2018 IL App (1st) 161325-U

SIXTH DIVISION
November 30, 2018

No. 1-16-1325

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. 11 CR 14049
	)	
JAMES GALAMBOS,	)	
	)	Honorable Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant set forth arguable claim of actual innocence in postconviction petition; reversed and remanded.

¶ 2 Defendant, James Galambos, appeals from the summary dismissal of his petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, defendant contends that he set forth arguable claims of actual innocence and ineffective assistance of counsel. Finding that defendant's actual innocence claim

has an arguable basis in law and fact, we reverse and remand the entire petition for second stage postconviction proceedings.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial in July 2012, defendant was found guilty of first degree murder and attempted first degree murder and sentenced to consecutive prison terms of 50 and 26 years. We affirmed defendant's conviction and sentence on direct appeal. *People v. Galambos*, 2014 IL App (1st) 123666-U. Below, we repeat the underlying facts of defendant's case to the extent necessary to understand defendant's current appeal.

¶ 5 Defendant was alleged to have shot Sergio Torres and Francisco Rueda on the afternoon of July 22, 2011. Torres died from his injuries. Rueda, the surviving victim, testified at trial that on July 22, he had been part of a group of 10 to 12 people near Legion Park in Chicago. There, Rueda observed defendant running towards the group. Rueda described defendant as a "white guy with long puffy hair" whose face was covered with a white shirt. Defendant's hand was in his pocket and he was with another man on a bike. When defendant was 10 to 15 feet away, he dared someone to "throw up the crown," which was a gang sign for the Latin Kings. Rueda did not see anyone display the symbol. After Rueda observed defendant pull something out, Rueda started walking and then heard six to eight gunshots, eventually noticing that he had been shot in the armpit. Subsequently, the police arrived and Rueda was taken to a hospital, where he identified defendant in a photo spread. On July 29, Rueda viewed a line-up and identified defendant as the person who shot at his group.

¶ 6 Others who had been part of Torres and Rueda's group also testified. Jose Herrera stated that defendant had approached the group on foot along with another man on a bike. Hererra described defendant as a white man with long hair who had a white shirt covering his face from

the nose down. After saying something that Herrera could not hear, defendant reached into his pocket and pulled out a gun that he pointed at some of Herrera's friends, whereupon Herrera saw sparks come out of the gun and heard three shots. Herrera ran across the street and eventually observed that Torres was lying on the sidewalk. In the early morning hours of July 23, Herrera identified defendant as the shooter in a photo array. About a week after the incident, Herrera identified defendant as the shooter in a line-up.

¶ 7 Benilli Mora[1] testified that while walking with his friends, he observed defendant approach on foot with another man who was on a bike. Defendant had a white shirt covering half of his face from the nose down. Mora heard a sound as if defendant was talking, but could not understand what defendant was saying. Mora observed defendant "throwing down the crown," which was a sign of disrespect to the Latin Kings. Defendant then pulled out a gun and fired a shot, causing Mora's friends to run away. Mora heard six shots, and when the shots were finished, he turned around and observed defendant and the man on the bike head south. On July 23, Mora identified defendant in a photo array, and on July 29, he identified defendant in a line-up.

¶ 8 Samuel Crawford testified that two men approached his group. One of the men was on a bike and the other, identified as defendant, had blond curly hair and a white t-shirt over his face from the nose down. Defendant "threw up" the Latin Kings sign, pulled out a gun from his pocket, and shot once at Crawford's friends. Crawford ran away and heard four more shots. Crawford observed Torres fall and called 911. Later, Crawford identified defendant as the shooter in a photo array.

¶ 9 Alexis Garza testified that after she joined Torres and Rueda's group on July 22, she observed defendant and another man approaching. Garza had seen defendant before and

[1] Benilli Mora is referred to elsewhere in the record as Benji Mora.

recognized him even though he was a wearing a t-shirt below his eyes. Defendant approached the group and said, " 'what you is. What you is. Throw up the crown, I dare you.' " Garza turned her head to see if anyone reacted and heard a shot. Garza observed defendant shooting "all crazy," as if he could not control the gun. Later that day, Garza identified defendant as the shooter in a photo array. A week later, Garza identified defendant in a line-up.

¶ 10 Jesus Vargas testified that on the day in question, defendant ran towards his group, yelled out gang signs, and pulled out a gun from his pocket and started shooting. Vargas heard six shots. Vargas described defendant as having blond hair and wearing a white shirt that covered his face below his nose. On July 29, Vargas identified defendant as the shooter in a line-up.

¶ 11 The State also called as witnesses two people who had been with defendant that day—Dre'von Brown and Gusti Korotkov. Brown testified that he had known defendant for about three years and just before the incident, he had been in Legion Park with a group that included defendant. Brown observed another group of people outside the park. Defendant or his friend, John, said, " 'there go some flakes,' " referring to rival gang members, and defendant jogged to the group while John biked. When defendant and John were about 10 feet from the other group, defendant assumed a firing stance, with his legs spread apart and his hands in front of his body. Brown could not see what defendant had in his hands, but heard five or six gunshots coming from defendant's direction. Afterwards, defendant ran towards Brown and then left the scene. Brown admitted that when defendant turned back around, Brown did not see defendant with a mask on or with a pistol in his hand. Further, Brown did not see defendant take anything out of his pocket when he approached the other group.

¶ 12 Korotkov testified that he had known defendant for three or four years and on July 22, he had been with defendant, Brown, John, and others in Legion Park. According to Korotkov,

defendant had arrived on a bicycle. At one point, Korotkov heard defendant and John talking about a group of people outside the park. Defendant and John rode bicycles towards the street. Korotkov stated that defendant stayed on his bike and he did not see defendant make gang signs or do anything with his hand in relation to the group. Once defendant and John reached the group, Korotkov heard a little noise, "like a little firework." The group and defendant and John went in opposite directions.

¶ 13 The State confronted Korotkov with a statement he had made to an assistant state's attorney and detective about the incident. According to that statement, defendant walked to the group and made gang signs as he approached. Korotkov also admitted that he had told the grand jury that on the day of the incident, he had been under the influence of drugs or alcohol.

¶ 14 Lookman Muhammed, who had been part of Torres and Rueda's group, testified for defendant. Muhammed stated that defendant approached the group with a gun and had a white cloth covering his face from the nose down. Someone in the group said, "Bust that s***, bust that b***," which meant "[i]f you got the balls, shoot your gun or whatever." Muhammed looked defendant in the eye and froze. Defendant shot three times before Muhammed ran and eventually saw Torres fall. Muhammed identified defendant as the shooter in a photo array on July 23, and about a week later, identified defendant in a line-up.

¶ 15 Ultimately, the jury found defendant guilty of first degree murder, attempted first degree murder, and aggravated battery with a firearm. Defendant was sentenced to consecutive 50 and 26-year prison terms for first degree murder and attempted first degree murder, which included firearm enhancements.

¶ 16 Defendant pursued a direct appeal, in which he contended that he was denied effective assistance of counsel because his counsel called a witness against him, failed to object to the

improper admission of multiple prior consistent statements, and presented a nonsensical closing argument. Defendant also asserted that the cumulative effect of counsel's errors established sufficient prejudice to require a new trial. This court found that defendant's counsel was not ineffective, rejected the claim of cumulative error, and affirmed the trial court's judgment. *Galambos*, 2014 IL App (1st) 123666-U. Our supreme court denied defendant's petition for leave to appeal on May 27, 2015.

¶ 17 On January 4, 2016, defendant filed a *pro se* postconviction petition. In part, defendant raised an actual innocence claim based on a notarized affidavit from Amber Jones that was dated March 12, 2015. The affidavit indicated that Jones lived in Norcross, Georgia, and stated as follows. On July 22, 2011, at around 4 p.m., Jones was passing Legion Park on the sidewalk and a group of 10 or more people walked past her. A man on a bicycle and a man on foot stopped her. The man on the bicycle said his name was James, but that his friends called him Joker. The man on foot started yelling at the group and asked, "What you is." The man on foot then pulled his t-shirt over his face to the bridge of his nose and approached the group. The man on the bike told Jones, " 'You better leave the Area.' " Jones started walking away. She heard five or six gunshots and started running down the sidewalk. She turned and saw the man wearing the t-shirt with a revolver in his hand. James was still on his bike and rode past Jones on the sidewalk. James also said, "Get out of here." People were running in every direction and Jones ran too. Jones never heard that anyone was actually shot that day. Jones further averred that she was recently in Chicago visiting friends and passed by the Legion Park area. There, she saw a flier with a picture of the "boy on the [bike]". As requested on the flier, Jones contacted a number, and was in turn asked to provide the affidavit. Jones stated that "[t]his 'James' person did not

have a gun, I'm 100% sure the man who pulled the T-shirt over his face to the bridge of his nose was the only person who shot the five or six shots that afternoon[.]"

¶ 18 In his petition, defendant stated that Jones was a complete stranger to him and in their brief encounter, she never disclosed her name. In two notarized affidavits, defendant stated in part that he did not know any witnesses' names, so he could not dispute the State's allegations. Before trial, defendant and his counsel discussed that "[defense counsel] couldn't find any of the witnesses present at the park when the shooting occurred because they weren't listed in the police reports and nobody knew who they were, [defense counsel] said it would be impossible to find any of them." Defendant further averred that after he was sent to prison, a law clerk told him to have his family put up fliers around where the crime occurred that asked if anyone saw the shooting, and to contact defendant, defendant's family, or the State's Attorney's office. Defendant stated that his family continued to put up fliers on and off for a couple of years. In February 2015, "a girl who I saw that day at the park and never knew her name contacted my family, she provided them with an affidavit, I still have not personally contacted her, but she may know more when an attorney talks to her[.]"

¶ 19 Defendant contended in his petition that Jones's affidavit was newly discovered evidence because none of the contents were available at the time of trial or would have been known to defendant or his counsel without knowing Jones's lawful identity. Defendant also asserted that there was nothing within the discovery that would have led him or his counsel through the use of due diligence to the discovery of the witness or her statement any sooner. Defendant contended that Jones's statement was exculpatory, material and non-cumulative, and of such conclusive character that it would probably change the result on retrial. Defendant's petition also asserted

other claims, including for ineffective assistance of counsel related to plea negotiations and other matters.

¶ 20 On March 31, 2016, the circuit court entered a written order that summarily dismissed defendant's petition. In part, the court stated that Jones's affidavit[2] appeared to be newly-discovered and was material to defendant's guilt or innocence. However, the court noted that six other eyewitnesses identified defendant as the shooter in photo arrays, line-ups, and at trial. According to the court, Jones's affidavit would not be capable of changing the result on retrial given the substantial and compelling evidence implicating defendant as the shooter. Defendant's other claims were also found to be frivolous and patently without merit.

¶ 21 Defendant subsequently appealed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant contends that he set forth an arguable claim of actual innocence based on Jones's affidavit. Defendant asserts that Jones was a disinterested eyewitness to the shooting who attested that defendant was unarmed at the time and that another man pulled the trigger.

¶ 24 The Act (725 ILCS 5/122-1 *et seq*. (West 2014)) provides a way for defendants to challenge their convictions or sentences for violations of federal or state constitutional law. *People v. Barrow*, 195 Ill. 2d 506, 518-19 (2001). The postconviction process can include as many as three stages. *People v. Marshall*, 375 Ill. App. 3d 670, 679 (2007). At the first stage, the defendant files a petition, which the circuit court independently reviews and, taking the allegations as true, determines whether "the petition is frivolous or is patently without merit." (Internal quotation marks omitted.) *People v. Tate*, 2012 IL 112214, ¶¶ 8-9 (quoting *People v.*

[2] The court's order refers to the affiant as Amber Park. We presume the court intended to refer to the affiant as Amber Jones.

Hodges, 234 Ill. 2d 1, 10 (2009)). The circuit court acts "strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." (Internal quotation marks omitted.) *Id*. ¶ 9. A petition may be summarily dismissed as frivolous and patently without merit only if the petition has no arguable basis in law or in fact *(id*.), meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation *(Hodges*, 234 Ill. 2d at 17). An example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Id*. at 16. Fanciful factual allegations include those that are "fantastic or delusional." *Id*. at 17. At this first stage, the petition only needs a limited amount of detail and does not need to set forth the claim in its entirety. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 22. The trial court may not engage in any fact finding or credibility determinations, and all well-pleaded facts not positively rebutted by the record are taken as true. *Id*.

¶ 25 If the circuit court does not summarily dismiss the petition, it is docketed for further consideration and moves to the second stage of proceedings, where counsel may be appointed. *Gaultney*, 174 Ill. 2d at 418. After counsel has made any necessary amendments to the petition, the State may move to dismiss or answer the petition. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). If the petition survives second stage proceedings, the petition advances to the third stage, where the circuit court conducts an evidentiary hearing that includes fact-finding and credibility determinations. *Id*. at 472-73. At the second and third stages, the defendant must make a substantial showing of a constitutional violation. *Id*. at 473.

¶ 26 Here, where defendant's petition was dismissed at the first stage of proceedings, our review is *de novo*. *Harmon*, 2013 IL App (2d) 120439, ¶ 22.

¶ 27 As for the specific claim before us, "[t]he due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Procedurally, actual innocence claims are resolved as any other brought under the Act. *Id.* "Substantively, the evidence in support of the claim must be newly discovered; material and not merely cumulative; and 'of such conclusive character that it would probably change the result on retrial.' " *Id.* (quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)).

> "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. [Citation.]" *People v. Coleman*, 2013 IL 113307, ¶ 96.

The new evidence does not need to establish the defendant's innocence, "but only that all of the facts and circumstances, including the new evidence, warrant closer scrutiny to determine his guilt or innocence." *People v. Ross*, 2015 IL App (1st) 120089, ¶ 32.

¶ 28 The parties do not dispute that the content of Jones's affidavit is material and noncumulative. Thus, we consider whether Jones's affidavit is newly discovered and of such conclusive character that it would probably change the result on retrial. Defendant argues that Jones's account of the shooting is newly discovered because there was no way that the police, the prosecutors, defendant, or defense counsel could have known to locate her to act as a witness at trial.

¶ 29 We agree with defendant that Jones's affidavit is newly discovered. Defendant stated in his petition that Jones was a complete stranger to him and did not disclose her name during their brief encounter. In his affidavits, defendant averred that he did not know any witnesses' names. Defendant further stated that defense counsel could not find any of the witnesses who were at the park when the shooting occurred because they were not listed in police reports and "nobody knew who they were." Defense counsel told defendant it would be impossible to find any of the witnesses. Jones provided the affidavit in 2015 after seeing a flier near Legion Park. The statements in defendant's and Jones's affidavits are not positively rebutted by the record, and so we take them as true. See *People v. Sparks*, 393 Ill. App. 3d 878, 883 (2009) (all well-pleaded facts not positively rebutted by the original trial record are taken as true). It is unclear how defendant could have located a witness whose name he did not know, who did not appear in any police reports, and who, at least as of 2015, lived in Georgia. Moreover, even with the fliers, defendant stated it took "a couple of years" until Jones came forward. Overall, we find that it is at least arguable that Jones's affidavit is newly discovered evidence.

¶ 30 In reaching this conclusion, we reject the State's contention that defendant provided insufficient information about what steps, if any, were taken to locate Jones. As support, the State asserts that a defendant bears the burden of showing there was no lack of due diligence on his part, citing *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21. The State asks for too much from defendant at this point. *Snow* involved second stage postconviction proceedings. *Id*. ¶ 6. Here, at the first stage of proceedings, defendant only needed to include a limited amount of detail and present "the gist of a constitutional claim." *Gaultney*, 174 Ill. 2d at 418. Defendant's petition met that "low threshold." See *id*.

¶ 31 The State further contends that even if Jones's existence as a witness was newly discovered, the content of her affidavit was not because the information was known to defendant at the time of trial where defendant was present at the time of the shooting. The State cites *People v. Jarrett*, 399 Ill. App. 3d 715, 724 (2010), and *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008), which both stated that evidence is not newly discovered when it presents facts already known to a defendant at or before trial, though the source of these facts may have been unknown, unavailable, or uncooperative. The State asserts that evidence that defendant was on a bike at the time of the offense was presented to the trier of fact through Korotkov's testimony. The State further contends that defendant himself knew that he was not the shooter and was on a bike because he was present during the incident.

¶ 32 The State applies the principle at issue from *Jarrett* and *Collier* too broadly. A defendant claiming innocence will always know that he is not the perpetrator, and to follow the rule as the State applies it would eliminate the possibility for any defendant to claim he was innocent. Affidavits from witnesses disputing that a defendant committed a crime have been found to be newly discovered evidence. See *Ortiz*, 235 Ill. 2d at 334 (witness's statement that he did not see the defendant in the area of the incident was newly discovered where witness did not admit to having witnessed the incident until more than 10 years later, he would not have been seen by the defendant at the time of the incident, and he made himself unavailable by moving to Wisconsin shortly after the incident); *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 37 (affidavit from witness stating that the defendant was not at the scene at the time of the incident was newly discovered even though the defendant maintained from the beginning that he was not at the scene).

¶ 33 Further, the principle stated in *Jarrett* and *Collier* was derived from *People v. Moleterno*, 254 Ill. App. 3d 615, 625 (1993), where the court found that a gun was not newly discovered evidence because the defendant "played an integral role in the unavailability of the weapon" and "knew of the existence of the gun and in whose possession it was well in advance of trial." Significantly, the defendant in *Moleterno* could have presented the evidence at trial through other means. The court found that the information at issue—the color of the gun—could have been testified to by the defendant when he took the stand, by the defendant's wife, or by subpoenaing a witness, who could have been asked about the color and whereabouts of the gun. *Id*. Here, based on defendant's petition and attached affidavits, there were no other avenues for presenting Jones's account of the incident.

¶ 34 We also note that *Jarrett* and *Collier* involved different procedural contexts than what is presented here. *Jarrett*, 399 Ill. App. 3d at 724, involved a successive postconviction petition, and further, the court noted that defendant had failed to mention the purported newly discovered evidence on direct appeal "or even in his first postconviction petition." Meanwhile, in *Collier*, 387 Ill. App. 3d at 637, which involved a second successive postconviction petition, the evidence at issue was "explored at trial." Here, we are presented with defendant's first postconviction petition, which contains details that were not explored at trial. We acknowledge that at trial, Korotkov testified at one point that defendant had been on a bike. However, Jones's affidavit contains more details than Korotkov's testimony, including that defendant was not the shooter. Thus, *Jarrett* and *Collier* are inapposite and we conclude that at this point, defendant has made a sufficient showing that Jones's account is newly discovered evidence.

¶ 35 We next consider whether Jones's affidavit is "so conclusive that it will probably change the result on retrial." *Ross*, 2015 IL App (1st) 120089, ¶ 32. At the first stage of postconviction

proceedings, the questions are whether "the facts alleged in support of the claim are either fantastic or delusional or positively rebutted by the record, and whether those unrebutted facts, taken as true, exonerate the defendant of the crime for which he *** was convicted." *People v. White*, 2014 IL App (1st) 130007, ¶ 26. Defendant contends that because Jones's affidavit excludes him as the shooter, it arguably has the potential to exonerate him.

¶ 36 Jones's affidavit is not fantastic, delusional, or positively rebutted by the record. Jones averred that a man on a bicycle, named James and pictured on the flier, told her to leave the area. Meanwhile, a man on foot pulled a t-shirt over his face and approached a group of people. Jones started walking away, heard gunshots, and then turned, observing that the man wearing the t-shirt had a revolver in his hand, while James was still on his bike. Jones's account has an arguable basis in fact. Further, while the State maintains that newly discovered evidence that merely impeaches a witness is typically not of such a conclusive character as to justify postconviction relief (*People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007)), Jones's affidavit, taken as true, goes beyond impeachment. Where a witness's statement is both exonerating and contradicts a State witness, it can be capable of producing a different outcome on retrial. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36. If true, Jones's account indicates that defendant was not the shooter and contradicts the State's witnesses, who all identified defendant as the shooter.

¶ 37 In asserting that Jones's affidavit is not sufficiently conclusive, the State asks this court to weigh Jones's affidavit against the other evidence presented at trial, which we may not do at this point. See *Sparks*, 393 Ill. App. 3d at 883 (the circuit court is not permitted to engage in any fact finding or credibility determinations at the first stage). We recognize that at trial, multiple witnesses identified defendant as the shooter. Still, to discount Jones's affidavit for that reason would require this court to impermissibly weigh the evidence and determine which version of the

incident was more credible. See *White*, 2014 IL App (1st) 130007, ¶ 29 ("Although multiple witnesses testified that defendant was the shooter, the court may not engage in an assessment of the relative weight of the evidence supporting the defendant's conviction and the evidence which exonerates the defendant at the first stage."). We are not persuaded by the State's reliance on *People v. Harris*, 206 Ill. 2d 293, 302 (2002), where our supreme court noted "the overwhelming evidence" of the defendant's guilt in finding that affidavits were not of such a conclusive character that they would probably change the outcome on retrial. *Harris* involved a capital defendant whose petition was dismissed without an evidentiary hearing—the equivalent of the second stage of proceedings. *Harris*, 206 Ill. 2d at 299. Again, we are considering defendant's petition at the first stage. Based on the standards that apply here, including that we view the petition " 'with a lenient eye,' " (*Hodges*, 234 Ill. 2d at 21), we conclude that defendant has set forth an arguable claim of actual innocence.

¶ 38 Defendant has also asserted a claim for ineffective assistance of counsel related to an alleged plea offer. We will not address that claim because when one claim survives dismissal, "all allegations of the postconviction petition advance as there is no provision in the Act for partial dismissals." *People v. Munoz*, 406 Ill. App. 3d 844, 855 (2010); see also *People v. Rivera*, 198 Ill. 2d 364, 370-71 (2001) (where a petition contains an allegation that is not frivolous or patently without merit, the entire petition must be docketed for second stage proceedings). Because defendant's actual innocence claim based on Jones's affidavit is sufficient to advance his postconviction petition to the second stage, we remand for second stage proceedings on the entire petition.

¶ 39 For the foregoing reasons, the judgment of the circuit court is reversed and the cause is remanded for further proceedings consistent with this order.

¶ 40 Reversed and remanded.