SIXTH DIVISION
June 30, 2016

No. 1-14-1101

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. 00 CR 24954
	)	
FLYNARD MILLER,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** The circuit court properly denied the defendant leave to file a successive post-conviction petition. New evidence regarding the claim that this court previously rejected does not substantively alter the claim and was positively rebutted by the record. The defendant was not prejudiced by the absence from trial of a new witness corroborating the defendant's account of events.

¶ 2 Following a bench trial, defendant Flynard Miller was convicted of first degree murder and attempted first degree murder and sentenced to consecutive prison terms of 47 and 6 years, respectively. We affirmed on direct appeal. *People v. Miller*, 1-04-0114 (2005) (unpublished order under Supreme Court Rule 23). We also affirmed the summary dismissal of defendant's

first post-conviction petition in 2006, and the 2011 order denying him leave to file a successive post-conviction petition. *People v. Miller*, 393 Ill. App. 3d 629 (2009); *People v. Miller*, 2013 IL App (1st) 111147. Defendant now appeals from a 2014 order denying him leave to file another successive post-conviction petition. He contends that his proposed petition presents claims of (1) ineffective assistance by a non-attorney purporting to be his counsel, who gave erroneous advice that caused him to reject a plea offer, and (2) ineffective assistance of trial counsel for not discovering, and the State's failure to disclose, a witness who would have corroborated defendant's trial testimony. For the reasons stated below, we affirm.

¶ 3 Defendant and codefendant Joseph Eastling were charged with the first degree murder of Charles Fowler (by personal discharge of a firearm proximately causing his death), and the attempted murder and aggravated battery with a firearm of Michael Casiel, on or about September 16, 2000.

¶ 4 On September 26, 2000, an appearance for defendant was signed by "Lawerance N. Vance." The transcript of November 3, 2000, reflects that "Lawrence E. Vance" identified himself as counsel for both defendants. On February 28, 2001, an agreed continuance order was signed by "Lawerance N. Vance" for both defendants. Howard Towles filed an appearance for defendant in October 2001 and represented him thereafter through trial and sentencing. On November 25, 2002, "Lawrence Vance" stated that he was appearing for codefendant and "stand[ing] in for" Towles on that day as to defendant. Subsequent transcripts reflect "Lawrence Vance" or "Lawrence M. Vance" (on September 12, 2003) appearing for codefendant. We shall use "pre-trial counsel" to refer to Vance and "trial counsel" to refer to Towles.

¶ 5 The evidence in the 2003 trial showed that the incident began when defendant and Fowler bumped into or jostled each other at the apartment Fowler shared with Molina Matthews,

Fowler's fiancée and the mother of codefendant's child. Fowler left his apartment after the bumping but returned with three friends, including Casiel and Anthony Hendrix, to support him in removing defendant and codefendant from his apartment. Matthews, Casiel, and Hendrix testified that neither Fowler nor his friends were armed. Fowler entered his apartment while his friends stayed in the hallway. Defendant and codefendant drew their guns, and defendant fired at Fowler. Fowler and his friends fled, with defendant and codefendant in pursuit and still firing. Fowler was holding onto Casiel but collapsed near the doorway of the building. Defendant continued to chase and fire at Casiel and the others, striking Casiel. Police officer G. Ephgrave saw defendant's pursuit and firing, did not see Casiel holding a gun, and did not see a gun near Fowler's body. Defendant and codefendant fled and were arrested at the scene. Officer Ephgrave saw each drop or try to "ditch" a gun. A bullet recovered from a wall of the apartment was fired from defendant's gun while a bullet removed from Fowler's body was from codefendant's gun. Defendant testified that Fowler had a gun at hand in his waistband when he entered the apartment. Defendant claimed that he fired into the wall in self-defense to scare off Fowler and that he was intentionally firing at the walls or the ground as he chased Fowler and the others. The court found defendant guilty of first degree murder, attempted murder, and aggravated battery with a firearm, finding that he personally discharged a firearm that proximately caused death. He was sentenced to 47 years' imprisonment for murder, including a 25-year firearm enhancement, consecutive to 6-year terms for the other two offenses.

¶ 6 On direct appeal, defendant challenged the firearm enhancement on various grounds and contended that he was not properly admonished regarding his right to file a motion to reconsider his sentence. We affirmed, except for vacating duplicate murder counts and the aggravated

battery conviction on a one-act-one-crime basis. *Miller*, No. 1-04-0114 (2005) (unpublished order under Supreme Court Rule 23).

¶ 7 In 2006, defendant filed a *pro se* post-conviction petition arguing in relevant part what we shall refer to as the "lost plea" claim: that pre-trial counsel neglected to inform him that, if he did not accept a plea offer of "20 years for the murder" and was found guilty, he was subject to the firearm enhancement. Defendant attached affidavits from himself and his mother averring that the State made an offer of "20 years at 85%" with the attempted murder and aggravated battery charges "ousted," and that pre-trial counsel informed them of the offer in February 2001 but did not tell them about the firearm enhancement. Defendant averred that he would have accepted the offer, and his mother averred that she would have advised him to accept it, had they been aware of the firearm enhancement. Defendant also averred that pre-trial counsel initially agreed to sign an affidavit that he failed to inform defendant of the firearm enhancement, but then refused to sign. The circuit court summarily dismissed the petition in October 2006, finding that the lost plea claim was based on conclusory allegations.

¶ 8 On appeal, defendant contended that his petition stated the gist of a meritorious claim regarding the lost plea. We summarized his claim:

> "[D]efendant seeks to rely on not being told that he faced a sentencing enhancement of 25 years for proximately causing the first degree murder of Fowler to explain his rejection of an offer to plead guilty and receive the minimum sentence of 20 years for first degree murder. The defendant does not deny that he was duly informed that he faced up to 60 years if convicted of first degree murder. Nonetheless, he contends had he been informed that he

> faced a minimum sentence of 45 years by his pretrial attorney, he would have accepted a plea offer of 20 years purportedly extended in February 2001." *Miller*, 393 Ill. App. 3d at 635.

In affirming the summary dismissal, we found the affidavits of defendant and his mother to be self-serving and concluded that defendant rejected the 20-year minimum sentence for first degree murder because he chose to assert self-defense at trial knowing he faced up to 60 years for first degree murder. We noted that his actual 47-year sentence for murder was well within the known unenhanced sentencing range.

¶ 9 In 2011, defendant filed a *pro se* motion for leave to file a successive post-conviction petition, including in relevant part the lost plea claim and various claims based on Matthews' attached affidavit. Matthews averred that, when Fowler entered the apartment "with his hands to his side down towards the rear of his thigh," defendant drew a gun, and Matthews immediately took cover with her son before she heard gunshots. In March 2011, the circuit court denied defendant leave to file that successive petition. In relevant part, the court found that Matthews' new evidence would not change the outcome because she saw defendant draw his gun, did not see the shooting as she took cover, and Casiel and Hendrix identified defendant as the shooter.

¶ 10 On appeal, defendant argued that he had not previously been able to properly raise the lost plea claim without counsel and that the law had changed since we affirmed the summary dismissal of the initial petition. We affirmed the denial of leave to file a successive petition, finding that the lost plea claim was barred as *res judicata* and that defendant failed to show the requisite cause and prejudice to file a successive post-conviction petition. While defendant did not have counsel in the circuit court on his initial petition, he had counsel for his appeal of its summary dismissal. We accepted *arguendo* defendant's claims that there had been a 20-year

plea offer and that pre-trial counsel did not mention the firearm enhancement but rejected as self-serving defendant's assertion that he would have accepted the 20-year plea had he known of the 25-year enhancement when he knew he faced up to 60 years for murder. While defendant argued at length that the law had changed since we reviewed the summary dismissal, we rejected that contention.

¶ 11 In November 2013, defendant filed another *pro se* motion for leave to file a successive post-conviction petition. He again raised the lost plea claim, claiming for the first time that (1) pre-trial counsel advised him "he could only be sentenced between 20 to 30 years" in prison if he rejected the plea offer and (2) pre-trial counsel "Lawerance E. Vance" was not a licensed attorney when he gave his erroneous advice. In support of this claim, he attached a February 2013 letter from the Attorney Registration and Disciplinary Commission (ARDC). The letter recited that defendant made an ARDC complaint against "Lawerance N. Vance," but that Vance told the ARDC that he never represented defendant. Defendant then told the ARDC he was complaining about "Lawerance *E.* Vance" while "Lawerance *N.* Vance" never represented him. (Emphasis in original.) The ARDC then informed defendant that "there is no attorney licensed in Illinois by the name of Lawrence *E.* Vance *** and there does not appear to be an Illinois attorney named Lawerance *E.* Vance" (emphasis in original), so the ARDC file on defendant's complaint was closed.

¶ 12 In the petition, defendant also raised claims of newly-discovered evidence of actual innocence, ineffective assistance of trial counsel, and the State's failure to disclose exculpatory evidence regarding Willie Wells, who allegedly would corroborate that Fowler had a gun so that defendant had fired in self-defense. This was newly-discovered evidence that he had cause not to present earlier, defendant argued, because he was unaware of Wells's account until June 2012.

In a September 2012 affidavit, Wells averred that he was on the street near Fowler's apartment building purchasing marijuana when a group of four or five men walked by. They seemed angry and to be looking for someone. A short time later, the same men ran past Wells. One of the men was "slumped over the other" and had a gun in his hand, which fell to the ground when he fell. The man who had been supporting the man with the gun then picked up the gun and continued fleeing, leaving the man where he fell. Wells then saw a man running after the other men fire one gunshot into the ground. Wells left the scene as police officers responded, but then returned several minutes later as he had not received his marijuana. At the scene, an officer interviewed Wells, who "told him exactly what I seen" and provided his name and contact information. Wells became aware of defendant's case in June 2012 when he met defendant in prison, and Wells told his account to defendant.

¶ 13 In a March 2014 order, the court denied defendant leave to file a successive petition. The court found Wells's affidavit to be cumulative of defendant's testimony, not material in that Wells did not see what occurred inside the apartment nor did he identify the person who dropped the gun, and was unlikely to change the outcome. The court noted that the lost plea claim had been rejected by this court and found that defendant provided "no evidence necessitating a re-evaluation of this frivolous claim." This appeal followed.

¶ 14 On appeal, defendant contends that the court erroneously denied him leave to file a successive post-conviction petition because he stated the requisite cause and prejudice for two sets of claims. The first is that a non-attorney purporting to be his counsel gave erroneous advice that caused him to reject a plea offer. The other claims are ineffective assistance of trial counsel for not discovering, and the State's failure to disclose, Wells's account corroborating defendant's testimony that Fowler was armed.

¶ 15 Generally, a defendant may file only one post-conviction petition without leave of the court, which may be granted if the defendant shows an objective cause for not previously raising the claims of the proposed petition and prejudice from not raising them. 725 ILCS 5/122-1(f) (West 2012). Another basis for granting leave to file a successive petition is that the proposed petition raises a newly-discovered claim of actual innocence. *People v. Sanders*, 2016 IL 118123, ¶ 24. Well-pled factual allegations in a post-conviction petition and supporting documentation must be taken as true unless positively rebutted. *Id.* ¶ 48. Our review of the denial of leave to file a successive petition is *de novo*. *People v. Diggins*, 2015 IL App (3d) 130315, ¶ 7 (citing *People v. Wrice*, 2012 IL 111860, ¶ 50).

¶ 16 We find that defendant's claim that pre-trial counsel was not a licensed attorney as of the February 2001 plea offer is positively rebutted by the record. Even though a court reporter rendered the name of pre-trial counsel as "Lawrence Vance" or "Lawrence E. Vance," and Vance denied to the ARDC that he ever represented defendant, the record includes both a September 2000 appearance and a February 2001 agreed continuance order clearly signed by "Lawerance N. Vance" as counsel for defendant. Moreover, the online records of the ARDC do not include a Lawrence Vance or a Lawerance E. Vance but do include a Lawerance N. Vance licensed to practice law from 1977 through the present year. *BAC Home Loans Servicing v. Popa*, 2015 IL App (1st) 142053, ¶ 21 (we can take judicial notice of ARDC's online records).

¶ 17 Even if we assume that pre-trial counsel was not a licensed attorney when he erroneously advised defendant regarding his plea offer in February 2001, that does not alter that this court has twice rejected the lost plea claim. As noted above, we rejected it not because we discounted defendant's evidence of the plea offer and erroneous sentence advice, but because we rejected his self-serving assertion that he would have accepted the plea offer had he been properly

advised. Thus, whether the erroneous advice came from an attorney or a layman pretending to be one does not improve the lost plea claim. We also find no cause or prejudice in defendant alleging for the first time in his third post-conviction proceeding that pre-trial counsel not only failed to mention the sentencing enhancement but described a sentencing range of only 20 to 30 years for first degree murder.

¶ 18 As to defendant's claims based on Wells's affidavit, we agree with the circuit court that his testimony is unlikely to change the outcome so that defendant did not show prejudice. Matthews, Casiel, and Hendrix testified to not seeing Fowler armed, and Matthews's affidavit for the second post-conviction proceeding also does not place a gun visibly in Fowler's possession. Wells's account that Fowler dropped a gun in his flight from defendant and codefendant, which Casiel picked up, does not directly address whether Fowler showed – or even had – a gun while in his apartment. Moreover, against Wells's account, we have Officer Ephgrave's testimony that he saw defendant pursuing and firing at Casiel and never saw Casiel holding a gun. Lastly, even if Fowler showed a gun in his waistband to armed men in his apartment while in the process of asking the men to leave, that would not remotely justify defendant's actions of immediately drawing and firing his gun in Fowler's apartment – without Fowler having drawn his gun – and then pursuing four men into the street firing more shots.

¶ 19 We find no error in the circuit court's denial of leave to file a second successive post-conviction petition. Accordingly, the judgment of the circuit court is affirmed.

¶ 20 Affirmed.