2013 IL App (1st)120201-U

SECOND DIVISION
March 29, 2013

No. 1-12-0201

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Respondent-Appellee,	)	of Cook County
	)	
v.	)	96 CR 497-04
	)	
CHARLES JOHNSON,	)	Honorable
	)	Joseph G. Kazmierksi,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

O R D E R

***Held*:** Defendant made a substantial showing of an actual innocence claim where he substantially showed that the fingerprint and palm print evidence was newly discovered, material and noncumulative, and of such conclusive nature that it would probably change the result on retrial.

¶ 1 Defendant Charles Johnson was convicted of murder, attempted murder and armed robbery, and sentenced to natural life in prison. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Johnson*, No. 1-98-1130 (2001) (unpublished order under Supreme Court Rule 23). Defendant filed a postconviction petition alleging actual innocence based on newly discovered fingerprint evidence. The trial court dismissed the petition after second-stage review, without an evidentiary hearing. On appeal, defendant contends that the trial court erred in dismissing his petition because it was timely, and the newly discovered fingerprint evidence was conclusive enough that it would probably change the result on retrial. Defendant contends that the postconviction petition should be remanded for a new trial, in front of a new judge. Alternatively, defendant contends that his petition should be remanded for an evidentiary hearing with a new judge. Defendant also claims that the trial court erred in dismissing his jury instruction claim.

¶ 2 I. BACKGROUND

¶ 3 The facts of this case are described in detail in the appellate court order, *People v. Johnson*, No. 1-98-1130 (2001) (unpublished order under Supreme Court Rule 23). We will only discuss those facts relevant to the postconviction proceeding.

¶ 4 *Trial*

¶ 5 On December 4, 1995, at approximately 6:30 p.m., two black men perused cars at two lots that were located next to each other: Elegant Auto and Prestige Auto, located at 7004 S. Western Avenue and 2417 West 70th Street, respectively. Ali Ali, an employee of Elegant Auto, testified that one of the men was wearing a white jacket and one was wearing a green jacket. Ali

identified Larod Styles, defendant's codefendant, as the man in the white jacket. Ali testified that Styles was interested in a white 1992 Pontiac Bonneville. After about ten minutes, the men left and went to Prestige. Munther Tadros, a Prestige employee, testified that two men came to the lot: one was wearing a white jacket and one was wearing a green jacket. At trial, Tadros identified defendant as the man in the green jacket. He testified that he did not identify anyone on December 5, 1995, when he viewed a lineup because he was afraid, and did not want to be a witness because two people "got shot right next door." Tadros viewed pictures at trial of the lineup he had previously viewed in 1995 and identified defendant as the man in the green jacket.

¶ 6 Ali, the Elegant employee, testified that the two men then returned to Elegant Auto and entered the office where he was sitting with two of the owners and another employee, Frank Neira. As soon as the two men walked in the office, one of the men began shooting. The two men he shot were the owners of Elegant Auto. Ali heard one of the men say "he is still alive. Shoot him." After the men left, two cars were missing from the lot: a white Pontiac and a green 1995 Chevrolet Impala.

¶ 7 Forensic investigators John Karalow of the Chicago Police Department (CPD) testified that he and his partner, Dennis Stankus, arrived on the scene at 7:30 p.m. They photographed the scene and collected fingerprints. The office did not contain any suitable fingerprints as they were all smudged or overlaid. Karalow testified that police officers at the scene told him that the suspects showed interest in particular vehicles on the lots, so they processed a green Pontiac Bonneville, a white Pontiac Bonneville that was parked on the street by the Elegant lot. Karalow identified exhibits of fingerprints that had been lifted from vehicles that had been examined. Six

usable fingerprints were lifted from two cars: a 1992 white Pontiac Bonneville from Prestige's lot, and a 1992 green Pontiac Bonneville from Elegant's lot. Karalow also testified that a portion of a palm print was taken from the fender of the green Pontiac Bonneville at Elegant, and part of a ridge impression that was right next to the palm print.

¶ 8 Officer Thomas Reynolds, a CPD police officer, testified that on December 5, 1995, he learned that officers had recovered the two stolen vehicles at approximately 2 a.m. at 7911 South Ingleside, and he was asked to process them. Reynolds testified that he lifted 6 fingerprints from the inside and the outside of both cars that were suitable for comparison. He testified that there were smudges and overlays, but he did not lift those from the vehicles.

¶ 9 On December 5, 1995, detectives received an anonymous tip about the murders, which led them to arrest 17-year-old Troshawn McCoy. McCoy implicated himself and three others in the crime: 14-year-old Lashawn Ezell, 16-year-old Larod Styles, and 19-year-old defendant. According to McCoy's statement, McCoy and Ezell sat as lookouts in defendant's car while defendant, who was carrying a gun, went into a building on the Elegant Auto lot with Styles to steal cars. Approximately fifteen seconds after defendant left the car, McCoy heard six shots fired. McCoy's confession states that he saw defendant and Styles exit the building and get in two separate cars. Defendant and Styles drove away, and left defendant's car three blocks south at 73rd and Western.

¶ 10 On December 5, 1995, at approximately 5 p.m., defendant was arrested at his home. He had just returned from work as a delivery driver for Coca-Cola. Defendant was taken in for questioning. Nearly twelve hours later, at 4 a.m. on December 6, 1995, defendant signed a

confession. Throughout the suppression hearing, trial, and postconviction proceedings, however, defendant has maintained that he did not read the written confession and was told it was routine documentation necessary for his release.

¶ 11 After defendant's and codefendants' arrests, the fingerprints that had been lifted from the stolen cars, as well as the prints lifted from the cars that had been touched by the perpetrators at Elegant Auto and Prestige Auto, were sent to the CPD's Latent Unit/Identification Section. The prints were compared to the victims' prints, the suspects' prints, and prints in the CPD's Automated Fingerprint Identification (AFIS) database.

¶ 12 John Waitman, the State's fingerprint examiner, testified at trial that only five of the fingerprints lifted from the stolen and perused vehicles were suitable for comparison in the AFIS database. Waitman testified that any palm prints were unsuitable for comparison because AFIS did not include palm prints.

¶ 13 Waitman further testified at trial that only a single fingerprint, which had been lifted from the white Pontiac Bonneville at Prestige Auto, could be matched to a known third party: Rodney Graham. In closing arguments, the State argued that Graham had nothing to do with the murders, and that his fingerprint was on that car from earlier in the day when he had traded his car in. The State specifically stated that Graham did not live anywhere close to where the stolen cars were recovered. The State further argued at trial that one of the smudged fingerprints could belong to defendant, and urged in closing arguments for the jury to find defendant guilty despite the lack of fingerprint evidence.

¶ 14 Defendant testified on his own behalf at trial. He stated that in December 1995 he was

working for Coca Cola Bottling Company driving a van and filling soda pop machines at different locations. Defendant testified that on the night in question, he went to the house of his girlfriend, Genoa Flournoy, after he got home from work. Once there, he saw Mr. and Mrs. Buford, his girlfriend Genoa, Tameka Chaplin, and Tameka's baby. After the Bufords left, he and the others ordered pizza. Defendant described the pizza delivery man as a heavy-set "white male." Defendant left the house to get soda at "Prestige Liquor." He saw Theolonias Akins at the store. After getting some soda he went back to Genoa's house where they ate pizza. The pizza receipt was entered into evidence.

¶ 15 The pizza deliverer, Mark Kasper, took the stand and testified that a young black man answered the door for the pizza on the night in question, but couldn't positively identify defendant as that man.

¶ 16 John Buford testified that he lives at 7305 South Oakley. On December 4, 1995, he got home at about 5:30 p.m. Genoa was at home with her friend, Tameka. A little later he heard the doorbell ring and defendant arrived. Buford's wife came home at about 5:45 p.m. and they left a little later to go bowling.

¶ 17 Ramona Buford testified that on the night in question she got home from work at 5:45 p.m. and when she arrived home her daughter Genoa, her daughter Javona, Tameka, and Tameka's baby were all there, as well as defendant and Mr. Buford. Ramona, her husband, and Javona left the house to go bowling at about 6:15 p.m.

¶ 18 Tameka Chaplin testified that on the night in question she was with her friend Genoa Flournoy at 7305 South Oakley. Genoa's stepfather was also there, as well as defendant. When

the pizza was delivered, Tameka, her son, defendant, and Genoa were all at the house. Defendant paid for the pizza and then left for about five minutes to get soda.

¶ 19 Theolonias Akins testified that on the day in question he pulled into the parking lot at Prestige Liquors and saw defendant's car with the motor running. Akins spoke to defendant at about 7:30 p.m. in the store and defendant said he was buying soda.

¶ 20 Genoa Flournoy testified that she dated defendant for about five years. On the day in question she got home from school at about 4 p.m. Defendant came over to her house, at 7305 South Oakley, at about 5 p.m. Genoa testified that her mother, Ramona Buford, and her stepfather, John Buford, left the house at about 6:30 p.m. She ordered pizza from "Villa Rosa" thereafter, which usually arrived about 45 minutes after ordering. Defendant went to the door to get the pizza. She testified that defendant left for five minutes to get soda at the store. She was with defendant until about 10 p.m on the night in question.

¶ 21 Additionally, a witness by the name of Maurice Steele testified that he was in a neighboring room to that in which defendant was being questioned after his arrest. He heard defendant ask for his mother, and an attorney, and heard detectives lie to defendant about witnesses identifying him in a lineup.

¶ 22 At the close of evidence, defendant was found guilty by a jury of the murders of Yousef Ali and Khaled Ibrahim, the attempted murders of Ali Ali and Frank Neria, and the offense of armed robbery, and sentenced to natural life in prison. On direct appeal, his conviction and sentence were affirmed.

¶ 23 *Post-Conviction Proceedings*

¶ 24 On June 16, 2008, defendant filed a motion to view the impounded record and photograph trial exhibits. Defendant explained that in the near future, he intended to file a motion for the reexamination of physical evidence and a petition for postconviction relief based on actual innocence due to newly discovered evidence. On that same day, an agreed order was entered by both parties, allowing both parties to view the physical evidence that was impounded in the case.

¶ 25 On December 2, 2008, defendant filed a motion for fingerprint testing pursuant to section 116-3 of the Criminal Code (725 ILCS 5/116-3) (West 2008)). Defendant argued that the fingerprint evidence was not analyzed using the FBI's Integrated Automated Fingerprint Identification System (IAFIS) and other new and expanded database technologies or subject to new techniques to enhance the quality of the prints and new scanning technologies. Defendant argued that the palm prints that were recovered from the stolen vehicles could now be used in the AFIS system. The State did not object.

¶ 26 On December 31, 2008, defendant filed a petition for postconviction relief. In his petition, he claimed that the jury received erroneous instruction on the issue of eyewitness identification testimony, depriving defendant of his right to due process and a fair trial. Defendant also claimed ineffective assistance of counsel for failing to object to the erroneous instruction. Defendant stated in his memorandum in support of his petition that the statute of limitations in the Act did not bar relief on his petition because a first stage petition must only state the gist of a constitutional claim, which he did. Defendant alleged that matters of timeliness must be alleged by the State at the second stage of postconviction proceedings, and in any event,

the jury instruction error was not discovered until recently, and thus defendant was not culpably negligent for failing to raise it earlier. Attached to the petition were affidavits by defendant and his mother explaining their quest to obtain counsel for defendant after his direct appeal was decided, and his appeal to the supreme court was denied. Also attached to the petition was an affidavit from one of defendant's counsel on appeal. He stated that he was unaware that the trial court provided a jury instruction that was inconsistent with Illinois Pattern Instructions, and therefore failed to raise the issue on appeal.

¶ 27 On November 17, 2010, defendant filed a supplement to his petition for postconviction relief, based on claims of actual innocence. Defendant stated the petition was a supplement to an earlier petition filed by him on December 31, 2008, which was docketed for second-stage postconviction review. Defendant also stated in his petition that on January 27, 2009, the trial court entered an order to establish fingerprint testing protocol and to release evidence for forensic testing. Defendant stated that on April 2, 2009, the court expressed a desire to consider any additional postconviction claims resulting from the fingerprint testing together with the ineffective assistance of counsel and jury instruction claims.

¶ 28 In defendant's supplemental petition, he argued that officers from the CPD had discovered a Buick, which had been reported stolen earlier in the day, hotwired and still running around the corner from Elegant Auto. According to a processing report attached to the petition, four fingerprints had been lifted from that vehicle and found suitable for the computer and suitable for comparison. Defendant argued that those four fingerprints had been lost, and not found again until 2010 in a vault at the Cook County State's Attorney's Office. According to an attached

processing report, the hotwired car was "suspected of being used in the double homicide."

¶ 29 Additionally, defendant stated in his supplemental petition that nine fingerprints had been lifted off of three stickers that had been found near the stolen vehicles, which had been peeled off the cars. The nine fingerprints had been found suitable for comparison, but were not introduced into evidence at the trial. Defendant alleged in his postconviction petition that in April of 1996, two years before defendant's trial, the CPD provided the sticker prints to the Cook County State's Attorney in defendant's case. Defendant further alleges that the CPD then conducted comparison testing of the sticker prints against defendant and his codefendants, as well as an AFIS search on August 29, 1996, which produced no matches. Defendant alleges that the State never shared those results with defense counsel despite a subpoena requesting production of all fingerprint testing reports.

¶ 30 All of the fingerprints were sent to defense counsel's fingerprint analysis expert, Kenneth Moses. Moses traced the prints and sent them back to CPD for resubmission to the CPD's AFIS, the Illinois State Police's (ISP) AFIS, and the CPD's palm print database. The CPD and ISP independently examined the fingerprints and palm prints as well. The fingerprints lifted from the hotwired car were also suitable for the FBI IAFIS system. The results of the fingerprint and palm print testing yielded matches to the prints of three previously unidentified felons: Davion Allen, Lamont Campbell, and Floyd Blaxon.

¶ 31 Davion Allen's prints were found on the green Pontiac that was perused at the Elegant Auto lot, as well as on the adhesive side of a sticker that was discarded from one of the stolen cars. Khaled Ibrahim, a deceased owner of Elegant Auto, left a total of six fingerprints on the

three stickers that were discarded. Floyd Blaxon's prints were found on the stolen hotwired car that was found running outside Elegant Auto. Lamont Campbell's prints were found on the white Pontiac perused by the perpetrators at Prestige Auto. None of the prints matched defendant or his codefendants.

¶ 32 Defendant argued in his petition that he was entitled to a new trial based on actual innocence because the fingerprint and palm print evidence was newly discovered, material and non-cumulative, and would probably change the result on retrial. Defendant contended that the current analysis of the fingerprint and palm print evidence was not possible at the time of defendant's trial. The newly discovered evidence showed that Davion Allen was both at the Elegant Auto lot as well as where the stolen cars were found abandoned since his prints were on a perused car from the lot and the adhesive side of a sticker that had been peeled from the one of the vehicles after the cars were stolen. Defendant argued that this evidence indicates that someone other than defendant committed the murders. Defendant contended that a retrial was necessary because the new evidence, coupled with the new theory of defense, would have put defendant's alibi defense in a different light at trial. Defendant would have been able to make a strong "third party guilt" defense had this fingerprint and palm print evidence been available at trial. Finally, defendant argued that the State's theory of the case, which was that defendant and codefendants stole the cars in order to strip them and sell the parts, is now less plausible since the cars were found in the same condition as they were on the lot.

¶ 33 Defendant also contended that the murders were motivated by something other than stealing cars for car parts because only the two owners were shot when there were two other

witnesses in plain sight. Defendant attached an affidavit to his supplemental petition, of private investigator Sarah Swanson, who recently spoke with Frank Neira, the fourth person in the office with the two owners and Ali Ali at the time of the shooting and therefore an eyewitness to the crime, who had disappeared after the murders. Swanson stated in her affidavit that Neira told her that the two owners had been involved in trouble leading up to the murders, and had been receiving threatening calls in connection with a car they had sold to a known drug dealer. Alternatively, because his postconviction petition was in the second stage, defendant argued that he should be granted an evidentiary hearing on his claim if he made a substantial showing of a constitutional violation.

¶ 34 *The State's Motion to Dismiss*

¶ 35 The State moved to dismiss defendant's postconviction petition on May 16, 2011, stating that defendant's petition was not timely, that he did not meet his burden for his claim of newly discovered evidence, and that he did not meet his burden for his claim of ineffective assistance of counsel. The State argued that the fingerprint evidence was not new because the jury had already heard that none of the fingerprints matched defendant at trial, and the fact that they have now been identified did not exonerate defendant.

¶ 36 On November 17, 2011, a hearing was held on the State's motion to dismiss. The State argued that the initial postconviction petition was filed six years past the limitation period and that the supplement to the petition was eight years past the limitation period. The State then argued that the ineffective assistance of counsel claim was waived because it could have been raised on appeal, and that the giving of that jury instruction did not rise to a constitutional

violation as the jury instruction given was commonly given at the time. The State contended that appellate counsel was not ineffective for failing to raise the issue because the outcome would not have been different had a different instruction been given.

¶ 37 In regards to defendant's actual innocence claim, the State argued that during the trial, the jury heard "extensive evidence" regarding the fingerprints that were taken from the stolen vehicles, and that defendant's prints did not match the recovered prints. The State contended that the fact that the prints have now been matched to other people does not exonerate defendant since the used car lots were open to the public and were likely touched, handled, and driven by potential buyers. The State argued that the new print evidence would not have been relevant or admissible at trial.

¶ 38 Defense counsel first contended that the statute of limitations does not apply to a claim of actual innocence, pursuant to section 122-1(c) (725 ILCS 5/122-1(c) (West 2008)). Counsel then argued that defendant was only brought into the case after an anonymous caller identified Troshawn McCoy as being involved in the murders. During McCoy's interrogation, McCoy gave the police the names of defendant, Larod Styles, and LaShawn Ezell. Defense counsel contended that McCoy was not friends with defendant, and was in fact enemies with Styles and Ezell, as they had beaten him up six months prior, sending him to the hospital. Defense counsel stated that the State's theory at trial was that the motive for stealing the cars was to steal car parts, yet the two owners were killed, and not the two potential eyewitnesses. Defense counsel stated that the cars were driven five miles away and never stripped of any parts and left abandoned. At the time of trial there were no alternative theories for the murder advanced.

¶ 39 Defense counsel reminded the trial court that the location of where the stolen vehicles were abandoned was used at trial to show that defendant and his codefendants were on their way to McCoy's house, which was another 20 blocks away. Defendant could offer no counter argument for why the cars were abandoned at that location at trial. Defense counsel argued that now it is known that Davion Allen, whose prints were left on a car perused at Elegant Auto, as well as on the adhesive side of a sticker that had been ripped off of one of the stolen vehicles, lived just down the alley from where the cars were abandoned.

¶ 40 Defense counsel further argued that the only "shreds" of evidence linking defendant to the crime scene were his confession and an unreliable eyewitness. However, defendant has always maintained that he did not understand the contents of the confession that he signed. Defense counsel contended that there were inconsistencies between the established facts of the case and the story that appeared in defendant's confession. Defense counsel then attempted to talk about what was now known about false confessions and youths, but the trial court did not allow it.

¶ 41 Defense counsel then argued that Tadros' identification of defendant was also problematic because while Tadros identified defendant at trial, he was unable to identify him in a lineup the day after the crime, two years prior to trial.

¶ 42 Defense counsel argued that there was now more physical evidence linking the convicted criminals that matched the fingerprints lifted from the stolen cars, than there was presented at trial for defendant. At the time of trial, the State used the fact that there were no matches of the fingerprint evidence as evidence that they belonged to potential customers, and not someone who committed the crime.

¶ 43 Defense counsel countered the State's argument that the fingerprints could belong to anyone that visited the used car lots, by arguing that Davion Allen's fingerprint was found on the adhesive side of a sticker that had been ripped off the stolen cars.

¶ 44 The trial court then asked defense counsel if this case went to a third-stage postconviction hearing, how defense counsel would show that Davion Allen was involved in the crime. Defense counsel stated that he would put his private investigator on the stand to explain to the court everything the investigator had done to make that link. He would also call witnesses, the alleged conspirators, and defendant himself.

¶ 45 Defense counsel further argued that Frank Neira, who was an employee at Elegant Auto and in the office on the day in question, disappeared after the murders. Defense counsel stated that Neira recently spoke to a private investigator and revealed that the owners of Elegant Auto had sold a Mercedes to a "drug dealer" in the months leading up to the murders, who came back later outraged that he had been defrauded by Elegant Auto. Defense counsel stated that Neira said the owners of Elegant Auto told the alleged drug dealer they would auction the car and give him the money. Neira told the private investigator that the owners then gave the drug dealer less money than what he had paid for the car, claiming that was all they had received in the auction. Neira claimed that in reality, the owners did not auction the car and instead brought it to their house until some time had passed, and then put it back in the lot. When the drug dealer noticed the car in the lot , he began calling the dealership. Neira told the private investigator that the owners would not take his calls, and that the calls became threatening. The owners expressed concern for their lives, and told Neira not to congregate in the office.

¶ 46 Defense counsel also stated that Samee Ali, Khaled Ibrahim's cousin, was employed at Prestige Auto lot and told a similar story. Ali knew about the Mercedes incident and the threats, but did not have all the details Neira had. Defense counsel argued that at a new trial, he would call Ali and Neira to testify. Defendant asked for a new trial, or at the very least an evidentiary hearing. The matter was continued to December 9, 2011.

¶ 47 *Trial Court's Ruling on State's Motion to Dismiss*

¶ 48 On December 9, 2011, the trial court stated that defendant's "petition was filed past the time within which the statutory guidelines are set for the filing of these types of petitions." The trial court stated, "I find that the failure to file a timely petition is not excused by the facts presented in the petition." The court further noted, "the issues raised with regard to the fingerprint evidence and the other issues with regard to the instruction does not in any way show that the defendant was - does not put forth an actual claim of innocence that is sustainable by the evidence in this case." The trial court found, based on that, that defendant "has not made a substantial showing of a violation of a constitutional right, and the petition is dismissed." When asked if there was a written order to follow, the trial court responded, "No."

¶ 49 The trial court entered an order granting the State's motion to dismiss the postconviction petition. There was no accompanying written order or memorandum explaining the bases for the trial court's conclusion. Defendant timely appealed.

¶ 50 II. ANALYSIS

¶ 51 On appeal, defendant contends that the trial court erred in dismissing his postconviction

petition asserting a claim of actual innocence.[1] A postconviction proceeding is a collateral proceeding rather than an appeal of the underlying judgment and allows review of constitutional issues that were not, and could not have been, adjudicated on direct appeal. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). " 'Thus, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised but were not, are considered waived.' " *Id*. (quoting *People v. Pitsonbarger*, 205 Ill. 2d 444, 491 (2002)).

¶ 52 The Post-Conviction Hearing Act (Act) provides a three-stage process for the adjudication of postconviction petitions. In the first stage, the circuit court determines whether the postconviction petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (2010). The State does not have an opportunity to raise any arguments against the petition during this summary review stage. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). The circuit court is required to make an independent assessment in the summary review stage as to whether the allegations in the petition, liberally construed and taken as true, set forth a constitutional claim for relief. *Id*. To survive dismissal at this stage, the petition must only present "the gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If the petition is found to be "frivolous" or "patently without merit," the court "shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision" within 90 days. 725 ILCS 5/22-2.1(a)(2) (West 2010).

¶ 53 If the petition survives the first stage, counsel may be appointed and the petition may be

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[1]We allowed The Innocence Network of the University of Wisconsin Law School file an *amicus curiae* brief in support of defendant's actual innocence claim.

amended. *Id*. The State may then file a motion to dismiss the petition. *Gaultney*, 174 Ill. 2d at 418; 725 ILCS 5/122-5 (West 2010). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). If no such showing is made, the petition is dismissed. *Id*. If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. *Id*.; 725 ILCS 5/122-6 (West 2010).

¶ 54 Here, the trial court dismissed defendant's postconviction petition at the second stage. At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we review the trial court's decision *de novo*. *People v. Pendleton*, 223 Ill. 2d 457, 473 (2006).

¶ 55 The trial court did not issue a written order when he dismissed defendant's second-stage petition. However in issuing the court's ruling, the court stated that defendant's petition was "filed past the time within which the statutory guidelines are set for filing of these types of petitions." The court then noted that it remained for the court to determine whether or not the late filing of a petition was excused by reasons that are set forth in case law regarding matters like newly discovered evidence or matters with regard to actual innocence. The trial court stated that the jury instruction claim could have been raised within the statute of limitations. The trial court noted that in regards to the other issue raised by the petition, which was "whether or not [the evidence] was new" and "whether or not the claim of this new evidence rises to the level of

actual innocence." The trial court concluded:

> "I find that the failure to file a timely petition is not excused by the facts presented in the petition. It was not filed in a timely manner. And in fact the issues raised with regard to the fingerprint evidence and the other issue with regard to the instruction does not in any way show that the defendant was - does not put forth an actual claim of actual innocence that is sustainable by the evidence in this case. Based on that I find that the defendant/petitioner has not made a substantial showing of a violation of a constitutional right, and the petition is dismissed."

¶ 56 *Timeliness of Petition*

¶ 57 In response to the trial court's finding that defendant's postconviction petition was time-barred, defendant contends that based on section 122-1(c) of the Act, which states that the statute of limitations "does not apply to a petition advancing a claim of actual innocence," his petition was timely. The State responds that section 122-1(c) of the Act has "never been interpreted by an Illinois court," and that "the expansive language of the statute lends itself to abuse." Specifically, the State contends that it would be easy for a defendant to put forward the most feeble claim of actual innocence and attach it to claims that have been time barred, thereby defeating the postconviction limitations provisions.

¶ 58 Section 122-1(c) of the Act provides, in pertinent part:

> "When a defendant has a sentence other than death, no proceedings

> under [the Act] shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petition alleges facts showing that the delay was not due to his or her culpable negligence.
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> ***
>
> This limitation does not apply to a petition advancing a claim of actual innocence."

¶ 59 Defendant's original postconviction petition was filed six years after the limitations period. In his original postconviction petition, defendant put forth a claim of ineffective assistance of counsel as well as improper jury instructions, and alleged the lack of timeliness was not due to his culpable negligence. Defendant's petition advanced to second-stage proceedings. Defendant then filed a supplement to his petition alleging actual innocence. "[A]s a general rule, an amendment which is complete in itself and which makes no reference to the prior pleading supersedes it, and the original pleading ceases to be a part of the record, being in effect abandoned or withdrawn." *People v. Cross*, 144 Ill. App. 3d 409, 412 (1986). However, counsel did not file an amended petition that was complete in itself; he merely filed a supplemental petition that specifically incorporated his original petition by reference. The supplemental

petition did not supersede his original petition, and all of the allegations of the original petition, and the facts set forth in the supporting documents, were before the court to the same extent as if they had been restated in an amended petition. Because defendant's postconviction petition advanced a claim of actual innocence, as it did here, the limitation does not apply to the petition. See 725 ILCS 5/122(c) (West 2008).

¶ 60 The State's contention that section 122(c) of the Act encourages a defendant to file a postconviction petition alleging actual innocence claim to get around the limitation is without merit. In order to survive the first stage of postconviction proceedings, a claim of actual innocence must not be frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). Accordingly, simply stating a claim for actual innocence would not be sufficient to get around the time limitations in the Act. See generally *People v. Steward*, 406 Ill. App. 3d 82, 95-96 (2010) (defendant's postconviction petition failed to state a meritorious claim of actual innocence because his claim was not only contradicted by the trial record, but also by the evidence presented in support of defendant's petition).

¶ 61 *Actual Innocence Claim*

¶ 62 At the second stage of postconviction proceedings a petitioner must make a substantial showing of a constitutional violation in order to advance to a third-stage evidentiary hearing. *Edwards*, 197 Ill. 2d at 246. Evidence in support of a claim of actual innocence "must be newly discovered; material and not merely cumulative; and 'of such conclusive character that it would probably change the result on retrial.' " *Ortiz*, 235 Ill. 2d at 333 (quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)). In *Ortiz*, the supreme court was considering whether the circuit court's

ruling following a third-stage evidentiary hearing was manifestly erroneous. *Id.* Thus, the court in *Ortiz* was charged with determining whether the petitioner had, in fact, shown actual innocence such that a new trial was warranted. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 34 (June 30, 2011). However, at the second stage of postconviction proceedings, the relevant inquiry is whether the petition has made a substantial showing of actual innocence such that an evidentiary hearing is warranted. *Id*.

¶ 63 Although defendant is not entitled to an evidentiary hearing as a matter of right, our supreme court has repeatedly stated that a hearing is required whenever the petitioner makes a substantial showing of a violation of constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998) (and cases cited therein). "Dismissal of a postconviction petition is warranted only when the petition's allegations of fact, liberally construed in favor of the petitioner and in light of the original trial record, fail to make a substantial showing of imprisonment in violation of the state or federal constitution." *Lofton*, 2011 IL App (1st) at ¶ 35. Accordingly, we must now determine whether defendant's petition made a substantial showing that the evidence upon which his actual innocence claim was based was newly discovered, material and not merely cumulative, and likely to change the result on retrial. *Id*. at ¶ 37.

¶ 64 We first address the requirement that the evidence must be newly discovered. Evidence that is newly discovered is defined as evidence that was discovered since the trial and could not have been discovered through due diligence. *Ortiz*, 235 Ill. 2d at 334 (witness' admission that he saw the incident 10 years after trial qualified as newly discovered evidence); *Lofton*, 2011 IL App (1st) at ¶ 37 (where there was no way for defendant to know someone else was the shooter,

defendant made a substantial showing that the evidence was newly discovered). Taking the facts alleged in defendant's petition as true, the fingerprint and palm print evidence constitutes newly discovered evidence. John Waitman testified at trial that only five of the fingerprints were suitable for comparison in the AFIS databases, and that none of the palm prints were suitable for comparison. Palm prints have since been added to the Chicago Police Department's AFIS database. Using this new testing, it was discovered that the two palm prints matched Davion Allen. Additionally, IAFIS, the FBI's national fingerprint database, did not become available until after defendant's trial. Running the fingerprints through IAFIS yielded fingerprint matches to Floyd Blaxon. Because these new developments in technology occurred after defendant's trial, no amount of due diligence could have yielded this newly discovered fingerprint and palm print evidence. Furthermore, it was recently discovered that one of the nine sticker fingerprints had been put through the AFIS in 1996 and did not match defendant or his codefendants, but that information was never provided to defense counsel. That sticker fingerprint is now known to belong to Davion Allen. Accordingly, we find that defendant made a substantial showing that the fingerprint and palm print evidence constituted newly discovered evidence.

¶ 65 The second requirement is that defendant must make a substantial showing that the evidence is material and not merely cumulative. *Ortiz*, 235 Ill. 2d at 334; *Lofton*, 2011 IL App (1st) at ¶ 38 (evidence that someone else was the perpetrator and that defendant was not present "is certainly material"). Taking the facts alleged in the petition as true, new evidence that implicates other potential offenders in the crime, and excludes defendant, is certainly material evidence. Significantly, the new evidence implicates Davion Allen, a potential offender who was

not mentioned in defendant's or codefendants' confessions, at both the car lot where the two victims were murdered, as well as at the spot where the cars were abandoned. There is no such physical evidence linking defendant to either the car lot or the stolen cars.

¶ 66 Evidence is considered cumulative when it does not add anything to what was previously before the jury. *Ortiz*, 235 Ill. 2d at 336 (new witness' testimony conflicted with the State's main witnesses on the central issue of the case, and was therefore not cumulative); *Lofton*, 2011 IL App (1st) at ¶ 38. Here, the new evidence adds something to what was previously before the jury, and was therefore not cumulative. It not only added additional potential perpetrators, but it also added a new theory of defense for defendant: third party guilt. While the State is correct that the jury knew that the fingerprints that had been suitable for comparison did not match defendant, that does not make the new fingerprint evidence cumulative. The jury did not know that those fingerprints conclusively matched other people, excluding defendant. Moreover, the fingerprint found on the sticker was never entered into evidence.

¶ 67 The State argues that such evidence would not have been allowed into evidence anyway, and therefore is irrelevant. We disagree. The question at this stage is not whether the newly discovered evidence is relevant, but rather whether defendant has made a substantial showing that the newly discovered evidence is material and non-cumulative. We find that he has.

¶ 68 Finally, defendant must make a substantial showing that the evidence is so conclusive that it would probably change the result on retrial. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008); *Ortiz*, 235 Ill. 2d at 336-37 (where no physical evidence linked defendant to the murder, at retrial the evidence of defendant's innocence would be stronger when weighed against the new

witnesses' testimony). The fact that the new fingerprint and palm print evidence conclusively matched other people, and now excludes defendant as a match, is significant. The newly discovered evidence directly contradicts the State's theory that the unmatched fingerprint and palm prints could be those of other potential buyers and a smudged fingerprint could belong to defendant. The fingerprint lifted off the adhesive side of a sticker that had been ripped off of one of the stolen vehicles is compelling evidence, especially since the same possible offender left his fingerprint on a car that the perpetrators had viewed earlier in the day. Moreover, the cars were found down the alley from the potential offender's home at the time the crime was committed. At trial, defendant's defense focused on attacking the reliability of the State's evidence and convincing the jury that a third party, Rodney Graham, whose fingerprint was found on one car on the Prestige Auto lot, was the guilty party. No physical evidence linked defendant to the murder at the time of trial. Thus, at retrial, the evidence of defendant's innocence would be stronger when weighed against the newly discovered fingerprint evidence excluding him as a match. The affidavit of private investigator Swanson addressing her interview with Frank Neira would support defendant's assertion that a different suspect had a motive to kill the victims. The fact finder will be charged with determining the credibility of the witnesses in light of the newly discovered evidence and with balancing the conflicting accounts of the crime at the evidentiary hearing.

¶ 69 Thus, we find that defendant has made a substantial showing that the newly discovered evidence is so conclusive that it would probably change the result on retrial. As our supreme court has stated, " 'this does not mean that [defendant] is innocent, merely that all of the facts and

surrounding circumstances, including the testimony of [defendant's witnesses], should be scrutinized more closely to determine the guilt or innocence of [defendant].' " *Ortiz*, 235 Ill. 2d at 337 (quoting *People v. Molstad*, 101 Ill. 2d 128, 136 (1984)).

¶ 70 For these reasons, we hold that defendant's postconviction petition was not time-barred, that he has made a substantial showing of a constitutional violation, and that he is entitled to a third-stage evidentiary hearing on his claim of actual innocence.

¶ 71 *Substitution of Judge on Remand*

¶ 72 Defendant contends that on remand, we should assign this case to a different judge. Defendant argues that the postconviction judge's failure to produce a written order upon his dismissal of the case, or otherwise show willingness to entertain the newly discovered evidence, demonstrates that he has prejudged the merits of the case and is therefore substantially prejudiced against defendant. As both parties correctly note, the same judge who presided over the defendant's trial should hear his postconviction petition, unless it is shown that the defendant would be substantially prejudiced. *People v. Hall*, 157 Ill. 2d 324, 331 (1993). "In order to obtain a remand to a new judge, a defendant must show 'something more' than simply that the judge presided over the defendant's earlier trial." *People v. Reyes*, 369 Ill. App. 3d 1, 25 (2006) (quoting *People v. Vance*, 76 Ill. 2d 171, 181 (1979)). To show prejudice, a defendant must show " 'animosity, hostility, ill will, or distrust' or 'prejudice, predilections or abitrariness.' " *Reyes*, 369 Ill. App. 3d at 25 (quoting *Vance*, 76 Ill. 2d at 181, and *People v. McAndrew*, 96 Ill. App. 2d 441, 452 (1968)).

¶ 73 In the case at bar, we agree with defendant that the trial judge appears to have prejudged a

central issue in defendant's postconviction case: whether defendant made a substantial showing that the newly discovered evidence was material, non-cumulative, and was so conclusive as to likely change the outcome on retrial. The trial judge did not address any prong of the three-part test, but rather simply stated that defendant had "not made a substantial showing of a violation of a constitutional right." The only explanation the trial court gave for this ruling was threefold: (1) that defendant's petition was untimely, (2) that such untimeliness was not excused by the facts presented in defendant's petition, and (3) that the facts did not put forth a claim of actual innocence that could be sustained by the evidence in the case. In this instance, while the trial court stated that defendant failed to meet his burden of a substantial showing of claim of actual innocence, that conclusion was not supported by any analysis. While we agree with the State that the Act requires a written order only in first-stage summary dismissals (725 ILCS 5/122-2.1(a)(2) (West2010)), we nevertheless conclude that defendant would be "substantially prejudiced" if this case were remanded to the same judge. *Reyes*, 369 Ill. App. 3d at 26 (finding that the trial court gave the impression of being unwilling to consider whether defendants met their burden in a postconviction petition). Accordingly, we remand the cause to the presiding judge of the criminal court, with the direction that the case be assigned to a different trial judge. Because of our decision, we need not address the remaining arguments raised by defendant in this appeal. See *Reyes*, Ill. App. 3d at 26.

¶ 74 Reversed and remanded with directions.