2015 IL App (2d) 130193-U
Nos. 2-13-0193 & 2-13-1113 cons.
Order filed May 26, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ERNEST E. GWINN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 01-CF-879 Honorable John T. Phillips, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justice Hutchinson concurred in the judgment.
Justice Zenoff dissented.

ORDER

¶ 1 *Held*: (1) The trial court erred in dismissing defendant's postconviction petition, which alleged that trial counsel was ineffective for failing to call certain witnesses, as the witnesses' affidavits, which had to be taken as true, were potentially exonerating; (2) defendant was entitled to a $1,575 credit against his fine, to reflect the 315 days he spent in presentencing custody.

¶ 2 In this consolidated appeal, defendant, Ernest E. Gwinn, appeals from the second-stage dismissal of his postconviction petition and from the denial of his motion for leave to file a successive postconviction petition. Defendant asks that we reverse the dismissal and remand the cause for an evidentiary hearing. Defendant also asks that we award him $1,575 credit against

his fines. For the reasons that follow, we reverse the dismissal of defendant's postconviction petition and remand for further proceedings, and we modify the judgment to reflect a $1,575 credit.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2000)) and sentenced to 31 years in prison. Defendant appealed, and we reversed and remanded for a new trial. *People v. Gwinn*, No. 2-04-0099 (2006) (unpublished order under Supreme Court Rule 23).

¶ 5 On remand, defendant elected a bench trial. The trial court found defendant guilty and sentenced him to 25 years in prison. Defendant appealed, and we affirmed. *People v. Gwinn*, 2011 IL App (2d) 090138-U. The evidence presented at defendant's bench trial was set out in our decision affirming defendant's conviction. A summary of the evidence relevant for purposes of the present appeal follows.

¶ 6 Detective Vince Nichols testified that, on the day of the incident, March 14, 2001, he worked as an agent with the Metropolitan Enforcement Group. That evening, Nichols interviewed Tony Robinson, an informant who had agreed to assist with a narcotics investigation, at the sheriff's department. Nichols observed Robinson use his personal cell phone to place a call to a preprogrammed number from the phone's contact list, shown as "Gene." Thereafter, Robinson told him that: he had just spoken with Gene and ordered four ounces of cocaine; Gene had agreed to deliver the cocaine to Robinson; and Gene wanted Robinson to call back in about 40 minutes. The court admitted the content of the conversation to show the course of the investigation.

¶ 7 Nichols testified further that, when Robinson called Gene back, Nichols observed Robinson again scroll through the contact list to the name Gene and push the send button. Thereafter, Robinson informed Nichols that Gene told him that he would be at the Walgreens at Lewis and Belvidere in Waukegan in about 15 minutes. Robinson also told him that Gene was a black male in his 30s with tight braided hair, that Gene drove a gold Dodge four-door, and that Gene usually traveled with his girlfriend. This testimony was admitted to show the course of the investigation.

¶ 8 Nichols further testified that he relayed this information to his supervisor, Kevin Grampo, and that agents set up surveillance near Walgreens. Because no vehicle or person matching the above description showed up at Walgreens, Robinson made a third phone call. Nichols saw Robinson scroll through the contact list to the name Gene and push the send button. Nichols saw Robinson have a phone conversation. Robinson advised Nichols that Gene was minutes away from Walgreens.

¶ 9 Police officer Tim Gretz was one of the officers conducting surveillance that night; he sat in an unmarked squad car in the Walgreens parking lot. Around 11:30 p.m., Gretz saw a gold, four-door Dodge drive slowly through the parking lot, flashing its lights. Gretz did not see anyone in the car other than the driver. The Dodge did not stop but exited the parking lot, driving south on Lewis. Shortly thereafter, Gretz was instructed by radio to look for a 5' 2" black female in her 20s. Other officers had stopped the Dodge and recovered a purse, which led them to believe that a female was involved and in the vicinity of the Walgreens. Gretz then drove to the Home Depot parking lot across the street and saw a female matching that description near the entrance to the Home Depot.

¶ 10 Officer Brian Peters, also part of the surveillance team, was parked in an unmarked car in the Home Depot parking lot. Peters learned by radio that the Dodge was driving south on Lewis. He located the vehicle, observed it flash its lights several times, and effected a traffic stop. Defendant, the driver and only person in the car, provided identification upon request.

¶ 11 Police officer John Willer arrived at the scene where defendant was stopped. When he asked defendant his name, defendant answered "Ernest Gwinn." When asked if he had a middle name, defendant replied "Eugene." Willer asked for proof of insurance, and defendant said that he did not have insurance because it was a rental car. Defendant gave Willer the rental agreement, which was in the name of "Shay Causey," whom defendant said was his girlfriend. Defendant was asked to exit the vehicle, and he complied while holding his cell phone. Defendant agreed to a pat-down and placed his cell phone on the trunk of the vehicle. No weapons or narcotics were found during the pat-down.

¶ 12 To test defendant's cell phone, Willer called Nichols to request that Robinson call Gene, "the subject we had gotten earlier the information about, who was supposed to have delivered the narcotics." Nichols, who was still at the police station with Robinson, watched Robinson scroll through his contacts to Gene and press the send button. Willer observed defendant's cell phone ring. This procedure was performed a second time, and defendant's cell phone rang again.

¶ 13 Defendant consented to a search of the vehicle, and Willer found a denim purse on the floor of the passenger seat. Inside the purse was a driver's license belonging to "Quinesha Roshay Causey." When asked whom the driver's license belonged to, defendant answered that it belonged to his girlfriend, who was at home in Zion. Defendant further stated that Causey knew that he was driving her vehicle.

¶ 14 Police officer Chad Roszkowiak testified that he retrieved Causey's driver's license from Willer. He then drove to Home Depot to see whether the license belonged to the female found near the entrance to Home Depot. It was a match; the female at Home Depot was Causey. After Roszkowiak noticed a bulge in the crotch area of Causey's pants, she pulled out a black knit glove from her groin area. Inside the glove was a clear plastic bag containing cocaine.

¶ 15 When Willer learned from the other officers that they had found Causey at the Home Depot, he relayed this information to defendant. Defendant then denied knowing Causey.

¶ 16 The State rested, and defendant did not present any witnesses.

¶ 17 The trial court found defendant guilty of possessing the cocaine with the intent to deliver. In reaching its decision, the court stated that it "considered only the evidence received in this case for the substantive purpose, if it was received as substantive evidence, and I did not consider any evidence that was allowed over objection for any purpose other than the limited purpose that I permitted it to be heard." *Id.* ¶ 19. In particular, the court noted that "the police were at the area of Walgreens at Lewis and Belvidere based upon what they were told was arranged by an informant. I have not considered in any way what was said but only that they were there based upon information that they were investigating." *Id.* The court went on to say that its guilty finding was based on the following evidence: the police located a particular vehicle that entered the parking lot of Walgreens; the vehicle drove slowly and did not stop but flashed its lights; the vehicle passed by the Home Depot where Causey was found standing at the entrance, despite the store being closed; defendant, after being stopped, said that his middle name was Eugene and provided the officer with a rental agreement in Causey's name; defendant told the officer that Causey was his girlfriend and that she knew that he was driving the vehicle; defendant's cell phone rang both times Nichols observed Robinson call Gene on his cell phone; the open purse in

the vehicle contained Causey's driver's license; officers at Home Depot observed a bulge in Causey's pants; and Causey handed over a glove that contained a plastic bag with cocaine.

¶ 18 On appeal, defendant argued that the trial court erred in admitting hearsay testimony from Nichols about the substance of his conversation with Robinson and in considering unreliable hearsay testimony at sentencing and that his trial counsel was ineffective for failing to object to hearsay testimony and for failing to move for a substitution of judges. *Id.* ¶ 1. We held that the admission of the hearsay testimony was harmless error, that the trial court considered only relevant and reliable evidence at the sentencing hearing, and that trial counsel was not ineffective. *Id.* ¶¶ 40, 51, 57

¶ 19 On May 29, 2012, defendant's newly retained counsel, Thomas Brandstrader, filed a petition for postconviction relief. The petition alleged a claim of actual innocence. The petition also alleged that defendant was denied the effective assistance of trial counsel, based on counsel's failure to interview three witnesses, who would have made clear that defendant was innocent. Finally, the petition alleged that defendant was denied the effective assistance of appellate counsel.

¶ 20 In support of his claims, defendant provided the affidavits of Robinson, Causey, and Tanya Allen, as well as his own. In his affidavit, defendant stated that he knew nothing about the drugs found on Causey. Robinson loaned him the rental car and later called him and asked him to return the car because Robinson's girlfriend, Causey, was angry that her car had been loaned to defendant. Defendant received a second call from Robinson, and Robinson asked him to pick up Causey at Walgreens. The calls came in on a phone that was in a purse that was left in the rental car. Defendant drove slowly through the parking lot at Walgreens looking for Causey. Defendant never told police that Causey was his girlfriend.

¶ 21 Robinson averred that, while he was driving to North Chicago to deliver cocaine, along with Causey, who was his girlfriend, he gave Causey a black glove filled with four ounces of cocaine to hold for him. Robinson told Causey to wait for him at Walgreens. Robinson drove to North Chicago to make the delivery. When he arrived, he was stopped by police, who discovered cocaine in his vehicle. He was arrested, taken to the police station, and told to make a phone call to get the rest of the cocaine. He called a random number and did not talk to anyone. He spoke into the phone and said to meet him at Walgreens with the drugs.

¶ 22 Causey averred that she was Robinson's girlfriend and that on March 14, 2001, she was upset with Robinson because he had loaned her rental car to defendant with her personal belongings in the car. Robinson asked her to go for a ride with him, and he gave her a black glove containing cocaine to hold. She put the glove in her panties. He dropped her off at Walgreens and asked her to wait there for him. She was stopped by police, and they discovered the cocaine. They asked her questions about defendant. She told them that she did not know anything about him, other than that he had her car. At the time of her arrest, defendant had no connection to her or the cocaine in her panties.

¶ 23 Allen averred that defendant was the father of her children and that, at the time of defendant's arrest, they shared an apartment. According to Allen, defendant was at home with her during the time leading up to his arrest and thus there was no time for him to have been part of a drug deal. Defendant was not a drug dealer. She was not called to testify, and, if she was, she could have verified that he was at home.

¶ 24 The State filed a motion to dismiss the petition.

¶ 25 The trial court held a hearing on January 3, 2013. Following the hearing, the trial court advised the parties that it would enter its written ruling on January 8, 2013, and continued the matter to that date. The court also set a status date of February 4, 2013.

¶ 26 On January 7, 2013, the trial court entered an order dismissing the petition. The court first found that defendant's claim of actual innocence was without merit, because the affidavits were not new evidence. The court next found that defendant's claim of ineffective assistance of trial counsel was without merit, because the parties did not aver that counsel failed to interview them. Further, the court found that, even assuming that counsel failed to interview them, defendant could not establish prejudice. Specifically, the court found that Allen's testimony would not have had a significant impact on the case since defendant's identity and presence at the scene cannot seriously be contested. In addition, the weight of her testimony that defendant was not a drug dealer would be slight given her relationship with him. Concerning Causey, the court noted that her affidavit did not claim that the phone in the car belonged to her. The court further noted that, even if Causey claimed ownership of the phone, her testimony would not raise the probability of a different result at trial because the claim would be incredible given the fact that the phone rang when Robinson speed-dialed "Gene." Concerning Robinson, the court noted that Robinson's affidavit contradicted defendant's affidavit in that Robinson said that he did not talk to anyone at the random number he dialed and that he spoke into the phone saying to meet him at Walgreens with the drugs, whereas defendant swore that Robinson called him twice and spoke to him about returning the car, rather than the delivery of the drugs. The court also found that Robinson's and Causey's testimony would have held little weight as their involvement in drug dealing would have made them less credible and because their testimony would not have been against their penal interest since the limitations period had expired.

¶ 27 The court further found that the affidavits did not make a substantial showing that counsel's failure to call the witnesses was objectively unreasonable. The court recognized that the decision to call a witness is a matter of trial strategy, unless the decision is so unsound that it entirely fails to produce meaningful adversarial testing of the State's case. The court noted that, at defendant's first trial, the defense rested after offering only a brief stipulation. The conviction was reversed on appeal, because certain evidence was improperly admitted. Thus, the court found that it was not objectively unreasonable for counsel to choose to test the State's more limited case on retrial without offering evidence from Allen, Causey, and Robinson, especially given that Allen's testimony would have been insubstantial and Causey and Robinson would have been weak witnesses subject to damaging impeachment. Further, the court noted that placing Robinson on the stand would have opened the door to a much wider examination of the assistance that Robinson provided to the police.

¶ 28 Finally, the court ruled that appellate counsel was not ineffective for failing to raise a reasonable-doubt argument, since such an argument would not have been viable.

¶ 29 On February 7, 2013, attorney Jennifer Blagg filed a motion to reconsider the dismissal of the postconviction petition. Blagg argued that Brandstader did not provide defendant with reasonable assistance of postconviction counsel, because he did not properly frame the arguments and failed to obtain critical information from the affiants. Blagg attached as exhibits to the motion to reconsider supplemental affidavits from Causey, Robinson, and Allen.

¶ 30 In Causey's supplemental affidavit, she clarified that her cell phone was among the personal belongings left behind in the rental car. She also stated that trial counsel never contacted her and that she would have testified if he had. She stated that her testimony would

have been consistent with her previous statements that Robinson was her boyfriend, that Robinson gave her the drugs to hold, and that defendant had nothing to do with the drugs.

¶ 31 Robinson stated in his supplemental affidavit that he had let defendant, who was his barber, use Causey's rental car. He did not realize that Causey had left her belongings in the car. When Robinson was arrested, the police wanted him to give them something in exchange for a break on his charges. They told him to call his supplier. At first he just dialed random numbers and acted like he was asking for drugs, then he lied and told the police that he was unable to make a connection. After that, the police told him to "call a guy named 'Gene.' " Robinson stated that he did not have any contacts in his phone for Gene. He knew defendant only as "G-Bo," and he would call him at his barber shop. Robinson called Causey's phone three times, hoping that defendant would answer. Defendant answered on the third call. Robinson told defendant to go to Walgreens and pick up Causey. Defendant told him that it would take awhile because he was in Zion. Robinson stated that he did not show the police his phone. They saw him make a call, but he never called a contact named Gene. He was never contacted by defendant's attorney, and if he had been he would have said that the drugs were his and that Causey was his girlfriend. He would have testified if asked.

¶ 32 Allen testified in her supplemental affidavit that, at the time of his arrest, defendant was her boyfriend and lived with her in Zion. Defendant left home that morning to go to work and did not return home. She later found out that he had been arrested. Defendant's attorney never contacted her, and she would have testified if asked.

¶ 33 A hearing on the motion to reconsider took place on February 20, 2013. At the outset, the judge noted that the motion to reconsider was untimely, since it was filed on February 7, 2013, more than 30 days after the dismissal was entered on January 7, 2013. The judge stated

that he was not sure whether he had jurisdiction to consider the motion. Thereafter the following transpired:

"THE COURT: You are seeking the Court to allow you to change affidavits that the court used in connection with the case to file new affidavits with new information to now allege that the Court should reconsider because the original was that appellate counsel was ineffective for what they didn't do; trial counsel was ineffective; and now I should reconsider it because post-conviction counsel was ineffective for what they did.

MS. BLAGG: Yes, your Honor.

THE COURT: I considered everything that you saw. I looked at the affidavits. So assuming that I have jurisdiction—

MS. BLAGG: Yes, sir.

THE COURT: And I don't believe I have jurisdiction. But assuming that I did, this is not going to be reopened so that we can start all over again based upon a new allegation that was not made.

So I am denying you your motion to reconsider for two reasons: One, on the merits, and, secondarily, because I don't have jurisdiction."

¶ 34 Defendant filed his notice of appeal that same day (appeal No. 2-13-0193).

¶ 35 On November 12, 2013, we dismissed the appeal for lack of jurisdiction. However, on December 17, 2013, the Illinois Supreme Court issued a supervisory order directing us to vacate the dismissal order, reinstate the appeal, and consider the appeal on the merits.

¶ 36 On June 21, 2013, while that appeal was pending, defendant filed a *pro se* motion for leave to file a successive postconviction petition, seeking to raise claims of unreasonable

assistance of postconviction counsel. On September 24, 2013, the trial court denied defendant's motion. Defendant timely appealed (appeal No. 2-13-1113).

¶ 37 On defendant's motion, we consolidated the appeals.

¶ 38 II. ANALYSIS

¶ 39 Defendant argues that the trial court "erred in refusing to allow Blagg to seek relief for the defendant from the unreasonable assistance of postconviction counsel." According to defendant, by refusing to consider the merits of the motion to reconsider and thereafter denying defendant leave to file a successive postconviction petition, the trial court left defendant without a remedy for his claim of unreasonable assistance of postconviction counsel.[1] Defendant maintains that the supplemental affidavits, attached to the motion for reconsideration, liberally construed in light of the trial record, make a substantial showing of ineffective assistance of trial counsel for failing to interview and call Causey, Allen, and Robinson to testify that defendant had no connection to the drugs found in Causey's panties and that therefore an evidentiary hearing is warranted.

¶ 40 In response, the State maintains that the trial court properly refused to allow Blagg to "reopen" the postconviction proceedings where the motion to reconsider was untimely filed. According to the State, given the lack of jurisdiction, the trial court's ruling was proper. The State further maintains that any claim concerning unreasonable assistance of postconviction counsel should be raised on appeal from the dismissal of a postconviction petition. Finally, the

[1] We note that, despite this argument, defendant does not seek relief from the denial of his motion for leave to file a successive postconviction petition. He asks only that we reverse and remand for an evidentiary hearing on his initial postconviction petition. Thus, we affirm denial of the motion for leave.

State tersely argues that defendant cannot show the substantial violation needed to advance to an evidentiary hearing, since the "affidavits do not undermine the evidence presented at trial."

¶ 41 Under the Post-Conviction Hearing Act (Act), individuals convicted of criminal offenses may challenge their convictions if there was a violation of their constitutional rights. 725 ILCS 5/122-1 *et seq*. (West 2012); *People v. Domagala*, 2013 IL 113688, ¶ 32. The Act provides for three stages of review by the trial court. At the first stage, the trial court may summarily dismiss a petition that is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Domagala*, 2013 IL 113688, ¶ 32. If the trial court does not dismiss a petition at the first stage, the petition advances to the second stage, where counsel is appointed if a defendant is indigent. After counsel determines whether to amend the petition, the State may file either a motion to dismiss or an answer to the petition. 725 ILCS 5/122-4, 122-5 (West 2012); *Domagala*, 2013 IL 113688, ¶ 33. At the second stage, the trial court must determine whether the petition and any accompanying documents make a "substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). If the defendant makes this showing at the second stage, then the petition advances to a third-stage evidentiary hearing. At a third-stage evidentiary hearing, the trial court acts as fact finder, determining witness credibility and the weight to be given particular testimony, and resolving any evidentiary conflicts. *Domagala*, 2013 IL 113688, ¶ 34.

¶ 42 Here, the trial court dismissed defendant's postconviction petition at the second stage. During a second-stage dismissal hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *Id*. ¶ 35. At this stage, the trial court accepts as true all well-pled facts that are not positively rebutted by the record. *Id*. There is no fact finding or credibility determination at this stage. *Id*. As a result, the State's motion to dismiss raises solely

the issue of whether the petition is sufficient as a matter of law. *Id*. The question before the court is whether the petition's well-pled allegations, if proven, would entitle the defendant to relief. *Id*. Since this is a purely legal question, our review at the second stage is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-89 (1998).

¶ 43 Defendant argued in his postconviction petition, *inter alia*, that his trial counsel was ineffective for failing to interview and present testimony from Allen, Causey, and Robinson. Claims of ineffective assistance are judged against the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Domagala*, 2013 IL 113688, ¶ 36. To prevail on a claim of ineffective assistance, a defendant must show both: (1) that counsel's performance was deficient; and (2) that this deficient performance prejudiced the defendant. *Id*.

¶ 44 Defendant seems to concede that the trial court's initial dismissal of the postconviction petition was proper, given the failings of the original affidavits, *i.e.*, they offered no support for his claim that counsel failed to interview Allen, Causey, and Robinson. However, in his motion to reconsider, defendant maintained that the affidavits' deficiencies were the result of the unreasonable assistance of postconviction counsel, and he asked that the trial court reconsider the dismissal in light of the supplemental affidavits. According to defendant, the trial court erred in failing to consider the supplemental affidavits and in refusing to consider the motion to reconsider on the merits. Defendant asks us to consider the supplemental affidavits in determining whether he made a substantial showing of ineffective assistance of trial counsel.

¶ 45 As an initial matter, we address the State's argument that the motion to reconsider was untimely. As already noted, we previously dismissed defendant's appeal for lack of jurisdiction, based on the untimeliness of the motion to reconsider. Thus, in directing us to "consider the

appeal on the merits," the supreme court has directed us, in essence, to treat the motion to reconsider as timely. Accordingly, we reject the State's argument.

¶ 46 Next, we note that, contrary to defendant's claim, it appears from the record that the trial court did, in fact, consider the supplemental affidavits in denying the motion for reconsideration. The court specifically stated: "I considered everything that you saw. I looked at the affidavits." The court concluded: "I am denying you your motion to reconsider for two reasons: One, on the merits, and, secondarily, because I don't have jurisdiction." Thus, the trial court did not reject the affidavits; it simply denied the motion to reconsider. Because the supplemental affidavits supported a preexisting claim of ineffective assistance of counsel and were considered by the trial court in denying the motion to reconsider, we too consider the affidavits on appeal. See *People v. Henderson*, 2014 IL App (2d) 121219 (notarized affidavits attached to a motion to reconsider the dismissal of a postconviction petition, which had been unnotarized and rejected by the trial court when attached to the petition, were properly considered by the trial court as new evidence in support of a preexisting claim); *People v. Coleman*, 2012 IL App (4th) 110463 (affidavit attached to a motion to reconsider dismissal of a postconviction petition was considered new evidence in support of a preexisting claim).

¶ 47 We acknowledge that, in denying the motion to reconsider on the merits, the trial court also stated, "this is not going to be reopened so that we can start all over again based upon a new allegation that was not made." Though it is not clear what the trial court meant by reopening the case and starting "all over again," it *is* clear that the supplemental affidavits supported a preexisting claim of ineffective assistance of trial counsel. Indeed, the supplemental affidavits could be considered only for that purpose, because any new claim would have been forfeited. Therefore, to the extent that Blagg's statements to the court could be interpreted as an attempt to

raise a new claim of unreasonable assistance of postconviction counsel in the motion for reconsideration, we agree with the State that such a claim would be improper. Any claim not raised in an original or amended postconviction petition is forfeited. See 725 ILCS 5/122-3 (West 2012). Moreover, "the post-conviction process does not provide a forum by which a defendant may challenge the conduct of counsel at an earlier post-conviction proceeding." *People v. Szabo*, 186 Ill. 2d 19, 26 (1998). Any "ineffectiveness" of counsel in the postconviction proceeding would not have been the denial of a constitutional right (see 725 ILCS 5/122-1(a)(1) (West 2012)), as there is no constitutional right to counsel in a proceeding under the Act. *Pennsylvania v. Finley*, 481 U.S. 551, 558-59 (1987); *People v. Lee*, 251 Ill. App. 3d 63, 64-65 (1993).

¶ 48 However, as noted, though defendant could not pursue a claim of unreasonable assistance of postconviction counsel in a motion to reconsider, defendant could offer the supplemental affidavits in support of his preexisting claim of ineffective assistance of trial counsel. Of course, he could also submit the unreasonable assistance of postconviction counsel not as a new claim but as a basis for reconsidering, in light of the supplemental affidavits, his preexisting claim. See *People v. Powers*, 376 Ill. App. 3d 63, 65-66 (2007) (defendant's motion to reconsider based on postconviction counsel's unreasonable assistance was an "appropriate motion directed against the trial court's dismissal of his postconviction petition"). We construe defendant's motion to reconsider accordingly. Further, because the trial court purported to consider the supplemental affidavits, we too consider them in determining whether defendant made a substantial showing that he was deprived of his constitutional right to effective assistance of counsel.

¶ 49 To establish the first prong of the *Strickland* test, that counsel's performance was deficient, a defendant must show "that counsel's performance was objectively unreasonable

under prevailing professional norms." *Domagala*, 2013 IL 113688, ¶ 36. To establish the second prong, that this deficient performance prejudiced the defendant, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* " '[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair.' " *People v. Evans*, 209 Ill. 2d 194, 220 (2004) (quoting *People v. Enis*, 194 Ill. 2d 361, 376 (2000)).

¶ 50 Here, the supplemental affidavits of Causey and Robinson, taken as true, establish that, had they been contacted by defendant's attorney, they would have told him "the truth." According to both Robinson and Causey, defendant had no knowledge of the drugs in Causey's panties. They each averred that the drugs belonged to Robinson. Additionally, the affidavits established that Causey was Robinson's boyfriend, not defendant's. The affidavits explained why defendant was driving Causey's rental car and why the car contained Causey's purse and cell phone. Robinson's affidavit also explained that, when the officer specifically asked him to call "Gene," he called Causey's cell phone because he knew that it was in the car and he hoped that defendant would answer it. Robinson averred that the officer did not look at his phone and that he did not have a listing for someone named "Gene" in his phone. Robinson's affidavit also explained that defendant was in the area because Robinson told him to pick Causey up at Walgreens.

¶ 51 Based on the supplemental affidavits, we find that defendant made a substantial showing that counsel's failure to interview Robinson and Causey was objectively unreasonable and that defendant was prejudiced. It has been held that the failure to adequately prepare for trial by not

conducting an investigation or by failing to interview known witnesses whose testimony may potentially exonerate the defendant can support an ineffectiveness claim. *People v. Davis*, 203 Ill. App. 3d 129, 140-41 (1990). Taking the supplemental affidavits as true, which we must at this stage of the proceedings, Robinson's and Causey's testimony could have potentially exonerated defendant. It is impossible to say at this point that counsel made a strategic decision not to call the witnesses, because counsel did not interview the witnesses. See *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005) ("An attorney who fails to conduct reasonable investigation, fails to interview witnesses, and fails to subpoena witnesses cannot be found to have made decisions based on valid trial strategy.").

¶ 52 In addressing the issue of prejudice below, the trial court found that defendant was not prejudiced by counsel's failure to interview, because any claim by Causey that the cell phone belonged to her was "incredible in light of the fact that the phone rang when Robinson speed-dialed 'Gene.' " The court also found that Robinson's testimony that he dialed a random number would lend little support to defendant's claim, because it would be contradicted by the testimony of the officer who stated that he saw Robinson dial the preprogrammed number for "Gene." The court also found that Causey's and Robinson's testimony would have "not have weighed significantly" in defendant's favor, because of their own involvement in the drug transaction and because, at the time of defendant's trial, they were free to take the blame as they were no longer at risk of prosecution. However, the credibility and veracity of the sworn statements should be assessed at a third-stage evidentiary hearing, not at the second stage of the postconviction proceedings. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). It is not until the evidentiary hearing that the trial court serves as a trier of fact, assesses the credibility of the witnesses, determines the appropriate weight of the testimony, and resolves conflicts or inconsistencies in

the evidence. *Domagala*, 2013 IL 113688, ¶ 35. Consequently, the court should have reserved its resolution of the conflicting evidence and credibility issues until it held a third-stage evidentiary hearing. Given the potentially exonerating testimony, there is a reasonable probability that, had the parties testified, the result of the proceedings would have been different.

¶ 53 Accordingly, we reverse and remand for further proceedings.

¶ 54 Finally, defendant argues that he is entitled to monetary credit against certain fines imposed. Under section 110-14(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-14(a) (West 2012)), a defendant who is incarcerated on a bailable offense and does not supply bail, and against whom a fine is levied in connection with the offense, shall be allowed a credit of $5 for each day, upon his application. ''[A]n application for monetary credit under section 110-14(a) [of the Code] may be raised at any time and at any stage of court proceedings, even on appeal in a postconviction proceeding.'' *People v. Vasquez*, 2013 IL App (2d) 120344, ¶ 23.

¶ 55 Here, the $3,000 drug assessment that defendant was ordered to pay is a fine. See *People v. Jones*, 223 Ill. 2d 569, 580 (2006). As defendant was incarcerated for 315 days before sentencing, he is entitled to a $1,575 credit. The State concedes that the credit is warranted. Therefore, under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we modify the trial court's sentencing order to reflect that defendant is entitled to a $1,575 credit to offset his $3,000 drug assessment.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we reverse the dismissal of defendant's petition and remand for further proceedings. In addition, we modify the judgment to reflect a $1,575 credit. We affirm the denial of defendant's motion for leave to file a successive petition.

¶ 58 No. 2-13-0193, reversed and remanded; judgment modified.

¶ 59 No. 2-13-1113, affirmed.

¶ 60 JUSTICE ZENOFF, dissenting:

¶ 61 I respectfully dissent. I believe that the trial court correctly and unequivocally found that the motion to reconsider raised a new claim of unreasonable assistance of postconviction counsel. The motion to reconsider clearly supplemented the original postconviction petition with this new claim, and the supplemental affidavits were submitted on the issue of postconviction counsel's unreasonable assistance, not on trial counsel's ineffective assistance. At paragraph 7 of the motion to reconsider, defendant stated: "Petitioner now supplements his prior petition in this motion to reconsider, along with supplemental affidavits from Causey, Allen, and Robinson." The clear import is that the supplemental affidavits were offered to support the claim of postconviction counsel's unreasonable assistance. Moreover, the only claim addressed in the entire motion to reconsider was unreasonable assistance of postconviction counsel, and Attorney Blagg stated to the court that she was raising a new claim. In response, the trial court said: "[T]his is not going to be reopened so that we can start all over again based upon a new allegation that was not made." The majority correctly observes that it would be improper to address a new claim in a motion to reconsider.

¶ 62 Given that defendant specifically did not intend that the supplemental affidavits be considered in support of his original claim of ineffective assistance of trial counsel, I am not willing to construe the motion to reconsider in that light and, effectively, act as defendant's advocate. The majority cites *People v. Powers*, 376 Ill. App. 3d 63 (2007), as authority for so doing. However, *Powers* is inapplicable. In *Powers*, the issue was whether the defendant, who was represented by counsel, could move *pro se* to withdraw a notice of appeal filed by counsel.

Powers, 376 Ill. App. 3d at 64-65. After the notice of appeal was filed, the defendant filed a *pro se* motion to reconsider the trial court's granting of the State's motion to dismiss the postconviction petition filed by counsel. *Powers*, 376 Ill. App. 3d at 64. In his *pro se* motion to reconsider, the defendant alleged that postconviction counsel had failed to answer the State's motion to dismiss or to attach certain affidavits and documents to counsel's postconviction petition. *Powers*, 376 Ill. App. 3d at 65. The defendant filed a motion to withdraw the notice of appeal so that his motion to reconsider could be heard. *Powers*, 376 Ill. App. 3d at 64. The trial court denied leave to withdraw the notice of appeal. *Powers*, 376 Ill. App. 3d at 64. The appellate court noted that an exception to the rule that a represented defendant cannot file *pro se* motions exists where the *pro se* defendant raises claims of ineffective assistance of counsel. *Powers*, 376 Ill. App. 3d at 65. Since the defendant raised claims of ineffective assistance of counsel, the court concluded that he should have been allowed to withdraw the notice of appeal. *Powers*, 376 Ill. App. 3d at 65-66. The court did not have occasion to address the issue presented by the instant appeal. Moreover, the defendant in *Powers* was *pro se*, whereas, here, defendant was represented by counsel, who intentionally raised only a new claim in the motion to reconsider. For these reasons, I would affirm the trial court.