

defendant's actual-innocence claim, and (3) defendant was denied effective assistance of counsel. We grant OSAD leave to withdraw as counsel and affirm the trial court's judgment.

¶ 3

I. BACKGROUND

¶ 4

On February 19, 2010, the State charged defendant, Zachary Allen Friemel, with unlawful restraint (720 ILCS 5/10-3 (West 2010)), possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2010)), two counts of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2010)), aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010)), and violation of bail bond (720 ILCS 5/32-10(b) (West 2010)).

¶ 5

On September 7, 2010, while present with his trial counsel, Ms. Barnes, defendant entered a fully negotiated plea of guilty to one count of criminal sexual assault. The trial court admonished defendant of the nature of the charges, the maximum and minimum penalties for which he was eligible, his right to enter a plea of not guilty, his right to a trial, and the rights he would give up if he entered a plea of guilty. The court also asked defendant, "has anybody threatened you or forced you, in any way, to give up your rights, and plead guilty?" Defendant responded, "no, sir." After admonishing defendant of his rights, the court found defendant understood the nature of the charge, the possible penalties, and voluntarily waived his right to a trial. Pursuant to the plea agreement, the State nol-prossed the remaining four counts and asked the trial court to impose an agreed sentence of four years in prison, a \$200 deoxyribonucleic acid (DNA) assessment, and a \$20 Violent Crime Victim's Act assessment.

¶ 6

As to the factual basis of the plea, the State explained the victim, Christina, would testify she and defendant had a prior dating relationship and have one child together. Christina would testify on February 18, 2010, defendant hit her on the side of the head, forced her to the ground, and digitally penetrated her vagina with his finger. The trial court found a factual basis

for defendant's plea and sentenced defendant according to the parties' plea agreement and then admonished defendant of his right to appeal.

¶ 7 On May 23, 2011, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)), alleging he "felt forced into taking the plea[] because on the day of [his] trial [his] Public Defender, Carla Barnes, told [him] she was refusing to take [his] case to trial" and was not prepared to take the case to trial. The trial court appointed counsel to represent defendant.

¶ 8 On December 20, 2011, defendant filed an amended *pro se* petition for post-conviction relief. Defendant alleged the court failed to ask if he committed the act to which he was pleading guilty, his trial counsel's failure to subpoena necessary material evidence and refusal to take the case to trial forced him to plead guilty, and new pieces of evidence "attack the alleged victim's credibility and prove [defendant's] innocence." This evidence included (1) the prison trust-fund log, indicating Christina sent defendant money; (2) visitation logs, indicating Christina visited him in jail and prison; and (3) letters from Christina, stating she loved him. Defendant attached the visitation logs and the victim's letters to his petition. Following a June 7, 2011, review of defendant's petition, the trial court docketed the petition and appointed postonviction counsel.

¶ 9 On January 9, 2012, defendant's postconviction counsel, Keith Davis, filed a motion to withdraw as counsel under Illinois Supreme Court Rule 13 (eff. Feb. 16, 2011). Counsel's motion attached a letter from defendant accusing postconviction counsel of lying to defendant and stating, "I have chosen to forego your advice and knowledge and have found that it is in my best interest to amend and file my Post-Conviction myself."

¶ 10 At the February 15, 2012, hearing on postconviction counsel's motion to withdraw, the trial court stated it had read defendant's letter and concluded counsel did not lie, but rather, defendant and his counsel disagreed about the significance of the law. The court explained to defendant that if it allowed counsel's motion, defendant would then be without counsel. The court stated, "[y]ou would be representing yourself[, i]n other words, I'm not going to appoint another attorney to represent you because you don't trust this attorney." The court then asked defendant his position on the motion to withdraw and defendant responded, "I have no qualms about it. I'll relieve him of his duties." After further questioning of defendant as to whether he understood he would be disadvantaged by representing himself, the court allowed counsel's motion to withdraw.

¶ 11 Defendant filed a *pro se* motion for production of his trial counsel's notes and the results of the rape kit test. The trial court granted defendant's motion. The State responded by submitting an affidavit from defendant's trial counsel stating she "[had] reviewed [her] file and there are no written notes available." The State also filed a response to the motion to produce the results of the rape kit, indicating the kit had never been analyzed.

¶ 12 The State then filed a motion to dismiss the amended petition, arguing waiver by defendant of the issues in the petition due to defendant's failure to file a motion to withdraw his guilty plea and make a substantial showing of a violation of his constitutional rights. In July 2012, the trial court heard arguments on the State's motion to dismiss. The court was provided a July 3, 2012, affidavit from Christina stating she spoke with defendant's trial counsel and told counsel she did not want defendant to go to prison. According to the affidavit, counsel told Christina she should speak with the State's Attorney's office and tell them she was retracting her statement and would not testify. The affidavit further represented the State's Attorney told

Christina she had "no choice" and that the Department of Children and Family Services (DCFS) could get involved if she did not testify. Subsequent to hearing arguments on the State's motion to dismiss, the trial court set the matter for an evidentiary hearing, deciding to "take the motion to dismiss with the evidentiary hearing in order to provide defendant an opportunity to prove what he's alleged."

¶ 13 At the September 12, 2012, evidentiary hearing, defendant, appearing *pro se*, testified Christina sent him three love letters, which he claimed established his innocence. Defendant testified before trial he had four interviews with his trial counsel. During these interviews, defendant told counsel he and Christina were engaged and, although he was at the victim's residence at the time of the offense, he did not engage in any sexual act with the victim on that date. Defendant also told counsel Christina visited him in jail and asked him if they could be together when he "got out" and apologized for "putting [defendant] in jail."

¶ 14 Defendant questioned his trial counsel as to why she had no written notes on him in her file. Counsel answered she did not "write down everything," stating, "I only write down what I need to write down, and most of the facts I use come from you, come from the police report, come from the victim." Counsel testified she reviewed the discovery from the State and requested relevant medical records. Counsel did not request the results of a rape kit test because there was no allegation the penis was inserted into the victim's vagina, explaining, "I was under the impression when I spoke with [defendant] that there would be no semen in her vagina because it was [defendant's] finger that was inserted into her vagina."

¶ 15 Counsel testified, had defendant not pleaded guilty, she was prepared to proceed with trial and her strategy would have been "to discredit the witness at the appropriate time." Counsel did not have a list of potential witnesses. Counsel recalled talking to Christina, stating,

"she told me she loved you, and that she wanted you to get probation, but she was not going to come in and testify any differently than what she told the police officers." Counsel stated defendant decided to plead guilty after she informed him of this conversation. The court did not hear closing arguments, instead directing the filing of written closing arguments.

¶ 16 On October 1, 2012, the trial court granted the State's motion to dismiss the postconviction petition. The court stated counsel's testimony was "entirely credible" and defendant's questions obligated counsel to disclose "[d]efendant had admitted to her that there was no penile penetration, only digital penetration." The court also found defendant's claim "he was 'forced' to plead guilty to this charge is not supported by his proofs, particularly in light of the admissions he required his attorney to disclose to the [c]ourt as a far more plausible explanation for his guilty plea." The court also found "there is no meaningful suggestion that challenging the complainant's testimony at the time of trial (the right to which he chose to voluntarily waive) would have resulted in his acquittal." This appeal followed.

¶ 17 **II. ANALYSIS**

¶ 18 OSAD argues it should be allowed to withdraw as counsel pursuant to the Supreme Court's decision in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), because defendant's claim lacks any arguable merit. The record shows service on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by January 13, 2014. He filed none. After reviewing the record, consistent with our responsibilities under *Finley*, we agree arguable merit is absent as to defendant's claim.

¶ 19 **A. Standard of Review**

¶ 20 The Act allows a defendant to "challenge his conviction or sentence for violations of federal or state constitutional rights." *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d

(2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he or she pleads guilty there will not be a trial of any kind, so that by pleading guilty he or she waives the right to a trial by jury and the right to be confronted with the witnesses against him or her; or that by stipulating the evidence is sufficient to convict, he or she waives the right to a trial by jury and the right to be confronted with any witnesses against him or her who have not testified."

The court fully complied with Rule 402(a). The court admonished defendant as to the nature of his charges, the possible penalties he faced, his right to a jury trial, and the rights waived by entering a plea of guilty.

¶ 24 The State recited the factual basis for defendant's guilty plea as required under Rule 402(c). See Ill. S. Ct. Rule 402(c) (eff. July 1, 2012). The court asked defendant, "has anybody threatened you or forced you, in any way, to get you to give up your rights and plead

guilty?" Defendant responded, "No, sir." The record is clear defendant was fully informed of the consequences of electing to plead guilty and knowingly, voluntarily, and understandingly agreed to do so. See Ill. S. Ct. R. 402(a), (b) (eff. July 1, 2012).

¶ 25 Further, the testimony of defendant's trial counsel at the evidentiary hearing on defendant's postconviction petition demonstrated defendant's plea was voluntary. The trial court explained counsel's testimony demonstrated "[d]efendant immediately elected to take advantage of a reasonably favorable plea agreement" after counsel informed him of Christina's unwillingness to lie for him. We agree. Defendant has presented no evidence to support his claim counsel's inaction forced him to plead guilty. Consequently, OSAD can make no meritorious argument the court's decision finding defendant's plea voluntary was manifestly erroneous.

¶ 26 C. Defendant's Actual-Innocence Claim

¶ 27 In defendant's amended postconviction petition, he argued love letters from Christina, evidence demonstrating she visited him in jail, and payment stubs demonstrating she sent him money prove he is innocent. The trial court rejected this argument. OSAD argues it can make no meritorious argument the court erred, as defendant's purported exonerating evidence is insufficient to establish an actual-innocence claim. We agree.

¶ 28 "[T]he due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *People v. Ortiz*, 235 Ill. 2d 319, 331, 919 N.E.2d 941, 949-50 (2009). "[E]vidence in support of the claim must be newly discovered; material and not merely cumulative; and 'of such conclusive character that it would probably change the result on retrial.'" *Id.* at 333, 919 N.E.2d at 950 (citing *People v. Morgan*, 212 Ill. 2d 148, 154, 817 N.E.2d 524, 527 (2004), citing *People*

v. Barrow, 195 Ill. 2d 506, 540-41, 749 N.E.2d 892, 913 (2001)). Defendant's purported exonerating evidence fails to satisfy the necessary requirements.

¶ 29 First, the victim's love letters and the fact she remained in contact with defendant are not newly discovered evidence. Newly discovered evidence is evidence "discovered since the trial and that the defendant could not have discovered sooner through due diligence." *Ortiz*, 235 Ill. 2d at 334, 919 N.E.2d at 950. While the letters were written after defendant pleaded guilty, defendant sought to use the letters to show Christina's continued feelings for him constituted proof he did not rape her. However, as testified to by trial counsel, defendant entered the plea of guilty fully aware of Christina's continuing expressions of care and ongoing contact with him.

¶ 30 Second, defendant's purported evidence is cumulative, as it adds nothing to the evidence that would have been before a jury. See *id.* at 335, 919 N.E.2d at 950. Christina never denied caring for defendant or remaining in contact with him. Defendant's trial counsel testified she believed, had Christina testified, Christina would have admitted she and defendant remained in contact and that she cared for defendant.

¶ 31 Third, defendant's evidence is not of such conclusive character that it would probably change the result at a trial. As the trial court pointed out, defendant's argument rests on his "entirely flawed" assumption Christina's "conduct *** was inconsistent with that of a rape victim." The court further noted, "[c]ommon sense would suggest that such an argument would likely be regarded as profoundly specious because many if not most rape victims are raped by acquaintances, frequently in complicated relationships in which the victim continues to care deeply for the offender." The trial court's assessment of the impact of this evidence is bolstered when one considers Christina was expected to testify in a manner consistent with her statements

to police and treatment providers. The fact Christina sent defendant love letters, visited him during his incarceration, and provided him financial support is not of such conclusive character as to probably change the result in the event of a trial. As a result, we agree OSAD can make no meritorious argument defendant should be granted a trial based on his actual-innocence claim.

¶ 32 We note OSAD also states courts disfavor actual-innocence claims following a guilty plea, citing the First District cases *People v. Simmons*, 388 Ill. App. 3d 599, 614, 903 N.E.2d 437, 452 (2009), and *People v. Barnslater*, 373 Ill. App. 3d 512, 527, 869 N.E.2d 293 306 (2007). We decline to address this issue, as it is unnecessary for the disposition of this case.

¶ 33 D. Ineffective-Assistance-of-Guilty-Plea-and-Postconviction-Counsel Claim

¶ 34 Defendant claimed he was denied effective assistance of counsel prior to pleading guilty, and defendant chose to represent himself in the hearing on his postconviction petition. OSAD argues it can make no meritorious claim defendant was denied effective assistance of counsel either in pleading guilty or at his postconviction hearing. We address each potential argument in turn.

¶ 35 1. *Trial Counsel*

¶ 36 Ineffective-assistance-of-counsel claims are reviewed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *People v. Callahan*, 334 Ill. App. 3d 636, 641, 778 N.E.2d 737, 742 (2002). Under the *Strickland* test, a defendant must show (1) "counsel made errors so serious he was not functioning as the 'counsel' guaranteed under the sixth amendment" and (2) defendant was prejudiced by counsel's errors. *Id.* (citing *Strickland*, 466 U.S. at 687). "Attorneys have an obligation to explore all readily available sources of evidence that might benefit their clients." *People v. Makiel*, 358 Ill. App. 3d 102, 107,

830 N.E.2d 731, 739 (2005). "Failure to conduct investigation and develop a defense has been found to be ineffective assistance." *Id.*

¶ 37 Defendant cannot satisfy the first prong, as defendant did not show his trial counsel committed any errors. Defendant claimed his trial counsel failed to gather evidence that would impeach the victim's credibility, but his counsel's testimony directly refuted his allegations. The trial court found counsel's testimony credible. Defendant presented no evidence supporting his allegation of ineffective-assistance-of-counsel. Consequently, OSAD can make no colorable argument the trial court erred in dismissing defendant's claim.

¶ 38 *2. Postconviction Counsel*

¶ 39 On behalf of defendant, OSAD also considered whether the trial court denied defendant his statutory right to postconviction counsel. OSAD concludes this issue presents no meritorious argument because defendant waived his right to counsel. We agree.

¶ 40 When a defendant's postconviction claims advance past the first stage, "counsel may be appointed for defendant, if defendant is indigent." *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007 (citing 725 ILCS 5/122-4 (West 2000)). This right to appointed counsel may be waived when a "defendant expresse[s] to the court a desire to represent himself." *People v. French*, 210 Ill. App. 3d 681, 690, 569 N.E.2d 934, 940 (1991). Further, "[a]n indigent defendant is not entitled to representation by the counsel of his or her choice; an attorney from outside the public defender's office should be appointed only after a showing of good cause." *Id.*

¶ 41 Here, defendant demonstrated no good cause to appoint another attorney, as the trial court found defendant and his attorney disagreed only as to the significance of the law. Defendant's testimony and his letter to his attorney supported the court's conclusion. As the

court found no good cause to appoint an attorney outside the public defender's office, it properly refused to appoint another attorney.

¶ 42 Defendant expressed a desire to represent himself after the trial court fully explained the consequences of postconviction counsel's motion to withdraw. The court admonished defendant he would have to continue as a *pro se* litigant if it granted counsel's motion to withdraw. The court indicated it could, if defendant requested, deny counsel's motion, allowing defendant to continue to be represented. After the court gave defendant this choice and detailed how defendant would be disadvantaged proceeding as a *pro se* litigant, defendant persisted in his desire to represent himself. Consequently, defendant waived his statutory right to postconviction counsel.

¶ 43 We agree with OSAD no meritorious argument can be made defendant was denied his right to postconviction counsel.

¶ 44 III. CONCLUSION

¶ 45 For the foregoing reasons, we grant OSAD's motion for leave to withdraw as counsel and affirm the trial court's judgment.

¶ 46 Affirmed.