

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2019 IL App (4th) 170423-U

NO. 4-17-0423

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

July 1, 2019

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
D'ANDRAE JOHNSON,)	No. 10CF203
Defendant-Appellant.)	
)	The Honorable
)	Scott D. Drazewski,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Holder White and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court’s dismissal of defendant’s successive postconviction petition.

¶ 2 In March 2010, the State charged defendant, D’andrae Johnson, with unlawful possession of a weapon by a felon. 720 ILCS 5/24-1.1(a) (West 2010). A jury later found defendant guilty of this offense, defendant appealed, and this court affirmed. In February 2014, defendant *pro se* filed a postconviction petition which was ultimately dismissed at the second stage. In January 2017, relying upon a claim of actual innocence, counsel filed a second petition for postconviction relief on behalf of defendant. In May 2017, the trial court denied defendant’s postconviction petition after concluding that defendant’s “claim of actual innocence is not based on any newly discovered evidence.”

¶ 3 Defendant appeals, arguing that his postconviction counsel provided unreasonable

assistance. We affirm.

¶ 4

I. BACKGROUND

¶ 5 In March 2010, the State charged defendant with unlawful possession of a weapon by a felon. 720 ILCS 5/24-1.1(a) (West 2010). In August 2010, defendant's case proceeded to a jury trial. Brice Stanfield of the Bloomington Police Department testified that he searched Rachael Matherly's apartment. Matherly, defendant, and two other adult males were present during the search. Stanfield stated that another officer found a revolver during the search. Defendant and Matherly initially denied any knowledge of the gun. However, after defendant was placed under arrest, he admitted that he owned the revolver.

¶ 6 During an interrogation video, which was played to the jury, defendant stated that he received the revolver from a person he declined to identify. At trial, defendant testified that (1) he did not know about the revolver and (2) he lied about owning the revolver to protect Matherly. Ultimately, the jury found defendant guilty, and the trial court sentenced defendant to 20 years in prison.

¶ 7 On his direct appeal, defendant essentially argued that (1) the State failed to prove him guilty beyond a reasonable doubt, (2) his attorney was ineffective, and (3) his 20-year prison sentence was excessive. This court disagreed and affirmed. *People v. Johnson*, 2012 IL App (4th) 110347-U, ¶ 60.

¶ 8 In February 2014, defendant *pro se* filed a "Petition for Relief From Judgment." Later that month, the trial court concluded that defendant's petition stated a "gist" of a constitutional claim for postconviction relief. Accordingly, the court appointed postconviction counsel for defendant and advanced the petition to the second stage.

¶ 9 In July 2014, counsel filed a supplemental petition for postconviction relief in

which he argued that defendant's trial counsel was ineffective. In September 2014, the State filed a motion to dismiss in which it argued that defendant's claims were untimely. See 725 ILCS 5/122-1(c) (West 2014) ("If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.").

¶ 10 In August 2015, counsel filed an addendum in which he asserted a claim of actual innocence. See *id.* ("This [time] limitation does not apply to a petition advancing a claim of actual innocence."). In May 2017, the trial court dismissed defendant's petition. Defendant appealed to this court but subsequently withdrew his appeal.

¶ 11 In January 2017, counsel filed a second petition for postconviction relief with an attached affidavit from Matherly. Counsel did not attach any other affidavits. In the affidavit, Matherly stated that "William Irving had brought [the revolver] to my apartment *** to show D'andre Johnson, myself, and some of our friends. D'andre Johnson and I never gave William Irving consent to leave the revolver at my apartment, and [he] never informed either of us that he would be leaving his revolver at my apartment." Matherly further stated that defendant "falsely confessed" to possessing the gun. Counsel argued that this affidavit "clearly supports" defendant's claim of actual innocence. In May 2017, the trial court concluded that defendant's "claim of actual innocence is not based on any newly discovered evidence." Accordingly, the court denied defendant's postconviction petition.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant appeals, arguing that his postconviction counsel provided unreasonable assistance. We affirm.

¶ 15

A. The Applicable Law

¶ 16 The Post-Conviction Hearing Act (Act) provides a criminal defendant the means to redress substantial violations of his constitutional rights that occurred in his original trial or sentencing. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23, 38 N.E.3d 1256; 725 ILCS 5/122-1 (West 2016). However, the Act “generally contemplates the filing of only one postconviction petition.” *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009). “A successive postconviction petition may only be filed if leave of court is granted.” *Crenshaw*, 2015 IL App (4th) 131035, ¶ 28; see also 725 ILCS 5/122-1(f) (West 2016).

¶ 17 The trial court may consider a successive petition if the defendant shows a claim of actual innocence. *People v. Jones*, 2017 IL App (1st) 123371, ¶ 41, 87 N.E.3d 938. When a defendant’s successive petition makes a claim of actual innocence, such a claim may be considered only if the evidence is (1) newly discovered, (2) material and not merely cumulative, and (3) of such a conclusive character that it probably would change the result on retrial. *Id.* ¶ 43. “Newly discovered evidence is defined as evidence that has been discovered since the trial and could not have been discovered sooner by the defendant through due diligence.” *Id.*

¶ 18 Postconviction counsel is only required to provide a defendant with a reasonable level of assistance. *People v. Bass*, 2018 IL App (1st) 152650, ¶ 11, 116 N.E.3d 413; *People v. Lander*, 215 Ill. 2d 577, 583, 831 N.E.2d 596, 600 (2005). This level of assistance “is a less rigorous standard than [the] constitutional guarantee of effective assistance under *Strickland*.” *Bass*, 2018 IL App (1st) 152650, ¶ 11 (referring to *Strickland v. Washington*, 466 U.S. 668 (1984)). To assure that a defendant receives a reasonable level of assistance from postconviction counsel, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) imposes specific obligations on postconviction counsel. *People v. Dixon*, 2018 IL App (3d) 150630, ¶ 13, 100 N.E.3d 193. How-

ever, the specific obligations of Rule 651(c) apply only when a defendant *pro se* files a postconviction petition and counsel is later appointed to represent the defendant. *People v. Cotto*, 2016 IL 119006, ¶ 41, 51 N.E.3d 802.

¶ 19 “Postconviction counsel has no obligation to engage in a generalized ‘fishing expedition’ in search of support for claims raised in a postconviction petition.” *People v. Vasquez*, 356 Ill. App. 3d 420, 425, 824 N.E.2d 1071, 1076 (2005). “Absent a showing of available material for supporting affidavits, a failure to present affidavits obviously cannot be considered [to be] neglect by the attorney.” *People v. Malone*, 2017 IL App (3d) 140165, ¶ 10, 74 N.E.3d 24. Further, when an attorney files a successive postconviction petition, this court may affirm if the attorney’s actions did not prejudice the defendant. See *People v. Zareski*, 2017 IL App (1st) 150836, ¶¶ 58-59, 68, 84 N.E.3d 527.

¶ 20 “This court reviews *de novo* the denial of a defendant’s motion for leave to file a successive postconviction petition.” *Crenshaw*, 2015 IL App (4th) 131035, ¶ 38. Likewise, we review *de novo* whether postconviction counsel provided a reasonable level of assistance. *People v. Russell*, 2016 IL App (3d) 140386, ¶ 10, 52 N.E.3d 714.

¶ 21 B. This Case

¶ 22 In this case, counsel filed a second petition for postconviction relief with an attached affidavit from Matherly. In the affidavit, Matherly claimed “William Irving had brought [the revolver] to my apartment *** to show D’andre Johnson, myself, and some of our friends.” Matherly further claimed that she never gave Irving permission to leave the gun at her residence. She also stated that defendant “falsely confessed” to possessing the gun.

¶ 23 We first conclude that postconviction counsel’s performance was not unreasonable. Although defendant argues that his postconviction counsel should have attached other affi-

davits, defendant fails to suggest what specific additional information could adequately support his actual innocence claims. “Absent a showing of available material for supporting affidavits, a failure to present affidavits obviously cannot be considered [to be] neglect by the attorney.” *Malone*, 2017 IL App (3d) 140165, ¶ 10; see also *People v. Beasley*, 2017 IL App (4th) 150291, ¶ 40, 85 N.E.3d 568. Further, counsel had “no obligation to engage in a generalized ‘fishing expedition’ in search of support” for defendant’s actual innocence claims. *Vasquez*, 356 Ill. App. 3d at 425.

¶ 24 In the alternative, we conclude that defendant was not prejudiced by counsel’s performance. See *Zareski*, 2017 IL App (1st) 150836, ¶¶ 58-59. Regardless of how the petition was drafted, any testimony from Matherly could not be considered “evidence that has been discovered since the trial and could not have been discovered sooner by the defendant through due diligence.” *Jones*, 2017 IL App (1st) 123371, ¶ 43. Further, Matherly’s testimony would have been cumulative of defendant’s testimony at trial and inconsistent with what she told the officers who searched her apartment in which the gun was found—namely, that she denied any knowledge of the gun. See *id.* Finally, such testimony would not be of such a conclusive character that it probably would change the result on retrial. See *id.* Thus, no prejudice has been demonstrated.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the trial court’s dismissal of defendant’s postconviction petition. We also grant the State’s request for costs pursuant to 55 ILCS 5/4-2002 (West 2016).

¶ 27 Affirmed.