

No. 1-14-0200

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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 Cook County.
Respondent-Appellee,)	
)	
v.)	No. 92 CR 20720 (02)
)	
ANDRE RUDDOCK,)	Honorable
)	Charles P. Burns,
Petitioner-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* The judgment of the circuit court was reversed and the cause remanded for further proceedings where the court erred in refusing to consider a supporting affidavit and made a credibility determination without an evidentiary hearing.
- ¶ 2 The defendant, Andre Ruddock, appeals from the circuit court order which denied him postconviction relief based upon his successive postconviction petition filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et. seq.* (West 2012)) alleging actual innocence. For the reasons that follow, we reverse and remand the cause for further proceedings consistent with this order.

¶ 3 Following a trial on October 20, 1994, the defendant was convicted of one count of first-degree murder and one count of attempted first-degree murder in connection with an August 19, 1992, shooting incident which resulted in the death of Octavia King and the injury of Kenyatta Wright.

¶ 4 The evidence presented at the 1994 trial established that, on the afternoon of August 19, 1992, a man identified as the defendant approached a group of people standing at a bus stop near the intersection of 74th and Aberdeen Streets. After retrieving a handgun from under his shirt, the defendant fired several shots at the group, striking the victims. Wright, who was struck twice, survived. King, who was chased by the defendant and shot again, later died.

¶ 5 During its case in chief, the State relied primarily on the testimony of Terrence Sanders and LaToya Perkins, who both identified the defendant as the shooter, despite the fact that he was wearing a white shirt over his face.

¶ 6 Sanders testified that, shortly before the occurrence, he was riding in a vehicle near the area of the shooting with Vondell Sullivan and Robert Johnson. While driving, they encountered several people, including the defendant, Raphael Cole^{*}, and David Evans. According to Sanders, Cole entered the vehicle and asked if anyone knew why King had been inquiring as to where he lived. Cole then announced that he was going to kill King. The defendant, who was standing just outside of the vehicle, responded to Cole's comment by stating that he was going to kill King instead. The defendant and Cole proceeded to argue over who was going to carry out the shooting of King. Shortly thereafter, Sanders left, and while he was walking home, he witnessed the shooting. He testified that he recognized the defendant as the shooter because of the shoes he was wearing and the way he was walking.

* Cole was convicted of conspiracy in connection with these shootings, but died in 2000.

¶ 7 Perkins, who was an acquaintance of the defendant, corroborated Sanders' account of the shooting, similarly testifying that she recognized the defendant as he approached the group because of the shoes he was wearing and the way he was walking.

¶ 8 Johnson also testified at the defendant's trial. However, Johnson denied being in a vehicle with Sanders and Sullivan shortly before the shooting. He also denied hearing the defendant say that he was going to shoot King or that he saw the defendant shoot at a group of people. Rather, Johnson testified that he saw an individual with a shirt over his face near 74th Street, but that he was walking away when he heard several shots being fired.

¶ 9 Following Johnson's testimony, the circuit court permitted the State to admit, as substantive evidence, a prior written statement and grand jury testimony by Johnson, pursuant to section 115-10.1 of the Code of Criminal Procedure (725 ILCS 5/115-10.1 (West 1994)). Johnson's written statement corroborated Sanders' account of the events preceding the shooting and also described a conversation that he heard between the defendant and Cole, during which the defendant agreed to shoot Wright and King. According to the written statement, Johnson also heard Cole tell the defendant to wrap a white shirt around his face so that no one could recognize him. Johnson's grand jury testimony was substantially consistent with his written statement. At the trial, Johnson testified that he made these prior statements because the police coerced him into naming the defendant as the shooter.

¶ 10 At the close of the evidence, the jury found the defendant guilty of first-degree murder and attempted murder. On November 29, 1994, the court sentenced the defendant to concurrent terms of 55 and 15 years' imprisonment, respectively. On direct appeal, this court affirmed the defendant's convictions and sentences, and rejected his contention that several instances of

prosecutorial misconduct deprived him of a fair trial. *People v. Ruddock*, No. 1-96-2923 (1997) (unpublished order under Supreme Court Rule 23).

¶ 11 On November 25, 1997, the defendant filed a *pro se* postconviction petition, alleging 14 separate constitutional violations. The circuit court summarily dismissed the defendant's petition, and that decision was affirmed on appeal. *People v. Ruddock*, No. 1-98-1409 (1999) (unpublished order under Supreme Court Rule 23).

¶ 12 On December 1, 2003, the defendant filed his first combined *pro se* petition for relief from judgment under the Act and under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2002)). In this petition, the defendant alleged that: (1) the State had knowingly used Sanders' false testimony that no promises had been made to him in exchange for his testimony; (2) the State had committed a *Brady* violation by failing to disclose its agreement with Sanders regarding consideration promised in return for his trial testimony; (3) he was denied a fair trial and due process by the State's unknowing use of Sanders' false testimony regarding his identification of the defendant as the shooter; (4) the State unknowingly used Perkins' false testimony regarding her identification of the defendant as the shooter; and (5) newly discovered evidence demonstrated his actual innocence.

¶ 13 Attached to the defendant's petition was an affidavit from Sanders in which he stated that he testified falsely at the defendant's trial because the prosecutor told him that if he gave "convincing testimony" at the defendant's trial, he would "receive leniency" on charges that were then pending against him in Michigan. Sanders further stated that he came forward with this information because he could no longer live with the knowledge that he had helped convict an innocent person.

¶ 14 In another affidavit attached to the first combined petition, Vondell Sullivan stated that he had been in his vehicle with Sanders for “most of the day” on August 19, 1992, and that he never encountered the defendant or Cole. Johnson also submitted an affidavit which was consistent with his trial testimony that he denied seeing the defendant shoot either of the victims, and which also stated that he was coerced into providing his written statement and grand jury testimony.

¶ 15 Finally, the defendant submitted affidavits from Tocolie D. Green, Cristin Y. Lee, and Sabrina Strong in support of his allegation that Perkins falsely testified that she had observed the defendant shoot King and Wright. All three of these affiants attested that they were previously afraid to come forward with this information.

¶ 16 On January 20, 2004, the circuit court summarily dismissed the defendant's first combined petition, finding, *inter alia*, that it was untimely and that it was frivolous and patently without merit. On appeal from that ruling, this court affirmed the dismissal of the claims which sought postconviction relief, but reversed the dismissal of the requests for relief from judgment pursuant to section 2-1401 of the Code. *People v. Ruddock*, No. 1-04-0983 (2005) (unpublished order under Supreme Court Rule 23). This decision was based on the conclusion that the defendant's allegations regarding the State's unknowing use of false testimony by Sanders and Perkins were cognizable only under section 2-1401 and that it was improper to summarily dismiss those allegations.

¶ 17 On remand, the State filed a motion to dismiss the defendant's section 2-1401 petition, asserting that it was untimely and failed to satisfy the substantive requirements of due diligence. The circuit court agreed and dismissed the petition. The defendant appealed from that order, and this court affirmed, finding that the defendant's petition was untimely. *People v. Ruddock*, No. 1-06-3762 (2008) (unpublished order under Supreme Court Rule 23).

¶ 18 On June 26, 2007, the defendant filed his second combined petition, asserting claims under the Act and section 2-1401 of the Code. Relevant to this appeal, the petition alleges an actual innocence claim under the Act. In support of his claim, the defendant attached to his petition the previously filed affidavits of Sanders, Sullivan, Johnson, Green, Lee, and Strong. The defendant attached four additional affidavits, all from 2004, from Shawn Travis, Josh Herron, Cortez Wraggs, and David Evans.

¶ 19 In his affidavit, Travis stated that, before the 1992 shootings, he was a friend and mentor of Cole. During a conversation with Cole after the incident, Cole admitted to shooting King and Wright. Subsequently, Travis posted flyers in the neighborhood where the shootings occurred urging people with information regarding the August 19, 1992, incident to come forward. After several people responded to the flyers, Travis asked two individuals to prepare and give him affidavits, which he would send to the defendant in prison.

¶ 20 Herron's affidavit stated that he saw one of Travis' posted flyers in the winter of 2003 and responded to it in January 2004. He further averred that he witnessed the shooting, saw the shooter take off his mask afterwards, and recognized the shooter to be Cole, not the defendant. Herron stated that he did not previously convey this information to the police because his family directed him to avoid involvement.

¶ 21 Wraggs stated in his affidavit that, on the day of the shootings, he was sitting on a bench with friends in a nearby baseball field. He heard gunshots, and subsequently saw a masked man running southbound on Aberdeen with a silver gun in his hand. Wraggs further declared that, because he was alarmed, he took out his gun to fire at the shooter. The shooter lifted the mask to reveal his face and said, "It's me; Ralph" to one of Wraggs' friends, who directed Wraggs not to shoot. Wraggs then observed the shooter continue southbound and disappear underneath a

viaduct. According to the affidavit, Wraggs met the defendant in prison in March 2004 and discussed the crimes for which the defendant was incarcerated. Wraggs told the defendant about what he witnessed in the baseball field that day. The defendant asked Wraggs to prepare his affidavit and, if necessary, to testify in court regarding the details of his story. Wraggs agreed although he and the defendant were not friends.

¶ 22 In his affidavit, Evans stated that he observed the shooting of King and Wright and that, although the perpetrator was wearing a mask, he recognized him as Cole because he knew Cole for many years. Evans admitted that, after the shooting, the police took him into custody, and he identified the defendant as the shooter for the police and before a grand jury. According to Evans, he identified the defendant only because the police beat and threatened him and showed him Cole's statement identifying the defendant as the shooter. He explained that he did not come forward earlier with this information because he disliked the defendant when they were younger but, now having matured, he realized that no one should be imprisoned for a crime that he did not commit.

¶ 23 On September 24, 2007, the circuit court denied the defendant leave to file the successive postconviction claim and dismissed the section 2-1401 claim, finding that the defendant failed to show cause as to why the four new affiants were previously unavailable and that the affidavits failed to demonstrate prejudice to the defendant. The circuit court also held that Evans' grand jury perjury admission was untimely, unsupported, and unlikely to change the result on a retrial.

¶ 24 The defendant appealed the circuit court's denial of leave to file his postconviction petition, arguing that the affidavits of Herron and Wraggs raised a claim of actual innocence. This court agreed and vacated the circuit court's denial of the defendant's leave to file the successive postconviction claims, and remanded for further proceedings. *People v. Ruddock*,

No. 1-07-2818 (2010) (unpublished order under Supreme Court Rule 23). In doing so, this court stated:

"The affidavits of Herron and Wraggs represent newly discovered evidence of defendant's actual innocence so as to require further proceedings on defendant's successive petition.

Accordingly, *** we vacate the circuit court's order denying defendant leave to file a successive post-conviction petition because the petition states a claim of actual innocence. We remand for further proceedings under the Act.

Vacated and remanded."

¶ 25 Our order did not address the affidavit of Evans in any way. We only stated, "[t]he affidavits of Herron and Wraggs are the subject of the parties' arguments on appeal and are discussed in greater detail." However, we recognized that the petition included the affidavits of Evans and Travis.

¶ 26 On remand, the circuit court appointed the defendant counsel, who, on February 14, 2012, filed a supplemental petition. The supplemental petition incorporated the defendant's actual innocence claim and attached the affidavits which were previously attached to the June 26, 2007, *pro se* petition, including the affidavits of Evans, Wraggs, and Herron.

¶ 27 On September 19, 2012, the State moved to dismiss the supplemental petition. In its motion, the State agreed that the circuit court should conduct an evidentiary hearing to assess the credibility of Wraggs and Herron based on this court's August 25, 2010, mandate. However, the State argued that the other affidavits, including Evans', should not be considered because they exceeded the scope of this court's remand order. The State contended that the defendant forfeited any claim based on Evans' affidavit when he failed to raise it in his appeal.

¶ 28 On January 24, 2013, the circuit court agreed with the State and interpreted this court's August 25, 2010, order as a direction to advance only the defendant's claims based upon the

affidavits of Wraggs and Herron to an evidentiary hearing. In doing so, the court relied upon *People v. Gonzalez*, 407 Ill. App. 3d 1026 (2011), and stated:

"[*Gonzalez*] specifically talks about what the Court should consider upon a mandate that was issued, and I will quote from the opinion, 'Upon remand, the trial court has no authority to act beyond the scope of the mandate. If the direction of the mandate is to proceed in conformity with the opinion, then the opinion must be consulted in determining the appropriate course of action.['] As stated, [if] specifics [sic] directions [are] not given, then the Court should examine the opinion and see whether or not further proceedings would be consistent with the opinion *** I believe that case is pretty much on point that I am to consider just what is considered in the mandate."

¶ 29 Despite the circuit court's decision to limit the evidentiary hearing to Wraggs and Herron, the court went on to find, *inter alia*, that Evans was unreliable. Referring to Evans' affidavit, the court specifically stated:

"I don't believe *** that this is newly discovered evidence and not cumulative. I don't believe that it shows that the result would change upon retrial. Again evidence is – his testimony is presumed to be unreliable, particularly since it involves confession, perjury here."

Thus, the court stated that “based on the mandate that was issued, based on my examination, and even based on my examination of the affidavits of witnesses outside the mandate[,] [it] is not proper to proceed on those particular affidavits at this time.”

¶ 30 Thereafter, the defendant withdrew Herron's affidavit, and the court held an evidentiary hearing on his claim of actual innocence based upon Wraggs' affidavit. Wraggs' testimony at the hearing was consistent with the information contained in his affidavit. After Wraggs testified, the defendant asked the circuit court to reconsider its decision regarding Evans, requesting that he be allowed to testify or that the court consider his affidavit when determining the credibility of Wraggs. The court denied counsel's request.

¶ 31 On January 9, 2014, the circuit court denied the defendant postconviction relief in a written order. The court determined that Wraggs was not a credible witness because his

testimony regarding the gun's color conflicted with the record and his poor recollection of the events rendered him unreliable. It also found that his testimony was unlikely to change the result of the case on a retrial because Wraggs, unlike Perkins, did not witness the shooting firsthand. The circuit court pointed out that Perkins, a reliable witness, identified the defendant as the guilty party. Therefore, it held that the defendant failed to make a substantial showing of his actual innocence and denied his petition. This appeal followed.

¶ 32 The defendant argues that the circuit court erred when it refused to consider Evans' affidavit or to allow him to testify at the evidentiary hearing on the basis that this court's 2010 mandate limited the scope of an evidentiary hearing to Wraggs and Herron. Moreover, the defendant maintains that the circuit court improperly made a credibility determination as to Evans without an evidentiary hearing. According to the defendant, the statements of Wraggs and Evans corroborate each other, and the outcome of his hearing would have been different had the circuit court properly considered the statements of Evans. Although we cannot know with certainty whether the outcome of Wraggs' evidentiary hearing would have differed if the circuit court had considered Evans' testimony, we agree with the defendant that the circuit court erred in limiting the scope of the hearing to solely Wraggs and Herron.

¶ 33 Proceedings regarding postconviction petitions are collateral attacks rather than appeals of the underlying judgment. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). A petitioner is only permitted to file one postconviction petition pursuant to the Act unless "fundamental fairness so requires"; then, the Act's restriction on successive petitions will be relaxed. *Id.* at 328-29. The successive petition must usually meet the cause-and-prejudice test. *Id.* at 329. However, a petitioner does not need to meet the requirements of the cause-and-prejudice test when he raises a claim of actual innocence. *Ortiz*, 235 Ill. 2d at 329. Claims of actual innocence can be

freestanding based upon newly discovered evidence. *Id.* at 331. The evidence in support of actual innocence claims "must be newly discovered; material and not merely cumulative; and 'of such conclusive character that it would probably change the result on retrial.'" *Id.* at 333, quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). We keep in mind that any issue that a reviewing court decides on direct appeal is subsequently barred by *res judicata*, and issues that a party could have raised on appeal, but did not, are forfeited. *People v. Harris*, 224 Ill. 2d 115, 125 (2007).

¶ 34 Here, the circuit court determined that all claims previously adjudicated in the defendant's initial postconviction petition, filed on November 25, 1997, and his successive petitions, filed on December 1, 2003, and June 26, 2007, were barred by the doctrine of *res judicata* or forfeited. Relevant to this appeal, the circuit court determined that, because the defendant did not raise the Evans affidavit in his appeal and because our 2010 order did not address that affidavit, the defendant forfeited any claim of actual innocence based upon Evans' testimony.

¶ 35 We agree that the defendant's actual innocence claims that were contained in his November 25, 1997, and December 1, 2003, petitions, which were based upon the affidavits of Sanders, Sullivan, Johnson, Green, Lee, and Strong, are barred by *res judicata* as those claims were dismissed by the circuit court, and we affirmed the dismissals. *People v. Ruddock*, No. 1-98-1409 (1999) (unpublished order under Supreme Court Rule 23); *People v. Ruddock*, No. 1-04-0983 (2005) (unpublished order under Supreme Court Rule 23). Therefore, the circuit court's determination that the defendant's claims based upon those affidavits were barred by *res judicata* was proper.

¶ 36 Conversely, the affidavits of Travis, Herron, Wraggs, and Evans were first attached to the defendant's June 26, 2007, combined successive petition which the circuit court denied him leave

to file. The Evans affidavit supported the same claim raised by Herron's affidavit, that Cole was the shooter. The defendant appealed that order and argued that the court should have granted him leave to file his successive petition because the affidavits of Wraggs and Herron sufficiently raised an actual innocence claim. Although the defendant limited his argument to those affidavits on appeal, we do not believe that he forfeited his arguments that the affidavits of Evans and Travis also supported his actual innocence claim because the focal subject of the appeal was the petition generally.

¶ 37 Further, our 2010 order acknowledged that the defendant's second combined postconviction petition encompassed all four of the newly filed affidavits and did not specifically limit the consideration of the defendant's claim only to the affidavits of Wraggs and Herron. Rather, we remanded for further proceedings under the Act, meaning that the circuit court should allow the filing of the defendant's petition and consider the actual innocence claim contained therein. Indeed, the circuit court allowed the defendant to file a supplemental petition, which included the affidavit of Evans, and we find that the circuit court erred when it refused to consider that affidavit on the basis that our prior order prevented it from doing so.

¶ 38 We further note that the circuit court's reliance on *Gonzalez* is misplaced. In fact, we find the facts of *Gonzalez* support our holding here. In *Gonzalez*, the defendant sought to file his postconviction petition which alleged a claim of actual innocence based upon the affidavit of his codefendant, James Lewis. *Gonzalez*, 407 Ill. App. 3d at 1029. The circuit court denied the defendant leave to file the petition, and he appealed that order. *Id.* The appellate court found in favor of the defendant, and drafted an order that vacated the circuit court's denial and remanded for an evidentiary hearing based upon Lewis' affidavit. *Id.* at 1029-30. On remand, the circuit court permitted the defendant to amend his petition in order to add a claim of ineffective

assistance of counsel. *Id.* at 1030. The State objected, arguing that, based upon the appellate court's remand order, the circuit court did not have the authority to allow the additional claim. *Gonzalez*, 407 Ill. App. 3d at 1037.

On appeal, the appellate court disagreed with the State:

"[W]e noted that the hearing had to address whether, for the purposes of the newly-discovered-evidence claim, 'Lewis's affidavit [was] of such conclusive character that it would probably change the result on retrial.' *** However, we did not otherwise dictate the scope of the evidentiary hearing. Thus, the trial court's action in allowing the defendant to amend his postconviction petition and to present the new claim at the evidentiary hearing did not exceed our mandate."

Gonzalez, 407 Ill. App. 3d at 1038.

¶ 39 Similarly, in this case, our August 25, 2010, remand order directed the court to conduct further proceedings, but it did not otherwise dictate the scope of an evidentiary hearing. Thus, the circuit court would not have exceeded the scope of our order if it had also considered Evans' affidavit. To the contrary, it erred by excluding his testimony because the main purpose of the evidentiary hearing was to assess the actual innocence claims contained in the defendant's petition as a whole.

¶ 40 We also agree with the defendant that the circuit court erred when it assessed Evans' credibility without an evidentiary hearing. When the judge who is deciding the postconviction petition is different from the judge who presided at defendant's trial, a recanting witness' credibility and reliability should be evaluated at an evidentiary hearing because the postconviction judge did not see or hear the witness testify at the defendant's trial. *People v. Hernandez*, 298 Ill. App. 3d 36, 40 (1998). Here, the judge who presided at the defendant's trial was different from the postconviction judge. Further, Evans did not testify at the defendant's trial, but only identified the defendant as the shooter for the police and before a grand jury. Therefore, the postconviction judge should have determined whether Evans, although recanting,

was a credible and reliable witness after he conducted an evidentiary hearing. *Hernandez*, 298 Ill. App. 3d at 40.

¶ 41 Accordingly, we reverse the judgment of the circuit court of Cook County and remand for further proceedings consistent with this order. Specifically, we direct the circuit court to consider the actual innocence claim contained in the defendant's supplemental petition, including all of the supporting affidavits attached thereto, and conduct an evidentiary hearing on the relevant witnesses before ruling upon the petition.

¶ 42 Reversed and remanded with directions.