

No. 1-09-1053

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).

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. 03 CR 12481
)	
JAMES MITCHELL,)	Honorable
)	John J. Fleming,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.

Justices Lavin and Pucinski concurred in the judgment.

O R D E R

HELD: Where defendant did not state the gist of a constitutional claim of actual innocence, he was not entitled to remand for second-stage post-conviction proceedings; the trial court's judgment was affirmed.

Defendant James Mitchell appeals the trial court's order summarily dismissing his *pro se* post-conviction petition. On

appeal, defendant contends that his petition stated the gist of an actual innocence claim. We affirm.

Defendant, Christopher Peoples, and Marcel White were charged with killing Brian Campbell during a dispute over selling drugs.¹ Defendant and Peoples were tried simultaneously by separate juries. The State asserted that Peoples fired the weapon that killed Campbell, and defendant was thus tried on an accountability theory.

Following a jury trial, defendant was convicted of first degree murder and home invasion in connection with the shooting death of Campbell. Defendant was sentenced to 45 years' imprisonment for the murder, with an additional 15-year sentence imposed because a firearm was used in the commission of the offense. Defendant was also sentenced to a consecutive term of 10 years for home invasion.

As relevant to this appeal, the evidence at trial revealed that Campbell and his fiancée, Ninner Powers, lived at 826 West 50th Street in Chicago in the second-story apartment of a two-flat on May 8, 2002. While Powers was talking to a friend on the front porch of the building, Campbell was upstairs. When Powers' friend left, she went inside and attempted to close the door. Defendant, White, and Peoples forced the door open and entered the apartment.

¹ Peoples and White are not subject to this appeal.

The men accused Powers of selling drugs for a rival gang, and told her that they wanted the drugs and the money. After Powers denied the accusations, White responded that he was going to get the money himself, and pushed Powers aside and ran upstairs to the second-floor apartment. Peoples followed White up the stairs, followed by Powers, and finally defendant. According to Powers, at some point, the group entered the second-floor apartment. Powers further testified that defendant told Peoples that Peoples should "pop [Powers]" to show the other gang that they "meant business." Peoples pointed a gun at Powers, and, as Campbell approached the group, Peoples shot Campbell. Peoples pointed the gun at Powers' head and pulled the trigger, but the weapon failed to discharge. Powers picked up the gun and tried to shoot at the men, but defendant, White, and Peoples ran out of the apartment building.

After defendant was arrested, he first admitted to police that he was with White and Peoples on the night of the murder but denied participation in the shooting, instead stating that he went to his grandfather's house. When defendant was questioned by police a second time he stated that he and White met Peoples on the porch of Powers' building, but again maintained that he left before shots were fired. Defendant said he went to his grandfather's house and took a bus to Minnesota the next day.

According to Detective Halloran, after being told that Powers, White, and Peoples had indicated defendant's involvement in the offense, defendant responded that on the night in question he ran into White and a man named Harper, who told them Powers sold drugs from her residence for a member of a rival gang. Defendant admitted that White told him Powers owed him money, and defendant agreed to go with White to get the money. White told defendant he was going to "fuck [Powers] up" if she did not have the money. According to Halloran, defendant then stated that he, White, and Peoples went to Powers' residence and Powers let them in because she sold drugs and did not want police to see them on her front porch. Peoples went upstairs into the apartment where defendant heard shots being fired. After shots were fired upstairs, White, Peoples, and defendant fled. Although Halloran did not memorialize defendant's statement, he wrote the information regarding defendant's confession in his police report and then contacted the State's Attorney to interview defendant.

The defense presented no testimony. The jury was instructed on the legal theory of accountability and found defendant guilty of first degree murder and home invasion. We affirmed that judgment on direct appeal. *People v. Mitchell*, No. 1-05-1114 (2007) (unpublished order under Supreme Court Rule 23).

In July 2008, defendant filed a *pro se* petition for post-conviction relief. As relevant to this appeal, he alleged that

he was actually innocent of the shooting and home invasion. In support, defendant attached an affidavit from Powers. Powers attested that she invited defendant into the hallway of her apartment, that he "had nothing to do nor invoke [sic] in any way the action of Marcell White and Christopher Peoples whom [sic] acted alone for the death of my beloved husband ***." Powers further stated that defendant showed "no action to encourage or encite [sic] what happened ***."

The circuit court found that defendant's petition was frivolous and patently without merit and summarily dismissed it. The court specifically stated that the information provided by Powers was not new, and that Powers testified to all the same facts at trial, *i.e.*, she placed defendant at the scene and "confirmed his role in the criminal endeavor." The court concluded that Powers' affidavit "merely parrots her trial testimony," and thus was cumulative, immaterial, and would not change the verdict on retrial.

On appeal, defendant contends that his post-conviction petition stated the gist of a claim of actual innocence. He specifically maintains that Powers' affidavit constituted newly discovered evidence because she recanted her most damaging trial testimony regarding defendant's guilt, *i.e.*, that defendant told the shooter to "pop her." An appeal from a first-stage

dismissal, as in this case, is reviewed *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

The dismissal of a petition is appropriate at the first stage of post-conviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2008)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a defendant to circumvent dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is a low threshold. *Hodges*, 234 Ill. 2d at 9-10.

Actual innocence is the equivalent of total vindication or exoneration. *People v. Anderson*, 402 Ill. App. 3d 1017, 1037 (2010). A defendant arguing actual innocence must demonstrate that the evidence upon which the claim is based is "newly discovered," *i.e.*, evidence not available at the time of trial and that could not have been discovered sooner through due diligence. *People v. Ortiz*, 235 Ill. 2d 319, 333-34 (2009). In addition, the evidence must be material and not merely cumulative, and also must be "of such conclusive character that it would probably change the result on retrial." *Ortiz*, 235 Ill. 2d at 333.

Here, we determine that defendant's actual innocence claim could be considered newly discovered evidence and material. Although evidence is typically not newly discovered when it presents facts already known to the defendant at or prior to trial, there is an exception to this rule when a witness later recants. *People v. Barnslater*, 373 Ill. App. 3d 512, 523-24 (2007). In this case, Powers recanted her previous testimony that defendant was a participant in the home invasion and murder, establishing newly discovered evidence. Furthermore, the information provided in Powers' affidavit, which attempted to diminish defendant's participation in the crimes, could be deemed non-cumulative and material.

However, defendant's actual innocence claim still fails because he cannot establish that the additional testimony would probably change the outcome of the trial. Newly discovered evidence which merely impeaches a witness will not generally be of such a conclusive character as to justify post-conviction relief. *Barnslater*, 373 Ill. App. 3d at 523. Furthermore, recantation testimony is regarded as unreliable, and a court will not grant a new trial on that basis except in extraordinary circumstances. *Barnslater*, 373 Ill. App. 3d at 523; citing *People v. Steidl*, 177 Ill. 2d 239, 260 (1997). Here, the affidavit at issue merely impeached Powers' trial testimony that defendant forced his way into the residence and participated in

the crimes by telling White, "why don't you just pop her then." Therefore, Powers' impeachment testimony would probably not change the outcome at trial.

Moreover, even without Powers' testimony at trial that defendant participated in the crimes, the evidence overwhelmingly established defendant's accountability for the home invasion and murder. The following factors are relevant in determining legal accountability: (1) presence during the commission of the offense; (2) continued close affiliation with other offenders after the commission of the crime; (3) failure to report the incident; and (4) flight from the scene. *People v. Smith*, 321 Ill. App. 3d 669, 673 (2001).

Here, defendant told police that he went to Powers' residence knowing that White might harm Powers if he did not receive the money that she allegedly owed him. The evidence also showed that defendant was at the scene of the crimes, fled the scene with codefendants, and left the State the following day. Defendant never assisted the victim or reported the incident to police. He did, however, admit his involvement in the aforementioned crimes to police. If defendant did not participate in the crimes, he would not have given knowing and voluntary statements to police detailing his involvement. Therefore, even though Powers' affidavit contained newly

discovered evidence, it would not have changed the outcome on retrial.

In reaching this result, we are not persuaded by defendant's contention that Detective Halloran's testimony regarding his confession carries little weight because he did not memorialize the confession. We initially note that Halloran explained that although he did not memorialize defendant's statement, he wrote the information regarding defendant's contention in his police report. More importantly, the jury was aware that defendant's confession to Halloran was not memorialized, and it was the jury's function to determine the weight to be given to that testimony. *People v. Evans*, 209 Ill. 2d 194, 211 (2004). We will not remand this cause for second-stage proceedings simply because defendant alleges that Halloran was not a credible witness. See *Evans*, 209 Ill. 2d at 211-212 (stating that reversal is not warranted simply because the defendant alleges that a witness was not credible).

We further reject defendant's contention that we should remand this cause for further proceedings because the trial court erred when it found that her affidavit contained the same information that she testified to at trial and was thus cumulative. A reviewing court can affirm the decision of a lower court on any appropriate ground regardless of whether the lower court relied on those grounds or was correct in its reasoning.

1-09-1053

People v. Johnson, 208 Ill. 2d 118, 128-29 (2004). Here, defendant failed to show that his petition stated the gist of a constitutional claim of actual innocence because the evidence supporting his petition was not of such a conclusive nature that it would probably change the result on retrial. Therefore, the trial court properly dismissed defendant's petition because it had no arguable basis in either law or fact.

In conclusion, defendant did not raise any viable claim of actual innocence. Accordingly, the circuit court's order summarily dismissing defendant's petition is affirmed.

Affirmed.