2017 IL App (1st) 152018-U

FIFTH DIVISION
June 16, 2017

No. 1-15-2018

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 99 CR 10375 (04)
	)	
LINORD THAMES,	)	
	)	Honorable
Defendant-Appellant.	)	Angela Munari Petrone,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's second-stage dismissal of defendant's successive postconviction petition is affirmed where defendant's newly discovered evidence was insufficient to support his claim of actual innocence.

¶ 2 Defendant Linord Thames appeals the second-stage dismissal of his successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, defendant argues the circuit court erred in dismissing his successive petition at the second stage without a third-stage evidentiary hearing because (1) he presented newly discovered

evidence that would change the result on retrial, (2) the circuit court applied an incorrect legal standard in evaluating his actual innocence claim, (3) the circuit court erred in making a credibility determination at the second stage, and (4) "there were two errors [in defendant's trial] that would not occur on retrial." For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of first degree murder, aggravated kidnapping, and attempted armed robbery. He was sentenced to serve 28 years for first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) and 14 years for aggravated kidnapping (720 ILCS 5/10-2(a)(1) (West 1998)) in the Illinois Department of Corrections (IDOC), the sentences to run concurrently. The evidence at trial established that on March 26, 1999, the victim Quinton Kirkwood had been playing dice in an apartment located on South Homan Avenue in Chicago. During the course of the game, the victim had won several thousands of dollars while James Williams (Williams) had lost money. The following day, on March 27, 1999, the victim's body was discovered in a rear basement stairwell at Christiana Avenue in Chicago. The victim had been shot to death. Thereafter, on April 30, 1999, defendant and his codefendants Williams, Antonio Thomas (Antonio), Duel Thomas (Duel), and Jeff Henderson (Henderson) were charged by indictment with first degree murder, aggravated kidnapping, kidnapping, and attempted armed robbery for the shooting death of the victim. The State prosecuted defendant on a theory of accountability.

¶ 5 A. Trial Proceedings

¶ 6 The matter proceeded to a jury trial which resulted in a mistrial. At defendant's second trial, the State presented the testimony of the following eight witnesses.

¶ 7 1. Testimony of Patrick Foley

¶ 8 Chicago police detective Patrick Foley (Detective Foley) testified that on March 27, 1999, he was assigned to investigate the homicide of the victim. During the course of the investigation, the victim's mother, Katie Kirkwood (Kirkwood) provided the police with defendant's name. In their respective interviews with the police, codefendant Henderson and witness Maurice Thomas (Maurice) implicated defendant as being involved in the incident.

¶ 9 Thereafter, on March 29, 1999, Detective Foley interviewed defendant. At the beginning of the interview, Detective Foley advised defendant of his *Miranda* rights because defendant "had been implicated by others" as being involved in the incident. During the interview, defendant stated that on March 25, 1999, the victim, Williams, Duel, and Frederick Laws (Laws) had participated in a dice game in an apartment located on South Homan Avenue in Chicago. The victim was "the big winner" of the game. Defendant lost $150 at the game. After the game ended and the victim left the apartment, Williams directed defendant to "go find Duel" and "get the money back from [the victim]." Defendant followed Williams's instructions and went to find Duel. When he found Duel, defendant informed him that the victim had "a lot of money" and "[Williams] wants you to get the money back."

¶ 10 2. Testimony of ASA Kelli Husemann

¶ 11 Assistant State's Attorney Kelli Husemann (ASA Husemann) testified that on March 30, 1999, she prepared a handwritten statement based on the oral statements made by defendant in the presence of Detective Foley. The entire text of the written statement was admitted into evidence and published to the jury.

¶ 12 In the written statement, defendant indicated that on the day of the shooting, March 26, 1999, he had participated in a dice game with the victim, Williams, Duel, Antonio, Henderson,

Laws, Keith Walker (Walker) and other individuals in an apartment located on South Homan Avenue. During the course of the game, Duel left to go to Laws's uncle's house which was located near the apartment. Near the end of the game, the victim had won approximately $2,500 while Williams had lost approximately $1,500. Williams then stared at defendant until they made eye contact and pointed to the victim. The victim was bent over and looking downwards to roll the dice. Williams mouthed to defendant, "go get Duel" so they could "get the money off of [the victim]."

¶ 13 Following Williams's instructions, defendant went to locate Duel at the home of Laws's uncle. There, defendant informed Duel the victim had won $2,500 while Williams had lost approximately $1,000 to $1,500 at the dice game. Defendant also stated to Duel that Williams wanted him to rob the victim and get his money back. Duel responded he could send another individual to the dice game "to kick in the door and take the money." Defendant indicated that was unnecessary and that Duel should wait outside until the victim left the apartment.

¶ 14 After their conversation, defendant returned to the apartment where the dice game was taking place. Shortly thereafter, Duel followed him into the apartment. When the victim noticed Duel, he "got jittery." He then passed out some money to the participants of the game, placed the rest of the money in his pocket, and left the apartment. Duel made eye contact with defendant, gave him "the yes sign which was Duel nodding his head up and down and opening his eyes wide," and also left. Defendant and Williams then waited in the apartment for Duel to return with the victim's money.

¶ 15 Thereafter, approximately five minutes later, Duel returned to the apartment and stated he did not have the money because the victim "took off." Duel also informed defendant and Williams that he "wasn't going to do it like that," meaning rob the victim, because the people in

the neighborhood knew Duel's face and would observe him chasing the victim. After another five minutes had passed, the victim returned to the apartment. As soon as the victim arrived, Duel left so that the victim would not recognize him as the individual who had just chased him. Shortly thereafter, Ronnie Wheatley (Wheatley) arrived and asked for Williams. Arrangements were made for Wheatley to drive the victim to his home in Williams's automobile. The victim then left the apartment with Wheatley.

¶ 16 About a minute later, defendant heard a strange sound outside of the apartment. He looked out the side window and observed Antonio grabbing the victim on the stairway. The victim was struggling to get away. Defendant informed Williams what he had observed but Williams said, "[b]e quiet." When defendant looked out the window again, he did not observe Antonio or the victim. After defendant and Williams exited the apartment, Wheatley informed defendant, "[s]ome m*** pulled a gun in people's faces. I don't play that shit." Defendant instructed Wheatley to "keep his mouth closed." Thereafter, defendant and Williams met Duel who informed them that Antonio had taken the victim to "go to [the victim's] house to get the money." Defendant then walked away.

¶ 17 Sometime later, defendant heard approximately nine gunshots. About a minute later, he observed Henderson driving a black vehicle at high speed out of an alley. Walker then approached defendant and indicated that defendant would be "in trouble" because Antonio had shot the victim. Defendant called Williams on the phone and informed him "things went bad" and related to Williams that Antonio had shot the victim. Williams then picked defendant up in his automobile and they spoke for approximately four minutes. Later, defendant met Duel and Antonio and confirmed that Antonio had shot the victim to death. Antonio indicated that Williams should not say anything about the incident. Defendant responded, "I ain't going to say

nothing about this." In the written statement, defendant indicated he knew "things didn't go as they should have," "he was caught up in the middle," and that he "knows now the whole idea of robbing the victim was a stupid idea."

¶ 18 ASA Husemann further testified that after defendant provided the statement, she read the entire written statement out loud, "line by line," with defendant. Defendant was also provided an opportunity to review and make changes or additions to the written statement. In addition, ASA Husemann, Detective Foley, and defendant signed each page of the written statement and initialed the changes made to the statement.

¶ 19 3. Testimony of Ronnie Wheatley

¶ 20 Wheatley testified he often ran errands for people in his neighborhood on South Homan Avenue. On March 26, 1999, he ran several errands for Williams and defendant while they were at a dice game in an apartment located on South Homan Avenue. When Wheatley returned to the apartment at approximately 9 p.m. that day, Williams, defendant, and the victim were there. Williams asked Wheatley to take the victim home but he refused because he had not been paid for his errands. Wheatley suggested that Williams drive the victim home himself. Williams, however, indicated he had to do something else and added, "[c]ome on, I got you." Wheatley left the apartment and started walking down the stairway with the victim. Then Antonio suddenly approached Wheatley, stuck a gun in his face, grabbed him by his jacket, and directed him to "get out" and "not say nothing." Antonio also grabbed the victim by his jacket and pushed him up against the wall. At this point in time, Wheatley ran away. When he returned to the apartment approximately 40 minutes later, he informed Williams that he did not appreciate having a gun in his face. Williams "smirked." Wheatley then went home.

¶ 21 The next morning, Wheatley and defendant spoke in front of a tire shop located in the

neighborhood. Wheatley was crying as he said the victim had been killed. In response, defendant stated, "Dam [sic], they wasn't supposed to kill him," "they was just supposed to have stuck him up." He also said, "you see these guys ain't playing, man, watch watch yourself." Wheatley left the neighborhood for a week because he thought his life was threatened.

¶ 22 Wheatley further testified he is a recovering addict with two prior drug convictions. He did not use drugs on March 25 or 26, 1999. In November 1999, he spoke with the police about the incident for the first time. He was in custody when he provided a written statement to an assistant State's Attorney about the incident, which he signed without reading. He denied, however, that he received anything in exchange for his trial testimony as he had already received Treatment Alternatives to Street Crime (TASC) probation.

¶ 23 4. Testimony of Frederick Laws

¶ 24 Laws testified he was friends with defendant for 20 years. On March 26, 1999, he attended Antonio's birthday party at his uncle's apartment located on South Homan Avenue. Duel, Antonio, Henderson, and Walter Pena (Pena) were also at the party. At approximately 8 p.m., defendant arrived and briefly stepped into a bathroom with Duel. When they came out, Laws heard defendant inform Antonio and Duel that the victim had won approximately eight thousand dollars in a dice game and that Williams "had a lick for them," meaning Williams wanted them to rob the victim. Defendant also asked Duel and Antonio if they wanted to "get [the victim]." Shortly thereafter, defendant, Duel, and Antonio left the party. Laws acknowledged he had been convicted of controlled substance violations in 1989 and 1992.

¶ 25 5. Testimony of ASA Fabio Valentini

¶ 26 Assistant State's Attorney Fabio Valentini (ASA Valentini) testified that based on the information provided to him by Pena, he prepared a written statement. The entire text of Pena's

written statement was admitted into evidence and published to the jury.

¶ 27 Pena's written statement indicated he had known defendant for two years prior to the incident. On March 26, 1999, Pena was attending Antonio's birthday party in an apartment located on South Homan Avenue. Later, defendant also arrived. He stepped out into the hallway with Duel for a few minutes and informed him the victim had won a lot of money from Williams in a dice game. Defendant then left. Thereafter, Duel, Antonio, and Henderson discussed "sticking up" the victim and returning Williams his money. During their discussion, Duel informed Antonio and Henderson that the victim had won seven thousand dollars from Williams. Then Duel, Antonio, and Henderson left the party. Thereafter, Pena discussed with Laws that defendant, Duel, Antonio, and Henderson "were going to rob the [victim]," and whether "they were really going to do it." Pena then left the party. Shortly thereafter, he heard gunshots and observed a black vehicle speeding out of an alley.

¶ 28 ASA Valentini further testified that after he finished handwriting Pena's statement, Pena read the first paragraph aloud. ASA Valentini then read the rest of the statement aloud as Pena read along. Pena was allowed to make changes or additions to the written statement.

¶ 29 6. Testimony of Walter Pena

¶ 30 Pena testified that near the end of March 1999, he attended Antonio's birthday party in an apartment located on South Homan Avenue. At the party, he observed Duel, Antonio, and Henderson, but he did not recall observing defendant there. Thereafter, on January 15, 2000, Pena provided a written statement to ASA Valentini regarding the incident. However, Pena claimed that everything he had said regarding defendant in that written statement was "incorrect and untrue." He had made up the entire statement because the police threatened him and he wanted to leave the police station.

¶ 31 7. Testimony of ASA Margaret Wood

¶ 32 Assistant State's Attorney Margaret Wood (ASA Wood) testified that on November 23, 1999, she obtained a written statement from Walker. The entire text of Walker's written statement was admitted into evidence and published to the jury.

¶ 33 In the written statement, Walker stated that at approximately 5:30 p.m. on March 26, 1999, he drove a black vehicle to South Homan Avenue. After playing dice with defendant and Williams, he attended Antonio's birthday party, and briefly left to visit a girlfriend. He drove Antonio's vehicle and left the black vehicle he had arrived in. When he returned to South Homan Avenue at approximately 10 p.m. that day, he found defendant, Duel, Antonio, Henderson, and Laws at the corner of the street. Walker learned that Antonio had thrown someone in the trunk of the black vehicle. Antonio informed Walker that, "[Williams] put me on a lick and I had to off him." Walker knew this to mean that Antonio had committed a robbery and had killed the victim. Later, Kirkwood pulled up and asked defendant if he had seen her son, the victim. Defendant responded, "no" and Kirkwood left. Walker then retrieved the black vehicle and drove home.

¶ 34 ASA Wood further testified that she read the statement aloud after it was written. She also made corrections to the statement per Walker's request. ASA Wood, a police detective, and defendant signed each page of the written statement and initialed the changes made to the statement.

¶ 35 8. Testimony of Keith Walker

¶ 36 Walker testified that at approximately 5 p.m. on March 26, 1999, he drove a vehicle to South Homan Avenue where he observed Williams and the victim playing dice in an automobile.

Thereafter, on November 23, 1999, he gave a written statement to ASA Wood regarding the incident but he disavowed portions of the statement at trial. He only admitted that he had observed defendant and had borrowed Antonio's vehicle on the night of the incident.

¶ 37 The State then rested. Defendant filed a motion for a directed verdict, which was denied.

¶ 38 9. Defendant's Evidence

¶ 39 Defendant testified on his own behalf. On March 26, 1999, he supervised a dice game in an apartment on South Homan Avenue. The victim and Williams participated in the game. Thereafter, defendant left to attend Antonio's birthday party which was taking place in the home of Laws's uncle located on South Homan Avenue. At the party, defendant informed Duel that Williams had requested he return to the dice game. Defendant then left the party and went back to the dice game. When he arrived, the victim left the apartment but returned five minutes later. Defendant then heard someone "hollering." He pulled the window curtains and observed Antonio holding the victim by his collar and pushing him against a wall. Defendant informed Williams but Williams instructed him to "be quiet." The next day, on March 27, 1999, defendant met Wheatley and indicated it was a "sad situation" and that he wanted to find out who killed the victim. Defendant also mentioned to Wheatley that he should be careful.

¶ 40 Defendant further disavowed portions of the written statement he had provided to ASA Husemann. Specifically, defendant claimed he did not know Duel and Antonio were planning to rob the victim. He denied informing Duel that Williams had a "lick" for him. He also denied informing Wheatley that the victim should not have been killed. In addition, defendant testified that he did not implicate himself in the planning of the robbery during his interviews with the police or ASA Husemann. Defendant initially testified he did not recall that ASA Husemann allowed him to read the written statement. He, however, acknowledged that she had read the

statement out loud to him and provided him with an opportunity to make corrections.

¶ 41 10. The Verdict and Posttrial Proceedings

¶ 42 After hearing closing arguments and deliberating, the jury found defendant guilty of first degree murder, aggravated kidnapping, and attempted armed robbery. Thereafter, defendant filed a motion for a new trial. At the hearing on the motion, Frank Askew (Askew) testified he was Wheatley's friend and former coworker. According to Askew, Wheatley had informed him before trial that if defendant did not give him any money, he would "take care of business." Wheatley also indicated to Askew that he was tired of being in jail, he did not have any cigarettes, and that defendant had visited other people in jail but not him. The circuit court denied defendant's motion. Defendant was then sentenced to serve concurrently 28 years for first degree murder and 14 years for aggravated kidnapping in the IDOC.

¶ 43 B. Direct Appeal

¶ 44 Following his conviction, defendant appealed, contending (1) his second jury trial violated double jeopardy because he was retried after the first trial had ended in a mistrial and alternatively, (2) he should be granted a new trial because the circuit court erred in allowing Wheatley's testimony to be admitted into evidence. This court affirmed the circuit court's judgment. *People v. Thames*, No. 1-02-0324 (2002) (unpublished order under Supreme Court Rule 23). Defendant filed a petition for leave to appeal to the Illinois Supreme Court, which was denied. *People v. Thames*, 213 Ill. 2d 573 (2005).

¶ 45 C. Postconviction Proceedings

¶ 46 1. Defendant's Initial Postconviction Petition

¶ 47 On January 30, 2008, defendant filed his initial petition for postconviction relief. Defendant alleged, *inter alia*, he was denied due process by (1) the State's failure to disclose

alleged benefits that were provided to Wheatley and Laws in exchange for their testimonies and Wheatley's alleged pending violation of his probation and (2) the State's presentation of false testimony from Wheatley and Laws. In support of his claims, defendant attached an affidavit to his petition from Laws. Laws averred his trial testimony, in which he stated defendant had asked Antonio to help Williams get his money back from the victim, was "totally false." He attested he did not observe defendant enter a bathroom with Duel or Antonio. Laws also did not hear defendant discuss robbing the victim with the two men at the party because it was "very loud." He claimed he had testified against defendant at trial because the prosecutors had informed him it was the only way for him to get out of jail.

¶ 48 On December 3, 2008, the State moved to dismiss defendant's petition arguing (1) the petition was untimely, (2) defendant's claims were barred by *res judicata* and waiver, (3) defendant failed to raise a claim of actual innocence, and (4) defendant's petition failed to demonstrate a constitutional violation.

¶ 49 Thereafter, on June 25, 2009, the circuit court granted the State's motion and dismissed defendant's petition at the second stage of the postconviction proceedings. In granting the motion, the circuit court found (1) defendant's petition was untimely because it was filed over two years beyond the time frame established in the Act, (2) defendant failed to demonstrate a lack of culpable negligence for the untimely filing, and (3) even if defendant's petition was not time-barred, the petition was contradicted by the record and barred by waiver and *res judicata*. On appeal, this court affirmed the circuit court's dismissal. *People v. Thames*, 2014 IL App (1st) 092054-U (unpublished order under Illinois Supreme Court Rule 23).

¶ 50 2. Defendant's Successive Postconviction Petition

¶ 51 On September 15, 2010, defendant filed a successive postconviction petition in which he

alleged (1) an affidavit provided by Wheatley presented newly discovered evidence that would support his claim of actual innocence and (2) the State failed to disclose that Wheatley had received leniency in his pending violation of probation case in exchange for his trial testimony.

¶ 52 In support of his claims, defendant attached two new affidavits to his petition from Wheatley and his initial postconviction counsel, Jennifer Bonjean (Bonjean). Wheatley attested his trial testimony, in which he stated defendant had informed him "they wasn't supposed to kill him *** they was just supposed to stuck him up," was not accurate and misleading. At trial, Wheatley had not meant to suggest or imply that defendant admitted he was involved in the crimes. Wheatley further averred he had initially provided a written statement to the ASA because the State had promised him leniency in his pending drug case. He received TASC probation after he provided the statement. The State also paid for him to stay in a witness protection program, paid for room service, and brought him clothes to wear. Wheatley further stated he had testified against defendant at trial to get out of jail and because he was afraid that the State would charge him with the victim's murder if he did not testify. The State had promised to release him from jail after he testified against defendant. He was released almost immediately after he gave his trial testimony. Wheatley stated he "felt terrible" because he knew that defendant did not have anything to do with the victim's murder. He had previously not come forward because he feared being charged with the victim's murder or perjury.

¶ 53 Bonjean averred she learned Wheatley had provided false testimony while she was preparing defendant's initial postconviction petition. Wheatley had refused to speak with her but she was later contacted by defendant's mother and was informed that Wheatley wanted to "come clean" about his false testimony at trial. On June 15, 2010, Bonjean interviewed Wheatley and obtained his affidavit. Wheatley reviewed the affidavit which was subsequently notarized.

¶ 54 Thereafter, defendant's successive postconviction petition reached the second stage and the State filed a motion to dismiss the successive petition. After the matter was briefed and argued, the circuit court dismissed defendant's petition, finding that Wheatley's affidavit did not substantially demonstrate defendant's actual innocence. The circuit court noted that Wheatley's affidavit was an attempt to interpret the meaning of his trial testimony, and that if Wheatley's affidavit were to be interpreted as a recantation, it was inherently unreliable. The circuit court also stated the evidence against defendant was "not scant" and that Wheatley's affidavit contradicted his trial testimony and the testimonies of other witnesses at trial. The circuit court held that accordingly, Wheatley's affidavit was not material and would not probably change the result on retrial. Additionally, the circuit court noted that the remainder of defendant's allegations had already been ruled upon, and thus, was cumulative and barred by the doctrine of *res judicata*. This appeal followed.

¶ 55 II. ANALYSIS

¶ 56 On appeal, defendant argues the circuit court erred in dismissing his successive petition without a third-stage evidentiary hearing because (1) he presented newly discovered evidence that would change the result on retrial, (2) the circuit court applied an incorrect legal standard in evaluating his actual innocence claim, (3) the circuit court erred in making a credibility determination at the second stage, and (4) "there were two errors [in defendant's trial] that would not occur on retrial." We first turn to consider the proper standard of review for defendant's arguments.

¶ 57 A. Standard of Review

¶ 58 We begin by noting the familiar principles regarding postconviction proceedings. The Act (725 ILCS 5/122-1 *et seq*. (West 2010)) provides criminal defendants the means to redress

substantial violations of their federal or state constitutional rights in the proceedings that led to the conviction. *People v. Allen*, 2015 IL 113135, ¶ 20 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002)). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on a prior conviction and sentence. *People v. Tate*, 2012 IL 112214, ¶ 8. "The purpose of the proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001).

¶ 59 The Act contains a three-stage procedure for relief. *Allen*, 2015 IL 113135, ¶ 21. At the first stage, a circuit court must independently review the defendant's petition within 90 days of its filing and shall dismiss the petition summarily if it determines that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010)*; People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the petition is not summarily dismissed as being frivolous or patently without merit, the petition advances to the second stage. *Hodges*, 234 Ill. 2d at 10.

¶ 60 At the second stage, counsel may be appointed to an indigent defendant. 725 ILCS 5/122-4 (West 2010); *Hodges*, 234 Ill. 2d at 10. The State must either file a motion to dismiss or file an answer within 30 days of the court's order to docket the petition. 725 ILCS 5/122-5 (West 2010); *Allen*, 2015 IL 113135, ¶ 21. To avoid dismissal, the defendant bears the burden of making a substantial showing of a constitutional violation to warrant a third-stage evidentiary hearing. *English*, 403 Ill. App. 3d at 129. At this stage of the proceedings, the circuit court takes all well-pleaded facts that are not positively rebutted by the trial record as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). The petitioner, however, is not entitled to an evidentiary hearing as a matter of right. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). In order to proceed to a third-stage evidentiary hearing, allegations in the petition must be supported by the record or

by its accompanying affidavits. *Id.* If the circuit court determines the defendant made a substantial showing of a constitutional violation, the petition advances to the third stage. 725 ILCS 5/122-6 (West 2010); *Allen*, 2015 IL 113135, ¶ 22.

¶ 61 At a third-stage evidentiary hearing, the circuit court determines the credibility of the witnesses, decides the weight to be given testimony and evidence, and resolves any evidentiary conflicts. *People v. Domagala*, 2013 IL 113688, ¶ 34. At this stage, the circuit court must determine whether the evidence demonstrates the petitioner is entitled to relief under the Act. *Id.*

¶ 62 In the case at bar, the circuit court granted the State's motion to dismiss defendant's successive petition at the second stage. The dismissal of a postconviction petition without a third-stage evidentiary hearing is reviewed *de novo*. *Pendleton*, 223 Ill. 2d at 473. Under *de novo* review, we perform the same analysis that a trial judge would perform. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 151.

¶ 63 Here, defendant argues the circuit court applied the wrong standard in reviewing his successive postconviction petition, as "the actual innocence standard does not require the [circuit] court to conclude that [defendant] is actually innocent *** but only that the result would probably be different at retrial." However, regardless of the circuit court's reasoning, a reviewing court may affirm a trial court's dismissal at the second stage on any basis substantiated by the record. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 17. "Our de novo review utilizing the proper standard addresses the trial court's use of an improper one if it did so." *Id.* Accordingly, we conclude that the use of an improper standard in analyzing a postconviction petition at the second stage does not itself serve as a basis for reversal and we need not consider whether the circuit court applied the wrong standard in this case. See *id.*

¶ 64 B. Actual Innocence

¶ 65 Having set forth our standard of review, we now turn to consider whether defendant's claim of actual innocence warrants a third-stage evidentiary hearing. Defendant contends the circuit court erred in dismissing his successive petition because he made a substantial showing of actual innocence based on newly discovered evidence. Specifically, he asserts that Wheatley's affidavit recanting his trial testimony demonstrated that defendant did not participate in the crimes. Defendant further argues the circuit court erred in making a credibility determination at the second stage. In addition, defendant claims "there were two errors [in defendant's trial] that would not occur on retrial."

¶ 66 Generally, the Act contemplates the filing of only one postconviction petition. 725 ILCS 5/122-1(f) (West 2010). Accordingly, all issues that were raised on direct appeal or in the original postconviction proceedings are barred from further consideration by the doctrine of *res judicata* and all issues that could have been raised but were not are forfeited. *People v. Anderson*, 375 Ill. App. 3d 990, 1000 (2007). A petitioner, however, may proceed on a successive petition by either satisfying the cause-and-prejudice test or asserting actual innocence. *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 33.

¶ 67 To succeed on a claim of actual innocence, a petitioner must present evidence that is (1) newly discovered, (2) material and noncumulative, and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. Evidence is newly discovered if it was discovered after trial and the defendant could not have discovered it sooner through due diligence. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). To qualify as material, the evidence must be relevant and probative of the petitioner's innocence. *Coleman*, 2013 IL 113307, ¶ 96. Noncumulative means "the evidence adds to what the jury

heard." *Id.* Conclusive means the evidence, when considered with the evidence presented at trial, would probably lead to a different result. *Id.* In determining whether the petitioner's new evidence is conclusive, "we must be able to find that petitioner's new evidence is so conclusive that it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt." *People v. Sanders*, 2016 IL 118123, ¶ 47. Further, a proceeding under the Act is limited to a consideration of constitutional claims and does not afford a procedure for a redetermination of guilt or innocence. *People v. Vail*, 46 Ill. 2d 589, 591 (1970). Moreover, evidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt as to the petitioner's guilt. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36. We take all well-pleaded factual allegations of a postconviction petition and its supporting evidence as true, unless they are positively rebutted by the record of the original trial proceedings. *Coleman*, 183 Ill. 2d at 385.

¶ 68 In the case at bar, regardless of whether defendant presented new, material, or noncumulative evidence, we conclude that Wheatley's affidavit is not of such a conclusive character that it would probably change the result on retrial. See *Sanders*, 2016 IL 118123 ¶ 47. The conclusiveness of the new evidence is the most important element of an actual innocence claim. *Id.* (citing *People v. Washington*, 171 Ill. 2d 475, 489 (1996)).

¶ 69 Here, Wheatley testified at trial that defendant informed him "they wasn't supposed to kill him … they was just supposed to stuck him up." In Wheatley's affidavit in support of defendant's petition, however, Wheatley claims his trial testimony was "not accurate and misleading" and that defendant "did not state or suggest that he was involved in the crime at all." Accepting as true Wheatley's representation in his affidavit that defendant did not indicate he was involved in the crime, that scenario does not necessarily exonerate defendant. See *People v.*

Collier, 387 Ill. App. 3d 630, 636 (2008) (the hallmark of actual innocence is total vindication or exoneration, not whether a defendant has been proved guilty beyond a reasonable doubt). While Wheatley's affidavit indicates defendant did not inform him that he was involved in the crimes, Wheatley does not state that defendant did *not* participate in the crimes. Further, Wheatley's trial testimony never indicated that he was present for any planning or conspiracy to commit the crimes. We also note that Wheatley's prior testimony would be admissible as substantive evidence on retrial. See 725 ILCS 5/115-10.1 (West 2010). In addition, Bonjean's affidavit that she learned Wheatley had provided false testimony at trial while she was preparing defendant's postconviction petition does not exonerate defendant. *Collier*, 387 Ill. App. 3d at 636. At best, the affidavits provided by Wheatley and Bonjean would impeach Wheatley's credibility as a witness, as the affidavits would merely conflict with Wheatley's testimony at trial. See *People v. Green*, 2012 IL App (4th) 10134, ¶ 36. An affidavit that merely impeaches or contradicts trial testimony is not sufficiently conclusive to justify a claim of actual innocence. *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007).

¶ 70 Moreover, the State provided substantial and compelling evidence against defendant at trial. Specifically, we find that defendant's written statement to the police provides persuasive evidence of defendant's guilt. Here, defendant was convicted under a theory of accountability. Under Illinois law, a person is legally accountable for the conduct of another if "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense." 720 ILCS 5/5-2 (West 2010); *People v. Taylor*, 164 Ill. 2d 131, 140 (1995). The written statement attributed to defendant acknowledges that (1) he delivered Williams's message to Duel and Antonio that he wanted them to rob the victim, (2) he

specifically instructed Duel to wait for the victim to leave the apartment instead of sending someone to rob the victim at the dice game, (3) he exchanged signals with Duel before Duel followed the victim out of the apartment to rob him, (4) he waited in the apartment with Williams for Duel to return with the victim's money, (5) he later reported to Williams that "things went bad" and that the victim had been killed, and (6) he agreed to keep quiet about the incident when he met Duel and Antonio the day after the murder. Moreover, the written statement indicates that defendant stated, "things didn't go as they should have" and that "he knows now the whole idea of robbing the victim was a stupid idea." The intent to aid Williams, Duel, and Antonio in the commission of the crimes was clearly implied by the written statement defendant provided to the police. We thus find this was an admission of the ultimate fact that defendant was guilty of the crimes charged and thereby constituted a confession. *People v. Edwards*, 106 Ill. App. 3d 918, 923 (1982) (a statement constitutes a confession if it contains an admission of facts which necessarily or directly imply all of the necessary elements of the offense in issue). The written statement attributed to defendant, therefore, provides persuasive evidence of defendant's guilt. See *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 27; *People v. Fillyaw*, 409 Ill. App. 3d 302, 316 (2011) ("A confession is the most powerful piece of evidence the State can offer, and its effect on the jury is incalculable").

¶ 71 We further note that while defendant did disavow portions of the written statement and offered testimony which was inconsistent with the statements he provided to the police, the written statement was published to the jury through the testimonies of ASA Husemann and Detective Foley. Further, while defendant initially claimed at trial that he was not provided an opportunity to review the written statement, he later admitted ASA Husemann had in fact read the written statement out loud to him and allowed him to make corrections. Defendant does not

explain why he disavowed portions of the written statement at trial. He also never objected to the admission of the written statement into evidence at trial.

¶ 72 Given the strong evidence of defendant's guilt provided above, we find that Wheatley's affidavit is not arguably so conclusive that it is more likely that not that no reasonable juror would find him guilty beyond a reasonable doubt in light of it, and thus would not change the result on retrial. *Sanders*, 2016 IL 118123, ¶ 47. We note that the circuit court did err in making a credibility determination as to Wheatley's affidavit at the second stage of postconviction review. However, our *de novo* review reveals that Wheatley's affidavit would not change the result on retrial. We thus conclude defendant has not made a substantial showing of actual innocence and his postconviction petition was properly dismissed at the second stage. See *People v. Rivera*, 2016 IL App (1st) 132573, ¶ 33.

¶ 73 As a final matter, we address defendant's argument that there were two errors in defendant's trial that would not occur on retrial: (1) the State improperly elicited testimony from the police that they had initially read defendant his *Miranda* rights because Henderson and Maurice had implicated defendant to the crimes; and (2) Pena's written statement to the police should not have been admitted into evidence in its entirety at trial. These issues were readily apparent on the record but were not raised on direct appeal. See *People v. Thames*, No. 1-02-0324 (2002) (unpublished order under Supreme Court Rule 23). Accordingly, we conclude these issues have been forfeited. See *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010) (when a claim is based entirely on facts contained in the trial court record, it is forfeited); *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005) (postconviction proceedings are not a substitute for a direct appeal, and accordingly, any issues that could have been raised on direct appeal, but were not, are procedurally defaulted).

¶ 74 III. CONCLUSION

¶ 75 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 76 Affirmed.