2018 IL App (2d) 160627-U
No. 2-16-0627
Order filed February 27, 2018
Modified Upon Denial of Rehearing March 27, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 06-CF-4882
MOSES TEGUME,	)	Honorable James K. Booras,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Jorgensen and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The doctrine of *res judicata* prevented relitigation on defendant's postconviction petition of whether he was prejudiced by the State's failure to disclose DNA evidence prior to his plea, and he did not present substantial new evidence that would relax the application of *res judicata*. In addition, defendant received reasonable assistance of postconviction counsel. Therefore, we affirmed.

¶ 2 Defendant, Moses Tegume, appeals from the circuit court's denial of his postconviction petition following a third-stage evidentiary hearing. He argues that he met his burden to show that the State violated his constitutional rights by failing to disclose exculpatory evidence in

violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He also argues that he received unreasonable assistance of postconviction counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Initial Proceedings and Guilty Plea

¶ 5 On December 20, 2006, defendant was charged with three counts of criminal sexual assault. The complaint alleged that on December 3, 2006, he performed three separate acts of sexual penetration against his nine-year-old stepdaughter, D.M.: placing his mouth on her vagina (count I); placing his penis in her vagina (count II); and placing his penis in her mouth (count III). Defendant was represented by Assistant Public Defender Moira Mercure, and the State was represented by Assistant State's Attorney MaryKay Foy.

¶ 6 On December 28, 2006, defendant pled not guilty. On February 16, 2007, the trial court denied defendant's request for a continuance and set a trial date of February 20. Foy informed the court that the State was willing to agree to a continuance because it was awaiting the results of DNA tests. The court granted a continuance of trial to March 30, 2007. On March 30, Mercure requested that trial be continued to April 10, 2007, so that she could discuss an offer from the State with her client, and the court granted her request.

¶ 7 On April 10, 2007, the parties presented the court with a negotiated disposition. The terms were that defendant would plead guilty to count I for predatory sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)), the sentence for that count would be 11 years' imprisonment, and the State would dismiss counts II and III. The court informed Defendant that he had the right to persist in his not guilty plea and receive a trial. After questioning defendant, the court found his guilty plea was voluntary.

¶ 8 Foy then presented the factual basis for the guilty plea as follows.

> "[T]here would be testimony that on December 3, 2006, at approximately 5:00 in the afternoon, [D.M.]'s aunt came to the apartment and found the defendant on top of [D.M.] whose date of birth would be July 26, 1997. [D.M.] is the defendant's stepdaughter. The defendant was staying there with—babysitting for [D.M.].
>
> There would be testimony also that the defendant who is over seventeen years placed his mouth on the vagina of [D.M.]. He did so while the child was on the bed underneath him in the bedroom."

Mercure stated that defendant would stipulate to the facts that related to the elements of the offense. The court found that there were sufficient facts to constitute a factual basis, and it accepted the guilty plea. The court sentenced defendant to 11 years' imprisonment.

¶ 9 B. Postconviction Pleadings and Motion to Withdraw Plea

¶ 10 On September 8, 2007, defendant filed a *pro se* postconviction petition pursuant to section 122-1 of the Post-Conviction Hearing Act (725 ILCS 5/211-1 (West 2006)) that sought to withdraw his guilty plea. Therein, he alleged violations of his constitutional rights, including ineffective assistance of counsel, breach of due process of law, and civil conspiracy. On September 19, 2007, defendant filed another *pro se* postconviction petition raising substantially the same allegations, and he amended the petition on September 21, 2007.

¶ 11 On October 18, 2007, defendant filed a *pro se* "Motion Presenting New Evidence to be Heard due to Wrongful Conviction in Circuit Court." Defendant attached multiple laboratory test results related to his case from the Northeastern Illinois Regional Crime Laboratory, which listed report dates of February 26, 2007; February 27, 2007; and May 23, 2007. Foy had faxed these reports to Mercure on September 19, 2007, and she in turn sent the results to defendant, who had received them on September 27, 2007.

¶ 12 The reports provided as follows. The February 26 report was for the known saliva of D.M., and it found no sperm cells in the saliva and no presence of semen-like stains on the saliva. The February 27 report was for several items: D.M.'s vaginal, anal, and leg swabs; the known standard of D.M.'s blood; and the known standard of defendant's saliva. The results indicated a DNA profile in the vaginal and anal swabs, and a partial DNA profile in the leg swabs, that were consistent with D.M.'s DNA profile. Defendant was excluded as a source of DNA for all of the swabs.

¶ 13 The May 23 report was for an analysis of underwear and a carpet fragment. The DNA profile identified from the underwear was consistent with coming from a mixture of one unknown female (the major profile) and from defendant (the minor profile). D.M. was excluded as a source of the DNA from the underwear. Examination of the carpet showed the possible presence of semen-like stains on the carpet, and the lab identified two stains, A and B. For carpet stain A, the DNA profile identified was consistent with a mixture from at least three unknown individuals. Defendant and the major profile from the underwear analysis could not be excluded as sources of the DNA. D.M. was excluded as a source for stain A. For carpet stain B, the DNA profile was consistent with coming from defendant and one unknown individual. D.M. was excluded as a source of the DNA for stain B.

¶ 14 Defendant also attached a letter from Mercure dated September 21, 2007, in which she wrote defendant that:

> "I received your request for the DNA results some time ago, however, at that time the Assistant State's Attorney had not received the results. She received the report on September 19, 2007[,] and faxed them to my office. I am forwarding them to you now."

¶ 15 While his *pro se* postconviction motions were pending, Tegume filed a late notice of appeal in the circuit court on October 22, 2007, and we allowed the late appeal. We entered a summary order on May 7, 2008, in which we found that the trial court had not properly admonished defendant of his appeal rights in strict compliance with Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). *People v. Tegume*, No. 2-07-1128 (2008) (unpublished summary order under Illinois Supreme Court Rule 23(c)). We remanded so that defendant could receive proper admonishments and file a proper post-judgment motion. *Id.*

¶ 16 On remand, defendant was appointed a new public defender, attorney Torrie Newsome. At a hearing on July 15, 2008, Newsome informed the court that defendant intended to file a motion to vacate his plea. On August 13, 2008, defendant filed a motion to vacate judgment and plea of guilty, based on the DNA reports he learned of after entering his plea. On August 20, 2008, the court advised defendant of his rights to file post-judgment motions and appeal. Newsome also informed the court that defendant was withdrawing his postconviction petitions. He explained that the petitions were "a little bit premature," because he now had the opportunity to seek to withdraw his plea.

¶ 17 Defendant filed an amended motion to vacate judgment and withdraw the plea of guilty on September 10, 2008, consistent with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). Therein, defendant alleged as follows. Prior to his guilty plea, Mercure had told him that DNA evidence was not available and that even if it were available and excluded him, he should plead guilty based on the other evidence. Months after his plea, defendant discovered that DNA test results were available in the February 26, February 27, and May 23 reports that excluded him as the source of DNA connected with D.M., and he attached the reports as exhibits.

¶ 18 The amended motion was heard on November 14, 2008. At the hearing, Newsome argued that defendant should have been able to consider the DNA evidence in the crime lab reports prior to entering a plea; he was unaware that Mercure had not requested or obtained the DNA test results prior to his plea; and justice would be better served letting the case go to trial. Defendant requested vacation of the conviction and withdrawal of the plea. The State responded by calling Mercure as a witness.

¶ 19 Mercure testified as follows. She had represented defendant from the beginning of his case. Defendant was charged with three counts of predatory criminal sexual assault, and she informed him that he faced mandatory consecutive sentences for each of the three counts. She advised him that if he was found guilty of all three counts, he faced a minimum 18 years' imprisonment at 85 percent of his sentence. She further discussed with him the State's discovery in the case, which included police reports, written statements, an audio recording of the 911 call the day of the alleged sexual assault, audio and visual recordings of D.M.'s interview with the police, and medical reports.

¶ 20 In particular, she discussed People's Exhibit No. 1 with defendant, a lab report from the Northeastern Illinois Regional Crime Laboratory, dated December 22, 2006.[1] Defendant was

[1] The details of the December 2006 report were as follows. The report was for test results on three items. Item 01 was a sealed sexual evidence collection kit, collected from D.M. The kit contained D.M.'s vaginal swabs, anal swabs, oral swabs, left and right leg swabs, and blood standard. Item 02 was the known saliva standard of defendant, and Item 03 was the known saliva standard of D.M. Microscopic analysis failed to indicate the presence of sperm cells on the vaginal, anal, or oral swabs. Further, no semen-like stains were found on the exhibits. "Amylase activity" was detected on the vaginal, anal, and leg swabs, which signified the

"very interested" in the results, and they discussed the December 2006 lab report at length a number of times. He also inquired about DNA test results at every meeting. Prior to defendant's plea, she had seen the December 2006 report but no other lab report. The December 2006 report indicated to her that either defendant had not ejaculated or that any ejaculate fluid had not been obtained by the sexual assault examination. Mercrue did not subpoena the DNA test results prior to defendant's plea, although she did verbally inquire of the State a number of times about whether DNA results were available, and the trial was once continued on the basis that the results were not yet ready. It was her understanding that, at the time of defendant's plea, the DNA test results were not available.

¶ 21 She eventually received the February 26, February 27, and May 23 reports with the DNA test results. Defendant had requested the results while in the Department of Corrections, and she contacted the State to request those reports in September 2007. The State faxed the reports to her within 24 hours, and she sent the reports to defendant.

¶ 22 Mercure stated that she would not have changed her advice to defendant based on these additional lab reports containing DNA test results. She never told him to plead guilty or that he had no chance of winning the case, but she explained his options and was concerned that the consequences resulting from a trial would be "incredibly severe," in particular a sentence much longer than the 11 years offered at the plea negotiation. She advised defendant that the 11 years offered by the State was "very reasonable" based on the allegations. She would have liked to have had the DNA results to discuss with defendant prior to his plea, but she did not have that

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presence of saliva. The report indicated that DNA analysis would need to be performed as the subject of a subsequent report.

information and, after he entered his plea, she did not pursue the test results until defendant requested them.

¶ 23 Further, she testified that while the additional lab reports did not support the allegations against him, they also did not exonerate him. Rather, even "if the DNA evidence came back a hundred percent in his favor, that didn't change the other evidence the State had available to them." In particular, she indicated to defendant that based on the 911 tape—which she described as very emotional and convincing—D.M.'s videotaped statements, and D.M.'s aunt's statement that she found defendant and D.M. together naked in a barricaded room, the State had a strong case regardless of the DNA results.

¶ 24 After her testimony, Newsome argued that while it was clear that Mercure had worked hard on behalf of defendant, his plea was not knowing and voluntary because he was still awaiting the DNA evidence. He argued that the DNA test results could go a long way toward attacking the credibility of the State's witnesses, and that this matter would be better served going to trial. The State responded that the DNA evidence did not exonerate defendant.

¶ 25 The court ruled that defendant's plea was knowing and voluntary and therefore denied his amended motion to vacate judgment and withdraw the plea of guilty. The court considered the entire record, including the lab reports, transcripts, affidavits, and testimony at the hearing. It explained that with the benefit of hindsight, there was no doubt that Mercure would have wanted to wait for the DNA test results, but at the time, 11 years was on the table. Nevertheless, the court found that Mercure was credible and that she was thorough in discussing defendant's options with him. Defendant appealed.

¶ 26 C. Direct Appeal

¶ 27 On direct appeal, defendant argued that his plea was involuntary and unknowing because he entered it without knowledge that the State possessed DNA test results related to his case that would have impacted his decision to plead guilty. *People v. Tegume*, No. 2-08-1158, slip order at 8-9 (2010) (unpublished order under Illinois Supreme Court Rule 23(c)). In addition, he argued that the DNA results raised substantial doubts about his guilt, and therefore his plea should be vacated in the interest of justice. *Id.* at 9.

¶ 28 We rejected defendant's argument that the DNA test results would have affected his decision to enter into the negotiated guilty plea. *Id.* at 9. First, we stated that it was undisputed that defendant was aware that there were outstanding DNA test results at the time of his plea, and second, there were no facts indicating he could not have waited for the results before entering into the plea deal. *Id.* Alternatively, he could have opted for trial. *Id.* at 10. Nevertheless, his counsel advised him that the State had a strong case against him regardless of the DNA results. *Id.*

¶ 29 We further rejected petitioner's argument that the DNA evidence raised doubts as to his guilt, reasoning that the DNA evidence was not exculpatory. *Id.* at 10. Citing the definition of sexual penetration (720 ILCS 5/12-12(f) (West 2008)), we explained that the absence of defendant's DNA in the February 26 and 27 reports did not prove that he did not penetrate D.M., only that he did not leave behind detectable bodily fluids or that his fluids were not retrieved in the samples. *Id.* at 10-11. The State did not need to prove that defendant ejaculated in D.M.'s mouth. *Id.* at 12. Moreover, defendant already knew from the December 2006 lab report that no presence of semen was found in D.M.'s swabs. *Id.* at 13.

¶ 30 Accordingly, we held that the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea, and we affirmed. *Id.* at 18.

¶ 31 D. Initial Postconviction Proceedings

¶ 32 Defendant filed a new *pro se* postconviction petition on June 20, 2011. Therein, he made three claims: (1) actual innocence; (2) ineffective assistance of plea counsel (Mercure); and (3) prosecutorial misconduct for withholding DNA evidence. He attached supporting documents, including the February 26 and 27 reports, police reports, and witness statements.

¶ 33 One of the attached documents was an evidence technician report from the Mundelein police department. The officer who wrote the report spoke to D.M.'s aunt, who was at the home when the officer arrived. She told the officer that when she entered the apartment, she found D.M. and defendant completely naked in the northeast bedroom, standing in the closet. Upon inspection of the apartment, the officer discovered a pair of blue jeans, white boxer shorts, and a white t-shirt lying on the floor. The officer then searched for semen stains in the bedroom using a blue light with orange filter. He was advised that D.M. may have been sexually assaulted in the northeast corner of the room near the crib. He noted several stains consistent with semen on the carpet near the crib, and he cut a sample of the carpet out with a knife.

¶ 34 Defendant attached another Mundelein police department report that summarized D.M.'s videotaped statement to the police as follows. D.M. knew the difference between a good touch and a bad touch, and the difference between the truth and a lie. Around 3:30 p.m. on December 3, 2006, her mother took her baby brother Christmas shopping, and defendant, who was her stepfather, stayed home with her, her sister, and her other brother. Around 5:30 p.m., defendant told the kids to get ready to go to their grandmother's house. Her siblings were in their bedrooms getting ready and she was near the front door when defendant put her in a headlock and pulled her into the bedroom. He began to kiss her on the mouth, placed his tongue inside her mouth, and told her she was a very pretty fat girl. She said that he taped her hands to a crib

above her head. The tape was clear tape that her mother used to wrap presents. He removed her clothing and began to kiss and lick her entire body. She tried to kick defendant, and he threatened to strike her if she did not stop. He spread her legs apart and then kissed her vagina and put his tongue inside her vagina.

¶ 35 While he was kissing her, defendant's phone rang and he stopped to answer it. She did not know who called. Defendant returned to the room after the phone call, and he proceeded to remove his clothing, exposing his penis. He released one of her hands and turned her on her stomach; he was kissing and licking her body.

¶ 36 At one point, her brother tried to enter the bedroom, which upset defendant. He grabbed her brother and threw him down the hall. She could hear him crying. Defendant closed the door and placed a vacuum cleaner and other items in front of the door. He returned to D.M., flipped her onto her back and placed his penis inside her vagina. She said that it felt bad and hurt. This continued for several minutes. He then put his penis in her mouth. He continued until some liquid came out of his penis into her mouth; she thought it was urine.

¶ 37 She then heard her aunt enter the apartment and call to the children. D.M.'s aunt tried to enter the bedroom, and defendant forced D.M. into the closet with him. She entered the room and found them naked in the closet. She asked what was going on, and she took all the children to the car.

¶ 38 D.M. underwent a physical examination at the hospital. Dr. Harris conducted D.M.'s examination, and he noted a small tissue tear between D.M.'s anus and vagina. She did not appear to have other physical injuries. The authorities also collected a rape kit, and the kit and her clothing were stored at the Mundelein police department.

¶ 39 Defendant also attached to his petition a Mundelein police department report that recounted his interview with the police following his arrest. The police interviewed him on December 3, 2006, around 11:30 p.m. An officer noted that defendant smelled of alcohol, and he said he had drunk a glass of wine a few hours earlier. Defendant knew that D.M. had made an allegation of sexual assault against him.

¶ 40 When asked to describe his day, defendant stated as follows. Around 2 p.m., his wife and son had gone shopping, and he was babysitting his son and two stepdaughters. Several hours later, he told the children to get ready to go to their grandmother's house. He was in his bedroom and removed his clothes to take a shower. That is when D.M.'s aunt arrived at the apartment, entered the bedroom, and saw him naked. In response to the stain found by police on the carpet, defendant said he may have had intercourse with his wife six months ago in that bedroom. Defendant agreed to submit a sample of his DNA.

¶ 41 On October 27, 2011, the court found that defendant stated the gist of a constitutional claim in his petition and that the postconviction proceedings should continue to the second stage.

¶ 42 On November 16, 2011, the State moved to dismiss the petition. The State argued that the petition was untimely; that it was an impermissible successive petition; that the petition improperly sought to relitigate the issues that were forfeited or *res judicata*; that the allegations were conclusory and unsupported by sufficient attached evidence; and that the DNA lab reports were not exculpatory. At a hearing on December 8, 2011, the court stated that it had been under the impression that defendant had no prior postconviction petition. However, it appeared there was a prior petition. On April 5, 2012, the court dismissed the 2011 petition for failure to seek leave to file h petition.

¶ 43 Defendant appealed the dismissal, arguing that his petition was not successive, and the State confessed error. This court vacated the dismissal and remanded for further proceedings on August 21, 2014.

¶ 44 D. Third-Stage Postconviction Proceedings

¶ 45 On remand, the court appointed Assistant Public Defender Sharmila Manak to represent defendant. On January 26, 2016, she filed a supplemental postconviction petition, alleging *Brady* violations, ineffective assistance of counsel for failure to admonish defendant regarding sex offender registration, and failure of the court to admonish defendant regarding sex offender registration. In particular, the petition alleged that the State violated its duty pursuant to *Brady*, 373 U.S. at 87, in that it did not disclose two lab reports containing DNA tests results (the February 26 and 27 reports) to defendant prior to his plea, despite both reports being available at least a month before he plead guilty. The petition alleged that the State was aware of the DNA test results prior to the plea, the results were exculpatory, and defendant was prejudiced by not having those results prior to his plea.

¶ 46 Attached to the supplemental petition was a voluntary statement[2] from defendant, in which he stated that he entered his plea because it was his "understanding that I had no choice but to go to trial without the DNA results." He continued that the judge had set a court date that he could do nothing about, and he likely faced 16 to 99 years as a result.

[2] Defendant refers to the voluntary statement as his "affidavit," but we note that his attached affidavit related to the court's and Mercure's failure to properly advise him regarding sex offender registration. His attached voluntary statement related to why he entered his guilty plea.

¶ 47 The State moved to dismiss the supplemental petition on March 8, 2016, arguing that it was untimely; the ineffective assistance claim did not meet the *Strickland* standard; actual innocence could have been raised in an earlier proceeding; the DNA test results were not exculpatory; and the State did not violate *Brady*. In addition, the State argued that defendant was attempting to relitigate issues that were known and could have been raised on direct appeal, and those claims were therefore barred.

¶ 48 The court heard the motion to dismiss on March 29, 2016. It declined to grant defendant an evidentiary hearing with respect to the alleged failures to admonish defendant regarding sex offender registration. On the other hand, the court found that the defendant had made a substantial showing of a possible *Brady* violation. The court explained that it was convinced by defendant's argument that there could have been an altered course of conduct if he had been apprised by the State of the lab reports dated prior to his plea. Therefore, the court denied the State's motion to dismiss, and the postconviction petition proceeded to the third stage for an evidentiary hearing regarding the alleged *Brady* violation.

¶ 49 The evidentiary hearing took place on July 12, 2016. Manak first called Sarah Owen, who worked in the drug chemistry section of the Northeastern Illinois Regional Crime Laboratory (the crime lab), and she testified as follows. She worked on defendant's case and was familiar with how the crime lab prepared lab reports. Lab reports contained report dates, which reflected when the report was generated. A report date did not mean that the report was available for dissemination at that time; after the report was generated, it still had to go through peer review before being approved. Once through peer review, the report would receive an approval date, at which time it became available for dissemination.

¶ 50 Manak showed Owen the February 26 report, and she testified that February 26, 2007, was the date the report was generated. The February 26 report was not approved until March 9, 2007, at which time it became available for dissemination. The crime lab disseminated reports in a variety of ways: by fax, by mail, or by someone picking up the report at the lab. It was "the goal" to disseminate reports soon after they were made available, but there were "a lot of variables in that."

¶ 51 On cross-examination, Owen testified that it was not uncommon that a rape kit would not show the presence of semen. There were a variety of reasons for that, including that no semen was present, that semen had been washed away or reabsorbed into the body, or that evidence was collected days afterward.

¶ 52 Next, the parties stipulated that Kenneth Pfoser was an expert in forensic science in the area of DNA comparison, and he testified as follows. He worked at the crime lab as the DNA technical leader, and he specifically worked on defendant's case. At the crime lab, he utilized the correspondence log, which was "really just a phone record." Any phone calls or correspondence, including emails, that the lab made with attorneys or police departments were documented.

¶ 53 Pfoser identified the correspondence log entries for defendant's case, and the logs were admitted into evidence without objection. Manak directed Pfoser to the logs on March 26, 2007. Around 2:30 p.m. that day, the logs indicated that Foy and another State's attorney requested DNA analysis on the underwear and carpet samples for a Friday court call. Around 3:30 p.m., there was another call in which Pfoser spoke to a member of the Mundelein police department, and the log indicated that Pfoser agreed to rush defendant's case. At that time, the February 26 and 27 reports had been generated. The February 27 report was approved on March 9, 2007,

which is when it became available for dissemination. The February 27 report showed that D.M.'s vaginal, anal, and leg swabs indicated the presence of D.M.'s DNA and excluded defendant's DNA. He did not know the approval date for the February 26 report, and he could not testify to the date that any report was released to the police department. He believed that, generally speaking, an approved report was mailed out within a week.

¶ 54 Pfoser continued that, on April 2, 2007, around 10 a.m., he gave verbal results to Detective Hergot on the underwear and carpet sample, but he also indicated that he needed more time to run the test again. There was no official report on April 2. Rather, the report was generated on May 23, 2007, and approved on June 8, 2007. The analysis of the carpet and underwear showed defendant's DNA on the underwear and carpet stains and excluded D.M.'s from both. Pfoser agreed that it was common to have rape kits that did not produce semen, either because no semen was present or because it was not present in high enough levels for their tests to detect. It was possible for someone to ejaculate into a child's mouth, later swab the child's mouth, and not find that person's DNA in the swab. Factors such as time passing, brushing one's teeth, or drinking could all prevent the recovery of semen.

¶ 55 After Pfoser's testimony, the State moved to dismiss the postconviction petition. The State argued that because the DNA evidence was not exculpatory, it did not implicate *Brady*. The State also requested that the court take judicial notice of the record in the case, including the postconviction petitions. The court responded that it would take judicial notice of "what's presented or what's proper before [the court] in this hearing." The State attempted to cite Mercure's prior testimony, and Manak objected. The court stated it was not supposed to take into consideration matters not stipulated to or presented at the hearing, and it denied the State's motion for a directed finding.

¶ 56 At the start of the State's case, Foy presented an affidavit from Mercure, in which Mercure stated that she had not received the results of DNA testing prior to defendant's plea. On March 19, 2007, Mercure averred that she met with defendant at the county jail, and she played the 911 call and D.M.'s interview for defendant. She further averred that she and defendant discussed that DNA swabs were taken on a number of occasions but that she had not yet received the DNA test results. Defendant was aware that the State had not tendered the results and that he had the option of waiting for the results.

¶ 57 Foy continued by recounting Mercure's prior testimony, in which she stated that the DNA results would not have changed her advice to defendant and that she did not believe they exonerated him in light of all the other evidence available. Mercure had testified that even if the DNA evidence was 100 percent in defendant's favor, the State still had a strong case. Her advice was based on the State's case, including the 911 tape and D.M.'s recorded statements to the police. She told defendant that the plea deal would result in a much lesser sentence than if he were found guilty at trial. She advised him that 11 years was a reasonable offer, but the decision whether to take the plea deal was his. She testified that she discussed all discovery material with him and shared everything she had received. The transcript of Mercure's testimony was admitted into evidence as People's Exhibit 2. The State rested.

¶ 58 Manak argued that the "issue [was] not that he pled knowing that there were other results outstanding." Rather, the "issue [was] whether or not there was DNA evidence available to the State that they didn't give to Miss Mercure." She argued that the State had or could have had actual physical control over the DNA results a month before defendant's plea. Manak continued that regardless of Mercure's advice to defendant at the time, the State had an obligation under *Brady* to disclose the available DNA evidence and it failed to do so.

¶ 59 The court denied the postconviction petition. Manak requested the appointment of the appellate defender and a date for a motion to reconsider, and the court agreed to grant both.

¶ 60 Defendant's motion to reconsider was heard on August 2, 2016. There, Manak argued there was clearly a *Brady* violation by the State. She contended that the DNA evidence was "exculpatory, definitely impeaching" and was important to defendant's version of the event. She continued that Mercure's advice to defendant was irrelevant; she was arguing a *Brady* violation "and only a *Brady* violation," and Mercure "was not ineffective because of misinformation that was given to her by the State." The court asked whether that could be waived, and she responded no, because in this case, defendant was unaware of the *Brady* violation. Manak stressed that here, the evidence was outstanding as to Mercure, but Foy "had the ability to get that information" because two undisclosed DNA reports were generated and available prior to defendant's plea.

¶ 61 The court responded that Mercure "expected those results to be either inculpatory or exculpatory, however, she chose and with your client to take the deal. Waived all of that. It is obvious from the record, and I find that it was a clear waiver." Manak asserted that defendant had not waived his right under *Brady* that the State had to disclose what it had or should have had knowledge of prior to his plea. The court responded that even if it were to assume that the DNA evidence was available and the results obvious, Mercure's advice to defendant was to plead guilty because "the other evidence was overwhelming." Accordingly, the court denied the motion to reconsider.

¶ 62 Defendant timely appealed.

¶ 63 II. ANALYSIS

¶ 64 On appeal, defendant argues that he established a constitutional violation under *Brady* at his third-stage evidentiary hearing, and therefore we should vacate his plea and remand for new proceedings. In the alternative, he argues that he received unreasonable assistance of postconviction counsel.

¶ 65 "After an evidentiary hearing where fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous." *People v. English*, 2013 IL 112890, ¶ 23. Here, the court heard witnesses and reviewed new evidence at the third-stage evidentiary hearing, and therefore the standard of review is whether the decision was manifestly erroneous. Manifest error means error that is clearly evident, plain, and indisputable. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 66 On the other hand, whether postconviction counsel provided a reasonable level of assistance of counsel in compliance with Supreme Court Rule 651(c) is reviewed *de novo*. *People v. Russell*, 2016 IL App (3d) 140386, ¶ 10.

¶ 67 A. *Brady* Violation

¶ 68 Before addressing the merits of defendant's *Brady* argument, we address the State's arguments that defendant forfeited his *Brady* argument and, even if not forfeited, any such argument is *res judicata* because we decided the issue on direct appeal. In particular, the State argues that defendant forfeited his *Brady* argument because he failed to raise any specific *Brady* argument on direct appeal or at his motion to withdraw his guilty plea. Forfeiture aside, the State contends that this court already adjudicated whether defendant was prejudiced by the State's failure to turn over the February 26 and 27 reports prior to his plea. See *Tegume*, No. 2-08-1158, slip order at 9-18. There, the State argues that we affirmed the trial court's denial of defendant's motion to withdraw his guilty plea, reasoning that defendant entered his plea knowing the DNA

results were outstanding, that the DNA results were not exculpatory, and that Mercure reasonably advised him that even if the DNA evidence was in his favor, the State had a strong case against him and he faced a much lengthier prison sentence after a trial.[3]

¶ 69 Defendant replies as follows. First, he argues that his *Brady* claim is not forfeited. He acknowledges that in the trial court, the post-plea proceedings did not include *Brady* arguments and did not address why the DNA results created doubt as to defendant's guilt. No such arguments were made until the postconviction petition, but defendant contends that Newsome was ineffective for not raising them in the trial court. In addition, defendant argues that he could not have raised the issue of a *Brady* violation on direct appeal because the facts necessary to establish the materiality of the withheld DNA test results were not contained in the direct appeal record.

¶ 70 Defendant continues that his *Brady* argument is not *res judicata*. He argues that the appellate court did not have sufficient facts before it on direct appeal to understand the significance of the DNA test results. The court was "in the dark," knowing only that defendant pled guilty to criminal sexual assault for placing his mouth on D.M.'s vagina. In particular, the

[3] We note that it is possible for the State to forfeit its arguments of forfeiture and *res judicata*. See *People v. Holman*, 2017 IL 120655, ¶ 28 (the State forfeited its argument that defendant forfeited a challenge to his sentence in successive postconviction petition by raising the argument for the first time in response brief before the supreme court); see also *Longo v. Globe Auto Recyclying, Inc.*, 318 Ill. App. 3d 1028, 1038 (2001) (*res judicata* is a procedural defense that may be forfeited). Here, however, the State alleged in its motion to dismiss the supplemental petition that defendant improperly sought to relitigate issues available on direct appeal and is barred from raising them. Therefore, these arguments are preserved.

court did not have evidence concerning D.M.'s story of how, when, where, and in what manner defendant allegedly assaulted her.

¶ 71 In a postconviction proceeding, "[i]ssues that were raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited." *English*, 2013 IL 112890, ¶ 22. That is because the "purpose of a postconviction proceeding is to permit inquiry into constitutional issues that were not, and could not have been, adjudicated previously on direct appeal." *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 45 (citing *English*, 2013 IL 112890, ¶ 22). Nevertheless, the doctrines of forfeiture and *res judicata* are relaxed where fundamental fairness requires it, where forfeiture stems from ineffective assistance of appellate counsel, and where the facts relating to the issue are not on the face of the original appellate record. *Id.*

¶ 72 In order to say whether defendant could raise a *Brady* violation in his postconviction petition, we must first set out what a *Brady* violation requires. In *Brady*, 373 U.S. at 87, the Supreme Court held that the prosecution violates a defendant's constitutional right to due process of law by failing to disclose evidence favorable to the accused and material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). In particular, a defendant must allege that: (1) the undisclosed evidence was favorable to him either because it is exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the defendant was prejudiced because the evidence was material to guilt or punishment. *Id.* at 73-74; see also *People v. Harris*, 206 Ill. 2d 293, 311 (2002) (to successfully allege a *Brady* violation, the undisclosed evidence must be material in that there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different). The

Brady rule encompasses evidence known to police investigators, not just the prosecutor, and the prosecutor has a duty to learn of favorable evidence known to the police. *Id.* at 73.

¶ 73 In the context of a guilty plea, *Brady* only protects against suppression of exculpatory evidence. See *People v. Gray*, 2016 IL App (2d) 140002, ¶ 13 ("*Brady* does not require disclosure of potential impeachment evidence before a defendant pleads guilty."). *Brady* seeks to guarantee the Constitution's promise of a fair trial, and a defendant who pleads guilty forgoes a fair trial and other accompanying constitutional guarantees. *U.S. v. Ruiz*, 536 U.S. 622, 628 (2002). Therefore, prosecutors do not need to disclose materially impeaching evidence prior to a defendant's plea agreement. *Id.* at 633. Nevertheless, a guilty plea must be made knowingly, intelligently, and voluntarily, and the more information the defendant has, the more aware he is of the consequences of his plea. *Id.* at 629.

¶ 74 As we explain *infra*, we agree that defendant's *Brady* argument is precluded by the doctrine of *res judicata*. Because we resolve the issue on *res judicata*, we need not address whether the argument was forfeited.

¶ 75 The law of *res judicata* encompasses both the doctrines of "true *res judicata*" (claim preclusion) and collateral estoppel (issue preclusion). *Bickel v. Subway Development of Chicagoland, Inc.*, 354 Ill. App. 3d 1090, 1102 (2004). Here, collateral estoppel is the applicable doctrine. Collateral estoppel bars the relitigation of a particular issue that was already decided in a prior case. *People v. Williams*, 392 Ill. App. 3d 359, 368 (2009). The party asserting collateral estoppel bears the "heavy burden of showing with clarity and certainty that the identical issue was decided in the prior adjudication." *St. Paul Fire & Marine Insurance Co. v. Lefton Iron & Metal Co., Inc.*, 296 Ill. App. 3d 475, 487 (1998). In order to assert collateral estoppel, a party must show three elements: (1) a final judgment in the prior case; (2) the same parties or privity of

parties; and (3) the issue decided in the prior case is identical to the issue presented here. *Id.* The identical issue must have been necessary to the prior judgment, and the person to be bound must have actually litigated the issue. *Kyoung Suk Kim v. St. Elizabeth's Hospital*, 395 Ill. App. 3d 1086, 1093 (2009).

¶ 76 On direct appeal, we decided two issues in the context of a motion to withdraw a guilty plea. First, we addressed whether the DNA test results would have affected defendant's decision to enter his plea. *Tegume*, No. 2-08-1158, slip order at 9. We rejected this argument, explaining that (1) it was undisputed that defendant was aware that the DNA test results were outstanding when he entered his plea, and (2) there were no facts indicating that defendant could not have waited for the results before entering his plea. *Id.* at 10. We also said that defendant could have opted for trial. *Id.* Nevertheless, Mercure testified that she advised defendant that regardless of the DNA test results, the State had a strong case against defendant. *Id.* Therefore, we found no merit in the argument that his plea was involuntary when made in the absence of the DNA test results. *Id.*

¶ 77 Second, we addressed whether the ends of justice would be better served by conducting the trial because the DNA evidence raised doubts as to defendant's guilt. *Id.* We again rejected the argument, agreeing with the State that the DNA evidence was not exculpatory. *Id.* at 11. Importantly, we explained that the State did not need to show the presence of semen to support its allegations, and nevertheless, defendant knew that no semen had been found on the swabs. *Id.* at 13. We noted that Mercure reviewed all the evidence with defendant, including the 911 tape, videotaped statements to the police, and medical reports. *Id.* She advised him that the State had a strong case and that regardless of the DNA evidence—even if it came back entirely in his favor—he faced the possibility of a lengthy prison sentence following trial. *Id.* at 13-14.

¶ 78 We believe the second issue we addressed is not identical to any *Brady* issue on the postconviction petition. On direct appeal, the second issue depended on whether the DNA evidence raised serious questions about defendant's guilt. For *Brady*, the question is whether his plea was made knowingly, intelligently, and sufficiently aware of the circumstances. See *Ruiz*, 536 U.S. at 629. While these issues may be related, the second issue from direct appeal will not render the *Brady* issue *res judicata*.

¶ 79 On the other hand, the first issue on direct appeal presents the identical issue of whether defendant would have pled guilty if the State had disclosed the results of the February 26 and 27 reports prior to his plea.[4] Our decision on direct appeal that these reports would not have affected his decision to plead guilty was (1) necessary to our judgment, (2) made between the same parties, and (3) actually litigated.

¶ 80 Nevertheless, defendant argues that the appellate court had an insufficient record before it to understand the significance of the DNA results, and in light of the evidence he offers through his postconviction petition, *res judicata* does not apply. It is true that the doctrine of *res judicata* is relaxed where the defendant presents substantial new evidence. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 158. The new evidence relied upon by a defendant that was not present before the appellate court must be (1) conclusive in character, in that the new evidence would probably have changed the results in the prior proceeding; (2) material and not merely cumulative; (3) and newly discovered since trial and of such a character that it could not have been discovered prior to trial. See *People v. Terry*, 2012 IL App (4th) 100205, ¶ 30 (citing *People v. Patterson*, 192 Ill.

[4] In his brief, defendant frames his position on the third *Brady* element as "had [he] been given access to this information, he would not have pled guilty and instead would have gone to trial."

2d 93, 139 (2000)). In the context of a guilty plea, the requirements logically center on the plea, not the conviction following a trial.

¶ 81 Here, defendant cites the February 26 and 27 reports, which he argues are exculpatory. He emphasizes Mercure's testimony that he was very interested in those reports, both before and after his plea, which showed that the DNA results were "a critical factor" in his decision to plead guilty. Defendant also cites D.M.'s statements that defendant licked her all over her body; kissed and licked her vagina; put his penis in her vagina; and placed his penis in her mouth and ejaculated. He argues this evidence shows that the DNA results were crucial, because given these allegations, the chance of finding no DNA evidence from D.M.'s swabs was "virtually impossible." Finally, defendant cites his voluntary statement attached to his supplemental postconviction petition where he states that he accepted the plea deal because he understood that trial was set for April 10, 2007, and he believed that unless he entered a plea, he would have to go to trial without the DNA results.

¶ 82 This evidence does not constitute substantial new evidence that can escape the preclusive effect of our judgment on direct appeal. First, much of the evidence is not new or was already before the appellate court. Defendant was aware of the 911 tape, D.M.'s statements, her aunt's statements, and the December 2006 report prior to his plea, because Mercure shared them with him. On appeal, we referenced the 911 tape, the medical reports, and D.M.'s aunt's statement that she found D.M. and defendant together naked. We cited the results of the February 26 and 27 reports, noting that no sperm was found in the swab from D.M.'s mouth and that defendant's DNA was excluded from swabs on D.M.'s arms, legs, vagina, and anus. We also determined that the State did not need to prove the presence of semen to convict him, and therefore evidence of whether defendant ejaculated was unhelpful. Finally, many of D.M.'s statements, such as that

defendant placed his mouth on her vagina, placed his penis in her vagina, and placed his penis in her mouth and ejaculated, were allegations contained in the record since the initial complaint.

¶ 83 Furthermore, defendant's proffered evidence is not conclusive. Defendant's statement, asserting that he believed he had a binary choice between taking the plea deal and proceeding to trial, does not demonstrate that he would have gone to trial if he had possessed the DNA test results. Instead, it shows that, given the State's evidence against him and the possibility of a lengthy sentence following trial, he opted for the plea deal. Nor are the results contained in the February 26 and 27 reports conclusive. While Mercure testified that the DNA results from the February 26 and 27 reports would have been "useful," she also testified that she advised defendant that the State had a strong case against him, even if the DNA evidence came back 100 percent in his favor. Defendant does not argue that her advice was unreasonable. We specifically stated on direct appeal that defendant knew the DNA results contained in the February 26 and 27 reports were outstanding, and he pled guilty anyway. *Tegume*, No. 2-08-1158, slip order at 9. Defendant presents no evidence that challenges this determination. The State still had strong evidence against him, including the 911 tape, D.M.'s record statement, and her aunt's potential testimony.

¶ 84 In sum, defendant presents no new evidence to rebut that he knew the State's evidence against him, knew the potential consequences of trial, and knew the DNA results were outstanding and would not have affected Mercure's advice. To rule in defendant's favor on the element of prejudice, we would have to relitigate the same issue from direct appeal of whether the February 26 and 27 reports would have affected his decision to reject the plea deal and go to trial, based on the same substantial facts. This is precisely the situation that *res judicata* seeks to prevent. *People v. Wright*, 2013 IL App (4th) 110822, ¶ 30 (explaining that collateral estoppel

prevents relitigation of issues of law or fact that have been previously litigated and decided in an action between the same parties). Accordingly, defendant's *Brady* argument is precluded.

¶ 85 B. Unreasonable Assistance of Postconviction Counsel

¶ 86 Defendant next argues that Manak provided him with unreasonable assistance of postconviction counsel in two ways. First, her representation was unreasonable because she failed to allege Newsome's ineffectiveness or at least provide a reason why Newsome could not have raised a *Brady* violation. Second, Manak failed at the evidentiary hearing to present the December 2006 report, D.M.'s statements on what occurred during the alleged sexual assault, and defendant's testimony or affidavit explaining why he pled guilty and would not have pled guilty had he possessed the February 26 and 27 reports. Defendant asserts that by failing to present this evidence, Manak failed to argue two elements of a *Brady* violation, namely, that the suppressed evidence was materially exculpatory, and that the suppression of evidence prejudiced him.

¶ 87 The State responds that defendant has forfeited his argument that Newsome was ineffective and that any *Brady* violation was precluded by *res judicata*.

¶ 88 There is no constitutional guarantee of effective assistance of counsel in postconviction proceedings. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Rather, a defendant has a statutory right to a reasonable level of assistance of counsel. *Id.* Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) imposes specific duties on postconviction counsel to ensure reasonable assistance. *Id.* Those duties are that postconviction counsel must (1) consult with a defendant by mail or in person, (2) examine the record of the challenged proceedings, and (3) make necessary amendments to the petition. *People v. Turner*, 2012 IL App (2d) 100819, ¶ 41.

¶ 89 Rule 651(c) also requires that postconviction counsel certify to the court that she has met these three obligations. *People v. Miller*, 2017 IL App (3d) 140977, ¶ 46. Rule 651(c) certification creates a rebuttable presumption that postconviction counsel provided reasonable assistance. *Id.* ¶ 47. A defendant can overcome this presumption by showing that counsel failed to substantially comply with her Rule 651(c) duties. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. However, a defendant does not need to show that postconviction counsel's failure to comply with Rule 651(c) caused prejudice. *People v. Ross*, 2015 IL App (3d) 130077, ¶ 15; see *Suarez*, 224 Ill. 2d at 47 (remand is required where postconviction counsel failed to satisfy Rule 651(c) obligations, regardless of whether the claims raised in the petition had merit). Whether postconviction counsel satisfied her Rule 651(c) obligations is a question we review *de novo*. *Miller*, 2017 IL App (3d) 140977, ¶ 46.

¶ 90 We conclude that Manak's performance at the evidentiary hearing was reasonable. She certified to the court that she consulted with defendant in person, examined the record of proceedings before and after the guilty plea, and made amendments to the petition necessary for an adequate presentation of his contentions. Defendant does not specifically argue that she failed to meet these obligations but instead argues that she did not present sufficient evidence of every element of a *Brady* violation at the evidentiary hearing. We note that while postconviction counsel's obligation at an evidentiary hearing is to "competently present the defendant's claims as framed by the petition," she is "not required to call every witness or bolster every claim with evidence or testimony." *Miller*, 2017 IL App (3d) 140977, ¶ 48. Here, Manak attached to the supplemental petition both defendant's voluntary statement and the December 2006 report, and she specifically argued, on a motion to reconsider, that the DNA evidence was exculpatory and important to defendant's version of events. Therefore, Manak presented the court with evidence

and argument as to all three elements of a *Brady* violation, and defendant has not rebutted the presumption of reasonable assistance.

¶ 91 Finally, we reject defendant's argument alleging that Manak was unreasonable for failing to raise Newsome's ineffectiveness because we have already determined that defendant failed to present substantial new evidence on the issue of prejudice—in particular, whether he would have rejected the plea deal and gone to trial had he possessed the February 26 and 27th reports prior to his plea.[5] Because the issue of prejudice was precluded, Manak could not have shown that Newsome was ineffective, and therefore she was not unreasonable for failing to raise the issue. Moreover, defendant has not argued fundamental fairness or ineffective assistance of appellate counsel on his appeal, and therefore we have no other basis to examine whether postconviction counsel acted reasonably to avoid a procedural bar to the petition. See *Thomas*, 2014 IL App (2d) 121001, ¶ 45 (the doctrines of forfeiture and *res judicata* are relaxed where fundamental fairness requires it, where forfeiture stems from ineffective assistance of appellate counsel, and where the facts relating to the issue are not on the face of the original appellate record); *cf. Turner*, 2012 IL App (2d) 100819, ¶ 55 (in postconviction proceedings, defendant preserved ineffective assistance of trial counsel claim by arguing that appellate counsel was ineffective for failing to raise the same issue). Accordingly, Manak provided reasonable assistance in compliance with Rule 651(c).

¶ 92 III. CONCLUSION

[5] Ineffective assistance of counsel requires a showing of both (1) deficient performance and (2) prejudice in that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. See *People v. Vega*, 408 Ill. App. 3d 887, 889 (2011).

¶ 93 For the reasons stated, we affirm the judgment of the Lake County circuit court. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 94 Affirmed.