

No. 1-09-2242

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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. 98 CR 1714
	)	
DEMEL HANNAH,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Hall and Karnezis concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court properly dismissed defendant's *pro se* section 2-1401 petition which alleged actual innocence based on newly discovered evidence, where the petition showed neither a meritorious defense nor diligence in presenting it.
- ¶ 2 Defendant Demel Hannah appeals from the denial of his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). On appeal, defendant contends that he was entitled to section 2-1401 relief on his claim of actual innocence of first-degree murder where he presented the affidavit of a codefendant exonerating defendant from participation in the crime. We affirm.

¶ 3 On the afternoon of January 18, 1996, Aaron Lanagan was murdered during an armed robbery of his convenience store, Nic and Pic Grocery and Deli, at 74<sup>th</sup> and Bishop in Chicago. About two years later, defendant and two codefendants, Corey Conley and Mario Ross, were arrested and indicted for the armed robbery and murder of Lanagan. Jermal Conley,<sup>1</sup> Corey Conley's cousin, was also apprehended and prosecuted as a juvenile. All four were members of the Gangster Disciples street gang.

¶ 4 Defendant filed a pretrial motion to suppress statements. At the hearing on the motion to suppress, testimony of police officers and assistant State's Attorneys (ASAs) revealed that defendant was arrested on the evening of December 20, 1997, on an unrelated offense and he was questioned about the Lanagan murder, ending with a court-reported statement to ASA Patrick Kelly at about 4:40 a.m. on December 21 in the presence of Detective James Cassidy. The trial court rejected defendant's claim of police coercion and *Miranda* violations and denied defendant's motion to suppress statements.

¶ 5 Prior to trial, the State presented a motion *in limine* requesting that the defense be barred from questioning Detective Cassidy about any case other than the one on trial. The prosecutor referred to *Chicago Tribune* articles about Cassidy in connection with the Ryan Harris case and another prosecution. The defense stated it had no plans to cross-examine Cassidy on any matter "that is irrelevant in these proceedings." The trial court ruled: "By agreement of the parties State's motion in limine with regard to Detective Cassidy is granted."

¶ 6 Defendant and codefendant Ross were tried by simultaneous but separate juries. Defendant, who was not present when the crime was committed, was prosecuted on a theory of accountability in that he instigated the planning of the armed robbery of the convenience store on two previous dates. The trial evidence of defendant's guilt consisted primarily of his post-arrest

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<sup>1</sup>Jermal Conley's first name is spelled "Jamel" in the record of defendant's trial.

court-reported statement. Defendant said in the statement that he was a "coordinator" in the Gangster Disciples street gang in charge of juveniles. In December 1995, defendant called a meeting of gang members to plan the robbery of the Nic and Pic convenience store in mid-January. Ross, Jermal and Corey Conley, and "Little Rob" attended the meeting. Defendant said he planned to "go in and get the money" while armed with a .357 revolver which belonged to the gang and was kept at an abandoned house. Defendant told the others they were to act as police lookouts: Ross was to watch the alley next to the store, Corey was to watch the street, and Jermal was to walk around near the store. Defendant held a second meeting on January 17, 1996. He decided at the meeting that the robbery would happen at 11 a.m. the next day and instructed the others to meet him in an abandoned house near the convenience store at 11 a.m.

¶ 7 Defendant further related in his statement that on the next day, January 18, he was not able to join the others because his mother made him go to school that day and took him to school. After school, defendant learned of the murder and Ross later told him that the robbery did not go as planned, that Jermal went into the store and shot the man. Defendant called an emergency meeting for the following morning. At the meeting, Jermal told defendant that he, Corey and Ross went to rob the store. but only Jermal entered the store. Jermal said the victim swung a stick at him and he shot the victim but said he had not intended to do so. Jermal also told defendant that the others stood watch as had been planned at the earlier meeting. Defendant asked the others if they had gotten anything from the store and told them to give it to him. Jermal told defendant that he did not take any money but left the store with two bags of potato chips and some soda. Defendant concluded the court-reported statement by saying he had been treated well during his five hours in custody before giving his statement and that no one had threatened him or forced him to make the statement. Defendant's statement was admitted in evidence without objection and published to the jury.

¶ 8 Defendant did not testify at his trial. The defense did not assert that defendant's court-reported statement had been coerced or was otherwise inadmissible. Rather, defense counsel argued to the jury that the statement demonstrated defendant had withdrawn from the robbery when he went to school instead of meeting with the others to rob the convenience store. However, the trial court denied defendant's request to give the jury his proffered instruction on withdrawal.

¶ 9 Defendant was found guilty as charged and was sentenced to consecutive sentences of 35 years for first degree murder and 10 years for armed robbery.

¶ 10 In defendant's direct appeal, which was consolidated with that of codefendant Mario Ross, defendant did not challenge the sufficiency of the evidence but contended that the trial court erred in refusing to instruct the jury on his defense of withdrawal. Defendant also challenged evidentiary rulings by the trial court but did not assign error to the court's denial of his motion to suppress statements. This court affirmed defendant's first-degree murder conviction but vacated his armed robbery conviction, with one justice dissenting on the ground that defendant's jury instruction on withdrawal should have been given. *People v. Ross*, 329 Ill. App. 3d 872 (2002).

¶ 11 In 2003 defendant filed a petition for postconviction relief in which he argued his constitutional rights were violated when the trial court refused his withdrawal instruction. Defendant also assigned error to the admission at trial of evidence of other crimes, as well as his trial counsel's refusal to question prospective jurors about possible bias toward gangs. The trial court summarily dismissed the petition as frivolous and without merit. This court dismissed defendant's appeal. *People v. Hannah*, No. 1-04-2504 (2005) (dispositional order).

¶ 12 On March 5, 2008, defendant's "Habeas Corpus Motion to Discharge" was filed in the trial court. The motion asserted a number of claims, including the allegation that the only

evidence of defendant's guilt, his statement to the police, was untruthful. Among the documents attached to the motion was an affidavit purportedly signed and verified by Jermal Conley on May 25, 2007, in which Jermal admitted that he shot and killed Aaron Lanagan on January 18, 1996. The affidavit stated that when Jermal was arrested for the Lanagan murder on December 31, 1997, he was questioned at the police station and gave a court-reported statement implicating defendant "as being the main conspirator" in the armed robbery/murder. His affidavit further stated in pertinent part:

"But in all truthfulness Demel Hannah didn't devise the plan to rob the Nic & Pic Deli, nor did he have knowledge that the aforementioned crime was in motion. Constrained by the overwhelming pressures of interrogation, I implicated Demel Hannah as being the initial planner because ASA Pat Kelley [*sic*] told me that if I didn't I wouldn't be charged as a juvenile but instead as an adult. The guilt of knowing that a [*sic*] innocent man was in prison based on a lie that I corroborated in making concrete, has become to [*sic*] immense to carry. Thats [*sic*] why I have come forth to not only clear my conscious [*sic*], but to help free a man who was charged and convicted of a crime that he did not partake in."

The affidavit also voiced Jermal's willingness to testify in court to the contents of the affidavit.

¶ 13 On May 22, 2008, while defendant's *habeas corpus* motion was pending, his *pro se* section 2-1401 petition, advancing a claim of actual innocence based on newly discovered evidence, was filed in the trial court.<sup>2</sup> Appended to the petition was Jermal Conley's affidavit,

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<sup>2</sup> Subsequently, defendant elected to proceed on his section 2-1401 petition, rejecting the

the same document previously attached to defendant's *habeas corpus* motion. The section 2-1401 petition asserted that defendant's statements to police "were made under coercion and tricknology" and that the court-reported statement "was fashioned by Detective James Cassidy and Assistant State's Attorney Patrick Kelly" and "produced under intense interrogation, intimidation, and coercion \*\*\* where Detective Cassidy was under investigation for his mishandling of the Ryan Harris murder case." Defendant contended that Jermal's affidavit exculpated defendant from guilt and constituted evidence of actual innocence of the crime.

¶ 14 The State filed a motion to dismiss the section 2-1401 petition. Defendant was granted leave to file an amended section 2-1401 petition. His amended petition reasserted his claim of actual innocence and proffered several excuses for his failure to observe the limitation period for filing his petition. The amended motion also raised supplemental arguments, including the claim that his court-reported confession was the product of torture, psychological duress, and police brutality. The State filed a motion to dismiss the second section 2-1401 petition. On July 9, 2009, the trial court granted the State's motion and dismissed the amended petition.

¶ 15 On appeal, defendant asserts the trial court erred in dismissing his petition without a hearing where his claim of actual innocence, supported by Jermal's affidavit, raised a material issue of fact.

¶ 16 A section 2-1401 petition for relief from a final judgment is the forum in which to correct all errors of fact occurring in a criminal prosecution that were unknown to the defendant and the court at the time judgment was entered, which, if then known, would have prevented its rendition. *People v. McLaughlin*, 324 Ill. App. 3d 909, 917 (2001). However, where a section 2-1401 petition is filed more than two years after the judgment was entered, it cannot be

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alternative of a successive postconviction petition and apparently abandoning the *habeas corpus* motion. The record does not indicate that the *habeas corpus* motion was ruled on.

considered. *Id.*; 735 ILCS 5/2-1401(c) (West 1996). "To obtain relief under section 2-1401, the defendant 'must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.'" *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003) (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)).

¶ 17 Claims of actual innocence may be raised in a section 2-1401 petition. *People v. Bocclair*, 202 Ill. 2d 89, 102 (2002). "In order to obtain relief under a theory of actual innocence, the 'defendant must show that the evidence he is relying on (1) is of such conclusive character that it will probably change the result on retrial; (2) is material to the issue, not merely cumulative; and (3) was discovered since trial and is of such character that the defendant in the exercise of due diligence could not have discovered it earlier.'" *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010) (citing *People v. Anderson*, 375 Ill. App. 3d 990, 1006 (2007)).

¶ 18 In the instant case, defendant failed to exercise due diligence in presenting his claim of actual innocence to the circuit court. The section 2-1401 petition was not timely where it was filed in 2008, more than 9½ years after his 1998 conviction and well beyond the 2-year time limit. Its supporting affidavit from Jermal Conley was not executed until 2007. Defendant asserts that the due diligence requirement and limitations period should be relaxed "[g]iven that Conley's exculpatory statement was not available until 2007." This same argument was rejected in *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008), where we held: "Although Freeman's affidavit did not materialize until the pendency of defendant's section 2-1401 petition, precedence instructs that evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable or uncooperative." Here, Jermal's affidavit did not represent newly-discovered

evidence, and defendant knew or should have known prior to his 1998 trial what Jermal knew. In defendant's 1997 court-reported statement he told ASA Kelly that shortly after the crime, Jermal admitted being the shooter and sole offender to enter the store. It is possible that Jermal, a codefendant and the person who actually shot and killed the victim, could not provide an affidavit prior to defendant's trial without exposing himself to liability. However, the "due diligence" requirement means diligence both in presenting the claim to the circuit court in the original action and in filing the section 2-1401 petition for relief. Defendant has given no reason why he did not procure Jermal's affidavit until 2007. It is well established that the two-year limitation period must be adhered to in the absence of a clear showing that the petitioner is under a legal disability or duress or that the grounds for relief are fraudulently concealed. *People v. Gillespie*, 407 Ill. App. 3d at 135-36. Defendant has made no clear showing of legal disability or duress that prompted the filing of his petition nearly 10 years after entry of the judgment from which he now seeks relief.

¶ 19 Even if defendant's section 2-1401 petition had been timely filed, defendant has failed to establish a meritorious claim. Jermal's affidavit was not of such conclusive character as would probably change the result upon retrial. The affidavit did not negate defendant's accountability for the murder of Lanagan or support defendant's claim of withdrawal.

¶ 20 Pursuant to section 5-2(c) of the Criminal Code of 1961 (Code), a person is legally accountable for another person's criminal conduct when, "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 1996). This provision of the Code does not deviate from the common law rule of common design, *i.e.*, where two or more persons engage in a common criminal design, any acts in furtherance of that design committed by one of the persons are

considered to be the acts of all, and all are equally responsible for the consequences. *People v. Rodriguez*, 229 Ill. 2d 285, 289 (2008); *People v. Snowden*, 2011 IL App (1<sup>st</sup>) 092117, ¶ 59. A defendant's participation in the common enterprise is presumed to continue until he communicates his intent to withdraw from the criminal enterprise. *People v. Jones*, 376 Ill. App. 3d 372, 386 (2007). The defendant may communicate his withdrawal by: (1) wholly depriving the group of the effectiveness of his prior efforts in furtherance of the crime; (2) timely warning law enforcement authorities, or (3) otherwise making proper efforts to prevent commission of the crime. *Id.*

¶ 21 "Actual innocence" means total vindication or exoneration. *Collier*, 387 Ill. App. 3d at 636. Jermal's affidavit did not completely exonerate defendant from accountability for the crime. The affidavit referred to defendant as an "innocent man" who was "convicted of a crime that he did not partake in," and both parties on appeal assume Jermal absolved defendant from guilt. However, we conclude the affidavit did not conclusively contradict defendant's confession that he planned the armed robbery of the store with his codefendants in two prior meetings. Jermal's affidavit stated only that, although he implicated defendant during police questioning as "being the main conspirator" and "being the initial planner," defendant "didn't devise the plan to rob the Nic & Pic Deli." Critically, Jermal's affidavit did not deny that defendant was present at the two armed robbery planning sessions. At most, the affidavit merely played down the role defendant took in the planning and denied that defendant initially instigated the armed robbery. The affidavit also claimed that defendant "did not partake in" the crime "nor did he have knowledge that the aforementioned crime was in motion." However, this was consistent with defendant's confession in which he stated that he went to school that day, did not participate in the armed robbery, and was unaware until later that Jermal had carried out his (defendant's) robbery plan. Moreover, in stating merely that defendant did not actually "partake" in the crime, Jermal's

affidavit did not speak to defendant's claim at trial that he withdrew from the criminal enterprise. In defendant's direct appeal, the majority of this court concluded that "there is no evidence in this record of an essential component of withdrawal: wholly depriving one's earlier efforts of effectiveness." *Ross*, 329 Ill. App. 3d at 887. Defendant's absence did not wholly deprive his cohorts of the effectiveness of his planning efforts. Jermal's affidavit did not contradict the fact that, in defendant's absence, Jermal took over the role of gunman that defendant had devised for himself.

¶ 22 Defendant also contends that his claim of actual innocence is supported by the fact that his court-reported statement to ASA Kelly and Detective Cassidy, the primary evidence at his trial of his guilt, was coerced and involuntary. In addition, he asserts that a hearing should have been held on his section 2-1401 claim that "Detective James Cassidy's involvement in extracting false confessions from youths in other cases supported Hannah's actual innocence claim as Cassidy coerced Hannah's false confession." These arguments were not appropriate issues for section 2-1401 relief. "The purpose of post-judgment review is not to relitigate matters that were or could have been raised on direct appeal, but rather to resolve arguments that new or additional matters, if they had been known at the time of trial, could have prevented a finding that the defendant was guilty of crimes charged." *People v. Burrows*, 172 Ill. 2d 169, 187 (1996), citing *People v. Berland*, 74 Ill. 2d 286, 314 (1978).

¶ 23 Prior to trial, defendant filed a motion to suppress his statements, a hearing was held, and the court denied his motion. At trial, defendant did not object to introduction of the statement, instead employing the strategy of arguing that the statement's content indicated defendant's withdrawal from the criminal enterprise. In his posttrial motion defendant preserved the issue that his statement was involuntary and could have raised the claim in his direct appeal, but he failed to do so. Consequently, he has forfeited the issue on collateral attack of the judgment.

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*People v. Rogers*, 197 Ill. 2d 216, 221 (2001). We also note that a pretrial State motion *in limine* to preclude the defense from cross-examining Cassidy on his alleged involvement in extracting false confessions in other cases was granted without objection by the defense, resulting in waiver of that issue.

¶ 24 In summary, defendant failed to demonstrate he was entitled to section 2-1401 relief where he failed to exercise due diligence in filing his section 2-1401 petition, and the petition itself with its supporting documentation failed to amount to a truly persuasive demonstration of innocence. We conclude that the trial court appropriately granted the State's motion to dismiss defendant's petition. Accordingly, we affirm the judgment of the trial court.

¶ 25 Affirmed.