2018 IL App (1st) 160298-U

No. 1-16-0298

Order filed June 1, 2018

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 07 CR 20545
	)	
MARCUS HUDDLESTON,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition was proper, as it did not state an arguably meritorious claim of newly discovered evidence of actual innocence as alleged.

¶ 2 Following a 2009 jury trial, defendant Marcus Huddleston was convicted of first degree murder and two counts of aggravated battery with a firearm and sentenced to consecutive prison terms of 35, 10, and 10 years. We affirmed on direct appeal. *People v. Huddleston*, No. 1-10-1114 (2012)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the

summary dismissal of his 2015 postconviction petition, contending that it stated an arguably meritorious claim of actual innocence. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with the first degree murder of Dwayne Patterson and the aggravated battery with a firearm of Jerome Simmons and Joseph Thomas, all allegedly committed on or about September 1, 2007.

¶ 4 At trial, Simmons, Thomas, Jermaine King, and Jerry Lacey testified. While there were discrepancies between their accounts, the consensus of their testimony was that Patterson, Simmons, Thomas, King, Lacey and others were at a sandwich shop at about midnight. The group had been drinking elsewhere earlier and came to the shop to eat. None of the group visibly had a gun. As the group was in the shop, a man entered the shop alone. Simmons bumped into the man, and Simmons and the man argued. The man left the shop, asking Simmons or the group to talk outside. Simmons and others in the group followed the man outside. As soon as the group stepped outside, there were gunshots, and Patterson, Simmons, and Thomas were shot.

¶ 5 King testified that defendant was the man from the shop and the person who fired a revolver at the group, and identified him as such at trial. Although Thomas, Simmons, and Lacey each testified that they did not recognize the man in the shop, either at the time or at trial, and did not see who fired the shots, the State introduced evidence that each had identified defendant as the shooter in statements to police and upon viewing photographic arrays. Thomas and Simmons had also identified defendant as the shooter from a lineup and in grand jury testimony. The forensic evidence established that Patterson died from a gunshot wound to the back, and that the bullet from Patterson's body was fired from a revolver found in defendant's home upon his

arrest. Defendant could not be excluded as contributing to DNA found on the revolver, but one in eight unrelated black males also could not be excluded.

¶ 6 On direct appeal, defendant contended that trial counsel was ineffective for (1) "fail[ing] to explain to the jury why defendant did not testify he acted in self-defense after counsel promised he would in opening statements," and (2) declining an instruction on eyewitness identifications. *Huddleston*, No. 1-10-1114, ¶ 2. Regarding the former, we found that counsel never told the jury that defendant would testify, that defendant himself told the court that he did not want to claim or testify to self-defense, and that the jury heard the evidence that counsel referenced or "promised" in opening statements. "The testimony in fact demonstrated that Simmons and defendant engaged in a verbal altercation in the sub shop, defendant was outnumbered, some members of the group had been drinking, and the group followed defendant out of the shop. This uncontested scenario does not exclude the possibility suggested by counsel that defendant was 'defending himself' at midnight on September 1, 2007." *Id.*, ¶ 31. As to the absent jury instruction, we noted that jury instructions are a matter of trial strategy. Moreover, we found the evidence against defendant overwhelming so that he was not prejudiced by any ineffectiveness: one witness identified defendant as the shooter at trial, three others had repeatedly identified him before trial as the shooter, and the gun found in defendant's home was the fatal weapon and bore DNA that could not be excluded as being defendant's.

¶ 7 Defendant filed his *pro se* postconviction petition in December 2015, claiming newly discovered evidence of actual innocence. Specifically, Frank Jemison averred in an attached affidavit that he was outside the sandwich shop on the night in question when he overheard Simmons planning to rob defendant but receiving an objection from Lacey. After Jemison

entered the shop, defendant entered the shop. Simmons tried to grab defendant's money, and defendant and Simmons argued. The rest of the group joined the argument, and one of them punched defendant. Lacey stood between defendant and the rest of the group, and defendant ran out of the shop. The group followed defendant outside, and defendant told them to leave him alone and "I'm not playing." Jemison then saw defendant holding a gun. After saying that he was unconcerned that defendant had a gun, Simmons ran towards defendant, who fired his gun. Jemison left when he saw that Simmons and Thomas were shot and found Patterson wounded a short time later. Jemison averred that, when he learned defendant was in the same prison as himself, he told defendant he would "tell the truth" and provide an affidavit.

¶ 8 Defendant averred to a similar account. He entered the shop, Simmons tried to take his money, he and Simmons argued, the group joined Simmons in threatening defendant with violence, someone in the group punched defendant, and he ran from the shop. Outside, they continued to threaten him and he told them to leave him alone, before he drew his gun. Simmons said that he did not fear defendant's gun and then rushed at him, and defendant fired. Defendant averred that he did not go to the shop that night seeking a fight but merely defended himself against their threats and numerical superiority. He did not testify at trial because he did not want his background to be used in impeachment and he doubted that "my testimony would be enough to prove self-defense." He was "under the impression that counsel had witnesses" but "found out she did not." He was unaware at the time of his trial that anyone was willing to testify on his behalf, supporting his self-defense argument, but then met Jemison in prison.

¶ 9 The trial court summarily dismissed the petition in December 2015, finding that it did not establish a colorable claim of actual innocence. The court found that defendant was aware of the

facts that Jemison averred to, so that Jemison was merely an unknown source of those facts. The court also found that Jemison's account was discoverable with due diligence, as defendant did not claim to be unaware of Jemison's presence at the shop. Instead, defendant merely assumed that it would be fruitless to obtain Jemison's account. Lastly, there was trial evidence that defendant had an altercation in the shop with a group that outnumbered defendant and followed him outside. The court concluded that Jemison's account did not add enough to the trial evidence that no jury could find defendant guilty of murder and aggravated battery.

¶ 10 On appeal, defendant contends that the summary dismissal of his postconviction petition was erroneous because it stated an arguably meritorious claim of actual innocence.

¶ 11 A postconviction petition may be summarily dismissed within 90 days of its filing if "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition may be summarily dismissed if it has no arguable basis in law or fact because it relies on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Boykins*, 2017 IL 121365, ¶ 9. At the first stage, well-pled factual allegations are accepted as true unless contradicted by the record. *People v. Brown*, 2017 IL 121681, ¶ 27; *Boykins*, ¶ 9. We review *de novo* the summary dismissal of a postconviction petition. *Boykins*, ¶ 9.

¶ 12 For a claim of actual innocence, a defendant must present evidence that is (1) newly discovered, (2) not discoverable earlier with due diligence, (3) material and not merely cumulative, and (4) of such conclusive character that it would probably change the result on retrial. *People v. Sanders*, 2016 IL 118123, ¶ 24. Evidence is new if it was discovered after trial and could not have been discovered earlier by exercising due diligence, material if it is relevant and probative of the defendant's innocence, and non-cumulative if it adds to the evidence heard

at trial. *Id.*, ¶¶ 24, 46-47; *People v. Coleman*, 2013 IL 113307, ¶ 96. Evidence is not newly-discovered when it presents facts already known to the defendant before or during trial, even where the source of those facts may have been unknown, unavailable, or uncooperative. *People v. Brown*, 2017 IL App (1st) 150132, ¶ 42. Conclusiveness is the most important element of an actual innocence claim. *Sanders*, ¶ 47. A defendant's new evidence must be so conclusive that it is more likely than not that no reasonable trier of fact would find him guilty beyond a reasonable doubt. *Id*. The new, material, and noncumulative evidence must place the trial evidence in a different light and undermine our confidence in the factual correctness of the guilty verdict. *Coleman*, ¶ 97. Actual innocence is a claim of vindication or exoneration, not insufficiency of the evidence or mere impeachment of witnesses. *Id.*; *Brown*, 2017 IL App (1st) 150132, ¶ 39.

¶ 13 Here, we find that defendant's petition and supporting affidavits do not present a claim of newly-discovered evidence of actual innocence. In particular, Jemison's affidavit is not newly-discovered evidence. The key evidence defendant seeks to introduce is that Simmons tried to take his money in the shop, the group joined their argument including punching defendant, the group followed him outside, he told the group to leave him alone, he drew his gun, and he fired only when Simmons ran towards him. Defendant's affidavit establishes that this *evidence* was known to him at trial. Only the new *source* of this evidence, Jemison, was allegedly unknown. Newly-discovered evidence of actual innocence is an exception to preclusion doctrines, such as *res judicata* and collateral estoppel, that " 'prevent a defendant from taking two bites out of the same appellate apple and avoid piecemeal *** litigation.' " *People v. Wideman*, 2016 IL App (1st) 123092, ¶ 49, quoting *People v. Ortiz*, 235 Ill. 2d 319, 332 (2009). Allowing defendant to

present this known evidence now, through Jemison, would be another bite at the apple, one not encompassed by the doctrine of newly-discovered evidence of actual innocence.

¶ 14 Accordingly, the judgment of the circuit court is affirmed.

¶ 15 Affirmed.