2013 IL App (1st) 110820-U

FOURTH DIVISION
May 23, 2013

No. 1-11-0820

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, Illinois,
	)	County Department,
v.	)	Criminal Division.
	)	
JOSE ZARAGOZA,	)	No. 98 CR 9701
	)	
Defendant-Appellant.	)	Honorable
	)	Mary Colleen Roberts,
	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in dismissing the defendant's section 2-1401 petition; the defendant failed in his burden to establish that the newly discovered recantation testimony of one of the victims was outcome determinative.

¶ 2 The defendant appeals from the dismissal of his *pro se* petition for relief from judgment filed pursuant to section 2-104 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). The defendant first contends that the circuit court erred in dismissing his petition as untimely. He argues that his court-appointed counsel provided "unreasonable assistance" by

failing to amend his section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)) to address why the late filing of the petition should be excused. In the alternative, the defendant argues that the circuit court erred in dismissing his section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)) on the merits, and asks that we remand the case for further proceedings on the basis of a letter written by one of the victims, who now admits that he perjured himself at trial when he identified the defendant as his assailant. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record below reveals the following facts and procedural history. In 1998, the defendant was tried before a judge for his alleged shooting of two victims, Gabriel Ramos (hereinafter Ramos) and Isaias Garcia (hereinafter Garcia). The following evidence was adduced at trial and summarized by this court on direct appeal:

¶ 5 "At trial the evidence established that at 3 p.m. on September 30, 1997, 15-year-old *** Ramos and 14-year-old *** Garcia were walking south on Western Avenue when [the] defendant and another individual suddenly jumped from between two parked vans and shouted a gang-related slogan. [The] [d]efendant then pulled out a gun and shot Ramos in the hip and Garcia in his legs. Both boys fell to the ground. Garcia remained alert, but Ramos lapsed into a coma.

Chicago Transit Authority operator William Coleman observed the shooting and used his radio to summon police and an ambulance. He saw the shooter and his accomplice run south on Western Avenue and then through a gangway near 40th Street. He described the shooter to police as five-feet, seven-inches tall, about 150 pounds,

having a short haircut and wearing a blue-hooded sweatshirt with baggy jeans. The accomplice wore a light-colored T-shirt and a pair of jeans. Coleman [admitted that he] was unable to identify [the] defendant in photographs of a 1998 lineup, but explained that he did not recognize [the] defendant because [the defendant] had long hair. In court, Coleman identified [the] defendant as the shooter.

Detective Edward Cunningham testified that when he arrived at the scene of the crime, the two victims had already been transported to the hospital. [The detective next admitted that] Coleman had not been invited to the lineup because Coleman told him over the telephone that he probably would not be able to identify anyone. When the detective visited Garcia in the hospital, Garcia stated that he did not know the shooter. [Five months later] [o]n February 23, 1998, another officer advised Detective Cunningham that [the] defendant had been arrested. Ramos came to the police station the following day and identified [the] defendant in a lineup. On February 25 [1998], [the] defendant told Detective Cunningham that he did not shoot anyone, but he did not have an alibi. At the time of the shooting, he might have been working at a restaurant on Archer Avenue. [The] [d]efendant then said that 'he did have a good reason to shoot them because they had been robbing people in the neighborhood' and despite being warned, Ramos had refused to stop.

[The] [d]efendant was then released from custody until February 28, 1998, when the police located Garcia. On that same day, police again arrested [the] defendant and had him participate in a lineup. Garcia then identified him as the shooter.

After Garcia identified [the] defendant, Detective Cunningham and an assistant State's Attorney interviewed [the] defendant. He told them that on the day of the shooting, he was with his friend John Searles from morning until 7 p.m. He and Searles had been breaking up a concrete sidewalk at Searles' house, and left the house only to visit a lumberyard for supplies.

The detective and assistant State's Attorney then visited Searles in his home. Searles told them that on the date of the shooting, he and [the] defendant had worked together on [the] defendant's low-rider bicycle. At the exact time of the shooting, Searles was watching videos with [the] defendant at [the] defendant's house.

When the detective and assistant State's Attorney returned to the police station where they told [the] defendant what Searles had said, [the] defendant responded that Searles had never come to his house that day to watch videos.

Both victims suffered serious injuries requiring lengthy hospitalization. Ramos did not awaken from his coma for about two months and remained in the hospital for at total of four and one-half months. He was then transferred to a rehabilitation center. Ramos testified that he suffered some memory loss as a result of the shooting and the coma.

[Approximately five months after the shooting,] [o]n February 22, 1998, Ramos was riding in a car with his mother when he saw [the] defendant standing on the stairs of a house near 40th Street and Artesian Avenue. Ramos immediately recognized [the] defendant as the shooter. He had seen [the] defendant before in the neighborhood where

they lived approximately 10 houses apart. Ramos knew him as 'Trouble G.' Ramos' mother drove him to the police station where they reported the sighting. Ramos also testified that in the year prior to the shooting he was adjudicated delinquent for robbery and for possession of a stolen motor vehicle. He acknowledged that because of his testimony in the instant case, the State's Attorney's office had relocated his family and provided him with some financial assistance.

On cross-examination, Ramos acknowledged that he did not identify 'Trouble G' as the shooter to anyone including Garcia until after he was released from the hospital and saw him on the street. On redirect examination, he explained why he did not identify him sooner, stating:

> '[b]ecause I just had the face in my head. I couldn't forget the face. I don't know I just didn't have a name to put with the face or anything else. I just had the face in my head and then when I saw him then that right there made me realize that is the guy right there.'

On recross-examination, when defense counsel asked him whether after coming out of his coma he had asked his mother to take him to the police station to view photographs of possible suspects, he stated that he had not.

Isaias Garcia testified that he and Ramos never discussed the case while Ramos was in the hospital or in a rehabilitation facility. He stated that he never told police the name of the shooter because he did not know him. Ramos never told Garcia that the shooter's name was 'Trouble G.'

* * *

John Searles testified on behalf of [the] defendant, stating that he had grown up with [the] defendant, who was one of his best friends. Searles was familiar with the two victims because Ramos lived on the same block, and Garcia frequented the neighborhood in September 1997. During the morning of September 30, 1997, Searles and [the defendant] performed some "cement work" on a sidewalk at [the] defendant's house and then remained at [the] defendant's house for the rest of the day. At 3 p.m., the time of the shooting, Searles was with [the] defendant on [the] defendant's front porch. Searles told the court that he and [the] defendant had worked on [the] defendant's sidewalk for two weeks.

On cross-examination, the State asked Searles if he recalled that he had told Detective Cunningham and an assistant State's Attorney that on the day of the shooting he and [the] defendant had worked together on [the] defendant's low-rider bicycle and had watched videos. Searles responded that they had worked on the bicycle every day for a month and that they generally watched videos together every day during that time period. When asked if he recalled where he was on the day before the shooting, September 29, 1997, Searles stated that both he and [the] defendant were unemployed for the entire months of September and October and were always together at each other's home.

[The] [d]efendant testified that he knew the two victims from the neighborhood where he lived, but had never spoken to either of them. He denied shooting them, stating that at the time of the shooting he was probably breaking up a cement sidewalk, a project

that had taken several days. He stated that he was unemployed during September 1997.

On cross-examination, when asked if he recalled telling Detective Cunningham and an assistant State's Attorney that he did not have an alibi but that he might have been working at a restaurant at the time of the shooting, he responded that the detective had asked him where he worked, and [the] defendant simply listed the places where he had previously been employed. He admitted that he had told Detective Cunningham and the assistant State's Attorney that although he did not shoot the victims, he had good reason to do so because they had been robbing people in the neighborhood, including attempts against himself and his brother. He admitted telling Detective Cunningham and the assistant State's attorney that Searles had never watched videos at the defendant's house." *People v. Zaragoza*, No. 1-99-1890 (December 20, 2000) (unpublished order pursuant to Illinois Supreme Court Rule 23).

¶ 6 At the close of the evidence, the defendant was convicted of two counts of aggravated battery with a firearm and sentenced to two terms of 15 years' imprisonment to be served consecutively. See *People v. Zaragoza*, No. 1-99-1890 (December 20, 2000) (unpublished order pursuant to Illinois Supreme Court Rule 23).

¶ 7 The defendant appealed his conviction and sentence arguing, *inter alia*, that the State failed to prove him guilty beyond a reasonable doubt because the testimony of the State's three eyewitnesses was incredible. See *People v. Zaragoza*, No. 1-99-1890 (December 20, 2000) (unpublished order pursuant to Illinois Supreme Court Rule 23). Specifically, the defendant argued that Ramos' identification of him as the shooter was incredible because of the five-month

delay between the shooting and the identification. *Id.* The defendant also questioned the credibility of Garcia's testimony that when he visited Ramos in the hospital they never discussed the case. *Id.* This court disagreed with the defendant, and affirmed both his conviction and sentence on appeal. *Id.*

¶ 8 In September 2003, the defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2002)), alleging, *inter alia*, (1) numerous "instances of corruption by every person and entity involved in his case from the police to the appellate court," and (2) that his sentence was excessive. See *People v. Zaragoza*, No. 1-04-0089 (May 10, 2005) (unpublished order pursuant to Illinois Supreme Court Rule 23). On October 31, 2003, the circuit court summarily dismissed the petition. *Id.* The defendant appealed arguing that the petition should have been permitted to proceed to the second stage of postconviction proceedings because he had stated the gist of a meritorious claim of ineffective assistance of appellate counsel for failure to raise a claim of ineffective assistance of trial counsel and failure to argue that the defendant's sentence was excessive. *Id.* On May 10, 2005, this court rejected the defendant's arguments and affirmed the dismissal of his postconviction petition. *Id.*

¶ 9 Three years later, on December 1, 2010, the defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2008)). The defendant alleged that he was wrongfully convicted based upon the false testimony of one of the victims, Ramos, who identified him as the shooter. The defendant explained that in 2006[1] both

[1]We note that it is unclear from the record whether Ramos, in fact, mailed his recantation letter to the defendant and the State in 2006. There are only two copies of the recantation letter

he and the State received "a letter from Mr. Ramos that clearly state's [*sic*] that he's willing to come to court and recant his testimony." In his petition, the defendant stated that he was bringing forth "newly discovered evidence" that Ramos falsely accused and identified him as the shooter because the defendant's friends had falsely accused Ramos' brother of robbery.

¶ 10 In support of his section 2-1401 petition, the defendant attached: (1) a copy of Ramos' recantation letter; (2) the State's investigatory report pertaining to that recantation letter; and (3) correspondence between the State, his trial counsel and himself upon receipt of the recantation letter.

¶ 11 In his recantation letter, Ramos admitted that he accused the defendant of shooting him even though he "was not sure who pulled the trigger" and is "100% sure on this very day that [he] do[es not] know who was to blame," because he never saw the shooter's face. Ramos explained that he identified the defendant because: (1) he was angry and wanted someone to be punished and (2) the defendant's gang-member friends had falsely accused Ramos' brother of robbery so he "figured [he would] [gi]ve them a taste of what we were going through with my brother." Ramos further stated that a man had been "sentenced to a life behind bars for a crime he was not guilty of" and Ramos "helped take the life of a [*sic*] innocent man." In his letter, Ramos also wrote: "He is not the shooter! I never saw the shooter! No one saw anything because it was covered, and I am speaking of the shooters face and body."

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in the record; one copy contains the following writing: "INV REQ" and "mailed 1/4/07". Aside from the defendant's allegation, there is no other indication in the record to support the notion that the letter was mailed either in 2006 or 2007.

¶ 12 Along with Ramos' recantation letter, the defendant attached the State's investigatory report pertaining to the letter, dated September 25, 2008. According to that report, an assistant State's attorney and two investigators interviewed Ramos at his residence on September 23, 2008. The report states that Ramos told the investigators that he dictated the letter to his brother, Noel, but that he "was not sure what was even in the letter." Ramos told investigators that his other brother, David, is a prison minister and that the defendant has become close to him as part of the prison ministry. David supports the defendant getting home to his family. According to the report, Ramos was contacted by the defendants' brother long before he wrote the letter whereupon he learned that the defendant's mother was sick. Ramos told the investigators that he "forgives the defendant and wants him to go home to his family" and that "he has done enough time." According to the report, Ramos also stated "I would not want to put a case on a guy but at the time I thought it was him."[2]

¶ 13 In support of his section 2-1401 petition, the defendant also attached copies of correspondence between himself, the State's Attorney's office and his trial counsel regarding Ramos' recantation letter. That correspondence indicates that on October 15, 2008, the State forwarded Ramos' recantation letter and its investigative report to the defendant's trial counsel. Counsel then sent that letter to the defendant on October 24, 2008, stating "you must contact your post-conviction attorney immediately, with this crucial information." The defendant received the

[2]The report also notes that Ramos was on crutches and recently had his leg amputated. When questioned by investigators about how that happened, Ramos stated "due to the things he himself had done."

letter at the Danville Correctional Center on October 29, 2008.[3]

¶ 14 After receiving the defendant's section 2-1401 petition, the trial court appointed counsel to represent the defendant. A year and a half later, on April 7, 2010, defense counsel filed a certification pursuant to Illinois Supreme Court Rule 615©, stating that he was filing the certification should the trial court elect to treat the defendant's section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2008)) as a postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122 *et. seq*. (West 2008)). In his 615© certification, defense counsel attested that he had: (1) "consulted with the petitioner by mail and by telephone," (2) examined the record of all proceedings relevant to the issues raised by the defendant and (3) interviewed Ramos. Defense counsel then stated that he would file no amendments to the defendant's petition and certified that "no amendments to [the defendant's] pleadings [are] *** necessary for an adequate presentation of [the defendant's] contentions."

¶ 15 The State then asked the circuit court for a continuance to file a motion to dismiss the defendant's section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2008)). The circuit court inquired if defense counsel would like file a response and defense counsel responded, "I don't think I'm going to file a response," and then "I'm just going to stand on the original pleadings and probably will have very short argument on this matter."

¶ 16 On August 19, 2010, the State filed its motion to dismiss, arguing that: (1) the defendant's section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)) was untimely and (2) the defendant

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[3]As already noted above, the defendant filed his section 2-1401 petition a month later, on December 1, 2008.

could not satisfy his burden of proof where only one of the there witnesses who identified him as the shooter recanted his testimony more than six years after the trial. The State specifically argued that a trial court is not permitted to review a section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)) if the petition is filed more than two years after the judgment "absent a clear showing that the person seeking relief was under a legal disability or duress or the grounds for relief were fraudulently concealed." The State further argued that "it is clear that petitioner bears the burden of alleging either legal disability or fraudulent concealment, however he failed to do so."

¶ 17 On August 19, 2010, at a status call hearing, defense counsel acknowledged receipt of the State's motion to dismiss, and once again stated that he did not think it would be necessary to continue the case in order for him to respond to the State's motion in writing. On November 4, 2010, both parties appeared in court and waived oral argument on the State's motion to dismiss.

¶ 18 On March 3, 2011, the circuit court issued a written order granting the State's motion to dismiss. The circuit court found that the defendant's section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)) was barred as untimely and that, in the alternative, Ramos' recantation of his testimony would not have affected the outcome of the defendant's trial. The defendant now appeals the circuit court's dismissal.

¶ 19 II. ANALYSIS

¶ 20 Section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2008)) provides a comprehensive statutory procedure by which final orders, judgments, and decrees may be vacated after 30 days from their entry. *People v. Vincent*, 226 Ill. 2d 1,7 (2007); see also *People v. Haynes*, 192 Ill. 2d

437, 460 (2000). Although a section 2-1401 petition is usually characterized as a civil remedy, its remedial powers extend to criminal cases. *Vincent*, 226 Ill. 2d at 7 (citing *People v. Sanchez*, 131 Ill. 2d 417, 420 (1989)).

¶ 21 In considering a section 2-1401 petition, the court must determine whether facts exist that were unknown to the court at the time of trial and would have prevented judgment against the defendant. *People .v. Welch*, 392 Ill. App. 3d 948, 952 (2009). To be entitled to relief under section 2-1401, defendant must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *Pinkonsly*, 207 Ill. 2d at 566.

¶ 22 A section 2-1401 petition must be filed within two years after entry of the judgment being challenged. 735 ILCS 5/2-1401(c) (2008); see also *Vincent*, 226 Ill. 2d at 7; *People v. Pinkonsly*, 207 Ill. 2d 555, 566 (2003). A section 2-1401 petition filed beyond the two year limitation will normally not be considered. *People v. Caballero*, 175 Ill. 2d 205, 210 (1997). An exception to the two-year period has been recognized, however, where a clear showing has been made that the person seeking relief is: (1) under legal disability or duress or (2) the grounds for relief are fraudulently concealed. *Pinkonsly*, 207 Ill. 2d at 566. To make a successful showing of fraudulent concealment, the defendant must specifically allege facts demonstrating that his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief, as well as offer factual allegations demonstrating his good faith and reasonable diligence in trying to uncover such matters before trial or within the limitations period. See *People v. Coleman*, 206

Ill. 2d 261, 290 (2002). Where, as here, a section 2-1401 is dismissed with prejudice on the pleadings, the standard of review is *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 23 On appeal the defendant first argues that his court-appointed counsel for his section 2-1401 petition provided "unreasonable assistance" by failing to amend his petition to explain the defendant's delay in filing the petition outside of the two-year statute of limitations (735 ILCS 5/2-1401 (West 2008)). The defendant asserts that because his *pro se* petition provided no explanation for the delay in filing, let alone any allegations regarding "fraudulent concealment," counsel had a duty to amend his petition to make such allegations to avoid the procedural bar. Relying on our supreme court's decision in *Pinkonsly*, 207 Ill. 2d at 566, the defendant asserts that section 2-1401 petitioners are entitled to the same level of "reasonable assistance" as petitioners filing postconviction petitions pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et. seq.* (West 2008)), and that it was unreasonable for appointed counsel not to amend his petition to address its untimeliness.

¶ 24 The State responds that the level of assistance required for counsel appointed to represent a defendant filing a section 2-1401 petition is merely to "exercise due diligence." In support of this argument, the State relies on *Tedder v. Fairman*, 92 Ill. 2d 216 (1982). The State asserts that appointed counsel here performed due diligence in ensuring that the defendant's *pro se* petition advanced the factual basis of his claim for relief. In any event, the State argues, under either a "reasonable assistance" or "due diligence" standard, postconviction counsel could not have alleged any additional facts to support "fraudulent concealment" so as to avoid the procedural bar of timeliness.

¶ 25 It is well-established that a defendant does not have a constitutionally guaranteed right to the assistance of counsel in any postconviction proceeding; rather that right, if any, arises from the statute. See *People v. Suarez*, 224 Ill. 2d 37, 41 (2007) ("there is no constitutional right to the assistance of counsel in postconviction proceedings; the right to counsel is wholly statutory"). *People v. Suarez*, 224 Ill. 2d 37, 42 (2007); see also *Pinkonsly*, 207 Ill. 2d at 567 ("The right to assistance of counsel at trial is derived form the sixth amendment, but the right to assistance of counsel in collateral postconviction proceedings is a matter of legislative grace."); see also *People v. Owens*, 139 Ill. 2d 352, 364 (1990); *People v. Porter*, 122 Ill. 2d 64, 73 (1988).

> "This distinction is rational, because trial counsel plays a different role than counsel in postconviction proceedings. [Citation.] At trial, counsel acts as a shield to protect defendants from being 'haled into court' by the State and stripped of their presumption of innocence. [Citation.] Postconviction petitioners, however, have already been stripped of the presumption of innocence, and have generally failed to obtain relief on appellate review of their convictions. *** Counsel are appointed to represent postconviction petitioners, not to protect them from the prosecutorial forces of the State, but to shape their complaints into the proper legal form and to present those complaints to the court." *Owens*, 139 Ill. 2d at 364-65.

¶ 26 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et. seq*. (West 2008)) explicitly provides for appointment of counsel at the second stage of postconviction proceedings where a defendant requests counsel and the court is satisfied that the petitioner has no means to procure one. See 725 ILCS 5/122-4 (West 2008). Our courts have interpreted the Post-Conviction

Hearing Act as guaranteeing a petitioner "reasonable assistance" of counsel. See *e.g.*, *Suarez*, 224 Ill. 2d at 42 ("The Act provides for a reasonable level of assistance"); see also *People v. Flores*, 153 Ill. 2d 264, 276 (1992) ("Because the right to counsel in post-conviction proceedings is derived from statute rather than the Federal or State Constitutions, post-conviction petitioners are guaranteed only the level of assistance provided for by the Act. That assistance has been defined by this court to mean a 'reasonable' level of assistance"); see also *Pinkonsly*, 207 Ill. 2d at 567; see also *People v. Perkins*, 229 Ill. 2d 34, 42 (2007).

¶ 27 To ensure this level of assistance Illinois Supreme Court Rule 651(c) imposes three duties on appointed postconviction counsel, which must be established either by the record or a certificate filed by counsel. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); see also *Perkins*, 229 Ill. 2d at 42. These duties are that counsel: (1) consulted with the petitioner to ascertain his contentions of constitutional deprivations; (2) examined the record of the trial proceedings; and (3) made any amendments to the filed *pro se* petition necessary to adequately present the petitioner's contentions. See Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984) ("Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it shall order that a transcript of the record of the post-conviction proceedings, including a transcript of the evidence, if any, be prepared and filed with the clerk of the court to which the appeal is taken and shall appoint counsel on appeal, both without cost to the petitioner. The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has

examined the record of the proceedings at the trial, and has made any amendments to the petitions filed pro se that are necessary for an adequate presentation of petitioner's contentions."); see also *Perkins*, 229 Ill. 2d at 42. The purpose of Rule 651(c) is to ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 44. Filing a Rule 651(c) certificate creates the presumption that counsel provided the required representation during second stage proceedings, but this presumption may be rebutted by the record. *People v. Marshall*, 375 Ill. App.3d 670, 680 (2007). The defendant bears the burden of overcoming that presumption by demonstrating that his counsel failed to substantially comply with Rule 651(c)'s requirements. *People v. Jones*, 2011 IL App (1 st) 092529 ¶ 23 (2011).

¶ 28 Unlike the Post-Conviction Hearing Act, however, section 2-1401 of the Code (735 ILCS 5/2-1401) neither explicitly addresses appointment of counsel, nor specifies the level of assistance required if counsel is appointed by the court. Compare 725 ILCS 5/122-4 (West 2008) with 735 ILCS 5/2-1401 (West 2008); see also *Pinkonsly*, 207 Ill. 2d at 568 ("Section 2-1401 does not specify any level of assistance"); see also *Welch*, 392 Ill. App. 3d at 951 ("section 2-1401 does not afford a defendant any specific level of assistance"). More importantly, our supreme court has never explicitly stated which level of assistance is required of counsel appointed to represent a section 2-1401 petitioner.

¶ 29 In *Pinkonsly*, our supreme court only addressed whether the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to section 2-1401 counsel and held that it did not. *Pinkonsly*, 207 Ill. 2d at 567. In that case, the defendant argued that he was denied his

constitutional right to effective assistance of counsel when counsel appointed to represent him in his section 2-1401 petition failed to argue that one of the defendant's crimes was a lesser included offense of another crime the defendant had committed. *Pinkonsly*, 207 Ill. 2d at 567. Our supreme court held that "the appellate court erroneously applied the *Strickland* standard to the defendant's claim that his section 2-1401 attorney was ineffective," because unlike the right to assistance of counsel at trial, which is derived form the sixth amendment, "the right to assistance of counsel in collateral postconviction proceedings is a matter of legislative grace." *Pinkonsly*, 207 Ill. 2d at 567-68.

¶ 30 Our supreme court then went on to note that the defendant's petition in that case was not brought pursuant to the Post-Conviction Hearing Act, but rather pursuant to section 2-1401 of the Code, which "does not specify any level of assistance" required for counsels appointed to represent such petitions. *Pinkonsly*, 207 Ill. 2d at 567-68. The *Pinkonsly* court then stated:

> "Assuming that the defendant was entitled to the same level of assistance on his section 2-1401 petition as on a postconviction petition, the defendant did not receive unreasonable assistance. The defendant's attorney was not unreasonable for failing to raise a putative legal error in a proceeding where only fact errors are cognizable." *Pinkonsly*, 207 Ill. 2d at 567-68.

¶ 31 Subsequently, relying on the aforementioned language in *Pinkonsly*, this appellate court in *Welch*, held that "while section 2-1401 does not afford a defendant any specific level of assistance," "a *court may *** assume that a section 2-1401 petition is entitled to the same level of assistance as a postconviction petitioner*." (Emphasis added.) *Welch*, 392 Ill. App. 3d at 952.

¶ 32 The defendant relies on *Pinkonsly*, 207 Ill. 2d at 567-68, and *Welch*, 392 Ill. App. 3d at 952, and asks us to find "unreasonable" his counsel's failure to amend the section 2-1401 petition to allege "fraudulent concealment" in explaining the petition's untimeliness. The defendant does not cite to any other published decisions, and our research has revealed none, that have explicitly held that the "reasonable assistance" standard applies to counsel appointed to represent a section 2-1401 petitioner.

¶ 33 The State, on the other hand, cites to our supreme court's 1982 decision in *Tedder*, 92 Ill. 2d 216, contending that counsel appointed to represent a section 2-1401 petition need not provide "reasonable assistance," but rather must only exercise "due diligence." In *Tedder*, our supreme court was asked to determine whether a trial court had the duty to appoint an assistant public defender to represent two prisoners, who had filed writs of *habeas corpus* and of *mandamus* alleging that they had been deprived of needed medical assistance in prison. *Tedder*, 92 Ill. 2d at 219-20. Our supreme court held that although a trial court was not required to appoint counsel in such cases, it had the discretion to do so. *Tedder*, 92 Ill. 2d at 226. The *Tedder* court then went on to state:

> "once a circuit court in its discretion, has determined that appointment of the public defender is appropriate to represent an indigent prisoner, *** then that assistant public defender is expected to *exercise due diligence* in proceeding with the assigned case." (Emphasis added.) *Tedder*, 92 Ill. 2d at 227.

The *Tedder* court ordered the appointed attorneys in that case to help the defendants amend their petitions because both trial courts had ruled that the petitions were inadequate. *Tedder*. 92 Ill. 2d

at 227-28. Based on the aforementioned language, the State urges us to apply the "due diligence" standard rather than reasonable assistance in evaluating the performance of counsel appointed to represent the defendant with his section 2-1401 petition below.

¶ 34 Although after a review of the aforementioned cases, we would be inclined to apply the "due diligence" standard articulated in *Tedder*, at the present moment, we need not determine which standard applies since, as shall be discussed below, we find that even if counsel had amended the defendant's section 2-1401 petition to avoid the procedural time-bar, the circuit court properly held that the actual innocence claim raised by the defendant in the petition had no merit.

¶ 35 In that respect, we note that in order to succeed on a claim of actual innocence in his section 2-1401 petition, the defendant bore the burden of establishing that the newly discovered evidence, *i.e.*, Ramos' recantation letter: (1) was not available at his original trial and that he could not have discovered it sooner through due diligence; (2) is material and non-cumulative and (4) is of such conclusive character that it would probably change the result on retrial. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004).

¶ 36 While Ramos' recantation letter certainly qualifies as newly discovered, material and non-cumulative, the record reveals that its contents are not of such conclusive character that they would probably change the result on retrial. The record reveals that Ramos was not the only person to identify the defendant as the shooter. Rather, two other individuals, the second victim, Garcia, and an eyewitness, Coleman, made multiple identifications of the defendant as the assailant. Although Coleman initially could not pick the defendant's photograph out of a photo

array, he gave a description of the shooter to police, and then made an in-court identification of the defendant as the shooter. At trial, Coleman also explained the reason for his initial failure to identify the defendant's photograph from an array, stating that the defendant's hair was longer in the photograph than it was on the day of the shooting. More importantly, Garcia independently identified the defendant as the shooter twice, once in a photo array and again in a line-up after the defendant's arrest. Contrary to the defendant's assertion, nothing in Ramos' recantation letter calls into doubt Garcia and Coleman's identifications. Ramos' statement that, "No one saw anything because it was covered, and I am speaking of the shooters face and body," is directly rebutted by Coleman's testimony at trial describing the shooter's appearance, clothes, and "short hair cut."

¶ 37 Our supreme court has repeatedly held that "[a] positive identification by a single eyewitness who had ample opportunity to observe is sufficient to support a conviction." *People v. Piatakowski*, 225 Ill. 2d 551, 566 (2007) (citing *People v. Vriner*, 74 Ill. 2d 329, 343 (1978)). Accordingly, since two witnesses other than Ramos observed the shooting and identified the defendant as the shooter, the defendant has failed to satisfy his burden of establishing that Ramos' recantation testimony could be outcome determinative. See *Morgan*, 212 Ill. 2d at 154.

¶ 38 III. CONCLUSION

¶ 39 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 40 Affirmed.