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2012 IL App (3d) 100696-U

Order filed May 14, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 13 th Judicial Circuit
)	Grundy County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0696
v.)	Circuit No. 91-CF-54
)	
EDWARD MOORE,)	Honorable
)	Robert C. Marsaglia
Defendant-Appellant.)	Judge Presiding

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant failed to establish his post-conviction counsel did not provide a reasonable level of assistance as required by Illinois Supreme Court Rule 651(c). The circuit court properly dismissed defendant's successive post-conviction petition claims regarding witness recantations because they were waived.

¶ 2 Defendant, Edward Moore, was convicted of seven counts of first degree murder, home invasion, aggravated criminal sexual assault, robbery, residential burglary, and arson and was subsequently sentenced to death. On January 18, 1996, on direct appeal, the Illinois Supreme

Court affirmed the convictions and sentence. *People v. Moore*, 171 Ill. 2d 74 (1996). In addition, defendant's original post-conviction petition was dismissed and the dismissal was affirmed by the Illinois Supreme Court. *People v. Moore*, 189 Ill. 2d 521 (2000).

¶ 3 Now, on appeal, defendant claims he did not receive a reasonable level of assistance from his post-conviction counsel as required by Illinois Supreme Court Rule 651(c). In addition, defendant also appeals the circuit court's dismissal of his successive post-conviction claims regarding the recantations of witnesses Irwin Johnson and Troy Snell. Defendant requests this court reverse the dismissal of defendant's successive post-conviction petition and remand for additional post-conviction proceedings. We affirm.

¶ 4 **FACTS**

¶ 5 **Trial Evidence**

¶ 6 The facts relating to defendant's trial are set forth in detail in the Illinois Supreme Court's opinion on defendant's direct appeal. See *People v. Moore*, 171 Ill. 2d 74 (1996). Consequently, we provide only a brief summary for purposes of this appeal.

¶ 7 On July 7, 1991, in the early morning hours, defendant sexually assaulted and murdered Judy Zeman at her home in Grundy County. Defendant had been hired by Judy to paint her newly constructed home. At approximately 5:00 a.m., a sheriff's deputy responded to a call of a car abandoned with its engine running. After inspection, the deputy determined the car belonged to Judy. Upon arriving at the Zeman residence, the deputy found Judy unclothed, with burns covering most of her body, lying naked in the driveway, with duct tape stuck in her hair. Judy told the deputy she had been raped and then set on fire. When asked by the deputy if she knew who did this to her, she replied she did not. She explained she had been asleep in her bedroom

when her dog began barking. She opened the bedroom door to let the dog out, and a man jumped at her with a knife. Judy could not describe the man who attacked her, but she saw he wore black tennis shoes, dark clothes, and gloves. After sexually assaulting her in the bedroom, he stole money and jewelry from the safe, then took Judy outside to a wood pile where he doused her in gasoline and set her on fire. She was able to crawl from the wood pile to the driveway. Judy died that night from her burns.

¶ 8 The evidence at trial further showed that later on July 7, 1991, defendant purchased a one-way plane ticket to Florida. Two witnesses from Florida testified defendant tried to sell rings belonging to Judy. After defendant asked a friend to help him launder money, defendant was arrested in New York City and placed in a holding cell where he allegedly made inculpatory statements regarding the Zeman murder to his holding cell mates, Irwin Johnson and Troy Snell. Johnson and Snell testified they heard defendant say the police were trying to charge him with murder, rape, and robbery in Illinois, but that Illinois had nothing on him. Johnson testified he heard Snell talk about a \$40,000 reward in this case when he and Snell were being transported to testify.

¶ 9 The State introduced the following physical evidence linking defendant to the crime scene: two fingerprints from defendant found on the duct tape taken from Judy's hair; one fingerprint from defendant found on the keys left in Judy's car; human hairs found in defendant's car which were consistent with Judy's hair with one strand showing extreme heat damage; DNA evidence matching defendant's blood type and DNA profile with the DNA and blood type of the seminal fluid taken from Judy's vaginal swab.

¶ 10 On June 9, 1992, the jury convicted defendant of seven counts of first degree murder, home invasion, aggravated criminal sexual assault, robbery, residential burglary, and arson. Defendant was subsequently sentenced to death for the murder of Judy Zeman. On direct appeal, the Illinois Supreme Court affirmed the convictions and sentence. *People v. Moore*, 171 Ill. 2d 74 (1996).

¶ 11 Post-Conviction Proceedings

¶ 12 On July 3, 1995, defendant filed a *pro se* post-conviction petition, which was amended on September 8, 1997 by appointed counsel. The amended post-conviction petition alleged defendant was unfit during both the trial and the sentencing hearing, trial counsel acted under a conflict of interest, and post-conviction counsel failed to comply with Rule 651(c). The trial court dismissed the amended post-conviction petition on January 28, 1998. Defendant appealed directly to the Illinois Supreme Court arguing his amended post-conviction petition made a substantial showing of a constitutional claim. While his appeal on the dismissal of his first amended post-conviction petition was pending with the Supreme Court, defendant attempted to raise an additional claim based on the recantations of witnesses Irwin Johnson and Troy Snell. On February 17, 2000, the Supreme Court refused to consider this additional claim because defendant failed to include it in either his *pro se* or his first amended post-conviction petition and then affirmed the dismissal of defendant's first amended post-conviction petition. *People v. Moore*, 189 Ill. 2d 521 (2000).

¶ 13 On January 9, 2001, defendant filed a *pro se* successive post-conviction petition which contained seven claims.¹ Defendant asserted multiple claims of ineffective assistance of trial counsel, one claim of unreasonable assistance of post-trial counsel, and alleged perjury by witnesses and informants, noting the affidavits of Johnson and Snell constituted newly discovered evidence. The court appointed the Capital Litigation Division (CLD) to represent

¹At the time defendant filed his successive post-conviction petition for relief, there was no statutory requirement defendant obtain leave of court to file such a petition. The leave of court requirement was mandated under P.A. 93-493, which became effective on January 1, 2004.

defendant in his successive post-conviction proceedings. Defendant objected to the two attorneys who were originally assigned from CLD to represent him. Thereafter, Jed Stone and John Greenlees, from CLD, were appointed and filed a first amended post-conviction petition on May 13, 2002.

¶ 14 This first amended post-conviction petition, contained nine claims which were similar to some of defendant's *pro se* claims and also added new claims of improper jury contact by a State witness, *Brady* violations, perjury, "outrageous governmental conduct," and a conflict of interest by trial counsel. On June 5, 2002, defense counsel filed a corrected first amended post-conviction petition without adding any new claims. Following the State's motion, the trial court required defendant to further amend his first amended post-conviction petition to allege cause and prejudice for each claim raised pursuant to the requirements set forth in *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002). Four additional *pro se* claims were filed on July 17, 2002, alleging perjury by both a State lab expert and a State witness, unreasonable assistance of post-conviction counsel for not filing a motion to suppress evidence, and ineffective assistance of trial counsel on direct appeal for not challenging the State's failure to disclose Irwin Johnson received a deal in exchange for his testimony. ²

¶ 15 On February 7, 2003, defense counsel Stone and Greenlees filed a second amended post-conviction petition including nine claims similar to those presented in the May 13, 2002 first amended post-conviction petition. On May 19, 2003, defense counsel filed a corrected second amended post-conviction petition, adding a tenth claim which simply adopted the eleven *pro se* claims which defendant had filed on January 9, 2001 and July 17, 2002.

¶ 16 Thereafter, on July 21, 2003, defendant filed a motion to discharge his attorneys or, in the alternative, to order counsel to file a corrected second amended petition, which had already been filed by defense counsel on February 7, 2003. Ultimately, on September 19, 2003, the trial court allowed attorneys Stone and Greenlees to withdraw after establishing defendant created a conflict

²On January 11, 2003, defendant's sentence was commuted from death to life without the possibility of parole.

of interest due to an irreconcilable difference of opinion which developed between counsel and defendant. The court noted defendant repeatedly sought assistance from the trial judge and the ARDC to override defense counsel's professional judgment.

¶ 17 Also on September 19, 2003, the trial court appointed Grundy County Public Defender, J.D. Flood, to represent defendant in the proceedings on the second amended post-conviction petition. Defendant filed motions to discharge Flood on February 23, 2004 and May 17, 2004. On May 12, 2004, defendant filed an ARDC complaint against Flood. The trial court denied defendant's motions to discharge Flood on April 1, 2004 and June 3, 2004, respectively. On July 6, 2004, defendant again filed a motion to discharge Flood, which the trial court denied.

¶ 18 On August 20, 2004, Flood filed a second corrected second amended post-conviction petition which contained a total of 22 claims, along with his Rule 651(c) certificate. In that petition, Flood adopted the first amended post-conviction petition and exhibits previously filed by Stone and Greenlees on May 19, 2003, which also included nine of the eleven *pro se* claims from January 9, 2001 and July 17, 2002. However, the second-corrected second amended post-conviction petition prepared by Flood also added four new "*pro se* supplemental claims", alleging the State concealed lab worksheets suggesting other suspects, ineffective assistance of trial counsel for not sufficiently attacking DNA evidence, unreasonable assistance of post-conviction counsel for not preserving defendant's claims of ineffective assistance of trial counsel during the original post-conviction proceedings, and failure to prove defendant guilty beyond a reasonable doubt.

¶ 19 On October 25, 2004, defendant filed *pro se* objections to both attorney Flood's Rule 651(c) certificate and the August 20, 2004 second-corrected second amended post-conviction petition prepared by Flood and attached his own, *pro se* third amended post-conviction petition. On January 24, 2005, defendant filed another objection to the second-corrected second amended post-conviction petition prepared by Flood and objected to Flood's continued representation.

Again, on February 24, 2005, defendant filed a *pro se* motion to discharge Flood and requested he be allowed to proceed *pro se*.

¶ 20 The trial court allowed defendant's request to proceed *pro se* on March 23, 2005. Shortly thereafter, defendant requested the appointment of counsel and on September 7, 2005, the trial court reappointed Flood to represent defendant.

¶ 21 On June 15, 2006, Flood filed a third amended post-conviction petition which incorporated the allegations of the second-corrected second amended post-conviction petition, but included one new claim alleging defendant was denied due process by the State's suppression of a police report involving another suspect.

¶ 22 On September 5, 2006, defendant again objected to Flood's representation. On September 13, 2006, defendant filed additional *pro se* claims which were duplicative of claims already pending in the third amended post-conviction petition filed by Flood on June 15, 2006. On May 9, 2007, defendant filed a *pro se* motion requesting to supplement the third amended post-conviction petition filed by Flood with two claims challenging the constitutionality of two public acts.

¶ 23 At a May 31, 2007 hearing, Flood asked for more time to review the new claims challenging the constitutionality of two public acts. The trial judge stated he had previously ruled he would not accept *pro se* filings from defendant, and denied defendant's *pro se* motion to add the new claims. On October 23, 2007, Flood revised the pleadings on defendant's two *pro se* claims and was allowed to adopt these claims and add them to the third amended post-conviction petition.

¶ 24 On November 26, 2007, the State filed multiple motions to strike exhibits and affidavits contained in defendant's third amended post-conviction petition. On November 29, 2007, the State filed a motion to dismiss the pending post-conviction petition. On January 31, 2008, Flood, with defendant's consent, withdrew two claims and conceded the State's motion to strike one

claim. After a hearing on the matter, the court entered an order dismissing an additional five claims on May 28, 2008.

¶ 25 On July 22, 2008, defendant filed a *pro se* motion for leave to file a fourth amended post-conviction petition, which the trial court subsequently denied. At a hearing on September 26, 2008, the trial court dismissed three claims and permitted one claim to proceed a third-stage evidentiary hearing. The remainder of defendant's post-conviction claims were dismissed at hearings on November 10, 2008, November 24, 2008, and June 30, 2009.

¶ 26 On August 27, 2009, the State filed an answer to the surviving claim, based on a *Brady* violation, set out in the third amended post-conviction petition. The court conducted a third-stage evidentiary hearing on July 14, 2010. On August 19, 2010, the trial judge denied defendant's request for post-conviction relief on that claim. On September 9, 2010, notice of appeal was timely filed.

¶ 27 ANALYSIS

¶ 28 Defendant raises two issues for our review of the trial court's decision dismissing the third amended post-conviction petition following a third-stage evidentiary hearing. First, defendant contends he did not receive a reasonable level of assistance from his post-conviction counsel, attorney Flood. Second, defendant argues the trial court erred by granting the State's motion to dismiss defendant's third amended post-conviction claims based on the recantation of witnesses Irwin Johnson and Troy Snell.

¶ 29 I. Reasonable Level of Assistance from Post-Conviction Counsel

¶ 30 We first consider defendant's claim he was denied a reasonable level of assistance from his post-conviction counsel, attorney Flood. There is no constitutional right to the assistance of counsel during Post-Conviction Hearing Act (the Act) proceedings, rather, the right to post-conviction counsel is provided by statute. 725 ILCS 5/122-4 (2004). Consequently, petitioners are only entitled to the level of assistance provided for by the Act. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007) (citing *People v. Turner*, 187 Ill. 2d 406, 410 (1999)). The case law provides that

post-conviction counsel must provide a reasonable level of assistance, which is less than that afforded by federal or state constitutions. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006) (citing *People v. Munson*, 206 Ill. 2d 104, 137 (2002)).

¶ 31 Supreme Court Rule 651(c) identifies the various obligations of post-conviction counsel. Counsel must consult with the petitioner either by mail or in person to ascertain the petitioner's contentions regarding the deprivation of constitutional rights and counsel must examine the record of the proceedings and make any necessary amendments to the *pro se* petition as required to present the petitioner's contentions of error. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). These duties imposed on post-conviction counsel serve to ensure the complaints of a prisoner are adequately presented. *Suarez*, 224 Ill. 2d 37, 46 (2007)

¶ 32 In this case, attorney Flood filed a rule 651(c) affidavit stating he complied with the Rule. However, an attorney's rule 651(c) certificate is not conclusive proof counsel has satisfied his obligations. *People v. Perkins*, 229 Ill. 2d 34, 52 (2007). Therefore, we next consider defendant's arguments he did not receive a reasonable level of assistance from attorney Flood, his post-conviction counsel.

¶ 33 Defendant claims attorney Flood failed to consolidate duplicate claims and contends the third amended post-conviction petition is "replete with duplicate and overlapping claims." In addition, defendant submits his post-conviction counsel failed to eliminate non-meritorious claims which served "only to distract and confuse" the trial court. The State asserts defendant was not prejudiced by the inclusion of duplicative or meritless claims.

¶ 34 In this case, defendant was unusually persistent and filed *pro se* post-conviction pleadings after the appointment of attorney Flood. In addition, defendant reported attorney Flood to the ARDC. Defendant filed his own objections to the contents of the second-corrected second amended post-conviction petition prepared by Flood and filed additional *pro se* claims, without leave of court, after Flood prepared a third amended post-conviction petition, requesting to add claims already incorporated into the third amended post-conviction petition.

¶ 35 Defendant's actions put his post-conviction counsel in a difficult position and it was not unreasonable for post-conviction counsel to try to incorporate all claims, in large part using defendant's own language, in an effort to assure his client's contentions of error were *all* presented to the trial court for a hearing on the third amended post-conviction petition. Based on the unusual circumstances of these post-conviction proceedings, this court cannot conclude that including arguably meritless or duplicative claims in a post-conviction petition qualifies as unreasonable level of assistance by defendant's post-conviction counsel in this case.

¶ 36 Defendant's next argues attorney Flood failed to amend the post-conviction petition to present ineffective assistance of trial counsel claims related to juror misconduct, as identified by defendant, in a legally sufficient context. Defendant asserts certain claims regarding the ineffective assistance of trial counsel could have been amended and supported by attorney Flood, or altogether eliminated, had counsel spoken with defendant's trial attorney before his death in 2009.

¶ 37 Defendant relies on *People v. Johnson*, 154 Ill. 2d 227 (1993), where post-conviction counsel failed to contact witnesses, identified by name in the *pro se* post-conviction petition, as persons who could provide information regarding certain constitutional claims. The *Johnson* court found counsel failed to satisfy Rule 651(c)'s requirement he make necessary amendments to the petition. *Id.* at 248. A trial court ruling on a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so. *Id.* at 241.

¶ 38 The Supreme Court, in *Johnson*, relied heavily on the fact post-conviction counsel filed an affidavit which unequivocally established counsel made no effort to investigate the claims presented by defendant in his *pro se* petition, nor did counsel seek any affidavits in support of those claims. *Id.* at 243. Here, however, counsel filed his Rule 651(c) certificate and further, in

response to defendant's ARDC complaint against counsel, counsel replied stating he had been actively working on defendant's claims.

¶ 39 Defendant further claims a discussion with trial counsel would have shed light of improper contact with the jurors. However, the record reveals the trial judge asked the jury whether there had been any unauthorized or improper contact and each one of the jury members indicated there had not been any improper contact. Therefore, we conclude defendant's arguments that post-conviction counsel should have conducted a further investigation to support his claim of jury contamination is without merit.

¶ 40 Defendant also claims a discussion with trial counsel could have assisted in the presentation of purported discovery violations which were set out in the third amended post-conviction petition. Rule 651(c) only requires post-conviction counsel to examine as much of the record "as is necessary to adequately present and support those constitutional claims raised by the petitioner." *Pendleton*, 223 Ill. 2d at 47 (quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993)). While post-conviction counsel may conduct a broader examination of the record and may raise additional issues if he chooses, there is no obligation to do so. *Pendleton*, 223 Ill. 2d at 476. See *People v. Garcia*, 405 Ill. App. 3d 608, 624-25 (2010).

¶ 41 Here, many of the alleged discovery violations could have been investigated by simply reviewing the record without contacting trial counsel, whom defendant steadfastly claims was ineffective. Post-conviction counsel's actions regarding the additional discovery claims met the requirements of Supreme Court Rule 651(c) and provided reasonable assistance. Further, the discovery violation pertaining to a *Brady* violation was the only claim which survived the State's second-stage challenge and was examined by the trial court during a third-stage evidentiary hearing. Clearly, post-conviction counsel did present this contention of error in a legally sufficient context for the trial court's consideration during the third-stage review.

¶ 42 In this case, the record reflects post-conviction counsel consulted with defendant, examined the record, and filed a second-corrected second amended post-conviction petition and

later filed a third amended post-conviction petition. These corrections and amendments obviously were designed to assist defendant when presenting his endless post-conviction claims for the trial court's consideration in compliance with Supreme Court Rule 651(c). Therefore, we conclude defendant's post-conviction counsel provided a reasonable level of assistance, as required by Rule 651(c), in presenting defendant's post-conviction claims.

¶ 43 II. Dismissal of Recantation Claims Based on Waiver

¶ 44 The defendant next claims the trial court's dismissal of his post-conviction claims based on the recantations of witnesses Irwin Johnson and Troy Snell should be reversed and remanded for an evidentiary hearing. Defendant alleged in his third amended post-conviction petition the State failed to disclose Johnson and Snell had been told about reward money from the State in exchange for their testimony, and they gave perjured testimony. The trial court dismissed those claims due to waiver because the claims could have been raised in the direct appeal or previous post-conviction petition.

¶ 45 We conduct a *de novo* review of the second-stage dismissal of post-conviction claims. *Pendleton*, 223 Ill. 2d at 473. Pursuant to *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002), a claim will be considered on its merits in a successive post-conviction petition if the cause-and-prejudice test is satisfied. If the petition does make a substantial showing of a constitutional violation, the matter proceeds to an evidentiary hearing. *People v. Hogley*, 182 Ill. 2d 404, 428 (1998). Further, for purposes of determining whether an evidentiary hearing is warranted, all well-pleaded facts in the petition and in any supporting affidavits are taken as true. *People v. Caballero*, 126 Ill. 2d 248, 259 (1989).

¶ 46 Post-conviction proceedings are collateral to a direct appeal. *People v. Towns*, 182 Ill. 2d 491, 502 (1998). Consequently, issues which were raised or could have been raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; and the principles of waiver. *Pitsonbarger*, 205 Ill. 2d at 456 (citing *Towns*, 182 Ill. 2d at 502-03). However, where the claimed error could not have been presented in an earlier proceeding, there exists the

potential for raising the issue in a second or subsequent post-conviction petition. *People v. Flores*, 153 Ill. 2d 264, 274-75 (1992).

¶ 47 Cause is defined as “any objective factor, external to the defense, which impeded the petitioner’s ability to raise a specific claim in the original post-conviction proceeding.”

Pitsonbarger, 205 Ill. 2d at 462. “A showing that the factual or legal basis for a claim was not reasonably available to counsel *** would constitute cause.” *Id.* at 460 (citing *Strickler v. Greene*, 527 U.S. 263, 283 n.24 (2009)). Prejudice will be found where the error so infected the trial that the resulting conviction or sentence violates due process. *Pitsonbarger*, 205 Ill. 2d at 464. Defendant argues his petition made a substantial showing of a claim of perjury and satisfied the cause-and-prejudice test of *People v. Pitsonbarger*, and therefore, the trial court should have considered the merits of that claim.

¶ 48 Defendant urges he has shown cause because he was unable to obtain the affidavits from Johnson and Snell until after the trial court dismissed his original post-conviction petition and the matter was before the Supreme Court for a review of that dismissal. The State suggests defendant and his trial counsel would have known at the time of trial that Johnson and Snell perjured themselves, and therefore, there is no justifiable reason defendant was unable to obtain the affidavits prior to the time of filing his original post-conviction petition in July 1995.

¶ 49 The record reveals defendant’s trial concluded on June 9, 1992. Defendant filed his original post-conviction petition on July 3, 1995, and later amended it on September 8, 1997. The petition was dismissed by the trial court on March 16, 1998 and notice of appeal was filed with the Supreme Court on April 7, 1998. Defendant obtained affidavits from Johnson and Snell on July 1, 1998, and August 3, 1998, respectively, but does not allege a reason he could not obtain those affidavits at any point before filing his original post-conviction petition on July 3, 1995. We agree with the State’s contention that defendant has failed to allege or establish cause.

¶ 50 Having determined defendant has failed to establish cause, we need not address whether defendant established prejudice. See *Pitsonbarger*, 205 Ill. 2d at 464 (for defendant to prevail on

his bid to file a successive post-conviction petition, he must show both cause and prejudice). On this basis, the trial court was correct in dismissing the perjury claim.

¶ 51 Defendant alternatively contends his third amended post-conviction petition and supporting evidence made a substantial showing of a claim of actual innocence based on the recantations of Johnson and Snell, and therefore, the trial court erroneously dismissed those claims. A claim of actual innocence based upon newly discovered evidence is a cognizable claim under the Post-Conviction Hearing Act as a matter of constitutional due process. *People v. Washington*, 171 Ill. 2d 475, 489-90 (1996). Further, with regard to an actual innocence claim, there is no required showing of cause-and-prejudice. *Pitsonbarger*, 205 Ill. 2d at 459-60; *People v. Ortiz*, 235 Ill. 2d 319, 330-31 (2009).

¶ 52 Newly discovered evidence is evidence which was unavailable at the time of the trial and which could not have been discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 298, 301 (2002). Relief requires the supporting evidence to be new, material, noncumulative, and most importantly, "of such conclusive character" as would "probably change the result on retrial." *People v. Washington*, 171 Ill. 2d 475, 489 (1996) (quoting *People v. Silagy*, 116 Ill. 2d 357, 368 (1987)).

¶ 53 Snell testified during trial he heard defendant say Illinois was trying to charge him with murder, robbery, and rape, but Illinois did not have anything on him. Snell's affidavit reiterates and confirms his earlier testimony, and contrary to defendant's assertion, does not constitute either a recantation or new evidence. See *People v. Moore*, 189 Ill. 2d 521 (2000) ("Snell's affidavit merely confirms his earlier testimony that defendant did not incriminate himself.").

¶ 54 On the other hand, Johnson's affidavit reveals he knew of the monetary reward and that he lied at trial when he testified that defendant had confessed to him. While we agree with defendant that this assertion qualifies as a recantation, defendant's third amended post-conviction petition fails to demonstrate that defendant exercised due diligence in uncovering the existence of a monetary reward and its potential influence on Johnson's trial testimony before his direct

appeal or the appeal of the denial of his original post-conviction petition. See *People v. Barnslater*, 373 Ill. App. 3d 512, 523-27 (2007).

¶ 55 Further, Johnson and Snell's new information would not have changed the outcome of the trial since the forensic DNA evidence and other circumstantial evidence strongly linked defendant to the scene of the crime. For example, the state presented evidence from neutral witnesses that defendant was in possession of the victim's jewelry, defendant's fingerprints were on duct tape found on the victim and on the victim's car keys, and forensic DNA evidence matched defendant's blood type and DNA profile to the seminal fluid present on the victim's vaginal swab. We agree with the State and conclude that, taken as true, the affidavits fail to provide exculpatory evidence showing defendant did not commit the crime or that someone else committed the crime.

¶ 56 **CONCLUSION**

¶ 57 For the reasons stated above, we find defendant's post-conviction counsel provided a reasonable level of assistance in presenting defendant's post-conviction claims. Additionally, we affirm the judgment of the circuit court of Grundy County dismissing defendant's post-conviction claims based on the affidavits of Johnson and Snell on the basis of waiver.

¶ 58 Affirmed.