

No. 1-14-3267

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 10273
	)	
KEVIN BARLOW,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

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

**ORDER**

¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition affirmed; the evidence of claimed actual innocence based on newly discovered evidence was not of such conclusive character that it would probably have changed the result on retrial.

¶ 2 Following a 2005 jury trial, defendant Kevin Barlow was convicted of first-degree murder and sentenced to 75 years in prison. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Barlow*, No. 1-05-3609 (2008) (unpublished order under Supreme Court Rule 23). Thereafter, defendant filed a *pro se* petition for relief under the Post-

Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He now appeals from the circuit court's summary dismissal of his petition. He contends that the court erred in dismissing his petition because he made a substantial showing of actual innocence of first-degree murder based on the newly-discovered affidavit of his codefendant. However, we disagree and find that the affidavit was not of such conclusive character that it would probably have changed the result on retrial. Therefore, we affirm the ruling of the circuit court of Cook County.

¶ 3 Defendant and John Stallworth were charged by indictment with the first-degree murder of Nina Boatman, attempted first-degree murder of Donnie Hayes, and multiple firearms offenses. Following his agreement with the State that, in exchange for his trial testimony, he would plead guilty of conspiracy to commit murder and the State would recommend a 12-year sentence, Stallworth testified as a witness for the State at defendant's trial. The following summary of the trial testimony is taken largely from our order on direct appeal in case No. 1-05-3609.

¶ 4 Lakeeta Lay testified that on the day before the shooting, she was a passenger in a black Mercury automobile driven by defendant. At that time she observed a Tech-9 gun, by the armrest inside of the car. Lay testified that defendant told her that his friend Boo had been shot. She initially denied that defendant said he was going to do anything to the person who shot Boo, but later admitted that on March 4, 2003, about three weeks after the shooting, she told a detective that defendant had pointed to the Tech-9 which she had previously seen in the car, and said that he was going to get even with the guys who shot Boo. She also admitted that on April 16, she gave a written statement to an assistant State's Attorney about what defendant had said to her about the shooting of Boo and what was going to happen to the people who shot Boo. On April

17, she repeated her statement under oath before the grand jury and testified that defendant told her that he, John Stallworth, and "Boney" (Michael Scott) "were going to retaliate."

¶ 5 John Stallworth testified for the State that in February 2003, he and Donnie Hayes were members of the Blackstones street gang, but that the two men were rivals who "controlled" different blocks in the South Shore area. Stallworth, defendant, Michael Scott, Challah Hall, and Tequan James ("Boo") controlled the block of 72nd and Phillips, while Hayes and others controlled the block of 74th and Phillips. Stallworth identified defendant as a member of the rival Gangster Disciples, but he considered defendant a friend, as the two had grown up together.

¶ 6 Events leading up to the attempted murder of Donnie Hayes and the murder of his aunt began in January 2003 when Boo James told Stallworth that someone had stolen his stereo. A friend of Hayes named Keno was bragging that he had stolen it. In mid-January, Boo James was shot. Defendant told Stallworth that he believed Donnie Hayes and his friends were responsible for the shooting and that he (defendant) wanted revenge. In early February 2003, while Stallworth and Scott were riding in Stallworth's car on 73rd and Yates, Hayes shot at the car. Stallworth phoned defendant and told him of the shooting. Defendant responded by telling Stallworth that they were "going to have to go get back at" Hayes.

¶ 7 At about 11:30 p.m. on February 8, 2003, defendant phoned Stallworth to ask about "the truck," which Stallworth understood to mean a black Tahoe that Hall and others occasionally rented. Stallworth told defendant where the Tahoe was parked and where the keys were kept. Stallworth testified that he and defendant planned to use the Tahoe to look for and retaliate against Hayes. Defendant, driving the black Tahoe, picked up Stallworth who, upon entering the Tahoe, saw a gun on defendant's lap. It was a Tech-9 that defendant had had for about a year.

While searching for Hayes in the Tahoe, they saw and picked up Boney Scott. Stallworth moved to the back seat and Boney sat in the front passenger seat. They were driving south on Yates when they noticed Hayes' green Bonneville and began following it. When Hayes pulled over to parallel park at 74th and Phillips, the Tahoe pulled up next to the passenger side of Hayes' vehicle. Stallworth saw that Hayes was the driver. From a distance of two or three feet, defendant fired on Hayes' car, five or seven times in rapid succession. Stallworth then asked for the gun and fired twice out the back window to prevent Hayes from following them. Defendant left the Tahoe at 74th and Crandon. He, Stallworth, and Boney Scott agreed to remain silent about the shooting before going their separate ways.

¶ 8 Donnie Hayes testified that in early February 2003, his aunt Nina Boatman had come from Wisconsin to visit Hayes and his mother. In the early morning hours of February 9, Hayes drove Boatman and her friend Deborah Salinger to the store in his green 1999 Bonneville. Hayes had seen defendant driving the black Tahoe several hours earlier. Just before the shooting, as Hayes was driving back from the store, he noticed that the same Tahoe was following his vehicle at 75th and Yates. Hayes stopped at 74th and Phillips, which was illuminated by several street lights. The Tahoe pulled up alongside. Hayes saw defendant, who was driving the Tahoe, and John Stallworth who was in the back seat behind defendant. Within three seconds, defendant began shooting into Hayes' car. Defendant fired six or seven shots, shattering the windows of Hayes' car. Salinger was able to duck down after the first two shots, but Boatman—who was in the front passenger seat—was unable to duck down until after the shots had been fired. Then the Tahoe drove away at high speed. Hayes drove his car around the corner to his house. He noticed that Boatman was bleeding from her abdomen. When Boatman reached the porch of the house,

family members came with towels to try to stop the bleeding. Hayes drove around the corner to the local fire department station for help. He banged on the door and rang the bell, but received no response. The truck returned and someone again fired at Hayes outside the firehouse. Hayes drove home. An ambulance arrived and took Boatman to Christ Hospital where she later died from her wounds.

¶ 9 Chicago police officer Shauntai Oquendo testified that she had responded to the police call of the Boatman shooting shortly before 1:55 a.m. Oquendo went to the Hayes house, which she described as "pandemonium." Although her focus was to render aid to Boatman, Oquendo spoke briefly with Hayes about the shooting. Oquendo's report referred only to the shooter being a black male. Officer Oquendo sent a flash message that the shooters drove a black Chevy SUV, but did not recall giving a specific model.

¶ 10 Chicago police detective Brian Johnson testified regarding his investigation of the shooting, including responding to a citizen tip which led him to the black Tahoe truck. Johnson testified that there were several bullet holes in the truck. The window glass protruded outward, leading him to believe shots were fired from inside the truck. He recovered five 9-millimeter bullet casings from the interior and directed an evidence technician to process the casings and the Tahoe for fingerprints.

¶ 11 Detective Johnson later met with Hayes at the police station. Hayes told Johnson that the shooter was a rival gang member named Kevin, who hung out in the area of 72nd and Phillips. Hayes identified the vehicle involved as a black Tahoe and identified defendant from a photo array. Hayes said he recognized another person in the Tahoe, but was unsure of his name.

¶ 12 Chicago police detective Richard Peck, a gang specialist familiar with the gangs that control the South Shore and with the gang affiliations of Hayes, Stallworth and defendant, spoke with Detective Johnson. Peck and his partner went to search for witnesses, interviewing the owners of the Tahoe and members of the Blackstones. On February 9, 2003, Peck learned that Hayes had identified defendant as the shooter, but did not issue an investigative bulletin for defendant until February 19. On February 25, 2003, Peck interviewed Hall at Stateville prison, where Hall was serving time on a drug possession conviction. Hall told Peck of the grudge between the groups over the crimes committed against Boo James, and that he had driven the black Tahoe and had given the keys to a friend of Stallworth.

¶ 13 On February 27, the police located Stallworth and brought him to the police station for questioning. That same day, the police searched defendant's home in his absence. Upon learning of the search, defendant voluntarily went to the police station. Hayes identified defendant and Stallworth in a lineup, but both were released without charges on March 1, while police sought Michael Scott and awaited the results of fingerprint analysis.

¶ 14 Forensic scientist Christi Fischer testified that she received six latent fingerprint lifts from the Tahoe, one of which was made by Stallworth. None of the prints matched defendant, though he could not be excluded by the results. Fischer relayed the results to Detective Johnson on March 3. On the following day, Detective Peck spoke with Lakeeta Lay, who told him that defendant had been in possession of a Tech-9 on February 8 and had spoken of the revenge plot.

¶ 15 On April 13, the police located Scott. On April 15, the police re-arrested Stallworth. After advising Stallworth of his constitutional rights and confronting him with the fingerprint evidence, Stallworth gave an inculpatory statement that also implicated defendant as the shooter.

On April 16, Stallworth admitted that he had tried "to keep Scott's name out." Stallworth then met with Detective Peck and an assistant state's attorney and gave a videotaped statement regarding the shooting. Peck testified that when Stallworth was asked what defendant did, Stallworth paused for approximately ten minutes before implicating defendant. The police brought defendant back to the police station on April 16, 2003. Defendant was arrested the following day.

¶ 16 The jury found defendant guilty of first-degree murder. The trial court sentenced him to 75 years in prison. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Barlow*, No. 1-05-3609 (2008) (unpublished order under Supreme Court Rule 23).

¶ 17 In June 2014, defendant filed in the circuit court a *pro se* postconviction petition which raised a claim of actual innocence of the murder of Nina Boatman and requested a new trial. In support of his actual-innocence claim, defendant attached as an exhibit to his petition the affidavit of John Stallworth in which Stallworth recanted "each and every element" of his trial testimony as a prosecution witness. The affidavit asserted that Stallworth's pretrial videotaped statement to two detectives and an assistant State's Attorney and his subsequent trial testimony, both of which inculpated himself and defendant in the murder, were false and coerced. Stallworth averred that the videotaped statement was coerced after he was told that his fingerprints were found in the Tahoe used in the shooting and that defendant had given a written statement implicating him in the shooting. The affidavit further stated that defendant was not in the Tahoe with Stallworth on February 9, 2003, and did not shoot at Donnie Hayes' vehicle on that date.

¶ 18 The affidavit was signed and notarized on June 2, 2010, which, the circuit court observed, was shortly before Stallworth's release from prison. The court noted that another petition exhibit, a letter to defendant from his sister, Tshayna Barlow-Culpepper, stated that Stallworth waited three more years to send his affidavit to defendant because Stallworth had told her he was worried that recanting his trial testimony would "sabotage his parole and have it revoked."

¶ 19 The petition was labeled a successive petition for postconviction relief, apparently under defendant's mistaken belief that the petition's untimeliness "waived" its status as an initial postconviction petition. The circuit court ruled that it was an initial petition and that defendant was not required to overcome the procedural hurdle of establishing cause and prejudice. The court determined that, although defendant did not file his postconviction petition until June 2014, he received Stallworth's affidavit through the prison mail system in December 2013. The court found that the affidavit constituted "newly discovered" evidence because defendant had no way of knowing before then that Stallworth intended to recant his testimony. The court also determined that the affidavit was material and not merely cumulative because it directly exculpated defendant and contained testimony not heard by the jury during defendant's trial. The court concluded, however, that the affidavit was not "of such conclusive character that it would probably change the result of trial" in light of the abundance of other evidence against defendant, including the testimony of Donnie Hayes and Lakeeta Lay. The court summarily dismissed the petition after concluding that defendant had failed to state the gist of a constitutional claim of actual innocence.



¶ 20 On appeal, defendant contends that summary dismissal of his postconviction petition was improper because it asserted an arguably meritorious claim of actual innocence, supported by the recantation affidavit of John Stallworth.

¶ 21 A postconviction proceeding is not an appeal; it is a collateral attack upon the prior judgment. *People v. Johnson*, 191 Ill. 2d 257, 268 (2000). The Act establishes a three-stage process for adjudicating a postconviction petition. The instant case involves the first stage of the postconviction process, during which the trial court independently assesses the petition, taking the allegations as true. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, a petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Id.* at 16. A petition lacks an arguable basis in law when it is grounded in "an indisputably meritless legal theory," for example, a legal theory completely belied by the record. *Id.* A petition lacks an arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Id.* 16-17. This court reviews the circuit court's first-stage summary dismissal of a postconviction petition *de novo*. *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 19.

¶ 22 A freestanding claim of actual innocence based on newly discovered evidence is cognizable in a postconviction petition because it is a violation of the Illinois Constitution's guarantee of due process for an innocent person to be convicted. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). A colorable claim of actual innocence is one that raises the probability that it is more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence. *People v. Edwards*, 2012 IL 111711, ¶ 33. To establish a claim of actual innocence, the evidence in support of the claim must be (1) newly discovered, meaning that it was discovered

after trial and could not have been discovered earlier through the exercise of due diligence; (2) material, meaning that it is "relevant and probative" of the defendant's innocence; (3) noncumulative, meaning that it "adds to what the jury heard"; and (4) of such a conclusive character that when considered with the trial evidence it would probably lead to a different result.

*People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 23 Here, defendant's claim of actual innocence is predicated on the affidavit of John Stallworth, recanting the incriminating testimony Stallworth gave at defendant's trial as an eyewitness and accomplice to the murder of Boatman. The recantation affidavit was executed seven years after the murder took place and five years after defendant was tried and convicted. The State does not dispute that Stallworth's recantation was not available at defendant's original trial and that defendant could not have discovered it sooner through vigilance, nor does the State question the material or noncumulative nature of the evidence. Rather, the State posits that Stallworth's recantation was not of such conclusive character that it would probably change the result on retrial. We agree.

¶ 24 The State argues that, even without Stallworth's trial testimony implicating defendant, the other trial evidence was more than sufficient for a conviction. However, the State's argument misstates the standard. We must consider the remaining evidence to determine whether Stallworth's recantation "places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict." *Coleman*, ¶ 97. For the following reasons, we determine such recantation testimony would not be conclusive enough to probably change the result upon retrial.

¶ 25 We begin by noting that the recantation of testimony is regarded as inherently unreliable. Consequently, the courts will not grant a new trial on that basis except in extraordinary circumstances. *People v. Steidl*, 177 Ill. 2d 239, 260 (1997). No such extraordinary circumstances present themselves here, where the trial produced evidence of defendant's guilt other than Stallworth's testimony and videotaped pretrial statement.

¶ 26 Stallworth was not the only eyewitness to the murder of Boatman, which was also witnessed by the intended victim, Donnie Hayes, who knew and recognized defendant. When Hayes pulled up at 74th and Phillips, he saw the Tahoe pull directly next to his car. Defendant was at the wheel of the Tahoe; John Stallworth was in the back seat behind him. Defendant fired about six or seven shots at Hayes' car. As defendant drove away, about two more shots were fired from the back of the Tahoe. This is consistent with what the detectives heard during their investigation. Hayes selected defendant's photograph from a photo array and subsequently identified him in a lineup and at trial. Even if Stallworth had not testified at defendant's trial, the testimony of a single witness who had ample opportunity to observe would have been sufficient to support a conviction. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007).

¶ 27 In addition to the testimony of Hayes, Lakeeta Lay testified that on the day before the shooting, she was a passenger in a car driven by defendant and observed a Tech-9 gun, by the armrest of the car. Defendant pointed to the Tech-9 and told her that his friend Boo had been shot and said he was going to get even with the guys who shot Boo.

¶ 28 While the State was not required to prove motive to sustain a murder conviction (*People v. Gonzalez*, 388 Ill. App. 3d 566, 586 (2008)), the State also presented evidence that the shooting was prompted by gang rivalry and retaliation for the shooting of defendant's friend Boo.

¶ 29 Our *de novo* review of Stallworth's affidavit indicates that it is not of such conclusive character that it would probably change the result if a new trial were granted. The major portion of the affidavit recounts the substance of Stallworth's videotaped pretrial statement and his trial testimony. The sum total of the affidavit's exoneration of defendant consists only of its final two sentences: "Stallworth states that Kevin Barlow was not in the vehicle with him on February 9, 2003. He also states that Kevin Barlow did not shoot at Donnie Hayes' vehicle on February 9, 2003." Significantly, the affidavit specifically avers: "Stallworth recants each and every element of his testimony." The affidavit is not of such conclusive character as to exonerate defendant of guilt. Because Stallworth denies "each and every element" of his trial testimony, it appears, though we cannot conclude with certainty, that he is also denying his own participation in the shooting. If the affidavit is to be interpreted to say that Stallworth himself was not present at the time of the shooting, we must question the basis for his claim that defendant was not a participant. In cases of actual-innocence claims where a codefendant alleges that the defendant did not participate in the crime, the courts look to determine whether the codefendant was in a position to have observed whether or not the defendant was present. Compare *Coleman*, 2013 IL 113307, ¶ 101 (allegedly exculpatory evidence of an individual claiming he was present but not involved in the crime and did not know who was involved, held to be "not relevant or probative of the defendant's innocence"), with *People v. Molstad*, 101 Ill. 2d 128, 135-36 (1984) (posttrial affidavits of five codefendants--four convicted of the crimes and one acquitted--that defendant was not present at the time of the attack on the victim and his vehicle, sufficient to require a new trial based on newly discovered evidence). Evidence of actual innocence must support total vindication or exoneration, and not merely present a reasonable doubt. *People v. Lofton*, 2011 IL

App (1st) 100118, ¶ 40, citing *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008); *People v. Green*, 2012 IL App (4th) 101034, ¶ 36. If Stallworth's affidavit is meant to convey that he himself was not present at the time of the shooting, we must question his claim that defendant was not present.

¶ 30 Even if Stallworth's affidavit is construed not to deny his own participation, it is still not so decisive as to cause a different result on retrial. The affidavit, if accepted by the trier of fact at a retrial, would serve merely to contradict Stallworth's own trial testimony through impeachment. We agree with the State that if Stallworth were to repeat his recantation as a defense witness upon a retrial, his testimony from the first trial and his pretrial videotaped statement, both of which detailed the participation in the crime by defendant and himself, would be admissible as substantive evidence of defendant's guilt. *People v. Thomas*, 354 Ill. App. 3d 868, 879-81 (2004); 725 ILCS 5/115-10.1 (West 2014). Moreover, the timing of the execution of the affidavit and its delayed delivery to defendant, coming as it did after Stallworth had served his own prison term and mandatory supervised release, could also be questioned by the State in the event Stallworth were to testify at a retrial.

¶ 31 Considering Stallworth's affidavit together with the trial evidence, as we must, we cannot say his testimony would probably cause a different result on retrial. *Coleman*, 2013 IL 113307, ¶ 96. Thus, defendant's claim of actual innocence is founded on a legal theory that is completely belied by the record and has no arguable basis in law or fact. See *Hodges*, 234 Ill. 2d at 26.

¶ 32 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County which summarily dismissed defendant's *pro se* postconviction petition.

¶ 33 Affirmed.