

NOTICE
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2014 IL App (5th) 120201-U

NO. 5-12-0201

N THE

APPELLATE COURT OF ILLINOIS

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).

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Alexander County.
)	
v.)	No. 97-CF-43
)	
CLEODIOUS E. SCHOFFNER, JR.,)	Honorable
)	William J. Thurston,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE WELCH delivered the judgment of the court.
Justices Cates and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held:* As the defendant failed to demonstrate cause or prejudice, the circuit court did not err where it denied the defendant's motion for leave to file a successive postconviction petition.

¶ 2 Cleodious Schoffner, Jr. (the defendant), appeals from the judgment denying his motion for leave to file a successive postconviction petition pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The circuit court denied the motion pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)) after determining that the defendant's motion failed to satisfy the "cause-and-prejudice" test. For reasons which follow, we affirm.

¶ 3 In January, 1998, the defendant was convicted by a jury under an accountability theory, and in March, 1998, was sentenced to a term of imprisonment for natural life for two first-degree murder convictions, and 10-year prison sentences for convictions of armed robbery, aggravated kidnapping, and aggravated battery with a firearm.

¶ 4 At trial, it was adduced that in April, 1997, the defendant had accompanied his cousin, Glen Schoffner, to D&M Quick Mart in Tamms, Illinois. Around the 8 p.m. closing time, three people were present in the store: a woman behind the sales counter, Norma Johnson; the owner of the Quick Mart, Donald Murphy; and Gary Wheaton. Glen first entered the store alone, but returned to his car to get money. On reentry, he was accompanied by the defendant. Glen pointed a gun at Johnson and demanded money from the cash register. Murphy pushed Johnson behind him, and Glen shot Murphy in the face. Glen then shot Wheaton, who survived this initial attack and crawled toward the restroom; however, Glen followed Wheaton and killed him. Johnson testified that Glen shot her in the leg and beat her. She stated that she was extensively injured by her assailants during the robbery, and testified that though she could not see, she believed that the defendant contributed to her assault because she remembered being beaten while Glen could be heard killing Wheaton in the restroom. Upon leaving, Glen took the store's cash register and put it and Johnson in the trunk of the car. Some time later, the car was wrecked and Johnson was removed from the trunk. Glen and the defendant were picked up by an acquaintance.

¶ 5 According to his trial testimony, the defendant and Glen went to Kevin "Bean" Mackins' home to change clothes. The defendant stated that Glen changed clothes, but

that he did not accept any of Mackins' clothes. However, Mackins testified that he gave the defendant a change of clothes. The defendant left Mackins' home, and after talking to his father, called the police and reported the incident. At the time that the police came to pick him up, the defendant's clothing matched Mackins' description of the clothing he had given to the defendant.

¶ 6 In a police interview, Cynthia Gales stated that before the incident, she had heard the defendant tell Glen to pick him up at 7 p.m. because some place closed at 8 p.m.; however, she testified at the trial that she never heard the defendant say that. The defendant testified that he was coerced into participating in the robbery by his cousin, who was threatening to kill him throughout the evening. He stated that he never intended to rob the store or kill anyone, and that he did not know beforehand of Glen's plan.

¶ 7 On direct appeal, the defendant argued that Gales' prior inconsistent statements should not have been admitted as substantive evidence because she never acknowledged making them, and also that the statements were not proper impeachment testimony. This court affirmed. *People v. Schoffner*, No. 5-98-0120 (1999) (unpublished order under Supreme Court Rule 23).

¶ 8 In July 1999, the defendant filed a *pro se* postconviction petition; in March 2001, his court-appointed attorney filed an amended petition. Among the allegations was a claim that the defendant received ineffective assistance of trial counsel where his counsel failed to interview Glen Schoffner, a material witness with exculpatory evidence,¹ and

¹Glen Schoffner had pled guilty to charges against him. As part of his plea

where counsel failed to interview or call Mackins, an allegedly material witness. Attached to the petition was an affidavit from Glen dated January 29, 1998, averring that the defendant had "nothing to do" with Glen's decision to commit the robbery and murders, and that he had only implicated the defendant because the prosecution threatened to seek the death penalty against him otherwise.

¶ 9 In its order, the circuit court noted that the record reflected that Glen, despite his recent affidavit, was given the opportunity to testify at the defendant's trial and did not do so by choice, as he had asserted his constitutional right against self-incrimination. The court also noted that the defendant failed to show prejudice or that the issue would have been meritorious on appeal, and "the reasons are clear and of record why Glen Schoffner should or could have not been called as a witness for the defense at trial."

¶ 10 As for the allegation regarding the interview with Mackins, the court noted that it was unsupported by an affidavit indicating the substance of the testimony or whether the witness would be willing to testify; as such, the defendant could not demonstrate prejudice. The court granted the State's motion to dismiss the petition, finding that all of

bargain, he agreed to testify for the prosecution at the defendant's trial, with the understanding that the testimony would be consistent with his earlier statements to police that implicated the defendant as a willing and active participant in the crimes. Before the defendant's trial began however, Glen asserted his constitutional right against self-incrimination and thus was not called to testify.

the defendant's claims were either meritless or waived as an issue of record that was not raised on appeal.

¶ 11 In June 2004, the defendant filed *pro se* a "collateral attack on void judgment pursuant to 2-1401." The court granted the State's subsequent motion to dismiss, finding that the issues could have been raised on direct appeal or in the first postconviction petition, and further that the petition was not timely.

¶ 12 In March 2007, the defendant filed a "supplemental petition for relief from the judgment pursuant to 735 ILCS 5/2-1401(c), or in the alternative, for post-conviction relief pursuant to 725 ILCS 5/122-1." The defendant stated that he had obtained newly discovered evidence that Mackins, "the only witness linking [the defendant] to the crime," committed perjury at his trial regarding giving clothing to the defendant on that night, and that Mackins had signed an affidavit to that effect. The defendant argued that this evidence was fraudulently concealed from him until February 2007, and that this recantation testimony would have changed the outcome of the trial. Additionally, he again referenced Glen's affidavit from the initial postconviction petition that averred to the defendant's actual innocence. Neither referenced affidavit was attached. The record does not contain any indication of a ruling or response to this petition.

¶ 13 In October 2011, the defendant filed a motion for leave to file a successive postconviction petition, which is the subject of the instant appeal. The defendant alleged that he received ineffective assistance of trial counsel where his counsel failed to convey a plea offer to him, and where his counsel failed to allow the assigned investigator to fully explore the case. In support of these allegations, the defendant attached an affidavit

from Curt Graff, the investigator who was assigned to assist the defendant's trial counsel. Graff's statement, dated July 27, 2009, averred that he was present for "a couple meetings" between the defendant and his counsel, and "it was [his] belief that [counsel] failed to properly inform [the defendant] of a potential plea bargain disposition offered by the State's Attorney's Office." Graff also noted that the defendant's counsel was "extremely misleading, regarding the alleged plea offer from the Prosecutor." The defendant's petition stated that he was not made aware of the plea offer until 2009, when his family hired an attorney who talked to Graff. As to the allegation that the defendant's counsel prohibited investigation of the case, Graff's affidavit also stated that counsel inhibited his investigation and would not allow him to interview Glen to determine if any exculpatory information could be garnered.

¶ 14 The defendant also alleged that he was denied due process where the State coerced the suppression of Glen's exonerating statement, which was material and exculpatory evidence, and that he was prejudiced by not being able to make use of it. Attached to the petition was a new affidavit from Glen, dated July 14, 2005, in which Glen averred that the defendant was innocent, and that he had been coerced by threat of the death penalty into implicating the defendant in the crime. Finally, the defendant alleged that he was prejudiced by the State's knowing use of perjured testimony at trial. The defendant attached a February 2, 2007, affidavit from Mackins attesting that he had lied at the defendant's trial, and that he was pressured by authorities to say that he gave the defendant clothes that night when in fact he did not.

¶ 15 On January 31, 2012, the circuit court entered an order denying the motion for leave to file the petition. The court noted that the defendant did not show cause, as the factual assertions relied upon by the defendant were available to him at the time that he filed his first postconviction petition, but he did not identify any objective factor which impeded his efforts to raise the claims in the earlier proceeding. The court noted that the defendant did not allege that the underlying facts were withheld from him or that the claims were based on newly discovered evidence, but "to the contrary, the claims relating to co-defendant Glen Schoffner and possible exculpatory evidence were raised in the initial post-conviction petition." The court found that the claims relating to Mackins' testimony did not involve newly discovered evidence, but rather that "[the claims] were simply not included in the initial petition." The court also found that the defendant failed to demonstrate prejudice resulted from the failure to assert this claim earlier. With respect to his counsel's failure to convey a plea offer, the court found that Graff's affidavit did not support the defendant's claim, and "had this claim been presented in the initial petition, there is scant probability that [the defendant] would have prevailed."

¶ 16 In this appeal, the defendant argues that the trial court erred when it denied him leave to file his successive petition.² Specifically, the defendant contends that he has

²Contrary to the State's argument that the defendant's attached affidavits fail to meet the cause-and-prejudice test because the affidavits from Glen and Mackins were attached to his March, 2007, pleading, we note that the March, 2007, document references the affidavits from Glen and Mackins, but the affidavits were not in fact

satisfied the cause-and-prejudice test in regard to his claims of ineffective assistance of counsel, and that he has satisfactorily demonstrated a claim of actual innocence regarding the newly discovered evidence of Mackins' recantation of his trial testimony. We disagree.

¶ 17 The Act contemplates the filing of only one postconviction petition. 725 ILCS 5/122-3 (West 2012). Consequently, all issues that were raised and decided on direct appeal or in the original postconviction proceedings are barred from further consideration by *res judicata*, and all issues that could have been raised but were not are forfeited. *People v. Anderson*, 375 Ill. App. 3d 990, 1000 (2007). However, where fundamental fairness requires, strict application of the doctrine of forfeiture will be relaxed. *People v. Newman*, 365 Ill. App. 3d 285, 288 (2006). The test to determine whether fundamental fairness requires an exception to the statutory bar of forfeiture is the cause-and-prejudice test set out in *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002), and codified in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)). To demonstrate cause, the defendant must identify an objective factor that prevented him from raising the issue in his initial postconviction proceeding; to demonstrate prejudice, the defendant must show that the claim so infected the proceeding that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2012). The test is applied to individual postconviction claims, not to the successive petition as a whole. *Pitsonbarger*, 205 Ill. 2d

attached. Further, the defendant filed those documents without leave of the court, and no ruling was issued on it.

at 462. The test is more exacting than the gist-of-a-constitutional-claim standard applicable to initial judicial evaluations of postconviction petitions that have already been filed with the court. *People v. Conick*, 232 Ill. 2d 132, 142 (2008). We review the denial of a motion to file a successive postconviction petition *de novo*. *People v. Williams*, 392 Ill. App. 3d 359, 367 (2009).

¶ 18 We find that neither of the defendant's current claims regarding the effective assistance of his trial counsel withstands the cause-and-prejudice test. First, we address his claim that he was denied effective assistance when his trial counsel failed to convey a plea offer from the prosecution. We initially note that we agree with the circuit court that Graff's affidavit does not support this claim. Allegations in a postconviction petition must be supported by affidavits or by the record in the case. 725 ILCS 5/122-2 (West 2012); *People v. Bleitner*, 227 Ill. App. 3d 257, 261 (1992). In considering a motion for leave to file a successive petition, all well-pleaded facts, as well as all supporting affidavits, are taken as true. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25. However, where an affidavit does not set forth specific facts to support that it is based upon personal knowledge, it is insufficient. *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007). Here, while Graff averred that he was present for "a couple meetings," the meetings he is referring to are those between the defendant and counsel, not with the prosecution. Further, Graff does not swear to the terms or even the definite existence of the offer, only referring to an "alleged" or a "potential" plea offer. Without a sound basis for the knowledge that the plea offer existed and was withheld from the defendant,

Graff's affidavit is insufficient, and thus need not be taken as true in consideration of the defendant's claim.

¶ 19 However, even if Graff's affidavit was taken as true by this court, the defendant cannot demonstrate that denying him the opportunity to raise this claim in a successive petition is prejudicial. As a general rule, defense counsel has the duty to communicate offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. *Missouri v. Frye*, ___ U.S. ___, ___, 132 S. Ct. 1399, 1408 (2012). Even if counsel's failure to communicate a plea offer rendered his performance deficient, however, a defendant is required to establish both deficient performance and prejudice to succeed on a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice from failure to convey a plea offer, a defendant must show a reasonable probability that he would have accepted it and that neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. *Frye*, ___ U.S. at ___, 132 S. Ct. at 1410. Here, the defendant's motion and Graff's affidavit only support that there *may* have been a plea offer. Without the record or supporting documentation containing any semblance of the potential terms of an offer, or indeed, the existence of the offer at all, the defendant cannot demonstrate a reasonable probability that he would have accepted it. Thus, the cases cited by the defendant are distinguishable. See, e.g., *People v. Trujillo*, 2012 IL App (1st) 103212, ¶¶ 11, 14 (finding the defendant sufficiently alleged ineffective assistance of counsel due to an allegedly undisclosed plea offer where the record contained evidence of the prosecution's offer of six years). Thus, we agree with the trial court that even if the defendant had

brought this claim in his initial postconviction petition, it is unlikely that the claim would have prevailed.

¶ 20 The defendant's next ineffective-assistance-of-counsel claim is that he was denied effective assistance when his trial counsel denied Graff the opportunity to further investigate Glen's potentially exonerating testimony. Again, the defendant can show neither that he had cause for not bringing this claim in his initial petition, nor that denying him the opportunity to raise this claim in a successive petition is prejudicial. First, we note that in a successive petition, the defendant is limited to claims that "were not and could not have been previously adjudicated." *People v. Morris*, 236 Ill. 2d 345, 354 (2010). In his initial postconviction petition, the defendant argued that his counsel was ineffective for failing to interview Glen, and the circuit court, in denying the motion at issue here, noted that the claims relating to Glen and possible exculpatory evidence were raised in the initial petition. However, even if we considered the defendant's latest iteration of his ineffective-assistance-of-counsel claim to be unique and supported by Graff's affidavit, the defendant remained unprejudiced by the denial of the opportunity to bring this claim because his counsel's performance was not deficient. A defendant's trial counsel only has a duty to make reasonable investigations or to make a reasonable decision which makes particular investigations unnecessary, and the reasonableness of a decision is assessed with heavy deference to counsel's judgment. *People v. Harris*, 129 Ill. 2d 123, 158 (1989). Glen made statements to the police that incriminated the defendant, and later, asserted his constitutional right against self-incrimination before the defendant's trial. Even if Graff was afforded the opportunity to gather information from

Glen, a defendant's sixth amendment right to compulsory process does not trump another person's fifth amendment right against self-incrimination. *United States v. Mabrook*, 301 F.3d 503, 506 (7th Cir. 2002). Given Glen's refusal to testify, and even if he had not so refused, the likelihood of the prosecution subsequently providing strong impeachment evidence by use of Glen's prior recorded statement, we think trial counsel's decision was a reasonable one. Whether the failure to investigate the testimony of a potential witness amounts to incompetence is dependent on the value of the evidence to the case. See *People v. Marshall*, 375 Ill. App. 3d 670, 676-77 (2007) (finding a witness's potential testimony contradicted his earlier statement, and thus the defendant's counsel reasonably determined that the testimony would have not been helpful to the defendant's case). As counsel's decision not to have Graff interview Glen does not constitute deficient performance, the defendant was not prejudiced when he was prevented from raising this claim in a successive petition.

¶ 21 Finally, the defendant claims that Mackins' recantation in his affidavit provides the defendant with newly discovered evidence, which also warrants leave to file his successive petition. Other than meeting the requirements of the cause-and-prejudice test, the defendant may be excused for failing to raise a claim in an earlier petition only if it is necessary to prevent a fundamental miscarriage of justice. *People v. McDonald*, 364 Ill. App. 3d 390, 393 (2006). To show a fundamental miscarriage of justice, a defendant must show actual innocence. *People v. Smith*, 341 Ill. App. 3d 530, 536 (2003). To obtain relief under a theory of actual innocence, the evidence in support of the claim must be newly discovered, material, noncumulative, and of such a conclusive character that it

will probably change the result upon retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Newly discovered evidence is evidence that was unavailable at trial and could not have been discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002).

¶ 22 We agree with the circuit court that the information provided in Mackins' affidavit is not newly discovered evidence. Due diligence assumes at least some level of deductive reasoning in an active effort to discover evidence based on the knowledge and information already possessed by the litigants. *People v. Barnslater*, 373 Ill. App. 3d 512, 526 (2007). Here, even if the defendant could demonstrate that the recantation was truly new evidence, despite his multiple claims regarding Mackins in his filing history with this court, we nevertheless find the defendant cannot show the "most important element of an actual-innocence claim" in that the evidence would likely change the result on retrial. See *People v. Edwards*, 2012 IL 111711 ¶ 40. Mackins' recantation does little to bolster the defendant's argument or call his culpability into doubt when compared to proffered testimony in the State's case. In affirming the defendant's conviction on direct appeal, this court noted the strength of surviving victim Johnson's testimony, stating that "[t]he evidence in this case is not closely balanced, due largely to the unusual circumstance of the ability of the surviving victim Norma Johnson to testify." *People v. Schoffner*, No. 5-98-0120 (1999), order at 7 (unpublished order under Supreme Court Rule 23). Mackins was an acquaintance of the defendant, and his recantation applied to only marginally valuable circumstantial evidence regarding the defendant's clothing. Thus, we believe that the strength of the State's evidence at trial would have made

Mackins' recantation, even if available to the defendant at the time of his initial petition, nonprejudicial.

¶ 23 It is a well-settled rule that successive postconviction petitions are disfavored in Illinois courts. *People v. Edwards*, 2012 Ill. 111711 ¶ 29. We find that the defendant failed to meet the cause-and-prejudice test, and thus that the defendant has not sufficiently demonstrated that the rule prohibiting successive petitions should be relaxed. Therefore, we affirm the trial court's denial of the defendant's motion for leave to file a successive postconviction petition.

¶ 24 Affirmed.