



come from the same gun or from two different guns.

¶ 4 At the defendant's trial, two witnesses described the events leading up to Hempel's death. Both witnesses, Amanuel Wade and Leroy Lucas, were also charged. Wade pled guilty pursuant to a negotiated plea agreement that included his testimony against the defendant and another codefendant, Johnny Sullivan. In exchange for his plea and testimony, the State agreed to drop other charges. Lucas also pled guilty in a plea deal that included his testimony. The State agreed to prosecute Lucas, who was 14 years old at the time the crime took place, as a juvenile.

¶ 5 Both Wade and Lucas testified that Leroy Samuels approached them separately and asked if they wanted to participate in a "lick." Lucas explained that a "lick" was a robbery, but Wade said that a "lick" was anything that could make some money, whether legal or not. Both Wade and Lucas testified that they agreed to participate, and Samuels told them that they would meet later with the defendant and Johnny Sullivan to plan the "lick."

¶ 6 Wade testified that he, Lucas, Samuels, Sullivan, and the defendant met between 6 and 7 in the evening in front of the Alton housing project where Wade lived. At this meeting, the defendant was present but was not participating in the group's discussion because he was too busy selling drugs. At this meeting, it was decided that Wade and Lucas were to rob a cab driver, Samuels was to act as a lookout, and the defendant and Sullivan were to create a diversion with a second cab, either by robbing it as well or by calling for a cab and leaving in it. Wade further testified that the group met up again at around 9 or 10 that same night. This time, they decided that Wade and Lucas would act as lookouts, Samuels would rob the cab, and the defendant and Sullivan would create the diversion with a second cab. Wade was to call for the cab that Samuels would rob.

¶ 7 Lucas's testimony regarding the planning of the crime was somewhat different from Wade's. Lucas testified that the five men met in Wade's house at around 11 p.m. He stated

that the plan was to rob two cabs—Wade and Lucas would rob one cab, and the defendant and Sullivan would rob the other. Lucas was not sure what Samuels' role was to be, although the robberies were Samuels' idea. Lucas further testified that the defendant was present but did not say anything while the crime was being planned.

¶ 8 Wade testified that he called his girlfriend, Veronica Mitchell, and asked her to call a cab for him. Lucas testified that he and Wade walked to Mitchell's home, where Wade asked her to call the cab for him. Both testified that Mitchell agreed to make the call. According to Lucas, they then walked back to the housing project to wait for the cab to arrive. Wade testified that he did not know who was responsible for calling for the second cab.

¶ 9 Both Wade and Lucas testified that the robbery did not go exactly as planned. According to Wade, Sullivan left alone in one of the two cabs, and the defendant got into the back seat of the other cab. Samuels signaled for Wade to come over and join him on the porch where he was waiting, but instead Wade got in the front seat of the cab. He testified that when he got into the cab, the defendant got out. Wade further testified that after the defendant left the cab, Wade grabbed some cash from the dashboard, and the driver fought back. During the ensuing struggle, Wade's gun went off. He did not know how many times the gun was fired.

¶ 10 Lucas testified that Sullivan got into one of the two cabs, but then got out 30 seconds later, got into the other cab alone, and drove off. Lucas saw both Wade and the defendant get into the remaining cab. He testified that Wade was inside the cab before the defendant got there, and the defendant got out of the cab before the shots were fired. Lucas further testified that they did not plan to kill anyone.

¶ 11 Veronica Mitchell testified that Wade and Lucas came to her house and asked her to call for a cab. She testified that they left as soon as she made the call. A detective who

interviewed the defendant testified that the defendant admitted that he was in the cab when the shots were fired.

¶ 12 The defendant's friend, Sierra Morgan, testified that she was with the defendant when the shooting occurred. She testified that they were sitting outside talking when they heard the gunshots. In rebuttal, however, the State presented the testimony of two officers. According to one, Morgan told him that she was with the defendant on the night of the murder, but she did not know whether she was with him at the time the murder occurred. According to the other officer, Morgan did not even tell him she was with the defendant that night.

¶ 13 At the close of evidence, the State dropped a charge of intentional murder (720 ILCS 5/9-1(a)(1) (West 2000)) and submitted to the jury only charges of felony murder (720 ILCS 5/9-1(a)(3) (West 2000)) and armed robbery (720 ILCS 5/18-2(a) (West 2000)). The jury found the defendant guilty on both charges. The court subsequently sentenced him to concurrent sentences of 25 years for murder and 15 years for armed robbery. The defendant filed a direct appeal, arguing only that his conviction for armed robbery must be vacated because armed robbery was the predicate felony for his felony-murder charge and was, therefore, a lesser-included offense. This court agreed and vacated his conviction for armed robbery. *People v. Smith*, No. 5-02-0348, order at 2 (Sept. 17, 2003) (summary order pursuant to Supreme Court Rule 23(c)(2) (eff. July 1, 1994)).

¶ 14 The defendant subsequently filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2004)). An amended petition alleged that (1) the State knowingly used the perjured testimony of two witnesses, Amanuel Wade and Veronica Mitchell, (2) the State did not charge the defendant with murder based on a theory of accountability for Wade's actions, (3) trial counsel was ineffective for failing to adequately investigate and cross-examine Veronica Mitchell about her claim that she had called to

request a cab where records showed there were no calls placed from her phone to Hempel's cab company that night, and (4) trial counsel was ineffective for failing to call Mario Pigeo, a witness who could have provided the defendant with an alibi.

¶ 15 An affidavit of Amanuel Wade was attached to the petition. In it, Wade stated that he testified falsely at the defendant's trial. He stated that he felt pressured by prosecutors and manipulated by his own attorney "to go along with this scheme to convict Jesse Smith." Wade stated that he told "authorities" and his own attorney that the defendant "played no active role" in the crime. He further stated that he was offered a plea deal if he agreed to testify "in accordance with their fabrication." The plea deal was an open plea to murder, pursuant to which other charges against him would be dropped and the State would seek a sentence of between 20 and 60 years in prison rather than the death penalty.

¶ 16 The State filed a motion to dismiss, arguing that (1) the petition did not provide any affidavits or other documentation to support the defendant's claims that Veronica Mitchell committed perjury and counsel was ineffective for failing to call Mario Pigeo, (2) the State was not legally required to charge the defendant with murder on a theory of accountability, and (3) the existing trial record showed that defense counsel adequately cross-examined Veronica Mitchell. In addressing the defendant's claim that the State knowingly used the perjured testimony of Amanuel Wade, the State asked to supplement the record with the transcript of Wade's testimony at an earlier hearing held on a postconviction petition filed by codefendant Johnny Sullivan. The State also asked the court to take judicial notice of its own ruling in Sullivan's case. The State argued that the defendant's allegation regarding the use of perjured testimony is identical to Sullivan's claim that the State knowingly used Wade's perjured testimony. The court found his testimony in the earlier proceeding not to be credible. As such, the State argued, the court could take judicial notice of its earlier finding and dismiss the defendant's claim based on the same allegations in this proceeding.

Importantly, the State did not argue that the petition was untimely.

¶ 17 At a hearing on the State's motion to dismiss, the State first argued that many of the claims in the defendant's petition were not supported by affidavits or police records. The State's Attorney highlighted the defendant's contention that Mario Pigeo would have provided an alibi defense had he been called to testify. The State's Attorney pointed out that there was no affidavit or other documentation to support this claim. The State argued that the court could evaluate claims related to counsel's cross-examination of State witnesses without looking beyond the trial record.

¶ 18 Finally, the State addressed the issue of Amanuel Wade's allegedly perjured testimony. The State's Attorney pointed out that the same court previously heard Wade's testimony at codefendant Johnny Sullivan's postconviction hearing and "found that there was no reason to overturn [Sullivan's] conviction based upon those allegations, and those are exactly the same" as the allegations Wade made in the defendant's case. The State's Attorney summed up her argument, stating, "So other than what I've stated before the Court today, and in the motion, I have nothing to add."

¶ 19 The defendant argued that further proceedings were necessary to resolve at least two of his claims. First, he argued that Veronica Mitchell was not sufficiently cross-examined where police records directly contradicted her testimony. Mitchell testified that she called the cab company at the request of Amanuel Wade, but police reports showed that no calls were made from her phone to the cab company. Those records were attached to the defendant's petition. The defendant also addressed his argument that the State knowingly presented the perjured testimony of Amanuel Wade. He argued that Wade's affidavit was "sufficient to [allow the matter] to proceed."

¶ 20 The court asked the prosecutor if she had any other arguments. The prosecutor responded with an argument addressing the standard for evaluating claims of ineffective

assistance of counsel. The court then stated, "For what it's worth, too, I also note that there was a question about the filing dates in here." The court asked the prosecutor if she wanted to make "any comment on that," to which she replied, "No, Your Honor." The court noted that the mandate from the appellate court after the defendant's direct appeal issued in October 2003 and that the defendant filed his postconviction petition in August 2004. The court then asked if either party wanted to make any arguments about this. Both the prosecutor and defense counsel said no.

¶ 21 The court then stated, "[A]ssuming [the defendant's petition] survives the question of whether this was timely filed or not, the only issue that I would go forward on is the issue concerning Veronica Mitchell." The court moved to the third stage, hearing the testimony of two witnesses (the defendant and his trial counsel) related solely to that issue. The court took the matter under advisement and entered a written order the following day.

¶ 22 In its order, the court first found that the petition was filed four months late and that the untimely filing "was not waived by the State nor excused by any claim or argument from the defendant. The petition is dismissed as untimely." The court then noted that "if the above is not sufficient, most of the petition does not survive the State's Motion to Dismiss." The court then analyzed each of the defendant's claims on their merits and granted the State's motion to dismiss as to each individual claim except for the claim regarding the cross-examination of Veronica Mitchell. The court analyzed this claim as well and ruled that it was "reviewed and denied." The defendant subsequently filed this appeal.

¶ 23 There are three stages of proceedings under the Post-Conviction Hearing Act. *People v. Pendleton*, 223 Ill. 2d 458, 471-72, 861 N.E.2d 999, 1007 (2006). At the first stage, the court determines whether the petition is frivolous or patently without merit. If the court does not dismiss the petition on this basis within 90 days, the petition advances to the second stage. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. At the second stage, counsel may

be appointed to represent an indigent defendant. Counsel may then file an amended petition on the defendant's behalf. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. After counsel has made any necessary amendments, the State may file a motion to dismiss the defendant's petition. If the State does not file a motion to dismiss or the court denies its motion to dismiss, the State must file an answer to the petition. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. The proceeding then moves to the third stage, an evidentiary hearing. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008.

¶ 24 Most of the defendant's claims were dismissed at the second stage. Although one of the defendant's claims did proceed to the third stage, he does not challenge the court's ruling on the merits of that claim. The defendant raises only two issues. He argues that the postconviction court erred in raising the issue of timeliness *sua sponte* and improperly made determinations of fact and credibility related to Amanuel Wade's affidavit. Our review of the second-stage dismissal of a postconviction petition is *de novo*. *People v. Barnslater*, 373 Ill. App. 3d 512, 519, 869 N.E.2d 293, 299 (2007) (citing *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008). We will therefore review both of the defendant's contentions *de novo*.

¶ 25 The defendant first argues that the postconviction court erred in determining, *sua sponte*, that his petition was untimely. As he correctly points out, untimeliness is an affirmative defense that the State must raise. See *People v. Bocclair*, 202 Ill. 2d 89, 101, 789 N.E.2d 734, 742 (2002). Generally, this means that the State must *plead* the affirmative defense of untimeliness; however, if the State does not raise the issue in its motion to dismiss, it is not precluded from challenging the petition as untimely in an amended motion to dismiss or in its answer. See *People v. Wofford*, 394 Ill. App. 3d 433, 438, 914 N.E.2d 1228, 1232 (2009).

¶ 26 The State does not dispute that this is the law. The State argues, however, that the record does not clearly establish that the State "intended to waive" the argument that the

defendant's petition was untimely. In support of its contention, the State points to the following statement made by the court during the hearing on the defendant's petition:

"I think it came up in a previous discussion that there was a--well, let me see the--the appeal on the trial was returned by mandate in October of 2003, and in some pleading it was mentioned that there was a--Mr. Smith's first petition was in August of 2004."

The State contends that this statement indicates that the State "had apparently raised the defense of untimeliness" in an earlier hearing. The State points to three earlier settings at which the hearing on the defendant's petition was continued by agreement of the parties. The record contains no transcripts from these hearings, although we note that from the docket entries in the record, it appears that nothing substantive occurred at any of the hearings. The State argues that the defendant, as the appellant, is responsible for providing this court with a record that is sufficiently complete to allow us to determine whether his allegations have merit. Thus, as the State correctly notes, we must resolve any doubts arising from gaps in the record against the defendant. See *People v. Lopez*, 229 Ill. 2d 322, 344, 892 N.E.2d 1047, 1060 (2008).

¶ 27 We first note that the court's statement is fairly vague. Contrary to the State's contention that the prosecutor "apparently" raised the issue of timeliness, the court did not specify who mentioned the filing date, nor did the court specifically state that the issue of timeliness was raised at all. On its face, the statement we have quoted simply indicates that someone mentioned the relevant dates in a prior discussion. At the postconviction hearing, the prosecutor specifically stated that she did not wish to raise any issues other than those raised in the motion to dismiss and explicitly declined to argue that the defendant's petition was untimely when prompted to do so by the court. In addition, the State did not raise the issue of timeliness in any pleading. In the face of this record, we do not believe we are required to presume that the State raised the issue of timeliness at a preliminary hearing for

which there is no transcript. In short, this record leaves no doubt to be resolved against the defendant by virtue of his failure to supply us with transcripts or bystander reports from every hearing that occurred in his case.

¶ 28 This conclusion does not help the defendant, however. Although the court stated that it was dismissing the petition based on untimeliness, the court in fact considered each claim of the petition on its merits. The order expressly states, "if the above [dismissal on the grounds of untimeliness] is not sufficient, most of the petition does not survive the state's Motion to Dismiss." The court then went on to analyze and dismiss or deny each claim on its merits. Thus, the court provided an alternative basis for dismissing each claim. The defendant does not challenge the court's rulings on the merits of any claims except his claim involving Amanuel Wade's testimony. We may thus affirm the court's ruling dismissing and denying his remaining claims without further discussion.

¶ 29 The defendant next argues that the postconviction court erred in making a credibility determination with respect to his claim that the State knowingly used the perjured testimony of Amanuel Wade. The defendant argues that at the second stage of postconviction proceedings, a court must take the facts alleged in the petition and supporting affidavits as true unless they are affirmatively rebutted by the record. *People v. Phyfiher*, 361 Ill. App. 3d 881, 884, 838 N.E.2d 181, 184 (2005) (citing *People v. Coleman*, 183 Ill. 2d 366, 380-81, 701 N.E.2d 1063, 1071 (1998)). He further argues that the postconviction court is precluded from engaging in fact-finding or making credibility determinations at this stage. *Phyfiher*, 361 Ill. App. 3d at 883-84, 838 N.E.2d at 184 (citing 725 ILCS 5/122-5 (West 2000)).

¶ 30 The State contends that the defendant's allegation and Wade's affidavit were affirmatively rebutted by the record. See *Barnslater*, 373 Ill. App. 3d at 519, 869 N.E.2d at 299 (explaining that "we will not credit allegations [that are] positively rebutted by the record"). This is so, according to the State, because the record was supplemented with a

transcript of Wade's testimony at Sullivan's postconviction hearing, and that testimony refuted the defendant's claim in two respects. Wade testified at Sullivan's hearing that the prosecutor never told Wade he intended to seek the death penalty; rather, it was Wade's own attorney who told him that the State would likely seek the death penalty if he did not agree to testify. Wade also testified at Sullivan's hearing that he did not know whether prosecutors knew his testimony was false. According to the State, both of these statements contradict the statement in Wade's affidavit that he was pressured to testify falsely with threats that he would receive the death penalty if he did not do so. The State further contends that the second statement refutes the defendant's claim that the State knowingly used perjured testimony.

¶ 31 The arguments of both parties correctly state the law. However, we do not believe either party correctly characterizes what the court actually did. Contrary to the defendant's argument, the court did not make an independent finding regarding Wade's credibility. Rather, the court took notice of its own prior finding. A trial court may properly take judicial notice of its own prior judicial proceedings. *People v. Knight*, 75 Ill. 2d 291, 296, 388 N.E.2d 414, 417 (1979). We also do not agree with the State that Wade's testimony affirmatively rebuts the defendant's claim that Wade perjured himself. Rather, it presents an issue of conflicting statements for the court to resolve. Here, however, the court had already found Wade's statements not to be credible, and the court took judicial notice of its ruling to that effect. Under the facts of this case, it makes little sense to require the court to hear Wade's testimony a second time.

¶ 32 The defendant argues, however, that there are factual differences between his claim that the State knowingly used perjured testimony in his trial and Sullivan's claim that Wade's testimony was perjured in Sullivan's trial. He argues that Wade may have felt pressured to testify falsely against the defendant because he was told that the State would otherwise seek

the death penalty, but he may not have been told the same thing when Sullivan was tried four months before the defendant's trial. He also argues that while Wade did not know whether the State knew his testimony against Sullivan was false, it is possible that he did know that prosecutors knew his testimony against the defendant was false. We are not persuaded. Wade's claim in both proceedings was that he was pressured by prosecutors to fabricate testimony. The court found this not to be credible. It makes no sense to think that the court would reach a different conclusion if it were to allow Wade to testify again at the defendant's hearing.

¶ 33 Finally, the defendant argues that his claims should survive because he makes a claim of actual innocence. We disagree. A freestanding claim of actual innocence requires newly discovered evidence that is material, not cumulative, and "of such conclusive character" that it would "probably change the result on retrial." *People v. Washington*, 171 Ill. 2d 475, 489, 665 N.E.2d 1330, 1337 (1996). It is also important to note that claims of actual innocence are governed by the same procedural rules as other claims that can be raised in postconviction proceedings, aside from the relaxation of procedural bars. See *Washington*, 171 Ill. 2d at 489, 665 N.E.2d at 1337. Here, we have already found that the court properly took judicial notice of its prior ruling on Wade's credibility. Even assuming Wade's affidavit is sufficiently conclusive that it would otherwise support a freestanding claim of actual innocence, the fact that the court previously found the same claim not to be credible defeats this type of claim just as it defeats the defendant's claim that the State knowingly used Wade's perjured testimony.

¶ 34 We find no error in the postconviction court's rulings. Thus, we affirm the court's order dismissing and denying the defendant's petition in its entirety.

¶ 35 Affirmed.