

2012 IL App (2d) 100619-U  
No. 2-10-0619  
Order filed February 1, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 90-CF-1057
	)	
FERNANDEZ KING,	)	Honorable
	)	John T. Phillips,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices McLaren and Burke concurred in the judgment.

**ORDER**

*Held:* The trial court properly dismissed defendant's successive postconviction petition: his claim of actual innocence was raised in his first petition and thus was barred by *res judicata* and did not satisfy the cause-and-prejudice test; in any event, the claim was without merit: new DNA tests of blood on defendant's clothing, which were inconclusive as to the source, would not change the result on retrial, as at trial the State had conceded that the blood was inconclusive and had not substantially relied on it, instead relying on other evidence, which was strong.

¶ 1 Defendant, Fernandez King, appeals from an order granting the State's motion to dismiss his second petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*

(West 2008)). Defendant contends that the petition made a substantial showing that he was entitled to a new trial, based on newly discovered DNA evidence (see 725 ILCS 5/116-3 (West 2010)). The State responds that the petition was barred by *res judicata* and legally insufficient. We affirm.

¶ 2 On May 24, 1990, Marguerito Gomez was beaten to death with a wooden board in Waukegan. In the same attack, Everado Estrada was severely injured. On June 6, 1990, defendant, James Bell, and Dae Won Kim were indicted for the first-degree murder (Ill. Rev. Stat. 1989, ch. 38, ¶ 9-1(a)) of Gomez and armed violence (Ill. Rev. Stat. 1989, ch. 38, ¶ 33A-2) against Gomez and Estrada. At trial, defendant would contest identity. Before trial, he moved *in limine* to exclude any evidence “pertaining to any items tested by the Northern Illinois Police Crime Laboratory \*\*\*, which testing resulted in inconclusive results as to the origin of human blood stains found thereon.” Defendant alleged in part that, because the sources of bloodstains on his clothing could not be determined, the evidence would be unfairly prejudicial. The trial court denied the motion.

¶ 3 On December 11, 1990, defendant’s jury trial began. The State’s first witness, Bertin Gaspar, testified as follows. On May 24, 1990, at about 9 p.m., he, Gomez, and Estrada were walking along 10th Street, which runs east-west on the border between Waukegan and North Chicago. Four or five men came up behind them. A “black man” hit Gomez and Estrada with “pieces of wood or bats,” knocking them both to the ground. Gaspar ran away. At about 10:30 p.m., he viewed a photographic lineup but could not pick out any of the attackers.

¶ 4 Estrada testified as follows. As he, Gaspar, and Gomez were walking down 10th Street, several men were walking behind them. When Estrada heard one man say something, he turned around. At that point, Gomez was hit in the forehead and fell to the ground; next, Estrada was hit in the side of the head and also fell. Before getting up and running away, Estrada saw Gomez’s

attacker (not the same man who had hit Estrada). The prosecutor asked Estrada whether he saw Gomez's assailant in court; at first, Estrada said, "He's right here," but then he added, "I don't recognize him right now. I don't see him." Estrada recounted that, while he was hospitalized the morning after the attack, Officer Marquez showed him the same photographic lineup that Gaspar had seen. He picked out the man who had attacked Gomez. In court, Gaspar marked the photograph that he had chosen. It was a photograph of defendant.

¶ 5 The State next called Ann Almond. However, she explained to the judge that she would refuse to testify. She was found in civil contempt and jailed.

¶ 6 Joey Martinez, a fifth grader at the time of trial, testified as follows. On May 24, 1990, he was living at Samaritan House on 10th Street. At about 9 p.m., he heard wood banging and looked out the window. He saw "three men hitting another guy with a board." The victim was on the ground and the others continued to hit him, using two boards. All three attackers were black men. They ran off. One of them dropped one of the boards along the way.

¶ 7 Dennis Cobb, a police crime scene investigator, testified that, at about 11:30 p.m. on May 24, 1990, he arrived at the crime scene. He collected a two-by-four from in front of All Nations Church at 604 10th Street, northeast of some bloodstains on the sidewalk. The board had two nails sticking out at one end, which also had a red stain. Cobb found another two-by-four on the sidewalk about 13 feet east of the pool of blood. In an alley between Wadsworth and McAlister just north of 10th Street, he found a metal table leg with a red stain on the end. Another officer recovered a second table leg nearby. Finally, Cobb photographed the area in front of a house at 930 Adams, northwest of All Nations Church. The photograph showed a pile of wooden debris, including several long boards. Thomas Luka, a police officer, testified that, at about 9:24 p.m. on May 24, 1990, he

was dispatched to the 600 block of 10th Street. A man was lying on the sidewalk, severely injured in the head. A wooden board was lying 10 to 15 feet east of the victim; a second board was in the planter of a building about 20 feet east of the victim. Joseph Coburn, the pastor of All Nations Church, testified that, at about 9 p.m., he was inside the church when he heard “groaning” outside. He ran out and saw the victim lying on the sidewalk, bleeding. One man was standing over the victim and had a two-by-four. Another man was bending over the victim. Coburn shouted. The two men ran off. Coburn did not get a good look at them. He went back inside and called the police.

¶ 8 James Bell testified as follows. He had been charged with murder but had pleaded guilty to armed violence. In exchange for the plea, he had agreed to testify against defendant. On direct examination, Bell testified that, on May 24, 1990, at about 9 p.m., he was walking on 10th Street with defendant. Near All Nations Church, Bell saw defendant “[h]it a guy with a board.” Asked what happened then, Bell testified, “I think he fell.” Asked how he and defendant had met that night, Bell testified, “I don’t remember. I saw him walking.” Bell did not provide further details. On cross-examination, he admitted that, on May 24, 1990, he told the police that he had not observed any of the incident earlier that evening and that he knew nothing about it.

¶ 9 Richard Slusser, a Waukegan police officer, testified that he secured the crime scene and looked for the perpetrators. At about 2:20 a.m. on May 25, 1990, he went to the area of 825 Lennox. There, he saw defendant and Bell wrestling. Defendant was wearing a gray and pink sweat suit. Dae Won Kim was in a car nearby. At Slusser’s request, defendant and Bell went to the police station.

¶ 10 Waukegan police detective Mark McCormick testified that, at about 3:20 a.m. on May 25, 1990, he spoke to defendant at the police station. Defendant signed a rights waiver. McCormick told him that the police were investigating the beating of a man in the 600 block of 10th Street.

Defendant said that, on the previous evening, he spent time at the home of “Ronnie,” then walked with Sam Almond to Handy’s, a store in the 700 or 800 block of 10th Street, where he saw Ronnie and “Keith” drive by. Defendant and Sam walked back to Ronnie’s home, where Ronnie and Keith had also arrived. Defendant said that he had had nothing to do with what had happened on 10th Street. Asked whether he had “talked with the three guys that had sticks when you walked past them by the church,” defendant said no. He added that one of the three men was black and that he saw only the backs of the other two men, but then he said that the other two men were Hispanic. Defendant never asked for permission to call his mother.

¶ 11 Waukegan police detective Michael Taylor testified that, at about 5:30 a.m. on May 25, 1990, he spoke to defendant at the police station. He asked defendant where he had been on the evening of May 24, 1990. Defendant said that he had been at his cousin Ronnie’s house and then, around 9:30 p.m., walked to the store, bought some potato chips, and went to visit a female friend. Taylor told defendant that he did not believe him. Defendant insisted that he had told the truth. Taylor said that he still did not believe him. Defendant agreed to sign another rights waiver and to write out a statement. The statement reads:

“I Fernandez King on the night of May 24 1990[,] I was on Ten [sic] Street in Waukegan[.] me [sic][,] James and this spanish [sic] guy name [sic] chino [sic] jump [sic] this Mexican with a stick with nails in it[.] We got the sticks from Adams ~~or m~~ in the alley on the left side coming from Tenth Street and them [sic] we ran from Tenth and ~~went~~ went down ~~adam~~ Wasworth [sic] and James threw the stick Bye [sic] the church and I went down lenox [sic] to go over my cousin [sic] house. Before I ~~me~~ met up went [sic] James and we was about to get in it, then the police came and ~~bron~~ brought us down, James Bell. Chino ~~ha~~ had the

stick and they Follow [sic] Behind [sic] me and first I James hit him and Then [sic] I hit him[.] Them [sic] Chino Bust [sic] him with the stick[.] The [sic] I ran and They [sic] Follow [sic] me.”

¶ 12 Taylor testified that he showed the statement to Lieutenant Crum, then returned to the interview room. Defendant told Taylor that he had not been truthful about who had been with him during the attack on Gomez. Taylor told defendant to write out another statement, which defendant did in the presence of Taylor and Howard Pratt, a detective. Defendant’s second statement related that he hit the victim because the victim was “telling [defendant] off” and defendant “just got mad.” Defendant summarized the incident as follows:

“We came from Wadsworth [sic] from behind him and it was ~~me~~ me and Ronnie Davis and Keith, and a Mexican guy and after I struck him I ran and they Follow [sic] me and went there [sic] separate [sic] ways. Me and Keith and Mexican boy had the sticks. Keith hit him in the back with a stick and Them [sic] the Mexican boy hit him in the back of his head and then he was in his pockect [sic][.] Then I ran away away. I saw him goin [sic] threw [sic] his pockets but I don’t know what had been took.”

¶ 13 Taylor denied threatening defendant or using any physical force against him. When the prosecutor asked Taylor whether he had observed anything about defendant’s sweat shorts, defendant’s attorney objected. At a sidebar, defendant’s attorney argued that the State should not be allowed to bring out that blood stains were on the shorts, because the forensics tests had been inconclusive on the source of the blood and even whether it had been fresh or dried when Taylor saw it. The judge overruled the objection. Taylor then testified that there had been a blood stain on the

shorts; the stain had appeared wet and “shiny” rather than “a dark dry.” The shorts were admitted into evidence, over defendant’s objection.

¶ 14 The State next called William Wilson, a forensic serologist who had examined some of the physical evidence. Wilson testified that he found human blood on both table legs. One of the wooden boards tested positive for Gomez’s blood. When Wilson examined the sweat shorts, he found that the bottom front of the right leg was stained with human blood. He could not recall the size of the stain, although it was smaller than the ¾-by-1¼-inch section of the shorts that he cut out. Wilson was unable to determine the volume of the blood, its age, or how long it had been dry. (The date of his examination is not given in his testimony.) Asked whether he had been able to determine whether the blood was consistent with Gomez’s blood, Wilson responded, “Based on my analysis I couldn’t make any conclusions other than [that] it was human blood.”

¶ 15 The State next called Ann Almond. On direct examination, she told the court that she had voluntarily decided to testify. She testified as follows. On May 24, 1990, at about 9 p.m., she and Charlie Kynard were walking in the area of 10th and Wadsworth. When they reached the corner, three black men ran past them “[o]ff 10th Street” toward McAlister. The prosecutor asked Almond whether she saw any of the three men in the courtroom. She responded, “I can’t do this.” At a conference in chambers, the judge asked Almond why she would not answer. She responded, “Because I am afraid. I am scared.” The judge admonished her that she could go back to jail if she did not provide “a good reason” for refusing to testify. He ordered her to answer the question. Back before the jury, the prosecutor repeated his question, and Almond identified defendant as one of the three men who ran past her on May 24, 1990.

¶ 16 On cross-examination, Almond testified that, on May 25, 1990, she told McCormick that she had seen three men running, but she did not then identify defendant as one of them. She did tell McCormick that one of the men was wearing a gray jogging suit that had blood on the left sleeve. Also that day, she told another detective that defendant was one of the three men. On May 28, 1990, she told a detective that she had recognized two of the men; that one was James Bell; and that Bell had been the one wearing the gray jogging suit with blood on the sleeve.

¶ 17 The State rested. Defendant first called Cassandra Davis. She testified that defendant was her cousin. She had seen him several times since his arrest. She lived at 848 South Utica in Waukegan, and defendant lived at 854 South Utica with his mother, Mattie King, and his sister. On May 24, 1990, at about 8 p.m., Davis was at home with her husband, Gregory Armstrong, defendant, and George Nash. At about 8:30 p.m., she visited her mother, who lived at 854 South Utica (in a separate apartment from defendant's family). She left at 9 p.m. to go home and get ready for work. At that time, defendant was at Davis's mother's apartment, as were Mattie King, Maggie Davis, Leon Nicholson, and Seneca Davis. The next time that Davis saw defendant was at about 9:15, at her home, when he came over. Tony Almond (whom she also knew as Sam Almond), Nash, and Armstrong were there. They and defendant had gotten together because Sam Almond had come in from out of town. Armstrong and defendant had been drinking for several hours. At about 9:15, Davis's aunt came over and picked up defendant and Mattie King. At about 9:35 or 9:45, defendant returned to Davis's house. He stayed there until 11:20, when Davis received a ride to work.

¶ 18 Davis testified that she could not recall telling any police officer about defendant's whereabouts on the evening of May 24, 1990. She had talked to defendant's lawyer. Also, she recalled, on May 24, 1990, her brother, Ronnie Davis, had not been at her house.

¶ 19 Leonard Hogan testified that he lived in North Chicago and had known defendant for 10 years. On May 24, 1990, between 9 and 9:30 p.m., he went to 854 South Utica because he had just purchased a car and wanted to show it to defendant. Hogan knocked on the door; Mattie King answered. Hogan asked whether defendant was home. Mattie King said no, but she went to Cassandra Davis's home to get him. Defendant soon came over, and he and Hogan went for a ride in the car. They drove onto 10th Street and saw three men running. Hogan asked defendant why the men were running. He drove onto 9th Street and took defendant home. Hogan admitted that the bill of sale for the car showed that he had purchased it on May 23, 1990.

¶ 20 Maggie Davis testified as follows. She lived in a duplex at 854 South Utica. Defendant's family also lived at that address. Her son Ronnie lived downstairs at 848 South Utica, and Cassandra Davis and Greg Armstrong lived in the attic. On May 24, 1990, at about 8 p.m., Maggie was home. Defendant had been coming and going from there all evening, by himself. At about 9 p.m., Maggie was in the kitchen talking with Mattie King, her sister. Defendant, Leon Nicholson, and Seneca Davis were also there. Mattie was telling defendant to be home by 10. Defendant told Mattie that he had been at Cassandra Davis's house partying because Sam Almond was there. Defendant agreed to be home by 10; he and Seneca Davis left. After a few minutes, Maggie and Mattie went to Mattie's apartment. As they entered, they heard a knock on the front door. Hogan and Mattie spoke, and Mattie went to Cassandra Davis's home to get defendant. Mattie and defendant returned at about 9:25. Defendant and Hogan stood outside. Mattie came in and closed the door. Maggie did not see defendant again for days. On May 25, 1990, she spoke to three police detectives. At trial, she denied telling them that she had not seen defendant at all the previous night.

¶ 21 George Nash testified that he resided at 831 McAlister and knew defendant. On May 24, 1990, at about 8 p.m., he left his house and drove to Greg Armstrong's house. There, he saw Cassandra Davis, Armstrong, and defendant. Nash joined Armstrong and defendant in drinking and conversing. When defendant's cousin Seneca Davis came up and told him that Mattie wanted him to come home, defendant left. He was gone for 10 minutes at the most and returned. He was talking about Hogan's car. Tony Almond had come over. The men needed more liquor, so Nash, defendant, and Tony Almond got into Nash's car and rode off. Driving down 10th Street, Nash saw about 12 police cars. He drove on, got gasoline and liquor, and returned to Armstrong's house, where he, defendant, and the others continued drinking. At about 1:30 a.m., Nash and defendant both left. Nash did not see Hogan at all that night.

¶ 22 Seneca Davis testified as follows. He lived at 854 South Utica with his mother, Maggie Davis, in the same building as defendant and his family. On May 24, 1990, he went from his mother's house to Cassandra Davis's home to pick up defendant. Seneca noticed that the clock said 9 p.m. He and defendant then walked back to their house. Before then, Seneca had seen defendant at defendant's home, but he could not recall how often or who had been there.

¶ 23 Defendant testified next. On direct examination, he related the following. Early on the morning of May 25, 1990, he was taken to the Waukegan police station. He was drunk and tired. He was sent to an interview room without having been told why, and he waited until McCormick and Detective David Yarc came in. McCormick asked defendant his whereabouts that day, followed by similar questions. Defendant asked twice whether he could call his mother, but McCormick told him to wait. Defendant gave a statement, and McCormick wrote as defendant spoke. McCormick left the room. A bit later, Taylor entered and began pacing. He asked defendant where he had been.

Defendant told him. Taylor then asked defendant whether he knew anything that had happened on 10th Street. Defendant said no. Taylor called him a compulsive liar. No other officer was in the room while defendant was with Taylor.

¶24 Defendant testified that Taylor kept asking him questions, defendant answered the questions, and Taylor kept telling him that he was lying. Taylor then left the room, returned with a piece of paper, and told defendant to write down where he had been and what he had done that evening. Defendant started to write, putting down that he had been at his cousin's house. Taylor grabbed the paper and took it out of the room. He came back with another piece of paper and told defendant to write down what he had been doing on 10th Street. Defendant told Taylor that he did not know what had happened on 10th Street. Taylor got upset, slapped defendant in the face, and told him, "You are going to write a statement." Defendant told Taylor that he "still didn't know what was happening." Taylor slapped him. Defendant fell to the floor. McCormick opened the door, peeked in, then closed the door.

¶25 Defendant testified that next Taylor grabbed him by the shirt, put him back into the chair, punched him in the stomach, threw him against the wall, threw him back toward the desk, and told him to sit in the chair. Taylor then had defendant write out a statement. He stood over defendant and essentially told him what to write. Defendant crossed out some words in order to write what Taylor was telling him. After defendant finished the statement, Taylor took it out of the room. Soon, he returned, accused defendant of lying "about the whole statement," left, and returned with another piece of paper. Defendant asked Taylor at least three or four times for permission to call his mother, but Taylor refused the requests.

¶ 26 Defendant testified that, after Taylor returned to the interview room, he had defendant write out a second statement. Taylor sat right in front of him but did not talk to him. Defendant testified that, at that time, he had blood on his shorts and the blood was still wet.

¶ 27 Defendant testified on cross-examination as follows. Although he had been drunk while at the police station, he remembered his statement to McCormick, or at least some of it. Asked when he had begun to remember the statement, defendant testified, “[a]bout last week some time.” He recalled that he told McCormick that he had gone to Cassandra Davis’s home because Sam Almond was visiting. Defendant denied having told McCormick that he had walked down 10th Street and gone to Handy’s alone; that he had seen three black men near the church; that the men had sticks that they then hid in the bushes; or that he “didn’t want any of that” and kept going. Defendant denied having made most of the other assertions that McCormick ascribed to him. He did not claim that McCormick had threatened or beaten him.

¶ 28 Defendant testified that he recalled having seen Lou Tessmann, another detective, but could not recall Tessmann ever entering the room while Taylor was talking to defendant. Taylor did not tell defendant to mention James Bell in his statement; defendant did that on his own. Taylor told him that the Hispanic man’s name was Chino, but he did not tell defendant to put down how many times defendant had hit Gomez. Taylor told defendant that there had been nails in the board, but he did not make defendant write that down, and defendant did not. Taylor made defendant write a second statement, telling defendant that the first one was a lie. Asked why Taylor would accuse him of lying if defendant had written what Taylor had ordered him to write, defendant responded, “I don’t know.” Taylor did not tell defendant what to put into the second statement. Defendant

admitted that the booking photograph taken about 24 hours after he spoke to Taylor did not show any swelling to his face.

¶ 29 Defendant next called Taylor, who testified as follows. When defendant wrote his first statement, Taylor was the only officer in the room. For the second statement, Pratt was also present. Defendant decided what to put into the statements.

¶ 30 Charlie Mae Kynard testified for defendant as follows. On May 24, 1990, she and Ann Almond were walking on Wadsworth. As they approached the intersection with 10th Street, Kynard saw “three guys running.” One of the men was wearing a gray jogging suit with long pants; there was blood on one of the suit’s sleeves. About 10 minutes later, the three men came running back on the south side of 10th Street. Defendant, whom Kynard had known for a few months, was not among the three men. The police interviewed Kynard later that evening. She told them that she could not identify any of the three men, because she had not had a good look at their faces. About a day later, Kynard learned that defendant had been arrested for the attack on Gomez and Estrada. However, she did not go to the police or the State’s Attorney’s office to say that defendant was not among the men whom she had seen. She did speak to defendant’s lawyer. Later, Kynard spoke to Frank Bullock, defendant’s attorney’s investigator, but she did not tell him that Bell had been one of the three men.

¶ 31 In rebuttal, Bullock testified that he spoke to Kynard on December 7, 1990, and that she told him that she had recognized Bell as one of the three men running away. McCormick testified that he did not enter the interview room while Taylor and Pratt were interviewing defendant and he never looked into the room at that time. Richard Davis and Yarc, Waukegan police detectives, each testified that, on May 25, 1990, they went to defendant’s house and spoke to Maggie Davis. Both

detectives testified that Maggie Davis told them that she did not remember seeing defendant the previous night and that she did not see him at all on May 24, 1990.

¶ 32 Pratt testified that, early in the morning of May 25, 1990, he and Tessmann entered the interview room and stayed for 5 to 10 minutes while Taylor was talking to defendant. Pratt entered again as defendant was writing his second statement. Pratt did not see Taylor use any physical force against defendant, and he did not hear Taylor threaten defendant or promise him anything in order to induce him to make a statement. Pratt saw no wounds of any kind on defendant's face. Marquez testified that, at about 5 a.m. on May 25, 1990, he showed Kynard a six-man photographic lineup that included Bell. Kynard could not identify any of the men as among those whom she had seen running, and she did not indicate that she even recognized any of the men in the lineup.

¶ 33 The parties stipulated that Bullock would testify that, on October 26, 1990, Cassandra Davis told him that, on May 24, 1990, at about 5 or 6 p.m., she was at home at 848 South Utica and that, at that time, defendant, Greg Armstrong, and Ronnie Davis, her grandnephew, went to the store.

¶ 34 In its closing argument, the State contended that defendant could be found guilty of murder either as the principal or as an accomplice. The prosecutor began by reminding the jury of the eyewitnesses who had identified defendant. He noted that Estrada had identified defendant from a photograph; while he had not identified defendant in court, defendant now looked very different from his photograph. Also, Bell had testified that he saw defendant commit the attack, although his testimony was admittedly suspect because he was an admitted accomplice. However, that could not be said of the third eyewitness, Ann Almond, who had been reluctant to testify at all and who was visibly fearful while on the stand. Almond, furthermore, "ha[d] no motive to lie." Yet despite her reluctance, she identified both Bell and defendant.

¶ 35 The prosecutor turned next to defendant's written confessions, noting that he had told the police inconsistent stories of his whereabouts before and during the attack. Further, despite later claiming ignorance of the event, he told the police that he had seen three men run by a church and toss away a board. Defendant's claim of physical abuse was undercut by his booking photo, and his claim that Taylor had told him what to put into the first statement was inconsistent with his testimony that Taylor had told him that the first statement was a lie and had to be redone. Further, the evidence was consistent with defendant having fled the crime scene, disposed of some of the evidence, and returned home—all of which would have taken only a few minutes. The alibi witnesses had not spoken up in defendant's favor until the trial, and their testimony was inconsistent.

¶ 36 The prosecutor's closing argument mentioned the bloodstains once. The prosecutor noted that defendant had had "blood on him" when the police picked him up and that, according to Taylor, defendant first said that that it came from wrestling Bell but then said that it came from a scab that he had been picking.

¶ 37 Defendant's attorney began his closing argument by attacking the eyewitness identifications, noting that Ann Almond had identified defendant but also that Almond and Kynard had testified that they had seen blood on the left sleeve of the jogging suit that defendant had been wearing. Referring to the photograph of defendant at booking, counsel continued:

"Where is the blood? That's what Fernandez King was wearing that night. We know it, because we got the photograph. That was taken when he was taken into custody in Waukegan. Where is the blood? There was blood on the left sleeve of the man that she saw running away in the gray jogging suit.

Is everyone getting a good look at this? Where is the blood? Both parties were there. \*\*\* Where is the blood on the left sleeve? It's not there.

We know this is what Fernandez King was wearing. Where is the blood?"

¶ 38 Defendant's attorney continued that Bell, who had identified defendant, had received "the deal of a lifetime to testify" against defendant and therefore would say whatever he needed to help himself. Also, there had been no evidence that Bell and defendant had met before about 9 p.m., so that the State was asking the jury to find that the two men had met and immediately decided that they would commit a murder. Counsel also contended that defendant's written statements had been coerced, and he referred the jury to the alibi witnesses' testimony.

¶ 39 Returning to a discussion of the physical evidence, defendant's attorney noted that no fingerprints or blood evidence from the scene of the crime implicated defendant. As important, the State had conceded that Wilson had testified that the blood on defendant's shorts had been tested but could not be identified as Gomez's blood. Instead, the evidence showed that defendant and Bell had been wrestling after the incident and that the blood got onto defendant's jogging shorts that way. All that could be said was that "it was wet blood." Counsel continued:

"I don't have to prove to you, the defendant doesn't have to prove to you where that blood came from. That's the State's job. \*\*\* That's their job.

Have they done it? No. Does that rise to the level of beyond a reasonable doubt. I believe it does [sic]. Is there blood there? Did Taylor videotape the confession? No."

¶ 40 Counsel returned to the alibi testimony and the weaknesses in the State's evidence. Near the end of his argument, he again asked, "Where is the blood? Where is the blood?"

¶ 41 In rebuttal, the prosecutor first responded to the rhetorical question, stating that there had been blood on defendant’s jogging shorts—and that the stained portion had been removed and tested by Wilson. Thus, “Officer Taylor [did not] manufacture those pants.” The sleeve of defendant’s jogging suit had also been stained by blood. That Bell’s clothing may have had blood on it meant little, as “[h]e was a murderer too.” Almond, Kynard, and Estrada had consistently testified that they had seen three black men running from the scene, and the other occurrence witnesses had not undermined this consistency. Defendant’s theory that the police had coerced him into confessing was refuted by the preservation of defendant’s earlier written statement, even though it was inconsistent in some ways with his second statement. Also, had Taylor been trying to frame defendant by dictating what to put into the first statement, he would not have obtained a second statement from defendant.

¶ 42 The jury found defendant guilty, and the trial court sentenced him to 40 years’ imprisonment. On appeal, defendant’s counsel moved to withdraw (see *Anders v. California*, 386 U.S. 738 (1967); *People v. Jones*, 38 Ill. 2d 384 (1967)). We granted the motion and affirmed the judgment. *People v. King*, No. 2-91-0146 (1992) (unpublished order under Supreme Court Rule 23).

¶ 43 On October 14, 2005, defendant petitioned for scientific testing of physical evidence. His petition alleged that identity had been the central issue at his trial; that some of the physical evidence used at the trial had bloodstains that might contain DNA that could identify the perpetrator and exclude defendant; and that the DNA testing, which had been unavailable at the time of the trial, had the potential to produce new, noncumulative evidence that was relevant to defendant’s assertion of actual innocence. On April 12, 2006, the trial court granted defendant’s petition, ordering a forensic biologist to test the blood on defendant’s sweat shorts against standards from the victim and to report

specifically whether the blood on the sweat shorts was “from the victim in this case.” On June 30, 2006, the trial court noted that it had received the test results, and it allowed defendant to file a motion for a new trial or for what other relief might be available.

¶ 44 On October 25, 2007, defendant, represented by Stone & Associates, LLC (Stone), filed a petition under the Act, alleging as follows. In obtaining the guilty verdict, the State had relied heavily on the evidence, both physical and testimonial, that blood had been on defendant’s sweat shorts very shortly after the attack on Gomez and Estrada. In its closing argument, and especially its rebuttal closing argument, the State had cited the bloodstain evidence as connecting defendant to the crimes. Although Wilson had testified that the source of the blood could not be determined, the State had implicitly argued to the jury that Gomez had been the source. This implication was crucial, given the weaknesses in the eyewitness testimony and defendant’s confessions. However, according to the forensic biologist who had tested the sweat shorts, the DNA profile of the bloodstain was consistent with coming from “a mixture of defendant [the major profile] and at least one unknown individual [the minor profile]”—but, crucially, Bell, Kim, and Gomez were all excluded as the source of the minor profile. Thus, the DNA evidence would likely change the result on retrial. Defendant asked the court to order a new trial or to hold an evidentiary hearing on his petition.

¶ 45 The trial court found that the petition was not frivolous. The State moved to dismiss the petition. The State observed that it had relied primarily on the three eyewitness identifications and defendant’s two confessions. It noted further that the jury had learned from Wilson that he had been unable to determine the source of the blood on defendant’s sweat shorts and from Taylor that the blood was wet more than seven hours after the murder, excluding Gomez as the source. Therefore, the State reasoned, the DNA tests were of no moment.

¶ 46 At a hearing on the State’s motion to dismiss, defendant conceded that, were the case to go to an evidentiary hearing, he would have no evidence to present beyond that set out in his petition. On July 23, 2008, the trial court granted the State’s motion to dismiss the petition. The court’s written order explained that, although the DNA test results were new, noncumulative evidence that could not have been obtained with due diligence at the time of the trial, the new evidence was not “so conclusive that it would probably change the result on retrial.” The court noted the paucity of pertinent blood-related references in the lengthy trial transcript. Further, most of the testimony about the blood on the sweat shorts was minor and not unfavorable to defendant. The DNA evidence established only that most of the blood on the sweat shorts was defendant’s and that the rest came from an unknown person. Thus, considering the eyewitness testimony, the proximity of defendant to the crime scene, and the other evidence on which the State had relied, the evidence at issue was “a minor part of the trial,” and the DNA evidence would not likely change the result on retrial.

¶ 47 On August 18, 2008, still represented by Stone, defendant appealed the judgment dismissing his petition. On March 18, 2009, this court ordered defendant to file the record on appeal and his brief within 10 days or the appeal would be dismissed without further notice. On March 18, 2009, because defendant had not complied with the prior order, we dismissed his appeal with prejudice.

¶ 48 On October 23, 2009, defendant—still represented by Stone—submitted the successive petition. It began by noting that defendant’s appeal from the dismissal of his first petition had been dismissed and that the supreme court had denied defendant’s request to reinstate the appeal. According to the petition, counsel’s admitted “ineffectiveness” should not deprive defendant of the opportunity to have his claim fully litigated. Recognizing that defendant needed to satisfy a “cause and prejudice” test before he could be allowed to file the successive petition (see 725 ILCS 5/122-

1(f) (West 2008)), defendant contended that he had shown “cause” in that the dismissal of his appeal had not been his fault, and “prejudice” in that he was denied his opportunity to have the appellate court review the merits of the dismissal of the first petition.

¶ 49 Defendant’s proposed successive petition was identical to the first petition. He requested that he be allowed to file the petition; that the trial court find that his counsel in the first proceeding had been “ineffective”; and that the court “[a]llow his appeal \*\*\* to proceed.”

¶ 50 On January 15, 2010, the trial court allowed defendant to file his successive petition. On February 1, 2010, defendant did so. The petition requested that the trial court find that his counsel in the first postconviction proceeding was ineffective for allowing the appeal to be dismissed and, if the court did so, allow defendant to file a new notice of appeal and proceed with the appeal from the dismissal of his first petition. Alternatively, defendant requested that the court grant the successive petition on the merits and thus order “a new trial based on the DNA evidence.”

¶ 51 On March 3, 2010, the trial court held that the successive petition stated the gist of a meritorious claim under the Act. On April 14, 2010, the State moved to dismiss the successive petition, reiterating the arguments that it had raised in moving to dismiss the first petition. On June 10, 2010, at a hearing on the State’s motion, the trial judge agreed with the State that it could not reinstate defendant’s appeal from the judgment dismissing the first petition; to do so would in effect defy (or purport to overrule) both the appellate court’s order dismissing the appeal and the supreme court’s order refusing to reinstate the appeal. The judge also held that, on the merits, relief was unavailable. He noted that the successive petition was substantively identical to the first petition. Therefore, because the first petition had been dismissed on the merits, the successive petition was barred by *res judicata*. After the court dismissed the successive petition, defendant timely appealed.

¶ 52 On appeal, defendant argues that the trial court erred in dismissing his successive postconviction petition, because he proved that the newly discovered DNA evidence entitles him to a new trial. The State responds that the dismissal was proper because (1) the successive petition was barred by *res judicata*; and (2) on the merits, defendant did not prove that the DNA evidence merited a new trial. On our *de novo* review (see *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006), *aff'd*, 227 Ill. 2d 39 (2007)), we agree with the State.

¶ 53 Before discussing the propriety of the judgment, we note one matter. Defendant's successive petition contended in part that he was entitled to relief under the Act because, on appeal from the dismissal of his first petition, his counsel was "ineffective" for failing to file the appellant's brief and the record within the time that this court allowed, with the result that the appeal was dismissed and defendant was denied appellate review on the merits. We agree with the State that this claim would entitle defendant to no relief under the Act. "[T]he post-conviction process does not provide a forum by which a defendant may challenge the conduct of counsel at an earlier post-conviction proceeding." *People v. Szabo*, 186 Ill. 2d 19, 26 (1998). Also, any "ineffectiveness" of appellate counsel in the postconviction proceeding would not have been the denial of a *constitutional* right (see 725 ILCS 5/122-1(a)(1) (West 2010)). There is no constitutional right to counsel in a proceeding under the Act. *Pennsylvania v. Finley*, 481 U.S. 551, 558-59 (1987); *People v. Lee*, 251 Ill. App. 3d 63, 64-65 (1993). Thus, if defendant is entitled to any relief, it must be based on his claim of actual innocence based on newly discovered evidence.

¶ 54 We agree with the State that defendant's claim of actual innocence is barred by *res judicata*. A ruling on a postconviction petition has *res judicata* effect on all claims that were raised or could have been raised therein. *People v. Erickson*, 183 Ill. 2d 213, 223 (1998); *People v. English*, 403 Ill.

App. 3d 121, 131 (2010). Defendant's successive petition raised the exact same claim that his first petition raised. Thus, because the trial court in the first postconviction proceeding rejected the claim, the trial court in this case was required to do so as well. Although defendant did not receive appellate review of the merits of the first dismissal, such appellate review is not a prerequisite to the application of *res judicata*.

¶ 55 For closely related reasons, we also conclude that the successive petition was barred by section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)). Under section 122-1(f), the trial court may not allow a defendant to file a successive petition unless the defendant has first established "cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." *Id.* Here, defendant's successive petition did not meet this test, because he *did* bring his claim in his initial postconviction proceedings. He could not show cause for the "failure" to do something that he actually did. Thus, the trial court should never have allowed the successive postconviction to be filed at all. *A fortiori*, the trial court should not have considered the petition on the merits. See *English*, 403 Ill. App. 3d at 130-32.

¶ 56 Although either *res judicata* or defendant's failure to satisfy section 122-1(f) fully disposes of this appeal, we also note that the successive petition was fatally deficient on the merits. To succeed on a claim of actual innocence based on newly discovered evidence, a defendant must show that the proffered evidence is so conclusive that it would probably change the result on retrial. *People v. Johnson*, 205 Ill. 2d 381, 392 (2002). Defendant fell far short of meeting this requirement.

¶ 57 In its case-in-chief, the State introduced strong and variegated evidence of defendant's guilt. The blood on defendant's sweat shorts was at most a minuscule part of this evidence, and, indeed, the State conceded that it was highly inconclusive. Taylor, a prosecution witness, conceded that,

when he interviewed defendant several hours after the murder, the blood on defendant's sweat shorts appeared wet and "shiny," implying that it could not have come from one of the victims of the attack. Wilson, the serologist who had analyzed the blood, conceded that he could say only that its source was a human being. Thus, in the State's case-in-chief, the evidence of the blood on defendant's sweat shorts was not crucial; indeed, it appears not to have been very important at all.

¶ 58 What *was* important to the State's case, and especially to the sole issue—identity—was the testimony of three eyewitnesses along with defendant's two written confessions. Although the State conceded that Bell's testimony was weakened by his obvious bias, it noted with equal force that Ann Almond identified defendant only with the greatest reluctance and despite her fear that she was endangering herself by testifying at all. Also, soon after the attack, Estrada identified defendant from a photographic lineup. Moreover, defendant handwrote two detailed confessions. We cannot assume, or even plausibly speculate, that the jury was reluctant to take him at his (original) word and was swayed only by the presence of unidentified blood that the State's own witnesses conceded could not be tied to the crime.

¶ 59 Although defendant asserts that the foregoing evidence had grave weaknesses, we cannot assume that the jury that found him guilty felt the same way. Moreover, defendant's attacks on the State's evidence are far from compelling. The credibility of the eyewitnesses was for the jury to decide. The mere fact that Bell had an obvious bias and testified only minimally did not make him inherently incredible; the jury may well have believed him. And Estrada and Almond were far stronger witnesses; the former had had nothing to gain by implicating defendant and the latter had been convinced that she would have a great deal to lose by doing so.

¶ 60 Defendant's insistence that his two confessions were unreliable because they were coerced was contradicted by the State's evidence to the contrary. We cannot assume or even reasonably infer that the jury accepted defendant's version of the interrogation that led to the confessions. (Indeed, before trial, the trial court had denied defendant's motion to suppress his statements, so we *know* that the trial judge did not accept defendant's account.) Moreover, defendant's account had glaring weaknesses. Although he asserted that Taylor had dictated the contents of the first statement, he also testified that Taylor had made him write the second statement because the first statement was a lie. Defendant conceded that he could not explain this contradiction. He also conceded that Taylor had not told him what to put into the second statement. Moreover, although defendant testified that he had not known, in advance of the interview, about the crime, he wrote out two statements that placed him at the scene and contained later-corroborated details about the incident.

¶ 61 In contending that the DNA evidence would likely change the result of the case on retrial, defendant relies not on the State's evidence at trial but only on the prosecution's rebuttal closing argument—specifically, the prosecutor's response to defendant's attorney's rhetorical question, "Where is the blood?" For the reasons that we have given, the strength of the State's evidence convinces us that this exchange in closing arguments was not crucial to the jury's decision to convict defendant. Further, defendant's attorney's question appears to have focused on the blood that allegedly had been on the sleeve of defendant's jogging shirt but, according to defendant's attorney, was not visible in the postarrest photograph of defendant. The prosecutor replied that there had been blood on the sweat shorts (although he did not assert that it came from an identified source) and that there had been other evidence that defendant's shirt had been stained by blood. We are convinced that, in all probability, the jury would have convicted defendant no matter what it had heard on the

subject of who (aside from defendant) left the blood that was found on defendant's sweat shorts. Whether the bloodstain at issue came from Gomez, Bell, or someone unconnected with the crime, it was not so crucial to the trial that the newly discovered evidence about its source(s) would likely have led to a different result.

¶ 62 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 63 Affirmed.