered bullets and other pieces of firearm evidence were not all fired from the same weapon; rather, more than one firearm was used at the crime scene.

¶ 17 Detective Tom Crane testified that he was assigned to investigate the murder of Loggins. He spoke to Finley a few days after the murder, and based on the information that Finley provided, Detective Crane put together a photo spread and made sure to include pictures of the defendant and co-defendant Bell in the photo array. He showed the photo spread to Beck on December 6, 2006, and Beck identified co-defendant Bell, who he referred to as "Cuz," and the

defendant as the shooters who fired weapons at the intersection of Kedzie and 13th Street. Detective Crane did not tell Beck whom to identify out of the photo array and he did not circle any of the pictures ahead of time to influence Beck's ability to identify the suspects in the shooting. The defendant and co-defendant Bell were subsequently taken into custody and were both present in a physical lineup shown to Beck and Barfield on December 18, 2006. Beck and Barfield viewed the lineup separately and both identified the defendant and co-defendant Bell as the shooters. Detective Crane did not instruct Beck or Barfield whom they should identify from the lineup, nor did he threaten either man physically or verbally.

¶ 18 On cross-examination, Detective Crane acknowledged that he did not know precisely when Beck arrived at the police station on December 6, 2006, to view the photo spread. Detective Crane speculated that Beck had probably waited a few hours at the station before they met to view the photographs. Detective Crane denied that he had threatened to charge Beck with a homicide if he did not make identifications from the photographs. Detective Crane acknowledged that he was also present when Beck signed a written statement on December 18, 2006, and denied that Beck was ever handcuffed in an interview room prior to giving his statement. Beck was not in police custody when he came to view the photo spread but was in custody at the time he provided his statement.

¶ 19 Detective Edward Carroll testified that he and his partner, Detective John Haniacek, conducted a photo array viewing with Barfield on December 12, 2006. Prior to giving Barfield photographs to view, Detective Carroll explained the process, informed Barfield that the individuals involved in the crime were not necessarily pictured and had Barfield sign a photo spread advisory form. Barfield identified the defendant and co-defendant Bell as the men who

shot at him. Detective Carroll never told Barfield whom to identify, never circled photographs in the array prior to showing them to Barfield, and never threatened Barfield in any manner.

¶ 20 ASA Lauren Brown testified that she was assigned to assist in the investigation of the fatal shooting of Loggins. As part of her investigation, she met with Barfield. She explained her role and informed Barfield that she did not represent him or any of the suspects involved in the shooting. Barfield indicated that he understood and was willing to speak with her about the shooting. He also agreed to let her transcribe his statement and she documented what he said during the course of their conversation. After she completed the statement, she provided Barfield with an opportunity to review the statement and make corrections and asked him to sign his name to each page if the information contained therein was "true and correct." Barfield did so.

¶ 21 ASA Brown testified that, in his statement, Barfield indicated he was in the vicinity of 13th Street and Kedzie and observed the shooting and observed the victim fall to the ground. A few days after the shooting, Barfield was shown photographs and identified the defendant and co-defendant Bell as the persons who shot him and shot and killed Loggins. ASA Brown showed Barfield pictures of the defendant and co-defendant Bell and he confirmed that they were the shooters. Detective Haniacek was also present in the room when Barfield provided his statement, but ASA Brown indicated that she had an opportunity to speak with Barfield privately. At that time, ASA Brown asked Barfield how he had been treated by the police and inquired whether he had been hurt or threatened in any way. Barfield denied that he had been mistreated or threatened. He told her that he had been given food and had been allowed to use the bathroom freely. According to ASA Brown's testimony, Barfield denied that he had been handcuffed at any time.

¶ 22 After speaking with Barfield, ASA Brown conversed with Beck. Detective Crane was present for this discussion. Beck also agreed to speak with her about the shooting and to permit her to memorialize his statement. ASA Brown testified that, in his statement, Beck admitted he was on his way to the liquor store located at Kedzie and 13th Street when he observed a white Chevrolet Caprice circle the block several times. Shortly thereafter, a green Buick Regal parked across the street from the store. Approximately three to five minutes later, the Chevrolet appeared again and Beck observed the defendant and co-defendant Bell in the vehicle. Beck grew up with the defendant, who he referred to as Double-D, and indicated that he was familiar with co-defendant Bell, but that he did not know his name. The Chevrolet stopped, and the defendant and co-defendant Bell exited the vehicle and began shooting at the Regal. After Barfield and Loggins were shot, the defendant and co-defendant Bell fled in the Caprice toward Roosevelt Road. As with Barfield, ASA Brown had an opportunity to speak with Beck privately and inquired as to his treatment by the police. He indicated that the officers had treated him "well" and that he had been provided with food, drink, and bathroom access. ASA Brown testified that Beck also denied that he had been handcuffed or that he had been threatened in any manner. Beck signed the statement, confirming the accuracy of his written account.

¶ 23 ASA Sabra Ebersole testified that she presented evidence before the grand jury in this case. Barfield appeared before the grand jury and acknowledged the statement he had provided to ASA Brown. He testified in accordance with that statement and confirmed that the defendant and co-defendant Bell were the shooters. Barfield denied that he had received threats or promises in exchange for his handwritten statement and further denied that his grand jury testimony was the result of any threats or promises. Beck also testified before the grand jury. ASA Ebersole testified that Beck also confirmed the accuracy of his prior written statement and

that Beck denied that his cooperation with the police was the result of threats or promises. The defendant, co-defendant Bell, and the detectives involved in the case were not present in the room when Barfield and Beck testified before the grand jury.

¶ 24 The State then proceeded by way of stipulation. The parties stipulated that the three discharged cartridge cases tested for fingerprints did not contain any latent fingerprint impressions suitable for comparison and that the autopsy conducted on Loggins revealed that he died from a single gunshot wound to the chest. The State then rested its case-in-chief.

¶ 25 Burns also testified for the defense and confirmed that he knew Beck and was aware that Beck's nicknames included Little Marcus and Pookie Slim. Burns further confirmed that he was present at the scene when the victim was shot and killed. At no time did Burns observe Beck at the scene.

¶ 26 Lajuan Bridges, a convicted felon currently serving a sentence for attempt murder and aggravated discharge of a firearm, testified that he was friends with Loggins. Bridges was in the vicinity of 13th Street and Kedzie at approximately 9:30 p.m. on November 18, 2006. He observed Barfield exit his vehicle and observed Loggins and Finley in the car. Bridges approached the vehicle and began conversing with Loggins, who asked Bridges if he had a "swisher," which Bridges testified was like a small cigar. At that time, a dark-colored vehicle appeared and two men wearing hooded sweatshirts exited the vehicle, but only the driver was holding a gun. Both men had the hoods of their sweatshirts over their heads but Bridges was still able to observe their faces. Neither the defendant nor co-defendant Bell were present at the scene that evening. Bridges heard five or six gunshots and observed Barfield fall to the ground. He also observed the shooting of Loggins and was within a couple of feet of Barfield's car when

that occurred. Bridges indicated that he had known co-defendant Bell three or four years before that incident and denied that he was the shooter.

¶ 27 On cross-examination, Bridges indicated that approximately one year after Loggins' death, he was incarcerated and learned that co-defendant Bell had been charged with the shooting. Bridges then disclosed to co-defendant Bell's counsel that he had been present at the crime scene, observed the shooting, and knew that co-defendant Bell was not the shooter. Bridges never discussed what happened on the night of the shooting with Barfield or Finley at any time after the offense.

¶ 28 The jury found the defendant and co-defendant Bell guilty of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 2006)). After an unsuccessful posttrial motion, the trial court sentenced the defendant to 40 years' imprisonment for the first degree murder conviction and 6 years' imprisonment for the aggravated battery with a firearm conviction, with the sentences to run consecutively. The defendant appealed, and we affirmed. *People v. Davis*, 1-09-1819 (2011) (unpublished order under Supreme Court Rule 23).

¶ 29 On April 3, 2013, the defendant filed an amended petition for postconviction relief. In the amended petition, the defendant raised, among others, the arguments that he was denied effective assistance of trial counsel when his attorney failed to call certain alibi witnesses and the effective assistance of posttrial counsel when his attorney failed to attach to his posttrial motion an affidavit in support of his claim that trial counsel was ineffective for failing to call Leroy

Franklin as an alibi witness. Three affidavits were submitted in support of the amended petition: one from the defendant, one from Glenn Davis, and one from Leroy Franklin.[1]

¶ 30 In his affidavit, the defendant swore that during a conversation regarding possible defenses, he told trial counsel that he wished to testify. Trial counsel told the defendant that he did not want the defendant to testify due to a recent firearm conviction, which counsel believed would damage the defendant's credibility. Instead, trial counsel told defendant that it would be best to pursue an alibi defense by calling Franklin to testify. Trial counsel never informed the defendant prior to trial that Franklin would not testify, nor did trial counsel prepare the defendant to testify. According to the defendant, the only reason he did not testify was because he was surprised and shocked by trial counsel's decision to not call Franklin to testify. Had he testified, the defendant swore that he would have testified that at about 9:30 p.m. on November 18, 2006, he was at home at 6045 South Justine with Franklin and Davis. At the time, he was planning what to get his mother for her birthday, which was the following day. After that, the defendant played video games in the guest room, where he stayed the entire night, not leaving until the following morning. In his affidavit, the defendant claimed that had trial counsel called Franklin as promised, the defendant could have made a knowing and intelligent decision as to whether to testify. Because, however, trial counsel, without explanation, failed to call Franklin, the defendant was afraid that if he testified, the jury would wonder why Franklin was not testifying.

¶ 31 In their affidavits, Davis and Franklin swore that they were interviewed by trial counsel and that they advised trial counsel of the defendants whereabouts on November 18, 2006. Both

[1] Although the amended petition referenced attached affidavits of the defendant, Davis, and Franklin, the amended petition in the record does not contain these affidavits. The parties' briefs on appeal, however, suggest that the affidavits attached to the amended petition were the same as those attached to the defendant's initial postconviction petition, which are in the record. Given that both parties, without objection, rely on the affidavits attached to the initial postconviction petition in making their respective arguments regarding the merits of the defendant's contentions in his amended petition, we will do the same.

swore that at approximately 9:30-9:45 p.m. that night, the defendant was at home with them at 6045 South Justine. The defendant was planning for his mother's birthday, which was the following day. Both also swore that if they had been called to testify at trial, they would have testified that the defendant was at home with them all afternoon and evening of November 18, 2006. Franklin further swore that trial counsel asked him if he would be willing to testify, and Franklin informed trial counsel that he would be happy to testify on the defendant's behalf. According to Franklin, trial counsel then told him that he (trial counsel) would call Franklin to testify. Both Franklin and Davis swore, however, that trial counsel never subpoenaed or called them to testify.

¶ 32 In response to the amended petition, the State filed an amended motion to dismiss.

¶ 33 On January 7, 2014, the defendant filed a motion seeking leave to file a second amended postconviction petition, this time including a claim that potential alibi witnesses for co-defendant Bell, identified for the first time in co-defendant Bell's postconviction petition, constituted newly discovered evidence of the defendant's innocence. More specifically, the defendant claimed that the affidavits of Bell, Sadie Norman, and Shakeya Norman attached to Bell's postconviction petition established that Bell could not have been involved in the alleged murder. According to the defendant, if Bell could not have been involved in the murder because he was at the Norman home, that fact further demonstrated the falsity of Barfield's and Beck's recanted statements in which they identified both Bell and the defendant as the shooters.

¶ 34 A couple of weeks later, on January 22, 2014, the trial court granted the State's motion to dismiss the defendant's amended petition. The trial court found, in relevant part, that the defendant's claim that trial counsel was ineffective for failing to call Davis and Franklin as alibi witnesses failed, because the record demonstrated that trial counsel spoke with the witnesses and

made the judgment call that their testimony would not be beneficial to the defendant. Instead, according to the trial court, given that two eyewitnesses recanted their identification of the defendant as the shooter, it appeared that trial counsel's strategy was to rely on the State's inability to prove the defendant guilty beyond a reasonable doubt, a strategy that would not be served by calling Davis and Franklin. With respect to the defendant's claim that posttrial counsel was ineffective for failing to attach an affidavit from Franklin to his posttrial motion in support of his claim that trial counsel was ineffective for failing to call Franklin as an alibi witness, the trial court concluded that it lacked merit because there was no requirement that an affidavit be submitted in support, the allegation of ineffectiveness in the posttrial motion was sufficient, and it was unlikely that the inclusion of an affidavit would have changed the trial court's mind on the posttrial motion.

¶ 35 On the same day as it granted the State's motion to dismiss the amended petition, the trial court also orally denied the defendant's request for leave to file a second amended postconviction petition. The record on appeal, as originally filed, did not contain a written order memorializing that oral decision or a transcript of the trial court's oral pronouncement.

¶ 36 The defendant filed his timely notice of appeal on February 20, 2014.

¶ 37 On August 16, 2017, we issued a Rule 23 decision reversing the trial court's second-stage dismissal of the defendant's ineffective-assistance-of-counsel claims and affirming the trial court's denial of the defendant's request for leave to file a second amended postconviction petition. Our affirmance of the trial court's denial of leave to file a second amended postconviction petition was based on the lack of sufficient record on appeal from which we could determine whether the trial court had erred.

¶ 38 On July 31, 2017, prior to the entry of our Rule 23 order, the defendant filed a motion for leave to supplement the record with the additional report of proceedings needed to review his contention that the trial court erred in denying him leave to file a second amended postconviction petition. That motion, for reasons unknown, was not entered into the clerk's C-Track filing system until September 1, 2017. By that point, the Rule 23 order had issued and, therefore, we denied the motion to supplement the record.

¶ 39 On September 6, 2017, the defendant filed a timely petition for rehearing in which he argued that we erred in affirming the trial court's denial of his request for leave to file the second amended postconviction petition on the basis of an insufficient record on appeal, because, he had filed a motion to supplement the record with the necessary report of proceedings prior to the issuance of the Rule 23 order. After confirming the validity of the claim that the motion to supplement the record had, in fact, been filed prior to the issuance of the Rule 23 order, we granted the defendant's petition for rehearing and permitted him to supplement the record as originally requested.

¶ 40 ANALYSIS

¶ 41 On appeal, the defendant argues that the trial court should have granted him an evidentiary hearing on his claims that he received ineffective assistance of trial counsel when counsel failed to call Davis and Franklin as alibi witnesses at trial and that post-trial counsel was ineffective for failing to attach to the motion for a new trial an affidavit from Franklin in support of the claim that trial counsel erred in failing to call Franklin as an alibi witness. The defendant also argues that the trial court erroneously denied him leave to file a second amended postconviction petition. We address each of these contentions in turn.

¶ 42 With respect to the defendant's postconviction claims of ineffective assistance of trial and posttrial counsel, they were dismissed at the second stage of review. At that stage, the defendant bears the burden of demonstrating that the petition, with its accompanying documentation, makes a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 33-35. If the defendant carries his burden, he is entitled to move on to the third stage and receive an evidentiary hearing. *Id.* at ¶34. It is there, at the evidentiary hearing and not during the second stage, that evidentiary questions are to be resolved. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). At the second stage, the trial court is to take as true all well-pleaded facts alleged in the postconviction petition and not positively rebutted by the trial record. *Id.* Thus, there is no need for the trial court to make any credibility determinations or factual findings at this stage. *Id.* As a result, the standard of review for dismissals at the second stage is *de novo*. *Id.*

¶ 43 I. Ineffective Assistance of Trial Counsel

¶ 44 The defendant first argues that he made a substantial showing that he was denied effective assistance of trial counsel when his attorney failed to call Davis and Franklin as alibi witnesses at trial. We conclude that the defendant carried his second-stage burden and that he was entitled to an evidentiary hearing on this issue.

¶ 45 Before addressing the merits of the defendant's claim, we first address the State's contentions that any claim with respect to trial counsel's failure to call Franklin is forfeited because it could have been raised on direct appeal but was not and that said claim is also barred by the principles of *res judicata*. In postconviction proceedings, issues that could have been raised on direct appeal but were not are considered waived, while those that were actually decided on direct appeal may not be afforded further review under the principles of *res judicata*. *People v. Whitehead*, 169 Ill. 2d 355, 371 (1996), overruled on other grounds, *Coleman*, 183 Ill.

2d 366. Where, however, the claims are based on facts that do not appear on the face of the original trial record, these rules are relaxed. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010); *Whitehead*, 169 Ill. 2d at 372.

¶ 46 Here, although posttrial counsel alleged in the defendant's amended motion for a new trial that trial counsel "erred" in not calling Franklin as an alibi witness, this issue was not raised on direct appeal. Despite the State's argument to the contrary, we conclude that the defendant could not have raised this issue on direct appeal because it is based on the affidavit of Franklin, which was *de hors* the original trial record. See *People v. Hall*, 157 Ill. 2d 324, 336 (1993) (the defendant's claim that trial counsel was ineffective for failing to investigate and present meaningful mitigating evidence at his death sentence hearing was not waived for failure to raise the issue on direct appeal, because the claim relied on affidavits of several alleged mitigating witnesses, which were not part of the original record on direct appeal).

¶ 47 The State contends that this issue was of record at the time of direct appeal because trial counsel disclosed Franklin as a witness during discovery. Although this is true, the disclosure simply identifies Franklin by name, date of birth, and address, but does not provide any information regarding his proposed testimony. Given that the defendant's claim that trial counsel was ineffective for failing to call Franklin as an alibi witness necessarily requires a showing that Franklin would have, in fact, provided an alibi for the defendant, we cannot agree that the simple disclosure of Franklin's identity in discovery makes trial counsel's alleged ineffectiveness of record. See *Taylor*, 237 Ill. 2d at 372-73 (claim that trial counsel operated under a conflict of interest, evidenced by his failure to call witnesses on the defendant's behalf, was based on facts outside the record where the record did not establish that the defendant

brought the witnesses to trial counsel, the witnesses were present at the shooting, and they did not see the defendant hand a gun to the co-defendant).

¶ 48 Because the facts supporting the defendant's claim that trial counsel was ineffective for not calling Franklin as an alibi witness were outside the record, we conclude that he has not waived this claim. In addition, we conclude that this claim is not barred by the doctrine of *res judicata*, not only because it depends on facts outside the record (see *id.* at 372), but also because the appellate court on direct appeal never decided the issue on its merits (see *Whitehead*, 169 Ill. 2d at 371). Although the State claims *res judicata* applies because the posttrial court rejected the claim as raised in the defendant's amended motion for a new trial, only "determinations of the reviewing court on the prior direct appeal" are *res judicata*. *Id.*

¶ 49 Having concluded that the defendant's claim that trial counsel was ineffective for failing to call Franklin as an alibi witness is not waived or barred, we turn now to the merits of his claim that trial counsel was ineffective for failing to call both Franklin and Davis as alibi witnesses at trial. To establish a claim of ineffective assistance of counsel, the defendant must show both that counsel's representation fell below an objective standard of reasonableness and that the defendant was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999). With respect to the first element—objectively deficient performance—the defendant must overcome the presumption that trial counsel's actions (or inactions) were the product of sound trial strategy. *People v. King*, 316 Ill. App. 3d 901, 913 (2000). Generally speaking, trial counsel's decision of whether to present a witness at trial is considered to be a strategic decision exempt from attack. *Id.* Attorneys have, however, been found to be ineffective where they have failed to present exculpatory evidence,

including witnesses who would corroborate the defendant's defense. See, *e.g.*, *id.*; *People v. O'Banner*, 215 Ill. App. 3d 778, 790 (1991); *People v. Garza*, 180 Ill. App. 3d 263, 269 (1989).

¶ 50 In this case, the defendant alleged in his amended petition that Davis and Franklin would have testified that at the time of Loggins' murder, the defendant was at home with them at 6045 South Justine, thereby making it impossible for him to have been present at Loggins' shooting. The affidavits of Davis and Franklin confirm that they would have testified as the defendant claims. This evidence would undoubtedly have supported the defendant's selected trial defense, which was to attack the sufficiency of the evidence presented by the State, including the credibility and voluntariness of the eyewitness identifications of the defendant as one of the shooters. The exculpatory testimony of Davis and Franklin would not only have corroborated the defendant's contention that the eyewitness identifications of him as a shooter were not credible, but would also have affirmatively placed him somewhere else—something no other evidence presented at trial did.

¶ 51 The State argues that the decision by trial counsel not to call Davis and Franklin must have been a sound strategic decision because trial counsel interviewed both Davis and Franklin, initially listed Franklin as a potential witness, and "presumably evaluated" how they would appear to a jury. We disagree that these facts, without more, require a conclusion that trial counsel's failure to call Davis and Franklin was a decision, much less a sound or strategic one. Based on the record before us, one could just as easily conclude that trial counsel's failure to include Davis on his witness list was an unintentional oversight or that his failure to call either Davis or Franklin was the result of failing to issue timely subpoenas or otherwise arrange for their appearances.

¶ 52 According to the State, trial counsel might have concluded that presenting the testimony of Davis and Franklin and making the "additional argument" of an alibi would distract the jury from trial counsel's chosen defense—the inability of the State to meet its burden of proof. The problem with this contention, of course, is that it is difficult to conceive, based on the current record, how this evidence, which so strongly supports the chosen defense, could also hurt that defense. Admittedly, the testimony of Davis and Franklin could support a separate and independent alibi defense, but it also completely supports the defense that the State failed to carry its burden of proof. The only evidence placing the defendant at the scene of the crime was the recanted statements of Barfield and Beck. In advancing his defense that the State failed to meet its burden, trial counsel repeatedly attacked the credibility and voluntariness of those recanted statements. The presentation of affirmative evidence that the defendant was somewhere else entirely would only serve to drive home the argument that the identifications of the defendant as the shooter could not possibly be credible. The State acknowledges in its brief that trial counsel "presented evidence that sought to further undermine the identification evidence against defendants." It makes little strategic sense, then—at least on the record currently before us—for trial counsel to forego presenting what is arguably the most undermining evidence, the testimony of Davis and Franklin.

¶ 53 The State contends that "the record shows that counsel had good reasons not to call defendant's alibi witnesses." We, however, have not found any articulated in or supported by the current record, and, other than what we have already discussed, the State has not identified any or cited any in the record. Just because trial counsel interviewed Davis and Franklin, was informed of their proposed testimony, and failed to call them as witnesses, that does not necessarily mean that trial counsel had good reasons for failing to call them as witnesses.

¶ 54 Taking the defendant's allegations and supporting affidavits as true, and given that Davis's and Franklin's testimony would have supported the defendant's attempts to discredit the State's identification evidence by affirmatively placing him away from the crime scene, based on the current record, we can conceive of no objectively reasonable strategy that was served by trial counsel's decision to forego presenting the exculpatory testimony of Davis and Franklin at trial. Accordingly, we conclude that the defendant made a substantial showing that trial counsel's performance fell below an objective standard of reasonableness. See, *e.g.*, *Garza*, 180 Ill. App. 3d at 269 (stating that the court could not find any sound tactical reason to forego calling witnesses to corroborate the defendant's alibi).

¶ 55 Numerous cases support our conclusion that counsel's actions fell below an objective standard. In *Tate*, like in this case, the defendant's defense to the murder charges was based on his claim of misidentification. *Tate*, 305 Ill. App. 3d at 612. The defendant argued during second-stage postconviction proceedings that his trial counsel was ineffective for failing to call three alibi witnesses who would have testified that he could not have committed the murder because he was with them. *Id.* at 610. This court agreed that the defendant was entitled to an evidentiary hearing on his claim, because the witnesses' testimony would have supported the defendant's misidentification defense and there was no strategic reason apparent on the face of the record for not calling the witnesses to testify at trial. *Id.* at 612.

¶ 56 Similarly, in *O'Banner*, this court held that trial counsel was ineffective for failing to call the defendant and her son to testify that it was her son and not the defendant who shot the victim. *O'Banner*, 215 Ill. App. 3d at 791. And in *People v. Skinner*, 220 Ill. App. 3d 479, 485 (1991), this court held that the defendant was entitled to an evidentiary hearing on his postconviction claim that trial counsel was ineffective for failing to call his parents in support of his defense that

he did not live where he was arrested. In both of these cases, this court found that the testimony of the witnesses would have supported the defendants' defenses, which were otherwise uncorroborated. *Id.*; *O'Banner*, 215 Ill. App. 3d at 791.

¶ 57 As in the above-discussed cases, the defendant's defense in the present case would have been bolstered by Davis's and Franklin's testimony, in that it would have tended to demonstrate that Barfield's and Beck's identifications of the defendant as one of the shooters could not have been correct, because the defendant was not at the scene of the crime. The State's attempts to distinguish these cases are unavailing, because those attempts boil down to the same argument: trial counsel made an informed, strategic decision to not call Davis and Franklin to testify. As discussed above, however, it is not apparent from the record that trial counsel made a *sound, strategic* decision to forego calling Davis and Franklin, and the State's insistence on labeling it such does not make it so.

¶ 58 The State analogizes the present case to *People v. Lacy*, 407 Ill. App. 3d 442 (2011), *People v. Smado*, 322 Ill. App. 3d 329 (2001), and *People v. Williams*, 252 Ill. App. 3d 1050 (1993). None of these cases are on point, however, as each of them involved records that demonstrated actual bases for not presenting the testimony of alibi witnesses, whereas in the present case, the record does not contain facts suggesting what strategic reason trial counsel would have had for foregoing the presentation of evidence that supported the chosen defense. For example, in *Lacy*, the record demonstrated that the alibi witness was a relative of the defendant's, which might cause the jury to afford her testimony less weight, and her affidavit contained statements that contradicted other, indisputable evidence in the case. *Lacy*, 407 Ill. App. 3d at 466-67; see also *Smado*, 322 Ill. App. 3d at 335 (concluding that trial counsel could have foregone calling the defendant's wife as an alibi witness because she could have been

severely impeached in multiple respects, thus making her testimony potentially harmful to the defense). Here, there is nothing in the record indicating a familial relationship between the defendant and Davis and Franklin, nor does the proposed testimony of Davis and Franklin contradict any indisputable evidence presented in the case. As for *Smado* and *Williams*, in both of those cases, the record demonstrated that trial counsel took affirmative actions that demonstrated a conscious decision to forego the presentation of alibi witnesses, namely, stating in discovery that they would not present an alibi defense (*Williams*) or withdrawing their previously asserted alibi defense (*Smado*). *Smado*, 322 Ill. App. 3d at 334; *Williams*, 252 Ill. App. 3d at 1059. Here, trial counsel took no such decisive action; rather, the record simply indicates that he disclosed Franklin as a witness, failed to disclose Davis as a witness, and then simply failed to call either one. As discussed above, this failure to call Davis or Franklin may have been a conscious decision, but it could just have well been the result of incompetence.

¶ 59 Having concluded that the defendant has made a substantial showing that trial counsel's failure to Davis and Franklin fell below an objective standard of reasonableness, we must consider whether the defendant was prejudiced by this failure. In the context of ineffective assistance of counsel, this court has described the prejudice component as follows:

> "To meet his burden under *Strickland*, defendant must show that the probability that counsel's errors changed the outcome of the case is sufficient to undermine confidence in the outcome. [Citation.] It is not necessary for defendant to prove by a preponderance of the evidence that the outcome would have been different; rather, defendant need only demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [Citation.] Indeed, prejudice may be found even when the chance that minimally competent counsel would

> have won an acquittal is significantly less than 50 percent, as long as a verdict of not guilty would be reasonable. [Citation.] In weighing the impact of counsel's errors, the reviewing court should consider the totality of the evidence before the finder of fact. [Citation.] That is, instead of viewing the improper evidence in isolation, the reviewing court must look to the ramifications the improper evidence might have had on the factfinder's overall picture of events. [Citation.]" (Internal quotation marks omitted.) *People v. McCarter*, 385 Ill. App. 3d 919, 935-36 (2008).

¶ 60 We conclude that the defendant made a substantial showing that absent trial counsel's failure to call Davis and Franklin, there is a reasonable probability that the defendant would have been acquitted. None of the purported eyewitnesses put on by the State testified at trial that they observed the defendant at the scene, much less firing a gun. Rather, the State had to impeach its own witnesses with their prior statements to the police and grand jury testimony to establish that the witnesses had, at one time, identified the defendant as one of the shooters. Those impeached witnesses—Barfield and Beck—testified, however, that their prior statements and grand jury testimony were coerced by threats and violence on the part of law enforcement. Bridges, who was called in co-defendant Bell's case, testified that the defendant was not present at the scene at the time of the shooting. Further complicating the jury's task of assessing guilt was the fact that Barfield, Beck, and Bridges were all convicted felons. Taken with the proposed testimony of Davis and Franklin that the defendant was with them all night, the jury could very well have foregone the contradictory and ever-changing testimony of convicted felons in favor of Davis's and Franklin's testimony and could have found the defendant not guilty. See *King*, 316 Ill. App. 3d at 918-19 ("In light of the inconsistent, contradictory testimony presented at trial, along with the clearly questionable credibility of the State's occurrence witnesses, we cannot say that

evidence of defendant's guilt in this case was overwhelming. As such, we believe that the absence of Matthews' alibi testimony at trial is sufficient to undermine confidence in defendant's conviction."); *Garza*, 180 Ill. App. 3d at 269-70 (holding that where the identification evidence against the defendant had debilities, the jury's crediting of that evidence could have been different if trial counsel had presented witnesses in support of the defendant's defense theory).

¶ 61 Relying solely on its contention that the defendant failed to make a substantial showing that trial counsel's failure to call Davis and Franklin was objectively unreasonable, the State makes no argument whatsoever that the defendant was not prejudiced by the alleged deficient performance. Accordingly, we conclude that the defendant made a substantial showing of ineffective assistance of trial counsel for failing to present the testimony of Davis and Franklin at trial, and that the trial court erred in dismissing this claim without an evidentiary hearing.

¶ 62 II. Ineffective Assistance of Posttrial Counsel

¶ 63 The defendant next argues that he made a substantial showing that he received ineffective assistance of posttrial counsel when posttrial counsel failed to attach an affidavit of Franklin to the defendant's amended posttrial motion alleging trial counsel's ineffectiveness for failing to call Franklin as an alibi witness. We agree. Where a request for a new trial is based on factual allegations outside of the record, a sworn affidavit must be submitted in support of the motion. *People v. Brandon*, 157 Ill. App. 3d 835, 845 (1987). The State attempts to limit this requirement to situations where the defendant seeks a new trial based on "new evidence" outside the record, this court has previously held that "where a new trial is sought on the ground of the unavoidable absence from the trial of a witness on behalf of the defendant, the defendant must in support of that motion attach *** the sworn affidavit of that witness as to the facts to which he

would testify on retrial, unless the lack of such an affidavit is sufficiently explained." *People v. Boyce*, 51 Ill. App. 3d 549, 562 (1977).

¶ 64 Here, posttrial counsel did not attach an affidavit from Franklin swearing to what his testimony would have been had he been called to testify and, as a result, for that specific reason, the trial court denied that claim. Specifically, the trial court stated, "Basically in his [the defendant's] motion he makes two allegations of ineffective assistance. Erred in not calling alibi witness Leroy Franklin without any affidavit from Leroy Franklin, so that allegation or that claim can't really be considered without any affidavit." Despite this specific finding that the defendant's claim had to be denied due to the lack of a supporting affidavit, the State argues that the defendant was not prejudiced by posttrial counsel's failure to include an affidavit because the claim of ineffective assistance of trial counsel for failing to call Franklin was without merit, given that trial counsel's decision was strategic. As previously discussed, however, such does not appear to be the case on the record before us. Accordingly, we conclude that where an affidavit of Franklin was required to support the defendant's posttrial claim of ineffective assistance of trial counsel, posttrial counsel did not include such an affidavit, the trial court specifically denied the defendant's posttrial claim based on the lack of a supporting affidavit, and the defendant has made a substantial showing of the merits of the underlying claim of ineffective assistance of trial counsel, the defendant has made a substantial showing of ineffective assistance of posttrial counsel, such that he entitled to an evidentiary hearing on the matter.

¶ 65 III. Motion to Amend

¶ 66 Finally, the defendant argues that the trial court erred in denying him leave to file a second amended postconviction petition to include a claim that co-defendant Bell's disclosure of alibi witnesses constituted newly discovered evidence of the defendant's innocence. A trial

court's ruling on a motion for leave to amend a postconviction petition is to be disturbed on appeal only if it represents an abuse of the trial court's discretion. *People v. Harris*, 224 Ill. 2d 115, 123 (2007).

¶ 67 The State argues that this issue is moot because, while this matter has been pending on appeal, the defendant filed a successive postconviction petition that included his claim of actual innocence based on the newly discovered alibi evidence presented by co-defendant Bell. The defendant disagrees that the issue is moot, claiming that the trial court's dismissal of his successive postconviction petition was based on the defendant's failure to raise the issue in his initial postconviction petition. We agree with the State that this issue is moot, because the trial court's ruling on the defendant's successive postconviction petition renders it impossible for us to grant effectual relief. *People v. McNulty*, 383 Ill. App. 3d 553, 558 (2008) ("When the issues involved in the trial court no longer exist due to intervening events that have rendered it impossible for the appellate court to grant effectual relief to defendant, the case is moot.").

¶ 68 Here, on March 20, 2017, the trial court entered an order dismissing the defendant's successive postconviction petition, which the defendant filed on February 24, 2015, while the present appeal was pending.[2] In that successive postconviction petition, the defendant raised the precise claim of actual innocence that he sought leave to amend his initial postconviction petition to include. In the March 20, 2017, dismissal order, the trial court gave the following reasons for its dismissal of the defendant's claim of actual innocence:

[2] The State requests that we take judicial notice of the March 20, 2017, order, because it does not appear in the record on appeal (as it was prepared long before the defendant filed his successive postconviction petition). The defendant has not objected to our consideration of this order and, in fact, relies on it himself to refute the State's mootness argument. Given the lack of objection by the defendant and the fact that the March 20, 2017, order is a public record that will aid in the efficient disposition of this case, we will take judicial notice of it. See *In re Donald A.G.*, 221 Ill. 2d 234, 242 (2006) (taking judicial notice a lower court's ruling where neither party objected); *Village of Riverwoods v. BG Ltd. Partnership*, 276 Ill. App. 3d 720, 724 (1995) ("Judicial notice is proper where the document in question is part of the public record and where such notice will aid in the efficient disposition of a case.").

"Here, the evidence set forth by petitioner fails to meet the actual innocence standard. First the evidence is not newly discovered. While it may be true that the evidence may not have been available at the time of trial, all three affidavits were notarized by February 2012. Petitioner filed his initial post-conviction petition on April 2, 2012. Petitioner fails to explain why he did not obtain these statements sooner, as is his burden. As such, the evidence is not newly discovered.

Even if the evidence did qualify as newly discovered, it is not indicative of petitioner's innocence. All three affidavits petitioner relies on do not even mention petitioner's name. Indeed these three affidavits all support *Derec Bell's* alibi but have nothing to do with *petitioner's* whereabouts on the night in question. First, Bell never mentions petitioner or petitioner's whereabouts in his affidavit. Sandie Norma[n], Bell's alibi witness and the mother of his children, indicated in her statement that Bell was with her and their children on November 18, 2006[,] from 5:30 p.m. until the next day, but she mentions nothing about petitioner or his whereabouts. Finally, Shakeya Norman, Derec Bell's daughter's[] statement is consistent with her mother's: Derec Bell was with her on November 18, 2006[,] starting at 5:30 p.m. and left the next day. There is nothing in any of the affidavits about petitioner or his whereabouts. As such, these affidavits are not of such conclusive character to change the result on retrial for petitioner. None of the evidence petitioner relies on, namely, Derec Bell's testimony, alibi, and alibi witnesses, is indicative of petitioner's innocence."

¶ 69 It is apparent from the March 20, 2017, order that not only was the defendant afforded the opportunity to present his claim of actual innocence, but also that the trial court addressed the claim on the merits. Specifically, the trial court found that the evidence of Bell's alibi was not

newly discovered and that, even if it was, it was not likely to vindicate or exonerate the defendant. See *People v. Calhoun*, 2016 IL App (1st) 141021, ¶¶ 27, 29-31 (stating that "in order to constitute a claim of actual innocence, the new evidence must vindicate or exonerate the petitioner" and finding that an affidavit from a witness recanting his identification of a co-defendant only supported a sufficiency-of-the-evidence argument, not a freestanding claim of actual innocence). Because the defendant was permitted to present his claim of actual innocence in his successive postconviction petition and because the trial court addressed the claim on its merits, the issue of whether the trial court erred in denying the defendant leave to amend his initial postconviction claim to include the claim of actual innocence is moot. See *People v. Whirl*, 2015 IL App (1st) 111483, ¶ 77 (holding that the defendant's appeal from the trial court's denial of leave to file a successive postconviction petition was moot where the trial court subsequently granted leave to file a successive postconviction petition).

¶ 70 The defendant argues that his appeal from the trial court's denial of his motion for leave to file a second amended postconviction petition is not moot, because the trial court dismissed his claim of actual innocence, in part, because he failed to raise it in his initial postconviction petition. According to the defendant, had he been allowed to file his second amended postconviction petition, the trial court would not have concluded that Bell's alibi evidence was not newly discovered. The defendant bases this on the trial court's statement that "all three affidavits were notarized by February 2012[, and] Petitioner filed his initial postconviction petition on April 2, 2012." The defendant also acknowledges, however, that his is but "one interpretation of the circuit court's comment that the evidence was not newly discovered." We agree that the trial court dismissed the defendant's claim of actual innocence in part based on the fact that the Bell alibi evidence was not newly discovered. More specifically, the trial court

appears to have concluded that the evidence was available once the affidavits were signed in February 2012, and, thus, were available at the time that the defendant filed his initial postconviction petition in April 2012.

¶ 71 We do not agree, however, that amendment of the defendant's initial postconviction petition in January 2014 would have changed the trial court's conclusion that the evidence was not newly discovered. After all, the trial court's order indicates that it believed the evidence should have been discovered by April 2012. Even in his January 2014 motion for leave to file a second amended postconviction petition, the defendant admits that he did not discover the alibi evidence until sometime around January 2, 2014—nearly two years after the trial court believed it should have been discovered. The trial court's holding in this respect was not one of forfeiture, *i.e.*, it did not conclude that the defendant had lost the right to raise the claim of actual innocence simply because he had not included it in his initial postconviction petition. Rather, the trial court concluded that the defendant's claim of actual innocence failed on the merits, because it could have been discovered by April 2012 through the use of due diligence. See *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009) (defining newly discovered evidence as "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence"). Thus, the defendant's contention that had he been allowed to amend his initial postconviction petition in January 2014, the trial court would have concluded that the evidence was newly discovered fails.

¶ 72 In any case, regardless of the timing of the defendant's discovery of Bell's alibi evidence, the fact of the matter is that the trial court afforded the defendant the opportunity to present his claim in his successive postconviction petition and addressed the merits of the claim, thus rendering the issue moot. As discussed, the trial court also concluded that the claim of actual

innocence failed because the evidence of Bell's alibi did not reflect on the defendant's innocence, only Bell's. *Calhoun*, 2016 IL App (1st) 141021, ¶¶ 27 (stating that "in order to constitute a claim of actual innocence, the new evidence must vindicate or exonerate the petitioner"). Accordingly, even if we were to reverse the trial court's denial of the defendant's request for leave to file a second amended postconviction petition and the defendant were to file another postconviction petition raising this claim, it would be to no avail because the trial court already determined that it lacked merit. Therefore, we are unable to afford the defendant any effectual relief on this issue, and we must consider it moot.

¶ 73 CONCLUSION

¶ 74 For the reasons stated above, we conclude that the defendant made a substantial showing of ineffective assistance of trial counsel on the basis that trial counsel failed to call certain alibi witnesses and ineffective assistance of posttrial counsel on the basis that posttrial counsel failed to include the necessary affidavits in support of the defendant's posttrial claim. The defendant is entitled to an evidentiary hearing on these issues. We further conclude, however, that the defendant's claim that the trial court erred in denying him leave to file a second amended postconviction petition to include a claim of actual innocence based on Bell's alibi evidence is moot.

¶ 75 Affirmed in part, reversed in part, and remanded.