2018 IL App (1st) 160723-U
No. 1-16-0723

SECOND DIVISION
July 31, 2018

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 93 CR 7752
	)	
JOE SHERROD,	)	
	)	The Honorable
Defendant-Appellant.	)	Evelyn B. Clay,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Walker concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment of the circuit court reversed and remanded for a new third-stage evidentiary hearing because Sherrod was denied his due process right to a fair third-stage hearing and the affirmative mistakes in the court's decision-making process were not harmless beyond a reasonable doubt.

¶ 2 Defendant Joe Sherrod appeals from an order of the circuit court of Cook County dismissing his successive postconviction petition following a third-stage evidentiary hearing. Sherrod contends that he is entitled to a new trial because newly discovered testimony of Delbert

Heard and Claude McGee implicating "Prince Joe" in the fatal shooting of Rodriguez Myles is noncumulative, material evidence that would likely change the result on retrial.

¶ 3 BACKGROUND

¶ 4 Previously, we affirmed Sherrod's jury conviction for first degree murder in the March 5, 1993 fatal shooting of Rodriguez Myles and the sentence of life imprisonment. *People v. Sherrod*, No. 1-95-1534 (1997) (unpublished order under Supreme Court Rule 23). We also affirmed the summary dismissal of Sherrod's two subsequent *pro se* postconviction petitions, which were filed in August 1996 and July 1997. *People v. Sherrod*, Nos. 1-96-3525, 1-97-3196 (consolidated) (unpublished order under Supreme Court Rule 23).

¶ 5 In 2002, Sherrod filed a *pro se* successive postconviction petition, asserting a free-standing claim of actual innocence. Sherrod attached the supporting affidavits of Brian Lacey and Carrie Williams, who were unavailable at trial.

¶ 6 Lacey averred that he knew Sherrod as a drug dealer in the housing project building at 2900 South State Street. Sherrod employed members of the Mickey Cobras including the victim Myles, but Sherrod himself was not a gang member. Joe Lane, the Mickey Cobra in charge of drug sales at the building, told fellow gang members to stop selling drugs for Sherrod, but the victim Myles continued to do so. The morning that Myles was fatally shot, Lacey was standing in a hallway of the building and facing apartments 101 – 104, when Lane asked if he had seen Myles. Lane then stood at the doorway of apartment 104 and fired three or four shots. According to Lacey, Sherrod was not in the building at that time. Lacey averred that he previously did not come forward because of his gang allegiance and fear of being labeled a "stool pigeon."

¶ 7 Williams averred that she lived in apartment 105 at the time, and that she allowed Sherrod, who was dating her sister, to sleep on the couch after he showed up early that morning

intoxicated. Sherrod was still asleep on the couch when Williams heard gunshots. According to Williams, an investigator for Sherrod urged her to testify at trial, but she refused because she did not like Sherrod, who she opined "was nothing but a no good drug dealer," and she did not want to upset the Mickey Cobras.

¶ 8 In his petition, Sherrod also alleged that additional newly discovered evidence showed his conviction was obtained through the State's knowing use of perjured testimony and fraudulent concealment of evidence. Sherrod referred to prosecution witnesses Jermaine Young and Carol Scott, who testified at trial that neither knew Joe Lane. Sherrod claimed that whoever sold drugs in the building at 2900 South State Street also knew Lane because Lane oversaw drug sales there for the Mickey Cobras. He stated that Young sold drugs "on a daily basis" to Scott, who used to buy drugs from Lane. Sherrod added that Lane and Young previously stored drugs and guns in Scott's apartment in exchange for drugs and that the State knew of this and fraudulently concealed it.

¶ 9 On October 4, 2002, the circuit court appointed postconviction counsel for Sherrod. In November, despite being represented by counsel, Sherrod filed a motion for leave to file a *pro se* postconviction petition *instanter*, citing counsel's failure to amend his *pro se* successive postconviction petition to allege facts showing that the late filing was not due to his culpable negligence because Lacey and Williams were previously unavailable.

¶ 10 More than one year later, on March 22, 2004, the State filed a motion to dismiss Sherrod's successive postconviction petition. In April, Sherrod filed a "*pro se* motion to notify the court of appointed post-conviction counsel's failure to promptly notify the State of additional newly discovered evidence of [his] actual innocence." Sherrod attached the July 19, 2003 affidavit of Marvin Grant, who carried the rank of "Prince" in the Black P. Stones gang for the

past 13 years. Grant averred that about 7:30 a.m., "[o]ne Saturday morning in March 1993," he was standing in front of the housing project building at 2930 South Dearborn Street when he heard gunshots coming from the building at 2900 South State Street. Grant saw Prince Joe come out of 2900 South State Street with a "shiny gun" in his right hand and fire several shots into a first-floor apartment before entering the building at 2920 South State Street. Later that day, Prince Joe told Grant that he had to make an example of Myles because he continued to sell drugs for Sherrod after being told to stop. Grant averred that he did not provide this information sooner because he did not want to destroy the business relationship between his gang, the Black P. Stones, and the Mickey Cobras.

¶ 11 In May 2004, Sherrod filed a "second amended *pro se* post-conviction petition," alleging additional newly discovered evidence of his actual innocence in the form of Grant's affidavit, and the circuit court docketed Sherrod's petition for second-stage proceedings. In early May 2007, postconviction counsel filed a Rule 651(c) certificate (Ill. S. Ct. R. 651(c) (effective Feb. 6, 2013)) and informed the State that she intended to adopt and stand on Sherrod's *pro se* filings. The next month, postconviction counsel filed a motion to withdraw from her representation of Sherrod. On September 21, 2007, when Sherrod was brought before the court on the matter, postconviction counsel noted that Sherrod had also filed a motion for postconviction counsel to withdraw and a complaint against her with the Illinois Attorney Registration and Disciplinary Commission. The circuit court asked Sherrod whether he wished to represent himself and he answered that he did not. The circuit court ultimately denied postconviction counsel's motion to withdraw.

¶ 12 Four years later, in May 2008, the State filed a second motion to dismiss, arguing that Sherrod failed to meet the cause-and-prejudice standard required to file a successive

postconviction petition, and that the affidavits comprising his newly discovered evidence did not support his actual innocence claim.

¶ 13 Following a hearing on February 17, 2009, the circuit court granted the State's motion to dismiss. Sherrod appealed, and in 2010, while his appeal was pending, he filed a "petition for leave to file a successive post-conviction petition, *instanter*." In his 2010 petition, Sherrod asserted a claim of actual innocence based on newly discovered evidence in the form of the affidavits of two eyewitnesses to the shooting, Claude McGee and Delbert Heard, who both saw someone other than Sherrod commit the shooting.

¶ 14 On March 11, 2011, the circuit court entered a written order denying Sherrod leave to file his successive postconviction petition *instanter*. In its written order, the circuit court found that Sherrod failed to demonstrate due diligence in obtaining the affidavits of McGee and Heard and failed to demonstrate that the affidavits would have changed the outcome on retrial. The circuit court stated that the affidavits were "inherently suspicious" because they were offered almost 15 years later and the evidence against Sherrod was overwhelming. Sherrod filed a notice of appeal from the denial on April 5, 2011, and appeal number 1-11-1062 was assigned. We subsequently granted Sherrod's own motion to dismiss his appeal on June 2, 2016, and the mandate issued on August 1, 2016.

¶ 15 As for Sherrod's appeal from the circuit court's judgment granting the State's motion to dismiss his previous successive petitions in 2009, we reversed the dismissal and remanded the cause to the circuit court for third-stage proceedings. *People v. Sherrod*, 2011 IL App (1st) 090590-U. In doing so, we stated that the proposed testimony in the affidavits of Lacey and Grant advanced a theory that another "Joe," specifically, Joe Sherrod's competing drug dealer, Joe Lane, was the gunman, and challenged the identification testimony presented by the State's

trial witnesses. *Id.* ¶ 22. We noted that Lacey would testify that he saw Joe Lane walk down the hallway, knock on apartment door 104 and fire three or four shots. *Id.* We noted that Grant would testify that Joe Lane had confessed to him. *Id.* We did not find this evidence cumulative or immaterial because the jury did not hear similar testimony from trial witnesses supporting the theory that another "Joe" committed the shooting. *Id.* Taken as true, we stated that these facts had the potential to change the result on a retrial. *Id.* ¶ 23. We noted that Sherrod presented no evidence at trial, and the only physical evidence connecting him to the shooting was his possession of keys to a car that a witness had seen the man who shot Myles use to leave the scene. *Id.* We stated that the newly discovered evidence, in the form of Lacey and Grant's affidavits, directly rebutted the testimony of the trial witnesses. *Id.* Accordingly, we found that Sherrod met the criteria to advance his postconviction petition to the third stage of proceedings for an evidentiary hearing. *Id.* However, we found that the affidavit of Carrie Williams, when taken as true, merely presented facts already known to Sherrod at or before trial and was not "newly discovered" evidence even if she was unavailable or uncooperative. *Id.* ¶ 18. Moreover, we did not consider the significance of Heard and McGee's affidavits as that was not before us in Sherrod's appeal from the circuit court's judgment granting the State's motion to dismiss his previous successive petitions in 2009.

¶ 16 Upon remand on February 1, 2013, Sherrod's postconviction counsel filed a motion to amend the witness list for the evidentiary hearing. In the motion, Sherrod stated that the addition of Heard and McGee, the affiants in his 2010 petition, would be in the best interest of judicial economy and expediency because "[a] stay has been granted to possibly have this court include the two newly discovered witnesses with the [appeal] pending before the [appellate] court due to the facts arising from the same event." Sherrod also stated that "[t]he affidavits of the newly

discovered witnesses and evidence is similar to the affidavits the appellate court ruled as newly discovered, noncumulative and of such a conclusive character that they would probably change the results on retrial." The circuit court granted Sherrod's motion with no objection from the State.

¶ 17 At the evidentiary hearing, Sherrod did not present the testimony of Lacey, Williams, or Grant. Rather, Sherrod presented the testimony of Heard and McGee.

¶ 18 Heard testified that he had been incarcerated since about 2008 and was serving a sentence of life imprisonment like Sherrod, whom he met in prison. According to Heard, one early morning in March 1993, he went to the building at 2900 South State Street to take "Miss Harris" grocery shopping as a favor for his friend Darryl Johnson. Miss Harris was Johnson's "lady friend." Heard did not remember the name of the grocery store that he had taken her previously. As he was entering the building, Heard saw "a guy shooting into an apartment" about 30 to 40 feet away but he did not recall the apartment number. Heard saw the gunman's profile but did not recognize the gunman. Heard described the gunman as "a tall guy," about six feet tall, 200 pounds, with corn rows or "braids hanging down from his baseball cap." He added that the gunman was wearing all red. When the gunman turned toward him, Heard ran to his truck and drove away. Heard saw the gunman for only a few seconds and did not see what happened inside the apartment. Later that day, police officers in an unmarked vehicle stopped Heard in the McDonald's parking lot at Halsted and 114th Streets and questioned him about the incident. He told the officers what he saw and gave them his pager number. A day or so later, Heard was contacted by the officers and transported to the police station where he viewed a lineup. Heard did not see the gunman in the lineup, and he did not recall whether Sherrod, whom he did not

know at that time, was in the lineup. Heard told the officers that the gunman was "much taller" and "much bigger" than Sherrod.

¶ 19 On cross-examination, Heard testified that the officers did not explain how they knew he was at the building when the shooting occurred, but he assumed that someone had provided his license plate number to them. Heard admitted that he was out on bond for attempted murder at the time, and he was not certain that he witnessed the same shooting for which Sherrod was convicted. He explained, "No, I'm not certain of that. I'm just saying what I saw that day. That's all I can tell you. I don't really know that much about his crime to be honest with you." Heard also stated that after meeting Sherrod in prison, he spoke to a state's attorney and Sherrod's attorney on two occasions. Heard doubted his ability to identify the gunman at the time of the hearing. We note there are no police photographs of Sherrod for this arrest in the record. However, the arrest report from this event states that on March 8, 1993, Sherrod was five feet _x_ (the inches are obscured by the filing punch hole) and weighed 160 pounds. The presentence investigation report completed February 3, 1995, states that at that time Sherrod was five feet seven inches and weighed 175 pounds.

¶ 20 McGee testified that about 7:30 one Saturday morning in March 1993, he was standing with a group of guys in front of the building at 2900 South State Street when Prince Joe approached and asked if anyone had seen the victim Myles, whom McGee referred to as Reno. McGee and Reno were members of the Mickey Cobras. McGee saw Prince Joe enter the building and knock on the door of apartment 104. McGee estimated that he was about two car lengths away from Prince Joe at that time. When the door opened, McGee believed he heard someone say, "Joe." McGee then saw Prince Joe draw what he realized was a gun because he heard shots

immediately after and ran home. He further testified that he did not see Sherrod and he did not speak to the police about the incident.

¶ 21 On cross-examination, McGee acknowledged that he did not live in the building and explained that he often visited fellow Mickey Cobras who lived there because he drove his sister to and from nearby Dunbar High School. He identified Carolos Marshall and Noel Christian as his friends who lived in the building. McGee then described the gunman as about 230 pounds, six feet tall, and wearing braids. He added that the gunman wore a red jacket, red shoes, and red pants but no hat. McGee stated Sherrod approached him on several occasions in prison seeking information about the incident, but he declined.

¶ 22 On further cross-examination, McGee stated that he did not remember being interviewed by an assistant state's attorney and an investigator from that office in April 2013. He explained that in 2012, he underwent spinal surgery that left him partially paralyzed, and by April 2013, he was on three different medications and his mind was foggy. He also stated that he knew of Reno but was not close with him.

¶ 23 Sherrod rested, and the State presented the testimony of Marci Ross, Joe Lane, and Investigator Daniel Brannigan.

¶ 24 Ross testified that she lived in apartment 104 at the time and was dating Joe Lane. She spent the early morning hours on March 6, 1993, visiting with her friends, Antoinette Austin and Thelma Stanley, while the victim Myles was laying down in her bedroom avoiding his girlfriend Crystal because they had a fight. Ross stated that her friends left the apartment around 5 a.m. and she remained on the couch in her living room. At 7:30 a.m., she heard a knock at her front door and Myles answered the door on his crutches. Ross heard whoever it was that knocked say "Joe" and saw Myles struggle to close the door. She then heard four or five gunshots and saw Myles

fall onto his back. A few minutes later, someone fired a shot through her kitchen window. Ross waited several minutes before calling the police from an upstairs neighbor's place. Ross acknowledged learning that Joe Sherrod was arrested for the murder of Myles and stated she did not know of a "Joe" in her building that was about six feet tall and 230 pounds, or a "Joe" that was a Mickey Cobra. She added that her boyfriend Joe Lane was not involved with the Mickey Cobras.

¶ 25 On cross-examination, Ross explained that Myles, whom she knew only by his last name, answered the front door because it might have been his girlfriend. She added that Myles did not say anything upon answering the door. Ross conceded that she and Joe Lane had been dating on and off and "at that particular point, [they] were just nice friends." Ross stated that Joe Lane usually called her before visiting, and she last saw him about two weeks before the incident. Ross stated that she did not tell the police about Joe Lane when asked if she knew a "Joe" because "I know for a fact should I say that he wouldn't even have nothing involved in that." On recross-examination, Ross stated that the voice she heard from the front door was not Joe Lane's voice.

¶ 26 Lane testified that he was seeing Ross and working two jobs in March 1993. He married Ross in 1999 after serving the military, and they divorced shortly thereafter. On the evening of the shooting, Lane returned home from work and was leaving for a party when he encountered detectives standing at his door. He agreed to accompany the detectives to the station where he answered their questions regarding the incident and then went home. He was not placed in a lineup. Lane added that he had never been arrested, and he did not belong to a street gang. Lane described himself as five feet, five inches tall, and 165 pounds. He testified that he did not know the victim Myles or a "Prince Joe" in the Mickey Cobra gang.

¶ 27 Brannigan, an investigator from the state's attorney's office, testified that he and an assistant state's attorney interviewed Delbert Heard at Branch 66 on March 29, 2013. Brannigan stated that he reviewed the police reports concerning the shooting but found no mention of Heard having been interviewed or witnessing a lineup. Brannigan also stated that he and the same assistant state's attorney interviewed Claude McGee, who was confined to a wheelchair, at Branch 66 on April 5, 2013. Brannigan asked McGee whether he was on any medication or in any pain, and McGee answered, "No." McGee said he knew Prince Joe, who at the time had a crazy look in his eyes and started shooting without asking questions. McGee said the shooting took place about 6 or 7 p.m. and he ran after the first gunshot.

¶ 28 On January 29, 2016, the circuit court dismissed Sherrod's petition for postconviction relief. In announcing its decision, the circuit court referred to its written ruling and stated that Sherrod's actual innocence claim was initially supported by the affidavits of Brian Lacey and Carrie Williams, which the appellate court had determined met the criteria set forth in *People v. Ortiz*, 235 Ill. 2d 319 (2009), and remanded for an evidentiary hearing. The circuit court stated that it had granted Sherrod's subsequent motion to add Heard and McGee as witnesses for the hearing without objection from the State. Because Lacey and Williams did not testify at the hearing, the circuit court stated that it had analyzed the testimony of Heard and McGee. The circuit court found that Heard's testimony lacked credibility, citing Heard's failure to recall the exact date of the incident, the full name of "Miss Harris," or the name of the grocery store where he took Miss Harris previously. The circuit court added that Investigator Brannigan testified there was no police record showing that Heard viewed a lineup or that his license plate was part of the investigation. The circuit court also found that McGee's testimony lacked credibility stating in pertinent part the following, which Sherrod now claims are filled with inaccuracies:

"Here [McGee] does not recall the specific date of the murder. He insinuates that he returned to the area after he dropped off his sister to Dunbar High School; however, he never asserts that he was actually at 2900 South State or at Apartment 104 where the murder occurred.

Further, as Investigator Brannigan testified in court, Prince Joe is a title of rank within gangs and is not an indication of a specific person. In addition, [McGee] informed Investigator Brannigan that the murder happened at 7:00 in the afternoon, as it was getting dark, and did not recall who the victim of the shooting was.

The Court heard two of the four affiants' live testimony and observed their demeanor. It is this Court's determination that Heard's and [McGee's] testimony are not credible.

More importantly, the evidence of the affiants [Heard and McGee] is not exonerative. The evidence of the affidavit was not—of the testimony and the affidavits would not overcome the amount of inculpatory evidence presented at trial.

Two witnesses observed [Sherrod] shooting into the 2900 South State building, and a third witness heard gunshots and observed [Sherrod] leaving the scene of the homicide in a vehicle. Reflected in the trial record, Denise Watson testified that at 7:30 a.m., she saw [Sherrod] shooting up the building through her window.

Further, Carol Scott, who knew [Sherrod] for 25 years, testified that she saw [Sherrod] shooting at the building.

Lastly, Jermaine Young testified that after hearing gunshots, he looked out his window and saw [Sherrod] walk out the building, enter into a black Nissan, and drive off. Additionally, all three witnesses identified [Sherrod] in a lineup.

***

> In this case there are three witnesses determined credible by this Court and the Illinois Appellate court. Based on the evidence presented at the evidentiary hearing, in conjunction with the credibility determined—and in conjunction with the credibility determinations that this Court has made, this Court finds [Sherrod] has failed to meet the *Ortiz* standard.
>
> Both Heard and [McGee] are not credible witnesses, and with certainty there is no reasonable probability that their incredible testimony would change the results on re-trial.
>
> Therefore, [Sherrod's] claim of actual innocence is frivolous and without merit."

¶ 29 This appeal follows.

¶ 30 ANALYSIS

¶ 31 "At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation." *People v. Carter*, 2017 IL App (1st) 151297, ¶ 132. Moreover, "the defendant no longer enjoys the presumption that the allegations in his petition and accompanying affidavits are true." *People v. Gacho,* 2016 IL App (1st) 133492, ¶ 13. The circuit court, as the finder of fact, makes credibility determinations, decides the weight to be given testimony and evidence, and resolves any evidentiary conflicts. *People v. Domagala*, 2013 IL 113688, ¶ 34. The circuit court " 'may receive proof by affidavits, depositions, oral testimony, or other evidence,' and 'may order the [defendant] brought before the court.' " *People v. Carter*, 2017 IL App (1st) 151297, ¶ 129 (quoting 725 ILCS 5/122-6 (West 2016)). Generally, where fact-finding and credibility determinations are involved, we will not reverse the circuit court's decision unless it is manifestly erroneous. *People v. English*, 406 Ill. App. 3d 943, 952 (2010). "Manifestly erroneous means arbitrary, unreasonable and not based on the evidence." *People v. Wells*, 182 Ill. 2d 471, 481 (1998).

¶ 32 The due process clause of the Illinois Constitution offers postconviction petitioners the right to raise a freestanding claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). To warrant a new trial, an actual innocence claim must be supported by evidence that is newly discovered, material and noncumulative, and of such conclusive character that it would probably change the outcome on retrial. *Id.* A defendant bears the burden of demonstrating the elements of an actual innocence claim by a preponderance of the evidence. *People v. Evans*, 2017 IL App (1st) 143268, ¶ 32. Because the circuit court denied Sherrod a new trial based upon its finding that Heard and McGee's testimony were not credible and would not change the outcome on retrial, we find that only the third element of Sherrod's actual innocence claim is at issue. *People v. Morgan*, 2015 IL App (1st) 131938, ¶ 61.

¶ 33 Sherrod argues that the circuit court incorrectly employed a higher standard than what is required of the third element of an actual innocence claim by stating that actual innocence means total vindication or exoneration and citing *People v. Anderson*, 402 Ill. App. 3d 1017, 1037 (2010). Sherrod asserts that the circuit court's determination in this regard is incorrect as well as its reliance on *Anderson*. As support, Sherrod quotes *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1034 (2011), where the appellate court stated that "new evidence need not necessarily establish the defendant's innocence; rather a new trial is warranted if all of the facts and surrounding circumstances, including the new evidence, warrant closer scrutiny to determine the guilt or innocence of the defendant." Sherrod points to the circuit court's statement that "[m]ore importantly, the evidence of the affiants is not *exonerative*," as further evidence that the circuit court incorrectly employed a higher standard. Relatedly, Sherrod argues that the circuit court's credibility determinations were based on numerous errors and "mis-rememberings."

¶ 34 The State responds that Sherrod fails to demonstrate that *Anderson* is no longer good law and this court recently noted the same proposition, *i.e.*, that "the hallmark of an actual innocence claim is 'total vindication' or 'exoneration,' " in *People v. Evans*, 2017 IL App (1st) 143268, ¶ 30. The State asserts that the circuit court used the proper standard in determining "that there was no reasonable probability that the testimonies of Heard and McGee would change the result on retrial." The State argues that the circuit court's judgment was not manifestly erroneous because "the evidence presented at the evidentiary hearing failed to establish that [Sherrod] was *actually innocent* of the murder." The State also responds that Sherrod is "splitting hairs" about the circuit court's incorrect recall of Heard and McGee's testimony.

¶ 35 In his reply brief, Sherrod points out that the State, "like the circuit court below," misconstrues our statement in *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (quoting *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999)), that "the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration,'" as support for its contention that evidence supporting an actual innocence claim must amount to total vindication or exoneration. Sherrod correctly observes that *Collier* did not hold that newly discovered evidence of actual innocence must completely vindicate a defendant; rather, in *Collier*, we noted the well-established standard that newly discovered evidence must be of such conclusive nature that it would probably change the result on retrial. *Id.* at 637 (citing *People v. Barrow*, 195 Ill. 2d 506, 540-41 (2001)). Sherrod also complains for the first time that the circuit court erred when it noted Investigator Brannigan's testimony that Prince Joe is a title of rank within gangs because his objection to that testimony during the evidentiary hearing was sustained.

¶ 36 The constitutional guaranty of due process of law applies in postconviction evidentiary hearings (*People v. Taylor*, 357 Ill. App. 3d 642, 648 (2005)), and where the record affirmatively

shows that the circuit court failed to recall critical defense evidence when entering judgment, the defendant did not receive a fair trial (*People v. Williams*, 2013 IL App (1st) 111116, ¶ 75). Although the circuit court is presumed to know and properly apply the law, when the record affirmatively shows otherwise, that presumption is rebutted. *People v. Virella*, 256 Ill. App. 3d 635, 638 (1993). We review *de novo* whether Sherrod was denied his right to due process (*Williams*, 2013 IL App (1st) 111116, ¶ 75) and whether the record shows that the circuit court "made an affirmative mistake in its decision-making process" (*Id.* ¶ 104).

¶ 37 Here, the circuit court recited the wrong standard of total vindication or exoneration twice and commented that "the affidavits would not overcome the amount of inculpatory evidence presented at trial" even though those affidavits were submitted in support of a different postconviction petition. The circuit court also concluded that Sherrod's actual innocence claim was "frivolous and without merit," which actually invokes the summary dismissal stage of postconviction proceedings. The appropriate standard for ultimate relief is provided in *People v. Washington*, 171 Ill. 2d 475, 489 (1996), where our supreme court stated that "[s]ubstantively, relief has been held to require that the supporting evidence be new, material, noncumulative and, most importantly, of such conclusive character as would probably change the result on retrial." (Internal quotation marks omitted.) Our supreme court has also stated that "*[p]robability, not certainty*, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence." (Emphasis added.) *Coleman*, 2013 IL 113307, ¶ 97. The circuit court's repeated reference to total vindication or exoneration and its ultimate conclusion that Sherrod's actual innocence claim was "frivolous and without merit," is strong affirmative evidence that the circuit court applied the wrong standard in determining the credibility of Heard and McGee. See *Virella*, 256 Ill. App. 3d at 638 (the circuit court repeatedly referred to the

wrong standard of proof in finding defendants guilty). We acknowledge that the circuit court also stated that "there is no reasonable probability that their incredible testimony would change the results on re-trial," but that isolated statement is entirely inconsistent with the circuit court's references to certainty during its credibility determination.

¶ 38 Moreover, the circuit court made credibility determinations based on various errors and incorrect recall of Heard and McGee's testimony. For example, the circuit court inaccurately stated that McGee "insinuate[d] that he returned to the area after he dropped off his sister to [*sic*] Dunbar High School" on a Saturday morning, that McGee had been partying all night before the shooting, and that he never asserted that he was at the building when the shooting occurred. The circuit court inaccurately stated that Heard was "placed in custody in a McDonald's parking lot" when he was merely stopped. The circuit court inaccurately stated that Heard testified that the officers who stopped him had informed him that his car was identified at the scene when Heard merely testified that he "assumed" that to be the case. As noted, Sherrod also complains that the circuit court erroneously considered the investigator's testimony that Prince Joe is a title of rank within gangs when his objection to that testimony during the evidentiary hearing was sustained. Although the main issue at trial was one of identification and the circuit court's incorrect recollection of Heard and McGee's testimony concerned other details that led to its determination that neither were credible, we believe that the circuit court's repeated reference to total vindication and exoneration, rather than probability, constitutes affirmative evidence that it failed to consider the crux of defendant's case, namely that someone else was the gunman. See *Williams*, 2013 IL App (1st) 111116, ¶¶ 81-90 (citing *People v. Mitchell*, 152 Ill. 2d 274 (1992), and *People v. Bowie*, 36 Ill. App. 3d 177 (1976)). After considering all the evidence, we cannot

find that the circuit court's mistakes in determining the credibility of Heard and McGee were harmless beyond a reasonable doubt. *Id.* ¶ 98.

¶ 39 CONCLUSION

¶ 40 For the reasons stated, we find that Sherrod was denied his due process right to a fair third-stage hearing and the affirmative mistakes in the circuit court's decision-making process were not harmless beyond a reasonable doubt. Accordingly, we reverse the judgment of the circuit court of Cook County and remand the cause for a new third-stage evidentiary hearing to be conducted under the appropriate standard for ultimate relief on an actual innocence claim. See *Virella*, 256 Ill. App. 3d at 639 (reversing and remanding for a new trial under the constitutionally proper standard).

¶ 41 Reversed and remanded with directions.