2015 IL App (5th) 130324-U

NO. 5-13-0324

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Hamilton County.
	)	
v.	)	No. 04-CF-31
	)	
BENJAMIN E. HOLLAND,	)	Honorable
	)	Paul W. Lamar,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: Appointed counsel's motion to withdraw is granted, and circuit court's dismissal of defendant's second petition for postconviction relief is affirmed, where defendant clearly failed to make a substantial showing that he was actually innocent of the crimes of which he was convicted, and no argument to the contrary would have any merit.

¶ 2 Defendant, Benjamin E. Holland, appeals from the second-stage dismissal of his second petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)). This appeal is defendant's third appeal in this case. Defendant's appointed attorney, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit. On that basis, OSAD has filed with this court a motion to

withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), along with a memorandum in support thereof. This court granted defendant the opportunity to file a *pro se* brief or memorandum objecting to OSAD's *Finley* motion and explaining why he thinks this appeal has merit, but he has not taken advantage of that opportunity. This court has examined the entire record on appeal and has considered OSAD's motion and memorandum. For the reasons stated below, this court grants OSAD's motion and affirms the judgment of the circuit court of Hamilton County.

¶ 3 BACKGROUND

¶ 4 The State charged defendant with three felony counts, *viz.*: one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)) and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2004)). In May 2005, the cause proceeded to trial by jury.

¶ 5 *The Trial: State's Case in Chief*

¶ 6 At trial, Melissa Wilson testified that she was the mother of complainants J.L. and V.L., nine-year-old twin girls born on September 19, 1995. Defendant was their biological father. He and Wilson never married. When J.L. and V.L. were four or five years old, defendant began having visitation with them, by order of a court. In January 2005, J.L. and V.L., who were nine years old at the time, informed Wilson that defendant had touched them inappropriately. Wilson took J.L. and V.L. to a doctor, who referred them to a child-abuse center, which contacted the police. Defendant did not have any further contact with the girls. Wilson denied ever encouraging J.L. or V.L. to falsely accuse defendant.

¶ 7 V.L. testified that she was nine years old. One night during the summer of 2004, she and twin sister J.L. were visiting their father, defendant, at defendant's father's house. V.L., J.L., and defendant were lying on an air mattress in a bedroom. No one else was in the room. Defendant was wearing only boxer shorts. Without saying anything, defendant briefly touched V.L.'s "private" with his hand. He touched her on top of her pajamas, not underneath them. It was the only time he ever touched her in this manner. V.L. did not say anything in response to this touching, but she moved from the air mattress to a bed in that same room. J.L. remained on the air mattress. On cross-examination by defense counsel, V.L. testified that she eventually told her mother about the incident because she thought she should tell somebody. According to V.L., she volunteered the information; her mother did not ask her whether anybody had touched her. V.L. did not know whether defendant touched J.L. similarly.

¶ 8 J.L., the twin sister of V.L., testified that one night, at the home of defendant's father, defendant removed his underwear and slipped into bed with her and V.L. Without saying anything, defendant moved his hand underneath J.L.'s underwear, placed his hand on J.L.'s "private", then inserted and "wiggled" a finger. It was not the first time defendant had engaged in such behavior with J.L. As part of this same incident, defendant took hold of one of J.L.'s hands and placed it on "his private." J.L. did not see defendant touch V.L. Eventually, J.L. informed her mother about the incident.

¶ 9 Brenda Burton, a sergeant with the Illinois State Police, interviewed defendant on August 30, 2004. At first, defendant stated that Melissa Wilson had fabricated the allegation that he molested V.L. and J.L. and had put the thought into their minds. Then,

Burton told defendant that both V.L and J.L. had been interviewed, and that V.L. reported that defendant placed his hand on V.L.'s vagina one night, and J.L. reported that defendant placed his finger in J.L.'s vagina on three occasions. Burton told defendant that each girl's statements were detailed and believable. At that point, defendant admitted to Burton that he in fact had placed his hand on V.L.'s vagina and, on three separate occasions, had inserted his finger into J.L.'s vagina. Burton asked defendant whether he ever placed J.L.'s hand on his penis, and he replied that on one occasion he awoke and found "a hand on his penis, but he did not remember putting it there." Defendant also stated that all sexual contact between him and the girls occurred during visitations between June and August of 2004, at his father's house, where defendant was staying during that time period.

¶ 10 Gwendolyn Basinger, an investigator with the Illinois State Police, and Kathy Marks, an investigator with the Department of Children and Family Services (DCFS), both testified that they were present for Burton's interview with defendant, but only as observers. Basinger and Marks both corroborated Burton's testimony concerning defendant's admissions.

¶ 11 *The Trial: Defendant's Case in Chief*

¶ 12 For the defense, Christina Allen testified that she was defendant's girlfriend of nine years. She was present for many of V.L. and J.L.'s every-other-weekend visits with defendant, and V.L. and J.L. always seemed to enjoy the visits. She was present for the visits in July 2004, and neither V.L. nor J.L. ever indicated in any way that defendant had behaved improperly toward them. The relationship between defendant and Melissa

Wilson, the mother of V.L. and J.L., was oftentimes rocky, due to Wilson's wanting more money in child support. Wilson did not want V.L. and J.L. to call defendant "dad." In late 2002, Allen observed Wilson physically attack defendant, grabbing him by the throat and pulling him out of a chair.

¶ 13 Donna Holland, the wife of defendant's uncle, Mike Holland, testified that she and Mike visited defendant every two weeks or so. Defendant and his two daughters always got along beautifully. Both daughters obviously enjoyed spending time with defendant, and neither daughter ever suggested to Donna that defendant had touched them inappropriately.

¶ 14 Victoria Scott, the live-in girlfriend of defendant's father, Gene Holland, testified that on July 30, 2004, she was at Gene's house, and she did not see V.L. or J.L. there.

¶ 15 Defendant testified that after V.L. and J.L. were born, he attempted to see them, but the girls' mother, Melissa Wilson, claimed that he was not the father and refused to allow him to see the girls. Defendant went to court and obtained visitation rights in April 2003. Defendant's last regular weekend visitation with the girls was on "[t]he weekend of July 23rd", at defendant's father's house. During the following weekend, defendant was with the girls on Saturday, July 31, 2004, from noon until 5 p.m., at Christina Allen's house; it was his last visit with them. He did not see the girls on July 30, 2004. The next weekend, he went to pick up the girls for his regular weekend visitation, but Melissa Wilson did not allow him to see them, stating that the girls' doctor or DCFS had forbade it. Wilson had refused visitation on several occasions in the past, due to disagreements about child support. At some point, she threatened to cut off visitations permanently.

Defendant denied ever touching V.L. or J.L. in an inappropriate manner. He also denied being alone with the girls at any point during any visitation in July 2004. He thought that Wilson had concocted the child-abuse allegations due to her anger about child support. During the interview with Brenda Burton, Burton told defendant that the police believed that he had molested V.L. and J.L. This statement left defendant "dumbfounded" for the remainder of the interview. He felt that Burton would not believe any statement that he was innocent. He told Burton, "You think I am guilty, so I will say whatever you want." However, he denied touching either girl's vagina when specifically asked about the matter.

¶ 16 *Verdicts and Sentences*

¶ 17 The jury found defendant guilty on all three counts. On June 8, 2005, the court held a hearing in aggravation and mitigation. The court imposed certain statutorily-required fines and sentenced defendant to imprisonment as follows: an 18-year term for predatory criminal sexual assault and a 4-year term for each of the two counts of aggravated criminal sexual abuse, with the two 4-year terms concurrent with one another but consecutive to the 18-year term.

¶ 18 *Direct Appeal*

¶ 19 Defendant appealed from the judgment of conviction. He argued that the circuit court (1) failed to admonish him adequately concerning the preservation of sentencing issues for appeal, and (2) misunderstood the sentencing range applicable to defendant. This court rejected defendant's arguments and affirmed the judgment. *People v. Holland*, No. 5-05-0396 (Jan. 17, 2007) (unpublished order under Supreme Court Rule 23).

¶ 20 *Defendant's First Postconviction Proceeding*

¶ 21 In August 2006, while his direct appeal was pending, defendant filed in the circuit court a *pro se* petition for postconviction relief accompanied by a 47-page memorandum in support thereof. He claimed that (1) trial counsel had provided constitutionally ineffective assistance by committing a wide variety of specified errors of omission and commission, and (2) direct-appeal counsel had provided constitutionally ineffective assistance by failing to argue that trial counsel had been constitutionally ineffective. One of the errors allegedly committed by trial counsel was his failure to call Debra Minder Russell and Ronald Culp as trial witnesses, even though defendant had informed counsel that these two witnesses had information showing that Melissa Wilson had fabricated the criminal allegations against him. Three affidavits–from defendant, Debra Minder Russell, and Ronald Culp–were attached to the petition.

¶ 22 Defendant, in his affidavit, which was dated August 15, 2006, stated that he, prior to trial, had informed trial counsel that Russell and Culp had information about Melissa Wilson's role in fabricating the charges against him, and had provided counsel with contact information for both Russell and Culp. Russell, in her affidavit, which was dated June 8, 2006, stated that in June 2004, she heard Melissa Wilson say that Wilson "was going to get [defendant] any way she could" and "was going to get even with him." Culp, in his affidavit, which was dated May 25, 2006, stated that on or about June 10, 2004, he heard Melissa Wilson "say that she was upset because [defendant] was not paying enough child support and she was going to take care of him once + for all." According to Culp,

"2 weeks later she came back + said she turned [defendant] in for molesting his daughters + thought it was very funny."

¶ 23 The circuit court appointed postconviction counsel for defendant. In July 2007, defendant, by counsel, filed an "amendment to *pro se* petition for postconviction relief." It added to the *pro se* petition a claim that newly discovered evidence "tend[ed] to negate [defendant's] guilt." Attached to the document were affidavits from Ronald Culp, Debra Minder Russell, Christina Lynn Allen, Carolyn Hamric, Teresa Vailes, and Virginia Minder.

¶ 24 Culp, in an affidavit dated July 20, 2007, essentially repeated the allegations he made in his affidavit of May 25, 2006, described *supra*. Russell, in an affidavit dated July 23, 2007, essentially repeated the allegations she made in her affidavit of June 8, 2006, described *supra*. Allen, in an affidavit dated July 19, 2007, stated that prior to defendant's trial, she told defendant's attorney that on July 30, 2004, she and defendant spent the entire day in St. Louis, Missouri, and defendant did not see either of his daughters that day, but when Allen testified at defendant's trial, defendant's attorney never asked her about this alibi. Both Hamric and Vailes, in separate affidavits dated July 16, 2007, stated that in August, September or October of 2002, they heard Melissa Wilson say that her two daughters had been molested by a man she met through the internet but Wilson was going to "blame defendant for it" and coach her daughters to blame defendant. Virginia Minder, in an affidavit dated July 19, 2007, stated that she worked diligently to locate witnesses for defendant prior to his trial but nevertheless did

not discover until after the trial that Carolyn Hamric and Teresa Vailes had information beneficial to defendant.

¶ 25 In August 2007, the State filed an answer to defendant's postconviction petition, denying all claims of constitutional violations.

¶ 26 In October 2007, the court held an evidentiary hearing. No witnesses were called, but the parties argued their respective positions. In January 2008, in a written order, the court concluded that defendant had failed to establish any of his constitutional claims, and denied the postconviction petition. Amongst other specific findings, the court found that trial counsel had not been ineffective for not calling Russell and Culp as witnesses, and that the "new evidence" contained in Hamric's and Vailes's affidavits would not change the result on retrial.

¶ 27 *Appeal from the Denial of the First Postconviction Petition*

¶ 28 Defendant perfected an appeal from the denial order. On appeal, defendant was represented by private counsel. Defendant argued that (1) trial counsel was ineffective for failing to call Ronald Culp and Debra Russell as witnesses, and (2) the newly discovered evidence of Carolyn Hamric's and Teresa Vailes's testimonies would probably change the result on retrial, for it served to exonerate defendant and to attack Melissa Wilson's credibility. This court disagreed with defendant's arguments, and affirmed the denial of his postconviction petition. This court concluded that affiants Culp, Russell, Hamric and Vailes had offered nothing but hearsay that was inadmissible for any purpose; trial cousel could not be ineffective for not offering inadmissible hearsay, and inadmissible hearsay could not possibly qualify as evidence of such a conclusive

character that it would probably change the result on retrial. *People v. Holland*, No. 5-08-0029 (June 15, 2009) (unpublished order under Supreme Court Rule 23).

¶ 29 *Defendant's Second Postconviction Proceeding*

¶ 30 In July 2010, defendant filed a second *pro se* postconviction petition. Defendant claimed that (1) he was actually innocent of the charges of which he was convicted; (2) trial counsel provided constitutionally ineffective assistance; (3) the State failed to prove his guilt beyond a reasonable doubt; and (4) the State relied on trial evidence that it should have known was fabricated. Attached to defendant's petition were affidavits from Kimberly Lynn Stover, James M. Shelton, Jr., and James Richard Goodwin, Jr.

¶ 31 Stover, in her affidavit dated June 9, 2010, stated that "in the early summer of 2005," shortly after defendant had been sent to prison, Stover overheard Melissa Wilson tell "some other woman" that she was glad defendant was in prison even though Wilson's boyfriend was the one who actually had molested Wilson's daughters. Shortly after overhearing Wilson's statement, Stover attempted to contact defendant's trial attorney, but he never got back to her. Stover never told anyone, other than her husband, about Wilson's statement until approximately three weeks before signing her affidavit, when she telephoned defendant's mother, Virginia Minder. Shelton, in his affidavit dated March 5, 2010, stated that one day in the summer of 2004, he heard Melissa Wilson say that she was going to get child support from defendant "even if she had to say that [defendant] had sexually touched [her daughters.]" Shelton also stated that in September 2009, he asked V.L. whether defendant ever had "touched" her or her sister, and V.L. answered in the negative and explained that she accused defendant because her mother

had coerced her into doing so. According to Shelton, his fear that Wilson would falsely accuse him of touching her daughters had prevented him, until "recently," from informing anyone about Wilson's and V.L.'s statements. Goodwin, in his affidavit dated July 26, 2010, stated that in 2005 or 2006, Melissa Wilson told him that she had fabricated the molestation accusations against defendant and had coached her daughters to falsely accuse defendant. According to Goodwin, he was an inmate at Shawnee Correctional Center and met defendant while incarcerated there.

¶ 32 In August 2010, in a written order, the court "denied" the second postconviction petition. The court found that defendant failed to show cause or prejudice and also failed to show any due-process violation at his trial. Referencing this court's decision in No. 5-08-0029, the circuit court indicated that the affidavits of Stover, Shelton and Goodwin were inadmissible hearsay.

¶ 33 In September 2010, the defendant, by counsel, filed a motion to reconsider the "denial" of the second postconviction petition. He averred that in the second postconviction petition, he had presented, albeit inartfully, a claim of actual innocence, and therefore he did not need to establish cause and prejudice in order to file the petition. In October 2010, the court granted defendant's motion to reconsider, vacated its previous "denial" order, and granted defendant time to file an amended petition.

¶ 34 In November 2010, defendant filed, by counsel, an "amended petition for post-conviction relief (second)." This pleading explicitly claimed that defendant was actually innocent, and newly discovered evidence "tend[ed] to negate [defendant's] guilt." According to defendant, the contents of the Stover, Shelton, and Goodwin affidavits, if

available at the time of defendant's trial, "could arguably have made a difference in the outcome of the trial." The likelihood of a different trial outcome was "even greater," defendant continued, when the Stover, Shelton, and Goodwin affidavits were considered along with the affidavits defendant had attached to his first postconviction petition. In addition, defendant claimed that his attorney in the appeal from the denial of his first postconviction petition (No. 5-08-0029, discussed *supra*) had been "ineffective" for failing to argue to the appellate court that the newly discovered evidence at issue in that appeal was in fact admissible at defendant's trial–admissible for the purpose of impeaching the testimony of Melissa Wilson. Attached to the amended petition were copies of the Stover, Shelton, and Goodwin affidavits that had been attached to the *pro se* postconviction petition filed in July 2010, and copies of the Culp, Russell, Allen, Hamric, Vailes, and Minder affidavits that had been attached to the "amendment to *pro se* petition for postconviction relief" filed in July 2007.

¶ 35 Also in November 2010, defendant's counsel filed a certificate indicating his fulfillment of the duties imposed by Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

¶ 36 In September 2011, the State filed a "motion to dismiss" defendant's second postconviction petition. The State asserted, *inter alia*, that defendant's actual-innocence claim was inadequate since the alleged newly discovered evidence did nothing more than impeach witnesses, and evidence that does nothing more than impeach witnesses is generally not of such conclusive character as to probably change the result on retrial.

¶ 37 In October 2011, defendant filed with the circuit court another affidavit in support of his "amended petition for post-conviction relief (second)." In this affidavit, dated June

14, 2011, Michial Thomas stated that one day during the summer of 2008, Melissa Wilson told him that she had told her twin daughters "to testify that there was a scar on [defendant's] privates" so as to increase the likelihood that their accusations against defendant would be believed. According to Thomas, Wilson also stated that defendant's conviction cleared the way for her to obtain full custody of the daughters.

¶ 38 In April 2012, the circuit court held a hearing on the State's motion to dismiss. The State stood on its motion. Defendant argued, *inter alia*, that there was a reasonable probability that the verdict would have been different if defendant's affiants had testified at trial that they heard Melissa Wilson and V.L. admit that the charges against defendant were false. The court took the matter under advisement. More than a year passed before the circuit court entered an order.

¶ 39 On June 5, 2013, in a written order, the court "denied" defendant's second petition for postconviction relief. The court began its order by stating that because defendant's petition included an actual-innocence claim, he was "not required to meet the cause and effect standard." (Presumably, the circuit court intended to state that defendant was relieved of any obligation to meet the cause-and-prejudice test before being allowed to file a second postconviction petition. See 725 ILCS 5/122-1(f) (West 2010).) In regard to the newly discovered evidence–*i.e.*, the various affidavits describing out-of-court statements allegedly made by Melissa Wilson and V.L.–the circuit court stated that it "would not be substantive evidence, but merely impeachment." In regard to defendant's claim that the attorney who represented him in the appeal from the denial of his first postconviciton petition was "ineffective" for failing to explain to the appellate court that

the hearsay evidence was admissible at defendant's trial for the purpose of impeaching Melissa Wilson, the circuit court asserted that defendant had not made a substantial showing of a constitutional violation.

¶ 40 From the order "denying" his amended second petition for postconviction relief, defendant now appeals.

¶ 41 ANALYSIS

¶ 42 In its final order in this cause, the circuit court stated that defendant's amended petition for postconviction relief, filed in November 2010, was "denied." Actually, the amended petition was dismissed, on the State's motion. On appeal, the dismissal of a postconviction petition without an evidentiary hearing presents a legal question that is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 378 (1998).

¶ 43 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a three-step process for any defendant who claims that he suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that resulted in his conviction. 725 ILCS 5/122-1(a) (West 2012); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). A postconviction proceeding is a collateral proceeding that allows inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56 (2002). A defendant initiates a postconviction proceeding by filing a petition with the circuit court. 725 ILCS 5/122-1(b) (West 2012). He bears the burden of establishing the claimed constitutional deprivation. *People v. Harper*, 2013 IL App (1st) 102181, ¶ 33.

¶ 44 At the first stage of postconviction proceedings, the circuit court independently examines the petition and takes as true the petition's factual allegations, and if the court finds that the petition's claims are frivolous or patently without merit, it must summarily dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the court finds that the claims are not frivolous or patently without merit, the proceedings advance to the second stage, where the court appoints counsel for an indigent defendant. 725 ILCS 5/122-4 (West 2014). Postconviction counsel may file an amended petition on the defendant's behalf. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The State may then file a motion to dismiss, or an answer to, the petition. 725 ILCS 5/122-5 (West 2012). If the State files a motion to dismiss the petition, the court may hold a hearing on the motion, and this hearing is part of the second stage. *Harper*, 2013 IL App (1st) 102181, ¶ 33. The circuit court must take as true all of the petition's well-pleaded facts, and must determine whether the petition and any accompanying documentation make a "substantial showing" of a constitutional violation. *Coleman*, 183 Ill. 2d at 380-82. If a substantial showing is not made, the court must dismiss the petition; if a substantial showing is made, the proceedings advance to the third stage and an evidentiary hearing. *Coleman*, 183 Ill. 2d at 381-82.

¶ 45 In general, a defendant will be limited to filing only one postconviction petition in any one criminal case. *Pitsonbarger*, 205 Ill. 2d at 456. As the Act explicitly states: "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2012). An exception to this general rule concerns claims of actual innocence. A defendant is allowed to file a second

or successive postconviction petition when he sets forth a claim that he is actually innocent of the crime(s) of which he stands convicted. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). The conviction of an innocent person violates the due process clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 2). *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Therefore, a person may assert in a postconviction proceeding a freestanding claim of actual innocence based on newly discovered evidence. *Id.* "Substantively, the evidence 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.' " *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009) (quoting *Morgan*, 212 Ill. 2d at 154). The last of these elements–*i.e.*, that the evidence is of such conclusive character that it would probably change the result on retrial–is the most important element of an actual-innocence claim. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). "[T]he hallmark of actual innocence means total vindication, or exoneration." (Internal quotation marks omitted.) *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008).

¶ 46 This case, which involves a postconviction claim of actual innocence, can be decided on the basis of the conclusive-character element of actual-innocence claims. In his amended petition, and in his argument at the hearing on the State's motion to dismiss the petition, defendant maintained that evidence of out-of-court statements allegedly made by Melissa Wilson and V.L.–statements indicating that the accusations against defendant were fabrications–would probably change the result on retrial because this evidence would impeach the damning testimonies of Wilson and V.L. However, courts long have recognized that mere impeachment evidence will typically not be of such

conclusive character as to justify postconviction relief. See, *e.g.*, *Harper*, 2013 IL App (1st) 102181, ¶ 49; *Collier*, 387 Ill. App. 3d at 637. (Indeed, new evidence that merely discredits, contradicts, or impeaches a prosecution witness is not even a sufficient basis for granting a defendant's posttrial motion for a new trial. *People v. Smith*, 177 Ill. 2d 53, 82-83 (1997); *People v. Chew*, 160 Ill. App. 3d 1082, 1086 (1987).) The case at bar is certainly not atypical. The impeachment evidence is not of such conclusive character as to justify postconviction relief here. The circuit court was correct in finding that defendant failed to make a substantial showing of actual innocence.

¶ 47 In his petition, defendant also claimed that his attorney in the appeal from the denial of his first postconviction petition–No. 5-08-0029, discussed *supra*–had been "ineffective" for failing to argue to the appellate court that the newly discovered evidence at issue in that appeal was in fact admissible at defendant's trial for the purpose of impeaching the testimony of Melissa Wilson. As previously noted, only claims of a constitutional magnitude may be raised in a postconviction petition. 725 ILCS 5/122-1(a) (West 2012). The right to postconviction counsel is not a constitutional right; it is a purely staturory right. Therefore, in postconviction matters a defendant is guaranteed only a reasonable level of assistance, rather than effective assistance. *People v. Owens*, 139 Ill. 2d 351, 364-65 (1990). Due to the nonconstitutional nature of this claim concerning counsel's performance in No. 5-08-0029, the claim could not properly be raised in a postconviction petition. Even if the claim could be raised in a postconviction petition, it would necessarily fail. Contrary to defendant's claim, counsel did argue in that earlier appeal that the newly discovered evidence–*i.e.*, the statements by affiants

Carolyn Hamric and Teresa Vailes–was admissible at defendant's trial for the purpose of impeaching the testimony of Wilson. Counsel did not use the words "impeach" or "impeachment", but he certainly argued that the new evidence placed Wilson's "credibility *** under substantial attack", which amounts to saying that it impeached her testimony. Furthermore, as explained in the immediately preceding paragraph, evidence that merely impeaches a State witness is not evidence of such conclusive character as to justify postconviction relief or a new trial. The circuit court correctly found that defendant had not made a substantial showing of a constitutional violation in relation to his attorney in that earlier appeal.

¶ 48 For the foregoing reasons, this court grants OSAD's motion to withdraw as defendant's counsel in this appeal, and affirms the judgment of the circuit court.

¶ 49 Motion to withdraw granted; judgment affirmed.