

2019 IL App (1st) 162659-U
No. 1-16-2659
Order filed September 12, 2019

Fourth Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 94 CR 19477
)	
WILLIAM BROWN,)	Honorable
)	Timothy J. Joyce,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court's denial of defendant's petition for postconviction relief following an evidentiary hearing is affirmed over defendant's contention that an affidavit, in which an alleged shooter takes full responsibility for the victim's death, was newly discovered, non-cumulative evidence that was conclusive enough to change the result at a retrial.
- ¶ 2 Defendant William Brown appeals from the denial of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 1998)), following an

evidentiary hearing.¹ He contends that the circuit court erred in denying him postconviction relief when the affidavit of his “codefendant” Jessie Smith, in which Smith takes full responsibility for the death of the victim and exonerates defendant, is newly discovered, non-cumulative, and conclusive evidence that would likely change the result at retrial. We affirm.

¶ 3 Defendant was charged with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 1994)), following the June 30, 1994, shooting death of Cornell Kenyetta Robinson. The evidence at defendant’s jury trial established that defendant pointed a rifle at Robinson and that Robinson was fatally shot by Jessie “Black Jessie” Smith.² We set forth only the testimony relevant for understanding the issue on appeal.

¶ 4 Yolanda Green testified that Robinson picked her up around 1 a.m. on June 30, 1994. They drove around, then returned to her neighborhood and parked. At one point, Green noticed two people approaching the vehicle. Defendant, whom she identified in court as O’Shea, was one of them. Defendant was holding a rifle and went to the driver’s side of the vehicle. The other person stayed on the curb. Defendant opened the door and tried to pull Robinson from the vehicle. However, Robinson held onto the steering wheel. Green moved to the passenger side floor because she thought defendant was “going to shoot up in the car.” She heard a gun “cock,” and then observed Robinson outside the vehicle. Green next heard “a lot of shooting.” When she looked up, defendant was standing in front of the vehicle, pointing the rifle at the ground. The other man had stepped off the curb and was pointing a firearm at the ground. Green could not see Robinson, but “knew he was on the ground.” After the gunshots stopped, defendant and the other

¹ Defendant is also known as O’Shea Collier.

² On March 12, 1996, Jessie Smith entered a plea of guilty to first degree murder and was sentenced to 35 years in prison. Smith’s name is also spelled Jesse and Jessee in the record.

man ran away. Green exited the vehicle and observed Robinson on the ground. Robinson sat up and said that O'Shea and Black Jessie had shot him. Robinson then walked toward his aunt's house.

¶ 5 Tracey Robinson, Robinson's cousin, testified that she was awakened by gunshots and ran to the front door. After hearing her cousin ask for help, she opened the door. When she asked Robinson what happened, he replied that "O'Shea and Black Jessie" shot him. Tracey identified defendant in court as O'Shea. Robinson was bloody and "in pain," so she took him to a hospital, where he died.

¶ 6 Chicago police detective Paul Bernadeck testified that he spoke with Robinson at a hospital on June 30, 1994. After that conversation, Bernadeck looked for O'Shea and Black Jessie. When he later spoke with Green, she stated that both defendant and Smith fired guns.

¶ 7 Chicago police officer James Spratte testified that on July 4, 1994, as he approached a certain residence, he observed a firearm being thrown out of a window. His partner recovered the gun, a semiautomatic pistol. Kevin Walker then let Spratte into the residence. Smith was taken into custody on the second floor. A .30-caliber carbine was recovered from the room in which Smith was arrested. Walker was also taken into custody.

¶ 8 Chicago police detective Kevin Glynn testified consistently with Spratte that a firearm was thrown out of a window, that this firearm and a rifle were recovered from the residence, and that Smith and Walker were arrested. On July 5, 1994, Glynn drove to Wisconsin where defendant was in custody at the Sauk County jail. He informed defendant of the *Miranda* rights and the purpose of the interview, *i.e.*, officers had information that he was one of two people who shot Robinson. Defendant then stated " 'check which gun he's shot with.' " Defendant was

brought back to Chicago. On July 15, 1994, Glynn learned that Robinson had died. During cross-examination, he testified that he heard Spratte say that the firearm was thrown out of a window.

¶ 9 Kevin Walker testified that he knew both defendant and Smith. In the early morning hours of June 30, 1994, Walker was at his house with defendant, Smith, and two other people “chilling and drinking.” At one point, Walker gave defendant a rifle. Defendant left with the rifle. Smith took a 9-millimeter handgun from the house. Walker did not know where they were going. Later, defendant and Smith returned with the rifle and Walker put it under his bed. He did not receive the handgun back. Walker identified the rifle in court.

¶ 10 Additional testimony established that one fired bullet and nine fired 9-millimeter cartridge cases were recovered from the scene of the shooting, and that two bullets were recovered from Robinson’s body. The parties stipulated that an expert in ballistics would testify that the two bullets recovered from Robinson’s body were 9-millimeter type bullets, and that all the 9-millimeter bullets recovered in this case were fired from the same firearm.

¶ 11 Defendant testified that he was dropped off at Walker’s house around 9:45 or 10 p.m. on June 29, 1994. Smith was also present. Defendant knew Walker well, and had met Smith, who was several years younger, within the prior year. Between 1:30 and 2 a.m., defendant left to walk to his fiancée’s grandmother’s house. Smith left with him. At one point, Smith said “that’s that punk I’ve been looking for” and ran toward a red vehicle. Smith drew a firearm. Smith went to the driver’s side of the vehicle, opened the door, told the occupant to exit the vehicle, and then shot him. Defendant stayed on the sidewalk. After hearing the gunshots, defendant ran to his grandmother’s house.

¶ 12 Defendant denied having a firearm, leaving the sidewalk, holding Robinson down, or having anything to do with the shooting. Defendant did not know that Walker had firearms in his bedroom, and testified that Walker was lying when he testified that defendant left his bedroom with a rifle. He never observed Smith with a handgun and was surprised by the shooting. Defendant knew Green from the neighborhood and did not observe her in the vehicle. He did not observe Robinson being pulled from the vehicle. Defendant testified that he told the police he did not have a firearm and had “nothing” to do with the shooting. Defendant acknowledged that when a police officer said that he allegedly shot Robinson, he replied “check the gun.” He did not tell the police that Smith was the shooter because he was afraid of Smith, who belonged to a gang. Defendant did not belong to a gang.

¶ 13 In rebuttal, Detective Glynn testified that defendant did not deny possessing a rifle or state that he was a witness to the shooting; rather, he stated “check the gun the victim was shot with.” Glynn also testified that defendant stated that he and Smith belonged to the same gang.

¶ 14 Defendant was found guilty of first degree murder, and sentenced to 45 years in prison. This judgment was affirmed on appeal. See *People v. Brown*, No. 1-95-0724 (1996) (unpublished order under Supreme Court Rule 23).

¶ 15 In January 2000, defendant filed a *pro se* petition for postconviction relief alleging, *inter alia*, that the State’s case was based entirely on “faulty eye-witness testimony” and perjury. Specifically, the petition alleged that Kevin Walker and his mother, Denise Walker, were threatened so that Kevin would “testify favorably for the State.” Attached to the petition in support were, *inter alia*, the affidavits of defendant, Denise Walker, and Kevin Walker.

¶ 16 Defendant averred that Green testified falsely since she “knew” that defendant did not leave the curb. Denise Walker averred that she was told by officers that she could be jailed for obstruction of justice if her son Kevin did not “testify favorably” for the State, that Kevin was “very afraid” of the police, and that she tried to testify on defendant’s behalf, but trial counsel said she would not be needed as “there was no way” that defendant would be convicted.

¶ 17 In his affidavit, dated December 17, 1999, Walker averred that he was threatened “a number of times” by police officers who stated that he could either testify favorably for them or be charged with murder. Walker further averred that after he refused, he was “threatened some more” and forced to lie. Walker finally averred that he tried to give this information to trial counsel, but that counsel refused “to call or interview” him about the case.

¶ 18 In February 2000, defendant filed an amendment to the petition, which included Jessie Smith’s affidavit. In his affidavit, dated January 12, 1999, Smith averred that he shot Robinson a “number of times” and that defendant “in no way participated in the offense.” Smith further averred that defendant was on the street when Smith spotted Robinson and approached Robinson’s vehicle. Smith also averred that when he noticed defendant running away he chased defendant, but could not catch him. Smith finally averred that he was aware that defendant was “falsely convicted,” but did not say anything because he “wanted to beat the murder charge” and was sure that defendant “would not be convicted.”

¶ 19 The petition was docketed and counsel was appointed. In 2005, private counsel entered his appearance for defendant. Private counsel subsequently filed an amended petition. Attached to the petition were, in pertinent part, a second affidavit from Kevin Walker and an affidavit from Kelly Marshall.

¶ 20 In his affidavit, dated January 10, 2006, Walker averred that he “never supplied weapons” to defendant and Smith and that his testimony was the result of police coercion. Walker averred that officers threatened him with a murder charge and that his family members were also threatened. Walker further averred that he was not contacted by defendant’s counsel prior to trial, and that the first time he spoke to someone in connection with defendant’s postconviction proceeding was in November or December 2005. In his affidavit, Marshall averred that he left his house after hearing gunshots and encountered Robinson, and that Robinson said he was shot by “Black Jesse.” Marshall further averred that he followed Robinson to Tracey Robinson’s house where Robinson knocked on the door, and that when Tracey opened the door, he heard Robinson tell her that Black Jesse shot him. Marshall finally averred that “[a]t no time” did Robinson mention defendant’s name or nickname, he did not see Green, and the first time he was contacted by “anyone” regarding defendant was in late 2005.

¶ 21 The State filed a motion to dismiss defendant’s *pro se* and amended petitions. The circuit court granted the State’s motion, finding that defendant’s petitions were not timely filed. On appeal, this court reversed and remanded, finding that in light of defendant’s claim of actual innocence and our supreme court’s decision in *People v. Ortiz*, 235 Ill. 2d 319 (2009), timeliness, in and of itself, was not a reason to grant the State’s motion to dismiss. *People v. Walker*, No. 1-07-3356 (2010) (unpublished order under Supreme Court Rule 23).

¶ 22 On remand, defendant filed a supplemental postconviction petition alleging ineffective assistance of trial and appellate counsel and a claim of actual innocence. The petition was supported by, in pertinent part, second affidavits from Smith and Marshall, and a third affidavit from Walker, averring to essentially the same facts as their prior affidavits, but dated 2012. In his

2012 affidavit, Smith further averred that he shot at defendant as defendant ran away. The matter proceeded to an evidentiary hearing as to defendant's claims of actual innocence and ineffective assistance of trial counsel.³

¶ 23 At the evidentiary hearing, Kevin Walker testified that his testimony at trial was "coerced" and untruthful. Officers "threatened and beat [him] up a little bit to make those statements," when "obviously" he did not know "anything." Over the course of several conversations with officers, Walker was told that defendant and Smith shot someone, and that he had something to do with it. Officers also said that if he did not say what was written on a paper, he would be charged with murder, his mother's house would be taken, and his family members could be locked up. Prior to defendant's trial, Walker was not contacted by defendant's attorney.

¶ 24 During cross-examination, Walker testified that he was not on the street when Robinson was shot and does not know who shot Robinson. He was in the basement when Smith was arrested on the second floor of Walker's house. Police also removed a rifle from his home that day. Walker had signed three affidavits in support of defendant's request for a new trial. Although he initially did not recall signing an affidavit in 1999, he then identified the 1999 affidavit. Walker signed the affidavit because "it wasn't true what was being said and I wanted to clear my name." In 2006, Walker signed a second affidavit because he "figure[d] it was the same affidavit." He signed a third affidavit on August 21, 2012. He acknowledged that none of his affidavits stated that he was "choked and told to say what was on the initial report." Walker had not previously "spoke out openly in court" because he feared "retaliation." When he complained "to the officers" in 1994, they told him to "shut up." He did not tell the assistant State's Attorney

³ The record reveals that Smith died prior to the evidentiary hearing.

(ASA) at defendant's trial that he was beaten by police. He further testified that at trial he was coerced into giving false testimony by the ASA. Walker admitted that his 2012 affidavit did not include that fact.

¶ 25 Kelly Marshall testified that after hearing shots, he walked in that direction and observed Robinson "staggering." Robinson said, "it's me cuz" and that "Black Jessie shot me." Marshall helped Robinson to Tracey's house. There, Robinson told Tracey that Black Jessie shot him. Robinson did not mention defendant's name. Marshall was not contacted by an attorney for defendant until 10 years after defendant's trial. However, if he had been contacted prior to trial, he would have testified to these facts. During cross-examination, Marshall testified that he did not contact the police. The defense entered the 2012 affidavits into evidence, and then rested.

¶ 26 The State entered a stipulation that on July 4, 1994, another ASA took a handwritten statement from Smith regarding Robinson's shooting. The statement was entered into evidence.

¶ 27 In the handwritten statement, Smith stated that he was 16 years old, belonged to a gang and knew Robinson from the neighborhood. Smith further stated that he was walking home around 4 a.m. on June 30, 1994, when he observed William O'Shea Collier, who was carrying a rifle and a semiautomatic firearm. O'Shea gave Smith the rifle. Smith further stated that at one point, he observed Robinson exit a vehicle and that there was a woman in the front passenger seat. O'Shea approached Robinson, began to argue, and then shot Robinson. Smith pointed the rifle at Robinson and fired in that direction. He then dropped the rifle and ran away.

¶ 28 The parties further stipulated that the ASA would testify that he was employed as an ASA in 1994, that he prepared a handwritten summary of Walker's statements, and that Walker never stated that Walker was physically threatened or abused in order to implicate defendant.

Petrakis would further testify that he never told Walker that Walker would go to jail for perjury if Walker did not testify to the information contained in the handwritten statement. Petrakis would finally testify that he was present when Smith entered a plea of guilty to first degree murder relating to Robinson's death.

¶ 29 The State then entered the transcript from Smith's plea hearing into evidence. During the plea hearing, the factual basis for Smith's plea stated, *inter alia*, that: (1) Smith and defendant approached the vehicle containing Robinson and Green; (2) defendant was holding a rifle and Smith was holding a 9-millimeter semiautomatic firearm; (3) defendant pulled Robinson from the vehicle and then fired the rifle at him; (4) Smith fired several shots at Robinson; and (5) 9-millimeter casings were recovered from the scene and two 9-millimeter bullets were removed from Robinson's body.

¶ 30 The circuit court denied defendant postconviction relief, finding, in pertinent part, that the affidavit of the "now-deceased" Smith was "hardly of such conclusive nature" as to require a new trial because it was contradicted by Smith's postarrest statement and Green's testimony that both Smith and defendant approached the vehicle with firearms. Defendant now appeals.

¶ 31 The Act provides a criminal defendant the means to redress substantial violations of his constitutional rights that occurred in his original trial or sentencing. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of proceedings under the Act, the circuit court must either dismiss the petition as frivolous or patently without merit or docket the petition for further consideration. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). At the second stage of proceedings, the allegations in the petition must make a substantial showing that the defendant's constitutional rights have been violated, with all well-pleaded facts that are not positively rebutted by the

record taken as true. *Pendleton*, 223 Ill. 2d at 473. If the allegations in the petition, as supported by the record or accompanied by affidavits, make a substantial showing of a violation of constitutional rights, the postconviction proceedings advance to a third-stage evidentiary hearing, where the defendant may present evidence in support of the allegations in the petition. *Pendleton*, 223 Ill. 2d at 472-73.

¶ 32 At the third stage of proceedings, it is the circuit court's role to conduct an evidentiary hearing, determine witness credibility, and resolve issues of fact. *People v. Domagala*, 2013 IL 113688, ¶ 34. A defendant is not entitled to relief unless he makes a "substantial showing" that his constitutional rights were violated. *Pendleton*, 223 Ill. 2d at 473.

¶ 33 When the circuit court holds an evidentiary hearing, the court's fact-finding and credibility determinations will not be reversed unless they are manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473. This standard affords great deference to the circuit court because, having observed and heard the witnesses testify, it is in a superior position to evaluate their credibility and resolve conflicts in their testimony. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). A decision is manifestly erroneous when the opposite conclusion is clearly evident. *People v. Coleman*, 2013 IL 113307, ¶ 98.

¶ 34 In the case at bar, defendant contends that the circuit court erred in denying him postconviction relief when he made a substantial showing of actual innocence.

¶ 35 "The due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). The elements of an actual innocence claim are that the evidence must be newly discovered, material and not merely cumulative, and of such a

conclusive character that it would probably change the result on retrial. *People v. Edwards*, 2012 IL 111711, ¶ 32. “Newly discovered evidence is defined as evidence that has been discovered since the trial and could not have been discovered sooner by the defendant through due diligence.” *People v. Jones*, 2017 IL App (1st) 123371, ¶ 43. “The United States Supreme Court has emphasized that claims of actual innocence must be supported ‘with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.’ ” *Jones*, 2017 IL App (1st) 123371, ¶ 44 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). “Claims of actual innocence are rarely successful because such evidence is obviously unavailable in the vast majority of cases.” *Jones*, 2017 IL App (1st) 123371, ¶ 44.

¶ 36 Here, defendant contends that the circuit court’s determination that Smith’s affidavit, in which Smith takes full responsibility for the shooting, was not conclusive enough to warrant a new trial was manifestly erroneous. He argues that the contents of the affidavit are “newly discovered,” not cumulative of other evidence presented at trial, and conclusive enough to change the result at retrial. Evidence is generally not newly discovered if it only presents facts known to defendant prior to trial, even though the source of the facts may have been unavailable or uncooperative. *People v. Wideman*, 2016 IL App (1st) 123092, ¶ 53.

¶ 37 The record reveals that Smith’s initial affidavit was dated January 12, 1999, several years after both the shooting and defendant’s trial. Moreover, the facts contained in Smith’s affidavit, that Smith was the shooter and that defendant did not participate in the offense, were the same facts to which defendant testified at trial. Defendant nevertheless argues that the affidavit was newly discovered evidence because defendant could not have compelled Smith to waive his right

against self-incrimination any sooner. Our supreme court has found that an affidavit is not discoverable through due diligence if the affiant would have invoked the right against self-incrimination. See *Edwards*, 2012 IL 111711, ¶ 38; *People v. Molstad*, 101 Ill. 2d 128, 134-35 (1984) (“no amount of diligence could have forced the codefendants to violate their fifth amendment right to avoid self-incrimination”).

¶ 38 In the case at bar, defendant was sentenced on February 3, 1995. Smith, however, did not enter a plea of guilty to first degree murder until March 12, 1996. In his 1999 affidavit, Smith avers that he was aware that defendant was “falsely convicted” but did not say anything because he “wanted to beat the murder charge” and was sure that defendant “would not be convicted.” Thus, we agree with defendant that the contents of Smith’s affidavit are “newly discovered.” We also agree that the facts contained in Smith’s affidavit are material and non-cumulative. At trial, defendant testified that he did not leave the curb, had nothing to do with the shooting, and was surprised by Smith’s actions. Smith’s affidavit is consistent with, and would corroborate, defendant’s testimony at trial that Smith was solely responsible for the shooting and defendant did not participate.

¶ 39 However, we are not convinced that the facts contained in Smith’s affidavit were conclusive enough to change the result at retrial. Our supreme court has held that it is “the conclusiveness of the new evidence [that] is the most important element of an actual innocence claim.” *People v. Sanders*, 2016 IL 118123, ¶ 47. Evidence of actual innocence must support a defendant’s “total vindication or exoneration, not merely present a reasonable doubt.” *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36. Newly discovered evidence does not have to be completely dispositive of an issue to be deemed likely to change the result upon retrial; rather, it

need only be conclusive enough “to *probably* change the result upon retrial.” (Emphasis in original.) *People v. Davis*, 2012 IL App (4th) 110305, ¶ 62.

¶ 40 At trial, Green testified that defendant and another man approached Robinson’s vehicle, that defendant was holding a rifle, and that defendant opened the driver’s side door and attempted to pull Robinson from the vehicle. Green placed herself on the floor because she thought defendant was going to shoot into the vehicle. When she raised her head after hearing gunshots, defendant was pointing his rifle at the ground and she “knew” that Robinson was on the ground. Robinson later stated that O’Shea, *i.e.*, defendant, and Black Jessie shot him. Tracey Robinson also testified that Robinson stated that he was shot by O’Shea and Black Jessie. Walker testified that he gave defendant a rifle which defendant returned, and two police officers testified that a rifle was recovered from Walker’s home. In contrast, defendant testified that he did not know that Smith had a firearm and was surprised by the shooting.

¶ 41 Smith’s affidavit is broadly consistent with defendant’s version of events. Smith avers that he shot Robinson and that defendant did not participate in the offense. However, we cannot agree with defendant that the contents of Smith’s affidavit are conclusive enough to probably change the result at a retrial for several reasons.

¶ 42 First, Smith’s affidavit averring that defendant was not involved in the shooting is contradicted by Smith’s statement made on July 4, 1994. In his written statement, Smith states that he was walking home when he ran into defendant, who was carrying a rifle and a semi-automatic firearm. Smith further stated that he observed Robinson exiting a vehicle, that a woman was in the front passenger seat, and that defendant approached Robinson and began to argue with him. Smith also stated that defendant fired the semiautomatic firearm at Robinson. Second, at

Smith's plea hearing, the factual basis for his plea was that Smith and defendant approached the vehicle containing Robinson and Green, defendant had a rifle and Smith had a semiautomatic firearm, defendant pulled Robinson from the vehicle, and Smith fired several shots at Robinson. Thus, the facts contained in Smith's affidavit contradict his statement made the month following the shooting, as well as the factual basis from his plea hearing.

¶ 43 Moreover, there is no indication in the record that Green and Tracey Robinson would not testify at retrial consistently with their testimony at defendant's original trial, that is, defendant approached Robinson's vehicle holding a rifle and Robinson stated that he was shot by defendant and Smith. Considering that the record reveals that Smith essentially gave three different versions of the events surrounding Robinson's death, we cannot agree with defendant that the evidence contained in Smith's affidavit was of such a conclusive character that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32. Accordingly, the circuit court's denial of defendant's postconviction petition was not manifestly erroneous. *Coleman*, 2013 IL 113307, ¶ 98.

¶ 44 For the forgoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 45 Affirmed.