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SECOND DIVISION
JANUARY 25, 2011

No. 1-09-2087

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
)	the Circuit Court
Plaintiff-Appellee,)	of Cook County.
)	
v.)	No. 98 CR 20510
)	
JAMES LIPSCOMB,)	Honorable
)	Frank Zelezinski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Karnezis concurred in the judgment.

MODIFIED ORDER UPON DENIAL OF REHEARING

_____ *Held:* Defendant forfeited review of his postconviction claim where he failed to challenge his guilty plea on appeal.

Pursuant to a negotiated plea, defendant James Lipscomb pled guilty to first degree murder. After accepting and entering judgment on the plea, the court sentenced defendant to 20 years in prison. Defendant subsequently filed a petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2004)), which the circuit court dismissed on the State's motion, without an evidentiary hearing. On appeal, defendant contends that he has sufficiently alleged a claim of actual innocence where he attached the affidavit of an eyewitness

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whose testimony would support a theory of self-defense. For the following reasons, we affirm the judgment of the circuit court.

BACKGROUND

Defendant's conviction arose from the fatal shooting of Sabrian Moore in July 1998. As part of a negotiated plea, defendant pled guilty to one count of murder in exchange for a sentence of 20 years' imprisonment, and the State agreed to *nolle pros* a second count of murder. The State presented a factual basis for the charges and defendant stipulated that these would be the facts adduced if he proceeded to trial.

Chastity Russell would have testified that she saw defendant and Moore arguing near Moore's home, and that Moore pushed defendant. Defendant then pulled out a gun and fired at least two shots at Moore, and Moore fell to the ground. Russell Bryant would have testified that he also saw the argument between defendant and Moore. Moore pushed defendant. Defendant then shot Moore at least two times. According to Bryant, Moore was not armed with a weapon.

Additionally, Assistant State's Attorney Nick D'Angelo would have testified that he took a court-reported statement from defendant on July 17, 1998. According to defendant's statement, he had gone to a rap festival earlier in the day and had gotten into an argument with a friend of Moore's. Defendant then got drunk and went over to Moore's home to "smooth things over with them." Defendant stated that Moore assaulted him when they began arguing. Moore pushed him, and defendant then pulled out a gun and shot Moore several times. Defendant further stated that Moore did not have any type of weapon.

Nancy Owens would have testified that, based on the autopsy she performed on Moore,

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the cause of death was multiple gunshot wounds and the manner of death was a homicide. The trial court admonished defendant with respect to his decision to plead guilty and subsequently sentenced him to 20 years' imprisonment.

Following his sentence, defendant did not seek to withdraw his guilty plea or pursue a direct appeal. However, on August 30, 2004, defendant filed a *pro se* petition for postconviction relief under the Act. Therein, he alleged a claim of actual innocence, based upon an affidavit from Steven McCollum, which defendant claimed would support a theory of self-defense. In the attached affidavit, McCollum stated that he was present at the time of the shooting. Prior to defendant firing any shots, McCollum observed Moore push defendant and then reach under his shirt as if he was reaching for a gun. McCollum also stated that after the shooting, two men, whom he had previously seen with Moore, removed a gun from Moore's pants. McCollum did not come forward with this information sooner because the two men threatened to kill him and his family if he told anyone about what he had seen.

Additionally, defendant argued that he did not knowingly and voluntarily enter his guilty plea because his trial counsel failed to advise him of the possible self-defense theory. He also claimed that trial counsel was ineffective for failing to interview McCollum. Defendant alleged that he informed his counsel prior to the plea hearing that McCollum would have corroborated his defense that he feared for his life and would have contradicted the State's testimony that Moore was unarmed.

The circuit court appointed counsel, and the State moved to dismiss the petition. Thereafter, the circuit court granted the motion to dismiss, finding that defendant voluntarily pled

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guilty, that he did not allege a freestanding claim of actual innocence, and that he could not prove prejudice regarding his ineffective assistance of counsel claim.

ANALYSIS

Defendant contends that he has sufficiently pled a claim of actual innocence to warrant an evidentiary hearing. Initially, the State maintains that defendant cannot raise a claim of actual innocence following a valid guilty plea where defendant does not now challenge his plea on appeal.

It is well established that a voluntary guilty plea waives all non-jurisdictional errors or irregularities, including constitutional errors. *People v. Townsell*, 209 Ill. 2d 543, 545 (2004). The principle behind this rule was expressed in *Tollet v. Henderson*, 411 U.S. 258 (1973), where the Supreme Court explained as follows:

“[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea ***.” *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

The Illinois appellate court has recently confronted this issue in the context of a collateral postconviction claim of actual innocence. The court has generally concluded that to proceed on a postconviction claim a defendant must challenge the knowing and voluntary nature of the plea.

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See *People v. Knight*, No. 3-08-0860, slip op. at 8 (Ill. App. Oct. 29, 2010) (State conceded that a claim of actual innocence is cognizable in postconviction proceeding following a guilty plea when the defendant can show that the plea was not knowing or voluntary); *People v. Barnslater* 373 Ill. App. 3d 512, 527 (2007) (if a defendant claims his plea was coerced, that coercion provides the necessary constitutional deprivation for which postconviction relief would be appropriate, but not where he claims actual innocence in the face of a prior admission of guilt); See also *People v. Simmons*, 388 Ill. App. 3d 599, 614-15 (2009) (expressing “doubt as to whether a defendant who pleads guilty may even legitimately assert a postconviction claim of ‘actual innocence’ ”); *People v. Smith*, 383 Ill. App. 3d 1078, 1086 (2008) (where the defendant pled guilty and did not challenge the plea in postconviction proceeding, the court would not consider an ineffective assistance of counsel claim that counsel failed to investigate a defense of compulsion).

Although defendant raised the voluntariness of his plea in his petition, on appeal defendant does not now challenge his guilty plea as being either involuntary or unknowing. Rather, he only maintains that he has newly discovered evidence of self-defense to support an actual innocence claim, relying on the decision in *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002), to assert that he may raise an actual innocence claim at any time. However, *Pitsonbarger* did not address whether a defendant could raise his constitutional claim in the face of a valid guilty plea.

Supreme Court Rule 341(h)(7) provides that “[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.” 210 Ill. 2d R.

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341(h)(7). By failing to challenge the voluntariness of his plea on appeal, defendant has procedurally forfeited review of this argument. 210 Ill. 2d R. 341(h)(7). Consequently, by his voluntary plea defendant has relinquished his right to assert his constitutional claim. See *Townsell*, 209 Ill. 2d at 545; *Smith*, 383 Ill. App. 3d at 1086.

Nevertheless, even if we were to review the argument as raised by defendant's petition, we find no merit to defendant's contention regarding his plea. At the second stage of postconviction proceedings, the court must consider whether the petition's allegations and accompanying documentation make a substantial showing of a constitutional violation. *People v. Hodges*, 234 Ill. 2d 1, 11 n.3 (2009). A petition may be dismissed if its factual claims are baseless. *Hodges*, 234 Ill. 2d at 17. A factual claim may be baseless where the record belies the claim made in the petition. *People v. Torres*, 228 Ill. 2d 382, 394 (2008) (indicating that our supreme court has consistently upheld the dismissal of a postconviction petition when the allegations are contradicted by the record). Our review of the petition at this stage is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998).

In his petition, defendant alleged that his trial counsel never advised him that he had a possible affirmative defense of self-defense if defendant decided to proceed to trial. Nevertheless, defendant's own affidavit makes it evident that he was fully aware of a possible affirmative defense. Prior to his plea, he allegedly directed his trial counsel to witnesses that would support a self-defense theory and told counsel that he shot Moore because he "feared that Moore would shot [*sic*] [him]." Accordingly, defendant's allegations do not make a substantial showing that he was unaware of a possible defense that he could have raised at trial. He merely

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alleges that counsel advised him that “things were looking bad and [he] did not have a chance.”

Additionally, the record reflects that defendant was thoroughly admonished during his plea hearing regarding his right to pursue his defense. He acknowledged that he understood that by pleading guilty he was giving up his right to trial, the right to testify or not testify on his own behalf, his right to be confronted by the witnesses against him and cross-examine those witnesses, his right to present evidence on his own behalf, and his right to object to any statements that may have been given by him. He also acknowledged that nobody threatened him or forced him to plead guilty and that he pled guilty of his own free will. Accordingly, because defendant’s allegations are contradicted by the record, his claim regarding an involuntary plea was properly dismissed.

Additionally, under the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), the defendant must establish substantial prejudice from his counsel’s alleged deficiency. *Strickland*, 466 U.S. at 687-88. A defendant establishes prejudice by showing that, but for counsel’s unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). In this context, “the question of whether counsel’s deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial.” *People v. Hall*, 217 Ill. 2d 324, 336 (2005), quoting *People v. Pugh*, 157 Ill. 2d 1, 15 (1993).

Here, the evidence at the plea hearing established that defendant admitted in his statement to the ASA that Moore was unarmed. Additionally, the eyewitness Bryant would have testified

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that Moore was unarmed, and the medical examiner would have testified to multiple gunshot wounds. Accordingly, given the evidence, it cannot be said that there is a reasonable probability that the result of the proceeding would have been different or that our confidence in the outcome is undermined. *Strickland*, 466 U.S. at 694. Consequently, defendant has not made a substantial showing that his guilty plea was involuntary.

In reaching our conclusion, we find this case distinguishable from *People v. Hall*, 217 Ill. 2d 324 (2005). In *Hall*, the defendant pled guilty to aggravated kidnaping premised on knowingly and secretly confining a child. On appeal from the dismissal of his post-conviction petition, the court held that the defendant made a substantial showing that his guilty plea was involuntary because his trial counsel erroneously advised him that he did not have a valid defense based on his lack of knowledge that a child was inside the car. *Hall*, 217 Ill. 2d at 335. The court found the defendant was prejudiced because his lack of knowledge would establish a plausible defense to aggravated kidnaping, and that the trial court's admonishments were not sufficient under those specific circumstances to negate the effect of the erroneous legal advice. *Hall*, 217 Ill. 2d at 336, 339.

Here, unlike *Hall*, defendant's allegations do not make a substantial showing that he was erroneously advised regarding the possibility of a plausible self-defense claim. Furthermore, unlike *Hall*, defendant cannot established prejudice where the State's case at trial would have established that defendant admitted that the victim was unarmed and where this fact was corroborated by an eyewitness. Additionally, unlike *Hall*, where the admonishments did not address the misrepresentations of defense counsel, here, the exhaustive admonishments fully

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articulated that defendant was giving up his right to testify and to present evidence on his own behalf in his defense and his right to object to his statement that Moore was unarmed.

Despite the existence of a valid plea, defendant maintains that fundamental fairness requires that we address the merits of his actual innocence claim because the guilty-plea process is equally as capable of convicting innocent people as the trial process. Defendant cites United States Supreme Court and Illinois cases that have recognized that defendants plead guilty for a variety of reasons other than guilt. See, e.g., *Brady v. United States*, 397 U.S. 742, 752 (1970); *People v. Jones*, 144 Ill. 2d 242, 269-70 (1970). We need not engage in a lengthy discussion of these cases as to whether an actual innocence claim may ever be raised despite a valid plea because we find that even if we considered defendant's actual innocence claim we would find that it would not warrant an evidentiary hearing.

Courts may consider a claim of actual innocence in a postconviction proceeding if the claim is based upon newly discovered evidence that is material, noncumulative, and of such a conclusive character that it would probably change the result on retrial. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Newly discovered evidence is evidence that was not available at the defendant's original trial and must be evidence that the defendant could not have discovered sooner through diligence. *Morgan*, 212 Ill. 2d at 154.

Here, defendant alleged in his petition that he told his trial counsel before trial that Moore tried to pull a handgun from the waistline of his pants, that defendant informed his counsel that McCollum would verify that Moore attempted to retrieve a handgun from his pants, and that McCollum would provide information to support defendant's theory of self-defense. Thus,

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defendant readily admits in his petition that he knew, prior to pleading guilty, that Moore allegedly attempted to reach for a gun when defendant shot him. Accordingly, defendant was the source of this information and the evidence in McCollum's affidavit was not newly discovered. *Morgan*, 212 Ill. 2d at 154 (evidence is not newly discovered if it was available at defendant's original trial); *People v. Harris*, 206 Ill. 2d 293, 300-301 (rejecting assertion of newly discovered evidence where defendant presented affidavits from his brothers attesting to defendant's whereabouts at the time of the shooting where defendant was the source of that information); *People v. Jarrett*, 399 Ill. App. 3d 715, 724 (2010) (where defendant admitted that he knew prior to trial that an individual aimed a gun at him, affidavits from witnesses to this effect did not constitute newly discovered evidence of self-defense).

CONCLUSION

In sum, defendant has forfeited review of his postconviction petition because he has failed to challenge his guilty plea on appeal. Even if we were to consider the argument raised in the petition regarding his plea, we would find that defendant has failed to make a substantial showing that his plea was unknowing or involuntary, and has failed to meet the two-prong test of *Strickland* to show prejudice by the alleged deficiency of counsel. Lastly, even if we were to reach the merits of his actual innocence claim, we would find that the circuit court properly dismissed it without an evidentiary hearing because the evidence presented in the petition was not newly discovered. For all the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.