2018 IL App (1st) 160308-U

No. 1-16-0308

August 14, 2018

Second 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. 11 CR 6063
	)	
DEMONJA MOORE,	)	Honorable
	)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's first-stage dismissal of defendant's postconviction petition is affirmed over his contention that he presented an arguable claim that his trial counsel was ineffective and that newly discovered evidence shows that he is actually innocent.

¶ 2 Demonja Moore, the defendant, appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq*. (West 2014). He contends the trial court erred in dismissing his petition because he raised an arguable claim

of: (1) ineffective assistance of trial counsel based on counsel's misapprehension of the law of involuntary manslaughter, which influenced his decision not to testify on his own behalf; and (2) actual innocence based on newly discovered evidence. We affirm.

¶ 3 BACKGROUND

¶ 4 Following a 2012 jury trial, defendant was convicted of first-degree murder while personally discharging a firearm.720 ILCS 5/9-1(a)(1) (West 2010). He was sentenced to a total of 65 years' imprisonment. On direct appeal, this court affirmed his conviction and sentence. *People v. Moore*, 2014 IL App (1st) 122568-U. We set forth the facts on direct appeal, but we recount them here only to the extent necessary to resolve the issue raised on appeal. See *Moore*, 2014 IL App (1st) 122568-U, ¶¶ 4-6.

¶ 5 The evidence at trial showed that, on February 14, 2011, Ziann Crump (Crump), was walking to school with her boyfriend, Brandon Williams (Williams). At the time, Crump was five months pregnant with Williams's child. Crump and Williams were walking northbound on Sacramento Boulevard. The pair walked in the street, near the curb, to avoid the snow and ice on the sidewalk. As they approached the intersection of Sacramento Boulevard and Harrison Street, a silver car pulled up next to them. Crump identified defendant as the driver of the vehicle. Defendant asked Williams if Crump was his girlfriend, to which Williams responded, "What does it look like? I'm walking with her." As Williams and Crump continued walking northbound, defendant hit Williams with his car, causing Williams to fall onto the hood and drop his coffee.

¶ 6 Williams walked over to defendant's window and punched him three or four times. Crump heard a gunshot and saw a flash of light coming from defendant's lap. Williams ran from

the car and said he had been shot. Defendant drove away. Crump called the police and then made her way to Williams, who collapsed in the street. An ambulance arrived and transported Williams to the hospital where he was pronounced dead.

¶ 7 Surveillance video of the shooting was played for the jury in open court. Crump explained that the video was a true and accurate depiction of the events that transpired that morning. The video shows that Williams was shot about three to four seconds after he approached defendant's window.

¶ 8 Kevin Walton (Walton) testified that on February 14, 2011, he arranged for defendant to drive him to school. Defendant picked Walton up at a convenience store located at the intersection of Sacramento and Harrison. Walton sat in the backseat of defendant's car while their friend Jeremy Head (Head) was in the passenger seat. Defendant drove northbound on Sacramento, where they encountered traffic. While waiting in traffic, defendant saw Crump walking in the street. Defendant called out to Crump through the passenger window and they began talking. Williams then arrived, walking next to Crump. Williams and defendant began to argue. Williams walked around the front of the car toward the driver's side. As Williams approached the driver's window, he reached his arm back. Walton "ducked down" because he did not know "what was fixing to happen." He heard a "shot go off" and then defendant drove away. Defendant drove Walton and Head to a nearby bus stop. Walton stated defendant had a "busted lip," but he did not see how he got it. Walton then took a bus to school.

¶ 9 Walton testified he could not recall talking with police officers on February 17, 2011, nor did he remember giving them a statement. When shown a signed statement, he admitted each

page of the statement had his signature and an attached photograph depicted him with the statement. He stated he signed the document "just to leave."

¶ 10 Walton further testified he did not view a lineup at the police station on March 19, 2011. Walton denied the signature indicating he identified defendant was his signature. He also could not recall testifying before a grand jury on April 4, 2011. The State then read portions of Walton's grand jury testimony. In his grand jury testimony, Walton stated Williams and Crump were walking alongside defendant's car. Defendant and Williams exchanged words. Williams moved to the front of defendant's car. Defendant tried to go around Williams, but hit him with his car. Williams walked over to the driver's side, spit on defendant, and punched him. Defendant then reached down and retrieved a black gun. Walton "heard" the gun "go off one time."

¶ 11 Assistant State's Attorney, Sean Concannon (Concannon) testified, on February 17, 2011, he interviewed Walton at the police station. The State introduced Walton's statement into evidence without objection and Concannon read it in open court. According to Walton's statement, defendant was looking at Crump and Williams got angry. The two men began "arguing back and forth." When defendant "tried to turn his car," Williams hit the hood. Williams walked around to defendant's open window and spit on him. Williams then "used his hands to hit [defendant] in the face." Defendant reached down and retrieved a "dark-colored" gun from his lap. Defendant shot Williams once before driving away on Harrison Street. Walton described defendant as driving "normal" after the shooting. Eventually, defendant pulled over and asked Walton and the other passenger to exit the car. Walton walked to a bus stop and rode the bus to school.

¶ 12 Head testified that on February 14, 2011, defendant was driving him and Walton to school. Head was seated in the passenger seat of defendant's car, while Walton sat in the backseat. Head saw the handle of a black gun protruding from underneath a shirt on defendant's lap. As defendant was driving north on Sacramento Boulevard, Head saw Crump and Williams walking in the street. Defendant drove alongside the couple and began talking to Crump through the passenger side window. Defendant asked Crump for her name and then asked Williams if she was "his girl." Williams stated she was, and asked "Don't you see I'm walking with her?" Williams and Crump moved in front of the car and continued walking. Head then "felt a bump" and saw Williams "about to fall over the car." After being "bumped" by defendant's car, Williams walked to the driver's side window and punched defendant twice in the face through the open window. Head saw defendant grab the gun from his lap and shoot Williams once in the chest. Head demonstrated defendant grabbed the gun from his lap with his right hand, held it horizontally across his body, aimed it at Williams' chest, and then fired. Defendant then turned east on Harrison Street. Eventually, defendant dropped Head off near where he had picked him up that morning.

¶ 13 On cross-examination, Head testified Crump did not respond to defendant's questions. He also stated Williams was cursing and yelling loudly at defendant. Head saw Williams punch defendant in the head "pretty hard." Head stated he had never seen Williams before that day.

¶ 14 James Grisby (Grisby), testified that on February 14, 2011, he was working for Safe Passage Community Watch on the northeast corner of the intersection of Sacramento Boulevard and Harrison Street. He heard screeching tires and turned to see that Williams had been hit by a car. Williams fell to the ground, stood up, walked to the driver's side window, and threw two or

three punches. Grisby heard a gunshot coming from inside of the car and saw Williams run across the street before falling down. Grisby informed the school there had been a shooting and then waited with Williams until an ambulance arrived. Grisby later went to the police station where he was shown a lineup and identified defendant as the driver. The State then rested.

¶ 15 Defense counsel informed the court, after "lengthy discussions" during the course of the trial, defendant did not wish to testify. The court explained to defendant that he had the right to testify and the decision was one "only [he] could make." The court then asked defendant if it was his decision not to testify on his own behalf, to which defendant replied, "Yes, sir."

¶ 16 The parties stipulated, if called, Rosa Silva (Silva) would testify that she is an investigator for the Office of the Cook County Public Defender. On September 28, 2011, she interviewed Walton while he was incarcerated in the Illinois Department of Corrections. During that interview, Walton stated defendant asked Crump her name. Williams approached the car and asked, "What the f*** are you doing talking to my girl?" Williams continued to exchange profanities with defendant and then Williams spit in defendant's face. Silva hand-wrote Walton's statement and he initialed each page. She would also testify, that on October 1, 2011, she interviewed Grisby, who told her that Williams "hit [defendant] very hard on the face."

¶ 17 The defense rested and the court heard arguments regarding the instructions that should be tendered to the jury. Defense counsel argued, in addition to the first-degree murder instruction, the jury should be instructed on self-defense, second-degree murder, and involuntary manslaughter. Regarding the involuntary manslaughter instruction, counsel argued "the jury could conclude that the trigger was pulled as a reaction from getting hit in the face by [Williams] causing the gun to discharge" or that the gun "just discharged" because it was "non-properly

functioning." Counsel further argued the jury could decide that defendant was "reckless" by "having the gun where he had it or grabbing the gun at all." The trial court declined to provide the involuntary manslaughter instruction, finding there was no evidence presented to support the assertion that defendant acted recklessly. The court agreed to provide the instructions for self-defense and second-degree murder.

¶ 18 After being instructed by the court, the jury found defendant guilty of first-degree murder, and also found that defendant personally discharged the firearm that proximately caused Williams's death. Defendant was sentenced to a total of 65 years' imprisonment.

¶ 19 On direct appeal, defendant contended: (1) the evidence did not support his murder conviction because he acted in self-defense; (2) in the alternative, his conviction should be reduced to second-degree murder because of the presence of mitigating factors; (3) his conviction should be reversed due to prosecutorial misconduct in closing argument; and (4) the trial court abused its discretion when it sentenced him to a term of 65 years in prison. This court affirmed defendant's conviction and sentence. See *Moore*, 2014 IL App (1st) 122568-U.

¶ 20 On June 25, 2015, defendant filed the *pro se* postconviction petition, alleging that (1) newly discovered evidence established that he was actually innocent of first degree murder; (2) his trial counsel was ineffective based on counsel's misapprehension of the law of involuntary manslaughter, which influenced his decision not to testify; and (3) his appellate counsel was ineffective for failing to argue that the trial court usurped the role of the jury by not allowing the involuntary manslaughter instruction.

¶ 21 In support of his actual innocence claim, defendant attached the affidavits of Walton and Head, who averred they altered their testimony at trial because they felt bad for Crump. In the

affidavits, both Walton and Head include their "unaltered" testimonies. In support of his ineffective assistance of counsel claim, defendant attached his own affidavit. In the affidavit, defendant averred counsel did not properly explain to him that he needed to introduce the *mens rea* element of involuntary manslaughter at trial. Defendant also averred, but for his counsel's deficient performance, he would have testified to several facts showing that his recklessness resulted in Williams's death, which would entitle him to an involuntary manslaughter jury instruction.

¶ 22 On September 18, 2015, the trial court summarily dismissed the petition, finding it frivolous and patently without merit. In a written order, the court explained Walton and Head's affidavits did not include newly available evidence, were cumulative of evidence already in the record, and were not conclusive evidence of actual innocence such that the result at trial would have been different. With respect to defendant's argument his counsel provided ineffective assistance, the court found defendant acquiesced to his counsel's strategy to pursue self-defense and the decision not to testify was ultimately his to make. Finally, the court explained defendant's appellate counsel was not ineffective for failing to argue that the trial court usurped the role of the jury by not allowing the involuntary manslaughter instruction because the evidence presented did not support the tendering of the instruction.

¶ 23 Defendant appeals, arguing the trial court erred in summarily dismissing his petition at the first-stage of postconviction proceedings because his petition presented an arguable claim of ineffective assistance of trial counsel and actual innocence.

¶ 24 ANALYSIS

¶ 25 Under the Act, a defendant may attack a conviction by asserting it resulted from a substantial denial of his or her constitutional rights. 725 ILCS 5/122–1 *et seq.* (West 2014); *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction action is a collateral attack on the judgment rather than a direct appeal from the conviction. *Tate*, 2012 IL 112214, ¶ 8. A circuit court adjudicates the petition in three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the trial court independently reviews the petition, takes all allegations as true, and determines whether the petition is "frivolous or patently without merit." *Id.*

¶ 26 The trial court may summarily dismiss a petition "as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact," meaning it is "based on an indisputably meritless legal theory or a fanciful factual allegation," such as a legal theory that is "completely contradicted by the record." *Hodges*, 234 Ill. 2d at 16. In this stage, the allegations of fact are considered true, "so long as those allegations are not affirmatively rebutted by the record." *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 47. We must construe postconviction petitions "liberally" and "allow borderline petitions to proceed." *Id.* at ¶ 5. Our review of the trial court's summary dismissal of a postconviction petition is *de novo. Hodges*, 234 Ill. 2d at 9.

¶ 27 Defendant first contends he presented an arguable claim of ineffective assistance of trial counsel. Defendant argues, due to his counsel's misapprehension of the law, he was denied a jury instruction regarding involuntary manslaughter. Specifically, he asserts his counsel never advised him of the need to introduce evidence of recklessness, the *mens rea* element, to entitle him to an involuntary manslaughter jury instruction. Defendant maintains counsel's misapprehension of

the law influenced his decision not to testify, even though his testimony would have included facts that would entitle him to the jury instruction.

¶ 28 Traditionally, to establish ineffective assistance of counsel, a defendant must show (1) counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, in *Hodges*, our Supreme Court indicated that in the context of first-stage postconviction proceedings, a defendant need not conclusively establish these factors. 234 Ill. 2d at 17. Rather, "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Id.* Deficient performance is performance that is objectively unreasonable under prevailing professional norms. *People v. Petrenko,* 237 Ill. 2d 490, 496–97 (2010); *Strickland*, 466 U.S. at 690, 694. Prejudice is found where a "reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Petrenko,* 237 Ill. 2d 490, 496–97 (2010); *Strickland*, 466 U.S. at 690, 694. Because a defendant must prove both elements, we may review the prejudice prong first. *People v. Gray*, 2012 IL App (4th) 110455, ¶ 25.

¶ 29 Defendant argues, but for his counsel's alleged deficiency, he would have testified to several facts showing evidence of recklessness resulted in Williams's death, entitling him to an involuntary manslaughter jury instruction. Had defendant been allowed to present this evidence he would have been convicted of involuntary manslaughter rather than first-degree murder. We disagree.

¶ 30 A person commits first degree murder when he "kills an individual without lawful justification * * * [and] either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or he knows that such acts create a strong probability of death or great bodily harm to that individual or another." 720 5/9-1(a)(1), (a)(2) (West 2010). In contrast, a person commits involuntary manslaughter when he "unintentionally kills an individual without lawful justification * * * [and] his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly." 720 ILCS 5/ 9-3 (West 2010). A person is reckless when he "consciously disregards a substantial and unjustifiable risk that circumstance exists or that a result will follow." 720 ILCS 5/4-6 (West 2010). "The basic difference between involuntary manslaughter and first degree murder is the mental state that accompanies the conduct resulting in the victim's death." *People v. Castillo*, 2012 IL App (1st) 110668, ¶ 49.

¶ 31 According to defendant's affidavit, his testimony would have shown he drove with a gun on his lap because it was a high crime area and he was afraid of being carjacked. After Williams's first two "hard" punches to the face, he was "almost knocked out" and had blurred vision. He feared Williams would see the gun and attempt to take it, and so he grabbed the gun "to maintain control of it." He then pointed the gun at Williams, hoping that Williams would see the gun and stop "violently hitting" him. Williams continued to punch defendant, which caused his head to jerk backward and left him "semi-conscious." These "jarring jolts" caused the gun to go off. Defendant claims he could not drive away from the scene to avoid Williams because, after the first two blows, he felt like he "might black-out" and he feared he would crash.

¶ 32 After reviewing the record, we find the court did not err in summarily dismissing this claim, where defendant cannot show he was arguably prejudiced by counsel's alleged deficient performance. Stated differently, defendant cannot show with his proposed testimony there is a "reasonable probability" the result of the proceeding would have been different. *Petrenko,* 237 Ill. 2d at 496–97. The evidence at trial belies defendant's argument that he acted without intent when he shot and killed Williams. First, regardless of why defendant carried a gun that morning, it is undisputed he was aware throughout the entire incident that he was armed. It is also undisputed that he initiated the conversation with Crump in front of Williams, which prompted the exchange of words between the two men. After the exchange, defendant struck Williams with his car hard enough to knock him onto the hood. Williams responded in kind by approaching defendant's window, spitting on him, and then punching him. After Williams did so, defendant shot him.

¶ 33 Contrary to defendant's affidavit, the two witnesses in the car with defendant testified that he grabbed his gun and shot Williams after he was punched, rather than while he was being punched. Moreover, as demonstrated by Head, defendant grabbed the gun from his lap with his right hand, held it horizontally across his body, aimed it at Williams' chest, and then fired. Furthermore, defendant's testimony that he could not drive away from Williams because he was "dizzy" is not consistent with the evidence. At trial, all the eye witnesses testified they saw defendant drive away without incident immediately after shooting Williams. In light of this evidence, even if defendant testified at trial, he cannot show a reasonable probability the result of the proceeding would have been different. *Petrenko,* 237 Ill. 2d at 496–97. Accordingly, the

court did not err in summarily dismissing defendant's claim of ineffective assistance of trial counsel.

¶ 34 Defendant next contends he is entitled to postconviction relief based on newly discovered evidence showing he is innocent of the offense of first-degree murder. Defendant included affidavits from Walton and Head who claim that they altered their testimonies at trial because they felt bad for Crump. The affidavits also include both witnesses "unaltered" testimony.

¶ 35 To prevail on a claim of actual innocence based on newly discovered evidence, the evidence supporting the claim must be arguably new, material, noncumulative, and of such a conclusive character that it would likely change the outcome on retrial. *People v. Mabrey,* 2016 IL App (1st) 141359, ¶ 23. Evidence is new if it was discovered after trial and could not have been discovered earlier through the exercise of 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.* Defendant bears the burden of showing due diligence. *People v. Walker,* 2015 IL App (1st) 130530 ¶ 18. Evidence, however, is not newly discovered if it was available at a posttrial proceeding or " 'presents facts already known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable or uncooperative.' " *People v. Snow,* 2012 IL App (4th) 110415, ¶ 21 (quoting *People v. Collier,* 387 Ill. App. 3d 630, 637 (2008)). The conclusive character of the alleged new evidence is the most important element of an actual innocence claim. *People v. Sanders,* 2016 IL 118123, ¶ 47. Moreover, actual innocence is synonymous with total vindication or exoneration. *People v. Calhoun,* 2016 IL App (1st) 141021, ¶ 30. The requirements of an actual innocence claim are "extraordinarily difficult to meet" (*People v. Coleman,* 2013 IL 113307, ¶ 94), and "courts rarely grant postconviction

petitions based on claims of actual innocence." (*People v. Wallace*, 2015 IL App (3d) 130489, ¶ 14).

¶ 36 Here, defendant relies on the affidavits of Walton and Head to support his claim that he is actually innocent of first-degree murder. We examine each affidavit to determine if the evidence contained therein is new, material, noncumulative, and of such a conclusive character that it would likely change the outcome on retrial.

¶ 37 Walton averred in his affidavit that he testified falsely at defendant's trial because Crump asked him to do so. He states defendant told Williams to get out of the street, but Williams ignored him and continued to walk slowly in front of defendant's car. Defendant hit the brakes, causing everyone in the car to jerk forward, and Williams "hopped on the hood" as an excuse to attack defendant. Walton also states defendant shot Williams as a "last resort" after being spit on and punched in the face "several times." Walton admitted he encouraged Head to "help [Crump]" and testify falsely.

¶ 38 Head averred in his affidavit that he withheld certain facts from his testimony because he felt bad for Crump. He stated Crump would "always smile and talk" to defendant and Williams "was insanely jealous." On the morning in question, defendant drove "slowly" behind Crump in order to "watch[] her body." This angered Williams, who positioned himself in front of defendant's car and then slowed down so as to let the car hit him. Head averred that defendant did not drive away because he was concerned for Williams's well-being. When Williams walked to the driver's side window, he spit in defendant's face and then punched him "several times." Defendant shot Williams once and told him to move away from his car. Head maintains

defendant had "no choice but to shoot" Williams, whom he described as a "hot-head," who "lost his life because of his temper."

¶ 39 After reviewing Walton's and Head's affidavits, we find neither affidavit contains evidence that is new, noncumulative, or of such a conclusive character that it would likely change the outcome on retrial. First, both affidavits simply revisit the altercation between defendant and Williams, which cannot be new evidence to defendant considering all three men experienced the events from inside of the same car. See *Snow,* 2012 IL App (4th) 110415, ¶ 21 (Evidence, however, is not newly discovered if it presents facts already known to defendant at or prior to trial, though the source of these facts may have been unknown, unavailable or uncooperative); *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009) (evidence is newly discovered if it "has been discovered since the trial" and defendant could not have discovered it sooner through "due diligence").

¶ 40 Second, Walton's and Head's "unaltered" testimonies are merely cumulative of their testimony at trial. Both Walton and Head testified defendant shot Williams after Williams punched him. Although in their affidavits Walton and Head averred Williams initiated the altercation, the jury saw video depicting much of the event and heard substantially similar testimony about whether defendant purposely hit Williams with his car. See *Ortiz*, 235 Ill. 2d at 335 ("evidence is considered cumulative when it adds nothing to what was already before the jury).

¶ 41 Third, and most importantly, Walton's and Head's proposed testimonies are not of such conclusive character that it would likely change the outcome on retrial. At most, their affidavits call into question whether defendant instigated the altercation by hitting Williams with his car or

if Williams allowed himself to be hit by defendant's car. However, as mentioned, the jury saw video of the incident and heard similar testimony about who initiated the altercation. Given this record, we cannot say it is arguable that Walton's and Head's proposed testimonies would have changed the outcome for defendant in a retrial.

¶ 42 CONCLUSION

¶ 43 For these reasons, we affirm the first-stage dismissal of defendant's postconviction petition.

¶ 44 Affirmed.