2018 IL App (1st) 152237-U

No. 1-15-2237

Order filed February 20, 2018

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 25810
	)	
BOBBY EZELL,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's summary dismissal of defendant's postconviction petition is reversed and remanded for further proceedings where he raised an arguable claim of actual innocence

¶ 2 Defendant, Bobby Ezell, appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He

contends that the circuit court erred in dismissing his petition because he presented an arguably meritorious actual innocence claim. We reverse and remand for further proceedings.

¶ 3 Following a jury trial, defendant was convicted of first degree murder (720 ILCS 5/9-1 (West 2007)) and sentence to 53 years' imprisonment. On direct appeal, this court affirmed his conviction and sentence in *People v. Ezell*, No. 1-07-2970 (2009) (unpublished order under Supreme Court Rule 23). Because we fully set forth the facts on direct appeal, we recount them here only to the extent necessary to resolve the issue raised on appeal. See *People v. Ezell*, No. 1-07-2970 (2009).

¶ 4 According to the State's theory of the case, defendant called the victim to his car and they spoke for several minutes. Defendant shot the victim multiple times as he was walking away from the car. A police officer was able to determine that a car registered to defendant's mother matched the description of the vehicle used in the murder and the officer was able to obtain a photograph of defendant. The officer prepared a photo array using defendant's photograph. Two witnesses identified defendant from that photo array and later in a lineup. Defendant was arrested following an unrelated shooting and the gun used in that shooting was forensically linked to the victim's murder.

¶ 5 The record shows that on September 8, 2003 at approximately 7 p.m., the victim, Cedric Sanders was talking to Shiree Farrell in the 10000 block of South Calumet Avenue. Defendant drove up in a dark blue four door sedan and shouted to the victim "Cedric the Entertainer, I will come back around when no girls are around." Defendant drove off. After a few minutes, Otis Woodson and Anthony Foster arrived and the victim and Farrell joined them. Defendant came back a few minutes later in the same dark blue sedan and asked the victim to come over to the

car. Defendant drove towards the middle of Calumet as the victim, Woodson, Foster, and Farrell walked toward defendant's car. The victim walked over and leaned into the driver's side. Farrell, Woodson and Foster stayed on the sidewalk standing on the driver's side of the car. After a few minutes, the victim turned and began walking away. Defendant extended his arm outside of the car and began firing a small, silver handgun at the victim. The victim ran towards the corner of 100th and Calumet along with Woodson and Foster and defendant "sped off." Woodson was running with the victim who said he thought he was hit and then collapsed. The victim suffered from three gunshot wounds and died as a result.

¶ 6 The police arrived and began securing the area of the shooting. Woodson, Foster and Farrell described defendant to the police as having a light to medium complexion and having an "afro" hairstyle. Farrell described defendant's hairstyle as "nappy. It was just everywhere all over his head." The car defendant was driving was described as possibly an older model four door navy blue Malibu with a temporary vehicle registration sticker in the rear window. Farrell, Woodson and Foster did not recognize defendant as someone they knew. The police recovered two fired .25 caliber cartridge cases and a fired bullet from the scene.

¶ 7 On September 8, 2003, Carol Black was talking for about three or four hours on a "party line." After finishing her conversations she phoned the victim's mother Constance Shines. On September 29, 2003, Shines phoned Chicago police detective John Fassl who was one of the detectives assigned to investigate her son's murder. Shines informed Fassl about her conversation with Black. Fassl contacted Black and spoke to her on October 3, 2003 at Area 2 detective's division. Based on his conversations with Black, Fassl went to the 10600 block of South Wabash Avenue and saw an older model four door Dodge sedan with Illinois license

plates on the car. Fassl "ran" the plates and the car came back registered to defendant's mother. From the registration, Fassl was able to obtain a photograph of defendant. Fassl determined that the photograph matched the description of the shooter given by the witnesses. Fassl compiled two photo arrays that included defendant's photograph and on October 10, 2003, he showed a photo array to Farrell and Woodson. Both positively identified defendant as the person who shot the victim on September 8, 2003.

¶ 8 Latoya Lewis testified that on October 10, 2003 at approximately 11 p.m., defendant was in front of his home at 10610 S. Wabash. Patrick Jones, Eddie Powell, Andre Robinson, Marcello Shaw, Zachariah Robinson, Andre Robinson and Zachary Wright were walking down Wabash from 105th Street. All were members of the 4 Corner Hustlers street gang. When the group walked in front of defendant's home words were exchanged. Powell punched defendant in the face. Defendant, who was a member of the rival Gangster Disciples pulled out a silver .25 caliber handgun and began shooting at the group. Defendant shot Powell, Jones and Zachariah Robinson. All three were taken to the hospital and recovered from their injuries.

¶ 9 After the shooting, defendant fled into his house. The police arrived on the scene, spoke to witnesses and were told "Polo" did the shooting and were directed to defendant's home. Defendant was also known as Polo. The police were let into defendant's home by his mother. When the police entered, defendant was in the washroom washing his hands. When defendant came out of the washroom he directed the officers to a vent in the kitchen where he had hidden a loaded silver .25 caliber semi-automatic handgun. Defendant was placed under arrest and transported to Area 2 for processing.

¶ 10 On October 11, 2003, Detective Fassl was checking the arrests in Area 2 from the previous day. Fassl noticed that defendant had been arrested for a shooting from the day before and the caliber of weapon used was a .25 caliber, the same caliber used in the victim's shooting. Fassl contacted the Illinois State Police Crime Lab and requested an expedited comparison of the gun recovered in the October 10 shooting and the bullets and shell casings recovered in the September 8 shooting. On October 23, 2003, Fassl received notification from the crime lab that the fired bullet and expended shell casings recovered from the crime scene on September 8 and the bullet recovered from the victim were fired from the gun recovered from defendant's home on October 10.

¶ 11 On October 28, 2003, both Farrell and Woodson viewed a lineup and identified defendant as the person who shot and killed the victim on September 8, 2003.

¶ 12 In his case in chief, defendant called his mother Darcell Ezell to testify. Ezell testified that in September of 2003, she owned a navy blue Dodge Diplomat that she purchased in January of 2003. The car had license plates in September. On September 8, 2003, Ezell was driving her car in the evening hours looking for homes in the Homewood area. Ezell had the only set of car keys and defendant did not use her car that day.

¶ 13 Defendant's brother Dwayne Dozier and Dozier's brother-in-law Robert Adams both testified that defendant always wore his hair in braids and that defendant was with Adams and his children on the night of the murder.

¶ 14 Keyonya Mills testified that on September 8, 2003, she was at a gas station on 127th Throop Street when she saw defendant in a van with a "bunch of kids." Mills testified that

defendant's hair was braided. Mills acknowledged on cross-examination that when you remove braids from hair that's not chemically treated it becomes an afro.

¶ 15 Defendant testified that in July of 2003, he was living with his brother on the second floor of 7025 South Justine and would watch Adams' children when Adams was away. Defendant moved to his mother's home at 10610 South Wabash around the second or third week of September 2003. On September 8, defendant drove with Adams and his children to a gas station on 127th and Throop. Defendant returned home and began talking to a girl that lived down the street. Defendant testified he remembered September 8 because he had sex with the girl later that evening. Defendant denied driving his mother's car on September 8, 2003.

¶ 16 Defendant also testified that on October 10, 2003, he was in front of his home at 10610 South Wabash when several of the neighborhood gang members called him names and threatened to kill him. Defendant noticed about 20 people gathering in front of his porch. Defendant saw Zach Robinson with a 9 millimeter "Baretta" [*sic*] and two others with handguns. "Sumu" punched him in the mouth and the others jumped on him forcing him to the ground. Several of the men began kicking defendant. As he was on the ground, defendant heard a noise and saw that a gun had fallen from one of the people beating him. Defendant grabbed the gun and began shooting at the people attacking him. The people fighting with him did not attempt to shoot him and fled. Defendant went into the house to reload the gun. Defendant testified he had several types of ammunition in his home including .25 caliber. Defendant knew his mother phoned the police so he hid the gun in a vent in the kitchen and went into the washroom to wash his hands.

¶ 17 At the conclusion of the evidence, the jury returned a guilty verdict as to the first degree murder of the victim and also found that defendant personally discharged the firearm that proximately caused the victim's death. Defendant was sentenced to 53 years' imprisonment.

¶ 18 On direct appeal, defendant contended that: (1) the trial court erred in denying his motions to suppress identification testimony because the State's two key witnesses were exposed to a suggestive photo array and lineup; (2) that he was deprived of his right to a fair trial by the admission of other crimes evidence; and (3) that the trial judge failed to properly *voir dire* the jury in violation of Supreme Court Rule 431(b). Counsel did not challenge the sufficiency of the evidence. This court affirmed defendant's conviction. See *People v. Ezell,* No. 1-07-2970 (2009) (unpublished order under Supreme Court Rule 23).

¶ 19 On March 9, 2015, defendant filed a *pro se* petition for postconviction relief based on a "free standing claim of actual innocence backed on newly discovered evidence where the perpatrator [*sic*] Leo Guider #N52434 confessed in a 2 page affidavit form notarized and signed." Defendant attached an affidavit from Leo Guider admitting that he was the person that killed the victim on September 8, 2003. In his affidavit signed on December 12, 2013, Guider averred that "I am a changed man and a new found Christian in Christ Jesus. I believe the only way I can live with myself and be at peace is by admitting that I am the person who killed Cedrick [*sic*] Sanders on September 8, 2003 at 100 South Calumet Street." Guider averred that the reason he killed the victim was because of a "bad drug deal." Guider averred that he drove up to the victim and stated "[W]hat's up Cedrick, I want to buy some dope. Cedrick stated to me 'wait.' I said that I didn't have time to wait I need a fix. I'll be back when the girl ain't around." Guider averred he left the area drove around the block and returned calling the victim back to his

car. Guider averred that the victim stuck his head into the car and extended his hand "showing me some dope. I handed Cedrick my money he took my money saying 'you aint getting nothing!' So I pulled a [.]25 caliber nickel-plated pearl handle pistol out and shot Cedrick in the chest." Defendant also provided an affidavit where he averred that he "honestly was not involve in anyway in this murder, i was never present at the scene of the murder period, also i do not know the victim and i never ever seen how this person even look to this day."

¶ 20 On June 4, 2015, the trial court issued a written order summarily dismissing defendant's post conviction petition finding that the "petitioner's claim is frivolous and patently without merit" and that "the Court cannot say that Guider's exculpatory affidavit is of such a conclusive character that it would probably change the result of retrial." The court found that "petitioner has failed to state the 'gist' of a claim of actual innocence."

¶ 21 Defendant appeals arguing that the trial court erred in summarily dismissing his petition at the first stage of postconviction proceedings because the petition pled an arguably meritorious actual innocence claim and should be advanced to second stage proceedings.

¶ 22 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) provides that the circuit court adjudicates a petition for postconviction relief in three distinct stages. *People v. Hodges,* 234 Ill. 2d 1, 10 (2009). At the first stage, a trial court may dismiss a petition only if it is " ' frivolous or is patently without merit. ' " *People v Cotto,* 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2014)). A petition is frivolous or patently without merit if it " 'has no arguable basis *** in law or fact.' " *People v. Papaleo,* 2016 IL App (1st) 150947, ¶ 19 (quoting *People v. Hodges,* 234 Ill. 2d 1, 11-12 (2009)). A petition has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation.

Hodges, 234 Ill. 2d at 16. "A legal theory is 'indisputably meritless' if it is 'completely contradicted by the record,' and a factual allegation is 'fanciful' if it is 'fantastic or delusional.' " *Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 16-17)(2009)). Postconviction petitions are generally drafted by a defendant with little legal knowledge. *People v. Torres*, 228 Ill. 2d 382, 394 (2008). Therefore it becomes necessary to liberally construe the provisions of the Act as they relate to defendant's filing and accompanying affidavit. See *People v. Brown*, 236 Ill. 2d 175, 193 (2010). "Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *People v. Hodges*, 234 Ill. 2d 1, 10 (2009) (citing *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008)). We review the dismissal of a first-stage postconviction petition *de novo*. *People v. Williams*, 2015 IL App (1st) 131359, ¶ 28.

¶ 23 Here, defendant is seeking postconviction relief based on newly discovered evidence claiming he is actually innocent of the September 8, 2003 murder. Defendant has included an affidavit of Leo Guider who claims to have committed the murder because of a "bad drug deal."

¶ 24 To prevail on a claim of actual innocence based on newly discovered evidence, the evidence supporting the claim must be arguably new, material, noncumulative, and of such a conclusive character that it would likely change the outcome on retrial. *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 23. Evidence is new if it was discovered after trial and could not have been discovered earlier through the exercise of due diligence, material if it is relevant and probative of the defendant's innocence, and non-cumulative if it adds to the evidence heard at trial. *Id.* Defendant bears the burden of showing due diligence. *People v. Walker*, 2015 IL App

(1st) 130530 ¶ 18. Evidence, however, is not newly discovered if it was available at a posttrial proceeding or " 'presents facts already known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable or uncooperative.' " *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21 (quoting *People v. Collier,* 387 Ill. App. 3d 630, 637 (2008)). The conclusive character of the alleged new evidence is the most important element of an actual innocence claim. *People v. Sanders*, 2016 IL 118123, ¶ 47. Moreover, actual innocence is synonymous with total vindication or exoneration. *People v. Calhoun,* 2016 IL App (1st) 141021, ¶ 30. The requirements of an actual innocence claim are " 'extraordinarily difficult to meet" *People v. Brown,* 2017 IL App (1st) 150132, ¶ 39, (quoting *People v. Coleman,* 2013 IL 113307, ¶ 94) and "courts rarely grant postconviction petitions based on claims of actual innocence.' " *Id.* (quoting *People v. Wallace,* 2015 IL App (3d) 130489, ¶ 14).

¶ 25 Here, in addressing whether the affidavit of Guider meets the actual innocence criteria, we must look to whether the affidavit is new, material, noncumulative, and of such a conclusive character that it would likely change the outcome on retrial. The circuit court found the affidavit to be material and noncumulative, the State does not contest these factors, and we agree. The affiant claims to be the actual killer having shot the victim over a drug deal gone bad. While defendant presented an alibi at trial he did not present evidence of an alternate suspect, therefore, the affidavit is noncumulative of the evidence the jury heard. The affidavit is also material since it is relevant and probative of the defendant's innocence. See *People v. Walker,* 2015 IL App (1^{st}) 130530, ¶ 18.

¶ 26 Returning to the newly discovered factor, we find defendant has pled facts that arguably support the conclusion that Guider's affidavit constitutes newly discovered evidence. Newly

discovered evidence "must be evidence that was not available at defendant's trial and that the defendant could not have discovered sooner through diligence." *People v. House*, 2015 IL App (1st) 110580, ¶ 40 (citing *People v. Barrow*, 195 Ill. 2d 506, 541 (2001)).

¶ 27 Defendant argues that Guider's affidavit is newly discovered because the affidavit was dated six years after defendant's trial and Guider averred that he was a "new found Christian." The State responds that Guider did not aver that he made himself "unavailable" at any point or when he made his decision to become a Christian. The State further responds that defendant did not aver when he learned of Guider's involvement in the murder.

¶ 28 Although the State's arguments are not entirely unfounded, we find that the State is placing too high of a burden on this *pro se* litigant. Postconviction petitioners are generally laymen with little legal knowledge and reviewing courts require only a limited amount of detail in the petition. See *Torres*, 228 Ill. 2d at 394. Here, we find the date of Guider's affidavit and his assertion that his confession was the result of a recent conversion are sufficient to show that it is at least arguable that defendant could not have discovered this evidence before trial.

¶ 29 We are unpersuaded by the State's argument that Guider was required to aver that he actively made himself unavailable. See *People v. Ortiz*, 235 Ill. 2d 319, 333-34 (2009) (witness made himself unavailable by moving to Wisconsin). Defendant averred that he was not present at the scene of the crime and Guider averred that he acted alone. Taken as true, there is no way defendant could have known that Guider was the murderer until Guider chose to confess to the crime. We note the other deficiencies the State identifies in the affidavits, *e.g.*, the failure of defendant to specify when and how he learned of Guider's involvement in and confession to the offense. However, we conclude that it is at least arguable, *i.e.*, not based on a meritless legal

argument of fanciful factual allegation, (see *Hodges,* 234 Ill. 2d at 17) that Guider's affidavit constitutes newly discovered evidence. Arguments about the details of the petition and affidavits are best left for the second stage of postconviction proceedings, after counsel has been appointed and given the opportunity to amend the pleadings as necessary. We, of course, express no opinion on whether defendant's petition and its supporting affidavits meet the higher standards required after the summary dismissal stage.

¶ 30 The final factor is whether the newly discovered evidence is of such a conclusive nature that it would probably change the result on retrial. See *Mabrey,* 2016 IL App. (1st) 141359, ¶ 23. At trial, defendant presented an alibi defense which the jury rejected. We cannot conclude a new jury would likewise reject defendant's alibi if also presented with testimony from another individual asserting that he committed the murder and acted alone. More accurately, we cannot conclude that defendant's actual innocence claim is based on a meritless legal theory or fanciful factual allegation. Although the State raises numerous challenges to Guider's affidavit and notes the strength of its case against defendant, we simply note that these are largely matters of credibility that we cannot consider at the first stage of proceedings where we are concerned solely with the pleadings and must accept as true all of defendant's allegations of fact even if they are unlikely. See *Hodges,* 234 Ill. 2d at 15-17 (citing *O'Blasney v. Solem,* 774 F.2d 925, 926 (8th Cir. 1985)).

¶ 31 We conclude the Guider affidavit sets forth enough facts to warrant a second stage proceeding. Guider's affidavit is arguably new information exonerating defendant that he could not have discovered prior to trial with the exercise of diligence. See *People v. House,* 2015 IL App (1st) 110580 ¶ 40.

¶ 32 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand the matter for further proceedings pursuant to the Act.

¶ 33 Reversed and Remanded.