

No. 1-11-3595

**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. 98 CR 3165
	)	
ALBERTIS SANDERS,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HARRIS delivered the judgment of the court.  
Justices Simon and Liu concurred in the judgment.

**O R D E R**

- ¶ 1 **Held:** The trial court's second-stage dismissal of defendant's amended postconviction petition is affirmed because the recantation of one of the two witnesses who identified defendant was not of such conclusive character that it would probably change the result on retrial.
- ¶ 2 Defendant, Albertis Sanders, appeals from the trial court's second-stage dismissal of his amended petition, filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). He asserts he is entitled to an evidentiary hearing on his claim of actual

innocence because one witness (Melissa Coates) who identified him as the driver of a vehicle involved in a shooting has recanted her testimony and raised doubt as to the identification by a second witness (Koweta Tiller). For the reasons that follow, we affirm.

¶ 3 At around 12:30 a.m. on January 2, 1998, Maro Smith was killed in a drive-by shooting. At trial, evidence was presented that four people occupied the car involved in the shooting and that the front passenger, Antoine Robinson, was the actual shooter. Two eyewitnesses, Melissa Coates and Koweta Tiller, identified defendant as the car's driver.

¶ 4 At trial, Melissa Coates testified that in the early morning hours of January 2, 1998, she was at 6912 South Indiana with Katrina Larkin, Wayne Simpson<sup>1</sup>, Maro Smith, and Koweta Tiller. Sometime around midnight, Coates saw, from her position on the top of the porch, a two-door Cougar approaching the intersection of 69th and Indiana, located approximately 70 feet away. Although trees stood in front of and between 6912 South Indiana and the corner, Coates could see Antoine Robinson in the front passenger seat, defendant in the driver's seat, Lamont Robinson in the seat behind defendant, and Memphis Abdulla in the seat behind Antoine. All four men in the car were members of the Gangster Disciples, while Smith belonged to the Blackstones gang. Coates had known defendant for six to eight years and called him "Bootsie." After stopping at the intersection, the car slowly continued southbound until it stopped again between 6908 and 6912 South Indiana. The front passenger window rolled down and Antoine fired 15 to 20 shots, killing Smith, who was standing in front of 6908 South Indiana. Afterward, the car accelerated and drove away. On January 3, 1998, Coates gave police the names of the four men and identified defendant, Antoine, and Lamont in a lineup.

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<sup>1</sup> While Coates and Larkin refer to a "Wayne" Simpson, three other witnesses—Tiller, McKnight, and Lazara—testified about a "Juan" Simpson. Based on our review of the record, "Wayne Simpson" and "Juan Simpson" appear to be the same individual.

¶ 5 Koweta Tiller testified that shortly before midnight, she left 6912 South Indiana to walk somebody named Jessica to the "EL" at 69th and Ryan. As she was walking back on 69th Street toward Indiana, she saw a dark-colored car approaching. Tiller recognized three of the four people inside, observing Antoine Robinson in the front passenger seat, Lamont in the backseat, and defendant, whom she knew as "Bootsie," in the driver's seat. When the car reached 6908 South Indiana, Tiller saw sparks emanate from a gun resting on the passenger-side windowsill and heard 10 to 20 shots. On January 3, Tiller spoke to police about what she had witnessed and identified defendant and the three other men in a lineup. She acknowledged that trees stood in front of 6908 and 6912 South Indiana but denied that they interfered with her ability to see down the street when the shooting occurred.

¶ 6 Katrina Larkin testified that she was standing about three or four steps from the bottom of the porch at 6912 South Indiana when, at around 12:30 a.m., she saw a car approaching. She observed four heads in the car and could identify Antoine Robinson as the shooter and Lamont Robinson and Memphis Abdulla as the backseat passengers, but she could not see the driver's face.

¶ 7 Steven Kostecki, a Chicago police department forensic investigator, testified he found blood splatter near 6912 South Indiana and a bullet hole in the drain pipe of the porch. He also saw bullet holes in the basement window of 6908 South Indiana. Gregory Buie, a Chicago police officer, testified he arrested defendant after speaking with Coates and Larkin.

¶ 8 Sherwood Coleman, a bartender at the Leather Lounge, testified defendant came into the lounge between 10:30 and 11 p.m on January 1, 1998. A young man accompanied defendant. Coleman remembered defendant because he came to the Leather Lounge at around the same time

every night and was one of the few packaged-goods customers who would tip. Defendant had a drink and remained at the bar until approximately 1 a.m.

¶ 9 Forty-year-old defendant, whose nickname was "Boosie," testified he did not know Smith, Simpson, Coates, or Tiller. He knew Larkin through his little brother's girlfriend. Defendant denied driving the car from which Robinson fired a gun, explaining that he was at the Leather Lounge with Virgil Clair between 11 p.m. and 1 a.m. When he spoke to the police on January 3, 1998, he told them he was at the Leather Lounge during the shooting, although he did not mention Virgil Clair's name. Defendant denied being involved with a gang.

¶ 10 Chicago police officer Brett McKnight testified that on January 2, 1998, at around 12:30 a.m., he went to 6912 South Indiana. There, he spoke to Simpson, who described the shooter as "Bootsy," a 22-year-old black male who lived at 67th and Indiana. Steven Lazara, a Chicago police department detective, testified that during his investigation of Smith's homicide, defendant told him he stayed at the Leather Lounge until 4 a.m., but defendant did not mention that anybody accompanied him. Lazara "attempted to locate a Leather Lounge" but could not find one on the night he looked. He did not ask defendant for the address of the Leather Lounge or follow up with defendant about his alibi. According to Lazara, Simpson attended a lineup, at which he identified defendant. Simpson did not testify at trial.

¶ 11 The parties stipulated defendant had previously been convicted of a felony charge of unlawful use of a weapon.

¶ 12 On this evidence, the trial court found defendant guilty of first-degree murder based on an accountability theory. The court stated it was "satisfied" the two eyewitnesses saw defendant, a person known to them, and immediately reported the crime to police soon after it occurred.

The court did not find defendant's alibi or Coleman's testimony to be credible. In August 1999, the court sentenced defendant to 35 years in prison.

¶ 13 Defendant filed a direct appeal, arguing (1) the evidence was insufficient to sustain his first-degree-murder conviction, (2) his sixth amendment right to offer testimony was violated when the trial court prohibited him from eliciting testimony from Officer McKnight that police had investigated another suspect with a nickname similar to defendant's, and (3) he was denied his right of confrontation because Lazara was allowed to testify that Simpson, who was available to testify but did not, had identified defendant in a lineup. This court affirmed defendant's conviction. *People v. Sanders*, No. 1-99-2848 (2001) (unpublished order under Supreme Court Rule 23). In doing so, we rejected defendant's first argument, noting that Coates and Tiller both testified they saw defendant and later identified him in a lineup. With respect to his second argument, we found the excluded testimony did not rise to the level of altering the outcome of defendant's trial given that defendant was identified as being at the crime scene and was later identified in two separate police lineups and in open court as the driver of the car. Finally, as to defendant's third argument, we agreed he was denied his right to confront Simpson; however, we found the error harmless beyond a reasonable doubt because Coates and Tiller identified defendant, gave credible and consistent versions of the events, and informed police they saw defendant and identified him in a lineup and in open court.

¶ 14 In August 2001, defendant filed a *pro se* petition for relief from judgment, asserting both Tiller and Coates committed perjury. The trial court denied defendant's petition as untimely and later denied his petition for rehearing. However, on appeal, this court reversed and remanded the trial court's decision, concluding the petition was timely. *People v. Sanders*, No. 1-02-1105 (2004) (unpublished order under Supreme Court Rule 23). On remand, the trial court appointed

the public defender to represent defendant. In November 2010, the public defender moved for defendant's petition to be recharacterized as a postconviction petition.

¶ 15 In March 2011, defendant filed an amended postconviction petition, alleging a claim of actual innocence based on newly discovered evidence and attaching thereto three documents signed by Coates, each providing more details than the document before it. In the most recent document, an affidavit dated August 29, 2003, Coates averred that although she previously testified defendant was driving the car, "the true fact" was that she "never was sure" of the driver's identity; rather, Juan Simpson told her defendant was driving the car and because she "wanted someone to pay for the murder" of her friend, she "forced [her] mind to believe what [she] was told." Coates further stated she "persuaded" Tiller "to agree with" her that defendant was driving the car. Before trial, Coates told the State's Attorney she was unsure of the driver's identity and the State's Attorney replied that if she changed her testimony, she would perjure herself. She was scared of the consequences of committing perjury so she "followed up on the fabrication."

¶ 16 Defendant also attached to his petition a February 11, 1998, affidavit from Steve Matthews, who did not testify at trial, in which Matthews stated that on the night of the shooting, he allowed Antoine and Lamont to "rent" his grey Mercury Cougar in exchange for three bags of cocaine. Later, between midnight and 1:30 a.m., Matthew saw the car in the middle of the street on 69th and Indiana. Inside of the car were three "dark skinned" people, not defendant. Matthews averred that he told the police about the car but they instructed him to say defendant was involved because he was a gang leader. To get his son's car back, Matthews had to go along with the police. However, Matthews said he was unaware of a time on January 1 or January 2 that defendant was ever in the car.

¶ 17 In September 2011, the State filed a motion to dismiss defendant's petition. The State asserted Coates' affidavits were not newly discovered evidence because neither the record nor the postconviction pleadings revealed defendant made any attempt to interview Coates prior to trial even though she had been disclosed as a witness. Moreover, the State contended Coates' affidavits were not of such conclusive character that they would likely change the result at trial given the other evidence presented at trial, including Tiller's testimony that she saw defendant driving. Further, Coates did not say in her affidavits that defendant was not the driver of the car; she merely stated she was unsure of the driver's identity. As to Matthews' affidavit, the State asserted it also did not constitute newly discovered evidence because it was signed on February 11, 1998, nearly 16 months prior to defendant's trial. The affidavit also would not change the result at trial because Matthews would be impeached with his grand jury testimony in which he said he rented his car to defendant on the night of the shooting and recalled seeing defendant driving the car as shots were being fired.

¶ 18 In October 2011, defendant filed a response to the State's motion to dismiss, contending Coates' recantation could not have been discovered earlier because Coates wanted somebody to pay for her friend's death and feared being charged with perjury. Moreover, defendant asserted Coates' averments would likely change the outcome at trial, pointing out that the arguments in his direct appeal had been rejected based on Coates' and Tiller's testimony. Finally, defendant argued that although Matthews' affidavit was dated prior to defendant's trial, it was "unclear" when defendant received the affidavit from Matthews. In addition, although Matthews' affidavit would not change the outcome of trial on its own, it would add support to Coates' affidavits.

¶ 19 Following a November 2011 hearing, the trial court granted the State's motion to dismiss. The court found that Matthews' affidavit was not "newly discovered" evidence and that although

Coates' affidavits were newly discovered, they were not of such a conclusive nature that they would change the outcome of trial because Tiller also identified defendant under oath.

¶ 20 This appeal followed.

¶ 21 On appeal, defendant contends his petition made a substantial showing that Coates' recantation would change the outcome upon retrial. Specifically, defendant argues, his conviction rested on Coates' and Tiller's testimony and Coates has now recanted and raised serious doubts as to the reliability of Tiller's identification. He further contends the allegations in Coates' affidavit are bolstered by other evidence presented at trial, such as testimony that Larkin was unable to identify the driver, trees lined Indiana Avenue, the driver was on the far side of the street, and Tiller failed to immediately contact police after the incident. He also notes Tiller's testimony conflicted with that of Larkin and Coates on several details.

¶ 22 The Post-Conviction Hearing Act (Act) allows defendants to challenge their convictions on grounds of constitutional violations. *People v. Domagala*, 2013 IL 113688, ¶ 32. The Act sets forth three stages of review. *Id.* At the first stage, the circuit court must determine whether, taking the allegations as true, the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). If the court does not dismiss the petition as frivolous or patently without merit, it advances to the second stage, where counsel may be appointed and the State is allowed to file a motion to dismiss or an answer to the petition. *People v. Hodges*, 234 Ill. 2d 1, 10-11 (2009); 725 ILCS 5/122-4 to 5 (West 2010). At this second 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). Unless they are affirmatively refuted by the record, the petitioner's allegations are taken as true, and the question is whether those allegations establish a constitutional violation. *Domagala*, 2013 IL

113688, ¶ 35. If a postconviction petition is not dismissed at the second stage, it advances to the third stage, where an evidentiary hearing is conducted. *People v. Tate*, 2012 IL 112214, ¶ 10.

We review a circuit court's dismissal of a petition at the second stage *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 23 The due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a claim of actual innocence based on newly discovered evidence, which is material, noncumulative, and "of such conclusive character that it would probably change the result on retrial." *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Evidence is "newly discovered" if it was unavailable at the time of the petitioner's original trial and the petitioner could not have discovered it sooner through diligence. *Morgan*, 212 Ill. 2d at 154.

¶ 24 First, we agree with defendant that Coates' affidavits qualify as newly discovered evidence. A defendant will not be precluded from presenting a witness's recantation as newly discovered evidence except if the defendant had evidence available at the time of trial to demonstrate the witness was lying. *People v. Barnslater*, 373 Ill. App. 3d 512, 524 (2007). As the trial court noted, Coates consistently identified defendant as the driver of the car prior to trial—namely, when she spoke to police after the shooting and when she testified at the grand jury proceedings. Moreover, Coates stated in her affidavits that she feared perjuring herself. Thus, we reject the State's contention that defendant's failure to interview Coates, even though she was listed as a witness prior to trial, showed a lack of due diligence. It appears no amount of diligence on defendant's part could have forced Coates to make the statements at trial that she has now made in her affidavits based on her fear of committing perjury.

¶ 25 We also agree, and the State does not dispute, that defendant's evidence is material and noncumulative because Coates and Tiller were the only witnesses that tied defendant to the

crime. Coates' averments that she was unable to identify the driver and she persuaded Tiller to identify defendant as the driver would be new information for the trier of fact to consider. See *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009) ("Evidence is considered cumulative when it adds nothing to what was already before the jury").

¶ 26 Regarding the conclusive character of the evidence, we find defendant has not made a substantial showing that Coates' recantation would likely change the outcome upon retrial. It is well established that the evidence alleged for actual innocence must support total vindication or exoneration, not merely fall within the rubric of whether guilt was established beyond a reasonable doubt. *E.g.*, *Ortiz*, 235 Ill. 2d at 336-37 (relief warranted where a new additional eyewitness testified defendant was not present when the victim was beaten and shot); *People v. Molstad*, 101 Ill. 2d 128, 132 (1984) (relief warranted where all five codefendants submitted affidavits stating the defendant was not present during the crime); *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40 (relief where the affiant purported to be the actual shooter and attested the defendant was not present at the shooting); compare with *People v. Anderson*, 402 Ill. App. 3d 1017, 1037 (2010) (no relief where at least one eyewitness identified the defendant as the offender in each of the six cases to which the defendant pled guilty). Moreover, where evidence merely impeaches a witness, it will typically not be of such conclusive character as to justify postconviction relief. *People v. Green*, 2012 IL App (4th) 101034, ¶ 36 (no relief warranted); *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008) (same).

¶ 27 We find that defendant has not made a substantial showing that Coates' recantation would likely change the outcome upon retrial because it only serves to impeach her trial testimony or raise a reasonable doubt argument. Coates identified defendant as the driver in a pretrial statement to the police, in a line-up, in grand jury testimony, and at trial. In the combined

content of her three statements, Coates only claims that she could not identify the driver but did not conclusively attest that defendant was *not* the driver. Coates does not offer an account to exonerate defendant because it does not preclude defendant's involvement. Coates' affidavit only provides the basis from which to assert a reasonable doubt argument or to impeach her pretrial identifications of defendant as the driver. Moreover, she did not veer from her identification of Antoine as the shooter or from her identification of Lamont and Abdulla as the back seat passengers in the car. In addition, Tiller never recanted her testimony identifying defendant as the driver in the drive-by shooting.

¶ 28 Our conclusion is supported by our decision in *Collier* where the defendant was convicted for his involvement in a fatal drive-by shooting and we rejected the defendant's claim of actual innocence based on the recantation of two trial witnesses. We reasoned the evidence was not of such a conclusive nature that it would probably change the result on retrial because none of the defendant's proffered affidavits went to actual innocence; rather, they merely impeached or contradicted the trial testimony. *Collier*, 387 Ill. App. at 637. Thus, because the allegations in the witnesses' affidavits, measured against their trial testimony, merely raised concerns of credibility, those allegations went to reasonable doubt, not actual innocence. *Id.*

¶ 29 The same can be said of the allegations contained in Coates' affidavits. Coates' statements that she did not know the driver's identity and that she "persuaded" Tiller to agree that defendant was driving could serve to impeach Coates' trial testimony and raise possible questions concerning the reliability of Tiller's identification. As the *Collier* court explained, however, these are issues that go to reasonable doubt, not actual innocence. Accordingly, we conclude the trial court did not err by dismissing defendant's postconviction petition.

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¶ 30 For the reasons stated, we affirm the trial court's judgment.

¶ 31 Affirmed.