

NOTICE
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2019 IL App (5th) 180510-U

NO. 5-18-0510

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Franklin County.
)	
v.)	No. 16-CM-313
)	
KELLY R. SKILLMAN,)	Honorable
)	Thomas J. Tedeschi,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court. Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s second-stage dismissal of the defendant’s petition for postconviction relief is affirmed where she abandoned her claim of actual innocence and her allegation that plea counsel labored under a *per se* conflict of interest was waived, time-barred, and insufficiently demonstrated.

¶ 2 On July 1, 2016, the defendant, Kelly R. Skillman, was arrested on a warrant that was issued upon the State’s filing of an information charging her with two counts of domestic battery (720 ILCS 5/12-3.2(a)(1), (2) (West 2016)) in Franklin County case number 16-CM-313. Both counts alleged that K.H. was a member of the defendant’s family and that on June 30, 2016, the defendant had “pushed K.H. down to the ground.”

Count I charged that the defendant's conduct "caused bodily harm to K.H.," and count II charged that the conduct constituted "contact of an insulting or provoking nature."

¶ 4 On July 5, 2016, the defendant appeared for a first advisement hearing, and Assistant Public Defender Jason Drew was appointed to represent her. On July 6, 2016, the defendant posted bond and was ordered to have no contact with her minor children, K.H., C.M., or L.S. The trial court later granted the defendant supervised contact with the minors at the discretion of the Department of Children and Family Services.

¶ 5 On August 4, 2016, Drew appeared with the defendant, and she entered a plea of not guilty to the State's domestic battery charges. On October 13, 2016, the defendant and Drew appeared at a pretrial conference, and a second pretrial conference was set for January 5, 2017.

¶ 6 On January 5, 2017, the defendant and Drew appeared, and the parties announced that they had reached a negotiated plea agreement. Pursuant thereto, the defendant pled guilty to the lesser-included offense of simple battery on count I (720 ILCS 5/12-3(a)(1) (West 2016)); the State dismissed count II; and the defendant was sentenced to an 18-month term of probation. The record indicates that the guilty plea proceedings were neither recorded nor transcribed. See *People v. Spooner-Tye*, 349 Ill. App. 3d 100, 106 (2004) (noting that where a defendant pleads guilty to misdemeanor charges, "there [is] no requirement that a transcript be prepared under Rule 402(e)"). We presume, however, that the defendant was fully admonished pursuant to Illinois Supreme Court Rules 402(a) (eff. July 1, 2012) and 605(c) (eff. Oct. 1, 2001) and that the trial court determined that there was a factual basis for the plea as required by Rule 402(c). See *People v. Howery*,

178 Ill. 2d 1, 32 (1997) (“[T]he trial court is presumed to know the law and apply it properly.”). Following the entry of her guilty plea, the defendant did not subsequently file a motion to withdraw the plea and did not pursue a direct appeal from her conviction.

¶ 7 On October 6, 2017, the defendant, through private counsel, filed a verified petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) and a supporting affidavit. The petition raised a freestanding claim of actual innocence and further alleged that Drew had labored under a *per se* conflict of interest while representing her in the present case.

¶ 8 In support of her conflict of interest claim, the defendant specifically alleged the following. Drew had previously represented Frankie Martin, the father of two of the defendant’s children, during contentious custody disputes in Franklin County case numbers 08-F-117 and 14-OP-265. Drew made false statements about the defendant while doing so. The defendant did not trust Drew and did not know why he had been appointed to represent her in 16-CM-313. “[T]here were at least four judges of the Second Judicial Circuit that had actual knowledge that [Drew] had a conflict of interest in that he was Frankie Martin’s attorney.” The defendant and Martin were currently involved in a custody dispute in Franklin County case number 2016-JA-32. As an assistant public defender, Drew had been appointed to represent the defendant in 2016-JA-32. On August 15, 2016, however, the Honorable Mark R. Stanley allowed Drew to withdraw from the case due to a *per se* conflict of interest. The defendant alleged that Drew had a similar conflict of interest in 16-CM-313, because “Martin would benefit in *** 2016-JA-32 from an unfavorable verdict against [the defendant] in *** 16-CM-313.”

¶ 9 In support of her claim of actual innocence, the defendant did not deny that she had pushed K.H. to the ground, as alleged in the State’s information. She maintained, however, that she had not caused any harm to K.H. and that there was no factual basis for the charge alleging that she had. The defendant alleged that at an August 7, 2017, hearing in 2016-JA-32, CASA representative Leslie Cox testified that the defendant was “innocent” and “did not cause any harm to K.H.” The defendant further alleged that in a document filed September 27, 2017, in 2016-JA-32, CARITAS Family Solutions had also admitted that she was innocent. The document stated that K.H. “ ‘did not endure any injuries.’ ”

¶ 10 On December 21, 2017, after finding that the defendant’s postconviction petition was not frivolous or patently without merit, the trial court docketed it for second-stage proceedings and gave the State 30 days to respond. On December 28, 2017, the State filed a motion to dismiss the defendant’s petition for postconviction relief. Noting that the petition was filed five months after the expiration of the four-month filing period applicable to petitions challenging judgments entered on misdemeanor guilty pleas, the State argued, *inter alia*, that the petition should be dismissed on the grounds that it was untimely filed. Arguing waiver, the State further noted that the defendant had never filed a motion to withdraw her guilty plea and had not otherwise sought to “avail herself of the appeal process following her plea.”

¶ 11 With respect to the defendant’s claim of actual innocence, the State argued that the claim was not based on new information that would not have been known when the defendant entered her plea. The State also noted that the defendant had not provided an

affidavit from Cox regarding “how or why [Cox] believed that the child did not endure any injury or whether [Cox] had any contact with the child in June of 2016 when the battery is alleged to have occurred.”

¶ 12 On January 19, 2018, the defendant filed a response to the State’s motion to dismiss her petition for postconviction relief. The defendant maintained, *inter alia*, that the State’s timeliness argument was irrelevant because neither of her claims were subject to any time restrictions. The defendant also noted that Cox had not testified in 2016-JA-32 until August 2017 and that the CARITAS document had not been filed until September 2017.

¶ 13 We note that in her response to the State’s motion to dismiss, the defendant specifically stated that she was raising “two claims” in her postconviction petition: actual innocence and conflict of interest. In a memorandum of law filed May 4, 2018, however, the defendant seemingly attempted to add a third claim by suggesting that her guilty plea had been involuntarily entered due to the State’s failure to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The defendant’s memorandum did not request leave to file an amended petition and did not identify what exculpatory evidence the State had allegedly failed to disclose.

¶ 14 On May 4, 2018, the trial court held a hearing on the State’s motion to dismiss the defendant’s postconviction petition. According to a bystander’s report that the defendant subsequently filed (see Ill. S. Ct. R. 323(c) (eff. July 1, 2017)), the defendant again clarified that her petition raised two claims: “actual innocence and *per se* conflict of interest of the court appointed attorney.” The defendant advised that the latter claim was

based on the fact that Drew had withdrawn from 2016-JA-32 due to a *per se* conflict and that the former claim was based on Cox's testimony and the CARITAS document. The defendant asserted that her claim of actual innocence was further supported by the fact that there was no physical evidence supporting her battery conviction, "no injury, no bruise, not even a red mark." Indicating that Cox's testimony and the CARITAS document were both based on statements from K.H., C.M., and L.S. and alleging that the State had never produced any statements from the minors, the defendant referenced the memorandum of law she filed on the day of the hearing and again suggested that her guilty plea had been involuntarily entered due to the State's failure to disclose exculpatory evidence.

¶ 15 The bystander's report of the hearing indicates that the State argued that the defendant's conflict of interest claim was untimely raised and that her claim of actual innocence was without merit. The State noted that neither CASA nor CARITAS had been present during the commission of the charged battery. The bystander's report does not indicate if or how the State responded to the defendant's suggestion that it had failed to disclose exculpatory evidence.

¶ 16 On September 24, 2018, the trial court entered a written order granting the State's motion to dismiss the defendant's petition for postconviction relief. With respect to the defendant's allegation that appointed counsel had labored under a conflict of interest, the court observed that the defendant had twice appeared with Drew after he had withdrawn from 2016-JA-32 and that neither she nor Drew had ever mentioned a possible conflict. The court further observed that the defendant had not subsequently moved to withdraw

her guilty plea. The court ultimately concluded that, because the defendant filed her postconviction petition more than nine months after entering her plea, her conflict claim was time-barred by the applicable four-month limitation period. The court further concluded that the defendant had failed to establish grounds warranting the relaxation of the limitation period. The trial court's order did not specifically address the defendant's claim of actual innocence or her suggestion that her guilty plea had been involuntarily entered due to the State's failure to disclose exculpatory evidence. On October 22, 2018, the defendant filed a timely notice of appeal.

¶ 17

DISCUSSION

¶ 18 On appeal, the defendant argues that the trial court erred in dismissing her claim that Drew labored under a *per se* conflict of interest while representing her in the present case. She suggests that the alleged conflict warranted the reversal of her conviction and that the trial court should have excused her failure to file her postconviction petition within the applicable time limit. The defendant does not challenge the trial court's dismissal of her claim of actual innocence. For the reasons that follow, we affirm the trial court's judgment.

¶ 19 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2016). The Act provides a three-stage process for the adjudication of a postconviction petition. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage, the trial court independently assesses the defendant's

petition, and if the court determines that the petition is “frivolous” or “patently without merit,” the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2016); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If a petition is not summarily dismissed at the first stage, it advances to the second stage, where the State can move to dismiss it. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2016). At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation (*Edwards*, 197 Ill. 2d at 245), and “all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true” (*People v. Pendleton*, 223 Ill. 2d 458, 473 (2006)). If the defendant makes a substantial showing of a constitutional violation at the second stage, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 245.

¶ 20 At the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. To make such a showing, “the allegations in the petition must be supported by the record in the case or by its accompanying affidavits.” *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). The failure to provide supporting affidavits or to otherwise explain their absence will alone justify the dismissal of a defendant’s postconviction claim. *People v. Delton*, 227 Ill. 2d 247, 255 (2008); *People v. Johnson*, 154 Ill. 2d 227, 240 (1993). Additionally, issues that could have been raised in a motion to withdraw guilty plea or on direct appeal are deemed waived (*People v. Hampton*, 165 Ill. 2d 472, 478 (1995)), and “[n]onfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act” (*Coleman*, 183 Ill. 2d at 381). The second-stage dismissal of a

postconviction petition is reviewed *de novo* (*People v. Sanders*, 2016 IL 118123, ¶ 31) and may be affirmed on any basis (*People v. Shanklin*, 304 Ill. App. 3d 1056, 1059-60 (1999)).

¶ 21 A postconviction petition challenging a misdemeanor conviction resulting from a guilty plea must be filed within four months after the rendition of the final judgment. *People v. Warr*, 54 Ill. 2d 487, 493 (1973). If not, the petition is subject to dismissal on the grounds that it was untimely filed. See *People v. Bocclair*, 202 Ill. 2d 89, 101-02 (2002); *Shanklin*, 304 Ill. App. 3d at 1058-59. To avoid such a dismissal, a defendant must allege facts showing that the petition’s delayed filing was not due to her culpable negligence. 725 ILCS 5/122-1(c) (West 2016). “[W]hether delay is due to culpable negligence depends not only on when the claim is discovered but on how promptly the defendant takes action after the discovery.” *People v. Davis*, 351 Ill. App. 3d 215, 218 (2004). Notably, the Act’s time limitations do not apply to claims of actual innocence. 725 ILCS 5/122-1(c) (West 2016); *People v. Bailey*, 2017 IL 121450, ¶ 17.

¶ 22 “Substantively, in order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial.” *People v. Coleman*, 2013 IL 113307, ¶ 96. “New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence,” and “[m]aterial means the evidence is relevant and probative of the petitioner’s innocence.” *Id.* “We note that the conclusiveness of the new evidence is the most important element of an actual innocence claim.” *Sanders*, 2016 IL 118123, ¶ 47.

¶ 23 As previously indicated, the defendant does not challenge the trial court's dismissal of her actual innocence claim. The defendant has thus abandoned the claim, and we need not address it. See *People v. Shaw*, 2019 IL App (1st) 152994, ¶ 25. We note, however, that the defendant's failure to provide affidavits from Cox and CARITAS in and of itself justified the claim's dismissal. We further note that the defendant's suggestion that her innocence was supported by the fact that there was no physical evidence corroborating her conviction was without merit. The infliction of "some sort of physical pain" will sustain a conviction for battery based on bodily harm (*People v. Mays*, 91 Ill. 2d 251, 256 (1982)), and direct evidence of a physical injury is not required (see *People v. Gaither*, 221 Ill. App. 3d 629, 634 (1991); *People v. Foster*, 103 Ill. App. 3d 372, 377 (1982)).

¶ 24 With respect to the defendant's conflict of interest claim, the defendant suggests that the trial court should have excused its late filing because she alleged that her guilty plea had been involuntarily entered, "because the State possessed evidence that would have exonerated her." The defendant thus suggests that the *Brady* claim she purportedly raised in her memorandum of law justified the late filing of her petition's conflict claim. Citing *People v. Cangelosi*, 68 Ill. App. 3d 489 (1979), the defendant's implied premise is that she could not have raised either claim before she was aware of Cox's testimony and the CARITAS document. See *id.* at 495 (relaxing the applicable four-month time limitation where the facts giving rise to the defendant's claim were unknown for several months after the entry of his plea). The defendant's conflict claim, however, was in no way dependent on her unrelated *Brady* allegation. Moreover, according to the bystander's

report, the defendant acknowledged that her conflict claim was based on Drew's withdrawal from 2016-JA-32, which occurred nearly five months prior to the entry of her guilty plea. As the trial court indicated, the defendant could have therefore raised her conflict claim in a motion to withdraw her guilty plea, on direct appeal, or in a timely-filed petition for postconviction relief. The trial court's dismissal of the defendant's conflict claim is thus affirmable on the grounds of timeliness and waiver.

¶ 25 Additionally, “[t]he Act permits the filing of only one petition without leave of court, and it expressly provides that any claim not raised in the original or amended petition is waived.” *People v. Evans*, 2013 IL 113471, ¶ 10 (citations omitted); see also 725 ILCS 5/122-3 (West 2016). Here, as noted, during the proceedings below, the defendant twice clarified that she was raising “two claims” in her postconviction petition: actual innocence and conflict of interest. The defendant's *Brady* claim, on the other hand, which ultimately amounted to an unsupported conclusion, was alleged in the memorandum that she filed the day of the hearing on the State's motion to dismiss. Under the circumstances, even assuming *arguendo* that the defendant's *Brady* claim might have provided justification for the late filing of her conflict claim, her *Brady* claim was not properly before the court, and the court was not required to consider it. See *People v. Vilces*, 321 Ill. App. 3d 937, 939 (2001).

¶ 26 The State correctly observes that on appeal, the defendant “suggests, without actually saying, that the State committed a *Brady* violation.” To the extent that the defendant presently raises this undeveloped claim, however, it is not properly before this court, either. See *People v. Young*, 2018 IL 122598, ¶ 28; *People v. Jones*, 213 Ill. 2d

498, 507 (2004). Because we do not possess the supervisory authority possessed by our supreme court, we are precluded from addressing any claim that was not raised in the defendant's petition. *Id.* In any event, as indicated, we reject the defendant's intimation that the untimely filing of her petition's conflict claim should have been excused in light of her last-minute *Brady* allegation.

¶ 27 Lastly, the bars of timeliness and waiver aside, a review of the merits of the defendant's conflict claim further leads us to the conclusion that it was properly dismissed. "A criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation." *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). "Unless a defendant waives his right to conflict-free counsel, a *per se* conflict is grounds for automatic reversal." *Id.* at 143. "When a defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a *per se* conflict arises." *Id.* at 142; see also *People v. Claybourn*, 221 Ill. App. 3d 1071, 1080 (1991) (noting that a *per se* conflict exists "where defense counsel has professional commitments to others clearly antagonistic to the interests of the accused").

¶ 28 The defendant maintains that a *per se* conflict of interest existed in the present case because Drew represented Martin in prior custody disputes against the defendant; Martin stood to benefit in 2016-JA-32 by the defendant's battery conviction; and Drew was allowed to withdraw from 2016-JA-32 due to a *per se* conflict. The defendant has never specifically claimed, however, that Drew had a tie or commitment to Martin that existed when Drew was appointed to represent her in July 2016 or when she pled guilty in January 2017. Moreover, as alleged in the defendant's petition, Drew was representing

her *against* Martin when Drew withdrew from 2016-JA-32 in August 2016. Thus, the conflict that prompted Drew’s withdrawal ostensibly stemmed from the long-recognized rule that forbids an attorney from appearing “against a former client where the attorney can use, to the detriment of said client, the information and confidences acquired during the existence of their former relation.” *Skillman v. McDowell*, 317 Ill. App. 85, 89 (1942); see also Ill. R. Prof.’l Conduct R. 1.9(a) (eff. Jan. 1, 2010) (“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent.”). We note that the defendant provides no additional information as to circumstances surrounding Drew’s withdrawal, and it is well established that “ ‘[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant.’ ” *People v. Carter*, 2015 IL 117709, ¶ 19 (quoting *Foutch v. O’Bryant*, 99 Ill. 2d 389, 392 (1984)). In any event, waiver and timeliness considerations aside, we conclude that the defendant has failed to make a substantial showing that Drew represented her while acting under a *per se* conflict of interest. We accordingly affirm the trial court’s judgment and deny the defendant’s request that we remand the cause for further proceedings.

¶ 29

CONCLUSION

¶ 30 For the foregoing reasons, the trial court’s second-stage dismissal of the defendant’s petition for postconviction relief is hereby affirmed.

¶ 31 Affirmed.