

No. 1-11-0506

**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. 96 CR 18348
	)	
ERIC LASH,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE REYES delivered the judgment of the court.  
Justices Hall and Gordon concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant's sentence was vacated and resentencing occurred on remand, defendant's subsequent filing under the Post-Conviction Hearing Act is an initial petition. This cause must be remanded for a third-stage evidentiary hearing when defendant made a substantial showing of actual innocence and the State concedes the existence of factual issues.

¶ 2 Defendant Eric Lash appeals from the circuit court's denial of relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). On appeal, defendant contends the circuit court improperly treated his petition as a successive petition because a defendant's first postconviction petition after resentencing is not a "successive" petition under the

Act. Defendant further argues the administrative imposition of a term of mandatory supervised release (MSR) by the Department of Corrections (DOC) violates due process and the separation of powers, and, therefore, the MSR term which he must serve upon his release from prison is void. Defendant finally contends that this cause must be remanded for third-stage proceedings under the Act because he made a substantial showing of actual innocence. We reverse and remand for an evidentiary hearing on defendant's claim of actual innocence.

¶ 3 BACKGROUND

¶ 4 Following a joint bench trial in July 1997, defendant and codefendant Parise Tolbert were convicted of aggravated discharge of a firearm and first degree murder under a felony-murder theory in the shooting death of the victim Donetta Poole. The convictions merged at sentencing and defendant was sentenced to natural life in prison. Because defendant's postconviction claim is one of actual innocence, it is necessary to set out the trial evidence in some detail.

¶ 5 At trial, the evidence established that the victim was shot and killed by a stray bullet fired from the weapon of Joseph Taylor during an altercation with a group which included defendant, Tolbert and Carlos Bellamy. Defendant, Tolbert and Bellamy were indicted for, *inter alia*, first degree murder based upon a felony murder theory with the predicate felony being mob action. Defendant and Tolbert proceeded to a joint bench trial.

¶ 6 At trial Assistant State's Attorney John Kirby testified that after speaking with Bellamy at a police station, he transcribed Bellamy's statement. This statement was then admitted into evidence and published without objection.

¶ 7 In his statement, Bellamy stated that he was a member of the Gangster Disciples gang (GD), and "hung out" on 64th and Talman with fellow GDs defendant, Derrick Lash (Derrick),

Tolbert, Richard Barnes, and "Little Kenny." He further stated that he used to hang out with the GDs at 64th and Fairfield which included, among others, Joseph Taylor and Dantae Redding.<sup>1</sup>

¶ 8 On June 21, 1996, Bellamy and Little Kenny went to 64th and Fairfield to talk to Redding because Redding had been disrespecting Little Kenny. A verbal altercation ensued. Later that evening, Bellamy and Little Kenny were approached by a group including Redding and Taylor. Another encounter then occurred. Bellamy and Redding were eventually separated. As Redding and his companions were departing after the argument, one yelled they were going to "strap up," that is, get guns. About an hour later, defendant, Derrick, and Tolbert arrived in defendant's van. After Bellamy told them what happened, defendant suggested the group go over to "Fairfield." Once there, defendant began arguing with Redding. Taylor was also present. Eventually the men began fighting. When Bellamy and his group left, someone from the Fairfield group yelled that it was "on," and Derrick responded they would be back. The men then went to a location where they kept their weapons. There, defendant armed himself with a .380. Defendant then drove to collect Richard Baines, and the group went to Taylor's residence. At one point, defendant yelled that Taylor was coming. Bellamy observed Taylor jogging toward him holding a .45. Taylor then fired at the van. As Bellamy ran to the van, he saw Derrick and Tolbert fire either at Taylor, or in Taylor's direction. As Bellamy's group drove away, Derrick again fired at Taylor.

¶ 9 Richard Baines, who had a pending home invasion case at the time of trial and had previously pled guilty to possession of a controlled substance, testified that he entered a van with defendant, Derrick, Tolbert, and Bellamy. Defendant was driving the vehicle. Once inside, the men told him that they were "locking up" on Fairfield, *i.e.*, going there for a fight. He testified consistently with Bellamy's statement regarding the arrival of Taylor. After a verbal altercation with Derrick, Taylor fired his weapon. Baines also observed Derrick and Tolbert fire their

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<sup>1</sup>Redding's first name is also spelled Dante in the record.

firearms. Ultimately, everyone returned to the van and defendant drove them away. As they left, defendant noticed Taylor standing in a gangway and Derrick shot at him.

¶ 10 Joseph Taylor testified he was the person responsible for firing the bullet which killed the victim. He identified Baines, Derrick, Tolbert and Bellamy as present when the shooting occurred.

¶ 11 Ultimately, the trial court found defendant guilty of mob action, aggravated discharge of a firearm, and felony murder predicated upon mob action. Defendant was subsequently sentenced to natural life in prison. Defendant's convictions and sentence were affirmed on direct appeal. *People v. Lash*, Nos. 1-98-0823, 1-98-0824 (cons.) (1999) (unpublished order under Supreme Court Rule 23).

¶ 12 In 2000, defendant filed a postconviction petition alleging his indictment for mob action was improperly amended without being presented to the grand jury, and the statute pursuant to which he was convicted was found unconstitutional. The circuit court denied defendant relief. On appeal, this court vacated defendant's sentence and remanded the cause for resentencing, while affirming all other aspects of the circuit court's ruling. *People v. Lash*, No. 1-01-1105 (2002) (unpublished order under Supreme Court Rule 23).

¶ 13 On remand, defendant was sentenced to 40 years in prison in September 2004. In January 2005, he filed a *pro se* motion to reconsider sentence. Defendant then filed a *pro se* motion for postconviction relief alleging, *inter alia*, ineffective assistance of trial and appellate counsel. After the circuit court found that the petition demonstrated a gist of a claim of a constitutional deprivation, the petition was docketed and postconviction counsel was appointed.

¶ 14 Defendant then filed a *pro se* supplemental postconviction petition alleging, *inter alia*, he was actually innocent and he was denied due process when the trial court failed to inform him of

the term of MSR he must serve upon his release from prison. The petition was supported by the affidavits of defendant, Derrick, Bellamy, Tolbert, and Joann Davies.

¶ 15 In his affidavit, defendant averred that after he was involved in the fight, he was dropped off at his mother's home by Derrick, Tolbert and Bellamy. According to defendant, he remained there with Davies until Derrick, Tolbert, Bellamy, and Baines arrived and told him about the shootout. Bellamy's affidavit stated he mistakenly told the police defendant drove the van back to 64th and Fairfield because he was scared. According to Bellamy, Derrick actually drove the van and dropped defendant off at his mother's home. Bellamy's affidavit further indicated this was the first opportunity he had to correct his statement. Derrick's affidavit stated he drove the van back to Fairfield after taking defendant home. Derrick contended he could not have provided this information at the time of defendant's trial because he was wanted in connection with this offense. Tolbert's affidavit stated that defendant did not go back to Fairfield and that Tolbert would have testified to this at trial, but his attorney would not allow him to testify. Davies claimed defendant was at his mother's house with her when Derrick and some of their friends arrived and told them about the shooting.

¶ 16 At a March 2009 hearing, the State informed the court defendant had filed not only a *pro se* postconviction petition, but also a *pro se* supplemental petition and a *pro se* motion to amend the petition. The State then asked the court to strike these filings. Postconviction counsel requested the court not to strike the documents, as she did not have copies. The court then stated in view of the fact that defendant was represented by counsel, "supplemental motions will be denied" and instructed the State to tender copies of everything to counsel.

¶ 17 In 2010, postconviction counsel filed a supplemental petition for postconviction relief alleging defendant's felony murder conviction should be vacated because mob action is not a forcible felony and the indictment charging defendant with mob action was rendered defective by

its failure to set forth the essential mental state element of the offense. The supplemental petition also asked the court to consider defendant's motion to reconsider sentence and incorporated all the allegations contained in defendant's previous postconviction petitions and motions to reduce sentence. Attached in support were, *inter alia*, the affidavits of Bellamy, Tolbert, Derrick, and Davies

¶ 18 The State then filed a motion to dismiss alleging, in pertinent part, defendant had failed to obtain leave of court prior to filing a successive postconviction petition. The motion also argued all *pro se* filings made after the appointment of counsel "should be stricken." At a subsequent hearing, the court stated there had been numerous *pro se* motions filed by defendant and several issues raised in those filings were adopted by postconviction counsel and incorporated into her filings. Ultimately, the court granted the State's motion to dismiss, stating that in "regards to the successive petition, whether or not this is a successive petition," the issues raised in the instant proceeding were not new and had not survived the cause-and-prejudice test.

¶ 19

#### DISCUSSION

¶ 20 On appeal, defendant first contends that the circuit court erred when it characterized the instant postconviction petition as successive because his resentencing constituted a separate "conviction" for purposes of the Act, and, consequently, the instant petition represents the first opportunity for him to raise his claims in a postconviction proceeding following resentencing. Defendant relies on *People v. Hager*, 202 Ill. 2d 143, 149-50 (2002), to argue that because a postconviction petition can only be filed by a defendant who has been "convicted," that is, a defendant who was subjected to a final judgment which included a conviction and a sentence, the instant petition should be treated as an initial petition. See also *People v. Woods*, 193 Ill. 2d 483, 488-89 (2000). Defendant further contends that because the instant petition was not a successive

petition, the circuit court erred in granting the State's motion to dismiss based upon the petition's failure to meet the requirements of the cause-and-prejudice test.

¶ 21 The State on the other hand, contends the instant petition is a successive petition because defendant filed a postconviction petition in 2000 which was summarily dismissed. The State further argues despite defendant's failure to seek leave to file the instant petition and the circuit court's failure to grant such leave, the court addressed the substance of defendant's claims on the merits. Although the State concedes the court discussed the cause-and-prejudice test in granting the motion to dismiss, the State argues the cause-and-prejudice test was not the basis of the court's denial of postconviction relief, and that this court may affirm the court upon any basis supported by the record.

¶ 22 *People v. Hager*, 202 Ill. 2d 143 (2002) is instructive. In that case, the question before our supreme court was when the six-month limitation period for filing a postconviction petition began to run when the defendant's sentence had been vacated on appeal and the matter remanded for resentencing. The court determined for purposes of the Act, there is no "conviction" for a defendant to challenge through a proceeding under the Act until he has been resentenced. *Hager*, 202 Ill. 2d at 149-50 (the Act requires that a defendant be "convicted," *i.e.*, "a final judgment which includes both a conviction *and* a sentence" (emphasis in original)).

¶ 23 Here, defendant was convicted and sentenced in 1997. Subsequently, in 2002, this court vacated defendant's sentence and remanded the cause for resentencing. When that sentence was vacated, the conviction, for purposes of the Act, ceased to exist. See *Hager*, 202 Ill. 2d at 149-50. Accordingly, defendant's 2005 postconviction petition could not be a successive challenge to his first conviction because that conviction no longer existed. Rather, the instant petition was defendant's initial challenge to his new conviction, the conviction entered when he was resentenced. In fact, the 2004 conviction is the only conviction that exists for the purposes of the

Act. Because this was defendant's first postconviction challenge to the conviction created following resentencing in 2004, the petition should have been treated as an initial postconviction petition. See *Hager*, 202 Ill. 2d at 149; see also *People v. Inman*, 407 Ill. App. 3d 1156, 1162 (2011) (order sentencing defendant on remand constitutes separate "conviction" for purposes of the Act). Accordingly, as the instant petition was not a successive petition, it should not have been subjected to the cause-and-prejudice test. However, because this court reviews the dismissal of a postconviction petition without an evidentiary hearing *de novo* (*People v. Pendleton*, 223 Ill. 2d 458, 473 (2006)), we still may reach the merits of defendant's contentions on appeal.

¶ 24 At the second stage of proceedings under the Act, the circuit court determines whether the defendant has made a substantial showing of a constitutional violation, and if such a showing is made, the defendant's petition proceeds to the third stage for an evidentiary hearing; if no such showing is made, the petition is dismissed. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). All well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true. *Pendleton*, 223 Ill. 2d at 473.

¶ 25 On appeal, defendant contends that he was improperly denied postconviction relief because his MSR term is void and his petition made a substantial showing of actual innocence. Before reaching the merits of defendant's contentions, however, this court must address the State's argument that defendant cannot raise these claims on appeal because neither issue was properly before the circuit court. The State argues defendant's *pro se* filings made after the appointment of postconviction counsel were stricken by the court, and, consequently claims raised in those filings cannot be heard for the first time on appeal.

¶ 26 The record reveals defendant filed a *pro se* supplemental petition alleging actual innocence and his MSR term was void after the appointment of postconviction counsel. When

the State requested the court to strike the *pro se* supplemental postconviction petition, the circuit court stated that in view of the fact defendant was represented by counsel, "supplemental motions will be denied." The State renewed this argument in its motion to dismiss, contending all *pro se* filings subsequent to the appointment of postconviction counsel "should be stricken." The fact the State continued to urge the trial court to strike the *pro se* filings made after the appointment of postconviction counsel leads to the conclusion the court did not grant the State's initial motion to strike. In any event, the supplemental postconviction petition filed by counsel stated it incorporated all allegations contained in defendant's previous *pro se* petitions. Attached to the motion in support were, *inter alia*, the affidavits of Bellamy, Tolbert, Derrick, and Davies. Based on the record before us, including the circuit court's references to defendant's *pro se* claims as it granted the State's motion to dismiss, this court concludes the claims raised in defendant's *pro se* supplemental petition were before the circuit court, and may therefore be properly raised in this appeal.

¶ 27 The State contends, however, that even if defendant's claim regarding his MSR term was properly before the circuit court, this claim must fail as the imposition of MSR was imposed by operation of law rather than by the DOC. We agree.

¶ 28 Here, defendant was resentenced to 40 years in prison in 2004. At that time, the Unified Code of Corrections (the Code) provided that "every sentence shall include as though written therein a term in addition to the term of imprisonment \* \* \* such term shall be identified as a mandatory supervised release term \* \* \* [which] shall be as follows: (1) for first degree murder or a Class X felony, 3 years." 730 ILCS 5/5-8-1(d)(1) (West 2004). As a term of MSR is mandated by statute, courts have no authority to withhold the mandatory MSR term when imposing a sentence. *People v. Whitfield*, 217 Ill. 2d 177, 200-01 (2005); *People v. McCurry*, 2011 IL App (1st) 093411, ¶ 16. Our supreme court has held the enactment of the MSR statute

was within the power of the legislature and did not violate the separation of powers clause of the Illinois Constitution. *People ex rel. Scott v. Israel*, 66 Ill. 2d 190, 194 (1977); see also *People v. Lee*, 2012 IL App (4th) 110403, ¶ 38.

¶ 29 Although defendant is correct that the September 2004 resentencing order does not indicate the term of MSR to which he is subject, the DOC website, of which this court may take judicial notice (*People v. Henderson*, 2011 IL App (1st) 090923, ¶ 8), reflects a three-year term. This court rejects defendant's contention that it was the DOC which imposed the MSR term because the imposition of an MSR term is automatic, pursuant to statute, when the trial court imposes sentence (*People v. Horrell*, 235 Ill. 2d 235, 242-43 (2009)). Defendant has failed to explain how the DOC's ministerial act of recording the term of MSR he must serve translates into an improper addition of a term of MSR to his sentence. Thus, defendant's claim that the DOC imposed the MSR term must fail. *Lee*, 2012 IL App (4th) 110403, ¶ 38.

¶ 30 This court is unpersuaded by defendant's reliance on *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936), and *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006). In *Hill*, the trial court sentenced the defendant to 18 months in prison and imposed a fine. Then the clerk of the court, following local "practice," added the condition that the defendant remain in custody until the fine was paid. *Hill*, 298 U.S. at 461-62, 465. The Supreme Court held the clerk did not have the power to alter the sentence imposed by the court, and consequently, the additional condition was void. *Hill*, 298 U.S. at 465-67. In the case at bar, unlike *Hill*, the three-year term of MSR was automatically applied pursuant to statute rather than without authority.

¶ 31 With regard to defendant's reliance on *Earley*, our supreme court recently rejected a similar argument. In *People v. Evans*, 2013 IL 113471, ¶ 15 (Feb. 22, 2013), the court first stated that decisions of the Second Circuit Court of Appeals interpreting New York state law had no authority to stop the enforcement of Illinois statutes. Consequently, even were the court to

assume that decision in *Earley* was correct, the decision had "absolutely no consequence in Illinois unless and until" an Illinois court accepted its analysis and then applied that analysis to section 5-8-1(d)(1) of the Code. *Evans*, 2013 IL 113471, ¶ 15. Therefore, the defendant in that case was not free to assume, based upon *Early*, that section 5-8-1(d)(1) would not be enforced against him. *Evans*, 2013 IL 113471, ¶ 15. The court then noted *Earley* was decided in June 2006, more than a year after the defendant was sentenced. *Evans*, 2013 IL 113471, ¶ 16. Consequently, defendant can not now rely on a decision made after his sentencing as support for his ignorance of the law at the time of his sentencing. *Evans*, 2013 IL 113471, ¶ 16.

¶ 32 Ultimately, as the MSR term was necessarily and automatically included in defendant's sentence, the three-year term of MSR is not void, and defendant's claim must fail. *Whitfield*, 217 Ill. 2d at 200-01; 730 ILCS 5/5-8-1(d)(1) (West 2004).

¶ 33 Defendant next contends that he made a substantial showing of a claim of actual innocence. He argues that the affidavits of Bellamy, Tolbert, Derrick, and Davies establish that he was at his mother's home at the time of the shooting.

¶ 34 A freestanding claim of actual innocence is cognizable under the Act because a wrongful conviction of an innocent person violates due process under the Illinois Constitution. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). A defendant can raise a freestanding claim of actual innocence based on newly discovered evidence in a postconviction proceeding. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). The evidence in support of the claim must be (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result at retrial. *Ortiz*, 235 Ill. 2d at 333. Newly discovered evidence is "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *Ortiz*, 235 Ill. 2d at 334. Thus, here, the relevant inquiry is whether defendant has made a substantial showing of actual innocence such that a

third-stage evidentiary hearing is warranted. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 34; see also *People v. Domagala*, 2013 IL 113688, ¶ 35 (Apr. 18, 2013) (at the second stage, a defendant has the burden to make a substantial showing of a constitutional violation).

¶ 35 Here, the facts contained in the affidavits of Derrick, Bellamy, and Tolbert are not cumulative of the evidence presented at trial because they indicate, rather than being present at the scene of the shooting, defendant was at his mother's residence. Additionally, these affidavits constitute new evidence in that neither Derrick nor Tolbert were available to testify at trial, Derrick because he was wanted in connection with the shooting and Tolbert because his attorney would not allow him to testify at the joint bench trial. See *People v. Molstad*, 101 Ill. 2d 128, 134-35 (1984) (posttrial affidavits of codefendants averring that the defendant was not present during the offense constituted newly discovered evidence, even though the defendant knew these facts before trial, because no amount of diligence could have forced the codefendants to incriminate themselves). Taken as whole, the facts contained in the affidavits are of such a conclusive character they could alter the result if defendant were retried. See *Ortiz*, 235 Ill. 2d at 333. Here, the affidavits establish defendant did not accompany his friends back to the Fairfield neighborhood and was not present at the time of the shooting. At trial, Baines's testimony and Bellamy's statement identified defendant as the driver of the van and placed him at the shooting. Bellamy's affidavit, however, indicates that it was actually Derrick who drove the van and that he identified the wrong brother in his statement because he was scared. Although Bellamy could be impeached with his prior inconsistent statement at retrial, his testimony, combined with that of Tolbert, Derrick, and Davies, is not cumulative of what was presented at trial. *Ortiz*, 235 Ill. 2d at 333. At retrial, assuming Baines testified consistently with his trial testimony, the testimony of Bellamy, Tolbert, Derrick, and Davies would contradict Baines and exonerate defendant. Where a witness statement both exonerates a defendant and contradicts the statement of a State witness,

it can be capable of producing a different outcome on retrial. See *Ortiz*, 235 Ill. 2d at 336-37 (at retrial, the factfinder must determine witness credibility in light of the new evidence and balance conflicting eyewitness accounts).

¶ 36 This court notes the State makes no argument regarding the merits of this issue on appeal, contending because this claim involves "factual and not merely legal issues, it would be improper for [the State] to address the substance of these claims before this Court, for to do so would [serve] to forfeit any number of requisite legal rulings to be made on issues of fact and credibility." This court is foreclosed from any fact-finding at the second stage of proceedings under the Act. See *Pendleton*, 223 Ill. 2d at 473 (all well-pled facts that are not positively rebutted by the record are taken as true). It is for the trial court, at a third-stage evidentiary hearing, to resolve evidentiary conflicts, weigh credibility, and determine the weight to be given testimony and evidence. *Domagala*, 2013 IL 113688, ¶ 46. Accordingly, we remand this cause for a third-stage evidentiary hearing on the issue of actual innocence.

¶ 37 For the reasons stated above, we affirm the judgment of the circuit court of Cook County in part and reverse in part.

¶ 38 Affirmed in part; reversed in part.