

No. 1-14-3533

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
Respondent-Appellee,)	Cook County.
)	
v.)	No. 06 CR 21440
)	
TREMAINE JOHNSON,)	Honorable
)	Charles P. Burns,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

Held: We affirm trial court's dismissal of petitioner-appellant's post-conviction petition at the first stage of the post-conviction proceeding where the petition and attached affidavits fail to establish that defendant is actually innocent.

¶ 1 The petitioner-appellant, Tremaine Johnson (hereinafter "defendant"), was convicted by a jury of first degree murder and during the commission of the offense, he personally discharged a firearm that proximately caused the death of another person. The trial court sentenced defendant

to 55 years in prison. Following his conviction, defendant filed his direct appeal challenging his 55 year sentence as excessive. In *People v. Johnson*, 2014 IL App (1st) 122611-U, this court affirmed defendant's conviction as not being excessive. On August 27, 2014, defendant filed his initial post-conviction petition alleging a sole claim of actual innocence. The claim was based on the affidavits of Larry Williams and Kiar Brown, who both averred that it was a girl, and not the boy, who shot the victim ice cream truck driver. After submission of the petition, the trial court summarily dismissed it. The trial court found that the affidavits did not show defendant was not at the scene or involved in the robbery that killed the victim. The court further concluded such testimony would only impeach the State's witnesses who testified defendant was in possession of a gun at the scene of the crime.

¶ 2 Before this court, defendant raises only one issue: whether the trial court erred in summarily dismissing his post-conviction petition at the first stage. Defendant argues his petition stated the gist of a constitutional claim entitling him to proceed to the second stage of a post-conviction proceeding. Based on the record before this court, we find no errors with trial court's handling of defendant's petition and affirm its dismissal at the first stage.

¶ 3

JURISDICTION

¶ 4 Defendant's post-conviction petition was dismissed by the trial court on September 29, 2014. Defendant timely filed his notice of appeal on October 15, 2014. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rule 651 governing appeals in post-conviction proceedings. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 651 (eff. Feb. 6, 2013).

¶ 5

BACKGROUND

¶ 6 Defendant was charged with the first degree murder of Hector Jimenez, an ice cream truck driver. At trial, Savarsia Florence testified that on August 12, 2006, at about 6:30 p.m., she was on the front porch of a friend's house located at 18th Street and Harding Avenue.¹ She was hanging out with a few friends. When Florence heard the familiar sound of the neighborhood ice cream truck coming, she walked across the street to the truck and ordered an ice cream cone. Florence was the only person at the truck until a girl she knew named Taheedah Cooper arrived with a boy Florence only knew by the nickname "Bodean." Florence identified defendant in court as "Bodean."

¶ 7 Florence was standing in front of the truck's service window when Cooper came on one side of her. Cooper asked the man in the ice cream truck for an ice cream sundae and then defendant arrived and stood on Florence's other side. Florence was standing behind Cooper and defendant, about five or six feet behind the truck when Florence heard Cooper say something. Defendant had a gun in his hand and he stuck his hand in the window then pulled it back out. Florence did not hear a gunshot and did not see the girl holding the gun. The truck quickly took off, going northbound on Harding until it crashed into a car. Defendant was walking off in the other direction toward 19th Street. Florence ran to where the truck had crashed and there were other people there trying to get the man out of the truck. Florence saw that the ice cream vendor was bleeding and eventually the man got out of the truck. As the man was getting out of the truck, his wallet fell out and Cooper, who had also walked over to the truck, picked it up.

¶ 8 Florence testified that she spoke to the police on August 15, 2006. She told the detective that she had been walking south on Harding when the ice cream truck crashed but did not tell

¹ We note that this section of Harding between 18th and 19th is a one-way street going north.

him that she had seen defendant or Cooper. Florence explained that she saw Cooper in the neighborhood a few days after the crash and that Cooper threatened her. Cooper told Florence not to mention her in relation to the robbery or the shooting. Cooper told Florence to keep Cooper's "name out of her mouth" or "they'd be asking who killed her." Cooper did not say anything about not telling the police about defendant. Florence spoke to detectives again on August 20, 2006 and told them everything she knew about the shooting including Cooper and defendant's involvement.

¶ 9 Patrick Murphy testified that he lived at 1851 South Harding. On August 12, 2006, a little before 7:00 p.m., he was waiting outside for his aunt, Donna Fitts, to pick him up. While he was waiting, he saw a boy and a girl in the empty lot that was just north of his house. He described the boy as being about 6 feet tall, between 17-19 years old, with a medium complexion and a low fade in his hair and the girl was about 16 years old with braids in her hair. Murphy also heard the familiar sound of the ice cream truck. Murphy's aunt arrived just as the ice cream truck was approaching. She parked in front of the house, on the west side of Harding. The truck stopped directly across from his aunt's car, on the east side of the street.

¶ 10 As the truck was approaching, Murphy saw the boy and girl wave down the truck. The boy went to the other side of the truck where the ice cream was being served and the girl stayed on the side of the truck that faced Murphy's house. Murphy did not see anyone beside the boy approach the truck. At this time, Murphy was searching his pockets and his aunt was searching her car for money to buy some ice cream. Murphy heard a noise that sounded like an "air sound" or a "little peck," which drew his attention back toward the truck. The boy Murphy had seen earlier was moving south toward 19th and Harding. Murphy could see that he had a gun in his hand which he then put into his front pocket. The boy then went east on 19th Street. The ice

cream truck headed north on Harding toward 18th Street. The truck hit a curb and crashed into a Cadillac.

¶ 11 Murphy spoke to the police that night and, two days later, went to the police station with his step-father. Murphy identified the girl from a photo array. He also identified the defendant as the boy he saw by the ice cream truck who then walked away after the "peck" sound.

¶ 12 Donna Fitts testified that on August 12, 2006, she drove to her niece's house to pick up her kids, Patrick and Kianna. When she arrived Patrick was waiting outside. There was an ice cream truck parked on the opposite side of her. Fitts noticed a girl and a boy walk across the front of her car and go up to the truck. Fitts estimated the pair to be in their early 20s. Fitts testified that she lost sight of the pair when they went to the service window on the other side of the truck. She further testified that she was searching for money for ice cream when she heard a "pop" sound. A few seconds later, she saw the boy and girl leaving from the service side of truck. The truck was now cruising down the street. At first, the boy and girl were both going south toward 19th Street but the girl crossed the street and went north, the same direction as the truck. Fitts did not see the boy with a gun. She called 911 and then went down the street to check on the ice cream truck driver. Two days later, on August 14, she went to the police station, looked at photo arrays, and identified a photograph of Cooper as the girl she saw at the scene. On August 22, Fitts reviewed a photo array and identified a photograph of defendant as the boy she saw at the scene.

¶ 13 Officer Reyes Sanjaunero and his partner were on a beat patrol on August 12, 2006, when he observed an ice cream truck on the front lawn of 1810 South Harding. There was a large crowd surrounding the truck. He cleared a path and entered the truck. Inside, he observed the victim slumped between the steering wheel and the front seat. The victim stated that he had been

shot and pulled up his shirt to show the officer his wound. Officer Sanjaunero observed a gunshot wound and called for emergency services. The victim died at the hospital.

¶ 14 After the shooting, defendant fled by bus to Atlanta, Georgia. Defendant later returned to Chicago and was arrested on August 18, 2006, at a bus station near 200 West 95th Street. At the conclusion of the trial, the jury found defendant guilty of first degree murder. The jury also found that during the commission of the offense of first degree murder, defendant personally discharged a firearm that proximately caused death to another person. Defendant's motion for a new trial was denied and the trial court sentenced him to 30-years for first degree murder and an additional 25-year term pursuant to the mandatory firearm enhancement.

¶ 15 On direct appeal, defendant did not challenge his conviction for first degree murder. The only issue he raised was that his sentence was excessive in light of the mitigating circumstances he presented below. In an Order dated June 27, 2014, this Court affirmed defendant's sentence. *People v. Johnson*, 2014 IL App (1st) 122611-U.

¶ 16 On August 27, 2014, defendant filed the petition for post-conviction relief which is the subject of this appeal. Defendant's petition set forth a claim of actual innocence based on newly discovered evidence. In support of his petition, defendant attached the affidavits of Larry Williams and Kiar Brown. Defendant alleged that both Williams and Brown were witnesses to the shooting and saw someone other than defendant commit the crime. The Williams affidavit stated that on August 12, 2006, Williams was at the corner of 18th and Harding when he noticed an ice cream truck cross 19th Street. He saw the truck pull over and noticed a boy and girl cross the street and approach the service window. The young women "said something pull out a black gun shot once, the boy run towards 19th Street and ran up 19th Street [sic]. The girl ran behind the truck. I was scared and I went home." In the Brown affidavit, she stated that on August 12,

2006, she saw an ice cream truck pull over on the 1800 block of Hardin. A girl and boy came over to the ice cream truck and it looked like a line was forming to buy ice cream. Brown avers that "a girl with braids with a red shirt and blue jean say something to the driver then up a gun and shot the driver once [sic]." The truck started to move towards 18th Street. The boy that was behind the girl ran south and the girl ran towards the truck. Brown stated that she did not come forward because she did not want to put herself in danger. She ended her affidavit with "I know someone is sitting in jail innocent of the crime and I'm willing to testify to the matter at hand."

¶ 17 On September 29, 2014, the trial court summarily dismissed defendant's post-conviction petition. In its order dismissing the petition, the trial court stated:

In the affidavits of both Williams and Brown, each testifies that on August 6, 2006 at the scene of the crime, they saw a young man and young woman walk up to the ice cream truck in which a woman, described as wearing a red shirt and blue jeans, pointed a gun at the victim, Hector Jimenez, shooting him. In these affidavits, Williams and Brown attack the notion that [defendant] did not shoot the firearm that killed the victim; however the affidavits do not present that [defendant] was not at the scene during the commission of the crime. In actuality, it corroborates the testimony of the witnesses at trial that a man and a woman, identified as [defendant] and Taheeda Cooper, committed armed robbery and killed the victim during the commission of the robbery. Further, the affidavits of Williams and Brown merely impeach the testimony of Florence and Patrick Murphy that [defendant] had a gun. This alone is not exculpatory evidence that would conclusively lead to a different result at trial.

Because the testimony of Williams and Brown is not evidence which would probably change the result on retrial due to the fact that it would merely impeach the notion that [defendant] did not shoot the firearm that killed the victim and corroborates the testimony of the witnesses at trial that man and a woman, identified as [defendant] and Taheeda Cooper, committed the crime, [defendant's] claim of actual innocence fails.

¶ 18 Defendant timely filed his notice of appeal from the summary dismissal of his post-conviction petition.

¶ 19

ANALYSIS

¶ 20 Defendant raises only one issue on appeal: whether the trial court erred in summarily dismissing his post-conviction petition alleging actual innocence.

¶ 21 The Post-Conviction Hearing Act establishes a means for a criminal defendant to attempt and seek redress for substantial violations of constitutional rights occurring in his original trial or sentencing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). A post-conviction proceeding is not a continuation of the original proceeding, but a collateral one, however, "issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata* and issues that could have been raised but were not, are considered waived." *Id.* at 456.

¶ 22 The Post-Conviction Hearing Act contains a three-stage procedure for relief. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). Within the first 90 days after the petition is filed and docketed, a trial court shall dismiss a petition summarily if the court determines it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If the petition is not dismissed as being frivolous or patently without merit, the court then orders the petition to be docketed for further consideration. 725 ILCS 5/122-2.1(b) (West 2014). At a first stage hearing, a trial court should consider "the petition's substantive virtue rather than its procedural compliance." *People v. Hommerson*, 2014 IL 115639, ¶ 11. While the threshold to survive a first stage review is low, a petitioner is not excused from supplying a "sufficient factual basis to show the allegations in the petition are 'capable of objective or independent corroboration.'" *People v. Allen*, 2015 IL 113135, ¶ 24 citing *People v. Collins*, 202 Ill. 2d 59, 67 (2002). A petition should be dismissed as frivolous or patently without merit only "if the petition has no arguable basis either in law or fact" – relying on "an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Meritless theories include those completely contradicted by

the record, while fanciful factual allegations may be "fantastic or delusional." *Id.* at 17. A court reviewing a petition at the first stage must take the allegations contained therein as true and construe them liberally. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). This court reviews the trial court's dismissal of a post-conviction petition at the first stage *de novo*. *Hodges*, 234 Ill. 2d at 1.

¶ 23 Under Illinois law, "a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process." *People v. Washington*, 171 Ill. 2d 475, 489 (1996). Actual innocence does not mean "whether a defendant has been proved guilty beyond a reasonable doubt, rather, the hallmark of actual innocence means total vindication or exoneration." *People v. Collier*, 387 Ill. App. 630, 636 (2008); *People v. Barnslater*, 373 Ill. App. 3d 512, 521 (2007) (actual innocence requires that a defendant be free of liability not only from the crime of conviction, but also any related offense).

¶ 24 In order to succeed under a claim of actual innocence based on newly discovered evidence, the evidence put forward as part of the petition must be "newly discovered." Our court has defined "newly discovered" as "evidence that was not available at defendant's original trial and that the defendant could not have discovered sooner through diligence." *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). "The defendant bears the burden of showing no lack of due diligence on his or her part." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21 citing *Barnslater*, 373 Ill. App. 3d at 525. The evidence must also be material and noncumulative and of such a conclusive nature that it would probably change the result on retrial. *Morgan*, 212 Ill. 2d at 154. A court should not consider evidence to be newly discovered "when the evidence presents facts already

known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable, or uncooperative." *Collier*, 387 Ill. App. 3d at 637.

¶ 25 Upon review of the record, we conclude the defendant's petition and the attached affidavits fail to set forth a claim of actual innocence, because, at the very least, the petition and affidavits demonstrate the defendant took part in the robbery. Important for our consideration is the fact that in neither the petition or by way of his own affidavit, does defendant claim that Cooper was in possession of the gun. This is despite the fact that defendant does not dispute that he was next to Cooper at the ice cream truck when the victim was shot. The affidavits attached to the petition mirror the testimony of the three State's witnesses presented at trial in that, moments before the robbery took place, defendant and Cooper approached the ice cream truck at the service side window and while both were in front of the window, the victim was shot. In bringing his petition, defendant in no way attempts to disassociate from Cooper, the robbery, or even the murder. He does not dispute that he was seen with Cooper in a vacant lot minutes before the shooting. He does not claim that Cooper acted independently or that he had no knowledge that Cooper was about to rob the victim. In fact, defendant never sets forth himself what occurred at the service window. Taking everything stated as true in defendant's petition, defendant's mere assertion that others saw Cooper hold and fire the gun, without more, fails to set forth claim of actual innocence.

¶ 26 Based on the above, we conclude that the petition and affidavits, on their face, fail to demonstrate a claim of actual innocence on the part of defendant. The petition has no arguable basis in law and the trial court did not err in dismissing defendant's petition at the first stage. We come to this conclusion without determining whether the affidavits constitute newly discovered evidence or whether the defendant has shown sufficient diligence in obtaining those affidavits.

¶ 27

CONCLUSION

¶ 28 For the foregoing reasons, we affirm the order of the trial court dismissing defendant's post-conviction petition at the first stage.

¶ 29 Affirmed.