



*Childrous*, 196 Ill. App. 3d 38, 552 N.E.2d 1252 (1990).

¶ 5 In June 1992, defendant filed a petition for writ of *mandamus*. Counsel was appointed, and in March 1993, an amended petition for postconviction relief was filed. Shortly thereafter, the trial court dismissed this petition because it was not timely filed. Defendant appealed but in March 1994, this court allowed defendant's *pro se* motion to dismiss his appeal. *People v. Childrous*, No. 4-93-0299 (Mar. 7, 1994) (dismissed on defendant's motion).

¶ 6 In May 1994, defendant filed a writ of *habeas corpus*. In October 1994, the trial court dismissed this petition.

¶ 7 In June 1994, defendant *pro se* filed a motion for release of record seeking transcripts of the sentencing hearings of several witnesses who testified against him. Defendant contended these transcripts would show consideration was given to the witnesses for their testimony. The record does not show any further action regarding this motion.

¶ 8 In April 1998, defendant filed his second postconviction petition. In this petition, defendant alleged Jeff Kimble must have been given consideration for his testimony because he was sentenced to four years in prison in 1988 but was seen on the streets by defendant's mother two weeks after he testified against defendant. In May 1998, the trial court dismissed this petition as frivolous. In April 1999, this court affirmed the trial court's dismissal of defendant's second postconviction petition because it was untimely filed. *People v. Childrous*, No. 4-98-0405 (Apr. 13, 1999) (unpublished order under Supreme Court Rule 23).

¶ 9 In January 2001, defendant filed his third postconviction petition, alleging an *Apprendi* violation, which the trial court dismissed in February 2001. See *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). In June 2003, this court affirmed the trial court's

dismissal of defendant's third postconviction petition. *People v. Childrous*, No. 4-01-0766 (June 11, 2003) (unpublished summary order under Supreme Court Rule 23).

¶ 10 In July 2003, defendant *pro se* filed a motion for discovery, a motion to file an untimely postconviction petition, and a fourth postconviction petition. In the motion for discovery, defendant asked for the records, results, and outcomes of all criminal charges pending against witnesses at the time they testified against him, including Rodney White, Titus White, Scott Sheppard, Willy B. Fisher, and Armin Bedemeyer. Defendant contended Cammona Gailes, another witness who testified against him, received consideration for her testimony and defendant believed the other witnesses were also given consideration. In the fourth postconviction petition, defendant (1) alleged two witnesses, Jeff Kimble and Cammona Gailes, committed perjury; (2) alleged trial counsel was ineffective; and (3) included a claim of actual innocence supported by the affidavit of Alvin Alexander. In December 2005, at defendant's request, the attorney appointed to represent him was relieved and new counsel appointed. In August 2009, defendant filed a motion to proceed *pro se*, which the trial court granted in September 2009. In December 2010, defendant was given 45 days to file an amended postconviction petition, which he did. Defendant's amended postconviction petition included 19 claims. On the State's motion, the trial court dismissed defendant's amended petition.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant argues the trial court erred in dismissing his fourth postconviction petition at the second stage because he made a substantial showing of (1) actual innocence based on newly discovered evidence supported by the affidavits of Alexander and Michael Williams

and (2) newly discovered perjury and *Brady* violations based on the State's failure to (a) disclose deals it made for the testimony of some of its witnesses, (b) correct the false denial of these deals by the witnesses, and (c) disclose the possible drug addiction of two of its witnesses.

¶ 14 A. Legal Principles

¶ 15 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). A postconviction proceeding is a "collateral attack on a prior conviction and sentence, and the scope of such a proceeding is generally limited to constitutional matters that have not been, or could not have been, previously adjudicated." *People v. Cummings*, 375 Ill. App. 3d 513, 518, 873 N.E.2d 996, 1001 (2007). Any issues that could have been raised on direct appeal are procedurally defaulted and any issues raised on direct appeal are barred by the doctrine of *res judicata*. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010).

¶ 16 In cases not involving the death penalty, the Postconviction Act establishes a three-stage process for adjudicating a postconviction petition. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007. "The relevant question raised during a second-stage postconviction hearing is whether the allegations in the petition, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which mandates a stage-three evidentiary hearing." *People v. Goodwin*, 2012 IL App (4th) 100513, ¶ 32, 976 N.E.2d 17 (citing *People v. Cheers*, 389 Ill. App. 3d 1016, 1024, 907 N.E.2d 37, 44 (2009)). Dismissal of a postconviction petition at the second stage is warranted when the allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitu-

tional violation. *People v. Coleman*, 183 Ill. 2d 366, 382, 701 N.E.2d 1063, 1072 (1998). We review a trial court's dismissal of a postconviction petition at the second stage *de novo*. *Id.* at 388-89, 701 N.E.2d at 1075. "[T]his court may affirm the trial court's judgment on any basis supported by the record." *People v. Little*, 335 Ill. App. 3d 1046, 1051, 782 N.E.2d 957, 962 (2003).

¶ 17 B. Actual Innocence Claim

¶ 18 In his amended *pro se* postconviction petition at issue here, defendant raised a claim of actual innocence, contending Cammona Gales or Rodney White, or both, are responsible for the murder of Beth Akers and he is innocent of the crime.

¶ 19 The due process clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 2) affords postconviction petitioners the right to assert, at any time, a claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 330-33, 919 N.E.2d 941, 948-50 (2009). To make a substantial showing of actual innocence sufficient to warrant an evidentiary hearing, a defendant must present newly discovered evidence that (1) could not have been discovered sooner through due diligence, (2) is material and not merely cumulative, and (3) is of such a conclusive character it would probably change the outcome of the trial. *Id.* at 333, 919 N.E.2d at 949-50.

¶ 20 In this case, defendant attached the affidavits of Alvin Alexander and Michael Williams to his postconviction petition in support of his actual innocence claim. Alexander's April 2002 affidavit avers on or about April 25, 1988, a prostitute by the name of "Mopey" (Cammona Gales) approached him and told Alexander, "she hit a nice lick a few weeks ago on N. 7th, St. That her and Rod [White] had beat this white bitch for \$170.00 and a half a pound of

[w]eed." Gailes also told Alexander she took care of it and had the police thinking someone else was responsible. Further, she stated she "was trying to pop off this white dude Todd who her brother bought his weed from, but while waiting her and Rod saw this white bitch drive up with a big hand bag, when she went towards Todd house, they hit her and was glad they did, because it was worth it." Williams's October 2009 affidavit avers in 2005, he was incarcerated at the Pontiac Correctional Center when he met Rodney White, another inmate. Between 2005 and 2006, he and White had several conversations. During one such conversation, White told Williams defendant was not responsible for the crime for which he was in prison, but in fact, White and a prostitute named Mopey were responsible for the murder. According to Williams's affidavit, White told him he and Gailes were out hustling one night when they came across a white female getting out of her car. They robbed the woman and Gailes shot her because she would not let go of her purse. White told Williams Mopey came up with the idea to blame defendant and White's testimony at defendant's trial was a lie. White also told Williams the State's Attorney told him if he did not testify against defendant, he and his brother would go to prison for a long time.

¶ 21 First, defendant contends the information contained in the Williams and Alexander affidavits is newly discovered evidence and could not have been discovered sooner through due diligence. The State asserts the Alexander's affidavit is not newly discovered because Alexander gave a statement to police on April 23, 1988, regarding Gailes's attempt (murder) case, which was pending at the time of defendant's trial. Thus, it seems the State's position is defendant could have discovered Gailes made this statement to Alexander had he exercised due diligence since Alexander had some contact with the police. We disagree. Defendant would

have had no reason to seek Alexander out and obtain a statement from him prior to his trial. The State agrees the information contained in the Williams affidavit is newly discovered because the alleged conversation between Williams and White did not occur until 2005, long after defendant was convicted. Thus, we find the information obtained in both affidavits is newly discovered evidence and could not have been discovered prior to trial through the exercise of due diligence.

¶ 22 Second, defendant contends the information contained in the affidavits is material and not merely cumulative. Evidence is considered cumulative when it does not add anything to what was previously considered by the jury. *Ortiz*, 235 Ill. 2d at 335, 919 N.E.2d at 950. We agree the information contained in the affidavits is material and not merely cumulative because this information would have added something to the evidence, *i.e.*, Gales and White, not defendant, were responsible for the murder.

¶ 23 Last, defendant contends the information contained in the affidavits calls for closer scrutiny of the State's case and would probably change the result on retrial. We disagree. In this case, the affidavits at issue are hearsay and not based on any personal knowledge of the affiants and, thus, as a general rule are insufficient. See *People v. Morales*, 339 Ill. App. 3d 554, 565, 791 N.E.2d 1122, 1132 (2003). More specifically, the affidavits at issue here are double hearsay *i.e.*, recantations of trial testimony by Gales and White, both of whom testified defendant admitted the crime. Recantation evidence is generally regarded as unreliable. *People v. Brooks*, 187 Ill. 2d 91, 132, 718 N.E.2d 88, 111 (1999). Additionally, the hearsay affidavits are suspect at best because both affiants were incarcerated when the affidavits were made and are serving life sentences with no possibility of parole. Even if this court were to find the hearsay evidence contained in Alexander's and Williams's affidavits admissible—which we do

not—defendant has failed to show this evidence is so conclusive it would probably change the result on retrial.

¶ 24 Alexander's affidavit states Gailes told him, "her and Rod [White] had *beat* this *white bitch*." (Emphases added.) Notably, as the State points out, Gailes did not tell Alexander she and White shot or killed anyone, but rather they "beat [a] white bitch for \$170.00 and a half a pound of [w]eed." Further, Gailes did not specify who the white girl was she and White allegedly beat and robbed.

¶ 25 Williams's affidavit that White told him he and Mopey were responsible for the murder of which defendant was convicted lends more support toward defendant's claim of actual innocence. However, we cannot find the hearsay evidence contained in Williams's affidavit, even coupled with Alexander's affidavit, would probably change the result on retrial. Both Gailes and White were interviewed by defense counsel and the Downstate Illinois Innocence Project, and both denied any involvement in the murder of Beth Akers.

¶ 26 Additionally, multiple other witnesses testified defendant had admitted robbing and shooting Beth Akers. Jeffrey Kimble, who lived with defendant at the time of the murder and was dating defendant's aunt, Jackie Danley, testified defendant and Tommy Coleman left the house at approximately 10 on the night of the murder with the intention of robbing someone. According to Kimble, when they returned home 1 to 1 1/2 hours later, they had possession of a purse, which they emptied out on the table. Kimble testified the name on the credit cards from the purse was Beth Akers. Coleman told Kimble defendant shot Akers because she would not let go of her purse. Kimble stated on April 9, 1988, he had read a newspaper article about Akers' murder and he threw the paper to defendant, who in turn threw the paper to Coleman. According

to Kimble, defendant then stated to Coleman, "if you wouldn't never had snatched the purse I wouldn't never have to shoot her \*\*\*."

¶ 27 Alfred Dawson testified he was in jail with defendant in July and August 1988 and defendant told him had it not been for statements made by Coleman, "[t]he State wouldn't have a case to bring him to trial," and "maybe if [Coleman] hadn't sold [Mopey] the gun \*\*\* they wouldn't be in jail." Later, after Dawson called defendant "a pistol-packing, purse snatching punk," defendant told Dawson, "he wished he'd have shot [him] instead of her."

¶ 28 Scott Sheppard testified he was in jail with defendant when, at the end of May 1988, defendant told him he and Coleman had been on North Seventh Street looking for a hustle when they saw a lady with a purse. Coleman tried to snatch the purse but the lady was struggling. Defendant told Sheppard he "wasn't going to let the bitch grab [him] so [he] had to ice her ass." Defendant then stated he shot the woman twice and he and Coleman later sold the gun they used to a prostitute named Mopey.

¶ 29 John Roth testified he was also in jail with defendant in late July 1988. Defendant told him he was in jail for shooting a girl, and he had shot her twice and she died.

¶ 30 Willie Fisher was incarcerated with defendant on May 29, 1988. He testified defendant told him he and a guy named Coleman were trying to make some money and they saw Akers walking South. Coleman grabbed her purse but the girl screamed so he shot her once and she fell to the ground. Coleman pulled the purse out of her hand and defendant shot her again. Defendant told Fisher they used a .22-caliber gun they had sold to Mopey.

¶ 31 Titus White testified he had a conversation with defendant on August 20 or 21, 1988, while in jail. White asked defendant if he shot the girl. According to White, defendant

said, "oh, Titus, man, he said I shot the bitch but [Coleman] didn't have to go \*\*\* telling them people \*\*\*." Defendant also told White they used "a .22 long" gun.

¶ 32 Armin Bredemeyer testified he was incarcerated with defendant when he overheard a conversation in the county jail on August 15, 1988, between Coleman and defendant. Defendant was talking to Coleman about "recanting his story that he previously gave and that if he didn't, certain things, could happen to him or his family." Bredemeyer also testified he heard Dawson tease defendant in late July 1988, and defendant responded, "I wish I hadn't shot that bitch, I wish I would have shot you instead \*\*\*." Further, Bredemeyer overheard defendant tell someone else in August 1988, "he didn't mean to shoot the girl, that he turned around and the girl saw his face and he panicked and he fired two shots and he ran."

¶ 33 Based on all the evidence and testimony presented at trial, we cannot find the hearsay affidavits of Alexander and Williams are so conclusive they would probably change the result on retrial. Thus, defendant failed to make a substantial showing of actual innocence sufficient to warrant an evidentiary hearing and we need not determine whether the trial court prematurely determined the hearsay affidavits would not have been admissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973).

¶ 34 C. Newly Discovered Evidence and *Brady* Violation Claims

¶ 35 In addition to his claim of actual innocence, defendant raised claims of newly discovered perjury and *Brady* violations based on the State's alleged failure to (a) disclose deals it made for the testimony of some of its witnesses, (b) correct the false denial of those deals by the witnesses, and (c) disclose the possible drug addiction of two of its witnesses. The State asserts these claims are untimely. We agree with the State.

¶ 36 Section 122-1(c) of the Postconviction Act provides as follows:  
"No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court \*\*\* or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2002).

Further, section 122-3 continues, "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2002).

"[C]ulpable negligence entails blameable neglect involving 'a disregard of the consequences likely to result from one's actions.'" [Citations.] \*\*\* [T]he culpable negligence standard in the [Postconviction] Act 'contemplates something greater than ordinary negligence and is akin to recklessness.'" *People v. Lander*, 215 Ill. 2d 577, 586-87, 831 N.E.2d 596, 601-02 (2005) (quoting *People v. Bocclair*, 202 Ill. 2d 89, 106, 789 N.E.2d 734, 744 (2002)). To demonstrate freedom from culpable negligence, a defendant must show some external force, such as a lengthy prison lockdown, deprived him of a meaningful opportunity to prepare a timely postconviction petition. *People v. Van Hee*, 305 Ill. App. 3d 333, 337, 712 N.E.2d 363, 367 (1999).

¶ 37 In this case, defendant's *Brady* and perjury claims are untimely and defendant fails to allege facts supporting a basis to show he was free from culpable negligence in failing to file his petition in a timely manner. Defendant was tried and convicted in 1988. The postconviction

petition at issue here was originally filed in 2003, 15 years later, and well outside the time frame allowed under section 122-1(c) of the Postconviction Act. Further, we note as early as 1994 (nine years before the petition at issue here), defendant filed a motion seeking the transcripts of the sentencing hearings of many witnesses who testified against him, asserting those transcripts would show the witnesses were given consideration for their testimony against him. In his second postconviction petition filed in 1998 (five years before the petition at issue here), defendant alleged Kimble was given favorable treatment after testifying against him. The trial court dismissed this petition as frivolous and this court affirmed, finding the petition untimely. See *People v. Childrous*, No. 4-98-0405 (Apr. 13, 1999) (unpublished order under Supreme Court Rule 23). Thus, defendant's fourth postconviction petition filed in 2003 and amended in 2011 is untimely.

¶ 38 Also, defendant asserts the newly discovered court documents attached to his postconviction petition disclose (1) previously unrevealed benefits to several State witnesses in exchange for their testimony against defendant and (2) two witnesses had a history of drug use. This does not excuse his failure to file his petition in the required time. See *People v. Diefenbaugh*, 40 Ill. 2d 73, 74, 237 N.E.2d 512, 513 (1968) (the mere allegation defendant was unable to obtain a second trial court transcript did not establish his freedom from culpable negligence in failing to file his petition in the required time). As such, defendant has failed to show his failure to bring these claims in a timely manner is not due to his culpable negligence.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the trial court dismissing defendant's fourth postconviction petition at the second stage. As part of our judgment, we

award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 41            Affirmed.