2018 IL App (1st) 160038-U

FIFTH DIVISION
Order filed: November 2, 2018

No. 1-16-0038

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 07 CR 14025
	)	
MICHAEL BLAKES,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse that part of the circuit court's order granting the State's motion to dismiss the defendant's amended postconviction petition at the second stage of proceedings where the defendant made a substantial showing that trial counsel was ineffective for failing to call certain witnesses, and remand the cause with directions that it be assigned to a different judge for third-stage postconviction proceedings. We affirm that part of the circuit court's order which dismissed the amended petition as to the defendant's allegations of unreasonable assistance of postconviction counsel, as postconviction counsel was not unreasonable for failing to identify evidence outside the record in support of the defendant's other contentions.

¶ 2 The defendant, Michael Blakes, appeals from the second-stage dismissal of his amended petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, he contends that (1) his amended petition made a substantial showing that trial counsel was ineffective for failing to investigate and call certain witnesses, and (2) postconviction counsel failed to provide reasonable assistance by not supporting other contentions in the amended petition with affidavits and exhibits. For the reasons that follow, we affirm in part, reverse in part, and remand with directions.

¶ 3 The defendant was charged by indictment with, *inter alia*, 16 counts of aggravated criminal sexual assault (720 ILCS 5/12-14 (West 2006)) arising from an incident on June 19 and 20, 2007, in Chicago. He retained three successive attorneys during pretrial proceedings, including Lawrence O'Reilly, who represented him at his bench trial. We set forth only the facts that are relevant to this appeal.

¶ 4 The victim, T.L., and her friend, Donisha Logan, testified that, on the evening of June 19, 2007, they observed the defendant engaged in a confrontation with other men on the street. T.L. denied that she, Logan, or other women participated in the incident, but Logan, on cross-examination, agreed that she told "the police" that the situation "escalated to include" herself, T.L., a woman named Candice, and "some girls."

¶ 5 When police arrived, T.L. and Logan accepted a ride from the defendant, Calvin Thomas Jr., and the defendant's brother, Myron Taylor. After leaving Taylor at an apartment building, the group drove to a liquor store and drank gin at a park. Sometime after midnight, T.L. stated that she wanted to go home. The defendant "slapped" her and called her a "bitch" because she did not want to have sex with him. Thomas drove the group to the defendant's house (Blakes

residence), where the defendant told T.L. to exit the vehicle. He struck her face with his fist, grabbed her arm, and forced her into the house.

¶ 6 T.L. testified that the defendant carried her to the basement and locked the door. He ordered her to remove her clothing, and when she refused, he struck her face. Then, he penetrated her orally, anally, and twice vaginally, saying that she "owe[d]" him for the alcohol that he purchased. T.L. screamed, and the defendant's brother, Lamon Blakes, and grandmother, Amie Blakes, entered the basement. The defendant took T.L. to a vacant building and demanded sex, but Lamon confronted him and they began fighting. Afterwards, Lamon took T.L. to the Blakes residence and Amie told her not to say anything to the police.

¶ 7 Two Chicago police officers testified that they were dispatched to the Blakes residence after the defendant called to report that Lamon had a gun. Amie opened the door, and T.L., who was "bruis[ed]" and "visibly shaken," reported that the defendant "raped" her. They arrested the defendant and transported T.L. to a hospital, where she underwent a rape kit. The parties stipulated that the results matched the defendant's DNA. A doctor testified that T.L. exhibited no visible trauma to her vaginal or anal areas, but had bruising on her left cheek and an abrasion on her forearm. According to Logan, T.L.'s bruises were not present before the incident.

¶ 8 Mercedes Cetewayo, who dated Lamon and lived at the Blakes residence at the time of the incident, testified that, since June 2007, she took a medication called Keppra for seizures and blackouts, and that her condition impaired her memory. She did not recall any events from June 20, 2007, providing a statement to police, or testifying before a grand jury. She stated that, prior to trial, no one asked whether she had a medical condition that affected her memory.

¶ 9 The State called Assistant State's Attorney Meg O'Sullivan, who interviewed Cetewayo on June 20, 2007. According to O'Sullivan, Cetewayo denied being "under the influence of

alcohol or drugs," did not mention that she had a seizure disorder that affected her memory, and did not state that she was on medication for that condition. In her written statement and grand jury testimony, which were entered into evidence, Cetewayo did not mention her seizure disorder, medication, or memory problems.

¶ 10 In her written statement and grand jury testimony, Cetewayo stated that, during the early hours of June 20, 2007, she heard a woman in the basement of the Blakes residence cry, "please let me go home." Cetewayo and Amie went to the kitchen, while Lamon and the defendant's cousin, Woogie (later identified as Howard Walker), went downstairs. When the defendant left the basement, Cetewayo saw T.L. crying on the stairs. The defendant exited the house with T.L., followed by Lamon. When the three of them returned, Amie instructed Cetewayo not to tell the police about T.L. However, when officers arrived, Cetewayo told them that a "victim," T.L., was in the house.

¶ 11 The defense called Amie, who testified that, on the morning of June 20, 2007, in the Blakes residence, she saw Lamon talking to a woman she had never seen before. Amie denied hearing her screaming or seeing her with the defendant in the basement, and stated that she did not tell anyone not to talk to the police. At approximately 7:30 a.m., officers arrived, searched the house for a gun, and left with the woman.

¶ 12 The defendant testified that he engaged in consensual sex with T.L. and that she became angry when he gave her money for the bus instead of driving her home. He denied punching her or forcing her into the house, and stated that she was injured earlier that evening when he observed her and Logan fighting with a group of women.

¶ 13 In rebuttal, the State called Chicago Police Detective William Filipiak, who testified that he interviewed the defendant following his arrest and that he never stated that T.L. and Logan fought with other women.

¶ 14 At the close of trial, the defendant was found guilty of four counts of aggravated criminal sexual assault and sentenced to four consecutive terms of six years and three months in prison.

¶ 15 On direct appeal, the defendant contended that he was entitled to 18 additional days of presentence custody credit. This court agreed, corrected his mittimus, and affirmed the judgment of the trial court in all other respects. See *People v. Blakes*, No. 1-10-0067 (2011) (unpublished order under Supreme Court Rule 23).

¶ 16 In August 2011, the defendant filed a *pro se* postconviction petition raising claims of ineffective assistance of counsel. In both the petition and the affidavits attached thereto, the defendant and the affiants directed allegations against the "trial counsel," the "trial attorney," or "Michael Blakes['s] attorney," but did not identify the attorney, by name, as O'Reilly.

¶ 17 In the petition, the defendant alleged that he provided counsel with Taylor's and Thomas's addresses and telephone numbers prior to trial, but counsel did not contact or subpoena them. According to the defendant, Taylor and Thomas would have testified that T.L. and Logan fought with a group of women on June 19, 2007, and Thomas would further attest that T.L. willingly entered the Blakes residence. Additionally, the defendant alleged that counsel failed to investigate Cetewayo's use of Keppra, and should have moved to suppress her statement to police. In an affidavit attached to the petition, Cetewayo averred that Keppra affects how she "think[s] and understands things," and that she "recently" learned that she "overdos[ed]" by taking the medication too frequently during the previous four years. The

affidavits of the defendant, Taylor, Amie, and Claudia Blakes were also attached to the defendant's petition, which the circuit court summarily dismissed.

¶ 18 On appeal, this court reversed and remanded the cause for second-stage proceedings because the allegations in the defendant's petition, along with the affidavits of Amie and Taylor, arguably supported a claim for ineffective assistance of counsel. *People v. Blakes*, 2013 IL App (1st) 113357-U. As the State's case partly rested upon T.L.'s and Logan's testimony that the defendant struck T.L. and dragged her into the house, and the defendant testified that T.L. had been injured in a fight and later engaged in consensual sex, we found that "it is at least arguable" that he "was prejudiced by counsel's failure to investigate and present the testimony of Taylor in support of [his] version of events and that counsel's performance, or lack therof, fell below an arguable standard of reasonableness." *Id.* ¶ 14. Because the Act does not permit partial dismissals at the first stage of proceedings, we did not address the defendant's additional claim that counsel was ineffective for failing to obtain Cetewayo's medical records. *Id.* ¶ 17.

¶ 19 On remand, the circuit court docketed the defendant's petition for second-stage proceedings and appointed postconviction counsel, who filed an amended postconviction petition that included (1) a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), and (2) her own verification pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2014)). The amended petition did not include a verification by the defendant.

¶ 20 Like the original petition, both the amended petition and the affidavits attached thereto raised allegations against the defendant's "trial counsel," "trial attorney," and "Michael Blakes['s] attorney," but did not identify that attorney, by name, as O'Reilly. The amended petition alleged that: (1) counsel was ineffective for failing to call additional witnesses to testify about T.L.'s fight with the other women and the consensual nature of the sex; (2) counsel was

ineffective for failing to obtain Cetewayo's medical records regarding her history of seizures or to proffer expert testimony about the effect of her medication; and (3) both "[t]he trial court and trial counsel" erroneously advised the defendant regarding his minimum sentencing range, and that appellate counsel was ineffective for failing to raise this issue on direct appeal. The amended petition did not include any affidavits or exhibits in support of the latter two contentions. However, in support of the first contention, the amended petition included 13 affidavits from the defendant, Thomas, Taylor, Walker, James Hall, Darlene Blakes, Amie, and Claudia. Postconviction counsel noted that O'Reilly's itemized billing statement, which appears in the record, does not show that he interviewed Thomas, Taylor, Walker, Hall, or Darlene.

¶ 21 Thomas and Taylor averred that, on the date of the incident, they witnessed T.L. fighting with other women and that she had bruises when she entered Thomas's car. Thomas did not sense "hostility" between the defendant and T.L., and added that, when he drove the group to the Blakes residence, T.L. stated that she would spend the night. Taylor attested that he went to the Blakes residence after the group dropped him off at the apartment building, and saw T.L. "smiling while willingly following" the defendant into the basement. Taylor was "awake in the house the whole time" that the defendant and T.L. were in the basement, and did not hear her "cr[y] out" or ask to "go home." According to Taylor, T.L. "seemed to be in a good mood later that morning when she walked out of the basement."

¶ 22 In their affidavits, Walker, Hall, and Darlene stated that: (1) they observed T.L. "willingly" enter the Blakes residence with the defendant; (2) they were in the house "the whole time" that the defendant and T.L. were in the basement; (3) T.L. did not scream, cry, or state that she "wanted to go home;" and (4) the defendant "never threatened" T.L. Walker averred that T.L. left the basement "smiling" the next morning. Thomas, Taylor, Walker, Hall, and Darlene

each stated that they were "willing to testify" at trial, and Walker further attested that the defendant's "lawyer" never contacted him.

¶ 23 The defendant averred that, prior to trial, he informed "trial counsel" that Taylor and Thomas were with him on the day of the offense and that both were willing to testify. According to the defendant, he and Amie gave Taylor's and Thomas's addresses and telephone numbers to counsel, but on the day of trial, counsel stated that "he was unable to contact" either witness and that neither was subpoenaed.

¶ 24 In her affidavit, Amie stated that she met with the defendant's "trial attorney" prior to trial, provided him with addresses and telephone numbers for Taylor, Thomas, Hall, Darlene, and Walker, and told him that all the witnesses were willing to testify. Claudia averred that she observed the encounter between Amie and the "trial attorney," and corroborated the account in Amie's affidavit.

¶ 25 The State filed a motion to dismiss the defendant's amended postconviction petition, which the circuit court granted following a hearing. In delivering his ruling from the bench, the judge reviewed the evidence adduced at trial, including T.L.'s and Logan's testimony that T.L. "wanted to go home," but the defendant "dragged" her into the house, forced her into the basement, and sexually assaulted her. The judge stated that T.L. "testified credibly ***, contrary to [the defendant's] absurd testimony, that it was a consensual date," and that her account was "corroborate[d]" by Cetewayo, who heard her "screaming in the basement" and later saw her crying. Regarding the affidavits attached to the defendant's amended petition, the judge stated that he "would have considered" the affiants' testimony had they testified at trial, but explained that, "[a]s far as what *** [they] would have said, in all honesty, this would not affect my decision one way or the other." This appeal followed.

¶ 26 For his first assignment of error, the defendant contends that his petition should be remanded for third-stage postconviction proceedings because he made a substantial showing of a violation of his right to the effective assistance of trial counsel. According to the defendant, trial counsel provided ineffective assistance by failing to investigate and call Thomas, Taylor, Walker, Hall, and Darlene, whose testimony would have contradicted the allegations of the State's witnesses and corroborated his version of events, *i.e.*, that T.L. was injured in a fight with other women and engaged in consensual sex with him.

¶ 27 The Act (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a three-stage process for a defendant "to challenge a conviction by alleging it was the result of a substantial denial of federal or state constitutional rights, or both." *People v. Cotto*, 2016 IL 119006, ¶ 26. When, as here, the defendant's postconviction petition reaches the second stage of proceedings, "all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true," and dismissal "is warranted only when the petition's allegations of fact—liberally construed in favor of the petitioner and in light of the original trial record—fail to make a substantial showing" of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382, 385 (1998).

¶ 28 The " 'substantial showing' of a constitutional violation that must be made at the second stage [citation] is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief." (Emphasis in original.) *People v. Domagala*, 2013 IL 113688, ¶ 35. Although the defendant "bears the burden of making a substantial showing of a constitutional violation" (*id.*), a second-stage inquiry into "whether a post-conviction petition contains sufficient allegations of constitutional deprivations does not require the trial court to engage in any fact-finding or

credibility determinations" (*People v. Childress*, 191 Ill. 2d 168, 174 (2000)). Our review is *de novo*. *People v. Johnson*, 2017 IL 120310, ¶ 14.

¶ 29 Both the United States and Illinois constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *People v. Hale*, 2013 IL 113140, ¶ 15. To support a claim of ineffective assistance of counsel at the second stage of postconviction proceedings, a defendant must make a substantial showing that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different. *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)); *People v. Groszek*, 2016 IL App (3d) 140455, ¶ 13. Failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. See *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 30 Turning to the first prong of *Strickland*, it is well-established that "[d]ecisions concerning what witnesses to call and what evidence to present on a defendant's behalf are viewed as matters of trial strategy," and "are generally immune from claims of ineffective assistance." *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002). These strategic decisions, however, "may be made only after there has been a 'thorough investigation of law and facts relevant to plausible options.' " *People v. Gibson*, 244 Ill. App. 3d 700, 703-04 (1993) (quoting *Strickland*, 466 U.S. at 690). "Generally, an attorney cannot be found to have made decisions based on valid trial strategy where he or she fails to conduct a *reasonable* investigation, fails to interview witnesses, and fails to subpoena witnesses." (Emphasis in original.) *People v. Irvine*, 379 Ill. App. 3d 116, 130 (2008).

¶ 31 In this case, the defendant alleged in his amended postconviction petition that trial counsel was ineffective for failing to call or interview Thomas, Taylor, Walker, Hall, or Darlene, whose evidence would have supported his theory that T.L. was injured in a fight with other women and later engaged in consensual sex with him. In their affidavits, Thomas and Taylor averred that, on the night of the offense, they saw T.L. fighting with other women and observed bruises on her face when she entered Thomas's car. All five affiants averred that T.L. entered the Blakes residence of her own volition, and Taylor, Hall, Darlene, and Walker further posited that they were in the house "the whole time" the defendant and T.L. were in the basement, and did not hear her scream, cry, or say that she wanted to go home. Walker, Hall, and Darlene agreed that the defendant did not threaten T.L., and Walker and Taylor maintained that they saw her leave the basement in a good mood. Each affiant stated that he or she was "willing to testify." The defendant averred that he gave counsel Taylor's and Thomas's addresses and telephone numbers prior to trial, and Amie, as corroborated by Claudia, alleged that she gave counsel contact information for all five affiants and told him that each would testify.

¶ 32 Taking these facts as true, as we must in reviewing a second-stage postconviction proceeding, we find that the defendant made a substantial showing that counsel was ineffective for failing to investigate and call witnesses whose evidence tended to corroborate his own testimony and contradict the State's theory of the case. T.L. and Logan testified that the defendant hit T.L., forced her into the Blakes residence, and sexually assaulted her. However, the affidavits of Thomas, Taylor, Walker, Hall, and Darlene support the defendant's testimony that T.L. sustained an injury to her face before arriving at the Blakes residence, and that he did not force her into the house or have sex with her against her will. Given that the defendant, Amie, and Claudia averred that counsel received contact information for each of these witnesses, and

was apprised that they were willing to testify, the alleged failure to call or interview any of them would have been unreasonable. *People v. Greer*, 79 Ill. 2d 103, 123 (1980) ("The failure to interview witnesses may indicate actual incompetence [citation], particularly when the witnesses are known to trial counsel and their testimony may be exonerating [citation].").

¶ 33 We also find that the defendant has shown a reasonable probability under the second prong of *Strickland* that, but for counsel's failure to call or interview Thomas, Taylor, Walker, Hall, and Darlene, the outcome of his trial would have been different. A " 'reasonable probability' is defined as a showing sufficient to undermine confidence in the outcome, rendering the result unreliable or fundamentally unfair." *People v. Patterson*, 2014 IL 115102, ¶ 81. The affiants' affidavits, taken as true for purposes of a second-stage postconviction analysis, contradict the State's evidence that the defendant struck T.L. and sexually assaulted her. Nor is their evidence cumulative of the defendant's and Amie's testimony. Critically, although Amie contradicted T.L.'s testimony that she witnessed the sexual assault and told her not to say anything to the police, the defense did not present any evidence to corroborate the defendant's testimony that T.L. was injured in a fight and later had consensual sex with him. Notably, on cross-examination, Logan agreed that she told "the police" that the confrontation between the defendant and other men on the street "escalated to include" herself, T.L., a woman named Candice, and "some girls." In view of the foregoing, the defendant made a substantial showing that trial counsel's failure to call or interview Thomas, Taylor, Walker, Hall, and Darlene was prejudicial.

¶ 34 In reaching this conclusion, we reject the State's argument that the facts alleged in the defendant's amended postconviction petition and the attached affidavits are not well-pleaded so as to support a claim of ineffective assistance of counsel. To the extent the State observes that the

defendant, Amie, and Claudia did not identify O'Reilly by name in their affidavits and, therefore, may have provided the witnesses' contact information to one of the other attorneys who previously represented the defendant, we note that each attested to contacting the attorney who represented the defendant at trial—that is, O'Reilly. Further, while the State notes that Thomas, Taylor, Hall, and Darlene did not expressly aver that they were *not* contacted by O'Reilly, his itemized billing statement does not show that he contacted, or attempted to contact, any of these witnesses. Because the billing statement contains no reference to Thomas and Taylor, the defendant's averment that counsel told him that "he was unable to contact" both of them does not mandate an inference the counsel attempted to contact either of them. Finally, although we are not unmindful that no evidence at trial suggested that Darlene, Taylor, or Hall were at the Blakes residence during the offense, the absence of testimony to that effect does not positively rebut the content of their affidavits. While these circumstances might be relevant to issues of credibility or the weight of the evidence, neither is at issue during a second-stage postconviction proceeding, where unrebutted allegations must be taken as true and liberally construed in light of the record. *Childress*, 191 Ill. at 174; *Coleman*, 183 Ill. 2d at 382, 385.

¶ 35 Based on the foregoing, we reverse the dismissal of the defendant's amended postconviction petition and remand the cause for a third-stage evidentiary hearing on his claim for ineffective assistance of trial counsel, without expressing any opinion as to the merits of his allegations. In so holding, we agree with the defendant's position that the cause should be assigned to a different judge. As noted, in granting the State's motion to dismiss the amended petition, the judge stated that, although he "would have considered" the affiants' testimony had they testified at trial, "what *** [they] would have said, in all honesty, *** would not affect my decision one way or the other." The judge's comments thus expressed credibility opinions that

were premature at the second stage of postconviction proceedings. Out of an abundance of caution, we remand the cause to the presiding judge of the criminal division of the circuit court with instructions to assign this case to a different judge for third-stage postconviction proceedings. See Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994) (the reviewing court may "make any *** orders *** that the case may require"); *Eychaner v. Gross*, 202 Ill. 2d 228, 279 (2002) (noting that Supreme Court Rule 366 "includes the power to reassign a matter to a new judge on remand").

¶ 36 For his next assignment of error, the defendant contends that postconviction counsel failed to provide reasonable assistance pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), due to her failure to attach evidence in support of two additional allegations raised in the amended petition—namely, that (1) trial counsel was ineffective for not obtaining Cetewayo's medical records regarding her history of seizures or proffering expert testimony about the effect of her medication; and (2) trial counsel erroneously advised him regarding his minimum sentencing range, and that appellate counsel was ineffective for failing to raise this issue on direct appeal.[1] Because postconviction counsel would not have included either claim in the amended petition had she believed that they were frivolous, yet did not attach Cetewayo's medical records, an affidavit from a medical expert, or evidence showing whether a plea bargain had been offered (or whether the defendant would have sought and accepted a bargain had he been properly advised), the defendant maintains that the failure to support either claim with evidence was unreasonable.

[1] Although the defendant's amended postconviction petition alleged that "[t]he trial court and trial counsel" erroneously advised him regarding his minimum sentencing range, he concedes in his brief on appeal that the trial court was not obliged to apprise him of his possible sentence because he did not plead guilty. See *People v. Harvey*, 366 Ill. App. 3d 910, 918 (2006).

¶ 37 Post-conviction counsel must provide a reasonable level of assistance. *People v. Lander*, 215 Ill. 2d 577, 583 (2005). To that end, Rule 651(c) requires that the record show that counsel: "(1) consulted with the defendant either by mail or in person to ascertain his claims of deprivation of constitutional rights; (2) examined the record of the trial court proceedings; and (3) made any amendments to the *pro se* petition necessary for an adequate presentation of the defendant's contentions." *Id.* at 584. Compliance with these duties is mandatory and may be shown by a certificate filed by postconviction counsel. *Id.* "The filing of a Rule 651(c) certificate gives rise to the rebuttable presumption that post-conviction counsel provided reasonable assistance." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. Counsel's compliance with Rule 651(c) is reviewed *de novo*. *Id.* ¶ 17.

¶ 38 Pursuant to Rule 651, the "mandate requiring counsel to make necessary amendments" to a *pro se* petition "is not limitless." *People v. Nelson*, 2016 IL App (4th) 140168, ¶ 16. Thus, the supreme court has recognized that "post-conviction counsel has an obligation to present a *petitioner's claims* in appropriate legal form," but "is under no obligation to actively search for sources outside the record that might support general claims raised in a post-conviction petition." *People v. Johnson*, 154 Ill. 2d 227, 247 (1993). In *People v. Williams*, 186 Ill. 2d 55 (1999), for example, a defendant alleged in a *pro se* petition that trial counsel was ineffective for failing to obtain "a blood-type expert to type the blood on [the victim's] clothing." *Id.* at 59. Subsequently, appointed counsel filed an amended petition that included the defendant's claim but lacked affidavits in support thereof. *Id.* On appeal from the dismissal of the amended petition, the defendant alleged that appointed counsel failed to comply with Rule 651(c) due to that omission. *Id.* The supreme court held that postconviction counsel "clearly had no obligation to seek out a

blood-type expert" or "conduct a fishing expedition for evidence," and that the "[d]efendant, not his appointed post-conviction counsel, was responsible for providing this information." *Id.* at 61.

¶ 39 Here, the defendant contends that postconviction counsel was unreasonable because she did not present Cetewayo's medical records or an affidavit from a medical expert. However, nothing in the record shows that the defendant identified an expert, or any other source of medical evidence, that might have corroborated Cetewayo's statement in her affidavit that her seizure condition and medication affected her memory. Postconviction counsel, as noted, is not obliged to actively search for evidence outside the record. *Johnson*, 154 Ill. 2d at 247; see also *Nelson*, 2016 IL App (4th) 140168, ¶¶ 8, 21 (finding that "postconviction counsel did not fail to provide reasonable representation by failing to conduct a search to find an expert who would support defendant's claims," despite including such claims in the amended postconviction petition).

¶ 40 We also reject the defendant's position that postconviction counsel was unreasonable for failing to produce evidence showing whether a plea bargain had been offered, or that he would have sought and accepted a bargain had he been properly informed of the minimum sentencing range. In *People v. Davis*, 156 Ill. 2d 149, 163 (1993), our supreme court held that a postconviction petitioner "is not entitled to the advocacy of counsel for purposes of exploration, investigation and formulation of potential claims." Instead, "[p]ost-conviction counsel is only required to investigate and properly present *** those claims which the *petitioner* raises." (Emphasis in original.) *Id.* at 164. In this case, the defendant never alleged in his affidavits that trial counsel misadvised him regarding the minimum sentencing range, nor did his *pro se* petition identify anything in the record suggesting that trial counsel erred in this regard. Indeed, the record shows that, when the trial court allegedly misadvised the defendant regarding the

minimum sentencing range, trial counsel was not yet involved in the case and the defendant, at that time, was demanding to proceed to trial.

¶ 41 Finally, the defendant observes that the amended petition did not include his own verification affidavit, and submits that, although the State forfeited the issue by not raising it in its motion to dismiss, the omission of the affidavit "affirmatively demonstrates" that postconviction counsel did not comply" with Rule 651. We disagree. For the reasons we have explained, postconviction counsel was not unreasonable in not conducting a "fishing expedition" in connection with Cetewayo's affidavit (*Williams*, 186 Ill. 2d at 61), and, further, there is no basis in the record for the allegation, raised for the first time in the amended petition, that trial counsel misadvised the defendant regarding his minimum sentencing range. Because these allegations fail on the merits, postconviction counsel's failure to obtain the defendant's verification affidavit in connection with either allegation is inconsequential.

¶ 42 In summary, we reverse that part of the circuit court's order granting the State's motion to dismiss the defendant's amended postconviction petition with respect to his claim that trial counsel was ineffective for failing to investigate and call Thomas, Taylor, Walker, Hall, and Darlene, and remand the cause to the presiding judge of the criminal division of the circuit court with instructions to assign this case to a different judge to adjudicate third-stage postconviction proceedings. The judgment of the circuit court is affirmed in all other respects.

¶ 43 Affirmed in part, reversed in part, and remanded with directions.