

NOTICE
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2012 IL App (4th) 110726-U

NO. 4-11-0726

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 1, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
BRYANT L. DOUGLAS,)	No. 07CF833
Defendant-Appellant.)	
)	Honorable
)	Jeffrey B. Ford,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where the affidavits attached to defendant's postconviction petition did not constitute newly discovered evidence to support a claim of actual innocence, the trial court did not err in dismissing the petition at the first stage.

¶ 2 In May 2008, a jury found defendant, Bryant L. Douglas, guilty of four drug-possession-with-intent-to-deliver charges. In August 2008, the trial court sentenced him to prison. In April 2010, this court affirmed defendant's convictions and sentences. In July 2011, defendant filed a *pro se* petition for postconviction relief. The trial court dismissed the petition, finding it frivolous and patently without merit.

¶ 3 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In May 2007, a grand jury indicted defendant on the offenses of (1) unlawful possession with intent to deliver 900 grams or more of a substance containing cocaine (count I) (720 ILCS 570/401(a)(2)(D) (West 2006)); (2) unlawful possession with intent to deliver more than 400 grams but less than 900 grams of a substance containing cocaine (count II) (720 ILCS 570/401(a)(2)(C) (West 2006)); (3) unlawful possession with intent to deliver more than 5,000 grams of a substance containing cannabis (count III) (720 ILCS 550/5(g) (West 2006)); (4) unlawful possession with intent to deliver 1 gram or more but less than 15 grams of a substance containing cocaine (count IV) (720 ILCS 570/401(c)(2) (West 2006)); (5) possession of a stolen firearm (count V) (720 ILCS 5/16-16(a) (West 2006)); and (6) unlawful possession with intent to deliver more than 10 grams but not more than 30 grams of a substance containing cannabis (count VI) (720 ILCS 550/5(c) (West 2006)).

¶ 6 In May 2008, defendant's jury trial commenced. As the parties are familiar with the facts of this case set forth in our prior order, we will only set forth those facts necessary for the proper disposition of this appeal. In April 2007, Champaign police officers began an investigation of a person known as "Will," later identified as Willie Hill, who was selling cannabis in Champaign. A confidential source purchased cannabis from Hill at 1423 Holly Hill Drive, Champaign. Based on that controlled buy, the officers obtained a search warrant for 1423 Holly Hill Drive.

¶ 7 Sergeant Matthew Crane testified he participated in the search warrant at the residence. Once inside, he saw and heard other officers telling a male, identified as defendant, to come out of a bathroom.

¶ 8 When Sergeant Thomas Walker later surveyed the bathroom defendant had been

exiting, Walker observed water and suspected cocaine lying on the floor and the lower part of the vanity in the cabinet under the sink. A bag of suspected cocaine was collected out of the bathroom. It was later tested and determined to be 5.8 grams of a substance containing cocaine.

¶ 9 Officer Matt Henson searched defendant and found on him a small bag of what was later tested and found to be 19.1 grams of plant material containing cannabis. Officer Henson also found on defendant a Motorola cellular phone and \$2,096 in cash.

¶ 10 The officers searched the residence and found a few items related to defendant. In the hallway linen closet, officers found a photocopy of defendant's social security card, a photocopy of his California identification card, a Fed-Ex Kinko's receipt to Ameren IP, and two fax cover sheets addressed to Ameren IP from defendant. In the kitchen on a shelf above the refrigerator, officers found defendant's wallet containing his social security card, a Visa debit card, California identification card, and Stamina Entertainment and other business cards.

¶ 11 Officer Henson interviewed defendant outside the residence. Defendant told him he lived at 1916 Pershing in San Bernardino, California. Defendant said he came to Illinois to clear up some outstanding traffic tickets and had been in Illinois for five days. Defendant said he owned a recording company called Stamina Entertainment and the cash found on him was proceeds from his employment. Defendant admitted the cannabis found on him belonged to him. When Officer Henson asked defendant about the cocaine found around the sink of the bathroom, defendant told Henson he had a habit. When asked if he had any other property in the residence, defendant told Henson he had two black suitcases in the children's room, but he did not mention his wallet, social security card, or identification card.

¶ 12 A search of the residence disclosed a number of other items. Contraband seized

included six packages of suspected cocaine wrapped in plastic wrap found in a laundry hamper. The suspected cocaine was later tested and determined to be 759.4 grams of white powder containing cocaine. Officers also found in the same laundry hamper suspected cocaine surrounded by three plastic bags. This cocaine was later tested and determined to be 46.4 grams of white powder containing cocaine. One fingerprint belonging to Hill was found on the plastic wrap around the cocaine in the hamper. The cocaine found in the hamper formed the basis of count II against defendant.

¶ 13 In the rafters of the garage, officers found an unsealed postal box containing several plastic bags of suspected cannabis. The suspected cannabis was later tested and determined to be 1,175 grams of plant material containing cannabis. Officers recovered from the same location and in the same box three bundles of suspected cannabis, described as in a "compacted form." This suspected cannabis was later tested and determined to be 4,722 grams of plant material containing cannabis. The postal box did not contain an address label, but the postal-service sticker indicated it was sent from San Bernardino, California. The cannabis found in the garage formed the basis of count III against defendant.

¶ 14 Officers also found in the residence a firearm, two digital scales, a roll of Saran wrap, a box of sandwich Baggies, and brown packaging tape. Other items found in the home were indicative of Hill and Marita Douglas, defendant's sister, living there, such as bills in their name containing the address of 1423 Holly Hill Drive.

¶ 15 Officer Jaceson Yandell testified it was typical for someone engaged in selling cannabis or controlled substances to be in possession of large amounts of cash. Defendant had \$2,096 in cash, which was consistent with an individual possibly selling illegal drugs. Moreover,

the \$29,790 found in a pickup truck observed at the house was also consistent with large-scale narcotics distribution. The amount of money found in the pickup truck was consistent with the amount necessary for purchase of a kilogram of cocaine and 15 to 20 pounds of cannabis.

¶ 16 Officer Yandell testified the typical source for cannabis and cocaine is south Texas, California, and Arizona. The controlled substances are typically transported by vehicle, train, bus, United States mail, Federal Express, and United Parcel Service. It is also very common for vehicles containing hidden compartments to transport controlled substances.

¶ 17 Officer Yandell also testified the cannabis found in the garage was in a form commonly seen in the possession of persons engaged in distributing cannabis—as opposed to users—and consistent with a high-level dealer. Part of the cocaine found in the hamper (46.6 grams) was compact, and appeared to have come off a fresh brick of cocaine. The remainder of the cocaine found in the hamper (759.4 grams) was not something typically found in the possession of a user.

¶ 18 Hill, who was charged with the same offenses as defendant, testified for the State. He stated he met defendant in 1996 in California, and both of them sold drugs at that time. Hill sold cocaine and defendant sold cocaine and marijuana. In 1999, defendant told Hill they could make more money selling drugs in Illinois. He, defendant, and another man brought cocaine from California to Illinois. In 2000, Hill and defendant paid a man to drive cocaine to them from California. Hill was ultimately convicted of possession with intent to deliver cocaine and received a 14-year sentence. Sometime after Hill's incarceration, defendant and Marita Douglas, defendant's sister, moved to Champaign-Urbana.

¶ 19 In 2006, Hill was paroled and lived in Springfield. Sometime thereafter, Hill

moved in with defendant and Marita on James Street. According to Hill, he and Marita dated in California and began dating again when he moved in with defendant. At that time, defendant was selling cocaine and cannabis. Hill testified he was only selling cannabis.

¶ 20 Hill, Marita, and Marita's four children moved to 1423 Holly Hill with help from defendant. Hill testified defendant gave him \$1,500 for the move-in fee and that Hill had to sell marijuana to pay defendant back. Hill also had a job, first at Plasti-Pak and then at the pork plant in Rantoul. He still struggled financially.

¶ 21 In January 2007, Hill's and Marita's baby was born. Hill was still having financial difficulty. Defendant wanted Hill to sell more marijuana, and Hill agreed. Hill sold marijuana for defendant, and defendant gave him money for his rent. Hill testified defendant did not live with him and Marita. Hill thought that in April 2007, defendant lived in California or Georgia, but that defendant still had his house on James Street in Champaign.

¶ 22 On May 10, 2007, Hill, Marita, and their baby took a trip to Texas to see Hill's mother. The other four kids stayed with Anthony Douglas, Marita and defendant's brother, at Hill and Marita's house. Hill testified that on the way to Texas, defendant called Hill stating that he was at Hill's house. Hill was concerned because defendant was not supposed to be there. Hill and Marita left Texas on Mother's Day and returned to Illinois on May 15, 2007. When Hill returned home, defendant was there with a Hispanic man. Hill told them to leave.

¶ 23 On May 17, 2007, defendant arrived at the house around 10:30 a.m. Some Hispanic men came to the house to meet defendant. They drove a big truck pulling an old car on a trailer. Defendant invited them in. Hill went to his room.

¶ 24 Hill, Marita, and defendant's fiancée, Kayanne Hunter, then left the house by car,

leaving defendant, Anthony, and all five kids. The Hispanic men were also still there with defendant. When Hill, Marita, and Hunter got to Bradley Street, Marita saw a truck and asked Hill what it was. Hill told her it was a raid truck. Marita asked Hill to "chirp" defendant and tell him. Hill called defendant and told him a raid truck was heading that way. Approximately four or five minutes later, Marita received a call telling her that her house was being raided.

¶ 25 Hill testified that he "freaked out" and told the women to drop him off because he did not want to go back to the house. Hill took off and ended up in Las Vegas, Nevada, where he was later arrested. Hill denied telling the women to check the clothes basket, vent, and the garage.

¶ 26 Hill testified he did not know anything about the cocaine in the house but knew about the cannabis. Hill testified he got the cannabis from defendant. Hill denied the cannabis was mailed to him in the box in which it was found. According to Hill, defendant brought the cannabis—in the form of a big, compressed block and weighing approximately 40 pounds—in a black bag about two to three weeks before the raid. Hill put the cannabis in the box in the garage the day before he left for Texas. He might have opened up one package to break it down for sale but did not open the others. Hill told defendant where it was because defendant had someone who wanted some of it.

¶ 27 Hill denied knowing anything about the cocaine found in the hamper in his room. He had no explanation for his fingerprint being on that cocaine, testifying as follows:

"The only way I can say my fingerprint got on that cocaine is, is when I got what I thought was cannabis I thought all of it was cannabis, so my fingerprint could have got on it then."

On cross-examination, when asked if the cocaine in the house came from the three men from California, Hill testified, "it could have." Hill again explained his fingerprint on the cocaine by stating it might have been in with the bundles of cannabis Hill got from defendant.

¶ 28 Hill admitted he had been in prison three times. He served time as a juvenile for robbery and vehicle theft, received a two-year sentence in California for possession of cocaine, and had a 2000 conviction in Illinois for possession with intent to deliver cocaine. On cross-examination, defense counsel asked Hill if he was testifying to gain leniency so he would not go to prison for the rest of his life. Hill testified "I wasn't promised anything."

¶ 29 Defendant testified he met Hill through friends in California but did not really know him. He denied telling Hill more money could be made in Illinois. Hill started living with defendant and Marita in Illinois after Hill and Marita struck up a romantic relationship.

¶ 30 Defendant denied knowing Hill dealt drugs. Defendant had no criminal history with drugs, although he admitted using cannabis from time to time. In California, he had convictions for receiving stolen property, possession of a firearm, and accessory to attempted murder.

¶ 31 Defendant testified he met the Hispanic men on May 13, 2007, to show them a 1964 Chevy Impala. He also called them on May 17, 2007, because he knew they were in the area. He had been talking to them about cars in Illinois. Defendant testified he was most acquainted with "Ricardo," but defendant did not know his last name. Defendant invited them over because Ricardo told defendant he had a 1961 Impala. Defendant denied having any dealings with the men regarding drugs.

¶ 32 Defendant saw the money the three men had. Defendant explained it was

common to have cash to buy old cars. Defendant took a picture of the money because of his record label, Stamina Entertainment. He explained that lots of videos use money in them to make it look like a person is rich. That was why he took a picture of the money.

¶ 33 After the Hispanic men left, Hunter, Marita, and Hill left 1423 Holly Hill Drive, leaving defendant at the house with "Terrance," another man who was there with Hill, and the kids. When the police truck arrived, defendant told the kids to go to the back. As defendant came down the hallway, he saw the bathroom door open and water running. He stepped into the bathroom to turn off the water. The officers came in and got him to the ground. He denied seeing cocaine in the bathroom. He testified that when he told the officers he had a habit, he was talking about the marijuana.

¶ 34 Defendant denied being partners with Hill in the drug trade. He denied any knowledge of the cocaine in the bedroom or the cannabis in the garage. The 19 grams of cannabis found on him were just for personal use. Defendant denied delivering cannabis to Hill two to three weeks before the raid, stating he was in California at the time.

¶ 35 Marita Douglas testified she was charged the same as defendant. Defendant lived in California. In April 2007, Marita drove to California to pick up some belongings and visit family and returned to Illinois with Hunter.

¶ 36 Marita further testified that in May 2007, defendant visited Champaign-Urbana. On the afternoon of May 17, 2007, Hill, Hunter, and Marita left the residence. As they drove, they saw the raid trucks. Hill made a call, but Marita did not know who he called. Marita received a call from a friend saying the police were at her house. Marita wanted to go back because the children were there. Hill said no, he was on parole, and he was looking at a long

time in jail. Hill told her to let him out of the car, and she did. Marita and Hunter returned to the house. Marita had not seen Hill since.

¶ 37 Marita denied any knowledge of the cocaine and cannabis in the house. She denied knowing Hill dealt cocaine or cannabis, but that she "kind of" suspected. Maria confirmed Anthony and defendant were involved in the classic-car business. She stated her belief that defendant was innocent.

¶ 38 Defendant's brother, Anthony Douglas, testified that in approximately February 2007, he had a conversation with Hill about the presence of cannabis and cocaine, although Anthony subsequently testified he only saw the cannabis. Hill told Anthony a friend was forcing him to sell it. Anthony refused to testify about who Hill told him he got the drugs from, except to say the people were from Los Angeles, California, because Anthony feared repercussions to his family.

¶ 39 Anthony testified that on May 17, 2007, defendant told him some friends were at 1423 Holly Hill Drive with a Chevy Impala they wanted to sell. Anthony was in the business of buying cars, restoring them, and selling them. Defendant was also involved. Anthony saw the car, and then he, defendant, and another man went to lunch. Defendant then returned to the residence. Anthony testified he had a 2006 conviction for possession of cocaine with intent to deliver.

¶ 40 Following closing arguments, the jury found defendant guilty on counts II, III, IV, and VI. Thereafter, defendant filed a posttrial motion, which the trial court denied. In August 2008, the court sentenced defendant to 40 years' imprisonment on count II, 25 years' imprisonment on count III, 15 years' imprisonment on count IV, and 3 years' imprisonment on count VI,

all concurrent.

¶ 41 Defendant appealed, arguing (1) the State failed to present sufficient evidence of his guilt on counts II and III, (2) he was deprived of due process and a fair trial because the State knew or should have known Hill gave false and misleading testimony, (3) the trial court abused its discretion in denying his motion *in limine*, and (4) the court abused its discretion in sentencing him. This court affirmed defendant's convictions and sentences. *People v. Douglas*, No. 4-08-0697 (Apr. 6, 2010) (unpublished order under Supreme Court Rule 23).

¶ 42 In July 2011, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 22-7 (West 2010)). Among other claims, defendant alleged he was actually innocent of the drug charges and newly discovered evidence, including affidavits and documents, supported his claim. In one affidavit, Marita Douglas, defendant's sister, stated the cocaine and cannabis seized at the house belonged to Willie Hill, who had been receiving it from Lavance Ervin. She stated defendant had no knowledge of the drugs in the house. She also stated she "wanted to speak up and tell the truth back then when the police raided my house but I was afraid because Lavance Ervin threatened the life of my family members that live close around him, and I was afraid for the life of my children because Lavance Ervin is a very dangerous person."

¶ 43 In his affidavit, Anthony Douglas, defendant's brother, stated he saw Willie Hill on or about May 10, 2007, with a garbage bag of marijuana and "lots of cocaine." When he asked what he was doing with the drugs, Hill stated he was selling the drugs for Lavance Ervin because he owed Ervin money. When asked at trial who Hill was receiving drugs from, Douglas stated he was "afraid to say that it was Lavance Ervin because he had threaten[ed] to

harm my family that was living close around him at the time." Douglas also stated defendant "never had anything to do with those drugs."

¶ 44 The trial court dismissed the petition, finding it frivolous and patently without merit. As to the claim of actual innocence based on newly discovered evidence, the court found the affidavits of Anthony Douglas and Marita Douglas, both of whom testified at defendant's trial, did not constitute newly discovered evidence. This appeal followed.

¶ 45 II. ANALYSIS

¶ 46 Defendant argues the trial court erred in summarily dismissing his postconviction petition because the affidavits of Anthony Douglas and Marita Douglas present an arguable basis for a freestanding claim of actual innocence based on newly discovered evidence. We disagree.

¶ 47 The Act "provides a method by which defendants may assert that, in the proceedings which resulted in their convictions, there was a substantial denial of their federal and/or state constitutional rights." *People v. Wrice*, 2012 IL 111860, ¶ 47, 962 N.E.2d 934, 945-46. A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 48 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit[.]" 725 ILCS 5/122-2.1(a)(2) (West 2010). Our supreme court has held "a *pro se* petition seeking postconviction

relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact."

People v. Hodges, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 49 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2010); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2010). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394, 398 (citing *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754).

¶ 50 Defendant's postconviction petition set forth a claim of actual innocence. He claimed the affidavits supplied by Anthony Douglas and Marita Douglas indicated they knew the name of the drug supplier, Lavance Ervin, but they did not name him at trial because they were afraid for their safety and that of their family. Defendant argues the affidavits that Ervin was the drug supplier tends to exonerate him and renders Hill's testimony implicating defendant unreliable.

¶ 51 Our supreme court has stated a claim of actual innocence based on newly discovered evidence is cognizable in a postconviction petition. *People v. Morgan*, 212 Ill. 2d 148, 154, 817 N.E.2d 524, 527 (2004).

"To win relief under that theory, the evidence adduced by the defendant must first be 'newly discovered.' That means it must be evidence that was not available at defendant's original trial and that the defendant could not have discovered sooner through diligence. The evidence must also be material and noncumulative. In addition, it must be of such conclusive character that it would probably change the result on retrial." *Morgan*, 212 Ill. 2d at 154, 817 N.E.2d at 527.

Our supreme court has noted the United States Supreme Court has emphasized that claims of actual innocence "must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" *People v. Edwards*, 2012 IL 111711, ¶ 32, 969 N.E.2d 829, 838 (quoting *Schulp v. Delo*, 513 U.S. 298, 324 (1995)). "[T]he hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.'" *People v. Collier*, 387 Ill. App. 3d 630, 636, 900 N.E.2d 396, 403 (2008) (quoting *People v. Savory*, 309 Ill. App. 3d 408, 414-15, 722 N.E.2d 220, 224-25 (1999)).

¶ 52 In the case *sub judice*, the affidavits of Anthony Douglas and Marita Douglas do not constitute newly discovered evidence. For evidence to be newly discovered, it must have been unavailable at the trial and the defendant must not have been able to discover it sooner through due diligence. Here, however, Anthony and Marita, brother and sister to defendant,

respectively, were defense witnesses. There can be no doubt they knew the name of the alleged supplier when they testified as their affidavits stated they did not speak up because of their fear of retribution by Ervin. Thus, that Ervin was the name of the alleged supplier could have been easily discovered with due diligence and thus that information would have been available to defendant at his trial.

¶ 53 We also note Anthony and Marita did not claim in the affidavits they did not divulge the information because of a fear of self-incrimination. Moreover, they would not have violated their fifth-amendment rights by giving the name of the drug supplier.

¶ 54 In addition to being available at trial, the evidence set forth in the affidavits was cumulative. Anthony testified defendant was not the source of the drugs. Marita testified defendant was innocent and she had never known him to sell drugs. Defendant also testified he did not deal in drugs. Providing the name of the alleged supplier in the affidavits amounts to cumulative evidence that defendant was not the supplier.

¶ 55 Here, the statements made in the affidavits did not constitute newly discovered evidence to support a claim of actual innocence. The facts therein were available at defendant's trial and they amounted to cumulative evidence. Moreover, the evidence cannot be said to be of such conclusive character that it would probably change the result on retrial. Thus, defendant's claim of actual innocence is indisputably meritless, and the trial court did not err in dismissing his postconviction petition.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 58 Affirmed.