THIRD DIVISION
March 30, 2016

No. 1-14-0560

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 21700
	)	
AR-RAAFI NICHOLS,	)	Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant has not satisfied the actual innocence requirement for filing a successive post-conviction petition by presenting the affidavit of a State witness recanting her trial testimony. The recantation does not constitute newly discovered evidence and likely would not change the outcome of the case on retrial, given the identification of defendant by an independent eyewitness.

¶ 2 Defendant Ar-Raafi Nichols appeals the circuit court's order denying his motion for leave to file a successive petition under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). On appeal, defendant contends that his successive petition presented a colorable claim of actual innocence supported by the affidavit of a State witness who recanted

her trial testimony that she saw defendant shoot the victim and asserted she was coerced into implicating defendant in the crime.

¶ 3 Following a jury trial in 2004, defendant was convicted of the first-degree murder of Victor Manriquez and was sentenced to 50 years in prison, which included a 25-year sentence enhancement for discharging a firearm that proximately caused death. In opening statement, defense counsel asserted that no physical evidence connected defendant to the scene and that Sherman James, one of the State's two occurrence witnesses, viewed the shooting in dim light and had never seen defendant before. Defense counsel also asserted that Sarina Leighty would not offer truthful testimony.

¶ 4 Leighty testified she and defendant had dated "off and on" for about three years and they had lived together for a month or two prior to the shooting. On July 23, 2001, she and defendant got into an argument, and she called Manriquez, whom she had known for about a month, and spent the day with him. The two drank beer all day and had sex at a motel, and Leighty saw defendant as they left the motel in Manriquez's car. Leighty testified defendant had seen her with Manriquez earlier in the day.

¶ 5 When Leighty and Manriquez were two blocks from the motel, she heard defendant call her name and asked Manriquez to stop the car at the corner of University Avenue and 73rd Street. Leighty got out of the car to speak to defendant, and defendant approached the car, where Manriquez was seated. According to Leighty, defendant told Manriquez to "drop down," which meant "give me your money." Manriquez raised his hands into the air. Defendant shot Manriquez twice with a handgun and fled. Manriquez was shot in the left cheek and left side of his chest at close range.

¶ 6 Starting on August 4, Leighty was questioned by police for several days. She signed a written statement implicating defendant and she testified before a grand jury that she saw defendant shoot Manriquez.

¶ 7 On cross-examination, Leighty said defendant shot Manriquez but acknowledged telling police shortly thereafter that she did not witness the shooting. When police questioned her at the motel, she claimed she had gotten out of Manriquez's car and had heard shots fired after she had walked almost back to the motel. She then left the motel and went to a bus station. Before leaving, she called the home of defendant's aunt to see if defendant was there because she "wanted to know why he would do something like that." Leighty stated that when police located her on August 4 in East Moline, Illinois, and brought her back to Chicago, they accused her of the shooting. When asked by defense counsel if that was when she "made up the story" about defendant being the shooter, she denied making up a story and maintained that defendant was the gunman. She told police she was afraid of defendant.

¶ 8 James testified that he lived at 7308 South University Avenue. At about 10:15 p.m. on the night in question, James left his home and saw a car parked on the corner. He saw a woman he later identified as Leighty talking to a man sitting in the driver's seat of the car. A man he later identified as defendant was standing on the other side of the car, and James heard defendant tell the man seated in the car, "Mother f---, give it up." Defendant walked toward the car and shot the man twice before fleeing to a nearby alley. The man in the car drove away and crashed into a viaduct about a block away.

¶ 9 James called police that night and described the gunman's height and said he wore jeans and a football jersey. He testified at trial that the gunman wore his hair in dreadlocks. James

testified that police spoke to Leighty at the scene and then "let her [go]." Police began looking for defendant after speaking to defendant's aunt. On August 2, James viewed two police photo arrays and identified defendant and Leighty. Two days later, he identified both defendant and Leighty in police lineups.

¶ 10 The sole witness testifying for the defense was Lakeesha McCormick, defendant's sister, who testified that defendant's hairstyle at the time of the shooting was inconsistent with James' description of the gunman. In closing argument, defense counsel asserted the photo array from which James identified defendant was suggestive, James' identification of defendant was not credible, and that Leighty had a motive to testify falsely.

¶ 11 On direct appeal, defendant argued that the evidence was insufficient to support his conviction and his trial counsel was ineffective for failing to seek the suppression of James' identification. He also asserted his trial counsel should have presented defendant's aunt as a witness and also presented the testimony of a police officer as to the description of the offender in a police report as wearing black jogging pants to impeach James' testimony describing the gunman's clothing. In addition, defendant argued that Leighty was an unreliable witness because she was angry with him at the time of the offense, she was intoxicated when she saw the shooting and she did not call police to report the crime. Defendant also challenged his 50-year sentence. This court affirmed defendant's conviction and sentence but ordered that the mittimus be corrected to accurately state the offense. *People v. Nichols*, No. 1-05-0050 (2006) (unpublished order under Supreme Court Rule 23).

¶ 12 In 2007, defendant filed a *pro se* post-conviction petition, alleging, *inter alia*, that his trial counsel should have investigated whether Leighty falsely implicated him in the shooting.

Defendant stated in the petition that between 2002 and 2004, while he was awaiting trial, Leighty contacted him by letter and by telephone and expressed regret that she was "forced to lie on me." Defendant asserted that he showed the letter to his trial counsel. The circuit court summarily dismissed that petition.

¶ 13 On appeal, this court affirmed, noting that defendant had not attached an affidavit of Leighty to his petition or claim he had attempted to obtain such an affidavit. This court further noted that defendant failed to attach to his petition the letter that Leighty sent him indicating her trial testimony was false. *People v. Nichols*, No. 1-08-2162 (2010), at 6-7 (unpublished order under Supreme Court Rule 23). Moreover, this court stated that even had such documentation been provided, defendant "was not prejudiced by the absence of Leighty's recantation because James, an independent eyewitness, provided an account of the shooting and identified defendant in a police photo array and a lineup." *Id.* at 7.

¶ 14 On December 17, 2012, defendant filed a *pro se* motion for leave to file a successive post-conviction petition, along with the petition itself. Defendant asserted therein that Leighty falsely implicated him in the shooting of Manriquez. Among the materials attached to the successive petition was an affidavit of Leighty, notarized in 2010, in which she attested she was coerced into signing the statement indicating defendant was the gunman.

¶ 15 The body of Leighty's affidavit states as follows:

> "That on August 4, 2001, I was taken to the area 2 police department on 111th Street in Chicago, Il and questioned about the death of Victor Manriquez. I was threatened, coerced and mislead [*sic*] by detective Brian Johnson to sign a statement to state that Ar-Raafi Nichols was the person who committed this crime, when I cannot

> honestly say Ar-Raafi Nichols was the person who did commit this crime. I was given a story of what was believed to have taken place and told that was what happened. Due to the pressure and fear for my life; because the police told me "I better figure out who did it or I'll be booked for murder." Out of fear for what will happen to me I agreed to go along with the coerced statement and say Ar-Raafi Nichols committed this crime. He was the only one I knew in Chicago at the time that I could state did this and make the story seem legit. I'm coming forward now because this has been heavy on my heart, it has been eating away at me knowing that the person that actually committed this murder is possibly out free while an innocent man is behind bars; also because that then means that the family of this victim does not have true closure to the death of their loved one. I apologize for going along with that misleading statement and can only pray that me coming forward will help in finding out the truth and bringing closure to both families."

¶ 16 Also accompanying the successive petition was a handwritten statement bearing Leighty's signature. The statement indicated that the account Leighty gave to police was coerced and that the police "totally lied [and] tricked me" and told her she "better figure out who did it." The statement further indicated that Leighty did not see the murder and was "highly intoxicated" and that she "still to this day [does not] know what happened."

¶ 17 Counsel later appeared in court on behalf of defendant and moved to amend the successive petition, stating that defendant was raising a claim of actual innocence based on Leighty's attestations. Counsel asserted in the amended filing that Leighty's affidavit and handwritten statement directly contradicted her testimony at defendant's trial.

¶ 18 In a written order on October 28, 2013, the circuit court denied defendant leave to file his successive petition. As to Leighty's affidavit and handwritten statement, the court concluded those documents constituted newly discovered evidence that was material and non-cumulative. However, the court found the materials were not of such conclusive character as to likely change the result on retrial, given James's independent identification of defendant as the gunman. The court found the remaining attachments to defendant's petition also did not support his actual innocence claim. Accordingly, the circuit court found that defendant had failed to establish a claim of actual innocence and denied defendant leave to file his successive petition.

¶ 19 On appeal, defendant contends his successive petition set forth a colorable claim of actual innocence based on Leighty's admissions, included in her affidavit and handwritten statement accompanying the successive petition, that she falsely named defendant as the shooter because a police officer threatened her that she had to identify someone. He contends this court should vacate the denial of leave to file his successive petition and remand for second-stage proceedings under the Act.

¶ 20 The Act provides a statutory remedy to criminal defendants who claim that a substantial violation of their constitutional rights occurred at trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. While the Act contemplates the filing of only one post-conviction petition, a successive petition may be filed where the defendant sets forth a valid freestanding claim of actual innocence. *Id.* ¶¶ 22-24. To file a successive petition, defendant must first obtain leave of court, and further proceedings on the petition do not occur until leave is granted. 725 ILCS 5/122-1(f) (West 2012); *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010). Leave should be denied only where it is clear, from a review of the successive petition and the documentation provided by the

petitioner, that as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 24.

¶ 21 To meet that requirement, the defendant's petition must be based on newly discovered evidence that could potentially exonerate him. *People v. Anderson*, 401 Ill. App. 3d 134, 140 (2010), citing *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). This requires supporting evidence that meets four requirements, *i.e.*, the evidence must be (1) newly discovered; (2) material; (3) non-cumulative; and (4) of such conclusive character that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32. When a defendant raises a claim of actual innocence, at issue is whether the defendant's petition and the supporting documentation raise "the probability that, more likely than not, no reasonable juror would have convicted him in light of the new evidence." *People v. Eddmonds*, 2015 IL App (1st) 130832, ¶ 13. This court reviews *de novo* the denial of leave to file a successive post-conviction petition. *Id*. ¶ 14.

¶ 22 The State does not dispute the second and third requirements listed above for an actual innocence claim. Therefore, our analysis involves whether the affidavit and handwritten statement of Leighty represent newly discovered evidence and whether that evidence is of such conclusive character as to probably change the result on retrial.

¶ 23 We first consider whether the evidence meets the requirement of being newly discovered. Newly discovered evidence is "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). It is the defendant's burden to show that there was no lack of due diligence on his part. *People v. Barnslater*, 373 Ill. App. 3d 512, 525 (2007), citing *People v. Harris*, 154 Ill. App. 3d 308, 318 (1987). Evidence does not qualify as "newly discovered" where it presents

facts that are already known to a defendant at trial or were known by the defendant prior to trial, though the source of these facts may have been unknown, unavailable or uncooperative. *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (2010); see also *Collier*, 387 Ill. App. 3d at 637; *Barnslater*, 373 Ill. App. 3d at 523.

¶ 24 Defendant concedes that he has long attempted to establish that Leighty lied at his trial about his involvement in the shooting. Defendant asserted in his initial post-conviction petition that his trial counsel was ineffective for failing to present evidence that Leighty falsely implicated him. He stated in the petition that Leighty contacted him between 2002 and his trial date in 2004 and apologized because she was forced to tell police that he shot the victim. Defendant now offers an affidavit of Leighty that she was coerced by a police officer into signing a statement implicating him in the shooting, along with a handwritten statement. However, Leighty's current affidavit and statement set out a theory based on facts that were known to defendant prior to his trial.

¶ 25 A defendant may present a witness's recantation as newly discovered evidence even where the defendant previously was aware that the witness had offered false testimony. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 23, citing *Barnslater*, 373 Ill. App. 3d at 524. However, a recantation is not deemed newly discovered evidence "if the defendant had evidence available at the time of trial to demonstrate that the witness was lying." *Id*.

¶ 26 Thus, the key inquiry is not whether defendant *knew* at the time of his trial that Leighty falsely implicated him but, rather, if he could have *presented evidence* at his trial of Leighty's recantation. Defendant contends he could not have presented Leighty's affidavit and letter earlier because she "has never before been willing" to recant her testimony, pointing out that had he

previously been able to secure a statement from Leighty, he would have offered it in support of his initial petition. Defendant further argues that due diligence could not have compelled Leighty to testify on his behalf.

¶ 27 Defendant admittedly knew before his trial that Leighty would implicate him in the shooting. He points to Leighty's remark in her affidavit that she was "coming forward now because this has been heavy on my heart." If Leighty was hesitant to offer her recantation earlier, that does not necessarily aid defendant, because the failure of a witness to come forward sooner of her own accord does not address the question of the defendant's due diligence. See *People v. Wingate*, 2015 IL App (5th) 130189, ¶ 27.

¶ 28 Defendant does not argue that he or his counsel attempted to obtain Leighty's statement; in fact, defendant asserted in his initial post-conviction petition that his trial counsel had failed to do so. Moreover, if Leighty was unwilling to cooperate with the defense, her lack of cooperation does not permit defendant to now present her affidavit and statement as newly discovered, if defendant was aware of her potential recantation. See *Collier*, 387 Ill. App. 3d at 637. Although defendant relies in part on *People v. Molstad*, 101 Ill. 2d 128, 134-35 (1984), that case involved the ability of the defendant to obtain affidavits from his codefendants, and the supreme court held that the codefendants' testimony was unavailable because the defendant could not force them to waive their right to self-incrimination. No such concern is present here.

¶ 29 Defendant also contends the instant case is comparable to *People v. Harper*, 2013 IL App (1st) 102181, ¶¶ 22-25, where the defendant supported his actual innocence claim with an affidavit from Cecil Hingston recanting his testimony, which had been read at defendant's second trial from a transcript of his testimony at defendant's first trial. In the affidavit, Hingston, who

managed the gas station at which the crime occurred, attested that he responded to police threats by complying and identifying certain people from a lineup. *Id*. ¶ 25. This court concluded that Hingston's affidavit constituted newly discovered evidence because "due diligence could not have compelled Hingston to testify truthfully at the first trial." *Id*. ¶ 42. The court further noted that defense counsel did not have the ability to cross-examine Hingston at the second trial. *Id*. Here, in contrast, defense counsel cross-examined Leighty.

¶ 30 We find this case more analogous to *People v. McDonald*, 405 Ill. App. 3d 131, 137 (2010), which the *Harper* court finds distinguishable. There, a witness in prison offered a statement exonerating the defendant and recanting his trial testimony. *Id*. at 134-35. This court held that statement did not constitute newly discovered evidence to support a claim of actual innocence because the witness testified at the defendant's trial and was cross-examined by defense counsel, and the testimony of that witness was corroborated by other witnesses. *Id*. at 137. For all of those reasons, the affidavit and statement of Leighty do not meet the definition of newly discovered evidence.

¶ 31 We also conclude that Leighty's current attestations are not so conclusive that they would probably lead to a different result at retrial. See *People v. Coleman*, 2013 IL 113307, ¶ 96; see also *People v. Washington*, 171 Ill. 2d 475, 489 (1996) (describing this requirement as the most important element of an actual innocence claim). The hallmark of a claim of actual innocence is the defendant's total vindication or exoneration. *People v. House*, 2015 IL App (1st) 110580, ¶ 41; see, *e.g.*, *People v. Adams*, 2013 IL App (1st) 111081, ¶ 37 (the statements of two individuals were capable of changing the result on retrial where they were unknown to the

defendant at the time of trial and corroborated the defendant's version of events, indicating that they saw the person committing the crime and that person was not the defendant).

¶ 32 The contents of Leighty's recantation do not exonerate defendant because in a potential retrial, the State would be able to again present the testimony of James, who witnessed the offense and identified defendant to police in a photo array and lineup. In addition, James identified Leighty as being present at the scene (an identification that defendant does not challenge), which corroborated her trial testimony.

¶ 33 Defendant raises various challenges to the credibility of James's testimony, including inconsistencies in his description of the gunman's physical characteristics. However, those factors are part of a reasonable doubt analysis, and consideration of an actual innocence claim does not involve an analysis of the sufficiency of the State's evidence to convict the defendant beyond a reasonable doubt. *Coleman*, 2013 IL 113307, ¶ 97 (noting that a finding that the evidence was not sufficient to convict the defendant would in fact result in the defendant's acquittal, as opposed to a new trial).

¶ 34 Still, defendant contends that Leighty's affidavit undermines James's account that he saw defendant shoot the victim, and he argues that James's testimony was "highly unreliable." Defendant has it backwards. James witnessed the shooting as a resident of the neighborhood, while Leighty, defendant's previous girlfriend, has offered statements that are recantations of her earlier account. Leighty now attests that she did not see the crime and was "highly intoxicated" and does not "know what happened." Recantation testimony is "inherently unreliable" and will not support a new trial except in extraordinary circumstances. *People v. Sanders*, 2016 IL 118123, ¶ 33, citing *People v. Morgan*, 212 Ill. 2d 148, 155 (2004); see also *McDonald*, 405 Ill.

App. 3d at 137. Where Leighty's inconsistent account was already explored at defendant's trial, it is unlikely that her affidavit and statement would lead to a different result on retrial, particularly when coupled with James's account of the offense and identification of defendant as the gunman. See *Collier*, 387 Ill. App. 3d at 637.

¶ 35 In conclusion, the materials accompanying defendant's successive petition that consist of Leighty's recantation of her trial testimony do not meet the tests for newly discovered evidence that would probably lead to a different result upon retrial. Accordingly, we affirm the judgment of the circuit court denying defendant leave to file a successive post-conviction petition.

¶ 36 Affirmed.