

No. 1-09-3179

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. 92 CR 13556
)	
AMOTTO JACKSON,)	Honorable
)	John A. Wasilewski,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

ORDER

Held: Where the affidavit in support of defendant's second-stage petition for postconviction relief failed to provide total vindication or exoneration for defendant, he did not make a substantial showing of actual innocence and the trial court properly dismissed his petition.

¶ 1 Defendant Amotto Jackson 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 2000). On appeal, defendant contends that the trial court erred in dismissing his petition because he made a substantial showing of actual innocence based on the affidavit of Darrell Winston. We affirm.

¶ 2 Defendant was charged with the April 1992, murder of Kristen Ponquinette along with codefendants Chezeray Moore, Henry Lovett and Timothy Mobley, who are not parties to this appeal. The victim died from "drowning in association with blunt head trauma" after she had sustained numerous injuries, her hands were tied behind her back, her feet were bound together at the ankles and connected to a manhole cover, and she had been thrown into the water. On April 26, 1992, the victim's body was recovered in the Cal-Sag Channel (Cal-Sag) near 127th Street and Cicero Avenue. Members of the Blackstone street gang, including defendant, his three codefendants, Charles Carpenter, Venus Beckom, Daniel Butler (Daniel), and Mendell Butler, who is Daniel Butler's brother and apparently referred to by the name "Mandell Strawter" in the subject affidavit, were implicated in the victim's beating and murder.

¶ 3 The evidence revealed that the victim was first assaulted at the Butler residence, moved to a garage near codefendant Moore's house where she was beaten, and then taken to a school playground where she was hit and kicked by two other females (Beckom and Lashanda Wilson). Ultimately, the victim was brought to an abandoned railroad bridge that crosses the Cal-Sag, the "black bridge," where two witnesses (Daniel and Wilson) saw defendant with Lovett and Mobley.

¶ 4 At trial, Venus Beckom testified that when she arrived at the Butler residence that night, defendant was there among several other people. The victim had round red marks on her wrist and her hair was "cut in a raggedy style." When Daniel came home, he told everyone to leave the basement. Defendant left with the victim, Mobley and Moore. Beckom and Wilson soon followed them to Moore's garage. Eventually, Beckom took the victim to the playground where defendant, Mendell, Carpenter, Mobley and Wilson joined. Beckom and Wilson hit and kicked the victim. After about five minutes, defendant pulled Beckom off of the victim, picked up the victim, and started walking away with her. Beckom then overheard a conversation between

Mendell, Moore, Carpenter, and Mobley, during which she heard Mobley say, "if they had to get rid of her get her away from the neighborhood. Kill her or something *** because she had already been to one [gang meeting]" and she "knew too much." Beckom then went with Carin Smith to a Harold's Chicken restaurant. In exchange for Beckom's testimony at trial, the State recommended a sentence of probation upon her plea of guilty to the aggravated battery and unlawful restraint of the victim.

¶ 5 Carin Smith testified that she was in the Butler's basement that night; she substantially corroborated Beckom's testimony. Smith did not go to the garage or the playground, but when she went to the Harold's Chicken restaurant with Beckom, she saw Mendell there.

¶ 6 Charles Carpenter was at the playground that night, and substantially corroborated Beckom's testimony. He recalled having a conversation with defendant, Mobley and others, but walked away because he did not want to have anything to do with what they were discussing. On May 14, 1992, Carpenter gave the police a signed statement in which he said that during the playground discussion, Mobley said, "[k]ill the bi***." At trial he denied having said that and said he only signed the statement so the police would leave him alone.

¶ 7 Daniel Butler testified that he could not remember whether defendant was in his basement when he arrived home. After telling everyone to leave his house, he went to the garage but he could not recall whether defendant was there. Defendant eventually joined them at the playground. Daniel left the playground with Wilson to go to the Harold's Chicken restaurant. When they returned later, defendant, Moore and the victim were no longer there. Daniel and Wilson walked to the black bridge. As they approached the bridge, defendant walked past them, but Daniel could not remember if he said anything. Moore and Lovett were on the bridge with the victim, but Daniel did not know whether she was conscious or if her hands or feet were tied. As he and Wilson left the bridge two or three minutes later, he saw defendant walking toward the

bridge carrying what looked like a manhole cover. Daniel and Wilson walked to a nearby bus stop and were joined by defendant, Lovett and Moore a few minutes later. Daniel admitted to having been convicted of delivery of a look-alike substance and had an unlawful use of a weapon by a felon charge pending against him at the time of trial.

¶ 8 At trial, Daniel admitted that he gave sworn testimony before the grand jury on May 8, 1992. According to his grand jury testimony, when he arrived home, defendant was in the basement and left with Moore and the victim. Defendant was also in the garage when Daniel arrived. When Daniel saw defendant while walking to the black bridge, defendant said he would be right back because "[h]e was going to get a sewer top." On the bridge, Daniel saw the victim lying in the gravel with her feet and hands tied. As Daniel and Wilson left, he saw defendant walking toward the bridge with a manhole cover, which defendant threw on the bridge. When defendant joined them at the bus stop, he told Daniel that he "sunk that bi***." Daniel asked what he meant and he said, "I sunk that whore." At trial, defendant testified that the police told him he would be charged with murder if he did not testify before the grand jury.

¶ 9 Lashanda Wilson's testimony substantially corroborated that of Beckom, Carpenter and Butler. Wilson hit the victim at the park. When she started walking away, she heard a guy yell at Beckom to stop. She saw defendant pick up the victim and carry her away. Wilson then went with Mendell and Daniel to the Harold's Chicken restaurant. Later, when Wilson and Daniel were walking to the black bridge, she saw defendant, who appeared "excited" and "happy." Defendant said he was getting a manhole cover and walked away. At the bridge, Moore told Daniel, "[w]e hit the bi*** in the head with bricks, and she still wouldn't die." Wilson saw the victim lying on the bridge, curled up in a ball. As Wilson and Daniel left, defendant approached, carrying a manhole cover. Mendell was at the bus stop when Wilson and Daniel arrived. When defendant, Moore and Lovett joined, defendant was "very excited" and "laughing, jumping up

and down, talking out loud." In exchange for Wilson's testimony at trial, the State agreed to recommend a sentence of probation upon her plea of guilty to the aggravated battery and unlawful restraint of the victim.

¶ 10 Defendant presented no evidence.

¶ 11 The jury found defendant guilty of first degree murder and aggravated kidnaping. The trial court sentenced defendant to an extended prison term of natural life for the murder based on its finding that the murder was accompanied by exceptionally brutal and heinous behavior and 15 years for the aggravated kidnaping.

¶ 12 Defendant appealed, and this court affirmed defendant's convictions and sentence. *People v. Jackson*, 281 Ill. App. 3d 759 (1996).

¶ 13 On September 11, 2000, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2000)). Subsequently, the trial court appointed counsel to represent defendant, and, in turn, the State filed a motion to dismiss the section 2-1401 petition on June 1, 2001.

¶ 14 On March 27, 2003, defendant filed a motion for DNA testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-3) (West 2002)), which the trial court later dismissed on the State's motion on October 21, 2005.

¶ 15 On March 27, 2003, defendant also filed the subject *pro se* postconviction petition,¹ which alleged, in pertinent part, an actual innocence claim based on the attached affidavit of

¹Defendant's filing was entitled "Supplement to Petition for Post-Conviction Relief and Motion to Allow D.N.A. Testing on Biological Evidence." However, there is no original postconviction petition in the record and defendant does not direct us to where the original petition would be. Therefore, we have construed the March 27, 2003, filing as defendant's postconviction petition.

Darrell Winston. In the affidavit, Darrell Winston attested that while he was serving time at the "Galesgurg [*sic*] Correctional Center," he met Mandell Strawter² and they "got along well." Mendell told Winston about a girl who was killed in his neighborhood in 1992. He said some of the Blackstone Sisters, "Venus, Poo-Poo, Wee-Wee, Karen and Sharon" killed the girl because she was sleeping with their boyfriends. Mendell told Winston that "he told the girls that they had to be sure to kill" the victim so she "wouldn't bring the police to the neighborhood." He also told Winston the girls took the victim to the black bridge, tied a manhole cover to her, and threw her over the bridge into the water. Mendell said that Daniel helped the girls because they could not carry the manhole cover by themselves.³ Finally, Winston attested that Mendell "went on to say that quite a few people ended up being charged in relation to the murder, but that he got off scott-free, and that four guys had been tried and convicted for the murder who had nothing to do with the crime at all." The date of the conversation is not given. The affidavit was notarized on July 8, 2002.

¶ 16 On January 7, 2005, the State filed a supplemental motion to dismiss defendant's section 2-1401 petition.

¶ 17 On August 22, 2008, defendant's counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984)), stating that defendant's "*pro se* original and supplemental petitions" adequately set forth his claims of deprivation of constitutional rights.

²Though the affidavit refers to "Mandell Strawter" and the trial witnesses referred to "Mendell Butler," both the affidavit and trial witnesses identified him as Daniel Butler's brother. Here, we will continue to refer to him as "Mendell."

³The State claims that Daniel, who allegedly carried the manhole cover to the bridge instead of defendant, is now deceased. Notably, defendant does not dispute this claim.

¶ 18 On April 24, 2009, the State filed a motion to dismiss defendant's section 2-1401 petition for relief and his postconviction petition. On October 23, 2009, the trial court entered a written order dismissing both petitions. In pertinent part, the court rejected defendant's claim of actual innocence because Winston's affidavit failed to state the basis of Mendell's knowledge, and "may be double or triple hearsay." The court also noted that the identical affidavit was used by codefendant Moore in a postconviction petition that was dismissed, and that this court affirmed the dismissal on appeal, agreeing that the affidavit was based on hearsay. *People v. Chezeray Moore*, No. 1-06-0318 (2008) (unpublished order pursuant to Supreme Court Rule 23). Defendant filed a timely notice of appeal.

¶ 19 On appeal, defendant argues that his postconviction petition set forth a substantial claim of actual innocence based on newly discovered evidence. Specifically, defendant argues that Winston's affidavit established that Mendell ordered the girls to kill the victim and that defendant had "nothing to do with the crime."

¶ 20 As an initial matter, the State argues that defendant's petition should be dismissed as untimely. However, while defendant's petition was pending, the Act was amended to exempt claims of actual innocence from the limitations for timely filing a petition. 725 ILCS 5/122-1(c) (West 2004). Therefore, we decline to dismiss the appeal based on timeliness.

¶ 21 A petition will be dismissed at the second stage of proceedings if it fails to make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2002). Therefore, a defendant does not have an automatic right to proceed to a third-stage evidentiary hearing. *People v. Turner*, 187 Ill. 2d 406, 415 (1999). In order to merit an evidentiary hearing, a petition must make a substantial showing that the defendant's constitutional rights were violated and must be based on factual allegations, not conclusory statements. *People v. Cox*, 136 Ill. App. 3d 623, 628 (1985). At the second stage, well-pleaded facts not positively rebutted by

the trial record must be taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A second-stage dismissal is reviewed *de novo*. *People v. Gomez*, 409 Ill. App. 3d 335, 339 (2011).

¶ 22 A claim of actual innocence must be based on evidence that is newly discovered, material and not merely cumulative. *People v. Ortiz*, 235 Ill. 2d 319, 333-34 (2009). It also must "be of such conclusive character that it would provide total vindication or exoneration and probably change the result on retrial." *People v. Munoz*, 406 Ill. App. 3d 844, 851 (2010) (citing *People v. Anderson*, 401 Ill. App. 3d 134, 140-41 (2010)). To support a claim of actual innocence, evidence must therefore do more than simply impeach a witness. *People v. Collier*, 387 Ill. App. 3d 630, 638 (2008).

¶ 23 Initially, we note that defendant criticizes the State's observation that codefendant Moore did not obtain relief based on the identical affidavit by Winston. However, the trial court made this same observation in the present case when it denied defendant relief. Moreover, defendant does not even suggest Winston's affidavit is not based on hearsay, which is insufficient. See *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003). Accordingly, although the unpublished Rule 23 order for codefendant Moore has no precedential impact on our decision for the instant defendant, Winston's identical affidavit has no more legal effect here either because it is still based on hearsay.

¶ 24 Defendant acknowledges that the affidavit is based on hearsay, but argues that Mendell's purported statements to Winston might be admissible as an exception to the hearsay rule because it was against Mendell's penal interest.⁴ Although we find this argument speculative at best, we need not consider this hearsay-exception claim because the dispositive inquiry is whether the alleged statements by Mendell were of such conclusive character that it would probably change

⁴This court denied codefendant Moore's petition for rehearing in case No. 1-06-0318, which advanced the same hearsay-exception argument.

the result on retrial. See *People v. Harris*, 206 Ill. 2d 293, 301 (2002). We find that Winston's affidavit is insufficient to support defendant's claim for actual innocence because it fails to totally exonerate or vindicate defendant.

¶ 25 According to Winston's affidavit, Mendell told Winston that "he told the girls that they had to be sure to kill" the victim. Mendell also told Winston that Daniel "helped the girls at the bridge, because the sewer top was too heavy for them to carry on their own" and that the girls "tied a sewer top to the [victim], and threw her over the bridge into the water." However, Mendell never mentioned defendant by name, never told Winston that defendant was not present that night or that defendant, by name, was innocent. Rather, Mendell made a general statement that "four guys had been tried and convicted for the murder who had nothing to do with the crime at all." These statements are not enough to exonerate defendant. Even if Mendell had ordered the girls to kill the victim, defendant still could have participated in the murder. Mendell did not tell Winston he actually witnessed Daniel helping the girls with the manhole cover, the girls tying the victim to the manhole cover, or the girls throwing the victim into the water. Mendell's knowledge of the murder could have come from another source and the affidavit fails to give Mendell's basis of knowledge for the details of the events on the bridge or the murder.

¶ 26 In contrast, both Daniel and Wilson testified at trial that they saw defendant put his arm around the victim and walk away with her, saw defendant carrying the manhole cover to the bridge where the victim was, and saw defendant at the bus stop shortly after looking "very excited." At best, Winston's affidavit impeaches the testimony of Daniel and Wilson. However, as it fails to provide defendant with total vindication or exoneration, defendant has not made a substantial showing of actual innocence. Cf. *Ortiz*, 235 Ill. 2d at 335-37 (actual innocence standard was met where a newly discovered eyewitness to the crimes testified that the defendant

was not present during their commission); *Munoz*, 406 Ill. App. 3d at 849, 855 (where a new affiant averred that he witnessed the shooting, named a man other than defendant as the shooter, and said defendant was not present during the shooting, the actual innocence standard was shown).

¶ 27 Defendant argues that Beckom and Wilson's testimony that Mendell was present that night provides a sufficient basis for his knowledge of the murder. However, the witnesses only place Mendell at the playground, at the Harold's Chicken restaurant, and at the bus stop after the murder occurred. The two eyewitnesses (Daniel and Wilson) to the events on the bridge testified to seeing Lovett, Moore and defendant, not Mendell, on the bridge with the victim. Therefore, the record does not support Mendell having a basis of knowledge of the events on the bridge leading up to the murder.

¶ 28 Winston's affidavit fails to exonerate defendant and establish that the result on retrial would probably change.

¶ 29 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 30 Affirmed.