

No. 10-2732

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 96 CR 11509
)	
ANTHONY ENGLISH,)	The Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

Held: The trial court properly found allegedly newly discovered evidence did not establish defendant's actual innocence and, thus, leave to file defendant's successive postconviction petition was properly denied.

¶ 1 Defendant Anthony English appeals from the denial of his successive petition for relief under the Postconviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2012). The judgment was entered on August 10, 2010; late notice of appeal was allowed on December 22,

2010. On appeal, defendant contends the trial court erred in summarily dismissing his petition where he stated a claim of actual innocence and, therefore, his petition was exempt from the statutory requirement that he obtain leave of the court to file. Defendant further contends the trial court lost the statutory power to summarily dismiss his petition because it allowed the 90 day time limitation to expire without action. Lastly, defendant contends the trial court erred by basing its decision on the outcome of a postconviction challenge in a different prosecution of defendant. For the reasons set forth below, we affirm.

¶ 2

FACTUAL BACKGROUND

¶ 3 On May 7, 1996, defendant was charged with first-degree murder for the December 27, 1995, shooting death of Bertram Scarver, a.k.a. "Black." Black was shot outside David's Food and Liquor on the southeast corner of Van Buren Street and Kildare Street in Chicago. Both Black and defendant were high ranking members of the New Breed Street Gang. The shooting was witnessed by Jerry Lawrence, Dwight Sanders, and Josh Cole, three fellow gang members, who identified defendant as the shooter. Defendant was arrested several months after the shooting, after he was also connected to the murder of rival gang member Keith Lewis, which was committed with the same weapon, a .380 caliber handgun, a month earlier.

¶ 4 Lawrence, Cole and Sanders testified for the State at defendant's trial for the shooting of Black, but they were treated as hostile witnesses because Cole and Sanders disavowed portions of their previous grand jury testimony and Lawrence disavowed portions of the statement he provided the police. The witnesses were impeached with their previous accounts and Lawrence's statement and Cole and Sanders' grand jury testimony were introduced as substantive evidence.

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The witnesses were also questioned regarding their earlier statements that they were fearful about testifying against defendant.

¶ 5 Sixteen-year-old Josh Cole testified that on the day of Black's shooting, he was in the vicinity hanging out with fellow New Breed Gang members near a store. Defendant and Donche Shannon, a.k.a. "Shakebag," also a member of the New Breed Gang, pulled up in a car. Cole testified Shakebag asked him to persuade Black to come out of the store for them; Cole refused. At trial, Cole testified he never saw defendant shoot the victim. The State presented Cole's grand jury testimony in which he testified that after shaking Black's hand, defendant shot Black with an automatic handgun and ran down Kildare, toward Congress. The State showed Cole pictures Cole had previously identified in a photographic lineup as defendant, Shakebag and Black. Cole denied viewing a lineup in this case. Before the grand jury, Cole testified he had viewed a lineup earlier that day and picked defendant out of the lineup as the shooter.

¶ 6 Twenty-two-year old Jerry Lawrence testified that on the evening of Black's shooting, he was hanging out with fellow New Breed gang member Dwight Sanders in a second floor apartment next to the store. When Sanders left the apartment, Lawrence heard gunshots. Fearing Sanders was the victim, Lawrence looked out the window and saw Black lying in a pool of blood outside the store. He saw a man shoot Black and then run away holding the gun. Lawrence called 911 from the store. Lawrence testified he spoke with a prosecutor in August 1996 and told her what he had seen on the night of the shooting; she memorialized his account in a handwritten statement. At trial, Lawrence denied he told the prosecutor he knew the defendant, instead testifying that he told her he heard the shooting was done by a man named "Shorty," who he

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found out from the police was defendant. Lawrence denied he told the prosecutor that when he looked out the window, he saw "Shorty," a.k.a. defendant standing over the victim. He claimed he told her he saw "a shorty," gang parlance for a young recruit, standing over Black. Lawrence denied telling the prosecutor he saw defendant fire at the victim 8-12 times. Lawrence testified that despite his assertion that he was not under the influence of drugs or alcohol at the time he signed the handwritten statement, he was in fact under the influence of marijuana when he spoke with the prosecutor. Lawrence acknowledged that while incarcerated, he spoke with two Assistant State's Attorneys and told them that although he was no longer a member of the New Breed Gang, he was afraid of retaliation if he testified against defendant.

¶ 7 On cross-examination, defense counsel read from a statement Lawrence had written for two Assistant Public Defenders in March 1997. In his statement, Lawrence stated he heard gunshots, but did not see the face of the shooter. He also stated that when he viewed a photographic array, he chose the photograph the police had been pushing in front of him. He further claimed he had been roughed up by the police, pressured to talk and make an identification, and brought to make his statement to the Assistant State's Attorney in handcuffs.

¶ 8 Nineteen-year-old Dwight Sanders testified he had never seen defendant before trial and admitted only that he ran from the scene with his hands over his head when he heard gunshots. The State read portions of Sanders grand jury testimony. Sanders denied telling the grand jury that when Black came out of the store, defendant walked up behind him, tapped him on his back and then shot him eight or nine times with a .38 caliber automatic handgun. Sanders testified that before he testified before the grand jury, a police officer hit him on his hands with a

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flashlight, pushed him back in his chair, called him names and told him to stop lying. Sanders admitted that he failed to tell the grand jury or Assistant State's Attorney that he was mistreated.

¶ 9 Following the bench trial in April 1997, defendant was found guilty of first-degree murder for the December 27, 1995, shooting death of Bertram "Black " Scarver. He was sentenced to a term of 40 years.

¶ 10 Defendant was tried for the November 25, 1995, shooting death of Keith Lewis, which occurred in a gang-related incident near Kostner Avenue and Van Buren Street in Chicago. At the trial, Keith Dickerson, a member of a rival gang of defendant's, testified he was walking with a group of people, including the victim, when defendant drove by. Defendant shouted to the group and then approached Lewis on foot. Defendant punched Lewis and when Lewis walked away, shot him in the back. When Lewis fell to the ground, defendant shot him again.

¶ 11 Dickerson testified he discussed Lewis' murder with the police only after he was arrested for an unrelated robbery charge in March 1996, but denied the police promised him anything in exchange for the information he provided against defendant.

¶ 12 Josh Cole testified he belonged to the New Breed gang. Cole testified he saw defendant prior to the shooting and that defendant asked him to accompany him, but Cole declined. Cole heard gunshots soon after and when he drove towards the area where Lewis was shot, he saw defendant running out of a nearby alley. Defendant asked Cole for a ride, saying he was "dirty," meaning he had a gun. Cole did not give defendant a ride.

¶ 13 A firearms expert testified that the bullets removed from Lewis and Scarver's bodies came from the same gun.

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¶ 14 Defendant requested a continuance after the close of the State's evidence because William Brown, a defense witness, was not in the courtroom. Defense counsel made an offer of proof that Brown, a member of a rival gang of defendant's, would testify that he saw a fight involving Lewis and Cole and he heard gunshots, but did not see who fired the gun. Brown then saw Cole run away, carrying a gun.

¶ 15 The State objected to the continuance on the ground that Brown had not been subpoenaed for that day. The State further indicated Brown stated he did not want to get involved in the case and admitted that he had lied to the police. The trial court denied the defense's request for a continuance. The jury found defendant guilty of first-degree murder for the shooting death of Lewis. Defendant was sentenced to a term of natural life.

¶ 16 Procedural History

¶ 17 On direct appeal, we affirmed the judgment of the trial court relating to defendant's conviction for the Black murder. *People v. English*, No. 1-97-2322 (December 23, 1998) (unpublished order under Supreme Court Rule 23). On April 7, 2000, defendant filed a *pro se* petition for postconviction relief. In his petition, defendant alleged his appellate counsel was ineffective for failing to raise certain issues counsel informed him were outside the record and his trial counsel was ineffective for failing to interview potential defense witnesses defendant claims would have exonerated him. Although defendant named three potential witnesses in his petition, he did not include affidavits from them. Defendant also claimed trial counsel incorrectly advised him that he would avoid the death penalty if he waived his right to a jury trial. The trial court summarily dismissed the petition. On appeal, this court found defendant's claim involving his

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waiver of a jury trial stated the "gist" of a claim of ineffective assistance of trial counsel and, therefore, remanded the case for second-stage proceedings. *People v. English*, No. 1-00-2001 (March 25, 2003) (unpublished order under Supreme Court Rule 23).

¶ 18 On remand, Assistant Public Defender (APD), Dennis Urban represented defendant. APD Urban also represented defendant on the postconviction proceedings related to the Lewis murder conviction. The trial court granted the State's motion to dismiss defendant's *pro se* petition and his attorney-prepared supplemental petition on July 7, 2005. On appeal, we affirmed the dismissal. *People v. English*, 1-05-2288 (May 14, 2007) (unpublished order under Supreme Court Rule 23).

¶ 19 Defendant filed a direct appeal regarding the Lewis murder conviction, claiming the State failed to prove him guilty beyond a reasonable doubt and the trial court abused its discretion in denying his request for a continuance to locate William Brown. This court affirmed the judgment on appeal, noting that two eyewitnesses testified they saw defendant shoot Lewis, in broad daylight and at close range, and that the proposed eyewitness claimed that he did not see who fired the gun. *People v. English*, 1-97-4521 (1999) (unpublished order under Supreme Court Rule 23).

¶ 20 On February 21, 2001, defendant filed his *pro se* postconviction petition regarding the Lewis murder conviction. Defendant alleged, *inter alia*, that the testimony of Brown would have contradicted the State's witnesses. In support, defendant attached an affidavit from Brown to his petition. In his affidavit, Brown attested that at the time of the shooting, Cole and Lewis were fighting and Brown and defendant were fighting. Brown claimed that when he heard gunshots,

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he was struggling with defendant, who "never showed or fired a gun" at that time. Defendant also discussed alleged discrepancies in the testimony of the State's witnesses, Keith Dickerson and Josh Cole. Defendant claimed Cole's identification of him as the shooter in both cases was the result of threats from the police and prosecutors that Cole would be charged with Lewis' murder if he did not offer information implicating defendant. Defendant attached Cole's affidavit to the petition. The petition was dismissed after second-stage proceedings. On appeal, defendant claimed the trial court erred in dismissing his petition without first holding an evidentiary hearing on his claim of actual innocence based on newly discovered evidence. Specifically, defendant argued the information in Brown's affidavit showed defendant could not have shot Lewis.

¶ 21 On appeal, we reversed the trial court's dismissal of defendant's postconviction petition, finding defendant made a substantial showing of a violation of his constitutional rights and remanded for a third-stage evidentiary hearing. In doing so, we held the information in Brown's affidavit, when taken as true, "is potentially exculpatory and calls into question the credibility of the State's witnesses." *People v. English*, 1-05-2287 (October 26, 2007) (unpublished order under Supreme Court Rule 23).

¶ 22 At the evidentiary hearing on remand, both Brown and Cole testified. *People v. English*, 406 Ill. App. 3d 943, 948-51 (2010). At the conclusion of the hearing, the trial court found both Brown and Cole "wholly lacking in credibility." The trial court concluded "[t]he performances they put on here in [this] courtroom [were] sad and not at all compelling." The court also noted that, since the time of defendant's trial, both Brown and Cole had "picked up quite a bit of additional baggage in [that] they're both now convicted murderers themselves." Defendant's

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petition was dismissed by the trial court; a ruling we affirmed on appeal. *English*, 406 Ill. App. 3d at 945.

¶ 23 On May 4, 2010, defendant filed the successive postconviction petition at issue in the instant case. In his petition, defendant alleged he had newly discovered evidence of his actual innocence. The evidence consisted of a copy of Cole's ten-year old affidavit and Brown's five-year old affidavit from defendant's postconviction proceeding in the Lewis murder and two newspaper articles naming Detective McWeeny as one of the police officers granted immunity in the investigation of torture in Area 2 by Sgt. Jon Burge and the officers under his command. The articles were published on December 2, 2005, and June 15, 2006.

¶ 24 On August 10, 2010, the court stated,

"He is bringing a pro se post-conviction petition, and he is talking about some witnesses that he says are starting to recant and that there was some evidence now of police misconduct from Detective McWeeny, who worked in Area 2 many years ago.

The fact is that we had an evidentiary [hearing] Post-Conviction Petition on Case Number 96 CR 11508 [Lewis Murder]. It was a separate murder case. Mr. English was convicted of two murders, both murders with the same gun.

The same witnesses he's talking about in this case did testify at a post-conviction proceeding before, and that post-

conviction proceeding was concluded on May 19th of 2009. At that time, those witnesses were found not to be credible.

It's basically the same allegations on this case as it was on the other case where an evidentiary hearing has already been held. I'll incorporate by reference the evidentiary hearing conducted on the other case, 96-11508 [Lewis Murder]. That hearing was conducted February 25th, April 16th, and May 19th.

I find accordingly that this pro se Post-Conviction Petition is without merit and denied."

¶ 25

DISCUSSION

¶ 26 On appeal, defendant contends the trial court erred in summarily dismissing his successive postconviction petition where (A) the court was required to docket his successive petition, without a prior request for leave to file, because it included an allegation of actual innocence based on newly discovered evidence; (B) the court's failure to rule on his successive petition within 90 days of its filing rendered any order entered thereafter void; and (C) in declining to advance his petition, the court improperly based its decision on the results of the evidentiary hearing conducted in his postconviction proceedings on the Lewis Murder conviction, a different prosecution. Defendant contends the trial court's dismissal was "premature" and "conflicted with both the terms of the [Act] itself, and with binding Illinois Supreme Court precedent construing that statute."

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¶ 27 The Act allows for postconviction relief through a three-stage procedure. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court determines whether the petition is "frivolous or patently without merit." 725 ILCS 5/122–2.1 (West 2012). If the petition meets the low threshold of stage one and advances to stage two, section 122–4 of the Act provides for the appointment of counsel for an indigent defendant. 725 ILCS 5/122–4 (West 2012). At the second stage, the trial court determines whether the petition states the "gist" of a constitutional violation, and if so, it advances to the third stage and an evidentiary hearing is conducted. 725 ILCS 5/122–6 (West 2012). An evidentiary hearing on the petition is required when the allegations of the petition, supported by the trial record and the accompanying affidavits, demonstrate a substantial violation of a constitutional right. *People v. Mitchell*, 189 Ill. 2d 312, 322 (2000).

¶ 28 Defendant contends that because the trial court failed to enter its order denying leave to file the petition within 90 days after its "filing," section 122–2.1 of the Act required his successive petition be automatically advanced to the second stage of proceedings.

¶ 29 Section 122–2.1 of the Act requires that "[w]ithin 90 days after the filing and docketing" of a petition, the trial court must examine the petition and enter an appropriate order. 725 ILCS 5/122–2.1(a) (West 2012). Defendant's postconviction petition was stamped "received" on May 3, 2010, stamped "filed" the following day, and assigned for hearing on May 11, 2010. On August 10, 2010, the petition was dismissed, 92 days after the initial hearing date and 99 days after the petition was filed. Defendant contends that because no action was taken on his petition within the 90 day time frame of section 122-2.1 of the Act, the petition should have been

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docketed for further proceedings. This issue presents a question of law regarding the interpretation of a statute and, therefore, our review is *de novo*. *People v. Donoho*, 204 Ill. 2d 159, 172 (2003).

¶ 30 Our supreme court addressed this issue in *People v. LaPointe*, 227 Ill. 2d 39 (2007), noting the important distinction between successive petitions and initial petitions under the Act. "Because the statute expressly conditions leave to file on the petitioner's satisfaction of the cause-and-prejudice test, a second or successive petition cannot be considered filed despite its having been previously accepted by the clerk's office." *LaPointe*, 227 Ill. 2d at 44.

¶ 31 Defendant contends that his failure to seek the court's approval prior to filing his successive postconviction petition was not in error because he asserted a claim of actual innocence and, therefore, his petition was outside the scope of *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002) and section 122–1(f) of the Act. Instead, defendant argues *People v. Ortiz*, 235 Ill. 2d 319 (2009) controls.

¶ 32 To be entitled to relief under the Act, a defendant must demonstrate a substantial deprivation of his constitutional rights in the proceedings that produced his conviction. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). The Act contemplates the filing of only one postconviction petition. *Morgan*, 212 Ill. 2d at 153. "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2012). However, the supreme court has carved out an exception to this rule, relaxing the bar to successive postconviction petitions when fundamental fairness so requires. *Morgan*, 212 Ill. 2d at 153. Generally, for a reviewing court to consider a defendant's successive

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postconviction petition on its merits, the defendant must show both "cause" for his failure to raise the claim in his initial postconviction petition and "prejudice" resulting from this failure. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459-60 (2002).

¶ 33 Under section 122–1(f), a defendant must satisfy the cause-and-prejudice test in order to be granted leave to file a successive postconviction petition. 725 ILCS 5/122–1(f) (West 2012).

"For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/ 122–1(f) (West 2012).

¶ 34 However, even if a defendant cannot satisfy the cause-and-prejudice test, his successive petition may be considered if he can demonstrate that consideration is "necessary to prevent a fundamental miscarriage of justice." *Pitsonbarger*, 205 Ill. 2d at 459. To demonstrate a fundamental miscarriage of justice, the defendant must show he is actually innocent. *Pitsonbarger*, 205 Ill. 2d at 459. "Although a showing of actual innocence may relax the bar of waiver, section 122–1(f) nonetheless mandates that defendants seek leave of court before filing successive postconviction petitions." *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008), citing *People v. Daniel*, 379 Ill. App. 3d 748, 750 (2008).

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¶ 35 In *Ortiz*, the State relied on the bar created by *Pitsonbarger*, and codified in section 122-1(f) of the Act, to argue the defendant's successive postconviction petition was barred from consideration for the defendant's failure to meet the cause-and-prejudice test despite his claim of actual innocence. *Ortiz*, 235 Ill. 2d at 330. Our supreme court disagreed, holding "in a nondeath case, where a defendant sets forth a claim of actual innocence in a successive postconviction petition, the defendant is excused from showing cause and prejudice." *Ortiz*, 235 Ill. 2d at 330.

¶ 36 We agree with defendant that *Ortiz* is on point here, but find no support for defendant's argument that in light of *Ortiz*, defendant's petition was subject to the normal procedures for petitions under the Act, including the advancement of a petition beyond first-stage proceedings unless it is frivolous or patently without merit within a 90 day time frame.

¶ 37 We find the trial court's denial to be a denial of defendant's implicit request for leave to file his successive postconviction petition because the petition failed to meet the actual innocence exception under section 122-1(f) (725 ILCS 5/122-1(f) (West 2012)), not a summary dismissal as defendant contends. Accordingly, defendant's successive postconviction petition never reached first-stage consideration by the trial court. The time restrictions of section 122-2.1(a), which require the trial court to independently review the postconviction petition within 90 days of its filing to determine whether "the petition is frivolous or [] patently without merit," ((725 ILCS 5/122-2.1(a)(2) (West 2012))), do not apply here. See *People v. LaPointe*, 227 Ill. 2d 39, 43 (2007) (the court rejected the defendant's argument that the trial court had to docket his successive postconviction petition because it failed to dismiss it within 90 days, noting "the Act treats successive petitions differently than initial petitions").

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¶ 38 In this case, the trial court was not considering the sufficiency of an initial postconviction petition during first stage review and, therefore, the law regarding such has no application here. Accordingly, that the court denied defendant's successive postconviction petition outside of 90 days after the petition was docketed on its call is of no legal import here.

¶ 39 Setting aside the issue of defendant's failure to seek leave prior to filing his successive postconviction petition, we find the court properly denied his petition because defendant failed to demonstrate his petition met the procedural requirements of a successive postconviction petition, specifically actual innocence.

¶ 40 Defendant contends he presented the gist of a constitutional claim of actual innocence based on newly discovered evidence, specifically allegations of potential police torture of the prosecutor's witnesses and, therefore, the trial court erred in dismissing his successive postconviction petition. We review the trial court's dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 41 The State contends defendant's petition was properly denied because defendant forfeited the claim, failed to meet the cause-and-prejudice test, and failed to show that the proposed evidence met the Act's requirements to qualify as newly discovered evidence.

¶ 42 Where, as here, a defendant in a noncapital case alleges actual innocence in a successive postconviction petition, "the defendant is excused from showing cause and prejudice." *Ortiz*, 235 Ill. 2d at 330; see also *Pitsonbarger*, 205 Ill. 2d at 459.

¶ 43 To obtain relief under a theory of actual innocence based on "newly discovered" evidence, the defendant must offer evidence that was not available at his original trial and that he

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could not have discovered sooner through diligence. *Morgan*, 212 Ill. 2d at 154. To be considered, the evidence must be material, noncumulative, and of such a conclusive nature, that it would probably change the result upon a retrial. *People v. Washington*, 171 Ill. 2d 475, 489 (1996).

¶ 44 Here, the defendant's claim of actual innocence based on newly discovered evidence is predicated on defendant's assertion that the police coerced the State's witnesses to implicate defendant in the shooting death of Black. In support of his claim, defendant cited to Sanders' trial testimony that he was hit in the hands with a flashlight. Defendant also cited to Lawrence's trial testimony that he was harassed and roughed up by the police when they first came to his apartment. The new evidence appended to defendant's successive postconviction petition included a newspaper article from December 2005, and one from June 2006, which named Detective McWeeny as one of three former Area 2 Detectives that had been granted immunity as part of the investigation into abuse at Area 2. Defendant also attached a copy of a 10-year old affidavit from State's witness Josh Cole, which defendant filed in the postconviction proceedings for the Lewis murder, and a copy of the 5-year old affidavit by William Brown, an alleged witness to the murder of Keith Lewis, which defendant also filed in the Lewis postconviction proceeding. No affidavits from Sanders or Lawrence were provided.

¶ 45 In his affidavit, Brown averred he was present when Keith Lewis was shot and that he knew defendant was not the shooter because Brown and defendant were fighting with each other when Lewis was killed. Brown alleged Cole and Lewis were fighting each other before the shooting.

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¶ 46 In his affidavit, Cole stated he was not sure where he was the day of the Lewis murder. Cole also contradicted his statements to the police and grand jury regarding Black's murder. In his affidavit, Cole claimed he did not see the person who shot Black. He claimed the police told him what to say from "day one" and that both the Assistant State's Attorneys and detectives in the case threatened to charge him with the murder of Lewis if he changed his testimony during the trial. Cole never alleged he was physically abused by Detective McWeeny.

¶ 47 We agree with the State that defendant's claims of newly discovered evidence do not comply with the standards set forth in the Act. Both affidavits were available to defendant prior to the second-stage dismissal of his initial postconviction petition in this matter. Additionally, the newspaper articles do not support a finding that Detective McWeeny abused any of the witnesses in this case. The evidence of record shows defendant could have presented this issue during his initial postconviction proceeding. His failure to do so can not be cured by his claim that the evidence is newly discovered evidence of his actual innocence. See *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008), quoting *People v. Jones*, 362 Ill. App. 3d 31, 34 (2005) and *People v. Savory*, 309 Ill. App. 3d 408, 411–15 (1999) (" 'actual innocence' is not within the rubric of whether a defendant has been proved guilty beyond a reasonable doubt. [citation.] Rather, the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' ") The allegations of Cole's affidavit, when measured against his grand jury and trial testimony, address credibility that go to reasonable doubt, not actual innocence. We hold the trial court properly examined defendant's claim of actual innocence and found he failed to meet the requirements. Accordingly, his successive postconviction petition was properly denied.

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¶ 48 Defendant next argues the trial court improperly relied on the results of the evidentiary hearing conducted in the Lewis postconviction proceeding to decline to advance defendant's petition for further postconviction proceedings in this case.

¶ 49 Defendant claims the trial court was limited to considering only the sufficiency of the petition and the accompanying documents "in the context of the case itself." Relying on the plain language of section 122-2.1 of the Act, defendant argues "[n]oticeably absent in that provision is any authority to look at other cases[.]" Defendant further argues the doctrine of *res judicata* prevented the trial court from relying on the results of the postconviction proceedings in the Lewis murder, a distinct prosecution, to the case *sub judice*. Defendant contends "[t]he strength of the recantation in each case must be measured against the strength of the evidence adduced in that case, and thus where a case is weak, less evidence may be required to undermine the confidence of that outcome." Defendant contends the court was barred from engaging in any fact-finding at the summary dismissal stage and, therefore, the court should have treated defendant's allegations of police misconduct as true and appointed counsel to represent defendant and granted him the right to an evidentiary hearing on the facts of this case, as he was granted in the Lewis proceedings. Defendant maintains, then, at the third stage hearing, the trial court could have properly weighed the evidence of police misconduct against the strength of the State's case and determined what, if any, relief was warranted.

¶ 50 The State responds that the procedural rules under the Act restricting what the court may consider are inapplicable at this stage because those restrictions do not apply until a defendant is granted leave to file the successive postconviction petition.

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¶ 51 As we discussed, the trial court's dismissal of defendant's successive postconviction petition was a denial of his implicit request for leave to file his successive postconviction petition because the petition failed to meet the actual innocence exception under section 122-1(f) (725 ILCS 5/122-1(f) (West 2012)). Accordingly, defendant's successive postconviction petition never reached first-stage consideration by the trial court.

¶ 52 Here, the trial court was not considering the sufficiency of an initial postconviction petition during first stage review and, therefore, the law regarding such had no application. The Act does not define what a trial court may consider in determining whether leave to file be granted. A determination of whether a defendant has satisfied the cause-and-prejudice test or met the exception by showing actual innocence based on newly discovered evidence almost always involves consideration of facts outside the record. Accordingly, the fact that the court considered information outside the record here, is not, in itself improper.

¶ 53 The trial court was not required to ignore the fact that it conducted an evidentiary hearing in defendant's postconviction proceeding in the Lewis prosecution in considering whether defendant's successive petition in the present case raised a claim of actual innocence, where the claim involved the same witness, with an identical affidavit and the court had the opportunity to hear the witness testify and observe his demeanor. Moreover, defendant's successive postconviction petition specifically requested the court consider Cole's testimony from the evidentiary hearing held in the Lewis murder postconviction proceedings to support his claims in the instant case.

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¶ 54 Lastly, our supreme court has explicitly held that the doctrine of collateral estoppel can bar consideration of an issue in a successive postconviction proceeding. *Ortiz*, 235 Ill. 2d 319 (2009), citing *People v. Tenner*, 206 Ill.2d 381, 395 (2002), quoting *People v. Partee*, 125 Ill.2d 24, 37 (1988) ("The preclusion doctrines of *res judicata*, collateral estoppel, and law of the case prevent a defendant from "taking two bites out of the same appellate apple" and avoid 'piecemeal post-conviction litigation.' ")

¶ 55 The doctrine of collateral estoppel bars relitigation of an issue already decided in a prior case. *Tenner*, 206 Ill. 2d at 352. "The doctrine applies 'when a party *** participates in two separate and consecutive cases arising on *different* causes of action and some controlling fact or question material to the determination of both causes has been adjudicated against that party in the former suit by a court of competent jurisdiction.'" (Emphasis in original.) *People v. Moore*, 138 Ill. 2d 162, 166 (1990), quoting *Housing Authority v. Young Men's Christian Ass'n of Ottawa*, 101 Ill. 2d 246, 252 (1984). "The threshold requirements for collateral estoppel are that (1) the court rendered a final judgment in the prior case; (2) the party against whom estoppel is asserted was a party or in privity with a party in the prior case; and (3) the issue decided in the prior case is identical with the one presented in the instant case." *People v. Franklin*, 167 Ill.2d 1, 11-12 (1995).

¶ 56 In the present case, it is clear the first two elements of the doctrine apply. There was a final judgment on the merits in the postconviction proceedings for the Lewis murder, which this court affirmed on appeal. *People v. English*, 406 Ill. App. 3d 943 (2010). Defendant was a party in both actions. The third element, whether the issue decided in the prior case, *i.e.*, the Lewis

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murder postconviction proceeding is identical with the one presented here, is where the parties differ.

¶ 57 In this postconviction proceeding, defendant claimed the testimony of Sanders, Lawrence and Cole were coerced by Detective McWeeny. Defendant's claims as to Sanders and Lawrence were affirmatively refuted by the record. At trial, Lawrence explicitly denied Detective McWeeny hit him. Sanders testified he was hit in the hand with a flashlight by a police officer, but he was impeached with his previous statement to the Assistant State's Attorneys that he was hit with a stick. Moreover, Sanders never identified Detective McWeeny as the officer that hit him. Defendant failed to attach affidavits from either Lawrence or Sanders supporting these allegations, nor did he explain his failure to do so. Defendant provided no independent corroboration to support his allegations that the testimony of Lawrence and Sanders was coerced by Detective McWeeny.

¶ 58 The record also does not support defendant's claim that Cole was coerced. Cole did not testify at trial that he was hit or coerced by the police. In his grand jury testimony, which was introduced as substantive evidence, Cole testified he had not been threatened or promised anything in return for his testimony against defendant. He further testified that he had been treated well by the police. In Cole's affidavit, he did not allege any physical abuse by the police. Cole claimed that he was pressured in to identifying defendant and providing information against him by the police to avoid being charged with the Lewis murder.

¶ 59 Although not a part of the record on this appeal, Cole testified at the evidentiary hearing on the Lewis murder postconviction petition regarding his recanting testimony and Brown

testified as well. At the conclusion of the hearing, the trial court found both men "wholly lacking in credibility." The court found "[t]he performances they put on here in [this] courtroom [were] sad and not at all compelling." The trial court noted that, since the time of defendant's trial, both Brown and Cole had "picked up quite a bit of additional baggage in [that] they're both now convicted murderers themselves." *English*, 406 Ill. App. 3d at 945. On appeal, we upheld the trial court's finding that neither Cole nor Brown were credible. *English*, 406 Ill. App. 3d at 954.

¶ 60 In the present case, defendant sought to re-use Cole's affidavit to support his claims of police coercion. Collateral estoppel barred defendant from relitigating the issue of alleged coercion of Cole's testimony; the exact same issue litigated in the postconviction proceeding for the Lewis murder.

¶ 61 Under these unique circumstances, based on the record and Cole's testimony at the evidentiary hearing during the postconviction proceedings on the Lewis murder, the trial court correctly determined defendant's successive postconviction petition failed to present a claim of actual innocence sufficient to warrant further proceedings under the Act.

¶ 62 **CONCLUSION**

¶ 63 Defendant failed to establish a claim of actual innocence in his successive postconviction petition, where defendant failed to demonstrate diligence in obtaining the witness affidavits, the allegations in defendant's proffered affidavits merely impeached or contradicted trial testimony, and the recantations of Cole were considered and rejected in an evidentiary hearing during the postconviction proceedings on the Lewis murder. Accordingly, postconviction relief was not

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warranted here. The trial court properly denied defendant leave to file a successive postconviction petition.

¶ 64 Affirmed.