THIRD DIVISION
December 27, 2017

Nos. 1-15-2028 and 1-16-1310, Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 11899
	)	
CHRISTOPHER HAYWOOD,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the first stage dismissal of defendant's postconviction petition because defendant failed to make a preliminary showing that the officer-affiant knowingly, or with reckless disregard of the truth, included false information in the affidavit in support of the search warrant executed on defendant's home and person; we affirm the trial court's denial of defendant's motion for new forensic testing of evidence because defendant failed to show new forensic testing has the potential to produce evidence materially relevant to his assertion of actual innocence.

¶ 2 Defendant, Christopher Haywood, was convicted of one count of armed habitual criminal

and two counts of possession of a controlled substance with intent to deliver. He was sentenced to concurrent terms of twelve years, seven years, and five years in prison, respectively. Defendant filed a direct appeal of this conviction and we affirmed the judgment of the trial court in an unpublished Rule 23 Order. *People v. Haywood*, 2014 IL App (1st) 121448-U. Defendant subsequently filed a *pro se* postconviction petition alleging his right to due process was violated because the trial court improperly denied his request for a *Franks* hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). Defendant claimed the affidavit used to support the search warrant contained information the officer-affiant knew to be false. Defendant also filed a motion for fingerprint and DNA testing of four packets of heroin recovered from his kitchen floor. The trial court summarily dismissed the petition finding the petition was frivolous and patently without merit. The court also denied the motion for new fingerprint and DNA testing. In this consolidated appeal, defendant contends the trial court erred by denying his postconviction petition because he presented new evidence the officer-affiant lied in the affidavit, and new forensic testing could produce evidence supporting his claim of actual innocence. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 This appeal concerns the dismissal of defendant's postconviction petition and motion for new forensic testing. In April 2012, a jury convicted defendant of armed habitual criminal, possession of a controlled substance with intent to deliver heroin, more than one gram but less than fifteen grams, and possession of a controlled substance with intent to deliver heroin, less than one gram. Defendant was sentenced to twelve years, seven years, and five years, respectively, for the above convictions, to be served concurrently.

¶ 5 Execution of Search Warrant on Defendant's Home

¶ 6 On May 28, 2009, police obtained a warrant to search the home located at 537 N. Hamlin in Chicago and defendant for heroin, any documents showing residency, any paraphernalia used in the weighing, cutting, mixing, and packaging of illegal drugs, and any money records detailing illegal drug activity. In the complaint for the search warrant, officer Lipsey stated:

> "On May 28, 2009, [Officer Lipsey] met an individual that for the sake of safety, I will refer to as J. Doe who stated that on 27 May, 2009, J. Doe met with a male black known to J. Doe as 'Da Da' on the 400 block of North Hamlin. J. Doe stated that J. Doe and Da Da went to 537 N. Hamlin, a single family residence and met with a male black known to J. Doe as 'Chris' for the purpose of purchasing Heroin. I [Officer Lipsey] then conducted a computer check and found an I-Clear system photograph of Christopher Haywood, aka 'Chris,' IR# 869692 which J. Doe identified as the same Christopher Haywood, aka 'Chris' that J. Doe and "Da Da" met with in the single family residence. Computer check also revealed that Christopher Haywood, aka 'Chris' used 537 N. Hamlin on previous arrests as his primary residence.
>
> J. Doe stated that on 27 May 2009 J. Doe met with 'Da Da' on the 400 block of N. Hamlin and handed 'Da Da' $100.00 USC and stated, 'I'm out.' 'Da Da' then chirped Christopher Haywood aka 'Chris,' on the cell phone and stated, 'we're burnt up.' 'Burnt up' is street terminology for sold out. J. Doe and 'Da Da' then walked to 537 N. Hamlin, a single family residence and met with Christopher Haywood, aka 'Chris' in the living room. J Doe related that Christopher aka 'Chris' asked 'how much do you want' to 'Da Da.' 'Da Da' stated 'one pack.' 'Da Da' handed $100.00 USC to Christopher Haywood aka

> 'Chris.' J. Doe related that Christopher Haywood aka 'Chris' then relocated to an orange couch in the living room, reached between the cushions, and pulled out a plastic bag containing thirteen zip lock bags, each containing suspect heroin. Christopher Haywood aka 'Chris' then handed the same pack to 'Da Da.' J. Doe related that 'Da Da' handed the same clear plastic bag containing suspect heroin to J. Doe on the front porch at 537 Hamlin, a single family residence. J. Doe then departed and took the same clear plastic bag containing thirteen zip lock bags, containing suspect heroin to the 400 block of north Hamlin and resold them to customers on the street for $10.00 USC each. J. Doe explained using the same heroin on a daily basis and always experiencing a 'high' from using it. J. Doe reported purchasing heroin through 'Da Da' from Christopher Haywood, aka 'Chris' for approximately four months, five weeks and a day. J. Doe further explained that J. Doe makes $30.00 USC from each pack of Heroin that J. Doe sells on the 400 block of north Hamlin.
>
> On May 28 2009 J. Doe and [Officer Lipsey] relocated to 537 N. Hamlin where J. Doe pointed to a single family residence and stated that this is the same location where Christopher Haywood, aka 'Chris,' sold 'Da Da' and J. Doe Heroin on 27 May 2009."

Officer Lipsey and the confidential informant signed the complaint for the search warrant, and the confidential informant appeared before the magistrate judge. The court issued the search warrant, which police executed on May 28, 2009. As a result of the search, police seized two handguns, a shotgun, ammunition, heroin, cocaine, bundles of U.S. currency, a digital scale, drug packaging, and several pieces of U.S. mail addressed to defendant.

¶ 7 Defendant's Pre-Trial Motion for a *Franks* Hearing

¶ 8 Defendant, through counsel, filed a pre-trial motion for a *Franks* hearing to quash the search warrant and suppress evidence seized as a result of the search. Attached to the motion were affidavits from defendant, defendant's brother, Randall Haywood, and defendant's friend, David "Da Da" Madison. Defendant stated in his affidavit that he was at home all day on May 27, 2009, no one came to his home, and he did not possess any illegal drugs or sell them to anyone. Defendant's brother's affidavit stated that he also lived at 537 N. Hamlin, was at home with defendant all day on "May 27, 2010," watching television and talking before going to bed around midnight, and that no one came to the home. Madison's affidavit stated he had known defendant for over 20 years, that Madison's birthday was on May 25, and that he met with defendant to celebrate his birthday for a day and a half. Madison averred that he never brought anyone to defendant's house to buy drugs on May 27, 2009, or during the four months preceding that date. Madison also averred that he never sold drugs of any kind and that he did not see defendant selling drugs.

¶ 9 Defendant argued in his motion for a *Franks* hearing that he had made a substantial preliminary showing that the averments in the complaint for the search warrant were false and that officer Lipsey signed the complaint with reckless disregard for the truth. The State argued defendant was not entitled to a *Franks* hearing because the confidential informant appeared before the judge who issued the search warrant and therefore the burden of determining the reliability of the informant and the basis for the informant's knowledge shifted to the court, and away from law-enforcement personnel. The State further argued that defendant's affidavits failed to make a preliminary showing that the officer-affiant knowingly made a false statement, or one in reckless disregard of the truth, in the complaint for the search warrant. The trial court

denied defendant's motion for a *Franks* hearing. The court found a *Franks* hearing was not warranted because this case involved a confidential informant who actually appeared before the judge issuing the search warrant, was available for questioning by the judge, and swore to and signed the complaint. The trial court also found that the affidavits defendant submitted with his motion were from biased, interested parties that only amounted to unsubstantiated denials. Accordingly, the court found the affidavits were insufficient under *Franks*. After the court denied defendant's motion for a Franks hearing, defendant requested that he be allowed to proceed *pro se*. Defendant waived his right to counsel and represented himself at his jury trial.

¶ 10 Jury Trial

¶ 11 At defendant's trial, Officer Brian Cygnar testified about the execution of the search warrant on the home at 537 N. Hamlin. Cygnar testified that when he entered the house he saw defendant running from the front room with a chrome gun in his hand. He saw defendant ditch the gun between two laundry bags as defendant fled toward the back of the house. Cygnar was about seven feet behind defendant when defendant entered the kitchen at the back of the house and he saw defendant reach into his right pocket and drop several small items onto the floor. Cygnar and two other officers chased defendant out the back door where he was detained. No one else was in the home at the time the search warrant was executed.

¶ 12 The evidence technician, Officer Green, testified next at trial. Green testified that he was the officer responsible for physically recovering, documenting, holding onto, transporting, and eventually processing all inventory material. He recovered four Ziploc baggies containing suspect heroin from the kitchen floor. He also recovered from the first floor a gun magazine containing several live rounds of ammunition, a light colored bag containing multiple live rounds of ammunition, one small blue tinted baggie containing suspected crack cocaine, a .357 magnum

revolver with five live rounds that Cygnar saw defendant drop, a .38 caliber revolver with six live rounds that had been found in a rear bedroom on a shelf, three pieces of U.S. mail addressed to defendant, a State of Illinois I.D. card bearing defendant's name and address on a coffee table in the living room, and a bundle of cash containing $60 under the couch in the living room. Green also recovered mail addressed to people other than defendant at 537 N. Hamlin. In an attic crawlspace on the second floor of the house, Green recovered a shoebox containing multiple empty handgun magazines, multiple loose rounds of ammunition, a box of live ammunition, a digital scale and multiple small empty packaging baggies. Another box recovered from the crawlspace contained four strips of tape and six clear plastic baggies with white powder. In the kitchen, Green located a plate with white powdery substance, along with a razor blade, a bundle of $250, and some packaging materials. Green recovered an unloaded shotgun from a closet in the basement. When Green spoke with defendant at the police station, defendant stated that any weapons found in the home belonged to his deceased grandfather and that he had no knowledge of the drugs found in his home.

¶ 13 The forensic scientist who tested the evidence recovered from defendant's home testified next. She testified that the four Ziploc baggies recovered from the kitchen floor contained less than one gram of heroin. The baggies containing white powder recovered from the shoebox in the attic contained between one and fifteen grams of heroin. The blue tinted baggie from the first floor of defendant's home contained cocaine. However, the white powdery substance found on the plate from the kitchen was not a controlled substance.

¶ 14 The parties stipulated that defendant had two prior felonies that qualified him for the offense of armed habitual criminal, and that the two qualifying offenses for the armed habitual criminal conviction were second degree murder and unlawful possession with intent to deliver.

The jury was not told what the qualifying felonies were. The State then rested.

¶ 15 Defendant then called his mother, Geronee Haywood, to testify. She testified that the house at 537 N. Hamlin had been her deceased father's home, but that her sister, her brother, defendant, and defendant's brother all currently lived there and had keys to the home. Three other relatives of Geronee's also lived in the home from time to time. Geronee's sister stayed in the right rear bedroom on the first floor, defendant stayed in the bedroom on the left side of the first floor, his brother occupied the second floor, and Geronee's brother stayed in the basement. There were separate gas and electric bills for the first and second floors, and Geronee identified photos of two gas meters in the front of the home and two circuit boxes in the home (one in the second floor and the other in the basement). Geronee testified that as of May 28, 2009, her deceased father had a shotgun and a .38 caliber handgun that he kept locked in the basement, but that he had passed away in 2004. Geronee did not know who owned the .357 magnum revolver and she had no knowledge of the narcotics that were found in the home.

¶ 16 Defendant's brother, Randall Haywood, next testified. He testified that he had a Firearm Owners' Identification Card, but that it had expired prior to May 2009. He owned ammunition, bullets, clips, .38 shells, .22 shells, and he kept the ammunition in the attic on the second floor in a black bag inside of a box. He lived on the second floor of the home and received mail at the address, which was placed on a table on the first floor when it arrived. However, Randall did not own any guns in May 2009. He identified from a photograph the shotgun recovered from the basement as belonging to his grandfather. He did not recognize the .357 magnum or know who owned it, and the scale and narcotics did not belong to him.

¶ 17 Defendant did not testify. The jury found defendant guilty of armed habitual criminal, possession of a controlled substance with intent to deliver, heroin one gram or more but less than

fifteen grams, and possession of a controlled substance with intent to deliver, heroin less than one gram. The jury found defendant not guilty of possession of a controlled substance with intent to deliver, cocaine. Defendant filed a motion for a new trial, which was denied. The trial court sentenced defendant to twelve years for armed habitual criminal, with three years of mandatory supervised release, seven years for possession of a controlled substance with intent to deliver between one and fifteen grams of heroin, and five years for possession of a controlled substance with intent to deliver less than one gram of heroin, all sentences to run concurrently.

¶ 18 Direct Appeal of Defendant's Conviction and Sentence

¶ 19 Defendant appealed his conviction, arguing: (1) the trial court erred in denying his request for a *Franks* hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978); and (2) his conviction for possession of a controlled substance with intent to deliver, heroin one gram or more but less than fifteen grams, should be vacated because there was insufficient evidence presented at trial to show that he constructively possessed the heroin that was found in the second floor crawlspace. Defendant also argued that his case should be remanded for resentencing and that his mittimus should be corrected to reflect $2,040 worth of credit.

¶ 20 In an unpublished order, we affirmed defendant's convictions and sentences in the trial court's rulings, but we ordered the mittimus corrected to reflect the proper credit against defendant's fines and fees. *Haywood*, 2014 IL App (1st) 121448-U. We found that the trial court did not abuse its discretion in denying defendant's motion for a *Franks* hearing because defendant's affidavits in support of his motion were from biased parties and included vague statements that did not preclude the possibility that the confidential informant was telling the truth about conducting a drug transaction with defendant on the day preceding the execution of the search. Additionally defendant's pre-trial motion failed to make a substantial preliminary

showing that the affiant for the warrant had knowingly or recklessly included false information in the warrant affidavit. The confidential informant was under oath, and the magistrate judge had the opportunity to assess his credibility. Also, Officer Lipsey had sufficiently corroborated the confidential informant's information by having the informant identify defendant's photograph as the person who sold him heroin and by having the informant identify the house at 537 N. Hamlin as the place where he bought the heroin.

¶ 21 Defendant's Postconviction Petition

¶ 22 In September 2014, defendant filed a *pro se* postconviction petition. Defendant claimed his right to due process was violated because Officer Lipsey obtained the search warrant by deliberately, knowingly, or with reckless disregard of the truth including perjured testimony in the affidavit. Defendant alleged Lipsey knew the confidential informant was lying because of her offer of leniency.

¶ 23 Defendant attached to the petition the affidavit of Anthony Jackson, who averred that he was the J. Doe informant in this case. In the affidavit, Jackson stated:

> "Officer Mireya Lipsey grabbed me and Dead Eye off the corner of 459 N. Hamlin. Took me and him to the Kedzie station strip-searched me and found seven Ziploc baggies with a naked lady on them and offered me a deal for someone else and I picked Chris out because they say he told on our house. I never been in Chris house. I lied about everything. This is my own will, no one pressured me throw [*sic*] this. I know this is the right thing to do. I was wrong and I want to do right."

Also attached to this affidavit was a notarized question and answer statement where Jackson alleged that Officer Lipsey offered him leniency before he appeared before the judge who issued

the search warrant and that he lied to Officer Lipsey about engaging in a drug transaction with defendant.

¶ 24 The trial court dismissed the petition in December 2014. The court found that even if Lipsey made an offer of leniency to Jackson, that would "not refute the presumed validity of the search warrant." The court also ruled any challenge to the validity of the search warrant was barred by the doctrine of *res judicata* because the issue of the denial of defendant's motion for a *Franks* hearing was already decided on direct appeal. Defendant filed a motion to reconsider, which the trial court denied.

¶ 25 On February 5, 2015, before the trial court ruled on the motion to reconsider dismissal of defendant's postconviction petition, defendant filed a motion seeking fingerprint and DNA testing of the four packets of heroin recovered from his kitchen floor. The Code of Criminal Procedure (Code) allows for a defendant to make a motion to compel forensic testing of evidence from his trial if the evidence "was not subject to the testing which is now requested at the time of trial." 725 ILCS 5/116-3(a) (West 2016).

> "The defendant must present a *prima facie* case that:
>
> (1) identity was the issue in the trial or guilty plea which resulted in his or her conviction; and
>
> (2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect." 725 ILCS 5/116-3(b) (West 2016).

The trial court shall allow new forensic testing of evidence if:

> "(1) the result of the testing has the scientific potential to produce new, noncumulative evidence (i) materially relevant to the defendant's assertion of

> actual innocence when the defendant's conviction was the result of a trial, even though the results may not completely exonerate the defendant, or (ii) that would raise a reasonable probability that the defendant would have been acquitted if the results of the evidence to be tested had been available prior to the defendant's guilty plea and the petitioner had proceeded to trial instead of pleading guilty, even though the results may not completely exonerate the defendant; and
>
> (2) the testing requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3(c) (West 2016).

If the result of this testing "reveals an unknown fingerprint from the crime scene that does not match the defendant or the victim, the order of the Court shall direct the prosecuting authority to request the Illinois State Police Bureau of Forensic Science to submit the unknown fingerprint evidence into the FBI's Integrated Automated Fingerprint Identification System (AIFIS) for identification." 725 ILCS 5/116-3(d) (West 2016).

¶ 26 In his motion for fingerprint and DNA testing, defendant denied possessing the four packets of heroin police recovered from the kitchen floor. Defendant claimed those packets of heroin were the same ones Lipsey recovered from Jackson the day before executing the search warrant. These packets had never been subjected to fingerprint or DNA testing. The trial court denied the motion for rehearing of the dismissal of his postconviction petition on May 22, 2015. On April 7, 2016, the trial court denied defendant's motion for new fingerprint and DNA testing, on *res judicata* grounds, finding the matter "was addressed during the trial and postconviction proceedings." This consolidated appeal from the dismissal of the postconviction petition and denial of forensic testing followed.

¶ 27 ANALYSIS

¶ 28 Defendant now appeals the trial court's denials of his postconviction petition and motion for new fingerprint and DNA testing of evidence. Defendant claims he has presented new evidence to show the officer-affiant in the search warrant intentionally, knowingly, or recklessly misled the magistrate judge, and therefore defendant was entitled to a *Franks* hearing. Defendant further contends that the packets of heroin recovered from his kitchen floor were not subject to forensic testing and the State has maintained custody of the evidence. He argues he is entitled to have the evidence now tested because identity was at issue with his conviction and testing the evidence has the potential to produce new, noncumulative evidence materially relevant to defendant's actual innocence claim.

¶ 29 The Post-Conviction Hearing Act (Act) allows an imprisoned defendant to challenge his conviction by claiming that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1 (West 2016). An imprisoned defendant's postconviction petition must "clearly set forth the respects in which petitioner's constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations." 725 ILCS 5/122-2 (West 2016). "[A] defendant at the first stage need only present a limited amount of detail in the petition." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The threshold for a defendant to survive dismissal at this stage is low because most petitions at this stage are drafted "by defendants with little legal knowledge or training." *Id.* A *pro se* defendant need only "allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *Id.* While our case law has previously referred to the defendant only needing to present the "gist" of a constitutional claim, the *Hodges* court indicated "gist" is "not the legal standard used by the circuit court to evaluate the petition, under

section 122–2.1 of the Act, which deals with summary dismissals. Under that section, the 'gist' of the constitutional claim alleged by the defendant is to be viewed within the framework of the 'frivolous or * * * patently without merit' test." *Id*. at 11. Thus, a postconviction petition will be sufficient to avoid summary dismissal simply if it "is not frivolous or patently without merit." *Id*.

¶ 30 Although "[n]either 'frivolous' nor 'patently without merit' is defined in the Act" (*Hodges*, 234 Ill. 2d at 11), the *Hodges* court clarified this standard for dismissal: "we hold today that a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Id*. at 11-12. Claims that lack an arguable basis in law or fact "include those 'based on an indisputably meritless legal theory' as well as claims 'whose factual contentions are clearly baseless,' *e.g.*, 'claims describing fantastic or delusional scenarios.' " *Id*. at 13 (quoting *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989)). Thus, a "petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Id*. at 16. We review *de novo* the first-stage dismissal of a postconviction petition. *People v. Swamynathan*, 236 Ill. 2d 103, 113 (2010). The trial court here summarily dismissed defendant's petition because it lacked an arguable basis either in law or in fact. On appeal, defendant maintains his petition and accompanying affidavits provide a basis in law and fact to support his claim that his constitutional rights were violated at trial.

¶ 31 Denial of Defendant's Postconviction Petition

¶ 32 Defendant claims his right against unreasonable search and seizure under the Fourth

Amendment was violated because police lacked sufficient truthful information in the complaint for a search warrant to amount to a showing of probable cause. U.S. CONST. amends. IV, XIV; Ill. CONST., art. I, § 6; see also *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that the Fourth Amendment is enforceable against the States under the Due Process Clause of the Fourteenth Amendment). Under the Fourth Amendment, "no warrant shall issue, but upon probable cause, supported by Oath or affirmation." U.S. CONST. amend. IV. Defendant argues without the evidence allegedly illegally seized as a result of false information in the application for a warrant there would be no evidence with which to convict him.

¶ 33 To obtain a search warrant, police must present a warrant affidavit setting forth the particular facts and circumstances underlying the existence of probable cause, so as to afford the magistrate judge an opportunity to independently evaluate the matter. *Franks*, 438 U.S. at 164. The factual showing supporting probable cause must be a "truthful" showing. *Id*. at 165. This does not mean that every fact in the warrant must be necessarily correct, "[b]ut surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Id*. Therefore, "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id*. at 155-56. If, at the hearing, the defendant can establish his allegation of perjury or reckless disregard for the truth "by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id*. at 156.

¶ 34 Defendant contends he has new evidence supporting his allegation Officer Lipsey knowingly, or with reckless disregard for the truth, included false information in the affidavit to obtain a warrant. Defendant met Anthony Jackson in prison, and Jackson alleged he was the confidential informant who appeared before the magistrate judge with Lipsey. Jackson signed an affidavit and a notarized set of questions and answers where he averred that he gave false information in his affidavit police used to obtain the search warrant executed on defendant. In his affidavit, Jackson stated he was picked up by Lipsey on May 28, 2009 and taken to a police station. Police searched Jackson and found seven Ziploc baggies of heroin marked with a "naked lady" symbol. Jackson averred he was offered leniency in exchange for naming who supplied him with the heroin, and that Lipsey told him defendant "told on [his] house." Jackson further averred he "lied about everything" in his affidavit supporting the search warrant. Defendant attached the affidavit and question and answer sheet to his postconviction petition. He argued this amounted to a substantial showing that Lipsey knowingly, or with reckless disregard for the truth, included false statements in the affidavit to obtain the search warrant.

¶ 35 The trial court dismissed the petition on grounds of *res judicata* because the question of the *Franks* hearing was raised on direct appeal. However, we agree with defendant that this matter is not barred by the doctrine of *res judicata*. Defendant has presented new evidence: the affidavit of the alleged J. Doe informant which states that his statements were false; and the petition presents allegations that the government agent, Officer Lipsey, knew the information was false. Although we disagree with the trial court regarding whether the issue is barred by *res judicata*, we may affirm the trial court on any basis found in the record because we review the judgment of the trial court rather than its reasoning. *People v. Jones*, 2015 IL App (1st) 133123, ¶ 33. Based on the record before us we find defendant's argument is meritless because he has

produced no evidence that Officer Lipsey herself gave false information in the application for search warrant or that she knowingly or recklessly used false information from her confidential informant in obtaining the search warrant.

¶ 36 The Fourth Amendment's proscription against search and seizure without probable cause applies to government action rather than the activity of private citizens. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("This Court has also consistently construed this protection as proscribing only governmental action."). Thus, there is a distinction between a government agent directly giving false information to procure a warrant rather than a private individual giving false information to a magistrate. Where the source of the allegedly false statements is not the officer-affiant, but a non-governmental informant, it is not enough for defendant to simply prove the informant provided false information. *Franks*, 438 U.S. at 170. This is not to say an informant appearing before a magistrate making false statements shields the officer and the search warrant from scrutiny. "The requirement that a warrant not issue 'but upon probable cause, supported by Oath or affirmation,' would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause." *Id*. at 168. Instead, a defendant must show the officer-affiant knew the informant's statements were false, or that the officer included the informant's false statements with reckless disregard of the truth. *People v. Lucente*, 116 Ill. 2d 133, 149 (1987) ("defendant's *ultimate* burden is to show by a preponderance of the evidence that the affiant-officer made deliberate or reckless false statements" (emphasis in original)). Defendant has not shown Officer Lipsey herself made false statements to the magistrate judge issuing the search warrant. Instead, he claims Lipsey knew Jackson was lying, or that she was reckless in regard of the truth for including Jackson's alleged false statements in the complaint for a search warrant.

¶ 37 Defendant argues *People v. Chambers*, 2016 IL 117811, supports his contention he made a substantial preliminary showing that the officer-affiant knowingly or with reckless disregard for the truth provided false information to the magistrate judge to obtain a search warrant. However, we find *Chambers* inapposite to the present case. In *Chambers*, police obtained and executed a warrant to search the defendant's residence based on the affidavit of a police officer and a confidential informant. *Id*. ¶¶ 3, 7. The confidential informant appeared before the magistrate judge who issued the search warrant and the trial court found this shifted the burden to the magistrate judge to determine the informant's credibility. Our supreme court explicitly rejected this reasoning, overturning *People v. Gorosteata*, 374 Ill. App. 3d 203 (2007). *Chambers*, 2016 IL 117911, ¶ 63.

¶ 38 Even if a confidential informant appears before the magistrate judge who issues the warrant, the officer still must take measures to not knowingly or recklessly provide false information. However, a reviewing court may still consider a confidential informant's appearance before an issuing magistrate as a factor for whether defendant made a substantial preliminary showing for a *Franks* hearing. *Id*. ("the presence of the informant who allegedly provided that information is merely a factor to be considered when deciding whether a substantial preliminary showing has been made"). Here, Jackson allegedly appeared before the magistrate judge, who was able to determine his credibility. While this is not a dispositive factor, we may properly consider it a factor weighing against defendant's claim he made a substantial preliminary showing for a *Franks* hearing.

¶ 39 Further, in *Chambers* the defendant filed a pre-trial motion for a *Franks* hearing, arguing the officer-affiant made explicitly false statements, and that the officer knowingly or recklessly provided false information in the affidavit supporting the search warrant. *Id*. ¶ 10. The

Chambers court found the defendant made an allegation of police deliberately using falsehoods and supported this allegation with a basis in fact through the affidavit of the alleged confidential informant, as well as the supporting affidavits from several alibi witnesses. *Id*. ¶ 92. Unlike the defendant in *Chambers*, here defendant has not shown information in the complaint was plainly false.

¶ 40 Defendant must show that Lipsey knowingly included false information to support her search warrant, or that Lipsey recklessly included false information. *Franks*, 438 U.S. at 171. Defendant's petition and Jackson's affidavit support neither contention. They simply indicate Jackson lied in the affidavit and that Lipsey made an offer of leniency. Defendant maintains that even if Officer Lipsey did not herself give false information in her affidavit supporting the search warrant, Lipsey knew the confidential informant was lying or at least included that information from the informant with reckless disregard of the truth. The alleged confidential informant in *Chambers* stated he was coached by the officer, had never been an informant for police before, and that the officer knew the statements in the affidavit presented to the magistrate judge were false. *Id*. ¶¶ 24-25. In this case Jackson has simply stated that he does not know defendant, that he was offered leniency, and that he lied after Lipsey allegedly informed him that defendant had "told on [Jackson's] house." Jackson has not averred that Lipsey provided him with false information, that she knew any information in the affidavit was false, or that she recklessly failed to corroborate information that was actually false. The warrant affidavit here sets out the measures Lipsey took to corroborate the information allegedly provided by Jackson, which Jackson's affidavit does not refute.

¶ 41 Defendant nonetheless claims he made a substantial showing Lipsey knowingly or recklessly included false statements made by Jackson in her complaint for the search warrant,

such that a *Franks* hearing is merited, relying on *Lucente*, 116 Ill. 2d 133. In *Lucente*, the defendant filed a motion for a *Franks* hearing, claiming the officer-affiant's statements in the affidavit supporting the warrant were false. He supported this claim with affidavits. The trial court granted an evidentiary hearing which revealed a number of inaccuracies in the warrant affidavit. Our supreme court affirmed the trial court's order to quash the warrant and suppress the evidence even though it found "the defendant's showing might have been stronger." *Id*. at 154. The "officer-affiant's position would have been bolstered had he provided some independent corroboration of the informant's statements." *Id*. This failure to corroborate information the informant provided demonstrated the officer's reckless disregard of the truth:

> "The greater the showing that the informant blatantly lied to the officer-affiant, or that the information from the informant is substantially false, the greater is the likelihood that the information was not appropriately accepted by the affiant as truth and the greater the probability that the affiant, in putting forth such information, exhibited a reckless disregard for the truth. This would be especially true where the warrant affidavit recited no independent corroboration of the information relied upon." *Id*. at 152.

The present case is readily distinguishable from *Lucente* because Officer Lipsey took steps to corroborate the information provided by the confidential informant. Therefore, Lipsey did not act with reckless disregard of the truth by including the confidential informant's statements in her affidavit supporting the search warrant.

¶ 42 Defendant's petition and attached affidavits amount to little more than unsubstantiated denials. Defendant has not shown Officer Lipsey knew the information in the affidavit in support for the search warrant was false or that she failed to take measures to corroborate the

information. Unlike in *Lucente* where the confidential informant provided verifiably false information which the officer never swore to corroborating, here Lipsey took some measures to corroborate the information provided by the confidential informant. In the affidavit in support of the search warranted, Lipsey stated the confidential informant specified the address 537 N. Hamlin, and Lipsey then confirmed that defendant previously listed that address in prior arrests. Lipsey did not make any claims about the reliability of the informant, unlike the officer in *Lucente* who lied about the reliability of his informant. In this case Jackson did not give any specifics about which statements in the complaint for the search warrant were false, and Jackson never claimed Lipsey knew he was lying. Therefore, *Lucente* does not support defendant's contention the trial court improperly dismissed his motion for a *Franks* hearing. Thus, we find defendant failed to make a substantial showing Lipsey herself made false statements, or knowingly or with reckless disregard for the truth provided false information in the affidavit supporting the search warrant. Defendant's claim has no arguable basis in law or fact. Therefore, we affirm the summary dismissal of defendant's postconviction petition. We next turn to defendant's motion for new DNA and fingerprint testing of the four packets of heroin recovered from defendant's kitchen floor.

¶ 43 Defendant's Motion for DNA and Fingerprint Testing of Evidence

¶ 44 In this case the officers who arrested defendant testified at defendant's trial, and Officer Cygnar testified he saw defendant dropping a gun and several packets of heroin as defendant attempted to flee the scene. Defendant argues that testing of the four packets of heroin marked with a "naked lady" symbol that were recovered from defendant's kitchen floor may produce new, noncumulative evidence that is materially relevant to his claim of actual innocence. Defendant alleges the heroin actually belong to Jackson, the alleged J. Doe informant, and not to

him. Defendant argues that the existence of Jackson's fingerprints on the packets of heroin would significantly advance his postconviction claim of actual innocence because the absence of his fingerprints and the presence of Jackson's fingerprints would prove defendant did not actually possess those four packets of heroin.

¶ 45 As noted above, the Code allows for a defendant to make a motion to compel new forensic testing of evidence from his trial if the evidence "was not subject to the testing which is now requested at the time of trial." 725 ILCS 5/116-3(a) (West 2016).

> "The defendant must present a *prima facie* case that:
>
> (1) identity was the issue in the trial or guilty plea which resulted in his or her conviction; and
>
> (2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect." 725 ILCS 5/116-3(b) (West 2016).

Defendant claims he has made a *prima facie* case for forensic testing. See *Johnson*, 205 Ill. 2d at 393 ("[I]n order to present a *prima facie* case for forensic testing, the defendant must show that identity was the central issue at trial and that the evidence to be tested was subject to a sufficiently secure chain of custody."). Defendant denied possessing the heroin and claimed the identity of who the heroin belonged to was therefore a central issue at trial. He further argued that the State has not indicated any break in the chain of custody, and that the evidence has remained in the State's control since the time of trial. The evidence has never been tested for DNA or fingerprints. Defendant claims that Jackson's affidavit indicates he was arrested with seven packets of heroin marked with the same "naked lady" symbol prior to the execution of the search warrant on defendant's home, and that Jackson's DNA or fingerprints may be found on

the heroin. If Jackson's fingerprints are found on the packets of heroin, defendant claims that would support his position he never possessed those packets of heroin and would therefore be materially relevant to his actual innocence claim.

¶ 46 The State argues defendant failed to make a *prima facie* case because identity was not an issue at trial. A police officer witness testified to seeing defendant drop four packets of heroin to the kitchen floor as defendant fled. The State contends that because it offered the eyewitness testimony of the arresting officer who saw defendant drop the packets of heroin, identity was not a central issue at trial. We disagree. We find identity was a central issue. See *People v, Shum*, 207 Ill. 2d 47, 64-65 (2003) (finding identity was a central issue even though "[t]he court stated that identity was not disputed because of the positive identification by the victim, who had been acquainted with defendant prior to the crime"). Defendant has maintained his innocence, claiming he did not possess those four packets of heroin, he never dropped them as he fled, and the police planted them. Therefore, we find identity was a central issue. *Id*. at 66.

¶ 47 Defendant maintains he has made a *prima facie* case for new forensic testing because identity was at issue; and, because the State maintained custody of the evidence the chain of custody was sufficient to establish the evidence has not been tampered with. Although the State concedes the chain of custody was "sufficient to establish that the packets have not been substituted, tampered with, replaced or altered," the State nevertheless contends that "fingerprints and DNA if present could be smudged or removed." However, the State fails to provide any citation to authority for its position. Here, the chain of custody has not been broken, the State still possesses the packets of heroin, and only the contents of one of those packets was tested to determine if it contained an illicit substance. *Johnson*, 205 Ill. 2d at 394

("[T]he Vitullo kit was subject to a sufficiently secure chain of custody. Though

> the State contends that the defendant has presented no evidence of the kit's location since [defendant's] 1984 trial, such evidence would not be available to the defendant. The Vitullo kit, as a piece of real evidence admitted at trial, would have remained in the custody of the circuit court clerk.").

Accordingly, we find defendant has shown the chain of custody was sufficient to establish the evidence has not been tampered with.

¶ 48 Therefore, defendant has made a *prima facie* case under section 116-3(b). Defendant's burden does not end with establishing a *prima facie* case for new forensic testing of evidence. Once defendant has made a *prima facie* case, the Code provides that the trial court shall allow new testing if it determines that:

> "(1) the result of the testing has the scientific potential to produce new, noncumulative evidence (i) materially relevant to the defendant's assertion of actual innocence when the defendant's conviction was the result of a trial, even though the results may not completely exonerate the defendant, or (ii) that would raise a reasonable probability that the defendant would have been acquitted if the results of the evidence to be tested had been available prior to the defendant's guilty plea and the petitioner had proceeded to trial instead of pleading guilty, even though the results may not completely exonerate the defendant; and
>
> (2) the testing requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3(c) (West 2016).

"After a defendant has established a *prima facie* case, the circuit court must assess the likelihood that the results of the testing sought by the defendant would materially advance a claim of actual innocence. [Citation.] This assessment entails an evaluation of the evidence introduced at trial

to determine whether the testing is likely to produce new, noncumulative evidence materially relevant to the defendant's claim of actual innocence." *People v. Stoecker*, 2014 IL 115756, ¶ 26.

¶ 49 Based on our evaluation of the whole record, we find defendant failed to show the results of testing would materially advance his claim of actual innocence. Evidence that "is 'materially relevant' to a defendant's actual-innocence claim need not, standing alone, exonerate the defendant; rather, it must tend to 'significantly advance' his claim of actual innocence." *Johnson*, 205 Ill. 2d at 395 (quoting *People v. Savory*, 197 Ill. 2d 203, 213 (2001)). Defendant has not shown evidence of Jackson's prints or DNA on the heroin recovered from defendant's kitchen floor will significantly advance his claim of actual innocence. Officer Cygnar testified at defendant's trial that he saw defendant drop the packets of heroin at issue. In addition, police recovered a sizeable quantity of heroin from defendant's attic, along with a scale and packaging materials. Defendant fled as soon as police began to execute the search warrant, which is evidence of his consciousness of guilt. See *People v. Henderson*, 39 Ill. App. 3d 502, 507 (1976) ("The concept of flight embodies more than simply leaving the scene of the crime. The accused must be attempting to avoid arrest or detection, actions which imply a consciousness of guilt."). Defendant did not wait for police to find illegal drugs or weapons – he fled as soon as the police arrived to execute the search warrant. He was not only trying to leave the scene of the crime, but was also attempting to avoid arrest. Additionally, simply because the same symbols are on the heroin found on defendant's kitchen floor as the heroin found on Jackson does not mean that heroin did not belong to defendant. Jackson's statement to police supporting the search warrant indicated Jackson repeatedly purchased heroin from defendant. It stands to reason that heroin found on defendant would bear the same symbol as the heroin found on Jackson if defendant

supplied Jackson. Even if Jackson's prints or DNA are found on the packets of heroin recovered from defendant's kitchen floor, that would still not advance his claim of actual innocence given the quantity of heroin and equipment for its distribution and sale found in defendant's attic. Jackson's prints or DNA on the heroin would not mean defendant did not possess the heroin because of the trial testimony of police who saw him drop the packets of heroin to the kitchen floor. Also, as defendant was running he threw away a .357 magnum between two laundry bags, which police later recovered. This, along, with defendant's flight, possession of other heroin and drug dealing paraphernalia, serves to corroborate defendant's conviction for possession of less than one gram of heroin with intent to deliver for the packets of heroin recovered from defendant's kitchen floor.

¶ 50 Defendant relies on *People v. Johnson* to support his claim that it is probable new forensic testing will reveal evidence materially relevant to his claim of actual innocence. *Johnson*, 205 Ill. 2d at 391. The defendant in *Johnson* was convicted of rape and murder, and received the death penalty. With his execution pending, the defendant argued "the State possessed forensic evidence which would establish his innocence. He asserts that DNA testing of a Vitullo rape kit *** would cast doubt on whether he raped Payne, and accordingly, whether he murdered Hackett." *Id*. The *Johnson* court found that because no evidence of the genetic material in the Vitullo kit was presented at trial, the defendant was not seeking to merely "impeach the State's evidence. Instead, he seeks to present, for the first time, evidence about the genetic identity of [the victim's] assailant." Moreover, the State's case against the *Johnson* defendant was largely circumstantial; "the only direct evidence of the defendant's guilt came from Payne's identification. A favorable result on a DNA test of the Vitullo kit would significantly advance the defendant's claim that he did not rape Payne, which, in turn, would

significantly advance his claim that he did not murder Hackett." *Id*. at 396-97. Unlike in *Johnson*, here the State's case was not largely circumstantial. Defendant fled the scene when police executed the search warrant; Officer Cygnar testified that he saw defendant ditch a chrome handgun between two laundry bags, and the evidence technician recovered a .357 magnum from between the two bags; Cygnar saw defendant drop the packets of heroin; as a result of the search police recovered more than one, but less than fifteen grams of heroin, along with a scale, packaging equipment, cocaine, rolls of cash, and other drug dealing paraphernalia; defendant lived at the residence and none of his family members testified to seeing the drugs before. Even if DNA or fingerprint evidence showed Jackson had touched the heroin recovered from defendant's kitchen floor, that would not significantly advance his claim of actual innocence because the evidence that he was dealing heroin was overwhelming.

¶ 51 Defendant also relies on *People v. Price*, 345 Ill. App. 3d 129, 134 (2003) to argue that even if there is a slight chance that DNA testing will yield a favorable result, testing is still warranted. The defendant in *Price* was charged with multiple counts of sexual assault against two different victims while they were imprisoned. A jury convicted him of three counts of aggravated sexual assault against one victim, but found him not guilty of the counts of sexual assault against the other victim. *Id*. The State presented a strong case against the defendant. One victim testified he was anally raped while he was in his cell by defendant, who also forced the victim to perform oral sex. *Id*. at 140. The second victim testified he saw the defendant enter the first victim's cell and he overheard the attack occur. The defendant had injuries he could not sufficiently explain that could be attributed to engaging in an aggravated sexual assault. *Id*. "Moreover, the spermatozoa sample *** was only a minor part of the State's case. It was introduced for the limited purpose of showing that Kien's anus had been penetrated." *Id*.

Nevertheless, the *Price* court found

> "a favorable result on a DNA test performed on the seminal fluid or spermatozoa sample has the exculpatory potential to significantly advance defendant's claim that he did not engage in any sexual acts with Kien. Applying section 116–3, we conclude that, under the facts of this case, a favorable result on a DNA test would be materially relevant to defendant's claim of actual innocence." *Id*.

The present case is inapposite. Even if forensic testing revealed Jackson had touched the heroin police saw defendant drop, that would not materially advance his claim that the heroin was not his. Defendant was caught with significantly more heroin than the packets dropped on his kitchen floor, and police recovered other corroborating evidence such the bundles of cash, drug dealing paraphernalia, and cocaine.

¶ 52 In *Savory*, 197 Ill. 2d at 214, our supreme court held that the evidence the defendant sought to be tested was not materially relevant to his claim of actual innocence. The defendant sought to have a bloodstain on his pants tested for the victims' DNA. However, "the bloodstain evidence was essentially a collateral issue at trial and was not central to the State's evidence of guilt. Under these circumstances, a test result favorable to defendant would *** only exclude one relatively minor item from the evidence of guilt." *Id*. at 215. The State had introduced testimony that the defendant made statements only the offender could have known. *Id*. In the present case, the State had more than the testimony of Officer Cygnar to support defendant's possession of less than one gram of heroin. Police recovered numerous weapons, drugs, and paraphernalia to show defendant possessed heroin with intent to deliver. Evidence of Jackson having touched the heroin recovered from defendant's kitchen floor would not substantially advance defendant's claim he was actually innocent of possessing those packets of heroin.

¶ 53 Because defendant's *pro se* postconviction petition was dismissed at the first stage, defendant need only show his petition was not frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 9. To do so, defendant had to show his claims had an arguable basis in law or fact. *Id*. at 11-12. Defendant failed to prove Officer Lipsey knowingly, or with reckless disregard for the truth, included false information in her affidavit in support of the search warrant. Defendant's affidavits either fail to state Lipsey knew the information in the affidavit was false, or the affidavits give self-serving statements from interested parties.

¶ 54 Defendant's motion for forensic testing fails because he cannot show the results of the testing will produce evidence materially relevant to his claim of actual innocence. Defendant argued DNA or fingerprint testing could reveal that the fingerprints or DNA of the informant was on the packets of heroin. However, even a result favorable to defendant would not significantly advance his claim that he was actually innocent.

¶ 55 CONCLUSION

¶ 56 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 57 Affirmed.