

No. 1-09-0399

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).

FOURTH DIVISION
May 12, 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. 89 CR 21882
)	
MICHAEL ROBINSON,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Pucinski and Salone concurred in the judgment.

O R D E R

HELD: Defendant is not entitled to an evidentiary hearing on his successive post-conviction petition where his claim of actual innocence is barred by the doctrine of collateral estoppel and where he has failed to make substantial showing of an unconstitutional disparity between his sentence and that of his codefendant.

Defendant Michael Robinson appeals from the dismissal, on motion of the State, of his successive post-conviction petition.

On appeal, defendant contends that he is entitled to an evidentiary hearing on his claim of actual innocence because his codefendant has admitted that defendant was not present during the commission of the offense. Defendant further contends that he is entitled to an evidentiary hearing on his claim that his sentence is unconstitutionally disparate to that of his codefendant. For the reasons that follow, we affirm.

Defendant's conviction arose from the 1989 armed robbery of a Chicago antique shop by two men. Following a jury trial, defendant was convicted of armed robbery and sentenced to an extended term of 60 years' imprisonment. We affirmed on direct appeal, rejecting defendant's contentions that he was ineligible for an extended term sentence and that his sentence was excessive. *People v. Robinson*, No. 1-90-1308 (1992) (unpublished order under Supreme Court Rule 23). The underlying facts of the case appear in our order on direct appeal and will be repeated here only as necessary.

In 1993, defendant filed a *pro se* post-conviction petition, which he and appointed counsel thereafter amended and supplemented numerous times over several years. Attached to the final version of the petition was a 2002 affidavit executed by codefendant, Vincent Tillman, who had pleaded guilty to the crime. In the affidavit, Tillman admitted committing the armed robbery and stated that his co-offender was not defendant, but a

man named Anthony Davis. In 2003, the trial court granted the State's motion to dismiss the petition. We affirmed. *People v. Robinson*, No. 1-04-0773 (2007) (unpublished order under Supreme Court Rule 23).

In 2006, defendant filed a successive *pro se* post-conviction petition. The trial court allowed it to be filed and appointed counsel, who thereafter supplemented the petition. Among the claims raised in the petition were a claim of actual innocence and a claim that defendant's 60-year sentence was unconstitutionally disparate to Tillman's 14-year sentence. Attached to the successive petition were two affidavits executed by Tillman in 1992, in which he stated that he committed the robbery with Davis, not defendant, and that he "was not in the presence of" defendant on the date of the crime. The State filed a motion to dismiss. Following a hearing, the trial court granted the motion.

On appeal, defendant contends that he is entitled to an evidentiary hearing on his claims of actual innocence and sentence disparity. In order to advance to an evidentiary hearing, a petition and its accompanying documentation must make a substantial showing of a violation of constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). Our review of the dismissal of a post-conviction petition on motion of the

State is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

Defendant contends that he has made a substantial showing of actual innocence by presenting Tillman's affidavits from 1992. Defendant argues that the affidavits constitute newly discovered exculpatory evidence which was unavailable at the time of trial, as Tillman had fled the jurisdiction and, even if Tillman had not been "on the run," defendant could not have forced him to testify and thereby incriminate himself. Defendant further argues that because the 1992 affidavits were not considered during his first post-conviction proceedings, his claim is not barred by collateral estoppel. Noting that in his initial post-conviction proceedings, both the trial court and this court criticized his delay in presenting Tillman, defendant asserts that the 1992 affidavits are significant because they demonstrate that Tillman did not wait until 2006 to come forward. Defendant asserts that the affidavits are material, non-cumulative, and of such conclusive character that they would probably change the result on retrial.

The State argues that defendant's claim of actual innocence was properly dismissed on the basis of collateral estoppel. The doctrine of collateral estoppel bars the relitigation of an issue that was already decided in a prior case. *People v. Tenner*, 206 Ill. 2d 381, 396 (2002). Collateral estoppel will apply when (1)

the court rendered a final judgment in the prior case; (2) the parties are the same or in privity; and (3) the issue decided in the prior case is identical to the one presented in the instant case. *Tenner*, 206 Ill. 2d at 396. The doctrine can apply in the post-conviction context to bar consideration of an issue in a successive post-conviction proceeding if the identical issue was decided in a prior post-conviction proceeding. *Tenner*, 206 Ill. 2d at 396; *People v. Williams*, 392 Ill. App. 3d 359, 368 (2009). However, if the defendant presents additional, newly discovered evidence in support of a claim, then collateral estoppel does not apply because it is not the same "claim." *People v. Ortiz*, 235 Ill. 2d 319, 332 (2009).

Defendant does not dispute the existence of the first two elements of collateral estoppel. However, he maintains that the claim of actual innocence in his successive post-conviction petition is not identical to the claim of actual innocence in his initial post-conviction petition. According to defendant's argument, the claim in the successive petition is not identical because it is supported by newly discovered evidence, that is, Tillman's 1992 affidavits, which were not considered by the trial court or this court during the initial post-conviction proceedings. In making this argument, defendant relies upon *Ortiz*, 235 Ill. 2d at 332-33, and *Williams*, 392 Ill. App. 3d at 369.

In *Ortiz*, our supreme court found that the claim of actual innocence included in the defendant's third post-conviction petition was not precluded by collateral estoppel. *Ortiz*, 235 Ill. 2d at 332-33. The court explained that although the defendant's first and second petitions also alleged actual innocence, the third petition "presented a new 'claim' of actual innocence because it offered two additional eyewitnesses who were previously unknown to defendant." *Ortiz*, 235 Ill. 2d at 333. In *Williams*, this court found that affidavits from two witnesses, "both of whom were involved in the crimes and were not heard from before," constituted newly discovered evidence so as to preclude the application of collateral estoppel. *Williams*, 392 Ill. App. 3d at 369.

In both *Ortiz* and *Williams*, the "new" evidence came from witnesses who were not previously involved in the defendants' post-conviction proceedings. In the instant case, in contrast, both the initial and successive post-conviction claims of actual innocence are supported by affidavits executed by Tillman. Not only were the 2002 affidavit and 1992 affidavits executed by the exact same person, but in addition, the substance of the affidavits is essentially the same. Thus, *Ortiz* and *Williams* are distinguishable.

Defendant has presented a claim of actual innocence based on Tillman's assertion that he committed the crime with an

individual who was not defendant. This issue was already decided in the initial post-conviction proceedings. Accordingly, the claim is barred by collateral estoppel, and we need not address defendant's additional arguments in support of his claim of actual innocence.

Defendant's second contention on appeal is that he is entitled to an evidentiary hearing on his claim that his 60-year extended-term sentence is unconstitutionally disparate to Tillman's 14-year sentence. He argues that he and Tillman have similar criminal backgrounds and that while his participation in the offense was "arguably more egregious," that circumstance alone does not warrant the imposition of a sentence 46 years longer than Tillman's. Defendant also acknowledges that Tillman pleaded guilty, but asserts that the typical sentencing considerations given to defendants who do so should not be given force in this case, as Tillman fled the jurisdiction in an attempt to avoid prosecution, was arrested pursuant to a warrant more than a year after the robbery, and did not plead guilty until after defendant had been convicted and sentenced.

As an initial matter, we note the State's argument that defendant has forfeited his disparate sentencing claim because he failed to raise it in his first post-conviction petition and has not shown good cause for failing to raise it earlier and prejudice resulting from his inability to raise it now. We

disagree with the State. The question of cause and prejudice arises when a defendant seeks leave to file a successive post-conviction petition. 725 ILCS 5/122-1(f) (West 2008). In the instant case, the trial court granted defendant leave to file. After counsel was appointed and the petition was amended and supplemented, the State filed a motion to dismiss. At the hearing on the motion, the trial court addressed the merits of defendant's disproportionate sentencing claim and rejected it. In these circumstances, we find that the petition has advanced to the stage where defendant must make a substantial showing of a violation of constitutional rights. *Edwards*, 197 Ill. 2d at 246.

In general, an arbitrary and unreasonable disparity between the sentences of codefendants who are similarly situated is impermissible. *People v. Caballero*, 179 Ill. 2d 205, 216 (1997). However, by itself, a disparity in sentences does not establish a violation of fundamental fairness. *Caballero*, 179 Ill. 2d at 216. This court will not disturb a disparity where it is warranted by differences in the nature and extent of the defendants' participation in the offense. *Caballero*, 179 Ill. 2d at 216. In addition, "A sentence imposed on a codefendant who pleaded guilty as part of a plea agreement does not provide a valid basis of comparison to a sentence entered after a trial." *Caballero*, 179 Ill. 2d at 217. It is proper to grant dispositional concessions to defendants who plead guilty since

the public interest in the effective administration of criminal justice is served. *Caballero*, 179 Ill. 2d at 218.

Here, defendant was convicted by a jury of armed robbery and was sentenced to 60 years' imprisonment. Tillman pleaded guilty to armed robbery in exchange for a sentence of 14 years. By pleading guilty, Tillman acknowledged his guilt, showed willingness to assume responsibility for his conduct, and made a public trial unnecessary. See *Caballero*, 179 Ill. 2d at 218. That Tillman did not plead guilty immediately after committing the crime does not change the fact that his eventual guilty plea served the public interest in the effective administration of criminal justice.

In addition, defendant's participation in the armed robbery was more significant than Tillman's. Defendant carried a gun; Tillman did not. Defendant pointed the gun at the female victim, told her to hurry up and remove her jewelry or he would kill her, put the gun's muzzle inside her mouth, struck the side of her face with the gun barrel, and put his hand inside her bra and then down her pants. Tillman, in contrast, went through the female victim's purse and the male victim's wallet, hog-tied the male victim, and struggled with the female victim before tying her hands and feet. After the victims were tied up in the bathroom, defendant kept the gun pointed at the victims' heads while Tillman went back into the store. Finally, as they were

1-09-0399

leaving, defendant told Tillman to "start the car and I will finish them." As we noted on direct appeal, "the facts of the instant case reflect a violent tendency on the part of defendant." *Robinson*, No. 1-90-1308, slip op. at 5. The facts do not reflect the same with regard to Tillman.

Defendant has not established that the difference between his sentence and Tillman's was unconstitutionally disparate. He has failed to make a substantial showing of a violation of constitutional rights. Accordingly, the trial court did not err in granting the State's motion to dismiss.

For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

Affirmed.