

No. 1-17-0138

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County, Illinois.
)	
v.)	No. 01 CR 23940
)	
KEVIN SMITH,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court’s dismissal of defendant’s postconviction petition following evidentiary hearing affirmed because court’s decision rested on credibility determinations that were not manifestly erroneous.

¶ 2 Defendant Kevin Smith, who was convicted of first degree murder and aggravated battery with a firearm in 2005, appeals the dismissal of his postconviction petition after an evidentiary hearing. On appeal, Smith contends that the trial court erred in finding witnesses

Robert Evans and Michael Smith (no relation) incredible, and in concluding that their testimony was not likely to change the outcome on retrial. Finding no error, we affirm.

¶ 3 BACKGROUND

¶ 4 This is our second review of Smith's postconviction petition. In our November 10, 2015 opinion, we reversed the court's dismissal of Smith's petition at the second stage of postconviction proceedings after finding that he had made a substantial showing of actual innocence sufficient to merit an evidentiary hearing. *People v. Smith*, 2015 IL App (1st) 140494. The trial court has now held that hearing and once again dismissed Smith's petition.

¶ 5 The facts underlying Smith's conviction were set forth in detail in our previous opinion, and we repeat only those necessary to the disposition of the current appeal. During a dice game among Gangster Disciples in Chicago on August 27, 2001, at approximately 10:00 p.m., a white car drove by and the three men inside the car began shooting at the dice players, killing Ardeen Adams and wounding Anton Moore. Defendant Kevin Smith and codefendant Kenneth Calhoun, who eyewitnesses identified as two of the shooters, were charged with multiple counts of first degree murder, attempted first degree murder, and aggravated battery with a firearm.

¶ 6 At a joint but severed bench trial beginning on December 5, 2003, the court heard testimony from three eyewitnesses: Bridget Banks (Adams' girlfriend), William Robinson, and Robert Evans. At trial, both Banks and Robinson recanted their pre-trial identification of Smith. Robinson was impeached with his prior signed statement naming Smith as the shooter as well as his identification of Smith in a line up. Banks, too, was impeached with her signed statement implicating Smith, her line-up identification of Smith, and her grand jury testimony, where she stated that she saw Smith in the car firing a gun.

¶ 7 Evans was the sole eyewitness who testified consistently with his earlier identification. We summarized his testimony in our previous order and repeat it here:

“Evans, a Gangster Disciple, testified that at some point during the game, a white car arrived on the scene, slowing as it reached the group of men. Although he could not identify the driver, Evans recognized Smith in the front passenger seat and Calhoun in the rear seat. He and Smith had been friends for twelve years despite their membership in rival gangs that were at war. (Smith was a Mickey Cobra). Although it was nighttime, Evans testified that the area was well-lit by a streetlight. When the car was about 12 feet away, Evans testified that Smith pulled himself out of the passenger side window and began shooting. Smith fired the first shot directly at Evans. The group of dice players immediately scattered. Evans could not locate Adams, but did see that Moore was shot twice in the back. He later identified Smith in a line-up and signed a statement on August 28, 2001 identifying Smith as one of the shooters. * * * Evans had not told officers on the scene immediately following the shooting that he recognized Smith as the shooter.” *Smith*, 2015 IL App (1st) 140494, ¶ 4.

¶ 8 No gun was recovered from Smith and the bullets recovered from the crime scene matched a gun found in the possession of another man who was not charged in connection with Adams’s murder.

¶ 9 The parties stipulated to Smith’s girlfriend, Lovie Brown’s testimony, which they agreed would be consistent with her grand jury testimony, wherein she testified that when she left to go to work at approximately 2:00 p.m. on August 27, 2001, Smith was at her house watching television. When she returned home at 11:30 p.m., Smith was still there, and her sister, Erica Brown, was asleep in the next room. Smith did not have a key to her house.

¶ 10 The trial court found Smith guilty of murder and attempted murder and sentenced him to 40 years' imprisonment.

¶ 11 Smith's conviction was affirmed on direct appeal (*People v. Smith*, No. 1-06-0043 (2009) (unpublished order under Supreme Court Rule 23)), and he timely filed a *pro se* postconviction petition on March 12, 2010. After counsel was appointed, Smith supplemented his petition with an affidavit from Evans that purported to show his actual innocence.

“Evans averred that following his testimony at Smith's trial, he began to have doubts about his identification. His doubts arose following a conversation with Banks, who told him that she was ‘sure’ Smith was not the shooter. He then spoke to an unnamed acquaintance who informed him that one of the shooters was a ‘dude’ named ‘Spanky.’ One month following trial, Evans was in a car when someone pointed out Spanky. Immediately upon seeing the individual identified as Spanky, it ‘came to [Evans]’ that Spanky, who looked a bit like Smith, was the actual shooter. According to Evans, his mistaken identification plagued him for some time, but he did not know who to inform of his error until the summer of 2012, when he met his friend ‘Reggie’ after nearly ten years. Reggie, also a friend of Smith's, told Evans that Smith wanted to contact him. Evans gave Reggie his phone number and told Reggie that he wanted to help Smith, because he ‘knew it wasn't [Smith].’ Smith called Evans and arranged for Evans to meet his attorney. Evans later prepared the affidavit recanting his identification.” *Id.* ¶ 12.

¶ 12 The trial court dismissed the petition on the State's motion on January 28, 2014. On appeal, we reversed the dismissal and remanded for an evidentiary hearing. *Id.* ¶ 27.

¶ 13 Following remand, on June 10, 2015, Smith filed a successive post-conviction petition again claiming actual innocence, this time supported by an affidavit from Michael Smith dated March 2, 2015. Michael averred that he was present for the dice game on August 27, 2001, and that Smith was not among the men in the white car who shot Adams and Moore. The court considered both petitions at the evidentiary hearing it held on November 21, 2016.

¶ 14 At the evidentiary hearing, Evans testified that he had known Smith since the early 1990s and they were good friends. He recounted the events of August 27, stating that he arrived at the dice game approximately five to seven minutes before the shooting started. He testified that the area was “kind of lit, but not really,” and that he was 12 to 15 feet away from the car when the shooting occurred. Evans testified that he realized he made a mistake in identifying Smith as the shooter six to seven months after the 2003 trial, when “guys” pointed out a man named “Spanky,” who they told Evans was the real shooter. Evans could not provide details as to who was with him or where he was when he discovered that Spanky was the shooter but testified that he “found out on the streets.” According to Evans, Spanky, just as Smith, had light skin and long hair. Evans did not know Spanky at the time of the shooting, could not provide his real name, and did not remember if he ever saw him again.

¶ 15 Evans testified that he did not know how to correct his erroneous testimony, although he did know where the police station was. Evans also denied knowing Smith’s family despite the fact that at the time of the evidentiary hearing, they had been friends for over 20 years. It was not until Evans saw a mutual friend, whose name he could not recall, but may have been Reggie, at a gas station in Calumet City, “a few years” after Smith’s trial that Evans made his first attempt to correct his mistaken identification. (Evans denied that he first saw Reggie ten years after the trial.) Evans testified that he told Reggie to have Smith call him because Evans realized Smith

was not the shooter. At the hearing, Evans testified that he never talked to Banks, but when pressed, admitted that they could have had a conversation.

¶ 16 Smith also presented testimony from Michael Smith, who grew up in the same neighborhood as Smith, but was Smith's rival, as he was in a different gang. Michael testified that he was at the dice game for several hours before the shooting. He was 12 to 15 feet away when a white, 2-door car pulled up to the game and the passengers started shooting. Michael testified that he was able to see clearly into the car and did not see Smith. He did not recognize the shooters. Michael ran when the shooting started and the police never spoke to him.

¶ 17 Michael discovered that Smith had been convicted of Adams' murder when he saw Smith in Menard Correctional Center in 2013 or 2014, where Michael was also serving time. After learning of Smith's conviction, Michael wanted to help him prove his innocence in the hopes that the real perpetrator would be found. Despite his testimony that he wanted to find the person who committed the crime, he refused to talk to an investigator from the State's Attorney's office prior to the evidentiary hearing.

¶ 18 The court took the matter under advisement and ultimately dismissed Smith's postconviction petition after finding that neither Evans nor Michael was credible. In reaching this decision, the court disbelieved Evans' testimony that he did not know how to correct his allegedly mistaken identification earlier. The court also highlighted inconsistencies between Evans' affidavit and his testimony at the evidentiary hearing – namely, whether Evans or Reggie brought up the possibility of getting in touch with Smith when the two ran into each other at the gas station. The court likewise found Michael's testimony incredible based on his failure to come forward earlier. In light of the credibility issues of the two testifying witnesses, the court

concluded that their testimony was not so conclusive as to probably change the result on retrial and dismissed Smith's petition.

¶ 19 Smith timely appeals.

¶ 20 ANALYSIS

¶ 21 The Post-Conviction Hearing Act (Act) allows a defendant who is imprisoned in a penitentiary to challenge his conviction or sentence for violations of his federal or state constitutional rights. 725 ILCS 5/122-1 (West 2014); see also *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). The Act establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1. During the third stage, at issue here, the defendant bears the burden to make a substantial showing of a constitutional violation at an evidentiary hearing. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). At the hearing, the trial court acts as the finder of fact, resolves conflicts in the evidence, makes credibility determinations, and considers the weight to afford particular testimony. *People v. Williams*, 2017 IL App (1st) 152021, ¶ 22. When the trial court's decision following an evidentiary hearing turns on findings of fact and credibility determinations, we review the court's decision for manifest error. *People v. English*, 2013 IL 112890, ¶ 23. A trial court's decision is manifestly erroneous where it is "arbitrary, unreasonable and not based on evidence." *People v. Wells*, 182 Ill. 2d 471, 481 (1998).

¶ 22 In this case, Smith's postconviction petition was premised on his claim of actual innocence, which is a cognizable constitutional violation under the Act. See *People v. Washington*, 171 Ill. 2d 475, 489 (1996) (conviction of innocent person violates Illinois Constitution's guarantee of due process). In order to succeed on a claim of actual innocence, a defendant must put forth evidence that is (1) newly discovered, (2) material and noncumulative, and (3) "of such conclusive character that it would be probably change the result on retrial."

People v. Ortiz, 235 Ill. 2d 319, 333 (2009). “Conclusive” means the new evidence, when considered along with the trial evidence, would probably lead to a different result. *People v. Coleman*, 2013 IL 113307, ¶ 96. The parties agree that Evans’ and Michael’s testimony was newly discovered and material, but disagree as to whether it was sufficiently conclusive as to probably change the result on retrial.

¶ 23 Initially, Smith challenges the trial court’s finding that Evans’ and Michael’s testimony at the evidentiary hearing was incredible. Turning first to Evans, his testimony at the evidentiary hearing recanted his earlier trial testimony identifying Smith as the shooter. Generally, recantations are inherently unreliable and a new trial will not be granted on that basis “absent extraordinary circumstances.” *People v. Sanders*, 2016 IL 118123, ¶ 33. Nevertheless, recantations should not be dismissed out of hand without analysis. *People v. Serrano*, 2016 IL App (1st) 133493, ¶ 26.

¶ 24 Here, the trial court’s credibility determination did not turn solely on the fact that Evans had recanted his earlier testimony. Rather, the court pointed to numerous factors casting doubt on Evans’ veracity. First, the court noted that it disbelieved Evans’ testimony that he did not know how to correct his testimony until speaking with Reggie. The court made this finding based on Evans’ concession that he knew where both the State’s Attorney office and the Area Two police station were located.¹ In addition, the court pointed to inconsistencies between Evans’ testimony at the evidentiary hearing and his initial affidavit. Specifically, in his affidavit, Evans said a conversation with Banks (whom he referred to as “Black”) following the trial prompted his doubts about his identification of Smith. However, at the hearing, Evans was equivocal about whether he spoke to Banks after the trial, and instead testified that he realized

¹ The court also suggested that Evans could have contacted Smith’s family to correct his mistaken identification, although Evans testified that he did not in fact know Smith’s family. While this was an incorrect assumption, it did not form the basis of the court’s credibility determination so as to render it manifestly erroneous.

his mistaken identification of Smith when his friends pointed out the shooter. Evans' testimony that he made a mistake in identifying Smith – a man he had had known for nearly a decade – when some unidentified “guys” pointed out “Spanky” – a man he had never seen before or since the shooting – is a fantastic story that the trial court appropriately discredited. See *People v. Coulson*, 13 Ill. 2d 290, 297 (1958) (“Where testimony is contrary to the laws of nature, or universal human experience, [the] court is not bound to believe the witness.”).

¶ 25 Nor did the court err in concluding that Michael Smith was no more credible than Evans. At the evidentiary hearing, Michael testified that although he was friends with Adams and clearly saw the man who shot him, he did not come forward to the police. Instead, it was not until he happened to see Smith in Menard Correctional Center (where both men were incarcerated) nearly 15 years after the shooting that he claimed to have told Smith that he was present and knew Smith was not the shooter. Given the lapse of time between the murder and Michael's decision to come forward, the lack of any explanation why he would not have come forward sooner, and the failure of any witness at trial to place him at the scene that evening, the trial court properly found that Michael's testimony was incredible.

¶ 26 Having determined that the trial court's finding that Evans and Michael were incredible was not manifestly erroneous, we further conclude that their testimony was not of such conclusive character as to probably change the result on retrial. At Smith's trial, the State presented testimony from three eyewitnesses who all identified Smith as the shooter on multiple occasions. The reliability of their identifications was bolstered by the fact that they were made shortly after the crime was committed and that all three witnesses had known Smith prior to the shooting. See *People v. Williams*, 2015 IL App (1st) 131103, ¶ 74 (affirming conviction based in part on eyewitness identification by witness who had known the defendant before the crime)

(citing *People v. Robinson*, 42 Ill. 2d 371, 375-76 (1969) and *People v. Nelson*, 40 Ill. 2d 146, 151 (1968)).

¶ 27 Smith makes much of the fact that Evans was the only witness who did not recant his initial identification at trial. But even if Evans recanted at a new trial, we cannot say the outcome would probably change. At a new trial, Evans would be impeached not only with his previous trial testimony, but with his prior identifications of Smith made within a month of the shooting. Those earlier identifications are far more reliable than Evans' recantation at a hearing 15 years after trial. This is particularly true given that Evans' recantation stemmed from doubts he had after being influenced by others who pointed out a different shooter.

¶ 28 In any event, even the testimony of a single eyewitness implicating a defendant who has since recanted is sufficient to sustain a conviction. *People v. Morrow*, 303 Ill. App 3d 671, 677 (1999) (finding that prior inconsistent statement, even in absence of corroborating evidence, sufficient to sustain a conviction); see also *People v. Curtis*, 296 Ill. App. 3d 991, 999 (1998) (same). And as discussed *supra*, Evans' recantation is singularly incredible. The addition of Michael Smith's testimony would likewise not change the outcome given Michael's own credibility issues.

¶ 29 *People v. Coleman*, on which Smith heavily relies, does not compel a different conclusion. In *Coleman*, the supreme court reversed the trial court's denial of the defendant's postconviction petition following an evidentiary hearing, concluding that new, material testimony from several eyewitnesses could probably have changed the result on retrial despite the fact that the witnesses had credibility issues. *Coleman*, 2013 IL 113307, ¶ 113. Importantly, the trial court in *Coleman* did not find the witnesses' testimony incredible standing alone, but based its credibility finding on the fact that the witnesses had criminal records and

were intoxicated at the time of the offense. *Id.* ¶ 106. But in fact, the witnesses’ testimony was consistent on “key details” of the crime and the witnesses corroborated the defendant’s alibi. *Id.*

¶ 30 This stands in stark contrast to Evans and Michael Smith’s testimony here. Evans and Michael’s testimony was only consistent to the extent that both men denied that Smith was the shooter; Evans alone identified another individual – Spanky – as the shooter. Moreover, Evans’ testimony, in contrast to the new testimony of the witnesses in *Coleman*, was a recantation of his trial testimony, and thus inherently unreliable. See *Sanders*, 2016 IL 118123, ¶ 33. For these reasons, we find *Coleman* readily distinguishable.

¶ 31 Finally, we address Smith’s contention that our earlier opinion reached a conclusion that Evans’ testimony “had the potential to change the results of a retrial.” Not so. We previously stated “[b]ecause Evans’ testimony was the strongest evidence against Smith, its recantation has the capacity, *if believed*, to produce a different result.” (Emphasis added.) *Smith*, 2015 IL App (1st) 140494, ¶ 22. Our statement that Evans’ testimony had the capacity to produce a different outcome turned on the *credibility* of that testimony, a determination that had not yet been made. Because the trial court found Evans’ testimony incredible at the evidentiary hearing, its conclusion that his recantation would not probably change the result on retrial was not manifestly erroneous.

¶ 32 CONCLUSION

¶ 33 For the reasons stated, we affirm the dismissal of Smith’s postconviction petition.

¶ 34 Affirmed.