

No. 1-11-0069

**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).

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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. 01 CR 27723
	)	
MICHAEL GLASPER,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant did not state the gist of a constitutional claim of actual innocence, he was not entitled to remand for second-stage postconviction proceedings; the trial court's judgment was affirmed.

¶ 2 Defendant, Michael Glasper, appeals the circuit court's order summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant contends his petition set forth an arguable claim of actual innocence. We affirm.

¶ 3 Defendant and his codefendants, Eugene Banks, Marcus Williams, Tremaine Kimbrough, and Jamel Phillips, who are not parties to this appeal, were charged with the murder of Brian Simmons and the attempted murder of Samuel Simmons on August 11, 2001, in Chicago, Illinois, following a dispute over drug territory. Defendant was tried separately by a jury and was convicted of both charges. The court subsequently sentenced defendant to 80 years' imprisonment for murder

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consisting of the maximum 60-year term for murder and a 20-year enhancement for discharging a firearm and, a consecutive 30-year term for attempted murder.

¶ 4 Relevant to this appeal, the evidence at trial revealed that Detective James Gilger testified defendant initially denied any involvement in the crime, but later admitted he was a member of the Traveling Vice Lords gang and implicated himself in the shooting. Defendant also provided a videotaped statement to an Assistant State's Attorney, where he again confessed to the crime. At trial, defendant argued his confession was coerced.

¶ 5 Defendant's statements revealed he, Mr. Williams, Mr. Phillips, Mr. Kimbrough, and Mr. Banks were driving around on August 11, 2001, discussing how Brian and Samuel Simmons had taken over Mr. Banks' drug spot. The five men drove to Lamon and Iowa Streets, put on black-hooded sweatshirts, and entered an alley where Brian and Samuel Simmons were standing. Defendant was carrying a silver 9-millimeter handgun and, as soon as the group entered the alley, they began to shoot at Brian and Samuel Simmons. Defendant admitted he fired two shots. Following the shooting, defendant wrapped his gun inside of a hooded sweatshirt and dropped it next to a bush. Police subsequently found a black-hooded sweatshirt, with a 9-millimeter handgun wrapped inside of it, at 4917 West Walton Street. Forensic testing showed the bullet recovered from the base of Brian Simmons' brain had been fired by the same gun.

¶ 6 Michael Farris, a convicted felon who was on parole at the time of the trial, testified that at about 11 p.m. on August 11, 2001, he was in the vicinity of Lamon and Iowa Streets when he saw defendant, Mr. Williams, and Mr. Phillips exiting an alley wearing black-hooded sweatshirts and carrying guns. Mr. Farris saw Mr. Williams and Mr. Phillips shoot at the victims, but did not see defendant. After making these statements at trial, Mr. Farris was confronted with his previous grand jury testimony and statement that he gave on October 18, 2001, when he was arrested for an unrelated charge of criminal drug conspiracy. In his October 18 statement and his grand jury testimony, Mr. Farris revealed he previously stated he observed defendant, Mr. Williams, and Mr.

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Phillips shooting in the direction of the victims. At trial, Mr. Farris never denied making those statements, but simply testified that he did not see defendant shoot the victims.

¶ 7 Keith Price testified that in addition to having a previous felony conviction for delivery of a controlled substance, he entered into a plea agreement on a charge of criminal drug conspiracy, and received probation and drug treatment in exchange for testifying against defendant. Mr. Price testified that two weeks after the shooting, he and defendant were in a car together. Mr. Price, who was a member of the Conservative Vice Lords gang, asked defendant if he had anything to do with the shooting. Defendant admitted "he, [Mr. Williams] and [Mr. Phillips] got at Brian. And after they made sure he was down, they helped [Mr. Banks] \*\*\* get at Sam." Defendant also told Mr. Price he left behind his hooded sweatshirt and a gun.

¶ 8 The defense presented no testimony, and the jury found defendant guilty of murder and attempted murder. We affirmed that judgment on direct appeal. *People v. Glasper*, No. 1-04-3005 (2006) (unpublished order under Supreme Court Rule 23). Defendant filed a petition for leave to appeal in the Illinois Supreme Court, which was granted. In *People v. Glasper*, 234 Ill. 2d 173 (2009), the Illinois Supreme Court affirmed defendant's convictions and sentences finding the evidence against him was overwhelming.

¶ 9 On September 3, 2010, defendant filed a *pro se* postconviction petition alleging, in pertinent part, that he was actually innocent of the shooting. In support, defendant attached an affidavit from his codefendant Jamel Phillips. Mr. Phillips attested that he was involved in the shootings of Brian and Samuel Simmons. He further attested that defendant did not have any involvement in the shooting, defendant did not know about the shooting and, defendant was not there when the incident occurred. In his petition, defendant indicated Mr. Phillips did not know defendant was in prison for the shooting in question until Mr. Phillips was also imprisoned for the same crime. The circuit court found defendant's petition was frivolous and patently without merit and, summarily dismissed the petition. In doing so, the court stated that even if Mr. Phillips testified consistently with his affidavit,

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the outcome of the trial would not be different because the evidence presented at trial supported the State's case and not Mr. Phillips' version of the facts.

¶ 10 On appeal, defendant contends that his postconviction petition stated an arguable claim of actual innocence. He specifically maintains Mr. Phillips' affidavit constituted newly-discovered material and noncumulative evidence that was likely to change the result on retrial. An appeal from a first-stage dismissal, as in this case, is reviewed *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 11 The dismissal of a petition is appropriate at the first stage of postconviction review where the circuit court finds it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2008)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. To have no arguable basis in either law or fact, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16. To circumvent dismissal at the first stage, a defendant must allege the "gist" of a constitutional claim, which has a low threshold. *Id.* at 9-10.

¶ 12 Actual innocence is the equivalent of total vindication or exoneration. *People v. Anderson*, 402 Ill. App. 3d 1017, 1037 (2010). A defendant arguing actual innocence must demonstrate that the evidence upon which the claim is based is "newly discovered," *i.e.*, the evidence was not available at the time of trial and could not have been discovered sooner through due diligence. *People v. Ortiz*, 235 Ill. 2d 319, 333-34 (2009). In addition, the evidence must be material and not merely cumulative. Additionally the evidence must be "of such conclusive character that it would probably change the result on retrial." *Id.* at 333.

¶ 13 Here, even if we accept Mr. Phillips' statement as "new evidence," defendant's actual innocence claim still fails because he cannot arguably show that Mr. Phillips' additional testimony is so conclusive, that it would probably change the outcome of the trial. In finding defendant's guilt overwhelming, the Illinois Supreme Court stated:

"Defendant admitted that he committed the crimes in question three different times: first, to Keith Price, a person he has known since childhood; next, in an oral

statement to Detective Gilger; and finally, in a videotaped confession. Michael Farris, an eyewitness to the crime who had also known defendant since childhood, positively identified defendant as one of the individuals involved in the shooting. Although the credibility of Price and of Farris was called into question because both are convicted felons with ties to the drug trade on Iowa and Lamon, the facts demonstrate that their respective testimony was corroborated by independent evidence, as well as defendant's statements. Additionally, defendant was linked to the murder weapon through his own testimony, the testimony of Price, and through [the firearm examiner's] testimony that the bullet found in Brian's head came from the gun defendant admittedly used. Defendant argued that his confessions were coerced, but there was no evidence presented to support that claim. In light of these facts, we conclude that no rational juror would have acquitted defendant of the offenses for which he was charged. The evidence of defendant's guilt is overwhelming." *Glasper*, 234 Ill. 2d at 202.

Therefore, Mr. Phillips' assertion, that defendant was not at the scene of the crime, would not have changed the result on retrial because it would be contradicted by defendant's confessions, the testimony of Mr. Farris and Mr. Price and, the physical evidence.

¶ 14 In reaching this conclusion, we find *People v. Sparks*, 393 Ill. App. 3d 878 (2009), relied on by defendant, distinguishable from the case at bar. After the defendant in *Sparks* was convicted of first degree murder, he filed a *pro se* postconviction petition alleging he was actually innocent of the crime. In support of his postconviction petition, the defendant attached an affidavit of a potential-occurrence witness, who supported his version of the events. The trial court summarily dismissed the petition, however, this court reversed and remanded for further proceedings. In doing so, we held that not only was the evidence presented by the occurrence witness newly discovered and not cumulative, it also would have affected the outcome on retrial. *Id.* at 886. This court specifically

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indicated that because there were two different explanations of the incident with each side alleging the other was the aggressor, it was conceivable the jury could have acquitted the defendant based on the testimony of defendant's occurrence witness. *Id.* In the instant case, unlike in *Sparks*, the evidence was not closely balanced and the outcome on retrial would not have been affected by Mr. Phillips' testimony.

¶ 15 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 16 Affirmed.