

2013 IL App (1st) 112370-U

FIFTH DIVISION
June 7, 2013

No. 1-11-2370

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 71 C 1267
)	
EUGENE HORTON,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly dismissed defendant's *pro se* section 2-1401 petition where the petition failed to raise a meritorious claim of actual innocence.
- ¶ 2 Defendant Eugene Horton appeals from the denial of his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). On appeal, defendant contends that his section 2-1401 petition based on his claim of actual innocence of first-degree murder should be remanded for further proceedings where he

presented the affidavit of a codefendant exonerating him from participation in the crime. We affirm.

¶ 3 On March 21, 1971, Terry Tomalak, a social worker, was beaten and stabbed to death in the apartment of Jacqueline Mack. Defendant and his two codefendants, Felton Peck and defendant's brother George Horton, were charged with the murder of Tomalak. Peck was tried separately and convicted.

¶ 4 The evidence at the Hortons' jury trial showed that Mack testified that defendant, George, and Patsy Taylor came to visit her the evening of March 21, 1971. Later, Tomalak and Peck joined the group. Mack testified that Tomalak and Peck began to argue, and someone hit Tomalak, who fell into Mack's bedroom. Defendant and his codefendants followed Tomalak into the bedroom and all three beat him with bottles. Mack attempted to call the police, but was restrained by Peck. Defendant and his codefendants continued to beat Tomalak until he was crying and pleading for his life. Mack then saw Tomalak running toward the front door and being stabbed in the back by Peck. When Tomalak fell to the floor, Mack saw defendant pick up the knife. Mack ran into her bedroom and heard the struggle continue. When she looked out of the bedroom door, she saw Tomalak lying on the floor. Patsy Taylor corroborated Mack's testimony, and testified that she saw Tomalak in the bedroom with defendant and his codefendants while Tomalak's head was covered in blood.

¶ 5 Defendant testified that he was present in the apartment, but denied having assaulted Tomalak. Instead, he testified that he watched the fight between Peck and Tomalak, and saw George break up the fight. When he left the apartment, Tomalak was alive.

¶ 6 Defendant and George were found guilty and each was sentenced to a term of 100 to 150 years' imprisonment.

¶ 7 In their consolidated direct appeal, neither defendant nor his brother George challenged the sufficiency of the evidence. Instead, they asserted various prosecution errors, and alleged that the trial court erred in admitting certain evidence, their privilege against self-incrimination under the Fifth Amendment was violated, and certain hearsay statements were improperly allowed into evidence. They also claimed error in the withholding from them of certain grand jury minutes and finally contended that the sentences were excessive. In affirming defendant and George's convictions, the court stated there was evidence that the Hortons were accountable for the actions of Peck, and that the State presented overwhelming evidence of guilt. *People v. Horton*, 14 Ill. App. 3d 957, 961-62 (1973).

¶ 8 Defendant has since filed, *pro se*, various petitions for post-conviction relief, DNA testing, relief from judgment, *habeas corpus*, and *mandamus*. Each was dismissed or denied by the circuit court, and this court affirmed those judgments. See *People v. Horton*, 47 Ill. App. 3d 915 (1977); see also *People v. Horton*, Nos. 1-86-2483 (1988); 1-00-3874 (2001); 1-01-1866 (2002); 1-01-3814 (2002); 1-02-2132 (2003); 1-04-0097 (2005) (unpublished orders under Supreme Court Rule 23).

¶ 9 On March 30, 2009, defendant filed a *pro se* petition pursuant to section 2-1401 of the Code, asserting that the sentencing court's admonishments regarding his right to file a motion to reduce his sentence were lacking, and that he was denied his right to present witnesses in mitigation. Appended to the petition was defendant's own affidavit and the affidavit of his codefendant brother, George Horton. In defendant's affidavit, he averred that he witnessed George and Peck attack and stab Tomalak to death, but he did not participate in the murder. George attested in his affidavit that he and Peck killed Tomalak and that defendant, although present at the scene, did not participate. George stated that he would have testified to that effect

at trial and at sentencing if his attorney would have allowed him to do so. The circuit court dismissed this petition on April 7, 2009.

¶ 10 On April 17, 2009, defendant filed an amended *pro se* petition pursuant to section 2-1401 of the Code, again asserting that the sentencing court failed to admonish him adequately regarding his right to file a motion to reconsider his sentence. He also asserted that he did not know he had the right to the assistance of counsel in preparing such a motion and the right to "compel attendance of witnesses known to be willing to testify to evidence of actual innocence of [defendant] at such available hearing." On May 22, 2009, the circuit court dismissed defendant's amended section 2-1401 petition.¹

¶ 11 On March 7, 2011, this court remanded the section 2-1401 petition to the circuit court for compliance with *People v. Laugharn*, 233 Ill. 2d 318 (2009). *People v. Horton*, No. 1-09-1664 (2011) (dispositional order). The State filed neither a response to the section 2-1401 petition nor a motion to dismiss the petition. On June 21, 2011, the trial court *sua sponte* dismissed defendant's petition, stating that defendant raised the same issues that he raised in his previous petitions, and incorrectly stated that a codefendant had testified against him at trial.

¶ 12 On appeal, defendant contends that his petition should be remanded for further proceedings because it included an affidavit from his codefendant brother George claiming that defendant did not participate in the offense and thus was actually innocent of the murder.

¶ 13 When a court dismisses a defendant's 2-1401 petition based on the pleadings and with no responsive pleadings filed, this court applies a *de novo* standard of review. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). Under this standard, we review the disposition rather than the reasoning

¹For the remainder of this order, we will refer to both defendant's March 30 and April 17 petitions collectively as defendant's "2-1401 petition."

of the circuit court and the review is "completely independent of the trial court's decision."

People v. Anderson, 2012 IL App (1st) 103288, ¶ 34.

¶ 14 We initially note that the State contends, and we agree, that defendant failed to raise an actual innocence claim in his section 2-1401 petition. Instead, defendant alleged in his petition that the sentencing court provided him with inadequate admonishments regarding his right to file a motion to reconsider his sentence, and to present witnesses in mitigation at his sentencing hearing. Defendant has thus forfeited his actual innocence claim on appeal. See *People v. Bramlett*, 347 Ill. App. 3d 468, 475 (2004) (finding the defendant forfeited his issue on appeal by failing to raise it in his section 2-1401 petition).

¶ 15 Defendant maintains, however, that because section 2-1401 is to be construed liberally to accomplish the goal of granting relief when necessary to achieve justice (*People v. Lawton*, 212 Ill. 2d 285, 298 (2004)), and because Illinois allows the liberal construction of pleadings (735 ILCS 5/2-603(c) (West 2008)), the allegations in his petition sufficiently raised an actual innocence claim. Defendant maintains that this is particularly true where he referred to the phrase "actual innocence" in his petition, and attached an affidavit from his codefendant averring defendant did not participate in the murder. In support, defendant cites to inapplicable cases which interpreted pleading standards not at issue in this case. See *Erickson v. Pardus*, 551 U.S. 89 (2007); *Webb v. Lane*, 222 Ill. App. 3d 322 (1991) (actions brought under 42 U.S.C. § 1983). Likewise, *Illinois Graphics Co., et al. v. Nickum*, 159 Ill. 2d 469 (1994), and *Laubner v. JP Morgan Chase Bank, N.A.*, 386 Ill. App. 3d 457 (2008), relied on by defendant, are inapplicable to the case at bar where neither applies section 2-1401 of the Code. We thus find that defendant's attempt to rephrase the sentencing issue in his petition as an actual innocence claim on appeal fails to avoid forfeiture.

¶ 16 Forfeiture aside, we find that defendant is not entitled to relief under section 2-1401 of the Code. A section 2-1401 petition for relief from a final judgment is the forum in which to correct all errors of fact occurring in the prosecution of a matter that were unknown to the defendant and the court at the time judgment was entered, which, if then known, would have prevented its rendition. *People v. McLaughlin*, 324 Ill. App. 3d 909, 917 (2001). However, where a section 2-1401 petition is filed more than two years after the judgment was entered, it cannot be considered. *McLaughlin*, 324 Ill. App. 3d at 917; 735 ILCS 5/2-1401(c) (West 2010). "To obtain relief under section 2-1401, the defendant 'must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.'" *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003), quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986).

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

¶ 18 Even assuming, *arguendo*, that defendant diligently presented his claim and timely filed his petition, we find that he has failed to establish a meritorious claim of actual innocence. George's affidavit was not of such conclusive character as would probably change the result upon retrial. The affidavit did not negate defendant's accountability for the murder of Tomalak. In

addition, that affidavit conflicts with an affidavit George Horton certified on June 9, 2004, wherein George Horton stated, "I am completely innocent of the charges made against me and none of my actions harmed the victim in any way."

¶ 19 Pursuant to section 5-2(c) of the Criminal Code of 1961, a person is legally accountable for another person's criminal conduct when, "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." Ill. Rev. Stat. 1971, ch. 38, par. 5-2(c), now codified at 720 ILCS 5/5-2(c) (West 2010). This provision of the Code does not deviate from the common law rule of common design, *i.e.*, where two or more people engage in a common criminal design, any acts in furtherance of that design committed by one of the persons are considered to be the acts of all, and all are equally responsible for the consequences. *People v. Rodriguez*, 229 Ill. 2d 285, 289 (2008).

¶ 20 Actual innocence means total vindication or exoneration. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). George's affidavit did not completely exonerate defendant from accountability for the crime where it placed defendant at the scene. George's affidavit claimed that defendant did not participate in the crime and sided with the victim. At most, the affidavit merely played down defendant's involvement in the murder. Moreover, George's assertion that defendant was merely present and did not participate in the offense was cumulative and consistent with defendant's testimony at trial. Defendant admitted at trial that he was present in the apartment during the murder, but denied assaulting Tomalak. The situation here is thus in contrast to *People v. Ortiz*, 235 Ill. 2d 319, 336 (2009), cited by defendant, where the defendant's supporting affidavit, and the witness' subsequent testimony at a hearing, provided evidence that no other defense witness offered at trial. In addition, George's assertion in his affidavit that

defendant did not participate in the murder was contradicted by Jacqueline Mack and Patsy Taylor, who testified at trial that defendant did participate in the murder.

¶ 21 In reaching this conclusion, we find unpersuasive defendant's argument that his cause should be remanded because the circuit court's conclusion that defendant's petition was legally insufficient constituted reversible error where the court did not address George's affidavit and misstated the evidence at trial. The question before the reviewing court is the correctness of the result reached by the lower court and not the correctness of the reasoning upon which that result was reached. *People v. Johnson*, 208 Ill. 2d 118, 128 (2003). Therefore, a reviewing court can affirm a lower court decision on any basis in the record, even if the lower court's reasoning was erroneous, and we affirm the lower court's decision because defendant's claim in his 2-1401 petition was without merit.

¶ 22 This court's decision in *People v. Sparks*, 393 Ill. App. 3d 878 (2009), relied on by defendant, does not change this result. In *Sparks*, 393 Ill. App. 3d at 886, which involved the summary dismissal of a post-conviction petition, this court stated that the circuit court's dismissal of defendant's petition was a concern because, based on the record, it was unclear whether the circuit court fully considered defendant's claim of actual innocence based on an attached affidavit. Defendant maintains that, similarly to *Sparks*, because the circuit court failed to acknowledge George's affidavit in its findings when it dismissed his petition, this cause should likewise be remanded. However, as stated above, defendant did not even state a claim of actual innocence in his petition. More importantly, in *Sparks*, 393 Ill. App. 3d at 886-87, this court found that it was arguable that the attached affidavit was new, material, noncumulative and could have changed the result of defendant's trial. In this case, however, George's affidavit did not exonerate defendant and would not have changed the outcome at trial.

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

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¶ 24 Affirmed.