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FIRST DIVISION  
DATE: MAY 16, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 27964
	)	
ANDRIAN WHEELER AKA DENNIS CURRY,	)	The Honorable
	)	Diane G. Cannon,
Defendant-Appellant.	)	Judge Presiding.

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

**O R D E R**

Held: Where defendant's post-conviction petition made a substantial showing of actual innocence at the second stage of proceedings, we reverse and remand for further proceedings under the Post-Conviction Hearing Act.

Defendant, Adrian Wheeler a/k/a Dennis Curry, appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West

2004)). On appeal, defendant contends that his petition made a substantial showing of actual innocence through the affidavits of Antoine Nichols and Stephanie Whitlow. We reverse and remand.

Following a bench trial, defendant was convicted of two counts of attempted first degree murder and sentenced to two consecutive 10-year terms of imprisonment. The evidence at trial revealed that Jennifer and Jason Hill were shot in front of their home on Talman Avenue near 69th Street in Chicago at about 8 p.m. on September 16, 2000. Darius Walton, a 15-year-old neighbor, was in front of the Hills' house with Jennifer and Jason when he observed a car driving on 69th Street. After turning onto Talman Avenue, the same car, which now had its lights off, approached the Hills' house and the driver started firing a gun in the direction of Walton and the Hills. Walton clearly saw the face of the driver because "he had his head out of the window." Walton knew the driver as "Big Dee," and identified defendant by his street name to police who arrived shortly after the incident. Walton also identified defendant from a photo array at the police station later that evening. Walton denied that he testified against defendant because he did not want him around the neighborhood, and also denied that the lighting conditions and flashes from the gun made it difficult to see the

NO.1-08-3256

shooter.

At the close of the State's case, the trial court granted defendant's request for a continuance to allow counsel time to investigate further. Four months later, defendant told the court that he had no witnesses to present and did not want to testify. The trial court found defendant guilty of two counts of attempted murder, and that judgment was affirmed on appeal. *People v. Curry*, No. 1-02-2587 (2004) (unpublished order under Supreme Court Rule 23).

On November 16, 2004, defendant filed a pro se petition under the Act, alleging, in pertinent part, that he was actually innocent. In support, defendant attached the affidavits of Stephanie Whitlow and Antoine Nichols. Whitlow attested that "in November" Walton admitted to her that he did not see the shooter in question, but named defendant because he did not like him, wanted to kill him, and stated that putting him in prison was the next best thing. Whitlow visited defendant in the Cook County jail and told him Walton's story. Defendant stated that he told his lawyer to contact Whitlow for an interview. Whitlow also called the lawyer's office, but he never returned any of her calls or interviewed her. Although Whitlow's affidavit failed to specify

NO.1-08-3256

any of the dates on which these conversations, calls, and visits occurred, defendant averred in his petition that the evidence in Whitlow's affidavit was not discovered until 2004, about two years after trial.

Nichols attested that at about 8 p.m. on September 16, 2000, he was walking down 69th Street and Talman Avenue when a car, driven by a light-skinned, slim, African American with short hair, drove up. The car slowed down, the driver stared at Nichols, and then Nichols ran away. While Nichols was incarcerated, he met defendant who told him that he was in prison for the shooting in question. Nichols attested that defendant could not have committed the crime in question because he saw the person who committed the crime, and it was not defendant.

The circuit court summarily dismissed the petition. On appeal from the first-stage dismissal, this court reversed and remanded the cause for second-stage proceedings. *People v. Wheeler*, No. 1-05-0959 (2006) (unpublished order under Supreme Court Rule 23). In doing so, this court found that, based on the record, it could not conclude that the outcome of defendant's trial would not have been different had defendant presented Whitlow and Nichols as witnesses. *Wheeler*, No. 1-05-0959, order at 7. We further stated that because

Whitlow and Nichols' testimony would have directly contradicted the testimony of the State's lone eyewitness, Walton, it could not be determined, as a matter of law, that such testimony would not have changed the outcome of the trial. Wheeler, No. 1-05-0959, order at 7-8. In reaching this conclusion, we made no findings regarding the merits of defendant's claims of newly discovered evidence. Wheeler, No. 1-05-0959, order at 8.

In December 2007, defendant, through his attorney, filed a supplemental post-conviction petition that was to be considered in addition to his pro se pleading. The supplemental petition alleged that defendant's consecutive sentence was improper where there was not a sufficient showing, nor an express judicial finding, that the crime caused severe bodily injury.

On March 5, 2008, the State filed a motion to dismiss defendant's petition, maintaining that Whitlow's affidavit was hearsay and not newly discovered. The State also argued that Nichols' affidavit was merely a bald accusation that was contradicted by the record at trial, and was insufficient to be considered material of such convincing character as to change the outcome at trial. The State further contended that defendant's claim that the trial court erred in sentencing him to consecutive

sentences ignored the evidence at trial and misapplies the law.

On May 14, 2008, the trial court heard arguments regarding the State's motion to dismiss, and granted defendant an evidentiary hearing on his consecutive sentences claim. However, the trial court dismissed defendant's other post-conviction claims, including his claim of actual innocence, which is the subject of this appeal.

On appeal, defendant contends that the second-stage dismissal must be reversed where the affidavits of Nichols and Whitlow substantially established his actual innocence. Defendant specifically maintains that the affidavits show that he was actually innocent because Nichols attested that he was not the shooter in question, and Whitlow attested that Walton told her that he had not seen the shooter, but identified defendant because he hated him and wanted him imprisoned.

The dismissal of a post-conviction petition is warranted at the second-stage of proceedings only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 382. At the second-stage, all well-pleaded facts that are not rebutted by the trial record are to be taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Fact-finding and

credibility determinations are made only in the third stage of proceedings, where an evidentiary hearing is held. Pendleton, 223 Ill. 2d at 473.

Actual innocence is the equivalent of total vindication or exoneration. People v. Anderson, 402 Ill. App. 3d 1017, 1037 (2010). A defendant alleging 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, construing defendant's post-conviction allegations liberally, we find that Nichols' affidavit was newly discovered evidence, material and not merely cumulative, and of such conclusive character that his testimony, if believed, would probably change the result on retrial.

First, Nichols' affidavit was newly discovered evidence. Nichols attested that while he was incarcerated for an unrelated offense, he met defendant in prison. Defendant told him that he

NO.1-08-3256

was in prison for the shooting in question. Nichols further attested that he knew defendant was not the shooter because he saw the person who committed the crime, and it was not defendant. Because defendant had not met Nichols until after his trial had concluded, there was no way for him to discover that Nichols had seen the shooting.

Second, Nichols affidavit was material, and not cumulative, to any evidence presented at trial. Defendant presented no evidence at trial, and Nichols' attestation that he saw the shooter and knew that it was not defendant would have supplied a first-person account of the shooting that contradicted the State's evidence.

Third, based on our liberal construction of defendant's post-conviction allegations in light of the record, we conclude that the statements in Nichols' affidavit were of such conclusive character that they would probably change the result on retrial. The only evidence implicating defendant was the testimony of a single eyewitness, and the potential testimony of Nichols would have contradicted that testimony. Therefore, we cannot determine, as a matter of law, that Nichols' testimony would not have changed the outcome of the trial. See *People v. Flournoy*, 336 Ill. App. 3d 739, 749 (2002) (remanding the cause for a new trial where

improperly admitted hearsay evidence may have affected the outcome at trial when only a single witness implicated the defendant).

In finding that Nichols' affidavit, if believed, substantially established his claim of actual innocence, we reject the State's assertions that Nichols' affidavit should be viewed with suspicion because he and defendant were serving prison time together, and Walton never wavered in his identification of defendant at trial. However, as previously stated, the credibility and the veracity of sworn statements are topics to be addressed at a third-stage evidentiary hearing, not at the second stage. *Pendleton*, 223 Ill. 2d at 473. In order to determine whether Nichols' affidavit should be viewed with suspicion, or whether Walton was a more credible witness than Nichols, the proceedings must advance to the third stage.

In regard to Whitlow's affidavit, however, we agree with the State's contentions that it failed to provide sufficient support for defendant's claim of actual innocence. Although defendant averred in his petition that Whitlow's affidavit was not discovered until August 13, 2004, about two years after defendant was convicted, he concedes in his reply brief that he "never argued that Whitlow's affidavit constituted newly discovered evidence of

NO.1-08-3256

[his] innocence." Because this evidence was not newly discovered, it cannot support a post-conviction claim of actual innocence. Nevertheless, Nichols' affidavit, by itself, was sufficient to substantially establish defendant's actual innocence claim and advance his cause to the third stage.

For the foregoing reasons, we reverse the trial court's order dismissing defendant's post-conviction petition and remand for further proceedings in accordance with the Act.

Reversed and remanded.