

THIRD DIVISION
July 20, 2011

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).

2011 IL App (1st) 093016-U
No. 1-09-3016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 98 CR 23340
)	
TONY GONZALEZ,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Neville and Steele concurred in the judgment.

O R D E R

HELD: Where defendant attached to an initial post-conviction petition a news report describing false identifications from witnesses in other cases involving same detective who investigated case against defendant, defendant presented newly discovered evidence of actual innocence so as to excuse petition's late filing; petition was remanded for second-stage proceedings.

¶ 1 Defendant Tony Gonzalez appeals the circuit court's summary dismissal of his *pro se* petition seeking relief under the Post-

Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, defendant contends his petition presented the gist of a claim of his actual innocence based on newly discovered evidence. In support of that assertion, defendant cites a federal jury verdict in a wrongful conviction case involving Chicago police detective Reynaldo Guevara, who investigated the eyewitnesses who testified for the State in the instant case. We reverse and remand for second-stage proceedings under the Act.

¶ 2 Following a 1999 jury trial, defendant was convicted of one count of first degree murder and two counts of attempted murder. Before trial, defendant moved to suppress the identification testimony of two State witnesses, Luis Marrero and Yesenia Rodriguez, asserting that the lineup composition was suggestive. The trial court denied defendant's motion. On appeal, this court reversed his convictions and remanded for a new trial based on the submission of an erroneous jury instruction regarding the evaluation of eyewitness identification testimony. *People v. Gonzalez*, 326 Ill. App. 3d 629, 641 (2001).

¶ 3 At defendant's second trial held in 2003, a jury heard the following testimony relevant to this appeal. In the early morning hours of July 24, 1998, Marrero and Rodriguez, along with Hector Rivera and Illuminata Nieves, were playing games and drinking in Nieves' apartment at 1215 North Washtenaw in Chicago. Rodriguez

and Marrero left the apartment at 2 a.m. arguing about Marrero's alcohol consumption.

¶ 4 Marrero testified that when he and Rodriguez were arguing in the alley, a man emerged holding a gun. Marrero was facing Rodriguez and had his back to the gunman, who shouted "Jiver killer." Marrero turned around and faced the gunman, who fired, striking Marrero in the shoulder and chest. Marrero fell to the ground, and the gunman went inside the apartment and fired additional shots, injuring Rivera and Nieves. The gunman returned to the alley and shot Marrero in the back and struck Rodriguez in the head with the butt of his gun. Rivera died from his injuries.

¶ 5 Detective Guevara, who also testified at defendant's first trial, stated he was a gang crimes specialist assigned to a violent crime unit. He testified the Latin Jivers and the Spanish Cobras were rival gangs in the area where the shooting occurred.

¶ 6 A couple of days after the shooting, Marrero viewed a police photo array of about six pictures and identified defendant as the gunman. Defendant's picture was the only photo with numbers under the face of the person depicted. About two weeks later, Marrero identified defendant in a police lineup. Marrero testified he had seen defendant in the neighborhood but did not know his name or if he belonged to a gang. Marrero stated no one in Nieves' apartment on the night of the shooting, including himself, was affiliated with a gang. Marrero testified he told police the

gunman had a "spot" by his neck and a gold tooth. He testified the neighborhood store at which he worked sold shiny wraps used to cover a tooth to resemble a gold tooth.

¶ 7 Rodriguez gave an account of the shooting consistent with that offered by Marrero. The day after the shooting, Rodriguez viewed a book of photos and identified defendant; she also identified defendant in court as the gunman.

¶ 8 Within two days of the shooting, Detective Guevara interviewed Rodriguez, who told him the gunman had shouted "Jiver killer" and had a black shirt tied around his head. Detective Guevara showed Rodriguez a book of photographs of members of the Spanish Cobras gang, and she identified defendant's photograph on page 36 of the Spanish Cobras book. The detective interviewed Marrero separately and showed him an array of about six photos from which Marrero selected defendant as the gunman. In that photo array, defendant was the only person pictured with arrest numbers in front of his chest.

¶ 9 Rodriguez and Marrero also separately identified defendant in a police lineup. Detective Guevara testified Rodriguez and Marrero spoke before looking at the lineup but did not interact during their separate viewings of the lineup. Detective Guevara testified that when Marrero identified defendant in the lineup, he mentioned defendant had a birthmark. Rodriguez never mentioned a gold tooth to the detective. For the defense, a dentist

testified she examined defendant's dental records and defendant's mouth and he had not had any front teeth prepared for a crown.

¶ 10 The jury convicted defendant of the first degree murder of Rivera and the attempted first degree murders of Marrero and Nieves. Defendant also was convicted of two counts of aggravated battery with a firearm. Defendant was sentenced to 30 years in prison for murder and two terms of six years each for the attempted murder convictions, all to be served consecutively. On appeal, this court affirmed. *People v. Gonzalez*, No. 1-03-1286 (2006) (unpublished order under Supreme Court Rule 23).

¶ 11 On August 3, 2009, defendant filed a *pro se* post-conviction petition asserting his innocence in these crimes. The petition asserted that on June 26, 2009, defendant obtained "newly discovered evidence which rise[s] to the level of actual innocence." Appended to defendant's petition was a news report of a federal wrongful conviction case won on June 23, 2009, by Juan Johnson against the City of Chicago. The news article stated a jury found Detective Guevara falsely implicated Johnson, a former member of the Spanish Cobras, in a gang murder in 1989 by intimidating witnesses into identifying Johnson as the killer. Also attached to defendant's petition were a photocopy of the six pictures viewed by Marrero and a copy of Detective Guevara's testimony at defendant's trial.

¶ 12 Defendant's petition further asserted the State failed to disclose material evidence of Detective Guevara's pattern of misconduct in coercing false identifications from witnesses. Defendant also asserted his trial counsel was ineffective for failing to demonstrate the unreliability of the detective's investigation that resulted in the identifications by Marrero and Rodriguez.¹ Affixed to defendant's petition was his own affidavit stating that he learned of the evidence in June 2009 and that the delay in filing his claim was not due to his own culpable negligence.

¶ 13 On October 2, 2009, the circuit court dismissed the petition as frivolous and patently without merit. Defendant now appeals that ruling.

¶ 14 Defendant contends his petition stated the gist of a claim of newly discovered evidence so as to survive the first stage of post-conviction review. He attached to his petition a copy of a June 23, 2009, Chicago Tribune news article describing a \$21 million jury award to former gang member Juan Johnson for his wrongful conviction. According to the article, Johnson served more than a decade in prison before being retried in 2004 and acquitted of the murder of a rival gang member. At Johnson's

¹ As the State observes on appeal, defendant's petition also included a claim of the ineffectiveness of appellate counsel for failing to raise trial counsel's error on direct appeal; however, in this appeal, defendant does not assert the validity of that claim.

second trial, witnesses to the murder testified Detective Guevara intimidated them into identifying Johnson as the perpetrator.

¶ 15 Before considering the merits of this claim, it is necessary to address the motion defendant has filed in this court that has been taken with the case. Defendant asks to supplement the record with affidavits and sworn testimony pertinent to Detective Guevara's investigations in other cases. A party may supplement the record on appeal only with documents that were actually before the trial court. *People v. Patterson*, 192 Ill. 2d 93, 127 (2000). Accordingly, defendant's motion to supplement the record on appeal with these materials is denied.

¶ 16 Defendant's *pro se* petition, which is his initial post-conviction filing, was filed in 2009, three years after this court affirmed his conviction on direct appeal. The petition therefore does not appear to be timely filed. See 725 ILCS 5/122-1(c) (West 2008) (petition must be filed within six months from date for filing certiorari petition or conclusion of those proceedings). Indeed, defendant does not contend the petition is timely. However, the time limitations of section 122-1(c) and the requirement that a defendant allege facts showing the delay in filing was not due to his own culpable negligence do not apply where, as here, a petition advances a claim of actual innocence. 725 ILCS 5/122-1(c) (West 2008).

¶ 17 In the first stage of post-conviction review, the circuit court considers the substantive merit of the petition and may dismiss the petition if the allegations there, taken as true, render the petition "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition is frivolous and patently without merit if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009).

¶ 18 More precisely, for a petition to be dismissed at the first stage of review, the petition must be based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation," which encompasses assertions that are fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17. If a petition survives these tests, the petition proceeds to the second stage of review, where counsel is appointed for the defendant and the State may move to dismiss the petition's claims. 725 ILCS 5/122-4 through 122-6 (West 2008); *People v. Rivera*, 198 Ill. 2d 364, 374 (2001). This court reviews the summary dismissal of a post-conviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 19 Applying the standards in *Hodges* to defendant's claim of actual innocence, defendant's post-conviction petition should proceed to the second stage of post-conviction review. Defendant's claim of actual innocence is not based on a fanciful factual allegation or an indisputably meritless legal theory.

¶ 20 To obtain review under an actual innocence claim, the evidence adduced by defendant must be "newly discovered," meaning it must be evidence that was not available at the defendant's original trial and that could not have been discovered sooner through diligence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004); *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (2010). Evidence of actual innocence also must be material, non-cumulative, and of such conclusive character that it would probably change the result on retrial. *Morgan*, 212 Ill. 2d at 154; *People v. Barrow*, 195 Ill. 2d 506, 540-41 (2001).

¶ 21 First, the news article about the jury verdict implicating Detective Guevara in the wrongful conviction of Johnson was published about a month before defendant filed his post-conviction claims and therefore meets the definition of newly discovered evidence. The Johnson verdict involved the detective who secured the identifications from eyewitnesses in his case, and the jury determined the detective was at fault for the wrongful conviction of a former gang member. Defendant's claim is not based on a fanciful factual allegation.

¶ 22 At this first stage, a consideration of defendant's claim does not include an assessment of credibility or any findings of fact on the part of this court. *People v. Jones*, 299 Ill. App. 3d 341, 363 (2010), citing *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Moreover, the petition's allegations, taken as true

and liberally construed, need only present the gist of a constitutional claim, which requires a petitioner only to plead sufficient facts to assert that claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 23 With the news of the verdict in another case involving Detective Guevara, defendant has offered facts to support a legal theory of his actual innocence. This evidence is non-cumulative because it has not been presented in another form or suggested earlier by other means. Moreover, the evidence, taken as true and liberally construed, also is material and of such conclusive character that it would probably change the result on retrial. Defendant's conviction was largely based on the eyewitness testimony of Rodriguez and Marrero, who were interviewed and shown pictures by Detective Guevara.

¶ 24 The State responds that Johnson, the defendant who prevailed in the federal case, is not involved in this proceeding. That contention, while true, misses the mark; the purveyor of false identifications from Johnson's case was Detective Guevara, who secured the identifications of defendant in the instant case.

¶ 25 In support of his claims, defendant cites *People v. Reyes*, 369 Ill. App. 3d 1 (2006), a consolidated case in which two criminal defendants each unsuccessfully sought to suppress their confessions before trial claiming they were physically coerced by Detective Guevara. Each defendant filed a post-conviction

petition; one of the petitions described a pattern of misconduct by the detective and had attached, *inter alia*, a Federal Bureau of Investigation's report asserting Detective Guevara had a reputation for accepting bribes. *Reyes*, 369 Ill. App. 3d at 11-12. The circuit court dismissed each petition, and this court reversed and remanded for second-stage proceedings. *Reyes*, 369 Ill. App. 3d at 24.

¶ 26 This court observed in *Reyes* that when addressing a post-conviction petition at the first stage of review, it is to determine merely whether a constitutional claim has been alleged, not whether it has been proven. *Reyes*, 369 Ill. App. 3d at 21. Under that standard, this court rejected the circuit court's assertion that the allegations that Detective Guevara improperly influenced the identifications of suspects by witnesses were not relevant to the contentions of the defendants in *Reyes* that their own confessions were physically coerced. *Reyes*, 369 Ill. App. 3d at 21. "In our view, any allegation that Guevara coerced a person to provide evidence is relevant to whether defendants in the case at bar were similarly coerced." *Reyes*, 369 Ill. App. 3d at 21.

¶ 27 The State points out that defendant has not attached to his petition any affidavits from the witnesses alleged to have been coerced, *i.e.*, Rodriguez and Marrero, that would support a conclusion that they were intimidated by the detective to falsely

implicate defendant in the shootings. Again, the instant case is at the first stage of post-conviction proceedings, unlike the cases on which the State relies, which involve either second-stage or successive post-conviction proceedings. See, e.g., *People v. Orange*, 195 Ill. 2d 437 (2001) (successive post-conviction petition); *People v. Gillespie*, 407 Ill. App. 3d 113 (2011) (fourth post-conviction petition).

¶ 28 The State further argues that defendant has not supported his actual innocence claim with newly discovered evidence because the evidence, meaning the news article, is used to support the other claims in his petition, including ineffectiveness of trial counsel. As a practical matter, defendant cannot logically assert the evidence could not have been presented earlier while at the same time contending his trial counsel should have raised the evidence at trial. See, e.g., *Reyes*, 369 Ill. App. 3d at 12 (claims raised in the alternative). However, defendant's separate contentions are not to be parsed at this stage of post-conviction review, as the petition must be treated as a whole and either dismissed or remanded in its entirety. See *Hodges*, 234 Ill. 2d at 22 n.8 (citing *People v. Rivera*, 198 Ill. 2d 364, 374 (2001)). Because we have determined defendant's actual innocence claim meets the standard of *Hodges*, the entire petition is remanded.

¶ 29 While this court makes no comment on the ultimate validity of any of the claims in defendant's petition, the petition sets

1-09-3016

forth sufficient facts and a legal theory that arguably support a constitutional claim. Accordingly, the circuit court's dismissal of defendant's post-conviction petition is reversed and this case is remanded for second-stage proceedings under section 122-4 through 122-6 of the Act (725 122-1 through 122-6 (West 2008)).

¶ 30 Reversed and remanded.