2013 IL App (4th) 120345-U

NO. 4-12-0345

FILED
November 26, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
AARON D. HORTON,	)	No. 10CF50
Defendant-Appellant.	)	
	)	Honorable
	)	Scott H. Walden,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant has rebutted the presumption, raised by the Rule 651(c) certificate (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984), that his postconviction counsel provided him reasonable assistance; therefore, the dismissal of the postconviction petition is reversed, and this case is remanded with directions to hold a new second-stage hearing, with the appointment of new postconviction counsel.

¶ 2 A jury found defendant, Aaron D. Horton, guilty of counts I and VII of the second amended information. Count I charged him with home invasion (720 ILCS 5/12-11(a)(3) (West 2010)), for which the trial court sentenced him to 22 years' imprisonment, and count VII charged him with residential burglary (720 ILCS 5/19-3(a) (West 2010)), for which the court sentenced him to a concurrent term of 10 years' imprisonment.

¶ 3 After an unsuccessful direct appeal, defendant filed a petition for postconviction relief, which the State moved to dismiss on the ground that it made no substantial showing of a

constitutional violation. The trial court granted the State's motion.

¶ 4 Defendant appeals on the ground that his appointed postconviction counsel failed to provide him a reasonable level of assistance. In our *de novo* review, we find that defendant has rebutted the presumption, raised by the Rule 651(c) certificate, that his postconviction counsel provided him reasonable assistance. Therefore, we reverse the trial court's judgment, and we remand this case for a new second-stage hearing, with the appointment of new postconviction counsel.

¶ 5 I. BACKGROUND

¶ 6 A. The Jury Trial

¶ 7 1. *The Testimony of Gregory Freels*

¶ 8 a. Josh Turnbaugh's Attempt To Break Into Freels's House in October 2009

¶ 9 Freels testified he used and sold cannabis while residing at 1220 Koetters Lane in Quincy and that Josh Turnbaugh was one of his customers. One day, in October 2009, Turnbaugh approached Freels and offered to trade methamphetamine for cannabis. Freels refused because he wanted cash.

¶ 10 Later that evening, Jeremy Hinkamper, who also lived at 1220 Koetters Lane, Quincy, Illinois, came home and found Turnbaugh knocking on the front door (as Hinkamper testified). Hinkamper told Turnbaugh that no one was home and that he, Hinkamper, had no key. Turnbaugh then sprayed pepper spray on Hinkamper and tried, without success, to kick in the door.

¶ 11 b. The Burglary in January 2010

¶ 12 In the early morning hours of January 26, 2010, Freels was asleep on the couch in

his living room, at 1220 Koetters Lane, and his girlfriend, Jocelyn Reid, who also resided there, was asleep in a bedroom. On a coffee table, next to the couch, were some debris of cannabis but not enough to smoke. Freels was awakened by a blow to his head: a man was standing over him, hitting him on the head with a pistol. This man, whom Freels did not know, was African-American and was wearing black clothing with a hoodie and some kind of stocking cap. Despite Freels's efforts to cover his head, the man hit him on the head with the pistol six times. Freels testified that the pistol "could have been a pellet gun that looked like a real gun or something, but it was definitely a gun."

¶ 13 Reid emerged from the bedroom and began trying to push the intruder toward the front door. Freels recovered his faculties and helped Reid push the man outside and close and lock the door. Then Freels ran to the bathroom to see if he had been wounded.

¶ 14 Freels had no idea why the man had come into the house. At no point did the man speak; nor did he look around for anything.

¶ 15 The police showed some photographic arrays to Freels, but he could not identify any of the pictured men as being the intruder. He estimated the intruder was about his own size: 5 feet 10 inches tall and 165 pounds. He told the police the only person he could think of who might know something about the burglary was Josh Turnbaugh.

¶ 16 At some point, the police became aware of the scales, clipped-off corners of Baggies, and cannabis in Freels's house. He never was charged, however, with delivering or intending to deliver cannabis. Instead, in return for the dismissal of a charge of possessing cannabis, he pleaded guilty to possessing drug paraphernalia. He was sentenced to a fine and costs.

¶ 17 2. *The Testimony of Jocelyn Reid*

¶ 18 Reid testified that during the night of January 25 to 26, 2010, she was awakened by the sound of scuffling in the living room. She was aware that Freels used cannabis and that he sold it out of the house. When she came out of the bedroom and into the living room, she saw Freels struggling with a man, who was beating Freels with a pistol. She ran over and shoved the man away from Freels.

¶ 19 The living room was illuminated with floor lamps, enabling Reid to see the intruder. She did not recognize him but estimated he was about 5 feet 9 inches or 5 feet 10 inches tall—about Freels's height—and that he weighed between 160 and 175 pounds (she had told the police 150 to 160 pounds). He wore black jeans, a black jacket, and a stocking cap. The man did not speak at all while he was in the house.

¶ 20 Like Freels, Reid had looked at photographic arrays without seeing anyone who resembled the intruder. According to Reid, however, defendant—the only black man in the courtroom—looked "very similar" to the intruder. Reid described the intruder's gun as a black pistol, which he held by the barrel, using it as a club. It seemed to her he was holding the pistol as "a sort of prop," not as if he really intended to use it. Unknowledgeable about guns, she had no idea what the make or model of the pistol was. She had no doubt, though, that it was a handgun; it looked like a real gun to her.

¶ 21 As the man beat Freels with the pistol, Reid pushed the man toward the open door, which was six to eight feet away. The man made eye contact with her and hit her once in the back of the head with the butt of the pistol. She muscled him into the doorway and hit him with the door as she tried to close it. Freels helped her push the door completely shut—in so

doing, pushing the man outside.

¶ 22 After the intruder was ejected from the house, Reid heard voices outside. It sounded like two men doing an after-action review in the front yard. The conversation went on for a minute or two (she told the police five minutes). She heard no car leaving. After checking on Freels, she dialed 9-1-1.

¶ 23 Both Reid and Freels suspected that Turnbaugh was somehow involved in the burglary. The frame of the front door had sustained damage when Turnbaugh tried to kick the door down in October 2009. Obviously, though, Turnbaugh was not the actual intruder on this occasion, because Turnbaugh was white and the intruder was black.

¶ 24 3. *The Testimony of Ruth Kipping*

¶ 25 Deputy sheriff Ruth Kipping testified she was dispatched to 1220 Koetters Lane at 1:55 a.m. on January 26, 2010. Reid, who was about 5 feet 7 inches tall, described the intruder as a black man about 5 feet 10 inches tall, weighing about 160 pounds, and armed with a black handgun. Freels stated his belief that Josh Turnbaugh might have been involved in the burglary. The front door of the house was damaged from a prior attempted break-in. At that time, the police did not search the house, and they discovered no cannabis.

¶ 26 4. *The Testimony of Josh Turnbaugh*

¶ 27 The State called Josh Turnbaugh. He testified he was awaiting trial on a charge of attempt (residential burglary) because of his attempt to break into Freels's residence in October 2009.

¶ 28 Turnbaugh testified that at 1:26 a.m. on January 26, 2010, Tiffany Robinson called him on his cell phone. He had known her ever since they were children. (Turnbaugh

denied knowing either defendant or another man, Termass Pleasant.) Robinson asked Turnbaugh if he knew where she could obtain some cannabis. He replied that Freels might have some. Robinson knew where Freels lived.

¶ 29 The afternoon of January 26, 2010, Turnbaugh received a visit from the police, who accused him of breaking into Freels's house the previous night. Turnbaugh denied any involvement, and he gave the police Robinson's name. To clear himself of suspicion, he agreed to go to Robinson's house that day and talk with her while wearing a wire. He carried out this agreement. He went to her house and talked with her about the burglary of Freels's house, which had occurred the previous night, and their conversation was secretly recorded.

¶ 30 5. *The Testimony of Sam Smith*

¶ 31 An investigator with the sheriff's department, Sam Smith, coordinated the investigation of the burglary. As far as he knew, nothing was stolen from Freels's house in the burglary.

¶ 32 After the police were given the name of Josh Turnbaugh, some police officers spoke with Turnbaugh, and he gave them the name of Garth Myers—which turned out to be false information. When Reid complained to the police that Turnbaugh was calling her and asking her if she knew who might have been involved in the burglary, the police brought Turnbaugh back to the police station and questioned him further. This time, Turnbaugh divulged that Robinson called him the night of the burglary and asked him where she might buy some cannabis. The police asked Turnbaugh to talk with Robinson at her house while wearing a wire. He agreed to do so. The police obtained an overhear order, and they recorded Turnbaugh's conversation with her.

¶ 33 On the basis of this recorded conversation, the police arrested Robinson around midnight on January 26 to 27, 2010, and questioned her. At first, she denied any involvement in the burglary. The police told her they did not believe her. After she changed her story two or three times, the police revealed to her that they had recorded her conversation with Turnbaugh. She then told the police what she had told Turnbaugh: that defendant was the one who entered Freels's residence during the early morning of January 26, 2010. Her statement was videotaped. She explained that she initially lied out of fear that defendant would beat her up.

¶ 34 The police went looking for defendant and Termass Pleasant. They found the two men at the residence of Bridget Gholston, 727 Kentucky Street, Quincy, Illinois, and arrested them. Gholston was Pleasant's girlfriend and the mother of one of his children.

¶ 35 At the time of the arrest, defendant was dressed all in black, and Pleasant was wearing pajama pants and a gray T-shirt. People's exhibit No. 4 was the clothing that defendant was wearing: a black T-shirt, black sweat pants, shoes, and a gray jacket that was black when turned inside out.

¶ 36 No one corroborated Robinson's statement that defendant and Pleasant were with her around 1:30 a.m. on January 26, 2010. Gholston told the police, however, that defendant and Pleasant were at her residence when she went to bed at 10 p.m. on January 25, 2010.

¶ 37 6. *The Testimony of Tiffany Robinson*

¶ 38 The State called Tiffany Robinson. She testified she had pleaded guilty to attempt (burglary). The basis of that charge was her participation in Turnbaugh's attempt to break into Freels's house in October 2009. On that occasion, she drove Turnbaugh to Freels's house, knowing he intended to break in and steal cannabis and electronic items. The plan was for

Turnbaugh to steal a Playstation system and a laptop for himself and a television for Robinson. When she and Turnbaugh got out of the car, they found that the door of Freels's house was locked. Freels's roommate, Hinkamper, came onto the scene, and Turnbaugh sprayed him with Mace.

¶ 39 Also, in response to what happened at Freels's house the early morning of January 26, 2010, the State charged Robinson with home invasion, a Class X felony carrying a mandatory minimum prison sentence of six years. She had been allowed, however, to plead guilty to burglary, a Class 2 felony, and this opened up the possibility that she could receive probation instead of a prison sentence. There was no agreement, however, as to a specific sentence. The benefit of the bargain for her was being allowed to plead guilty to the lesser offense, burglary, in lieu of being convicted of home invasion. Her part of the agreement was to testify truthfully against her two codefendants, defendant and Pleasant.

¶ 40 Robinson admitted that when the police arrested her, she initially lied to them, denying she had anything to do with the burglary. She lied because she was afraid that members of defendant's family would beat her up. Then the police revealed to her that the conversation she had with Turnbaugh, in the apparent privacy of her bedroom, had been recorded. That prompted her to level with the police. She testified: "I'm thinking that I was pretty much going to get in trouble, that I was caught." She told the police what she had told Turnbaugh: that defendant was the one who actually went into Freels's house.

¶ 41 Robinson testified that the night of January 25 to 26, 2010, she was driving her car around. Her ex-boyfriend, defendant, was with her, as was Termass Pleasant, the father of her two-year-old son. Defendant was wearing "a black hoodie" and "dark sweatpants," and he

had on "a wave cap," something in between a stocking cap and a skull cap. She never saw defendant carrying a gun that night, and she did not know, one way or the other, whether he had a gun on him. She estimated that her other passenger, Pleasant, was 5 feet 6 inches or 5 feet 7 inches tall and that he weighed 125 to 130 pounds. She could not remember what Pleasant was wearing, but he probably was wearing sweatpants because he always wore sweatpants.

¶ 42 Robinson had picked up defendant and Pleasant around 10 p.m. or 10:30 p.m. on January 25, 2010, from Bridget Gholston's house. (Pleasant, who recently had been released from jail, was in a relationship with Gholston at the time.) The three of them—Robinson, defendant, and Pleasant—were smoking cannabis in her car (she did not know where the cannabis had come from), and they wanted to buy more cannabis.

¶ 43 So, Robinson telephoned Turnbaugh and asked him if he knew where she might obtain some cannabis. He replied that Freels would have some. She passed this information on to her two passengers. The prosecutor asked her:

> "Q. What then, Ms. Robinson, does Aaron Horton say in the car there with you and Termass Pleasant about what he intends to do?
>
> A. He tells me that was a lick and that he would do it."

Robinson explained the meaning of the phrase "that was a lick": it meant that defendant would run inside Freels's house and steal the cannabis.

¶ 44 The prosecutor asked Robinson:

"Q. Was there any question from the conversation inside the car after you shared that information with them about what that intent was?

A. Well, I was going to show them the house, and they was supposed to do it by themselves, but he—Well, go ahead.

Q. That's all right. I didn't mean to interrupt you.

A. But he decided he was going to go ahead and do it that night."

¶ 45 Robinson drove to 1220 Koetters Lane and pulled into the driveway. Defendant and Pleasant were in the car with her. Defendant got out, and Pleasant remained in the car. Defendant walked over to a window of the house, and then he checked the front door; it was unlocked. He came back to the car and told Robinson the door was unlocked and that he was going to enter the house. Robinson pulled out of the driveway of 1220 Koetters Lane and "kind of into another little driveway next door," about 20 feet away from Freels's house. Pleasant stayed in the car with her. Defendant headed back toward the house and picked up a two-by-four about three feet long. Robinson testified: "I know he grabbed [the board]. I'm not sure if he took it into the house with him or what he did with it."

¶ 46 Defendant had been out of Robinson's sight for about two minutes when Pleasant called out to him, from inside the car, " 'Come on, Aaron,' " or " 'Let's go, Aaron.' " Defendant returned to the car, and he appeared to be angry. The prosecutor asked Robinson:

"Q. In that regard, what does he say when he gets back to the car?

A. That he didn't find any weed, they didn't have any, and he says that he had hit the white girl and the white boy.

Q. Let me stop you there. He was specific to describe at least to the extent of the sex and the race of two people, right?

A. Right.

Q. 'White girl,' right?

A. Right.

Q. 'White boy' were the words he used.

A. Yes.

Q. What did he say that he did to the white boy?

A. He said that he was laying on the couch and he hit him, and then the white girl came from the hallway and he had struck her also.

Q. What did he have to say or what did he—When he comes back, you know, what kind of fight either of them put up?

A. He said the white girl had more heart than the boy did.

Q. Those were the words that he used?

A. Yes, meaning that the white girl gave more of a fight than the boy did."

¶ 47 After defendant got back in the car, Robinson drove Pleasant back to Gholston's house and dropped defendant off at a house at Fifth and Cedar Streets.

¶ 48 7. *The Testimony of Shane Williams*

¶ 49 The defense called Shane Williams, who had two felony convictions. He testified that in January 2010, he and Heaven Schuette were defendant's roommates in an apartment at 537 Grant Street. Although Williams could not remember any specific dates, he testified that defendant most likely was home by 9 p.m. on January 25, 2010, playing video games, drinking, and smoking cannabis, because those generally were his activities every evening.

¶ 50 8. *The Testimony of Kamilah Hawkins*

¶ 51 Kamilah Hawkins testified she had been defendant's girlfriend for about two years and that he was with her on January 25, 2010, until about 6 p.m., when she went to work. Hawkins further testified that according to her cell phone records, she received a call at 10:09 p.m. while she was at work. The call was from Termass Pleasant, who was using Bridget Gholston's cell phone. Hawkins told Pleasant he was "crazy" and that she did not know where defendant was.

¶ 52 9. *The Testimony of Chandra Bridget Gholston*

¶ 53 Chandra Bridget Gholston testified she knew defendant through Pleasant, who was the father of one of her children. According to Gholston, defendant and Pleasant were in her residence at 10 p.m. or 10:30 p.m. on January 25, 2010, when she went to bed. As far as she knew, they did not leave while she was asleep. At 6:15 a.m. on January 26, 2010, she left for work, and when passing through the living room, she saw Pleasant asleep on a bed and defendant asleep on a couch.

¶ 54 10. *Defendant's Testimony*

¶ 55 Defendant testified he was between 6 feet 1 inch and 6 feet 2 inches tall and that he weighed 180 pounds. Pleasant, by contrast, was 5 feet 6 inches or 5 feet 7 inches tall, and he

weighed 150 pounds.

¶ 56 Defendant knew who Gregory Freels was, but he did not know Jocelyn Reid. He was puzzled that Turnbaugh denied knowing him, considering that he and Turnbaugh had been in some of the same classes together in high school. Defendant denied riding around with Robinson and Pleasant in the late evening of January 25, 2010. He also denied going inside Freels's house in the early morning of January 26, 2010.

¶ 57 In January 2010, defendant was living with Shane Williams and Heaven Schuette. Around 4 p.m. on January 25, 2010, he went to Bridget Gholston's house to visit his younger brother, Anthony, who was living there. At that time, defendant was wearing a green hoodie, blue jeans, and white tennis shoes. Pleasant also was at Gholston's house, and defendant drank, smoked, and looked up rap beats on the computer.

¶ 58 Around 8 p.m. on January 25, 2010, Pleasant left with Robinson in her car. (Pleasant was the father of Robinson's child.) Defendant did not know where Robinson and Pleasant went, and he did not see them again the rest of that evening. After Pleasant left, defendant remained at Gholston's house for less than a half hour. He telephoned Schuette to come pick him up and take him home.

¶ 59 Pleasant telephoned defendant the next day, January 26, 2010, around 11 a.m. or noon, and defendant went back over to Gholston's house. He and Pleasant got on the computer again, but defendant left when Pleasant and Gholston began arguing.

¶ 60 Later, in the evening of January 26, 2010, Pleasant telephoned defendant again, and defendant went back over to Gholston's to watch a movie. Defendant liked the movie enough to watch it twice. Once again, Robinson arrived and picked up Pleasant, leaving

defendant there at Gholston's. Defendant fell asleep at Gholston's and returned to his apartment at 10 p.m.

¶ 61 When asked about Gholston's testimony that she saw him in her residence at 6:30 a.m. on January 26, 2010, defendant testified that they all had been drinking and that Gholston was a "light drinker" who did not need much alcohol to become intoxicated.

¶ 62 When the police arrested him, defendant was wearing the clothing subsequently seized by the police: black sweatpants, a black T-shirt, red and clear Nike shoes, and a gray jacket. The inside of the jacket, where the label was located, was black with gray trim. Defendant denied ever wearing the jacket inside out.

¶ 63 Defendant remembered he was arrested in Gholston's house, but he did not recall what time it was when he was arrested. He thought he was arrested in the late evening of January 27, 2010, rather than in the early morning of that day.

¶ 64 11. *The State's Case in Rebuttal*

¶ 65 In its case in rebuttal, the State called Smith, who testified that defendant was arrested at 2:59 a.m. on January 27, 2010, about 26 hours after the burglary of 1220 Koetters Lane.

¶ 66 12. *The Verdicts*

¶ 67 The jury acquitted defendant of one count of home invasion (the count alleging injury to Reid) but convicted him of the other count of home invasion (the count alleging injury to Freels) and also of residential burglary.

¶ 68 B. The Direct Appeal

¶ 69 Defendant took a direct appeal, in which he raised three issues. *People v. Horton*,

2011 IL App (4th) 100492-U, ¶ 3. First, he challenged the sufficiency of the evidence. *Id.* We concluded that under our deferential standard of review, the questions he raised about bias, credibility, and discrepancies in the evidence did not justify overturning the verdicts. *Id.*

¶ 70 Second, defendant argued that, on its own initiative, the trial court should have instructed the jury that a "firearm," for purposes of home invasion, did not include a pellet gun. *Id.* ¶ 4. He maintained that the court's failure to so instruct the jury was plain error. *Id.* We found no plain error in this respect since the ordinary meaning of "firearm" excluded a pellet gun. *Id.*

¶ 71 Third, defendant contended that the one-act, one-crime rule required the vacation of his conviction of residential burglary. *Id.* ¶ 5. We disagreed because the convictions of home invasion and residential burglary were not carved from precisely the same physical act and because residential burglary was not a lesser included offense of home invasion. *Id.*

¶ 72 Therefore, we affirmed the trial court's judgment on direct appeal. *Id.* ¶ 6.

¶ 73 C. The Postconviction Proceeding

¶ 74 In December 2010, defendant filed a *pro se* petition for postconviction relief, in which he alleged that his trial counsel, Edward K. Downey, had rendered ineffective assistance. One of defendant's reasons for being discontented with Downey is that he neglected to call Heaven Schuette as a witness in the trial. According to the *pro se* petition, Schuette would have testified that she and defendant were home, in their residence, when Freels's house was burglarized. Although defendant swore to the truth of his *pro se* petition, he provided no affidavit by Schuette herself.

¶ 75 In April 2011, the trial court appointed postconviction counsel and docketed the

case for a hearing.

¶ 76 In November 2011, postconviction counsel, Todd R. Eyler, filed an amended petition for postconviction relief. The amended petition adopted and incorporated all the allegations in the *pro se* petition, including the allegation that Downey rendered ineffective assistance by failing to call Schuette at trial. Nevertheless, no affidavit by Schuette was attached to the amended petition. Nor did the amended petition offer any explanation for the absence of an affidavit by Schuette.

¶ 77 In December 2011, Eyler filed a certificate pursuant to Rule 651(c).

¶ 78 In January 2012, the State filed a motion to dismiss the amended postconviction petition for failure to make a substantial showing of a constitutional violation. In its motion, the State wrote:

> "It is alleged that trial counsel was ineffective in not calling 'Heaven Schuette and other witnesses' as alibi witnesses on defendant's behalf. It should be noted that 'Kamilah Hawkins' was provided in the Notice of Alibi Defense filed on March 30, 2010 as being the alibi witness who would testify that the defendant was with her at 2831 Westbury[] Court, Quincy, [Illinois,] at the time of the offense. There is no information in the Amended Post-Conviction Petition, or attachments thereto, as to what Heaven Schuette, or 'other witnesses' would have testified to, nor is there argument as to how her (their) testimony could have changed the result of the trial. There is no indication in the record why

> Kamilah Hawkins was not called as an alibi witness, but it is presumed that after trial counsel interviewed her, a determination was made that her testimony would not benefit the defendant. There is a strong presumption that the decision of trial counsel to not call Heaven Schuette or other unnamed witnesses, was the result of sound trial strategy. There is no documentation offered which would suggest otherwise."

¶ 79 In March 2012, the trial court held a hearing on the State's motion for dismissal. In the hearing, the prosecutor observed: "[A]ttached to the petition there is nothing telling us what [Heaven Schuette] would have testified to. There is no affidavit from her or any other proposed witnesses as far as what she would say, so there really is no basis for the Court to conclude that the trial counsel was ineffective in not calling that particular person as a witness."

¶ 80 In response, Eyler admitted the lack of an affidavit by Schuette. He argued, however:

> "As it relates to the witnesses, Ms. Schutte [*sic*], I think Mr. Horton does suggest at least enough in his initial petition as to what he thinks Ms. Schutte [*sic*] would have said. It's clearly not in an affidavit form, but he sets forth in here what he's getting out is he believes that had she been called she would have helped create—not create—but helped present evidence in support of an alibi as to where he was. If the Court has reviewed the transcripts, as I'm sure it has, then that's really all I'm going to say and leave it

> at that, because I think the testimony that was presented at trial that Mr. Horton suggests or says may or may not be she should have been called because she could have helped present evidence which would have supported his alibi, the fact that he was not with the individuals at the time in question and, in fact, was somewhere else."

¶ 81 At the conclusion of the hearing, the trial court granted the State's motion for dismissal. As for defendant's claim that Downey had rendered ineffective assistance by failing to call Schuette at trial, the court noted the petition did not "have an affidavit from [her] as to what she would [have] testif[ied] [to] with respect to any alibi."

¶ 82 This appeal followed.

¶ 83 II. ANALYSIS

¶ 84 Defendant argues that by failing to procure an affidavit from Schuette, Eyler failed to give him a "reasonable level of assistance" as postconviction counsel. See *People v. Lander*, 215 Ill. 2d 577, 583 (2005). We decide *de novo* whether postconviction counsel provided reasonable assistance to the defendant. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 85 We begin with the observation that Eyler filed a certificate pursuant to Rule 651(c). This certificate raises a presumption that defendant received reasonable assistance. See *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. Defendant has the burden of overcoming that presumption by proving that Eyler failed to substantially perform the duties in Rule 651(c). See *id.*

¶ 86 For the following reasons, defendant contends that he has carried his burden.

Eyler alleged, in the amended petition, that Downey had rendered ineffective assistance as trial counsel by failing to call an alibi witness, Schuette. (Eyler made this allegation by adopting the allegations of the *pro se* petition.) It is well established in case law that if a postconviction petition claims a trial counsel rendered ineffective assistance by failing to call a witness, the petition must include an affidavit by the witness setting forth the substance of the testimony the witness would have given if he or she had been called. *People v. Johnson*, 154 Ill. 2d 227, 240 (1993) (and cases cited therein). In spite of this case law, Eyler filed no affidavit by Schuette, and in the amended petition, he offered no explanation for the lack of an affidavit by Schuette. See 725 ILCS 5/122-2 (West 2012). When the prosecutor pointed out the lack of an affidavit by Schuette, Eyler responded that defendant's affidavit would suffice—as if Eyler were unaware of the case law requiring an affidavit by the witness.

¶ 87 Defendant compares his case to *People v. Turner*, 187 Ill. 2d 406, 414 (1999), and *People v. Waldrop*, 353 Ill. App. 3d 244, 250 (2004), in which postconviction counsel provided a less than reasonable level of assistance by failing to attach any affidavits to the postconviction petition, to support the claims therein.

¶ 88 The State responds that *Turner* and *Waldrop* are distinguishable because in those two cases, postconviction counsel affirmatively stated to the trial court their incorrect belief that supporting affidavits were unnecessary. See *Turner*, 187 Ill. 2d at 414-15 (postconviction counsel argued to the trial court that the mere allegation of a constitutional violation, without any affidavits or other evidentiary support, was sufficient to justify an evidentiary hearing); *Waldrop*, 353 Ill. App. 3d at 250 ("Postconviction counsel mistakenly believed that he did not have a duty to seek an affidavit from the witness specifically identified in defendant's *pro se* petition."). The

State argues this case is more comparable to *People v. Guest*, 166 Ill. 2d 381, 413 (1995), and *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 25, in which the reviewing courts relied on a statement from *Johnson*, 154 Ill. 2d at 241: "In the ordinary case, a trial court ruling upon a motion to dismiss a postconviction petition which is not supported by affidavits or other documents may reasonably presume that postconviction counsel made a concerted effort to obtain affidavits in support of the postconviction claims, but was unable to do so."

¶ 89 In neither *Guest* nor *Johnson*, however, did the postconviction counsel argue to the trial court that the mere allegation of a constitutional violation was enough to merit an evidentiary hearing—whereas the postconviction counsel in *Turner* made that argument (*Turner*, 187 Ill. 2d at 414-15) and Eyler made that argument, too. Eyler argued to the court that defendant's sworn allegation as to what Schuette would have said on the stand if she had been called as a witness at trial was sufficient to merit an evidentiary hearing on the amended postconviction petition. In that respect, this case is more comparable to *Turner* than to *Guest* and *Johnson*. If Eyler believed that defendant's bare allegation would suffice, he would have had (in his own mind) no reason to seek an affidavit from Schuette. On the authority of *Turner*, we conclude that defendant has rebutted the presumption that Eyler provided reasonable assistance to him. We cannot safely presume that he made a concerted effort to obtain an affidavit from Schuette.

¶ 90 III. CONCLUSION

¶ 91 For the foregoing reasons, we reverse the trial court's judgment and remand this case with directions to hold a new second-stage hearing, with the appointment of new postconviction counsel. See *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 21.

¶ 92 Reversed and remanded with directions.