2018 IL App (4th) 160308-U

NOS. 4-16-0308, 4-17-0903 cons.

FILED
September 27, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
CALVIN L. SMITH,	)	No. 00CF1349
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court (1) properly granted the State's motion to dismiss defendant's successive postconviction petition where defendant's newly discovered evidence lacked conclusiveness but (2) erred by denying defendant's fourth motion for leave to file a successive postconviction petition because defendant made a *prima facie* case his sentence violates the eighth amendment under *Miller v. Alabama*, 567 U.S. 460 (2012) and its progeny.

¶ 2 In October 2014, defendant, Calvin L. Smith, filed his third *pro se* motion for leave to file a successive postconviction petition, asserting actual innocence based on Deon Hoskin's affidavit. In January 2015, the McLean County circuit court granted defendant leave to file his successive postconviction petition. Thereafter, the State filed a motion to dismiss defendant's successive postconviction petition, which the court granted after a March 3, 2016, hearing. The court later denied defendant's motion to reconsider the dismissal of his successive postconviction petition. In April 2016, defendant appealed the dismissal of his successive

postconviction petition, and this court docketed defendant's appeal as case No. 4-16-0308.

¶ 3 In May 2017, defendant filed his fourth *pro se* motion for leave to file a successive postconviction petition. On October 18, 2017, the circuit court denied defendant's motion. Defendant appealed the denial of his fourth motion for leave to file a postconviction petition, and this court docketed the appeal as case No. 4-17-0903.

¶ 4 In March 2018, this court granted defendant's request to consolidate the appeals in case Nos. 4-16-0308 and 4-17-0903. On appeal, defendant contends the circuit court erred by (1) dismissing his successive postconviction petition in case No. 4-16-0308 and (2) denying his fourth motion for leave to file a successive postconviction petition in case No. 4-17-0903. In case No. 4-16-0308, we affirm the circuit court's judgment, and in case No. 4-17-0903, we reverse the court's judgment and remand for further proceedings.

¶ 5 I. BACKGROUND

¶ 6 A. Trial Proceedings

¶ 7 On the night of November 8, 2000, while working as a cashier at the Main Street Convenient store (Convenient Store) in Bloomington, Illinois, Mahendra Patel (Mike) received a gunshot wound to his left eye during a robbery and died from that injury. The next day, the police arrested defendant in connection with Mike's death and conducted a recorded interview of him.

¶ 8 In November 2000, a grand jury indicted defendant on single counts of intentional, knowing, and felony murder for Mike's death (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2000)). The grand jury also indicted defendant on single counts of armed robbery (720 ILCS 5/18-2(a)(4) (West 2000)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2000)). The State later nol-prossed the aggravated-battery indictment. Each of the four

remaining charges stated the offense was subject to an enhanced penalty under section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West Supp. 1999)), which provided that, "if, during the commission of the offense, the person personally discharged a firearm that proximately caused *** death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." Defendant pleaded not guilty.

¶ 9 In September 2001, the circuit court commenced defendant's jury trial. As the parties are familiar with the facts of this case, we need only set forth the facts necessary to analyze the issues in this appeal.

¶ 10 Michael Barford testified that, on the night of November 8, 2000, his wife drove him to the Convenient Store after his car broke down. As he was approaching the Convenient Store, he saw a little commotion and then a person leaving the Convenient Store, who was wearing a mask or a "do-rag" over his face and carrying a black satchel. Michael assumed a robbery had taken place and ran after the individual. He described the masked man as a tall, thin African American, wearing a black or navy blue sweatshirt and blue jeans or dark pants.

¶ 11 After losing sight of the individual, Michael observed an African-American man, who was wearing a hooded sweatshirt, walking slowly down the street, and looking at the Convenient Store. Michael thought that was unusual. His wife had driven down the street to where he was, and Michael got into his wife's car and returned to the Convenient Store. Michael entered the Convenient Store and observed the victim lying on the floor. He also observed the black plastic insert from the cash register drawer was empty and laying close to the victim.

¶ 12 Jeanne Barford testified she drove her husband, Michael, to the Convenient Store on the night of November 8, 2000. When she drove up to the Convenient Store, she observed a

man wearing a "do-rag" over his face run out of the store. The man had something clutched to his chest. Her husband then jumped out of the car and ran after the man. A slight, black man, wearing a white and gray sweater with a red stripe, then approached her car window and told her he thought someone inside had been shot. Jeanne then drove after her husband and found him. Jeanne saw another man standing across the street from where her husband was and down a little bit farther. That man was standing and staring. Shortly after she stopped the car, the man wearing the gray sweater again approached her car and said someone had been shot. Jeanne and her husband returned to the Convenient Store where she later saw the man in the gray sweater talking to the police.

¶ 13 Bloomington police officer Tommy Lee Walters testified he arrived at the Convenient Store and observed the open cash register drawer and the victim lying on the floor. He recovered a .22-caliber shell casing from the pool of the victim's blood. Walters also testified a gun was recovered in an area near the Convenient Store. Additionally, Walters recovered a black "do-rag" from the closet in the northwest bedroom of the apartment where defendant was living.

¶ 14 Chris Jacobson, a forensic scientist, testified defendant's fingerprint matched one of the fingerprints found on the cash register insert. Jacobson was unable to recover any prints from the recovered gun. Linda Yborra, also a forensic scientist, testified the shell casing found at the scene was fired from the recovered gun. The parties stipulated the blood on the $113 recovered from defendant was the victim's blood.

¶ 15 Bloomington police detective Clay Wheeler testified he interviewed defendant the day after the shooting. When defendant was asked if he had any money from the robbery, he reached into his pants pocket and placed some money on the table. He then reached into his

sock, removed a wad of cash, and threw the cash on the table, stating it was "dirty money."

¶ 16 The videotaped interview was played for the jury. Therein, defendant stated he believed the gun's safety mechanism was on when he entered the store with codefendants Robert Goodman and Marvin Alexis and that the gun accidentally discharged. They had only intended to rob the store. Defendant also told the police the "do-rag" was on the shelf in the closet of his bedroom.

¶ 17 Defendant testified on his own behalf. On November 8, 2000, defendant lived in an apartment in Bloomington. At about 1:30 p.m., Alexis and Goodman stopped by the apartment. According to defendant, Alexis and Goodman wanted to buy a quarter-pound of marijuana from him. The pair stated they would be back that night to pick up the marijuana.

¶ 18 At 9 p.m., Alexis and Goodman returned to defendant's apartment and sampled the marijuana. The pair did not purchase any and said they would return in five minutes. At around 9:30 p.m., they came back. Goodman appeared nervous and shook up. He stated he wanted defendant to bring the marijuana to him in 5 to 10 minutes because Goodman wanted to make sure everything was "cool" at the house first. Defendant received between $250 and $260 from Goodman before he left.

¶ 19 Defendant and his cousin, Ethan Bailey, walked over to Goodman's apartment, with defendant concealing the marijuana in his waistband. As they approached, they noticed a lot of police. The police detained the two for about 10 minutes. Defendant returned to his apartment and hid the marijuana. He and Bailey then proceeded to the apartment of Samantha Turrentine and Jackie Zimmerman.

¶ 20 After about 10 minutes, defendant left with Turrentine and went to a gas station, where he spent over $40 of the money he received from Goodman. They returned to

Turrentine's apartment, where defendant played cards and threw dice. Defendant, along with Zimmerman and Bailey, left the apartment about 1 a.m. and went to a hotel. Defendant paid for the room, but Zimmerman signed for it. The three left the hotel about 1:30 p.m.

¶ 21 Upon returning to his apartment, defendant went over to Goodman's apartment. Defendant learned from Joseph Matthews that Goodman and Alexis had been arrested. Matthews blamed defendant for their arrest because they were walking to defendant's apartment to get the marijuana when they were arrested. According to defendant, Matthews told him that he had to confess to the crime and threatened to kill him and his family. After his arrest, defendant admitted committing the crime when he learned he had been implicated because he did not have time to warn his mother about Matthews' threats. When asked how his fingerprint could have been found on the cash register drawer, defendant stated he owed Mike money for cigarettes and Mike told him on a particular occasion to put the money under the tray in the cash register.

¶ 22 On rebuttal, Matthews testified he talked to defendant on November 9, 2000, and defendant stated the murder was a mistake. Matthews also stated he did not threaten defendant or tell him to confess. On cross-examination, Matthews admitted he had a felony conviction.

¶ 23 Following closing arguments, the jury found defendant guilty of armed robbery and returned a general verdict of guilty for first degree murder. In October 2001, defendant filed a motion for a new trial. On December 17, 2001, the circuit court held a joint hearing on defendant's posttrial motion and sentencing. After hearing the parties' arguments, the court denied defendant's posttrial motion. The court then addressed sentencing. A few minor amendments were made to defendant's presentence investigation report. The State presented the testimony of Nicholas Rogers, Rebecca Meier, Sarah Gossmeyer, and Detective Wheeler about

an October 2000 robbery of a Pizza Hut. It also presented the transcript of defendant's November 9, 2000, interview and a victim's impact statement from Mike's widow. Defendant did not present any evidence except for his statement in allocution.

¶ 24 Rogers testified that, on October 3, 2000, around 8:30 p.m., he was standing near the cash register waiting to pay for and pick up his dinner at the Pizza Hut near the Convenient Store. A man walked into the restaurant and put a handgun to Rogers's forehead. The man was African American with an average build—was not notably short or tall—wearing sunglasses, what appeared to be a red bandana across his face, and a blue shirt. The man told Rogers to get on the ground, and Rogers did so. Rogers could hear the man order someone to put the money in the bag. He also heard the man threaten a girl by saying he would shoot her if she did not let him out the back door. Rogers could not positively identify the man who committed the robbery at the Pizza Hut.

¶ 25 Meier and Gossmeyer were Pizza Hut employees on the night of the robbery. Meier was the manager doing closing paperwork, and Gossmeyer was a waitress. Gossmeyer testified the man, who had entered the restaurant and forced the customer to the ground, was wearing a grey hooded sweatshirt with a football jersey over it, dark pants, a "maroonish colored" handkerchief around his face, and sunglasses. The man came up to Gossmeyer and held what she believed was a gun to her side and ordered her to put money in the bag, which she did. The man then ordered her to go to the other cash register. That register was empty, and Gossmeyer got on the ground. The man ordered her to get up and walk him out the back door or he would shoot her. Meier testified the man, who had entered the restaurant and approached Gossmeyer, appeared to have a tiny gun in his hand. He also had a "black little felty type bag." According to Meier, the man had a red t-shirt or something pulled over his head and was wearing

a New England Patriots jersey and dark jeans. The man took around $200 from the cash registers. Both women said the man was African American.

¶ 26 Detective Wheeler testified he also investigated the Pizza Hut robbery. During his and Detective Shepherd's November 9, 2000, interview of defendant regarding the Convenient Store murder, they asked defendant if he was involved in any other robberies and defendant made statements regarding the Pizza Hut robbery. The transcript indicates defendant admitted he had committed a robbery at the Pizza Hut a month before the Convenient Store murder. Defendant stated he used a shirt sleeve to cover his face and was wearing sunglasses, blue jeans, and black shoes. He also had a small black bag with a red top. Defendant stated he had a long lighter in his hand that he shoved into a man's back and ordered him to get on the ground. He then ran over to the cash register and ordered a girl to put the money in the bag. The girl put the money in the bag, and he ran out the back door. Defendant said he got around $180 from the robbery. He denied having a gun or threatening to shoot anyone. Defendant said he did the two robberies to obtain rent money and denied committing any other crimes.

¶ 27 In his statement of allocution, defendant said he was real close to the victim and felt remorse for the Patels. Defendant denied killing the victim. He said Matthews forced him to confess to the Convenient Store murder and the Pizza Hut robbery. Defendant pointed out he was 17 years old when the crime took place and he was now 18 years old. He did not have a prior record. Defendant insisted he was trying hard to stay out of trouble.

¶ 28 The circuit court found two mitigating factors: (1) defendant having no prior delinquency or criminal history and (2) the fact the crime was facilitated by others. As for aggravation, the court found the offense involved both compensation and serious injury and defendant did have a history of criminal activity. The court noted the differences between the

defendant and the victim, specifically as to their work ethic and lifestyle. The court further found it did not believe defendant was forced to confess and did not believe the shooting was an accident. The court declared the murder was "as close to an assassination or an execution, whatever you want to call it, as anything I've ever seen." It sentenced defendant to 55 years' imprisonment on one count of first degree murder (knowing) to run consecutively with 31 years' imprisonment for armed robbery. Defendant filed a motion to reduce his sentence. In January 2002, the court denied defendant's motion to reduce his sentence.

¶ 29 B. Direct Appeal

¶ 30 On direct appeal, this court affirmed the circuit court's judgment with the modification that defendant's knowing-murder conviction should be vacated, his intentional-murder conviction should be reinstated, and the cause remanded for resentencing on the intentional-murder conviction. *People v. Smith*, No. 4-02-0059 (May 20, 2004) (unpublished order under Illinois Supreme Court Rule 23). In January 2005, the circuit court amended the sentencing judgment to reflect defendant was sentenced to 55 years' imprisonment for intentional first degree murder. The court did not hold a new sentencing hearing on remand.

¶ 31 C. Prior Collateral Proceedings

¶ 32 In April 2007, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). Defendant alleged, *inter alia*, (1) defense counsel was ineffective for failing to call Amy Klawitter as a defense witness; (2) defense counsel was ineffective for failing to call Ethan Bailey as an alibi witness; (3) newly discovered evidence in the form of an affidavit from Zachary Porter showed he was innocent of the crime; and (4) he was denied a fair trial when the State withheld deoxyribonucleic acid (DNA) evidence. In July 2007, the circuit court summarily

dismissed defendant's postconviction petition, finding it frivolous and patently without merit. This court affirmed the dismissal. *People v. Smith*, No. 4-07-0674 (July 23, 2008) (unpublished order under Illinois Supreme Court Rule 23).

¶ 33 In September 2007, while his postconviction petition appeal was pending, defendant filed a *pro se* motion seeking posttrial relief under section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West Supp. 2007)). Defendant attached an October 2004 motion to withdraw the guilty plea filed by codefendant Alexis, wherein Alexis claimed defendant was actually innocent of first degree murder. Defendant argued that, since Alexis originally implicated defendant and had since recanted, Alexis's original statement to police implicating defendant was a lie. Defendant claimed that, if he had this "newly discovered evidence" previously, he could have shown his innocence.

¶ 34 In May 2008, the circuit court found defendant's motion was untimely because it was filed more than two years after the judgment of conviction. Further, the court found defendant did not plead any ground that would extend the two-year period under section 2-1401 of the Procedure Code. On the merits, the court stated any claim by defendant he confessed involuntarily was a matter that should have been raised on direct appeal or in a postconviction petition. The court noted defendant's videotaped confession was played for the jury and stated the following:

> "If the defendant's claim is correct that Marvin Alexis gave false information to the police that resulted in his arrest, and the confession is voluntary, the [section] 2-1401 claim has no merit. However, there are no circumstances in the record that would indicate that the confession was involuntary. A review of State Exhibit No. 29 reveals that the defendant was more than willing to talk to the

officers because he was upset with co-defendant Marvin Alexis who gave him the gun used in the murder because defendant claims Mr. Alexis told him the safety was on. Therefore, the text of the confession consisted of defendant admitting that he shot and killed the victim but complaining that he was misinformed by his co-defendant as to the status of the safety on the gun."

¶ 35 The circuit court also noted the evidence showed the cash recovered from defendant after the murder contained bloodstains from the victim. The court concluded the evidence of defendant's guilt was overwhelming and found no merit in the motion. Accordingly, the court *sua sponte* entered judgment against defendant. This court affirmed the circuit court's judgment. *People v. Smith*, No. 4-08-0430 (Apr. 15, 2009) (unpublished order under Illinois Supreme Court Rule 23).

¶ 36 In September 2009, defendant filed his first *pro se* motion for leave to file a successive postconviction petition, claiming he had newly discovered evidence of actual innocence. Attached to the motion was an affidavit from Bailey, who stated he was with defendant in their apartment at 10 p.m. on November 8, 2000, when the robbery occurred at the Convenient Store. Bailey stated he was reluctant to make the affidavit because of his fear of going through the interview process again, and he did not want to "suffer mistreatment" at the hands of another lawyer who did not care about his cousin's innocence. In addition to the alleged alibi, defendant stated his second piece of newly discovered evidence was the claim the State withheld DNA evidence. Defendant attached a *pro se* postconviction petition to the motion, which alleged (1) trial counsel was ineffective for failing to call Bailey at trial; (2) the State withheld DNA evidence; (3) both trial and appellate counsel were ineffective for not raising the issue of the DNA testing; (4) the appellate court erred in finding the admission of

defendant's statement was harmless error; and (5) trial counsel was ineffective in not telling the jury Alexis and Goodman pleaded guilty.

¶ 37 In February 2010, the circuit court judge Robert Freitag denied the motion for leave to file a successive postconviction petition. Judge Freitag found defendant had raised some of the issues in prior proceedings and the claims of actual innocence were not based upon any newly discovered evidence. Defendant appealed the denial, and this court granted the State Appellate Defender's motion for leave to withdraw and affirmed the circuit court's judgment. *People v. Smith*, 2011 IL App (4th) 100167-U.

¶ 38 While his appeal from the denial of his first request to file a successive postconviction petition was pending, defendant filed a second *pro se* motion for leave to file a successive postconviction petition in November 2010. In the attached postconviction petition, defendant claimed actual innocence based on newly discovered evidence in the form of an affidavit from Deryke Pfiefer. In the attached affidavit, Pfiefer claimed he had purchased marijuana from defendant at 10 p.m. on the night of the murder. On the way to defendant's apartment, Pfiefer stated he saw Goodman and Alexis walk toward the Convenient Store. During the drug transaction, defendant declined Pfiefer's offer to attend a party because defendant was waiting for Goodman and Alexis to bring him some money. Pfiefer left. While sitting at a red light near the Convenient Store, he saw Goodman and Alexis, who was holding a shotgun, inside the store. Once the light turned green, Pfiefer pulled away and saw Goodman and Alexis run from the store. Pfiefer then "went on about [his] night." The next day, Pfiefer returned to defendant's residence to tell him what he had witnessed. Pfiefer was unable to do so because defendant had been arrested. Pfiefer kept what he knew to himself because he did not want to put himself or his family in harm's way.

¶ 39 In September 2011, Judge Freitag denied defendant's second motion for leave to file a successive postconviction petition. Judge Freitag found the existence of Pfiefer as a potential witness did not constitute newly discovered evidence. The court stated defendant "offered no explanation as to how, with due diligence, he could not have developed or discovered the testimony of Deryke Pfiefer prior to trial." Defendant appealed the denial, and this court affirmed the denial of defendant's second motion for leave to file a successive postconviction petition. *People v. Smith*, 2013 IL App (4th) 110876-U, ¶ 37.

¶ 40 On appeal from the denial of his second motion for leave to file a successive postconviction petition, defendant also argued the 25-year sentence enhancement for personally discharging a firearm that caused the death of another during the commission of an armed robbery violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). The State conceded the argument, and this court agreed. *Smith*, 2013 IL App (4th) 110876-U, ¶ 39. We vacated defendant's 31-year sentence for armed robbery and remanded the cause for resentencing on defendant's armed robbery conviction with a sentencing range of 6 to 30 years in prison. *Smith*, 2013 IL App (4th) 110876-U, ¶¶ 45-46.

¶ 41 In September 2012, Judge Freitag recused himself from this case because he had just realized he was still serving as the felony chief assistant State's Attorney in McLean County when the charges in defendant's case were first filed.

¶ 42 On remand for resentencing on the armed robbery conviction, a new presentence report was prepared for defendant. The circuit court held a new sentencing hearing on December 2, 2014, at which the only evidence was the presentence investigation report. After hearing the parties' arguments, the court resentenced defendant to 10 years' imprisonment for armed robbery to run consecutive to his 55-year prison sentence for first degree murder. The court filed an

amended sentencing judgment that same day.

¶ 43 D. Case No. 4-16-0308

¶ 44 In October 2014, defendant filed his third *pro se* motion for leave to file a successive postconviction petition. In the attached postconviction petition, defendant claimed actual innocence based on newly discovered evidence in the form of an affidavit from Deon Hoskin. He also attached the affidavits of Pfiefer and Bailey. Additionally, defendant raised a claim his due process rights were violated because Judge Freitag had decided his first two motions for leave to file a successive postconviction petition and was the prosecutor that signed and filed the original charges in this case.

¶ 45 In his affidavit, Hoskin stated he witnessed a portion of the armed robbery of the Convenient Store on November 8, 2000, at around 10:00 p.m. Hoskin saw Alexis and Goodman walking through the store's parking lot toward the store and Goodman handed Alexis what looked like a sawed-off shot gun. Hoskin averred that, once "they" entered the store, he saw Alexis go to the counter and Goodman stop and stare by the door. He then witnessed the victim's hands instantly go up in the air. Hoskin further stated he saw the driver of a green car pull up to the intersection and slowly go through the light as the driver looked over at the store. As Hoskin continued walking down Oak Creek Street toward Main Street, he saw Alexis go behind the counter while still pointing the gun at the guy behind the counter who still had his hands up. After turning left on Main Street, Hoskin looked back and saw Alexis and Goodman running out of the door toward Tracy Drive. Hoskin stated defendant was not one of the two people he saw that night and he did not see defendant in the area of the store at the time of the crime.

¶ 46 In January 2015, the circuit court granted defendant leave to file a successive

postconviction petition and appointed defendant counsel. Counsel did not amend defendant's *pro se* postconviction petition and filed the certificate required by Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). In February 2016, the State filed a motion to dismiss defendant's successive postconviction petition, alleging Hoskin's statements are positively rebutted by the record and not of such a conclusive character that would probably change the result on retrial. The State also noted this court had found the evidence against defendant was overwhelming. See *Smith*, 2011 IL App (4th) 100167-U, ¶ 35. As for defendant's due process claim, the State argued defendant offered no support for his claim Judge Freitag's rulings were the result of bias and failed to show both cause and prejudice.

¶ 47 On March 3, 2016, the circuit court held a hearing on the State's motion to dismiss. After hearing the parties' arguments, the court granted the State's motion to dismiss. In explaining its ruling, the court noted it found persuasive this court's language in affirming the denial of leave to file a successive postconviction petition based on the statements made by Bailey, an alibi witness who did not testify at defendant's trial. There, we stated the following:

> "Even if Bailey's testimony was not available at trial, the evidence was not of such a conclusive character that it would probably change the result of the trial. The evidence against defendant was overwhelming given his confession, his admission the money found on his person came from the armed robbery, the victim's blood on the money, and defendant's fingerprints on the cash drawer. As defendant failed to set forth evidence to allege a claim of actual innocence, the trial court did not err in denying his motion for leave to file a successive postconviction petition on this ground." *Smith*, 2011 IL App (4th) 100167-U, ¶ 35.

¶ 48 On April 4, 2016, defendant filed a motion to reconsider the circuit court's dismissal, asserting the circuit court should not have relied on this court's prior description of the evidence and erred by making a factual determination at the second stage of the proceedings. After an April 26, 2016, hearing, the court denied defendant's motion to reconsider. The next day, defendant filed a notice of appeal in compliance with Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014). See Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013) (providing the procedure for appeals in postconviction proceedings is in accordance with the rules governing criminal appeals). Accordingly, this court has jurisdiction of defendant's appeal under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013). As stated, this court docketed the appeal from the second-stage dismissal of defendant's successive postconviction petition as No. 4-16-0308.

¶ 49 E. Case No. 4-17-0903

¶ 50 In May 2017, while his appeal from the dismissal of his 2014 successive postconviction petition was pending, defendant filed his fourth motion for leave to file a successive postconviction petition, asserting he is entitled to a new sentencing hearing because his sentence violates the eighth amendment and the proportionate penalties clause of the Illinois Constitution because it is a *de facto* life sentence. Defendant attached his proposed postconviction petition. On October 18, 2017, the circuit court filed a written order denying defendant's fourth request to file a successive postconviction petition. The court found defendant had established cause but failed to establish prejudice, noting defendant's sentence was not a mandatory term of life in prison and his sentence was at the low end of the sentencing range for his crimes.

¶ 51 On November 1, 2017, defendant filed a motion to reconsider the circuit court's denial of his fourth motion for leave to file a successive postconviction petition. The next day,

the court denied defendant's motion to reconsider. On November 30, 2017, defendant filed his notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. July 1, 2017). See Ill. S. Ct. R. 651(d) (eff. July 1, 2017) (providing the procedure for appeals in postconviction proceedings is in accordance with the rules governing criminal appeals); Ill. S. Ct. R. 373 (eff. July 1, 2017) (providing that, if the circuit court receives a notice of appeal after the due date, the time of mailing by an incarcerated, self-represented litigant is deemed the time of filing, and proof of mailing shall be as provided in Illinois Supreme Court Rule 12(b)(6) (eff. July 1, 2017)). Accordingly, this court has jurisdiction of defendant's appeal under Illinois Supreme Court Rule 651(a) (eff. July 1, 2017). As stated, this court docketed defendant's appeal from the denial of his fourth petition for leave to file a successive postconviction petition as No. 4-17-0903.

¶ 52 II. ANALYSIS

¶ 53 A. Postconviction Act

¶ 54 The Postconviction Act provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007.

¶ 55 At the first stage, the circuit court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the court does not dismiss the petition, it proceeds to the second stage, where, if necessary, the court appoints the defendant counsel. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense

counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008.

¶ 56 Additionally, the Postconviction Act contemplates the filing of only one petition without leave of court. 725 ILCS 5/122-1(f) (West 2014). The defendant forfeits any claim not presented in the original or amended petition. 725 ILCS 5/122-3 (West 2014). Our supreme court has "identified two bases upon which the bar against successive petitions will be relaxed." *People v. Sanders*, 2016 IL 118123, ¶ 24, 47 N.E.3d 237. The first exception is when the defendant satisfies the cause-and-prejudice test. 725 ILCS 5/122-1(f) (West 2014); *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621 (2002). The second is known as the fundamental miscarriage of justice exception. *Sanders*, 2016 IL 118123, ¶ 24.

¶ 57 B. Second-Stage Dismissal of Successive Postconviction Petition

¶ 58 In this case, the State did file a motion to dismiss defendant's successive postconviction petition at the second stage of the proceedings, and the circuit court granted that motion. Defendant challenges the dismissal, asserting he had made a substantial showing of actual innocence. The State disagrees.

¶ 59 At the second stage of the postconviction proceedings, the circuit court is concerned only with determining whether the petition's allegations sufficiently show a constitutional infirmity that would necessitate relief under the Postconviction Act. *People v.*

Coleman, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. "[T]he 'substantial showing' of a constitutional violation that must be made at the second stage [citation] is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief." (Emphasis in original.) *People v. Domagala*, 2013 IL 113688, ¶ 35, 987 N.E.2d 767. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). However, at a dismissal hearing, the court is prohibited from engaging in any fact-finding. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at 1071. When a defendant raises a claim of actual innocence, the relevant inquiry at the second stage of postconviction review is whether the defendant has made a substantial showing of actual innocence so as to warrant an evidentiary hearing. *People v. Rivera*, 2016 IL App (1st) 132573, ¶ 29, 64 N.E.3d 1. We review *de novo* the circuit court's dismissal of a postconviction petition at the second stage. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 60 "The evidence of actual innocence must be (1) newly discovered, (2) not discoverable earlier through the exercise of due diligence, (3) material and not merely cumulative, and (4) of such conclusive character that it would probably change the result on retrial." *Sanders*, 2016 IL 118123, ¶ 24. The "conclusiveness of the new evidence is the most important element of an actual innocence claim." *Sanders*, 2016 IL 118123, ¶ 47. The defendant's new evidence must be "so conclusive that it is more likely than not that no

reasonable juror would find him guilty beyond a reasonable doubt." *Sanders*, 2016 IL 118123, ¶ 47. In its motion to dismiss, the State asserted defendant failed to make a substantial showing of actual innocence because his new evidence was not of such conclusive character that it would probably change the result on retrial.

¶ 61 Defendant contends Hoskin's statements clearly show Alexis and Goodman acted alone in the armed robbery at the Convenient Store and Mike's murder and thus he is innocent of the crimes. However, defendant's assertion overlooks the fact he initially confessed to police he was involved in the armed robbery, pulled the trigger of the gun, and shot Mike. Defendant's confession contained numerous details of the robbery and murder and he admitted the money on his person came from the armed robbery. The State also presented other strong evidence of defendant's guilt, including the victim's blood on money in defendant's possession, defendant's fingerprint on the cash drawer, and a black "do-rag" found in defendant's bedroom. At trial, defendant testified Marvin and Alexis were together on November 8, 2000, and wanted to buy marijuana from him that night. Defendant was at his apartment at the time the armed robbery and murder occurred. When Goodman returned to buy the marijuana, he left the money but did not take the marijuana because he needed to check out what was going on at his apartment. The next day, Matthews forced defendant to confess to the crimes by threatening to kill defendant and his family if he failed to do so. Defendant's alleged false confession defense failed at trial.

¶ 62 In addition to Hoskin's statements conflicting with defendant's confession, the statements conflict with other evidence presented at defendant's trial. Hoskin stated Alexis was wearing dark clothing. However, Alexis was identified in a photograph taken at the scene, wearing a mostly light grey sweater with a red stripe. Moreover, Hoskin stated he saw Goodman and Alexis running out the doors headed towards Tracy Drive. However, Jeanne and Michael

both testified one man ran out of the Convenient Store, not two. Jeanne further testified a second man, later identified as Alexis, approached her car right after the first man took off running. Alexis then stayed in the area as he approached her car again when she picked up Michael. She later saw him talking to the police in front of the Convenient Store. Further, both Jeanne and Michael testified the man who ran out of the store had a "do-rag" over his face, and Michael said the man was holding a satchel against his chest. While Hoskin describes what Goodman and Alexis were wearing and carrying that night, he fails to mention both the "do-rag" and the satchel.

¶ 63 Thus, we find Hoskin's statements merely add conflicting evidence in support of defendant's defense that failed at trial. As such, even taking the well-pleaded facts as true, we agree with the circuit court that Hoskin's statements are not of such conclusive character as would probably change the result on retrial. See *Sanders*, 2016 IL 118123, ¶ 52 (finding the witness's recantation testimony merely added conflicting evidence to the evidence adduced at the trial and thus, even taking the recantation testimony as true, it was not of such conclusive character as to probably change the result on retrial). Accordingly, defendant failed to make a substantial showing of actual innocence, and we affirm the circuit court's grant of the State's motion to dismiss.

¶ 64 C. Fourth Request to File a Successive Postconviction Petition

¶ 65 In his fourth petition for leave to file a successive postconviction petition, defendant contends he is entitled to a new sentencing hearing because he received a *de facto* life sentence without proper consideration of the factors set forth in *Miller v. Alabama*, 567 U.S. 460 (2012), which violates the eighth amendment (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, §11). Defendant contends he

established cause and prejudice for filing a successive postconviction petition. The State disagrees, contending defendant failed to establish both cause and prejudice. When the circuit court has not held an evidentiary hearing, this court reviews *de novo* the denial of a defendant's motion for leave to file a successive postconviction petition. See *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 66 Section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2016)) provides the following:

> "Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process."

Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *People v. Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909. However, with a motion for leave to file a successive postconviction petition, the court is just conducting "a preliminary screening to determine whether defendant's *pro se* motion for leave to file a successive postconviction petition adequately alleges facts demonstrating cause and prejudice." *People v. Bailey*, 2017 IL 121450, ¶ 24, 102 N.E.3d 114. The court is only to

ascertain "whether defendant has made a *prima facie* showing of cause and prejudice." *Bailey*, 2017 IL 121450, ¶ 24. If the defendant did so, the court grants the defendant leave to file the successive postconviction petition. *Bailey*, 2017 IL 121450, ¶ 24.

¶ 67 1. *Limitations on Juvenile Sentencing*

¶ 68 Before we determine whether defendant's fourth motion for leave to file a postconviction petition met the cause-and-prejudice test, an examination of the case law addressing juvenile sentencing is warranted.

¶ 69 In recent years, the United States Supreme Court has addressed the appropriateness of juvenile sentences and found the eighth amendment prohibits certain harsh sentences for juveniles. First, in *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Court held the death penalty was unconstitutional for juvenile offenders. Next, in *Graham v. Florida*, 560 U.S. 48, 74 (2010), the Court concluded a life sentence without the possibility of parole for juveniles not convicted of homicide was unconstitutional. Then in *Miller*, 567 U.S. at 489, it found unconstitutional a sentencing scheme that mandated life in prison without the possibility of parole for juvenile offenders (those under the age of 18), including those convicted of homicide. The *Miller* Court did not foreclose sentencing a juvenile convicted of homicide to life in prison, but it emphasized the judge or jury must have the opportunity to consider mitigating factors before imposing the harshest possible penalty on a juvenile. *Miller*, 567 U.S. at 489. In reaching its holding, the *Miller* Court explained that, before imposition of life imprisonment without the possibility of parole, a court must consider how children are different from adult offenders for purposes of sentencing and the offender's youth and attendant characteristics. *Miller*, 567 U.S. at 480, 483. Most recently, in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 736 (2016), the Court found *Miller* announced a new substantive rule of constitutional law that is

retroactive on state collateral review. It also reiterated what must be considered before imposing life imprisonment without the possibility of parole on a juvenile. *Montgomery*, 577 U.S. at ____, 136 S. Ct. at 733-34. The *Montgomery* Court further emphasized life imprisonment without parole was unconstitutional "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, 577 U.S. at ____, 136 S. Ct. at 734.

¶ 70 In turn, the Illinois Supreme Court has addressed and applied the aforementioned decisions by the United States Supreme Court. Before *Montgomery*, the Illinois Supreme Court in *People v. Davis*, 2014 IL 115595, ¶ 39, 6 N.E.3d 709, held *Miller* stated a new substantive rule of law applicable retroactively to cases on collateral review. The *Davis* case involved a defendant who was 14 years old at the time of the offense and had received a mandatory sentence of natural life imprisonment. *Davis*, 2014 IL 115595, ¶¶ 4-5. In *People v. Reyes*, 2016 IL 119271, ¶¶ 9-10, 63 N.E.3d 884, our supreme court extended *Miller* to a mandatory term of years that is the functional equivalent of life without the possibility of parole (*de facto* life sentence). The *Reyes* court found the defendant in that case had received a "*de facto* life-without-parole sentence" when he at 16 years old committed "offenses in a single course of conduct that subjected him to a legislatively mandated sentence of 97 years, with the earliest opportunity for release after 89 years." *Reyes*, 2016 IL 119271, ¶ 10.

¶ 71 Most recently, in *People v. Holman*, 2017 IL 120655, ¶ 40, 91 N.E.3d 849, the Illinois Supreme Court held "*Miller* applies to discretionary sentences of life without parole for juvenile defendants." There, the circuit court had exercised its discretion and imposed a sentence of life without parole for a murder the defendant committed at age 17. *Holman*, 2017 IL 120655, ¶¶ 1, 17. After finding *Miller* applicable to the *Holman* defendant, it then explained what it means to apply *Miller*. *Holman*, 2017 IL 120655, ¶ 40. Our supreme court found the following:

> "Under *Miller* and *Montgomery*, a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation. The court may make that decision only after considering the defendant's youth and its attendant characteristics. Those characteristics include, but are not limited to, the following factors: (1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation." *Holman*, 2017 IL 120655, ¶ 46.

After examining the cold record at the time of the defendant's original sentencing hearing to determine compliance with the aforementioned considerations, the *Holman* court found the defendant's sentence was constitutional under *Miller*. *Holman*, 2017 IL 120655, ¶¶ 47-50.

¶ 72 2. *Cause*

¶ 73 Defendant argues he established cause since the United States Supreme Court handed down its decisions in *Miller* and *Montgomery* well after he was sentenced in 2001, and those decisions apply to his case because he committed the crimes at age 17 and received a *de facto* life sentence. The State disagrees defendant has established cause. Citing section 122-3 of the Postconviction Act (725 ILCS 5/122-3 (West 2016)), it asserts the question is whether

defendant could have raised his *Miller* argument in his earlier postconviction proceedings. The State further contends the Illinois Supreme Court's decision in *Davis* provides for the claim defendant now raises.

¶ 74 Section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2016)) represents *an exception* to section 122-3 of the Postconviction Act. *Bailey*, 2017 IL 121450, ¶ 15. The plain language of section 122-1(f) states the defendant "shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her *initial* post-conviction proceedings." (Emphasis added.) 725 ILCS 5/122-1(f) (West 2016). The State cites no case law, indicating the "initial" language has been extended to earlier requests for leave to file a successive postconviction petition. Even if the State is correct that defendant must show he could not have asserted the claim in an earlier postconviction proceeding, defendant is correct he did not have a *Mille*r claim until our supreme court extended *Miller* to *de facto* life sentences in *Reyes*, 2016 IL 119271, ¶¶ 9-10. The Illinois Supreme Court decided *Reyes* in September 2016, almost two years after defendant's October 2014 motion for leave to file a successive postconviction petition. Accordingly, we find defendant did establish cause for filing a successive postconviction petition.

¶ 75 3. *Prejudice*

¶ 76 In this case, defendant must have alleged facts making a *prima facie* showing of prejudice under *Miller*. Specifically, defendant must show *Miller* applies to his sentence and the court's sentencing of defendant did not comply with *Miller*. The State asserts defendant failed to do so.

¶ 77 Although our supreme court has held a discretionary natural life sentence (*Holman*) and a mandatory *de facto* life sentence (*Reyes*) raise issues under *Miller* and its

progeny, it has not held a discretionary sentence of a term of years in prison constituted a *de facto* life sentence falling under *Miller*. This court has also not addressed that issue. However, in numerous cases, the First District has examined whether a discretionary sentence is a *de facto* life sentence under *Miller* and its progeny. See *People v. Johnson*, 2018 IL App (1st) 153266, ¶ 23, petition for leave to appeal pending, No. 123511 (collecting cases); see also *People v. Croft*, 2018 IL App (1st) 150043, ¶ 20, 100 N.E.3d 577; *People v. Rodriguez*, 2018 IL App (1st) 141379-B, ¶ 70, petition for leave to appeal pending, No. 123679. Moreover, the First and Third Districts have found discretionary *de facto* life sentences and applied *Miller* in cases where the defendant received a sentence similar or shorter than defendant's 65-year aggregate sentence. See *People v. Smolley*, 2018 IL App (3d) 150577, ¶ 22, petition for leave to appeal pending, No. 123598 (65 years); *People v. Buffer*, 2017 IL App (1st) 142931, ¶ 62, 75 N.E.3d 470, petition for leave to appeal granted, No. 122327 (Ill. Nov. 22, 2017) (50 years); *People v. Ortiz*, 2016 IL App (1st) 133294, ¶ 24, 65 N.E.3d 945, petition for leave to appeal pending, No. 121578 (60 years). The State asserts the aforementioned cases were wrongly decided. However, at this point in the proceedings, the court is only engaged in a preliminary screening. Thus, based on those cases, defendant has made a *prima facie* case *Miller* applies to his sentence.

¶ 78 Next, we address whether defendant made a *prima facie* case the circuit court failed to sufficiently consider the *Miller* factors as explained in *Holman*. Defendant contends the circuit court did not make the requisite finding "defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." See *Holman*, 2017 IL 120655, ¶ 46. On appeal, both of defendant's briefs focus primarily on the argument the circuit court failed to properly consider his potential for rehabilitation. Additionally, we note that, on page nine of his motion for leave to file a

successive postconviction petition, defendant points out the circuit court did a comparison of defendant's lifestyle and the lifestyle of the victim, who was 48 years old at the time of his death.

¶ 79 Here, a reasonable argument exists the circuit court overlooked defendant's youth and its attendant characteristics based on the court's comparison of the work ethic and behavior of a 17-year-old defendant with that of the 48-year-old victim. Thus, we find defendant has made a *prima facie* case his sentence does not comport with *Miller* and its progeny. Accordingly, the circuit court erred by denying defendant's fourth motion to file a successive postconviction petition. However, we emphasize our decision is in no way an opinion on the actual merits of defendant's petition or on whether defendant will ultimately prevail on his sentencing claim. Additionally, this court is aware the Third District in *People v. Lusby*, 2018 IL App (3d) 150189, ¶ 29, did not remand for further postconviction proceedings but instead remanded for a new sentencing hearing. We do not find that procedure is appropriate in this case.

¶ 80 III. CONCLUSION

¶ 81 For the reasons stated, we affirm the McLean County circuit court's March 3, 2016, dismissal of defendant's successive postconviction petition at the second stage of the postconviction proceedings in case No. 4-16-0308. In case No. 4-17-0903, we reverse the circuit court's October 18, 2017, denial of defendant's fourth petition for leave to file a successive petition and remand the cause to the McLean County circuit court for further proceedings on defendant's March 2017 successive postconviction petition.

¶ 82 Appeal No. 4-16-0308, Affirmed.

¶ 83 Appeal No. 4-17-0903, Reversed; cause remanded.