

No. 1-13-0009

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 05 CR 3872
)	
ROBERT CURRY,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant's initial post-conviction filing does not present an arguable claim of actual innocence; the affidavit of another man confessing to the shooting was not potentially exonerating because one witness testified there were two gunman, and defendant said he and another person were wanted for the shooting.
- ¶ 2 Defendant Robert Curry appeals the circuit court's summary dismissal of his post-conviction petition. On appeal, he contends his petition presented an arguable claim of his actual

innocence in the shootings of two men in 2004, as supported by his girlfriend's affidavit describing a statement made by another man involved in the offense. Because defendant's post-conviction petition fails to make a showing of defendant's actual innocence, we affirm.

¶ 3 Following a jury trial in 2006, defendant was convicted of the first degree murder of Cesar Fowler and the attempted murder of Andre Armstrong near 4213 South Champlain Avenue in Chicago. At trial, a State witness, Stanton Roach, testified that on October 12, 2004, defendant stepped out of a vehicle occupied by two or three other people wearing hooded sweatshirts over their heads. Roach testified that defendant fired a gun in the direction of both victims. In contrast, Armstrong testified at trial that two men exited the vehicle and fired in their direction, fatally striking Fowler. Armstrong told police that two shooters were involved and later identified defendant in a police photo array and lineup. Roach also identified defendant in a photo array and lineup.

¶ 4 The jury heard a portion of the grand jury testimony of Sherron Adams, who knew defendant. Adams told the grand jury that a few weeks after the shooting, defendant told Adams that he (defendant) and "T" were wanted in the neighborhood because they shot the victims. The parties stipulated to ballistics evidence that two types of bullet casings were recovered from the scene, indicating the shots fired at the victims came from two different weapons. Defendant presented an alibi defense, which was rebutted by a police investigator who testified that no witnesses placed defendant at a baby shower for a relative of his girlfriend, Raven Echols, where he claimed to be at the time of the shootings. Defendant surrendered himself to police on January 11, 2005.

¶ 5 The jury found defendant guilty of the murder of Fowler; however, the jury did not find that defendant personally discharged a firearm. The jury also found defendant guilty of the

attempted murder of Armstrong. Defendant was sentenced to 50 years and 15 years for those respective offenses, with those sentences to be served concurrently.

¶ 6 On direct appeal, defendant challenged the sufficiency of the identification testimony to support his conviction. This court affirmed defendant's convictions and sentences. *People v. Curry*, No. 1-06-2092 (2008) (unpublished order under Supreme Court Rule 23).

¶ 7 On June 18, 2009, defendant, by private counsel, filed a "Post Conviction Petition Advancing a Claim of Actual Innocence." The petition contended defendant "has consistently maintained his innocence" and that Echols had "embarked on her own investigation in this case," which was ongoing and which revealed that Joshua Taylor was the offender. The petition asserted the following: (1) Echols was able to "surreptitiously" tape-record two conversations in which Taylor confessed to the crime; (2) Echols gave the recording to defendant's trial counsel, who lost it; (3) defendant's counsel told Echols that Taylor's confession was not admissible as evidence; and (4) the State might have a copy of the recording and that material was "*Brady* material," meaning it was favorable to the defense and should be disclosed.

¶ 8 Defendant's counsel attached to the petition an affidavit of Echols stating, in its entirety, "Affiant Raven Echols, n/k/a Ravel Echols-Ford, after first being duly sworn upon oath deposes and states under penalty of perjury, that the facts and matters stated in the foregoing Petition are true and correct under oath." The lines on the affidavit for Echols' signature, the date, and the notary information are blank. Also attached to the petition was an Illinois Department of Corrections (IDOC) Internet Inmate Status Report on Joshua Taylor, dated May 9, 2009. The report states that Taylor was taken into custody in 2008 in an aggravated battery case and was released on parole in March 2009.

¶ 9 Eleven days later, on June 29, 2009, defendant's counsel filed a second petition identical to the first filing. The copy of Echols' affidavit attached to that petition was signed, dated and notarized.

¶ 10 On August 21, 2009, the circuit court dismissed defendant's petition as frivolous and patently without merit. In a written order, the court concluded that defendant's claim of actual innocence had no merit because it did not completely exonerate him of the crime and, furthermore, any confession by Taylor would be inadmissible because the recording was made without Taylor's consent. The court also noted that Echols' affidavit was unsigned.

¶ 11 On September 14, 2009, counsel for defendant filed a motion for reconsideration, pointing out that his second filing was accompanied by a signed and notarized affidavit of Echols. The motion further asserted that one witness observed one shooter, in contrast to Armstrong's trial testimony that he saw two shooters. The motion contended defendant set forth an arguable claim of his actual innocence.

¶ 12 In the following weeks, defendant's counsel supplemented his motion for reconsideration with additional filings and documentation. On October 26, 2009, counsel filed a supplement to the motion in which he asserted Armstrong's testimony that he saw two gunmen was impeached at trial with his prior statement to a police officer immediately after the shooting that only one shooter fired at him and Fowler. He also pointed out the jury found he did not personally discharge a firearm.

¶ 13 The motion further contended defendant's trial counsel was ineffective in failing to present evidence that could be exculpatory. Attached to that filing is a general progress report (GPR), dated October 14, 2004, which was two days after the shooting, that details a police interview of Terrell Hill, who had been arrested for delivery of a controlled substance. Hill

claimed to witness a gang shooting near the area of 43rd Street "between Vincennes and Champlain," and that the gunman's nickname began with an "S." Hill said he knew the shooter as a member of the Gangster Disciples street gang and the shooter had confronted him about drug sales in the area.

¶ 14 In addition, the motion asserted that fired cartridge casings recovered from the scene matched a gun recovered by Chicago police on February 1, 2005, belonging to a person named Willie Sanders. The motion cited to the stipulation of the ballistics evidence entered at defendant's trial and asserted that Sanders admitted he carried that gun for protection. The motion also asserted, *inter alia*, that defendant's trial counsel was ineffective in failing to call several known witnesses to attest to defendant's alibi.

¶ 15 On November 30, 2009, counsel for defendant asked permission to file an un-notarized affidavit in which defendant attested all of the assertions made in his petition, and in the motion for reconsideration and supplements were true. Defendant claimed he could not receive notary services in prison due to a lockdown. The court allowed that affidavit to be filed in January 2010.

¶ 16 Over the following years, defendant's case was continued numerous times at his counsel's request. On November 14, 2012, defendant's motion for reconsideration was denied. Defendant has filed a timely notice of appeal of that ruling.

¶ 17 On appeal, defendant contends the circuit court erred in dismissing his petition at the first stage of post-conviction review because he presented an arguable claim of actual innocence. He argues the court impermissibly acted as a fact-finder in considering his claims and should have limited its review to the "arguable claim" standard set out in *People v. Hodges*, 234 Ill. 2d 1 (2009).

¶ 18 A defendant may file a petition under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) to obtain review of a constitutional issue that was not, and could not have been, adjudicated on direct appeal. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). At the first stage of adjudication, the circuit court independently assesses whether the allegations in the petition, when liberally construed and taken as true, adequately present a constitutional claim for relief. *People v. Hommerson*, 2014 IL 115638, ¶ 7. In that analysis, the court must examine the petition's "substantive virtue" rather than its "procedural compliance." *Id.*

¶ 19 The circuit court must dismiss a first-stage post-conviction filing if it finds the petition to be frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 12. A petition lacks an arguable basis in fact or law when it is based on an indisputably meritless legal theory, which is a theory that is completely contradicted by the record, or based on a fanciful factual allegation, which is defined as "fantastic or delusional." *Id.* at 16-17.

¶ 20 An actual innocence claim should be treated procedurally like any other post-conviction claim, and the burden of proof is on the petitioner to show the denial of a constitutional right by a preponderance of the evidence. *People v. Coleman*, 2013 IL 113307, ¶ 92. A dismissal of a petition at the first stage of post-conviction proceedings is reviewed *de novo*. *Hommerson*, ¶ 7.

¶ 21 To succeed on a claim of actual innocence, the defendant must present new, material, non-cumulative evidence that is so conclusive that it would probably change the result on retrial. *Coleman*, 2013 IL 113307, ¶ 96. For evidence to be considered as "new," the evidence must have been discovered after trial that could not have been discovered earlier through the exercise of due diligence. *Id.* To be "material," the evidence must be relevant and probative of the

defendant's innocence, and to be "non-cumulative," the evidence must add to what the jury heard at the defendant's trial. *Id.* To be "conclusive," the evidence, when considering along with the trial evidence, must probably lead to a different result. *Id.* That new evidence need not prove the defendant's actual innocence; it is sufficient that "all of the facts and surrounding circumstances *** should be scrutinized more closely to determine guilt or innocence." *People v. Molstad*, 101 Ill. 2d 128, 136 (1984); see also *Ortiz*, 235 Ill. 2d at 337.

¶ 22 In support of defendant's petition, he presented the affidavit of Echols, a current or former girlfriend, asserting that Taylor had confessed to the shooting. An affidavit that merely impeaches or contradicts trial testimony makes a claim of reasonable doubt, not of actual innocence. *People v. Collier*, 387 Ill. App. 3d 630, 637-38 (2008) (noting that "reasonable doubt of a defendant's guilt is not a proper issue for a post-conviction proceeding"). Rather, the hallmark of actual innocence is a defendant's total vindication or exoneration. *People v. Anderson*, 402 Ill. App. 3d 1017, 1037 (2010), citing *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999).

¶ 23 Regardless of the initial verification issues with Echols' affidavit, even if no such issues had occurred, the affidavit's contents were cumulative of what the jury heard at trial and would not have changed the result upon retrial. At trial, the jury heard the contradictory testimony as to the number of shooters. One witness (Roach) stated defendant was the only shooter who fired at the victims and also heard testimony from Armstrong (the surviving shooting victim) that two men fired weapons. Therefore, the affidavit did not exonerate defendant but merely indicated that Taylor may also have been involved in the shooting. Furthermore, the jury also heard testimony that defendant told a witness that he and "T" were wanted in the shooting. Taylor's confession would not have exonerated defendant because there was evidence that two

perpetrators fired shots and, moreover, that the bullets and related materials recovered from the scene came from two different weapons. In addition, although the jury found that defendant did not personally discharge a firearm in the murder of Fowler, that fact also does not exonerate defendant, given the evidence of two weapons and two shooters.

¶ 24 For the same reasons, the materials attached to defendant's motion for reconsideration and subsequent filings do not support defendant's actual innocence claim. The motion for reconsideration reiterates that the testimony at trial variously described one or two gunmen, which does not support an actual innocence claim, but instead questions the sufficiency of the evidence to establish defendant's guilt. Cf. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 33 (evidence that the actual shooter said the defendant was not at the scene, as the defendant had consistently asserted since his arrest, presented a "legitimate claim of actual innocence").

¶ 25 As for the police GPR detailing a conversation with Terrell Hill two days after the shooting, the statements of Hill also do not exonerate defendant. Hill stated that he witnessed a gang shooting and that the gunman's name began with S. However, it cannot be determined from the report whether the crime to which Hill refers was the shooting at issue here.

¶ 26 The motion for reconsideration also states that the ballistics evidence matched a gun that was traced to a man named Willie Sanders in February 2005. As with the facts set out above, that evidence also does not establish defendant's actual innocence, where it still would have been possible for defendant to have used that weapon in October 2004 regardless of Sanders' later ownership.

¶ 27 Defendant's contentions and the supporting documentation do not establish even an arguable claim that such evidence would prevent a jury from convicting him again. Thus, defendant has not presented the gist of a meritorious constitutional claim of his actual innocence.

Furthermore, in response to defendant's contention on appeal that the circuit court erred in extending its review beyond the standard in *Hodges*, we note that the court was well within its purview to weigh defendant's actual innocence claim against the facts set out in the record. See *People v. Deloney*, 341 Ill. App. 3d 621, 627 (2003) (a defendant must present the gist of a claim for relief that is meritorious "when considered in view of the record of the trial court proceedings"); see also *People v. Dredge*, 148 Ill. App. 3d 911, 913 (1986).

¶ 28 Accordingly, the circuit court's summary dismissal of defendant's post-conviction petition is affirmed.

¶ 29 Affirmed.