

**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).

2013 IL App (3d) 120019-U

Order filed December 4, 2013

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

|                                      |   |                               |
|--------------------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
|                                      | ) | of the 10th Judicial Circuit, |
| Plaintiff-Appellee,                  | ) | Tazewell County, Illinois,    |
|                                      | ) |                               |
| v.                                   | ) | Appeal No. 3-12-0019          |
|                                      | ) | Circuit No. 90-CF-116         |
|                                      | ) |                               |
| JAMES L. PACK,                       | ) | Honorable                     |
|                                      | ) | Stuart P. Borden,             |
| Defendant-Appellant.                 | ) | Judge, Presiding.             |

---

JUSTICE McDADE delivered the judgment of the court.  
Justice Lytton concurred in the judgment.  
Presiding Justice Wright dissenting.

---

**ORDER**

- ¶ 1 *Held:* The trial court erred by dismissing defendant's successive postconviction petition without an evidentiary hearing, where defendant's petition made a substantial showing of actual innocence.
- ¶ 2 Following a jury trial, defendant, James L. Pack, was found guilty of aggravated criminal sexual abuse (Ill. Rev. Stat. 1987, ch. 38, ¶ 12-16(c)(1)(i)), and was sentenced to seven years' imprisonment. Defendant appeals the second-stage dismissal of his successive postconviction

petition. Defendant argues that his petition should not have been dismissed because he made a substantial showing of actual innocence. We reverse and remand.

¶ 3

### FACTS

¶ 4 On April 26, 1990, defendant was charged with aggravated criminal sexual abuse. Ill. Rev. Stat. 1987, ch. 38, ¶ 12-16(c)(1)(i). The indictment alleged that between June 1 and August 4, 1988, defendant fondled the penis of J.M., who was under 13 years of age, for the purpose of sexual arousal.

¶ 5 The cause proceeded to a jury trial on December 10, 1990. J.M. testified that on one occasion in 1988, he spent the night at defendant's house and had taken a bath with defendant's son, J.P. J.P. got out of the bathtub first and left the bathroom. Defendant entered the bathroom and used his hand to touch J.M.'s penis for about one minute, telling J.M. that he had a rash. J.M. left the bathroom and told J.P. what had happened. J.M. did not reveal the incident to the police until April 1990. Officer Cary Martin testified that he interviewed J.M. in April 1990, and verified that this was what J.M. told him.

¶ 6 J.P. testified that he saw defendant reach into the bathtub while J.M. was still sitting in it. Later that night, J.M. told J.P. that defendant had touched him. J.P. testified that J.M. did not stay the night. L.P., defendant's daughter, testified that she believed J.M. stayed the night at defendant's house in September or October 1988. Defendant testified that he did not molest J.M. and that J.M. had never taken a bath at his house or spent the night.

¶ 7 The jury found defendant guilty of aggravated criminal sexual abuse. Defendant was sentenced to seven years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Pack*, No. 3-91-0283 (1993) (unpublished order under

Supreme Court Rule 23).

¶ 8 On February 20, 2004, defendant filed an amended postconviction petition, alleging that defendant's son and daughter, who testified against defendant at his trial, perjured themselves at the direction of the assistant State's Attorney. Defendant's son and daughter averred that the assistant State's Attorney threatened them into testifying that J.M. had spent the night at defendant's house and that defendant had sexually abused J.M.

¶ 9 On July 26, 2004, the trial court dismissed defendant's petition, finding that defendant's sentence had expired prior to filing his petition. This court affirmed the decision on appeal. *People v. Pack*, No. 3-04-0948 (2006) (unpublished order under Supreme Court Rule 23). The supreme court reversed and remanded for further proceedings, finding that defendant's consecutive sentence in case No. 90-CF-115 qualified defendant as imprisoned for purposes of postconviction relief. *People v. Pack*, 224 Ill. 2d 144 (2007). Thereafter, defendant did not pursue his postconviction claims.

¶ 10 On December 27, 2010, defendant filed a *pro se* successive postconviction petition, and the trial court granted defendant leave to file. On May 2 and October 28, 2011, appointed counsel filed an amended and a second amended petition, alleging defendant's actual innocence based on newly discovered evidence. Defendant attached an affidavit from J.M. dated December 2010 and a refined affidavit dated September 2011. J.M. averred that when he was 12 years old, he provided false testimony at defendant's trial because he felt pressure from authorities to accuse defendant. J.M. further averred that defendant had never molested or inappropriately touched him. Defendant also attached J.P.'s affidavit from his postconviction petition filed in 2004.

¶ 11 On November 28, 2011, the State filed a motion to dismiss, asserting that defendant's allegation of perjured testimony was not newly discovered evidence of actual innocence. The State also asserted that without defendant's allegation of the State's knowing use of the false testimony, he could not establish a due process violation. The trial court agreed and granted the State's motion to dismiss. Defendant appeals.

¶ 12 ANALYSIS

¶ 13 Defendant argues that his successive postconviction petition should be remanded for an evidentiary hearing because his petition made a substantial showing of actual innocence based on the newly discovered evidence that J.M. recanted his trial testimony.

¶ 14 The Post-Conviction Hearing Act (Act) provides for a three-stage review process for criminal defendants who challenge their convictions based on constitutional violations. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Domagala*, 2013 IL 113688. In order to proceed to a third-stage evidentiary hearing, the allegations set forth in the petition, as supported by the record or accompanying affidavits, must make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403 (2003). In making this determination, all well-pleaded facts in the petition and affidavits are to be taken as true. *Id.* It is not until the evidentiary hearing that the trial court serves as a fact finder and determines witness credibility and the weight to be given to testimony and evidence, and resolves any evidentiary conflicts. *Domagala*, 2013 IL 113688. We review a dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Pendleton*, 223 Ill. 2d 458 (2006).

¶ 15 A claim of perjury, standing alone, does not rise to the level of a constitutional violation under the Act. *People v. Brown*, 169 Ill. 2d 94 (1995). To establish a due process violation

based solely on perjury, defendant must allege that the State knowingly used the false testimony at trial or exhibited some lack of diligence in allowing use of the testimony. *Id.* By contrast, a freestanding claim of actual innocence based on newly discovered evidence is cognizable under the Act, without the allegation of any State action, because the conviction of an innocent person violates the due process clause of the Illinois Constitution. *People v. Washington*, 171 Ill. 2d 475 (1996).

¶ 16 In the instant case, defendant alleges his actual innocence based on J.M.'s recent affidavit, where J.M. admitted lying at trial and to authorities that defendant had sexually abused him. We find that defendant's allegations comprise a freestanding claim of actual innocence, and we will review the sufficiency of defendant's allegations under this theory. See *id.*

¶ 17 To win relief under a freestanding claim of actual innocence, the evidence in support of the claim must be newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319 (2009). Here, we find defendant's supporting affidavits sufficient to make a substantial showing of his actual innocence based on newly discovered evidence. J.M. averred that his testimony at defendant's trial was false and that defendant did not sexually abuse him. J.M. noted that he was 12 years old at the time of trial and that he felt pressured to accuse defendant.

¶ 18 J.M.'s recantation of defendant's alleged abuse is of such conclusive character that it would probably change the result on retrial. J.M.'s recantation is both material and not cumulative because his potential testimony goes directly to whether defendant in fact committed aggravated criminal sexual abuse and J.M. was the only eyewitness that directly implicated defendant. Although defendant's son testified that defendant put his hand in the bathtub with

J.M., he averred that this testimony was a lie. Moreover, J.M.'s recantation testimony qualifies as newly discovered evidence because it was unavailable to defendant at the time of his trial. See *People v. Morgan*, 212 Ill. 2d 148 (2004) (finding eyewitness' recantation of incriminating testimony newly discovered).

¶ 19 In arguing that defendant's petition was properly dismissed, the State asserts that a witness' recantation of his prior testimony is inherently unreliable and, in this case, was insufficient to warrant an evidentiary hearing. See *People v. Jones*, 2012 IL App (1st) 093180. The State further asserts that J.M.'s potential testimony would not be dispositive of defendant's innocence in light of Martin and J.P.'s testimony that J.M. told them of defendant's sexual abuse.

¶ 20 We acknowledge that recantation evidence is often viewed with skepticism. However, we are reviewing the dismissal of defendant's postconviction allegations at the second stage. At this stage, the court only needed to determine whether defendant made a substantial showing of a constitutional violation, taking all well-pleaded facts as true. See *Domagala*, 2013 IL 113688. We conclude that defendant has met this burden. It is not until the evidentiary hearing that credibility and factual determinations are made and when the trial court determines whether J.M.'s recantation entitles defendant to relief. *Id.* As such, we will not make evidentiary determinations at this stage.

¶ 21 Accordingly, we find defendant's petition and supporting documents made a substantial showing of a constitutional violation. Therefore, we reverse the trial court's dismissal of defendant's petition and remand the cause for a third-stage evidentiary hearing on defendant's claim of actual innocence.

¶ 22

CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of Tazewell County is reversed, and the cause is remanded for further proceedings.

¶ 24 Reversed and remanded.

¶ 25 PRESIDING JUSTICE WRIGHT, dissenting.

¶ 26 In 2010, Jason McCoy, the victim in case No. 90-CF-116, came forward claiming he provided false testimony against defendant in 1991. Eventually, defendant filed a successive, second amended postconviction petition in October 2011 with an attached 2003 affidavit from defendant's son, an occurrence witness, and a modified 2011 affidavit from McCoy.

¶ 27 The exhibits attached to the second amended postconviction petition are curious. First, the 2003 affidavit prepared by defendant's son, James Larandy Pack II, alleging prosecutorial misconduct, was misidentified as Jason McCoy's first affidavit.<sup>1</sup> Defense counsel also attached a second exhibit, identified as McCoy's second affidavit, which was signed by McCoy in 2011. McCoy's 2011 affidavit claims he gave false testimony against defendant but unlike defendant's son, *does not* allege prosecutorial misconduct induced the false accusation. Thus, there is nothing in this record to support the view that prosecutorial misconduct caused McCoy, the victim, to falsely accuse defendant in 1991.

¶ 28 I respectfully observe that the 2003 affidavit from defendant's son, which was attached to the second amended postconviction petition filed in October 2011, is not newly discovered evidence. Obviously, the same affidavit was submitted to the circuit court, and reviewed by this court, with respect to the first 2004 postconviction petition. See *People v. Pack*, No. 3-04-0948

---

<sup>1</sup>This affidavit was filed in connection with defendant's original 2004 postconviction petition, reviewed by this court in *People v. Pack*, No. 3-04-0948 (2006) (unpublished order pursuant to Supreme Court Rule 23); .

(2006) (unpublished order pursuant to Supreme Court Rule 23). Moreover, *res judicata* applies since the sufficiency of this affidavit was considered on review based on the original postconviction petition filed in 2004. *People v. Pack*, No. 3-04-0948 (2006) (unpublished order pursuant to Supreme Court Rule 23); *People v. Pack*, 224 Ill. 2d 144 (2007); see *People v. Nicholas*, 2013 IL App (1st) 103202, ¶ 31 (court stated that issues actually decided on direct appeal or in a first postconviction petition are barred by the doctrine of *res judicata* and those that could have been raised on direct appeal or in a first postconviction petition but were not are forfeited).

¶ 29 In his 2011 affidavit, McCoy attributes the false accusation to his own fragile mental health in 1991. Absent an allegation that the prosecution coerced McCoy, the 2011 affidavit includes a recantation but does not qualify as newly discovered evidence supporting an actual innocence claim. Hence, I would affirm the trial court's decision dismissing the second amended postconviction petition, with the two attached affidavits, in this case.