

No. 1-15-0723

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. 08 CR 19852
)	
DETERTORING SANDERS,)	Honorable
)	Steven J. Goebel,
Petitioner-Appellant.)	Judge Presiding.

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

ORDER

Held: We affirm trial court's denial of defendant's motion for leave to file a successive post-conviction petition because the issue sought to be raised in the successive petition has been waived and, additionally, fails to establish defendant's actual innocence.

¶ 1 Following a bench trial, petitioner-appellant, Detertoring Sanders (hereinafter "defendant"), was convicted of being an armed habitual criminal after it was proven that Chicago

Police officers found defendant in possession of an AR-15 assault rifle. The trial court sentenced defendant to 10 years in prison. Following his conviction, defendant filed his direct appeal challenging the denial of his motion to quash his arrest and suppress evidence because there were no specific and articulable facts to justify the initial stop. This court affirmed the denial of the motion to suppress and quash. *People v. Sanders*, 2013 IL App (1st) 102696.

¶ 2 Defendant filed his initial post-petition conviction on April 27, 2013. In this initial petition, defendant raised several issues concerning his arrest and trial. This initial petition was summarily dismissed by the trial court, which this court affirmed on appeal. *People v. Sanders*, 2013 IL App (1st) 112085-U. Defendant then filed a motion seeking leave to file a successive post-conviction petition based on a claim of actual innocence. In support of this claim, defendant attached the affidavit of Clifton Hall who averred that the arresting officer, Officer Dolen, and Joseph Pearson set up defendant. The Hall affidavit further stated that arresting Officers Dolen and Triantafillo are on the "Bond List," a listing of Chicago Police officers with complaints against them. The trial court denied defendant leave to file the successive petition.

¶ 3 Before this court, defendant raises only one issue: whether the trial court erred in denying him leave to file his successive post-conviction petition based on a claim of actual innocence. Based on this court's review of the petition and record, we find no error with the trial court's order denying defendant leave to file a successive post-conviction petition because the issue sought to be raised has been waived. Moreover, the affidavit does not show defendant to be actually innocent of the convicted crime.

¶ 4

JURISDICTION

¶ 5 Defendant's successive post-conviction petition was dismissed by the trial court on January 12, 2015. Defendant timely filed his notice of appeal on February 11, 2015.

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).

¶ 6

BACKGROUND

¶ 7 On the evening of October 5, 2008, defendant was arrested at the intersection of 79th and Halsted after the police found an AR-15 rifle on the backseat of the vehicle defendant was driving. Prior to the arrest a concerned citizen had flagged down Officer John Dolen of the Chicago Police and relayed to him that she had just seen a man load a "machine gun" into a car. The citizen gave a description of that individual along with a description of the car and a license plate number. Officer Dolen, along with Officers Wagner and Triantafillo patrolling in a separate car, located the car at 79th and Halsted. Officer Dolen parked at the rear of the vehicle while Officers Wagner and Triantafillo parked at front. Officer Wagner got out of the car and identified himself as a police officer. He began to approach the driver's side door when he noticed the rifle in the backseat, shouted "gun," and ordered the individual, the defendant, out of the car. After removing the defendant from the car, Officer Triantafillo recovered the rifle from the back seat.

¶ 8 Before trial, defendant moved to quash his arrest and suppress the rifle. At the hearing on defendant's motion, Officers Dolen and Wagner were called to testify. Officer Dolen testified that on October 5, 2008, he was patrolling near 79th and Normal when he was flagged down by an unidentified female he had never met before. She relayed to Officer Dolen that she had just observed a man take a "machine gun" from somewhere near a garbage can and place it in a car. She informed Officer Dolen that this individual was black, 30 to 35 years old, and was wearing a

red coat and blue jeans. She further relayed that the car was a gold or brown Chrysler with the license plate number A739050, and was headed north on Halsted.

¶ 9 While Officer Dolen testified that he did not call the plate number into the police station or dispatch, he did relay the information to Officers Wagner and Triantafillo who were also working in the area. Both police cars made their way to Halsted and began traveling north. At the intersection of 75th and Halsted, the officers encountered a vehicle matching the description they had just received. Defendant was the driver and sole occupant of the vehicle. Officers Wagner and Triantafillo were parked at the front while Officer Dolen was at the rear. Officer Dolen testified that Officer Wagner began to approach the driver's side door, at a certain point yelled "gun" and ordered defendant out of car. Officer Triantafillo recovered an AR-15 rifle from the back seat. Officer Dolen testified that he did not take any of the concerned citizen's personal information and did return to the area where they talked but he could not find her. When questioned by the court, Officer Dolen stated the rifle was recovered from the back seat.

¶ 10 Officer Wagner's testimony at the motion to suppress hearing mirrored that of Officer Dolen. He explained that Officer Dolen radioed them and relayed information concerning an individual with a "machine gun." He testified that Officer Dolen provided a description of the individual, the make/model of the car, and a license plate number. Upon locating the described vehicle, Officer Wagner exited his vehicle and identified himself as a police officer. He testified that upon approaching the vehicle he noticed the AR-15 on the back seat, yelled "gun," and ordered defendant out of the car. He also testified that Officer Triantafillo recovered the rifle from the back seat.

¶ 11 After hearing the above testimony and argument from the parties, the trial court denied the motion to quash and suppress. The parties then proceeded to trial. At trial, Officer Wagner

was the sole witness to testify and it was consistent with his testimony from the suppression hearing. He identified defendant as the driver and only occupant of the vehicle. He testified that as he approached the car, from about three feet away, he could see an AR-15 on top of a black bag on the back seat of the car. He arrested the defendant while Officer Triantafillo retrieved the rifle.

¶ 12 After recovering the rifle, he removed a 10-round magazine from the bottom. Inside the black bag were two 30-round magazines: one with 18 live rounds and the other was empty. The gun, magazines, and bag were inventoried and introduced into evidence. After his arrest, defendant told police that Clifton "Flex" Hall paid him \$15 to drive the car to another location. Officer Wagner testified that the car did belong to Clifton Hall. Officer Wagner further testified that Clifton Hall was in a vehicle behind defendant's the night of the incident though it was Officer Dolen who spoke with Hall. Hall was not arrested at the scene. The State then entered into evidence certified copies of Sanders' qualifying felony convictions. After the State rested, defendant moved for a directed verdict, which the court denied. Defendant did not put on any evidence.

¶ 13 The trial court found defendant guilty of being an armed habitual criminal and sentenced him to ten years' imprisonment. In his direct appeal, defendant argued the trial court erred in denying his motion to quash arrest and suppress evidence because there were no specific and articulable facts to justify a stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). *People v. Sanders*, 2013 IL App (1st) 102696. This court affirmed the denial of his motion to quash and suppress. *Id.* ¶ 32.

¶ 14 Sanders filed a *pro-se* post-conviction petition on April 27, 2011. In this petition, he argued that his Fourth Amendment rights were violated when police arrested him based on

information obtained from a citizen; the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it destroyed video footage of the area in which he was arrested; Officer Dolen committed perjury by saying he never called in the Chrysler's license plate number; Sander's right to confront the witnesses against him was denied; and his due process rights were violated when the rifle was not properly inventoried and when the Illinois Department of Corrections required him to serve 85% of his sentence. The trial court summarily dismissed the petition. On appeal, his appointed counsel filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court granted counsel's motion and affirmed the dismissal of defendant's petition. *People v. Sanders*, 1-11-2085 (April 11, 2013) (unpublished order pursuant to Supreme Court Rule 23).

¶ 15 On December 8, 2014, Sanders filed a *pro se* petition for leave to file a successive post-conviction petition. In this petition, defendant argued that he was actually innocent of the offense. He supported his claim of actual innocence with the affidavit of Clifton Hall, who attested that defendant was set-up by Officer Dolen and Joseph Pearson, and the "Bond List" which showed Officers Dolen and Triantafillo had complaints of police misconduct filed against them. Defendant asserted he could not obtain the affidavit from Hall earlier because he was unable to locate Hall until the two were placed together at Shawnee Correctional Center.

¶ 16 The affidavit of Hall averred that on October 5, 2008, he witnessed Officers Dolen and Wagner "charge" defendant for an AR-15 rifle. Hall states that while in the area of 79th and Wentworth, Hall observed Joseph Pearson be "coerced" over the phone by Dolen to set up a crime in exchange for leniency for Pearson's heroin possession. Pearson removed an AR-15 rifle from his car and Hall allowed Pearson to place it in the "rear trunk area" of Hall's car.

¶ 17 On January 12, 2015, the court denied defendant leave to file his successive post-conviction petition. The trial court first found that defendant failed to explain why he was unable to obtain an affidavit from Hall earlier given that he knew the car belonged to Hall at the time he was arrested and therefore, had a relationship with Hall. While the trial court found that Hall's testimony would not be cumulative, the court found Hall's claim that Joseph Pearson and Officer Dolen set up defendant was irrelevant and unsupported. The court explained that Hall's affidavit did not refute the fact that defendant was driving in the automobile with the AR-15 in the back seat at the time of his arrest. The court explained that, Hall's affidavit merely provides an explanation for how the gun arrived in the back-seat of Hall's car. Based on this, the court concluded, even taking Hall's affidavit as entirely true, defendant would still have been convicted of armed habitual criminal because it remained uncontested that he was the driver and sole occupant of the car with a firearm in the back seat. Finally, the court rejected the use of the "Bond List."

¶ 18 Defendant timely filed his notice of appeal.

¶ 19 ANALYSIS

¶ 20 Defendant raises only one issue on appeal: whether the trial court erred in summarily dismissing his successive post-conviction petition alleging actual innocence. The defendant's petition relies on the affidavit of Clifton Hall, who avers that he allowed Joseph Pearson to place the AR-15 into the trunk of Hall's Chrysler. In his petition, defendant then states that he was unaware that the AR-15 was in the trunk when he drove the vehicle. While Hall and defendant were present at the scene of the arrest, neither states that the gun was removed from the trunk instead of the back seat.

¶ 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 While the supreme court has made clear that the Post-Conviction Act contemplates only one post-conviction filing, it also recognized that Illinois case law has developed "two bases upon which the bar against successive proceedings will be relaxed." *People v. Edwards*, 2012 IL 111711, ¶ 22. The first basis for allowing a successive filing is when a petitioner can demonstrate "cause and prejudice" for the failure to raise the claim earlier. *Id.* citing *Pitsonbarger*, 205 Ill. 2d at 459. The second exception is known as the "fundamental miscarriage of justice" exception. *Id.* To meet this exception, a petitioner must show actual innocence. *Id.* In order to move forward with a successive proceeding, a petitioner must first obtain "leave of court" and support this request with enough documentation to allow a circuit court to make that determination. *Id.* The *Edwards* court explained that with respect to a claim of actual innocence raised in a successive filing, "leave of court should granted when petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted him in the light of new evidence." *Id.* ¶ 24. The *Edwards* court specifically left open the question of the proper standard of review to apply to this situation. See *Id.* ¶ 30 (declining to decide whether an abuse of discretion standard or *de novo* standard applies). We do not resolve the issue here because under either an abuse of discretion or the more deferential *de novo* review, defendant's petition and attached affidavit fail to set forth a colorable claim of actual innocence.

¶ 23 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).

¶ 24 In order to succeed under a claim of actual innocence, 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 *People v. Barnslater*, 373 Ill. App. 3d 512, 525 (2007). 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." *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008).

¶ 25 Upon review of the record, we conclude the circuit court did not err in denying defendant leave to file a successive petition, because the issue raised by the petition, the location of the AR-15, was raised and discussed at both the suppression hearing and the trial. At the suppression hearing, Officer Wagner testified that as he approached the vehicle, he identified the AR-15 on top of the back seat. He further testified that Officer Triantafillo then removed the AR-15 from the back seat. Officer Dolen also testified at the suppression hearing that Officer Wagner shouted "gun" after observing the AR-15 on the back seat and Officer Triantafillo then recovered it from the back seat. Officer Triantafillo was not called to testify.

¶ 26 At trial, Officer Wagner, the only witness to testify, again stated that the AR-15 was visible from outside of the car because it was laying the back seat. Defense counsel also cross-examined Officer Wagner on the location of the AR-15, and he again confirmed it was lying on top of the back seat. Officer Wagner also testified that defendant was present at the scene when the gun was removed from the backseat. He testified that as he handcuffed defendant, Officer Triantafillo was recovering the gun from the back seat. Defendant did not call Officer Triantafillo to question him directly about the recovery of the AR-15. In finding the defendant guilty, the trial court specifically relied on the fact that the gun was recovered from the back seat. Defendant did not challenge location of the AR-15 on direct appeal.

¶ 27 Because the issue of the location of the AR-15 was discussed at trial, and not raised on direct appeal, defendant has waived any challenge to this issue. See *People v. Barrow*, 195 Ill. 2d 506, 518-19 (2001) (stating that under the Post-Conviction Act issues that could have been presented on direct appeal, but were not, are considered waived).

¶ 28 We also agree with the trial court that the affidavit of Clifton Hall does nothing to establish the actual innocence of the defendant. See *Barnslater*, 373 Ill. App. 3d at 521 (stating that actual innocence requires that a defendant be free of liability not only for the crime of conviction but also any related offenses). Defendant was convicted of being an armed habitual criminal. 720 ILCS 5/24-1.7(a) (West 2014). This required the State to demonstrate that defendant "possessed" any firearm after having been convicted of a total of 2 or more of the offenses listed.¹ *Id.* Constructive possession may be established by evidence that permits the inference that defendant knew what the object was, where it was located, had previously obtained it, or intended to obtain or retrieve it at some future point. *People v. Givens*, 237 Ill. 2d

¹ There is no dispute that defendant had prior convictions which met the offenses under 720 ILCS 5/24-1.7(a)(1)-(3) (West 2014).

311, 335 (2010). Here, the trial court found that given the size of the AR-15 and its location on the back seat, the defendant had to have noticed it. Based on this, the court found that defendant had constructive possession of the AR-15. How the weapon came to be in the back seat is irrelevant to whether defendant possessed the weapon for the purpose criminal liability. Moreover, while Hall was present at the scene of the arrest, he does not discuss the AR-15's recovery. Accordingly, Hall's proposed testimony as to how the AR-15 ended up in the back seat does not establish defendant's actual innocence.

¶ 29 Based on the above findings, the trial court did not err when it denied defendant's motion for leave to file a successive post-conviction petition.

¶ 30 **CONCLUSION**

¶ 31 For the foregoing reasons, we affirm the order of the trial court denying defendant leave to file a successive post-conviction petition.

¶ 32 Affirmed.