SECOND DIVISION
July 23, 2013

No. 1-10-2599

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 93 CR 9271
	)	
ANTHONY BROWN,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: The dismissal of defendant's successive post-conviction petition affirmed where he failed to make a substantial showing of actual innocence; post-conviction counsel provided reasonable assistance and complied with Rule 651(c); mittimus corrected.

¶ 2 Defendant Anthony Brown appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his second successive petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends that he made a substantial showing of actual innocence entitling him to an evidentiary hearing, and that his post-conviction counsel failed to provide him reasonable assistance or satisfy the

requirements of Supreme Court Rule 651(c) (eff. Feb. 6, 2013). He also requests that his mittimus be corrected to reflect the correct calculation of time served.

¶ 3 The record shows that defendant and codefendant, Byron Graham, were charged by indictment with offenses perpetrated on May 28, 1993, against Daisy Anderson, an elderly woman who lived alone on the south side of Chicago. The record further shows, in relation thereto, that this court affirmed the judgment subsequently entered on defendant's 1996 jury convictions for the first degree murder of Anderson, home invasion, robbery and residential burglary, and the sentences imposed thereon: consecutive natural life imprisonment for murder and 30 years' imprisonment for home invasion, concurrent terms of seven years' imprisonment for robbery and 15 years' imprisonment for residential burglary. *People v. Brown*, No. 1-96-0587 (1998) (unpublished order under Supreme Court Rule 23). In 1999 and 2001, defendant filed separate *pro se* post-conviction petitions which were summarily dismissed, and this court affirmed those decisions on appeal. *People v. Brown*, Nos. 1-99-2341 (2000), 1-01-3524 (2003) (unpublished orders under Supreme Court Rule 23).

¶ 4 On January 23, 2002, defendant filed a combined *pro se* "petition for relief from judgment" under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)), and third petition for post-conviction relief. In this petition, defendant alleged, in relevant part, that he was actually innocent of the crimes of which he had been convicted based on newly discovered evidence, namely, an affidavit from codefendant Graham, who had pleaded guilty to first degree murder and home invasion. Defendant acknowledged his trial assertion that codefendant Graham killed the victim prior to his arrival, but maintained that Graham supported that theory in his affidavit where he averred that the victim was dead prior to the time he (defendant) arrived on the scene. Defendant also alleged that Graham's counsel would not let him say anything, and that his wife, Paula Brown, who visited him in July 2001, informed him

that she had received a letter from Graham. In her attached affidavit, Paula averred that she received the letter in February 2000, but did not forward it to defendant because they were having marital problems, and she had overheard that inmates were not supposed to communicate from prison to prison.

¶ 5 The letter from Graham, dated February 3, 2000, was also attached to defendant's petition. In it, Graham indicated that he told his attorney that defendant had nothing to do with the victim's death, but was told that it would be best to just be concerned about himself. In the same letter, Graham indicated that he told his attorney to tell defendant's attorney that he would testify on his behalf, but that defendant's attorney indicated that she did not need him to testify for defendant.

¶ 6 In his affidavit dated August 7, 2001, Graham averred that he had an argument with the victim over some money that she owed him and refused to pay back. When she threatened to call police, he grabbed her from behind in a choke-hold, and before he knew it, her body went limp. He then placed his ear to her chest, realized that she was no longer breathing, and drove off in the victim's car. When he saw defendant a few blocks away, he told him what he had done, but defendant did not believe him, so he took him to the victim's home. There, defendant checked the victim's pulse, and realized that Graham had told him the truth. Graham further averred that he wanted to come forward with the truth earlier, but that his attorney would not let him do so.

¶ 7 The report of proceedings reflects that the circuit court summarily dismissed defendant's petition as frivolous and patently without merit on March 28, 2002. Defendant subsequently filed a petition for rehearing, alleging that his newly discovered evidence claim triggered, at the very least, a response from the State. The court denied the petition on August 2, 2002, and defendant filed a notice of appeal in September 2002. While that appeal was pending, from November 2002, through September 2004, defendant filed a myriad of *pro se* pleadings under the

Act and section 2-1401 of the Code, and the State filed a motion to dismiss the first of these pleadings, which was ultimately stricken due to the pending appeal. On May 26, 2005, this court reversed the circuit court's summary dismissal of defendant's post-conviction petition, and remanded the cause for further consideration under the Act. *People v. Brown*, No. 1-02-3015 (May 26, 2005) (unpublished order under Supreme Court Rule 23).

¶ 8 On remand, counsel was appointed to represent defendant, and on June 30, 2009, counsel filed a Supreme Court Rule 651(c) certificate in which he stated that he had consulted with defendant both by mail and in person to ascertain his contentions of deprivation of constitutional rights, examined the record of the trial proceedings, and investigated two occurrence witnesses at defendant's request. Counsel also examined the claims raised by defendant in his petition filed on January 23, 2002, and found that no amendments were necessary for an adequate presentation of defendant's claims. Counsel noted that he did not waive any issues raised by defendant, "but proffers no further comment upon same." Counsel also stated that he made several attempts to contact Graham via mail, but that Graham failed to respond to his correspondence. Counsel also advised the court that he made numerous attempts to contact Graham, but he "refuses to answer."

¶ 9 On January 28, 2010, the State filed an amended motion to dismiss defendant's petition alleging first that the court should strike the *pro se* pleadings filed between November 2002 and September 2004, because the court lacked jurisdiction to consider those claims which sought to amend a pleading no longer pending in the circuit court after defendant filed a notice of appeal from the dismissal of his January 2002 petition. The State also alleged that the successive petition should be dismissed because defendant failed to obtain leave of court before filing it, and that his actual innocence claim does not meet the standard for showing a substantial violation of defendant's constitutional rights. The State maintained that defendant failed to establish that Graham's statement was undiscovered at the time of trial where he indicated that it was conveyed

to his attorney that Graham would testify on his behalf, but counsel rejected that offer; and further, that it was not of such a conclusive character that it would probably change the result of his trial. The State noted that Graham indicated that he choked the victim with his hands, but that type of strangulation was "ruled out" as the cause of death by the medical examiner, who opined that the victim died as a result of ligature strangulation.

¶ 10 After hearing the arguments of respective counsel on August 19, 2010, the circuit court entered a written order granting the State's motion to dismiss. In this order, the circuit court noted that defendant had filed numerous *pro se* pleadings to amend the instant petition, and that those filed from September 16, 2002, until July 26, 2005, were stricken. The court then found, in relevant part, that defendant failed to make a substantial showing of a meritorious claim of actual innocence. The court explained that the evidence presented at trial supported the State's theory of the case that the victim died from ligature strangulation and does not support the version of facts in Graham's affidavit that the victim died from manual strangulation.

¶ 11 In this appeal from that ruling, defendant first contends that he presented a substantial showing of an actual innocence claim, and requests this court to remand his cause for an evidentiary hearing. He claims that Graham's affidavit was newly discovered, noncumulative, exculpatory evidence that Graham alone killed the victim.

¶ 12 A defendant may file only one post-conviction petition without leave of court. 725 ILCS 5/122-1(f) (West 2010). In order to obtain such leave, defendant must demonstrate cause for his failure to bring the claim in his initial post-conviction petition and prejudice resulting from that failure, or present newly discovered evidence of actual innocence. *People v. Wideman*, 2013 IL App (1st) 102273, ¶13. Where defendant seeks leave of court to file a successive post-conviction petition based on actual innocence, leave should be denied only where it is clear, from a review of the successive petition and the documentation provided by defendant that, as a matter of law,

defendant cannot set forth a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶24. For the reasons that follow, we find that defendant failed to do so here, and that the dismissal was appropriate under either a *de novo* or abuse of discretion standard of review. *Edwards*, ¶30.

¶ 13 The elements of a claim of actual innocence are that the supporting evidence be newly discovered, material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial. *Edwards,* ¶32. In other words, defendant's request for leave of court and supplementary documentation must raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Edwards*, ¶31.

¶ 14 In this case, defendant relies on Graham's affidavit of August 7, 2001, where he essentially claimed sole responsibility for the murder. However, for evidence to be newly discovered it must have been unavailable at trial and be of such character that defendant in the exercise of due diligence could not have discovered it earlier. *Edwards*, ¶34. Here, defendant was clearly aware of this and defendant asserted it at trial. In his letter dated February 3, 2000, Graham stated that he had told his attorney to tell defendant's counsel that he would testify on his behalf, but that counsel indicated that she did not need him to testify for defendant. Nevertheless, Graham averred that his attorney advised him not to testify on defendant's behalf. Under these circumstances, it appears that the evidence was known to defendant at the time of trial, but that it was unavailable to him at trial, and thus qualified as newly discovered. *Edwards*, ¶¶34, 38.

¶ 15 That said, even if this evidence could be considered newly discovered, it is not of such conclusive character that it would probably change the result on retrial. *Edwards*, ¶40. Evidence

must be material to the issue, not merely cumulative, and is considered cumulative when it adds nothing to what was already before the jury. *People v. Brown*, 2013 IL App (1st) 091009, ¶50.

¶ 16 Here, defendant relies on Graham's averment that he (defendant) confirmed that the victim was dead upon his arrival, unlike the trial evidence which indicated that he (defendant) told authorities he was unsure if the victim was dead when he arrived, and thus, establishes that he was unaccountable for the homicide, and "vindicates [his] trial defense, giving it the direct support it lacked at trial." Graham's representation that defendant confirmed upon his arrival that the victim was not breathing was merely cumulative to the defense trial theory that codefendant Graham killed the victim prior to his arrival on the scene. *People v. Smith*, 177 Ill. 2d 53, 85 (1997).

¶ 17 Moreover, this evidence is not of such a conclusive character that it would probably change the result on retrial. Graham's claim that he killed the victim alone was already before the jurors, and defendant argued during closing argument that he only helped cover up Graham's murder. In addition, Graham's averment that he manually strangled the victim was refuted by the pathologist's testimony that the victim "died as a result of ligature strangulation," and, specifically, that there was a "lack of evidence to support any other form of strangulation, which is mainly manual strangulation." In his affidavit, Graham did not refute the theory that defendant gave him a cable wire to tire around the victim's neck when he arrived on the scene. Thus, even if Graham's affidavit could be considered new evidence, it does not raise the probability that, in light of it, that it is more likely than not that no reasonable juror would have convicted defendant. *Edwards*, ¶40. As we noted on direct appeal, even if the jury believed defendant's theory of the murder, the evidence was not so unreasonable, improbable or unsatisfactory as to leave a reasonable doubt of defendant's guilt. *Brown*, order at 17-18. We, therefore, conclude that

defendant failed to make a substantial showing of actual innocence, and affirm the order of the circuit court dismissing defendant's petition at the second stage of proceedings.

¶ 18 In reaching this conclusion, we find defendant's reliance on *People v. Ortiz*, 235 Ill. 2d 319 (2009), misplaced. In *Ortiz*, an evidentiary hearing was held at which an eyewitness to the crime testified in direct contradiction to prior statements made by the State's two eyewitnesses that defendant was not present during the murder, and the supreme court held that such testimony was newly discovered evidence warranting a new trial. *Ortiz*, 235 Ill. 2d at 327, 335-37. Here, defendant does not have equivalent contradictory testimony, but rather, representation by a codefendant who pleaded guilty, that he acted alone. In addition, there was expert testimony that the victim died from ligature strangulation, which was not refuted by Graham's affidavit. *Cf. People v. Molstad*, 101 Ill. 2d 128, 132, 135 (1984) (affidavits from codefendants not cumulative where they indicated that defendant, as he maintained at trial, was not present during attack of the victim as they went to the sole issue of who was present). Further, and as noted above, testimony consistent with defendant's theory at trial that codefendant Graham acted alone would have been merely cumulative to what was already before the jury. *Smith*, 177 Ill. 2d at 85.

¶ 19 Defendant next contends that post-conviction counsel provided unreasonable assistance and failed to satisfy the requirement of Supreme Court Rule 651(c) (eff. Feb. 6, 2013). He specifically claims that counsel failed to interview Graham, and thus did not satisfy the requirement that he make any necessary amendments to the petition; and, further, that he failed to rebut the State's alleged misstatement that the pathologist "ruled out" manual strangulation.

¶ 20 The Act provides for a reasonable level of assistance by post-conviction counsel (*People v. Suarez*, 224 Ill. 2d 37, 42 (2007)), which can be shown by compliance with Rule 651(c) (*People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007)). That rule specifies the duties of post-conviction counsel, and provides that counsel is required to consult with defendant either by mail

or in person, examine the record of the trial proceedings, and make any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of defendant's contentions. The filing of a Rule 651(c) certificate creates a presumption of compliance with the rule. *People v. Johnson*, 232 Ill. App. 3d 674, 678 (1992).

¶ 21 Here, counsel filed a Rule 651(c) certificate stating that he had consulted with defendant by mail and in person to ascertain his contentions of deprivation of constitutional rights, examined the trial record, investigated two occurrence witnesses pursuant to defendant's instruction, and found no amendments were necessary for an adequate presentation of defendant's petition. Counsel also stated that he attempted on several occasions to contact Graham via mail, but that Graham failed to respond. Counsel thereby created a presumption of compliance with Rule 651(c) (*Johnson*, 232 Ill. App. 3d at 678), which defendant has not rebutted.

¶ 22 Although defendant contends that counsel should have personally gone to the prison where Graham was located to interview him, counsel need only attempt to investigate the witness named by defendant in order to provide reasonable assistance, and counsel did so here by making a concerted effort to obtain information from him through numerous letters. *People v. Johnson*, 154 Ill. 2d 227, 245 (1993). Graham's failure to respond does not negate counsel's efforts or amount to unreasonable assistance.

¶ 23 Defendant further maintains that post-conviction counsel provided unreasonable assistance when he failed to respond to the State's alleged misstatement that the pathologist's testimony "ruled out" manual strangulation. As indicated above, the trial transcripts show that the doctor "ruled out" manual strangulation when she testified to her opinion that the victim died of ligature strangulation, and that there was a "lack of evidence to support any other form of strangulation, which is mainly manual strangulation." Thus, defendant's claim is refuted by the record. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001).

¶ 24 Finally, defendant contends, the State concedes, and we agree that the mittimus should be corrected to reflect 1,036 days of credit for time served. We, therefore, correct the mittimus as indicated *(People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)), and affirm the order of the circuit court of Cook County in all other respects.

¶ 25 Affirmed; mittimus corrected.