

SIXTH DIVISION  
August 14, 2015

No. 1-13-1468

**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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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	90 CR 3821
	)	
MIGUEL FLUKER,	)	Honorable
	)	Joseph M. Claps,
Petitioner-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

**ORDER**

*Held:* Circuit court's denial of defendant's second successive postconviction petition following a third-stage evidentiary hearing was not manifestly erroneous.

¶ 1 Defendant Miguel Fluker appeals from an order of the circuit court granting the State's motion denying his second successive petition for postconviction relief under the Post-

Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). For the reasons that follow, we affirm.

¶ 2 Following simultaneous but severed jury trials, defendant and codefendant Lavasia Charles were found guilty of first-degree murder in the gang-related shooting death of Jesse Hudson. Defendant was sentenced to 60 years' imprisonment.<sup>1</sup> Defendant's conviction and sentence were affirmed on direct appeal. *People v. Fluker*, Nos. 1-91-3945 & 1-92-0128 cons. (1994) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied defendant's request for leave to appeal. *People v. Fluker*, 163 Ill. 2d 570 (1995). Our court subsequently affirmed dismissals of defendant's initial and first successive postconviction petitions. *People v. Fluker*, No. 1-97-1758 (1998) (unpublished order under Supreme Court Rule 23); *People v. Fluker*, No. 1-03-0014 (2004) (unpublished order under Supreme Court Rule 23).

¶ 3 On July 17, 2009, defendant filed a second successive petition for postconviction relief at issue in this appeal, reasserting his claim of actual innocence.<sup>2</sup> In support of the claim, defendant primarily relied on alleged newly discovered evidence in the form of an affidavit from a man named Exosie Simmons in which he recanted his trial testimony. Simmons had testified as a prosecution witness at defendant's murder trial and identified him as one of the shooters.

¶ 4 After conducting an evidentiary hearing on the petition for postconviction relief, the circuit court denied the petition. The court determined, among other things, that the statements

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<sup>1</sup> Codefendant Charles was sentenced to 50 years' imprisonment. Another codefendant, Maurice Harris, pled guilty and was sentenced to 20 years' imprisonment.

<sup>2</sup> The petition was signed by Attorney Jane E. Raley of the Center on Wrongful Convictions, Bluhm Legal Clinic, Northwestern University School of Law.

contained in Simmons' affidavit were insufficient to support defendant's claim of actual innocence. We agree with the circuit court and for the reasons that follow we affirm its judgment denying defendant's second successive postconviction petition.

¶ 5

#### ANALYSIS

¶ 6 The Act provides a procedure by which criminal defendants may assert that their convictions or sentences were the result of a substantial denial of their federal or state constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction action is not an appeal from the judgment of conviction, but rather is a collateral attack on the trial court proceedings. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). In noncapital cases such as this one, the Act provides a three-stage process for adjudicating a defendant's request for collateral relief. *Id.* In this case, defendant's petition advanced to a third-stage evidentiary hearing. When, as here, a circuit court conducts a third-stage evidentiary hearing involving questions of fact and credibility determinations, the court's decision will not be reversed unless it is manifestly erroneous. *Beaman*, 229 Ill. 2d at 72. A circuit court commits a manifest error only when the error is clear, plain, evident and indisputable. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 7 Defendant argues that the circuit court's judgement granting the State's motion denying his second successive postconviction petition was manifestly erroneous because the evidentiary hearing revealed newly discovered evidence in the form of Simmons' recantation affidavit which defendant claims established his actual innocence. "The due process clause of the Illinois Constitution allows a prisoner to present a freestanding claim of actual innocence based on newly discovered evidence." *People v. Flowers*, 2015 IL App (1st) 113259, ¶ 32.

¶ 8 In order to be entitled to a new trial based on newly discovered evidence of actual innocence, a defendant must show that the evidence relied upon is newly discovered (*i.e.* the

evidence was not available at the time of trial and could not have been discovered sooner through the exercise of due diligence). *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). In addition, the evidence must be material and non cumulative. The evidence must also be of such conclusive character that it would probably change the result on retrial. *Id.* Our Supreme Court has determined that the "conclusive character" requirement is the most important element of a claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶ 40; *People v. Washington*, 171 Ill. 2d 475, 489 (1996). "Newly discovered evidence is considered to be of a conclusive nature if it raises the probability that, in light of the new evidence, it is more likely than not that no reasonable juror would have convicted the defendant." *People v. Sanders*, 2014 IL App (1st) 111783, ¶ 23 (citing *Edwards*, 2012 IL 111711, ¶ 40).

¶ 9 At the evidentiary hearing in this case, the circuit court listened to and observed the demeanor of the parties as they testified, including Simmons, and afterwards concluded that the statements contained in Simmons' recantation affidavit were not of such a conclusive character that they would probably change the result on retrial as required to support defendant's postconviction claim of actual innocence. We do not believe the circuit court erred in this regard.

¶ 10 It is well settled that a witness's recantation of his or her prior trial testimony is generally regarded as inherently unreliable. *People v. Fields*, 135 Ill. 2d 18, 43 (1990); *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). It is for the circuit court to determine the credibility of recantation testimony after observing the demeanor of the witness. *Fields*, 135 Ill. 2d at 43. Based on our examination of the record, we cannot conclude that the circuit court erred in finding that Simmons' trial testimony was more credible than the statements contained in his affidavit recanting his trial testimony. Simmons, an eyewitness to the shooting, gave four different

versions of events. It was up to the circuit court as the trier of fact and the judge of witness credibility to determine which of the following versions to believe.

¶ 11 At trial, in 1991, Simmons testified that he observed the shooters from close range, under good lighting conditions, and was able to positively identify defendant as one of the shooters. Simmons testified he had known defendant from around the neighborhood prior to the shooting.

¶ 12 Then, in an affidavit dated June 5, 2007, filed in connection with defendant's second successive postconviction petition, Simmons recanted his trial testimony. In his affidavit, Simmons reaffirmed that he witnessed the shooting and saw the shooters, but this time he claimed that defendant was not one of them and added that to the best of his knowledge, defendant was not present in the area when the shooting occurred. Simmons averred that the police pressured him into identifying defendant as one of the shooters. Simmons claimed that at the time he gave his trial testimony, he was facing charges of attempt first-degree murder and armed robbery, and was offered and accepted a plea deal of ten years in return for his testimony against defendant.

¶ 13 Four years later, in May 2011, Simmons voluntarily agreed to meet with Assistant State's Attorney (ASA) Terrence Reilly and investigator Thomas McGrill to be interviewed regarding the shooting. The interview was videotaped and a DVD (digital video disc) of the interview was admitted into evidence at the evidentiary hearing and reviewed by the circuit court. In the interview, Simmons explained that he decided to recant his trial testimony after being contacted by individuals from Northwestern University who were trying to obtain a new trial for defendant. Simmons recounted that he was told by Attorney Alison Flaum and private investigator Thomas Kopecky that various people had provided affidavits in an effort to help defendant obtain a new trial. Simmons was also shown a letter defendant had written him. Simmons explained that the

letter made him feel sorry for defendant. Simmons stated they made it seem like "it was all up to [him]" and that he "had the power to help [defendant] get out" of prison.

¶ 14 Simmons stated that he felt defendant had done enough time and deserved a chance to turn his life around. Simmons claimed that he could relate to defendant's situation because he had been able to change his own life around after being released from prison. And so, even though Simmons reaffirmed that he saw defendant shoot the victim, he nevertheless signed the affidavit recanting his trial testimony because he was now a religious man and wanted to help defendant "get out of this situation." Throughout the videotaped interview, Simmons repeatedly reaffirmed the truth of his trial testimony, stating on numerous occasions that defendant was the person he saw shoot Jesse Hudson. Simmons reviewed his affidavit line-by-line and addressed each averment in it. He identified as "lies" those paragraphs in his affidavit where he averred that: he did not see defendant shoot Jesse Hudson; he was pressured by the police into identifying defendant as one of the shooters; he was offered a deal on his pending charges in return for his trial testimony; and he received a 10-year prison sentence as a consequence of his trial testimony against defendant. At the conclusion of the interview, Simmons reiterated that his trial testimony was truthful and that he signed the affidavit because he just wanted to help defendant "become a free man" after defendant had a "cry out" to him.

¶ 15 At the evidentiary held on February 6, 2012, Simmons testified that the paragraph of his affidavit where he claimed the police pressured him into identifying defendant as one of the shooters, was "somewhat" true. Simmons attributed his new-found uncertainty regarding the accuracy of his identification of defendant to conversations he had with some unnamed individuals. Simmons testified that he heard someone else name defendant as a shooter before he provided defendant's name to the police and was now not a hundred percent sure that

defendant shot Jesse Hudson. Simmons denied that his trial testimony was, in any way, tied to a favorable plea agreement on his then-pending charges.

¶ 16 Simmons was then asked questions regarding his videotaped interview with ASA Reilly. Simmons acknowledged he told the ASA that he gave his 2007 affidavit because it was "a possibility that I got the wrong person." Simmons also admitted however that when he was asked during the videotaped interview "why would you sign your name to a affidavit that's false," he responded that he felt bad for defendant, that "everybody deserves a second chance," and that one of the reasons he felt bad for defendant was because he had also been to prison. Simmons admitted telling the ASA during the interview that his affidavit was false and that his trial testimony was "the truth." Simmons confirmed that his videotaped interview was voluntarily given and that it was not the product of any force or threats, such as charges of perjury.

¶ 17 At the conclusion of the evidentiary hearing, the circuit court took the matter under advisement. On March 29, 2013, the circuit court issued a 32-page opinion and order denying defendant's second successive petition for postconviction relief. The circuit court determined that the statements in Simmons' affidavit recanting his trial testimony were not of such a conclusive nature that they would probably change the result on retrial. The circuit court noted that "after observing and evaluating Simmons' demeanor, testimony, and various contradictory statements, Simmons' original trial testimony remains untouched."

¶ 18 Based on our examination of the record and in light of the inconsistencies in Simmons' various accounts of the shooting, we believe that the circuit court, as the trier of fact, could have reasonably determined that Simmons' trial testimony identifying defendant as the person who shot and killed Jesse Hudson was truthful and that the subsequent statements in his affidavit

recanting his trial testimony were untruthful. See *People v. Brooks*, 187 Ill. 2d 91, 133 (1999); *Fields*, 135 Ill. 2d at 43.

¶ 19 We also agree with the circuit court that none of the other evidence introduced at the evidentiary hearing buttressed Simmons' recantation. Defendant presented the testimony of his former girlfriend Angela Gathings in an effort to establish an alibi defense. The court determined that Gathings' alibi testimony that defendant was with her at the home of a third individual from 3:00 p.m. until after the shooting occurred, "was entirely incredible," where the record showed the shooting occurred at approximately 6:30 p.m., and defendant told police he was at the scene of the crime an hour before the shooting. The court also noted that Gathings failed to explain her delay in coming forward with the alibi information and referred to her demeanor during her testimony to support its finding.

¶ 20 The court further determined that Simmons' recanting affidavit was not corroborated by the affidavits of Tanika Langford, her brother Charles Langford, or Alvin Jones. The Langfords averred that neither defendant nor Simmons were present at the scene when the shooting occurred. The court concluded that these averments were directly contradicted by Simmons who consistently testified he was at the crime scene when the shooting occurred. In his affidavit, Alvin Jones failed to mention Simmons at all.

¶ 21 The circuit court also found that Simmons' recanting affidavit was not corroborated by deceased codefendant Maurice Harris' affidavits and testimony from his clemency hearing. In his affidavit submitted in the Lavasia Charles' case, Harris claimed that Charles did not commit the crime. In his two affidavits submitted in the instant case, Harris claimed defendant was not the shooter and that he committed the crime along with a man named Alex Collins, also deceased. At his clemency hearing, Harris stated that he and an unnamed codefendant were



responsible for the victim's death. The court determined that Harris' claim that Charles did not commit the crime was directly contradicted by Simmons' statements and testimony that Charles was one of the shooters.

¶ 22 In sum, given the role of the circuit court as trier of fact and based on the evidence presented at the evidentiary hearing, we cannot say that the court's denial of defendant's second successive petition for postconviction relief following the hearing was manifestly erroneous.

¶ 23 Finally, defendant alternatively argues he should be granted a new trial even if we find the circuit court properly held that the statements contained in Simmons' affidavit recanting his trial testimony were not sufficiently worthy of belief to support his claim of actual innocence. Defendant maintains that in light of Simmons' various accounts of the shooting, his trial testimony identifying defendant as one of the shooters must now be viewed as wholly unreliable and a conviction based on such unreliable identification testimony necessarily violated his due process. We must disagree.

¶ 24 The due process clause precludes a jury from convicting a defendant on identification evidence that is unreliable. *People v. DeJesus*, 163 Ill. App. 3d 530, 532 (1987) (citing *Manson v. Braithwaite*, 432 U. S. 98 (1977)). However, in this case, the due process clause was not implicated by Simmons' recantation of his trial testimony. A witness's recantation of his prior trial testimony is generally regarded as inherently unreliable and therefore the fact that a witness recanted his previous trial testimony does not necessarily mean he perjured himself at trial or that his trial testimony was false. See, e.g., *Allen v. Woodford*, 395 F. 3d 979, 994 (9th Cir. 2005) (a prosecution witness's "later recantation of his trial testimony does not render his earlier testimony false."). In addition, the circuit court concluded that even absent Simmons' trial testimony, the

other evidence presented at trial, specifically defendant's confession, would have supported a verdict of guilty based upon a theory of accountability.

¶ 25 Accordingly, the circuit court's denial of defendant's second successive petition for postconviction relief following a third-stage evidentiary hearing was not manifestly erroneous.

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.