2018 IL App (1st) 151125-U
No. 1-15-1125

SECOND DIVISION
March 29, 2018

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 01 CR 1421
	)	
HERRON DOUGLAS,	)	
	)	The Honorable
Defendant-Appellant.	)	Carol M. Howard,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Where the witnesses' affidavits attached to the defendant's successive postconviction petition alleged facts that the defendant was aware of prior to trial, they did not constitute newly discovered evidence and, thus, the defendant failed to state a colorable claim of actual innocence, and the trial court did not err in denying the defendant leave to file a successive postconviction petition.

¶ 2 The defendant, Herron Douglas, appeals from the trial court's denial of his motion for leave to file a successive postconviction petition. Defendant argues that the trial court erred in

denying his successive petition, because it contained a colorable claim of actual innocence. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Following a bench trial, defendant was found guilty of two counts of attempted first degree murder of a peace officer (720 ILCS 5/8-4 (West 2002); 720 ILCS 5/9-1 (West 2000)) and sentenced to concurrent sentences of 35 years' imprisonment. Because the facts of this case were detailed in defendant's previous appeals, we state only those facts necessary to the disposition of the present appeal.

¶ 5 At defendant's trial, the following evidence was presented. Officers Rafael Magallon and Denis Lopez testified that on the night of December 5, 2000, while conducting surveillance, they stopped John Martinez in connection with a suspected drug transaction. As they were patting down Martinez, defendant and Gilberto Irizarry exited a nearby home. Magallon recognized defendant from previous interactions with him. Defendant yelled to the officers, "What's up?" Lopez responded, "What's up?" At that point, Martinez yelled, "Betty up, Betty up," a street slang term for police. Upon hearing that, Magallon held up his badge and identified himself as police. Defendant pulled out a gun, pointed it at the officers, and began shooting. The officers returned fire and a firefight ensued.

¶ 6 After the shooting stopped, defendant ran back into the house from which he had come, and the officers gave chase. Magallon and Officer Vidas Nemickas, who had arrived in response to a call for backup, testified that when they entered the house, they observed defendant exiting the bathroom, wiping his wet hands. Nemickas later recovered a gun and drugs from the yard next door.

¶ 7 Erica Mendez testified that on December 5, 2000, she was at Irizarry's home with defendant, Irizarry, and others. Mendez testified that her recollection of events that night was poor because she was drunk at the time. She testified that she heard gunshots, but that she could not recall whether defendant was inside or outside at the time. She also could not recall whether she saw defendant in the bathroom.

¶ 8 Assistant State's Attorney Nancy Galassi testified that she took Mendez's statement regarding the events of December 5, 2000. In that statement, Mendez indicated that earlier on the night of December 5, 2000, she observed defendant in possession of a handgun, which he put in his waistband. Later that night, upon returning from a liquor store, Mendez saw two men dressed in dark clothing on the corner. She went inside and told defendant about the two men, who she thought might be rival gang members. Defendant then left the house, after which Mendez heard gunfire. When the gunfire stopped, defendant returned to the house and went into the bathroom. Mendez heard running water and a sloshing sound, as if defendant was washing his hands. When defendant exited the bathroom, he was shirtless. He asked for a coat to wear, sat down, and began spitting on his hands and rubbing them together.

¶ 9 Irizarry testified that on the night in question, he and defendant—both members of the Latin Kings street gang—were socializing with some other people at Irizarry's house. Defendant was armed with a revolver and showed it to the others who were there. At some point, Irizarry went to the liquor store, and on his return, he observed three men standing on the corner. Irizarry went inside and told defendant about the men. Defendant went outside to investigate, and Irizarry followed. Defendant then exchanged words with the men standing on the corner. Defendant pointed his gun at the men, and the men told him to put the pistol down, which caused Irizarry to believe that they were police. Defendant fired at the officers first and the officers

returned fire. At that point, Irizarry sought cover and did not see much of what happened next. After the gunfire stopped, defendant and Irizarry ran back into the house. Irizarry collected drugs that he had in the house and defendant handed the gun to Irizarry, and Irizarry then threw the drugs and gun next door.

¶ 10 The parties stipulated that no prints suitable for comparison were recovered from any of the firearms evidence collected at the scene.

¶ 11 Following his conviction and sentencing, defendant was unsuccessful in his direct appeal and his initial postconviction petition. Thereafter, defendant sought leave to file a successive postconviction petition. In that successive petition, defendant made, among others, a claim of actual innocence based on affidavits provided by Martinez, Shallimar Santiago, and Ismael Claudio.

¶ 12 In his affidavit, Martinez attested that on the night in question, he was stopped by two officers. While being searched, Irizarry and two other men exited Irizarry's house. Irizarry asked the officers who they were, and the officers responded in an aggressive tone. The officers drew their guns and Irizarry began shooting at them. The officers then returned fire. The two men that were with Irizarry ran back into the house. When the shooting stopped, Irizarry ran down the gangway by his house to the backyard. Martinez heard one of the officers ask the other if he had gotten a look at the shooter, and the other officer responded that he had not. Finally, Martinez attested that after being interviewed by an assistant state's attorney, he encountered defendant's attorney, who asked Martinez if he would be willing to be interviewed. Martinez agreed and gave defendant's attorney his contact information. Martinez never heard from defendant's attorney, "even after telling him the majority of what's included in this affidavit."

¶ 13 Santiago attested in his affidavit that on December 5, 2000, he went with Irizarry and Mendez to the liquor store. As the three returned to Irizarry's house, Irizarry saw two men standing on the corner. Irizarry asked some other people on the street who the men were, and the others responded that the men were probably "Folks." Irizarry asked the other people if they were "strapped." When they said no, Irizarry said that he was going to get his gun and would be back out. Inside the house, Santiago observed defendant playing with Irizarry's gun. A few minutes later, after speaking to someone who had come to the door, Irizarry grabbed his gun and told defendant and Santiago to follow him outside. While out there, Santiago waited at the gate of Irizarry's house, while Irizarry and defendant walked toward the men on the corner. Irizarry asked the men several times who they were, and the men responded by asking who Irizarry was. Suddenly, gunshots rang out. As he dove for cover, Santiago observed that defendant did not have a gun and was ducking behind cars in an attempt to get back to the house. Defendant and Santiago made it back into the house, and Santiago saw Irizarry run into the gangway toward the back of his house, but he did not make it back inside before the police entered the house.

¶ 14 In his affidavit, Santiago also stated that after he was arrested and taken to the police station, the police "repeatedly interrogated" him. He ultimately signed a statement "just to be left alone[,] as the police had made it clear that they wer[e]n't going to stop or let [him] go until [he] signed what they wanted."

¶ 15 Claudio's affidavit stated that on the night of December 5, 2000, he was sitting in his car waiting for his girlfriend when he saw two men grab Martinez and begin to aggressively go through his pockets. Claudio stopped Irizarry, who was walking down the street, and told him that he thought the men were robbing Martinez. Irizarry asked Claudio if he was "strapped," and Claudio said no. Irizarry rushed into his house and came back outside with a gun. Defendant

and Santiago followed behind Irizarry. Irizarry asked the men with Martinez who they were, and the men asked Irizarry who he was. Irizarry then pointed his gun at the men and they began to exchange fire. Claudio ducked down in his car until the shooting stopped, at which point he looked up and saw defendant and Santiago run back into Irizarry's house and Irizarry run into his gangway.

¶ 16 Claudio further averred that three days later, Irizarry told Claudio that he thought the men were rival gang members, although they turned out to be police officers. When Claudio asked how Irizarry got out of jail so quickly, Irizarry started crying and explained that the officers had been unable to identify the shooter, defendant was refusing to cooperate with the police, and the investigating detectives planted the case on defendant. The detectives told Irizarry that if he did not want to be charged, he needed to sign the statement that they had written out for him. Irizarry told Claudio that he blamed defendant in order to get out of jail and that he planned to move to Florida so that he did not have to testify. A month after this conversation, Claudio visited defendant in jail and told defendant what Irizarry had said. Defendant asked Claudio to speak with his attorney. Thereafter, Claudio went to his gang leader, who threatened him with a four-minute beating if he did not stay away from the case. Because, as of the time of his affidavit, Claudio was no longer associated with that gang, he was available to testify to what he saw and heard.

¶ 17 Defendant also submitted an affidavit in support of his successive petition. In it, defendant attested that on the night in question, he was at Irizarry's house. While there, defendant played with Irizarry's gun to entertain his female companions. When Irizarry returned from the liquor store, he grabbed the gun, and told defendant and Santiago that there were "Folks" on the corner robbing Martinez. As defendant's group approached the men, Irizarry

asked the men who they were, and the men asked Irizarry who he was. Defendant assumed that the men were rival gang members. At some point, Irizarry raised his gun and pointed it at the men. The men began firing. Irizarry took cover behind a car, and defendant and Santiago laid on the ground. When the shooting stopped, all three retreated toward Irizarry's house. Defendant and Santiago went back inside, while Irizarry ran down the gangway.

¶ 18 In a detailed written order, the trial court denied defendant's request for leave to file the successive petition. With respect to his claim of actual innocence, the trial court found that the testimony of Martinez and Santiago was not newly discovered evidence, because defendant was aware of their presence and participation in the events of December 5, 2000, and thus knew of, or could have discovered with due diligence, the evidence prior to trial. As for Claudio's testimony, the trial court concluded that it was newly discovered because defendant was unaware of Claudio's presence at the scene of the shooting and because Claudio was effectively silenced by the threat of a beating from his gang leader. Nevertheless, the trial court also found that the evidence from all three of these witnesses would not have affected the outcome of defendant's trial, because the identification evidence by the officers was strong and the testimony of Martinez, Santiago, and Claudio would have conflicted with defendant's trial strategy of arguing that, although he was the shooter, he did not realize that he was shooting at police officers at the time. Accordingly, the trial court denied defendant's motion for leave to file a successive postconviction petition, and defendant brought this timely appeal.

¶ 19 ANALYSIS

¶ 20 On appeal, defendant argues only that the trial court erred in denying his motion for leave to file a successive postconviction petition, because he stated a colorable claim of actual innocence based on the affidavits of Santiago and Claudio. Defendant makes no argument with

respect to Martinez's affidavit or any of the other claims raised in his successive petition. Because we conclude that the testimony of Santiago and Claudio does not qualify as newly discovered evidence, we affirm the trial court's denial.

¶ 21 The Post-Conviction Hearing Act generally limits a defendant to filing one postconviction petition without leave of court. 725 ILCS 5/122-1(f) (West 2014). Any claims that are not included in that initial petition are considered forfeited or waived. 725 ILCS 5/122-3 (West 2014). There are two exceptions to this rule: (1) where the defendant can satisfy the cause and prejudice test, and (2) the fundamental miscarriage of justice exception. *People v. Sanders*, 2016 IL 118123, ¶ 24. It is the latter exception that defendant seeks to invoke in the present case. Under the fundamental miscarriage of justice exception, defendant is required to demonstrate actual innocence. To do so, defendant must present evidence that is (1) newly discovered, (2) material and not just cumulative, and (3) of such conclusive character that it would probably change the result on retrial. *People v. Edwards*, 2012 IL 111711, ¶ 32. As our supreme court has stated:

> "[L]eave of court [to file a successive postconviction petition] should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. [Citations.] Stated differently, leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' "

Id. at ¶ 24. We review the denial of defendant's motion for leave to file a successive postconviction petition *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13.

¶ 22 Defendant argues on appeal that the evidence in Santiago's and Claudio's affidavits satisfies the requirements of a claim for actual innocence. We disagree, because we conclude that neither qualifies as newly discovered evidence. Newly discovered evidence is defined as evidence that was unavailable at trial and could not have been discovered sooner through the exercise of due diligence. *Edwards*, 2012 IL 111711, ¶ 34. This court has previously stated that "[i]t is well established that evidence is not 'newly discovered' when it presents facts already known to a defendant at or prior to trial, even if the source of these facts may have been unknown, unavailable, or uncooperative." *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (2010).

¶ 23 With respect to the information contained in Santiago's affidavit, it is not newly discovered evidence, because defendant was, since the time of the shooting, aware of all of the relevant information contained in it, namely, that Santiago witnessed the shooting, defendant was not in possession of a gun at the time of the shooting, and it was Irizarry and not defendant who engaged with and shot at the officers. In fact, defendant admits that he was aware of all of these facts in his own affidavit. See *People v. English*, 403 Ill. App. 3d 121, 133 (2010) ("Defendant attested in his affidavit that he, Farris, Ronald, and Charles were all together at defendant's mother's house at the time of the shooting. Accordingly, this was not newly discovered evidence; defendant was aware that Charles Streeter was with him during the time in question and he had this information available to him both at the time of trial and when he filed his initial postconviction petition."). Additionally, the record on appeal reveals that defendant identified Santiago as a potential defense witness in his pre-trial discovery responses, further indicating that defendant was aware that Santiago possessed relevant information.[1]

[1] We note that on appeal, defendant argues that the State's inclusion of Santiago on its witness list suggests that Santiago, consistent with his statement to police, would have testified favorably for the State. Applying defendant's own logic, however, his inclusion of Santiago on his witness

¶ 24 Defendant argues that although he was aware of Santiago's presence at the scene, the information in Santiago's affidavit should nevertheless be considered newly discovered, because Santiago relented under police pressure and gave a statement to police implicating defendant, thus essentially rendering him unavailable until he chose to recant his statement. Defendant attempts to analogize this case to a situation where a trial witness recants his testimony implicating the defendant. In support, defendant cites to *People v. Harper,* 2013 IL App (1st) 102181, ¶ 42. We disagree that the present situation is similar to a recanting witness, that *Harper* supports defendant's analogy, or that *Harper* has any relevance here.

¶ 25 In *Harper*, the defendant was convicted of arson and two counts of first-degree murder. *Id.* at ¶16. In his third successive postconviction petition, the defendant included a claim of actual innocence based in part on the affidavit of a recanting witness. At the defendant's first trial, the witness—a gas station attendant—testified that on the morning of the fire, he observed two men come to the gas station, purchase gasoline, pump it into a gas can, and leave in a white truck that might have been a Ford Bronco. *Id.* at ¶ 14. When the defendant was retried following reversal on his direct appeal, the transcript of the witness's testimony from the first trial was read into the record, because the witness was unavailable to testify at the second trial. *Id.* Evidence was also presented that the defendant drove a white Ford Bronco around the time of the fire. *Id.* at ¶¶ 7, 12.

¶ 26 In support of his third successive petition, the defendant submitted an affidavit from the witness, recanting his trial testimony. In that affidavit, the witness stated that he had not sold gas to anyone in a truck or van on the morning of the fire and that he told police as much. *Id.* at ¶ 25. The police, however, told the witness that two people had confessed to purchasing gas from the

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list equally suggests that defendant was aware that Santiago possessed information beneficial to his defense and expected Santiago to testify to such.

witness. The police also threatened the witness that if he did not identify who they wanted him to identify, they would fine him and give a negative report to his boss. *Id.* On appeal, this court found the witness's affidavit to constitute newly discovered evidence, because, given the witness's previous statement to police and the officers' threats, "due diligence could not have compelled [the witness] to testify truthfully at the first trial." *Id.* at ¶ 42.

¶ 27 We think the problems with defendant's reliance on *Harper* are obvious. *Harper* does not stand for the proposition that anytime a witness recants his or her previous statement, the recantation is necessarily considered newly discovered evidence. Rather, *Harper* was decided under a specific set of facts that are not present in this case, namely, the witness in *Harper* was threatened harm by police. In addition, the witness was unavailable to testify at the defendant's second trial and, thus, not subject to cross-examination. Here, in contrast, although Santiago's affidavit indicates that the police were persistent in their questioning, there are no allegations that they threatened to harm Santiago if he did not cooperate. Second, there is nothing in the record that suggests that Santiago was unavailable to testify at trial. Although defendant terms Santiago as "unavailable" because defendant believes he would have testified favorably for the State, the fact that a witness would not testify in defendant's favor does not render them unavailable altogether. *See generally* Ill. R. Evid. 804(a) (eff. Jan. 1, 2011) (not including in the definition of "unavailability as a witness" witnesses who would testify unfavorably to the party calling them). Certainly, defendant could have called Santiago to testify and examined him regarding the circumstances surrounding, and the veracity of, his statement to the police.

¶ 28 Along these same lines, defendant's failure to call or subpoena Santiago to testify at trial is fatal to his contention that Santiago's affidavit constitutes newly discovered evidence. Recall that newly discovered evidence does not include evidence that could have been discovered

sooner through the exercise of due diligence. *Edwards*, 2012 IL 111711, ¶ 34. Our supreme court has held that where a defendant is aware of alibi evidence but the witness is reluctant or unwilling to testify, the evidence will not be considered newly discovered unless and until the defendant subpoenas the witness to testify or provides an explanation for why he did not subpoena the witness to testify. *Id.* at ¶¶ 35-38 ("In this instance, however, where there was no attempt to subpoena [the alibi witnesses], and no explanation as to why subpoenas were not issued, the efforts expended were insufficient to satisfy the due diligence requirement. The alibi evidence could have been discovered sooner through the exercise of due diligence, and the evidence therefore was not newly discovered."). Here, there is no record that defendant subpoenaed Santiago, and defendant has not provided any explanation for this failure. Accordingly, given that defendant was aware of the information that Santiago possessed, defendant's failure to subpoena Santiago defeats any claim that Santiago's affidavit constitutes newly discovered evidence.

¶ 29 Moving on to Claudio's affidavit, we also conclude that it does not constitute newly discovered evidence because defendant was, prior to trial, aware of the ultimate facts alleged in it, even if he did not necessarily know that Claudio was an eyewitness. As with Santiago's affidavit, the relevant information in Claudio's affidavit was known to defendant prior to trial—it was Irizarry and not defendant who engaged with and shot at the officers. Again, defendant would have been aware that Irizarry was the shooter, because, by all accounts, defendant was present at the time of the shooting. Even defendant admits in his affidavit that he observed Irizarry shoot at the officers. In addition to already knowing that Irizarry was the shooter, defendant was also aware prior to trial that Irizarry admitted to Claudio that he was the shooter, as Claudio specifically states in his affidavit that he visited defendant in jail a month after the

shooting and informed defendant of what Irizarry told him. Accordingly, all of the relevant facts in Claudio's affidavit were known to defendant prior to trial and prior to the filing of his initial postconviction petition.

¶ 30 The only thing that was allegedly unknown to defendant prior to trial was that Claudio had witnessed the shooting. This fact, however, is inconsequential to our determination where defendant already knew the relevant underlying facts of what Claudio witnessed, *i.e.*, that Irizarry and not defendant shot at the officers. As we have previously stated, "if a defendant knew of certain facts at or prior to trial, those facts are not transformed into 'newly discovered evidence' simply because the source of these facts may have been unknown, unavailable, or uncooperative." *Jarrett*, 399 Ill. App. 3d at 724.

¶ 31 In *Jarrett*, the defendant based his claim of actual innocence in part on the affidavits of two witnesses, both of whom alleged that they observed a man named Michael Blue point a gun at the defendant prior to the defendant shooting, thus corroborating the defendant's self-defense claim. *Id.* at 718-19. We concluded that the witnesses' affidavits did not constitute newly discovered evidence, because the defendant admitted that he knew, prior to trial, that Michael Blue had pointed a gun at him but had done nothing with this information on direct appeal or in his initial postconviction petition. *Id.* at 724. We also held that the fact that the defendant might not have known the identities of the witnesses who saw Michael Blue point a gun at the defendant did not render their affidavits newly discovered evidence, because defendant already knew the underlying fact of Michael Blue pointing a gun at him. *Id.*

¶ 32 Likewise, in this case, prior to trial, defendant knew that Irizarry was the shooter and that Irizarry had admitted as much to Claudio. The fact that defendant might not have known that Claudio actually witnessed the shooting and the fact that Claudio was later unwilling to

cooperate[2] does not change the fact that defendant knew prior to trial that Irizarry was the shooter and that he had admitted as much to Claudio. Thus, just like the lack of knowledge of the witnesses' identities did not render the already-known information newly discovered in *Jarrett*, Claudio's fear of testifying and defendant's ignorance of Claudio's presence at the scene does not render the information in Claudio's affidavit newly discovered.

¶ 33 The cases cited by defendant in support of his claim that Claudio's affidavit constituted newly discovered evidence because defendant did not know that Claudio was present at the scene and because Claudio was threatened by his gang leader are readily distinguishable in that, unlike the present case, they did not involve evidence that the defendant was aware of prior to trial. In *People v. White*, 2014 IL App (1st) 130007, ¶ 13, the witness's affidavit stated that he saw who shot the victim and that it was not the defendant. Nothing in that case indicated that the defendant was aware of the shooter's identity prior to trial. In *People v. Adams*, 2013 IL App (1st) 111081, ¶ 33, the defendant would not have had knowledge of what the witnesses attested to observing, because the defendant claimed that he was not at the scene of the crime at the same time as the witnesses. Similarly, in *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009), because the defendant claimed to have been at the back of the park at the time of the murder, he would not have known what the witness observed at the front of the park where the murder took place.

¶ 34 In sum, because defendant was aware—prior to trial—of the relevant facts in Santiago's and Claudio's affidavits, the affidavits do not constitute newly discovered evidence and defendant has failed to state a colorable claim of actual innocence. Because defendant's actual innocence claim fails for lack of newly discovered evidence, we need not decide whether

[2] We note that there is no evidence in the record that defendant ever attempted to secure Claudio's cooperation at trial or that defendant was aware, prior to Claudio's affidavit, that Claudio was unwilling to cooperate due to the claimed threats by his gang leader.

Santiago's and Claudio's affidavits meet the other two requirements of an actual innocence claim.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 37 Affirmed.