

No. 1-09-1206

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).

FIFTH DIVISION
March 25, 2011

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. 01 CR 16022
)	
ALEX NEGRON,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Epstein
concur in the judgment.

O R D E R

HELD: Defendant's claim of actual innocence must fail when the newly discovered evidence would probably not change the result on retrial.

Defendant Alex Negrón appeals from the dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). He contends the circuit

court erred in dismissing his petition when he made a substantial showing that he was actually innocent, or, at the minimum, that he did not personally discharge a firearm. We affirm.

Defendant and codefendant Yohn Zapada were arrested in June 2001 and charged with, *inter alia*, the murder of the victim, Omar Brown. The court subsequently granted defendant's petition to sever. The men were tried simultaneously, defendant by a jury and codefendant by the court. Prior to trial, defense counsel indicated that if codefendant testified at his own trial, she would seek to have him testify in front of the jury. The court suggested that defense counsel present the court with authority permitting a defendant to call a codefendant to testify, as the court was unaware of any such caselaw.

The evidence at defendant's trial established, through the testimony of witnesses Conan Little and Rafael Vega, that defendant shot the victim two or three times as the victim lay face-up on the ground. The parties stipulated that the bullets recovered from the victim's body and a gun recovered from defendant's hotel room were submitted to the State Police Crime Lab. The parties also stipulated that an expert in the field of firearms identification, if called to testify, would testify that the bullets were fired from the gun recovered from defendant's hotel room. A medical examiner testified that the victim died as a result of multiple gunshot wounds and that the gunshot wounds

to the back of the head and the back were not consistent with the victim being shot while he was face-up on the ground. Defendant was convicted of first degree murder, and ultimately sentenced to 50 years in prison.¹

Defendant appealed and this court remanded the matter for resentencing. *People v. Negron*, No. 1-02-3713 (2004) (unpublished order under Supreme Court Rule 23). On remand, defendant was sentenced to 48 years in prison.

In 2007, defendant filed a *pro se* petition for postconviction relief contending, among other claims, that he was not proven guilty beyond a reasonable doubt because he did not shoot the victim, the eyewitnesses lied, and the testimony of the medical examiner did not indicate that someone stood over the victim and shot him. Attached to the petition was defendant's affidavit in which he averred that he ran away when he heard gunshots and it was "Danny" who had a gun.²

Also attached to the petition were the *pro se* postconviction petition and affidavit of codefendant. Codefendant averred that

¹ Codefendant was also found guilty of first degree murder and sentenced to 50 years in prison. See *People v. Zapada*, 347 Ill. App. 3d 956 (2004). Although the record indicates that codefendant has also filed a *pro se* postconviction petition, codefendant is not a party to this appeal.

² The record does not reveal Danny's surname.

after the victim tried to run him over, he and the victim began fighting. Defendant and Danny were also present. The victim choked him and Rafael Vega hit him on the back until he fell to the ground. As Danny helped codefendant up, codefendant saw the victim coming toward him again. He grabbed Danny's gun and fired twice to scare the victim. When codefendant realized that he had shot the victim he became very scared, gave the gun back to Danny, and ran away. As he ran, he heard more shots being fired, so he looked back and saw Danny chasing the victim while firing a gun. Codefendant also averred that he would testify under oath that he did not see defendant with a gun during the incident.

Counsel was appointed and subsequently filed a certificate pursuant to Rule 651(c) (eff. Dec. 1, 1984), without filing a supplemental petition. The State filed a motion to dismiss, which the circuit court granted.

On appeal, defendant contends that he made a substantial showing, based on codefendant's affidavit, that he was actually innocent of the victim's murder, or at the minimum, that he did not personally discharge a firearm.

The Act provides a mechanism through which a criminal defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2006); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second stage, it is the defendant's burden to

make a substantial showing of a constitutional violation; all well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). This court reviews the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Pendleton*, 223 Ill. 2d at 473.

Under the due process clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 2), a defendant can raise a "free-standing" claim of actual innocence based on newly discovered evidence in a postconviction proceeding. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). To obtain relief pursuant to a claim of actual innocence under the Act, the supporting evidence must be new, material, noncumulative, and of such a conclusive nature that it would probably change the result of a retrial. *People v. Hickey*, 204 Ill. 2d 585, 601-02 (2001). "Newly discovered" evidence is evidence that was unavailable at trial and that a defendant could not have discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002); see also *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (2010) (when the new evidence presents facts that a defendant knew prior to, or during trial, it is not "newly discovered" even if the source of those facts may have been unavailable, uncooperative, or unknown).

An affidavit from a codefendant qualifies as newly discovered evidence notwithstanding a defendant's awareness of that evidence before trial. In *People v. Molstad*, 101 Ill. 2d 128, 134-35 (1984), our supreme court determined that the posttrial affidavits of five codefendants averring that the defendant was not present during the offense constituted newly discovered evidence, even though the defendant knew these facts before trial, because no amount of diligence could have forced the codefendants to violate their fifth amendment right not to incriminate themselves. There, the codefendants could not have testified that defendant was not present during the offense without incriminating themselves by admitting their own presence. *Molstad*, 101 Ill. 2d at 134-35.

While the court in *People v. Jones*, 341, 365 (2010) found that a codefendant's affidavit did not constitute new evidence based upon the timing of affidavit and the lack of any allegation that the codefendant could not have come forward earlier without damaging his own defense, this court finds that the timing of a convicted codefendant's affidavit in support of a defendant's claim of actual innocence affects the weight afforded to that affidavit, not whether it constitutes newly discovered evidence (see *Jones*, 399 Ill. App. 3d at 376-77 (Howse, J., dissenting)).

Although codefendant's affidavit constituted newly discovered evidence (*Molstad*, 101 Ill. 2d at 134-35), defendant's

claim must still fail as the facts contained in the affidavit were not of such a conclusive character that they would change the result if defendant was retried. See *Hickey*, 204 Ill. 2d at 601-02. While codefendant's affidavit purports to exonerate defendant, it merely states that codefendant did not see defendant with a gun, not that defendant was not present or that defendant left the scene prior to codefendant running away.

Here, defendant contends that the "diametrically opposed" version of the events contained in codefendant's affidavit casts doubt upon the testimony of eyewitnesses Vega and Little. However, allegations of actual innocence should seek to establish a defendant's actual innocence of the crime rather than question the strength of the State's case. *People v. Coleman*, 381 Ill. App. 3d 561, 568 (2008). This court has previously held that evidence which merely impeaches a witness is usually not of such a conclusive nature as to justify postconviction relief. *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007).

Contrary to defendant's assertion, it is unclear whether codefendant's testimony would probably change the result of a retrial when there is no indication that either eyewitness has recanted his testimony placing defendant at the scene of the crime firing a gun at the victim. The potential addition of codefendant's testimony, rather than vindicating defendant, would require the fact finder to determine which witness's version of

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events was most credible. Because the facts contained in codefendant's affidavit are not of such a conclusive character that they would probably change the outcome of a retrial, defendant has failed to allege a claim of actual innocence under the Act (*Hickey*, 204 Ill. 2d at 601-02), and the circuit court properly dismissed his petition.

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.