2014 IL App (1st) 113768-U

FOURTH DIVISION
May 22, 2014

No. 1-11-3768

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 95 CR 11734(02)
	)	
JAMES DAVIS,	)	
	)	The Honorable
Defendant-Appellant.	)	Joseph G. Kazmierski,
		Judge, presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

Held: Third-stage denial of postconviction petition following an evidentiary hearing affirmed where court's finding that the additional testimony of witness Marco Henderson was insufficient to establish defendant's actual innocence was not manifestly erroneous.

¶ 1 Defendant James Davis appeals from an order of the circuit court denying his petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/1223-1, *et seq*. (West 2010)) following an evidentiary hearing. On appeal, defendant contends that new evidence of the

testimony of an eye witness, Marco Henderson, established that he was actually innocent of the crime for which he was convicted. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Following a jury trial, defendant was convicted of the first degree murder of Frank Klepacki and the armed robbery of Casey Klepacki. He was sentenced to concurrent terms of 60 and 30 years' imprisonment, respectively. On direct appeal, this court affirmed defendant's conviction. *People v. Davis*, No. 1-00-0909 (2001) (unpublished order under Supreme Court Rule 23). Many of the facts herein are taken from our original order on direct appeal. *People v. Davis*, No. 1-00-0909 (2001) (unpublished order under Supreme Court Rule 23). Because the facts of the offense are fully set out in that order, we restate here only those facts necessary to an understanding of defendant's current appeal.

¶ 4 i. The Trial

¶ 5 The State's evidence at trial established the following. At approximately 10:45 p.m. on March 19, 1995, defendant and co-defendant Johnny English[1] robbed and shot Casey Klepacki and fatally shot his brother, Frank Klepacki after selling them narcotics.

¶ 6 Casey, the surviving victim, testified that on the evening in question, he and Frank went to 1009 North Monticello Avenue in Chicago to purchase drugs. Casey had with him approximately $1400. In the basement of 1009 North Monticello Avenue, defendant and another individual sold Casey and Frank $55 worth of cocaine. In view of defendant, Casey gave Frank $5 from the large roll of bills he was carrying. After buying the drugs, Frank and Casey smoked the cocaine in the basement while defendant and the other individual went upstairs. Casey testified that he had previously met defendant on several occasions.

[1] Co-defendant Johnny English was tried concurrently with defendant in a severed jury trial. He is not a party to this appeal.

¶ 7 Frank and Casey encountered defendant and Johnny English in the gangway as they left the house. Casey testified that both defendant and English were armed with guns and had their faces partially covered. Defendant and English ordered Frank and Casey to the back of the house, and told Casey to give them his money. Defendant grabbed a sliver necklace from around Casey's neck. When Casey did not give him the money, English shot Casey in the back. Casey fell to the ground, then stood up and ran away. English then fatally shot Frank. Two days later, Casey identified both defendant and English in a lineup.

¶ 8 June Pressbury testified that, at the time of the shooting, she and her mother lived at 1009 North Monticello Avenue. June was upstairs with friends. About 30 minutes before the shooting, defendant entered the house to use the restroom. When he left, June saw him walk toward the corner of Augusta Boulevard and Monticello Avenue. She was still in her room when she heard gunshots.

¶ 9 Assistant State's Attorney Thomas Lyons testified that defendant admitted his involvement in the crime to the police, and agreed to have ASA Lyons handwrite defendant's confession. Assistant State's Attorney Lyons testified that, after he handwrote the confession, he had defendant read part of the statement out loud to ensure that defendant could read. Defendant, Lyons, and Chicago Police detective Duffin then signed the bottom of each page of the statement.

¶ 10 Defendant's confession was read into the record:

> "Statement of James Davis taken March 22, 1995 at 1:45 a.m. at Area 4 Violent Crimes. Present, ASA Thomas Lyons, Detective Duffin, star number 20448.

This statement taken regarding the attempt armed robbery/shooting and homicide of Frank and Casey Klepacki which occurred on March 19, 1995 at 1009 North Monticello at 10:45 p.m.

***

James states that on March 19th, 1995, he was working with a guy called Toby[2] selling rock cocaine from the gangway along the side of Emma's house *** at 1009 North Monticello on the west side. James states that the customers could buy cocaine from him or Toby and then go into Emma's house to smoke it.

James states that he was armed with a black 32 caliber semi-automatic pistol with the ammo clip missing, but the gun was loaded with a bullet in the firing chamber. James states that Toby was armed with a 25 caliber black semi-automatic pistol that was loaded with a bullet in the firing chamber and more in the ammo clip.

They had guns because selling drugs is a dangerous business. And you have to be prepared in case other drug dealers come or if somebody tries to rob you of your drugs or the money—or the money you're making or if the police come.

James states that he saw a guy he knows as Uncle Junior *** coming with 2 white guys that he did not know. And that they went into Emma's basement.

[2] According to the record before us, co-defendant Johnny English is also known as Toby.

James states that he sold the white guys fifty-five dollars worth of rock cocaine. When the one guy was getting out his money, James noticed that he had hundreds of dollars on him mostly in 50's.

James states that a woman at Emma's house also noticed that these 2 white guys were flashing large amounts of money and then Toby called James into the bathroom. Toby and James discussed how easy it would be to rob these 2 guys and how much money they could both make by robbing them.

The plan that James and Toby devised was for James and Toby to leave out the side door of Emma's house, wait in the gangway for the 2 white guys. And when they came out, Toby and James would both hold their guns, surround them, order them back and steal all their money.

James states that he waited in the gangway on one side of the door closer to the front street. And Toby waited on the other side of the door closer to the back or the alley.

James states that both he and Toby still had their guns and they were both to keep the other guy covered and watch their backs in case there were complications, like if the guys wouldn't give up there [*sic*] money without a fight, or if the police showed up during it.

James states that they waited for a few minutes. And when the 2 guys came out, James and Toby pulled out their pistols, surrounded them, and walked them to the back of the house. Toby said 'This is a

stickup. Give up all of your money'. And James pointed his gun at one of the guys and told him to take his shoes off because James knew that sometimes chumps liked to hide money in their shoes because they think nobody will find it.

James states that Toby ordered one guy onto the porch and made him lay down on the ground so that Toby could search him for the money or other valuables. At the same time, James was standing at the back of the gangway blocking the path so that nobody could get away. And James was searching the other guy for money.

James states that the guy he was searching said he didn't have any money and when James didn't find any money in his shoes, he told him to take his pants off. James states that the guy was searching—the guy he was searching then repeated that he did not have any money and that they might as well shoot him because he had no money.

James states that Toby was still on the porch at that time. And Toby yelled out [] 'f*ck this shit' and fired one shot hitting the guy that James was searching in the back. The guy tried to run away but fell in the gangway.

James states that Toby came off the porch and saw the guy in the gangway and started to go after him, but the guy must have heard Toby coming, because he got up and ran for his life.

James states that Toby then went back on to the porch and shot the other white guy 2 times. That guy started to make his way off the

> porch fell down [*sic*], got up and made it a few more feet and collapsed and died.
>
> James states that although both he and Toby had guns and tried to stick these guys up, it was Toby who actually fired the shots that killed the dead guy.
>
> James further states that these guys could have avoided this if they just gave up [their] money. That this guy might still be alive today."

¶ 11 Defendant testified on his own behalf. He denied having confessed to police officers. He explained he did not know how to read and just signed his name to the statement because ASA Lyons instructed him to do so. Defendant further testified that, on the night of the shooting, he sold drugs to two men in the basement of the house at 1009 North Monticello Avenue. After the transaction, however, defendant left the house and went to the corner of Augusta and Monticello Avenue, about five houses away, where he usually sold drugs. He stated that approximately 15 to 20 minutes later, as he was talking with a woman named Lorna, he heard gunshots coming from the house. On cross-examination, however, defendant said he was talking with a woman named Yolanda when he heard the gunshots.

¶ 12 Defendant testified that, after hearing the gunshots, he and the woman started to walk toward 1009 North Monticello Avenue. As they did so, they saw a man run from the gangway and fall into the street. When defendant approached the fallen man, who was one of the men he had sold drugs to in the basement, the man told him to "get away" and accused him of "set[ting] him up."

¶ 13 The State objected to the defense calling Yolanda Peters or defendant's sister, Joyce Davis, as witnesses. As to Peters, the State argued that the defense had failed to list her as a witness in discovery. As to Davis, the State argued that she had been present throughout trial despite an ongoing motion to exclude. The trial court barred both witnesses from testifying.

¶ 14 The defense rested. The parties presented their closing arguments.

¶ 15 The jury returned verdicts of guilty for the murder of Frank Klepacki and for the armed robbery of Casey Klepacki. Defendant was acquitted of the attempt murder of Casey and the armed robbery of Frank. The court sentenced defendant to 60 years' imprisonment for murder and 30 years' imprisonment for armed robbery, to be served concurrently.

¶ 16 ii. The Direct Appeal

¶ 17 Defendant appealed, contending that his trial counsel was ineffective for failing to include two witnesses, Yolanda Peters and Joyce Davis, on defendant's witness list, which resulted in those witnesses being barred from testifying at trial. *People v. Davis*, No. 1-00-0909 (2001) (unpublished order under Supreme Court Rule 23). This court affirmed the judgment of the circuit court. As to Yolanda Peters who, according to defense counsel, would have testified that she was with defendant when the shooting occurred and that defendant was not involved in the shooting, this court found:

¶ 18 "Here, defendant failed to establish he was prejudiced by defense counsel's failure to disclose Yolanda Peters as an alibi witness prior to trial. The surviving victim testified that he had met defendant several times prior to the shooting and his testimony identifying defendant as the offender was positive and credible. Defendant gave inconsistent

testimony regarding who he was with at the time of the murder. He testified on direct examination that he was talking with Lorna when he heard gunshots, yet on cross-examination he stated that he was talking with Yolanda when he heard the gunshots. Furthermore, as in [*People v.*] *Burns*, [304 Ill. App. 3d 1 (1999)], defendant confessed. In light of the overwhelming evidence presented at trial, which included defendant's signed confession and the surviving victim's identification of defendant, Yolanda Peters' proposed testimony would not likely have changed the result of the proceedings. Defendant has therefore failed to establish the prejudice necessary to establish his claim of ineffective assistance of counsel." *People v. Davis*, No. 1-00-0909 (2001) (unpublished order under Supreme Court Rule 23).

¶ 19 Additionally, as to defendant's sister, Joyce Davis, who, according to defense counsel, would have testified that defendant had always been in remedial classes during grammar school and high school, this court found:

¶ 20 "As to defendant's sister, her testimony would have been cumulative of defendant's testimony that he was unable to read. Neither Yolanda Peters' nor Joyce Davis' proposed testimony would have likely changed the result of the proceedings, and defense counsel was not ineffective for failing to list them as possible witnesses." *People v. Davis*, No. 1-00-0909 (2001) (unpublished order under Supreme Court Rule 23).

¶ 21 iii. Post Conviction

¶ 22 In June 2008, defendant filed a *pro se* postconviction petition. Defendant was appointed counsel to represent him. In April 2009, defendant, with counsel, filed a supplemental petition alleging actual innocence in which he argued there was newly discovered evidence which impacted his case. He also acknowledged that defendant's postconviction petition was filed late, but argued that it was not due to defendant's culpable negligence. In the petition, defendant claimed: (1) he was denied the effective assistance of counsel for failure to file a motion to suppress defendant's statement; (2) defendant was denied his due process rights when prosecutors pressured witness William Wilson to testify falsely that defendant had confessed to participating in the robbery; and (3) that the affidavits of Marco Henderson, William Wilson, and Yolanda Peters, attached to the petition, constituted sufficient newly discovered evidence of his actual innocence. In support of his petition, defendant attached his own affidavit in addition to affidavits from Henderson, Wilson, Tomaine Davis, and Peters.

¶ 23 In William Wilson's affidavit, Wilson averred that, on March 19, 1995, he was not present "when a conversation took place" about defendant confessing to a person named William Hughes and that at the time of the shooting, defendant was "on the corner with a girl name Yolanda."

¶ 24 In Tomaine Davis' affidavit, Davis averred:

> "I attended the trial of James Davis in March of 1997. I heard the testimony at that trial of witness William Wilson. Shortly after William Wilson concluded his testimony and as he was leaving the courtroom he said to me that he had been forced by the state's attorney to testify to a lie. I make this statement freely without duress or promise of compensation."

¶ 25 In Marco Henderson's affidavit, the affidavit at issue here, Henderson averred:

"If ever called as a witness i will testify that i personally observed the crime which JAMES DAVIS has been convicted of, and when testifying i will testify that i seen two unknown people running from the [gangway] after shots was fired and i observe this take place while walking toward the [corner] of the block after leaving the game room which is also a candy store that is located on Monticello the two unknown people [] had hoods and something covering their face when i seen them their [*sic*] was a black male and also a black female standing on the corner of Monticello which was JAMES DAVIS and some unknown female and after the shots was fired i ran to take cover. This crime took place on March 19, 1995."

¶ 26 In Yolanda Peters' affidavit, Peters averred:

"On the evening of March 19th 1995 I was standing on the corner of Monticello & Augusta with James Davis when we heard gun shots and saw someone run and fall into the street. Me and James ran over and James asked the man if he was alright, and the man said you niggas set me up. Then James said man I don't know what your [*sic*] talking about and then we left."

¶ 27 In December 2009, the State filed a motion to dismiss, arguing, in part, that defendant's claim of actual innocence was not free-standing and was not based on newly discovered evidence that could not have been discovered prior to trial through due diligence. Defendant filed his response, attaching an additional affidavit in which he addressed the timing of when he learned of the information provided in the various affidavits. Defendant admitted that his initial *pro se* petition erroneously implied that he knew about Henderson's information before

trial, but that he actually first learned that Henderson had information concerning his innocence after his trial, sometime between 1990 and 2000, while they were both in Menard Correctional Center. Therefore, explained defendant, he was not able to inform his trial attorney of the information he learned from Henderson.

¶ 28 The postconviction court heard second-stage arguments on the State's motion to dismiss. In October 2010, the court: (1) denied the State's motion to dismiss defendant's claims regarding the affidavits of witnesses Marco Henderson, William Wilson, and Jermaine Davis; (2) advanced the portion of the petition dealing with those affidavits to a third-stage hearing; and (3) granted the State's motion to dismiss as to all other claims.

¶ 29 At the evidentiary hearing, only March Henderson and the investigator for the State testified.

¶ 30 Marco Henderson testified he had known defendant and his family for over 20 years, since he was approximately 10 years old. Henderson made an in court identification of defendant as he appeared at the time of the crime. Henderson testified that, on or about March 19, 1995, he frequented the corner of Augusta and Monticello to buy marijuana from defendant. That night, between 9:30 and 10:45, he left the game room and walked to the corner of Augusta and Monticello. It was then that he heard three or four gunshots. Henderson did not see anyone actually shoot a gun.

¶ 31 When Henderson heard the shots, he looked and saw defendant standing on the opposite side of the corner on Monticello, closer to North Avenue, with a woman Henderson recognized but whose name did not know. Henderson later realized the woman's name was Yolanda. When Henderson saw defendant, defendant was not holding a gun or anything that resembled a gun in his hands.

¶ 32 Henderson further testified that, after he heard the shots, he saw two people run up Monticello approximately five or ten feet from where defendant was standing. One of these people was tall, slender, and wearing a hooded sweatshirt with the hood pulled up over his head. Henderson could not see this person's face. Henderson testified that he could not see the person's hands, but also testified that it looked as if the person was carrying a gun. The other individual was about the same height and was also wearing a hood covering his head. Henderson could not see that person's face, either. Henderson watched the two individuals as they ran past him and up Monticello. He testified that defendant did not join the two individuals when they ran past. Henderson saw defendant and the woman walk away. Henderson then left the area by bus.

¶ 33 Henderson testified he was arrested a few weeks later on an unrelated matter and, when the police questioned him, he told them what he had seen on the night of the shooting. He was later arrested again, convicted of murder, and imprisoned in the Menard Correctional Center. In 2001, after approximately 3 ½ years at Menard, Henderson learned from defendant, who was also imprisoned at Menard, that defendant had been convicted of the shooting near Augusta and Monticello. Henderson related to defendant what he had seen that night, and agreed to sign an affidavit regarding those events. Later, defendant brought Henderson a typed affidavit. Henderson testified that he "somewhat" read it, made no changes to it, and signed it in the law library. The affidavit was notarized in the library. At the time he signed the affidavit, Henderson believed it to be true.

¶ 34 In the affidavit, Henderson stated that he "personally observed the crime." On cross-examination, however, Henderson admitted that, contrary to this statement, he did not observe the crime for which defendant was convicted. On re-direct, Henderson agreed that

he did not lie in the affidavit because he "thought [he] had seen something about the crime," even though what he actually saw was people running immediately after the crime.

¶ 35 Henderson further testified that he did not see defendant from March 19, 1995, the day of the shooting, until June 1996, when Henderson was charged with an unrelated murder. At that time, Henderson saw defendant in the courthouse bullpen and asked him why he was there. Defendant responded that he was there because he had been charged with the March 19, 1995, murder on Monticello. Henderson testified that he "did not recall" whether he told defendant that he knew defendant was not involved in the shooting, but that "maybe" he did so.

¶ 36 Henderson spoke with Cook County State's Attorney Investigator Thomas McGreal at the Hill Correctional Center on May 10, 2011, along with Assistant State's Attorney Carol Rogala. Henderson denied telling Investigator McGreal that he signed the affidavit in his cell with no notary present. Henderson admitted he told Investigator McGreal that he did not swear under oath that what was in the affidavit was true, and that a notary will sign anything. Henderson testified that "certain parts" of his affidavit were true. He told Investigator McGreal that the statement that he "personally observed the crime" was not true. He also told Investigator McGreal that the statement in his affidavit that he was walking toward the corner of the block when he saw two unknown people running from the gangway after the shots were fired was not true, because he was not actually walking toward the two unknown people that were running. Henderson also told Investigator McGreal that, although he stated in his affidavit that the game store was on Monticello, it was actually located on Augusta.

¶ 37 Investigator McGreal also testified at the hearing. McGreal interviewed Henderson on May 10, 2011, at the Hill Correctional Center in Galesburg, Illinois. McGreal testified that,

at that time, Henderson told him he had seen defendant and Johnny English, known as Toby, in the courthouse bullpen, and "they" told him that they were there on charges that they participated in the murder on Monticello. Henderson told him the next time he saw defendant was in 2001 at the Menard Correctional Center, where they discussed the murder. Defendant later brought Henderson an affidavit, which he signed in his cell.

¶ 38 McGreal showed Henderson the affidavit. McGreal testified that Henderson verified the signature on the affidavit was his and, initially, Henderson stated that the facts in the affidavit were correct. McGreal and Henderson then went through the affidavit line-by-line, however, and Henderson admitted that parts of the affidavit were not true. For example, Henderson denied that he ever swore that the statements contained in the affidavit were true or correct, although it said so in the affidavit. Henderson also stated that the line in the affidavit that he personally observed the crime was a lie, and that he only observed two individuals running across Augusta Avenue at Monticello. Henderson stated that, while the affidavit reflected he saw two people running from the gangway after the shooting, he actually did not see them coming from the gangway because the gangway was not visible from where Henderson was standing. Although in the affidavit he had averred that the two runners had their faces covered, Henderson told McGeal that they actually were just wearing hooded sweatshirts with the hoods pulled up.

¶ 39 McGreal testified that Henderson told him he recognized one of the two people running as Johnny English. He said he saw defendant standing with an unknown female on the corner at the time of the shooting. He later learned the woman's name was Yolanda. Henderson said the portion of the affidavit that said he ran for cover after the shooting was incorrect; he actually turned and walked in the opposite direction from the gunshots because

he did not want to get involved. Henderson said he did not know the date on which the crime occurred.

¶ 40 The parties then presented their closing arguments. Defense counsel argued, in part, that Henderson's testimony was newly discovered evidence because there was no actual evidence that Henderson and defendant discussed defendant's case when they encountered one another in the courtroom bullpen, and Henderson testified that he did not recall whether they had discussed the matter. Counsel also argued that the trial evidence was slim because the crime took place at night by two masked offenders. Counsel also argued that the surviving victim's testimony was not very reliable, as he was under the influence of drugs and, although he had encountered defendant many times before, was unable to identify him as the shooter to the police immediately after the shooting.

¶ 41 The State responded, in part, that the appellate court had found the evidence overwhelming, and that the trial court had considered the fact that defendant had confessed to his involvement in the shooting as well as defendant's live testimony that he was merely standing on the corner with a woman at the time it occurred. The State argued that, where defendant's testimony at trial was that he was standing on the corner with a woman during the shooting, Henderson's testimony of the same fact scenario was not newly discovered, but merely being repeated by a different source.

¶ 42 The postconviction court took the matter under advisement. After reviewing the trial record, Henderson's affidavit, and Henderson's testimony, the postconviction court denied the petition, noting:

"THE COURT: Based upon the evidence that I hear, I do make credibility determinations concerning the witnesses that were called at that hearing, namely

Marco Henderson, called by the Petitioner, who was also incarcerated for murder at the time he testified. He testified to facts that were contrary to his submitted affidavit. He admitted to the falsity of major aspects of that document, thereby calling into question the bulk of his testimony to this court.

¶ 43 Based on that finding, Petitioner has not shown a constitutional violation at his trial. His petition is denied."

¶ 44 Defendant appealed.

¶ 45 II. ANALYSIS

¶ 46 On appeal, defendant contends that the postconviction court erred in denying his petition where he sufficiently established his actual innocence. Specifically, he maintains that relief in the form of a new trial is warranted where Marco Henderson testified at the evidentiary hearing that he knows defendant was not involved in the shooting because, at the time he heard gunshots coming from a nearby house and then saw two individuals running from that area, he also observed defendant standing on a nearby street corner with a woman. For the following reasons, we affirm.

¶ 47 The Post-Conviction Hearing Act provides a remedy to a criminal defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002); 725 ILCS 5/122-1 *et seq*. (West 2010). Proceedings are initiated by the filing of a petition verified by affidavit in the circuit court in which the conviction took place (725 ILCS 5/122-1(b) (West 2010)), and ultimately may consist of up to three distinct stages (*People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006)). If a petition is not summarily dismissed by the trial court, it advances to the second stage, where an indigent defendant is provided assistance by counsel. *People v.*

Hobson, 386 Ill. App. 3d 221, 230-31 (2008). At the second stage, the petition under consideration must make a substantial showing of a constitutional violation or be subject to a motion to dismiss. See *People v. Vasquez*, 356 Ill. App. 3d 420, 422 (2005); 725 ILCS 5/122-5 (West 2010). If the State's motion to dismiss is denied, or no such motion is filed, the State must file a timely answer to the postconviction petition. 725 ILCS 5/122-5 (West 2010). If, upon consideration of the petition, with any accompanying documentation and in light of the State's answer, the trial court determines that the requisite showing of a constitutional violation has been made, a third- stage evidentiary hearing follows. *Hobson*, 386 Ill. App. 3d at 231.

¶ 48 In the instant case, defendant's petition advanced to a third-stage evidentiary hearing. Where, as here, a postconviction evidentiary hearing involves fact-finding and credibility determinations, we will only disturb the decision of the trial court where it is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473; *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). "Manifest error is that which is 'clearly evident, plain, and indisputable.' " *People v. Johnson*, 206 Ill. 2d 348, 360 (2002) (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)).

¶ 49 An action for postconviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). Any issues which were decided on direct appeal are barred by *res judicata*; any issues which could have been raised on direct appeal are defaulted. *Tenner*, 206 Ill. 2d at 392.

¶ 50 Here, defendant contends he established his actual innocence based on newly discovered evidence where Henderson, who did not testify at trial, testified at the evidentiary hearing that, at the time of the shooting, he saw defendant standing on a nearby street corner

with a woman. The wrongful conviction of an innocent man violates due process. *People v. Washington*, 171 Ill. 2d 475, 481 (1996). The due process clause of the Illinois Constitution allows a prisoner to present a freestanding claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). A proper claim under the Act may include a claim of actual innocence based on newly discovered evidence. *People v. Burrows*, 172 Ill. 2d 169, 199 (1996). The hallmark of this type of claim is total vindication from the crime. *People v. Barnslater*, 373 Ill. App. 3d 512, 520 (2007). A claim of innocence must be based on newly discovered evidence that establishes the defendant's innocence rather than merely supplementing an assertion of a constitutional violation with respect to trial. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009), citing *People v. Morgan*, 212 Ill. 2d 148, 154 (2004), citing *People v. Washington*, 171 Ill. 2d 475, 579 (1996). The supporting evidence must be newly discovered, material, noncumulative, and of such conclusive character as would probably change the result on retrial. *Morgan*, 212 Ill. 2d at 154. Newly discovered evidence is evidence that was unavailable at trial and could not have been discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002).

¶ 51 Our supreme court recently clarified the standard to be used in actual innocence cases:

> "Substantively, in order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. *Washington*, 171 Ill. 2d at 489. New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. See [*People v. Burrows*, 172 Ill. 2d 169, 180 (1996)]. Material means the evidence is relevant and probative of the petitioner's innocence. *People v. Smith*, 177 Ill. 2d 53, 82-3

(1997). Noncumulative means the evidence adds to what the jury heard. [*People v. Mostad*, 101 Ill. 2d 128, 135 (1984)]. And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. *Ortiz*, 235 Ill. 2d at 336-37." *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 52 A claim of actual innocence is not a challenge to whether the defendant was proved guilty beyond a reasonable doubt, but rather an assertion of total vindication or exoneration. *Barnslater*, 373 Ill. App. 3d at 520. "Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence, both new and old, together. *Coleman*, 2013 IL 113307, ¶ 97, citing *People v. Davis*, 2012 IL App (4th) 110305, ¶¶ 62-4.

¶ 53 In this case, the evidence presented by defendant to establish his claim of actual innocence is Henderson's testimony that, at the time he heard gunshots coming from a nearby house and then saw two individuals run past, one of whom appeared to be armed, he also saw defendant, standing on a nearby street corner with a woman. Defendant claims that, given the evidence upon which defendant was convicted, there is a reasonable probability that this newly discovered testimony would change the result on retrial.

¶ 54 The first element we must consider is whether the evidence here was "newly discovered." Evidence is newly discovered if it has been discovered since trial and could not have been discovered by the defendant sooner through diligence. *Ortiz*, 235 Ill. 2d at 334. "Generally, evidence is not 'newly discovered' when it presents facts already known to the defendant at or prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative.' " *Barnslater*, 373 Ill. App. 3d at 523.

¶ 55 The State urges us to find that Henderson's testimony regarding the shooting does not qualify as newly discovered evidence because his account was substantially similar to the account defendant provided in his own defense at trial, that is, defendant, like Henderson, testified he was on the corner and was not the shooter. We disagree, and believe the State's argument more properly relates to the question of whether the evidence was cumulative of evidence presented at trial than to whether the evidence was "newly discovered." See *Coleman*, 2013 IL 113307, ¶ 96.

¶ 56 Additionally, the State argues that this evidence is not newly discovered where Henderson: (1) was arrested for an unrelated matter and told the police at that time what he saw the night of the shooting; and (2) "maybe" told defendant in 1996 that he knew defendant did not commit the crime. First, we will not hold defendant responsible to discover something a potential witness told the police in an altogether separate incident. Secondly, we disagree that Henderson's answer of "I don't recall. Maybe I had" when asked if he had told defendant in 1996 that he knew defendant was not involved in the shooting shows that he did so. Quite the contrary; we find this answer to be a very uncertain response, indicating that Henderson did not remember whether he gave defendant that information.

¶ 57 In addition, there is no evidence in the record that defendant should have or could have discovered Henderson's potential testimony before 2001, when Henderson approached him in prison. In fact, the evidence presented gives no indication that defendant knew, or should have known, of Henderson's presence in the general vicinity that evening. Rather, Henderson testified that he immediately turned and walked away after seeing the gunmen run past defendant on the street corner. This testimony supports a finding that Henderson's

testimony regarding the events surrounding the shooting constitutes newly discovered evidence.

¶ 58 Next, we turn to the question of whether the newly discovered evidence is material and not merely cumulative. *Washington*, 171 Ill. 2d at 489. The State does not argue that this evidence is not material. Rather, the State argues the evidence is merely cumulative where defendant testified at trial he was standing on a nearby street corner when the crime occurred and Henderson also testified at the hearing that defendant was standing, unarmed, on a nearby street corner with a woman. Essentially, the State's argument is that evidence that corroborates a defendant's alibi testimony should be considered cumulative. We disagree.

¶ 59 Evidence is considered cumulative when it does not add anything to what was previously presented to the jury. *Ortiz*, 235 Ill. 2d at 335. Evidence is not cumulative if it would create new questions in the mind of the jury. *People v. Williams*, 392 Ill. App. 3d 359, 369 (2009). Here, Henderson's testimony, which corroborated defendant's testimony, would likely create new questions in the mind of the jury. Moreover, Henderson's testimony would certainly add something to what was previously presented to the jury. See *Ortiz*, 235 Ill. 2d at 335. Specifically, Henderson's account provided critical corroboration for defendant's testimony, but also presented a witness' first-person account with fresh details about the shooting and its aftermath that were never presented to the jury. For example, Henderson testified that immediately after the shots were fired, he saw two hooded individuals running up Monticello and past defendant. It appeared to Henderson that one of the fleeing individuals was carrying a gun. These details, which were not a part of defendant's testimony at trial and were never before the jury, constitute non-cumulative evidence which would add to what the jury heard.

¶ 60 However, the fact that the evidence is newly discovered, material, and noncumulative does not end our inquiry. To succeed in a claim for postconviction relief, the new evidence must be of such conclusive character as to probably change the result on retrial. *Coleman*, 2013 IL 113307, ¶ 96. In determining whether the evidence is so conclusive as to probably change the result on retrial, the court must engage in a balancing test of the evidence before it. *Coleman*, 2013 IL 113307, ¶ 97. In *Coleman*, our supreme court specified that, once the postconviction court determines that the evidence presented at the third-stage evidentiary hearing was new, material, and noncumulative:

> "the trial court must then consider whether that evidence places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict. This is a comprehensive approach that involves credibility determinations that are uniquely appropriate for trial judges to make. But the trial court should not redecide the defendant's guilt in deciding whether to grant relief. *** Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence, both new and old, together." *Coleman*, 2013 IL 113307, ¶ 97.

¶ 61 The case at bar deals with a witness who claims he saw defendant standing on a nearby street corner at the time of the shooting and, therefore, defendant could not have been involved in the shooting. Defendant argues that the evidence presented against him at trial was not overwhelming because the "evidence upon which his conviction rests—Casey Klepacki's identification testimony and the inculpatory statement attributed by State's witnesses to [defendant]—bear serious weaknesses." The State responds that defendant has waived any argument regarding the sufficiency of the evidence is waived. Following the

direction of our supreme court in *Coleman*, however, we are cognizant that consideration of a postconviction case which has advanced to a third-stage evidentiary hearing requires a "comprehensive approach" wherein a trial court must determine whether the new evidence "places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict." *Coleman*, 2013 IL 113307, ¶ 97. It is this nuance that empowers us to consider defendant's argument here which, really, is not a challenge to the sufficiency of the evidence presented at trial—which this court on direct appeal determined was sufficient—but rather presents the question of whether the newly discovered evidence, that is, Henderson's testimony, places the trial evidence in a different light and undercuts the court's confidence in the guilty verdict. We find that it does not.

¶ 62 We find no manifest error in the finding of the court that Henderson's testimony was not a credible witness. The court specifically found:

> "THE COURT: Based upon the evidence that I hear, I do make credibility determinations concerning the witnesses that were called at that hearing, namely Marco Henderson, called by the Petitioner, who was also incarcerated for murder at the time he testified. He testified to facts that were contrary to his submitted affidavit. He admitted to the falsity of major aspects of that document, thereby calling into question the bulk of his testimony to this court."

¶ 63 As we have noted herein, the consideration of evidence at a third-stage postconviction proceeding is a comprehensive approach, and a trial judge is in the unique position to make credibility determinations at this stage. See *Coleman*, 2013 IL 113307, ¶ 97 (Credibility determinations at a third-stage postconviction proceeding are "uniquely appropriate for trial judges to make.") Here, the postconviction court heard all of the evidence before it,

including Henderson's testimony. Henderson's testimony conflicted with his affidavit in a number of aspects, including: (1) although he averred he saw the crime occur, his testimony reflected that he merely observed the aftermath of the crime rather than the crime itself; and (2) although he averred that the two individuals he saw fleeing the scene had their faces covered, his testimony revealed that they were merely wearing hooded sweatshirts, but no facial covering. Additionally, Henderson testified that defendant brought him a prepared affidavit, and Henderson only "somewhat" read it before signing it. The postconviction court also noted that, at the time he provided the postconviction evidence, Henderson was imprisoned for murder. The postconviction court was in the unique position to hear Henderson's live testimony and observe his demeanor. We find no manifest error in its determination that Henderson was not a credible witness.

¶ 64 This court determined on direct appeal that overwhelming evidence of defendant's guilt was presented at trial. *People v. Davis*, No. 1-00-0909 (2001) (unpublished order under Supreme Court Rule 23). That overwhelming evidence included defendant's signed confession and the surviving victim's identification of defendant. *People v. Davis*, No. 1-00-0909 (2001) (unpublished order under Supreme Court Rule 23). Certainly, there is no reasonable probability that the additional testimony of Marco Henderson, an incredible witness, would change the result on retrial.

¶ 65 III. CONCLUSION

¶ 66 For all of the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 67 Affirmed.