

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2018 IL App (4th) 170706-U

NO. 4-17-0706

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 14, 2018

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

KEIAHTY K. JONES,)

Defendant-Appellant.)

) Appeal from

) Circuit Court of

) McLean County

) No. 08CF401

) Honorable

) Scott D. Drazewski,

) Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices DeArmond and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court’s denial of defendant’s amended petition for postconviction relief at the third stage of the postconviction proceeding was not manifestly erroneous.

¶ 2 Following an August 2017 third-stage evidentiary hearing, the trial court denied defendant Keiahty K. Jones’s amended postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). Defendant contends the trial court erred by denying his postconviction petition where the testimony of a codefendant was newly discovered evidence demonstrating his actual innocence. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In August 2008, a jury found defendant guilty of three counts of aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 2008)). The trial court sentenced defendant to three concurrent terms of 16 years’ imprisonment. In March 2011, this court awarded defendant

monetary credit against his fines but otherwise affirmed his convictions and sentence on direct appeal. *People v. Jones*, No. 4-09-0227 (March 2, 2011) (unpublished order under Supreme Court Rule 23).

¶ 5 In December 2011, defendant filed a *pro se* petition for postconviction relief, which raised numerous claims, including a claim of actual innocence supported by an affidavit executed by codefendant, Eddie Spice. The affidavit averred that on April 6, 2008, Spice shot into a crowd of people at Evergreen Apartments in Bloomington, Illinois, and ran from the scene with Eric Clark and Michael McNabb. Spice, Clark, and McNabb came across defendant parked in a white vehicle on the side of the road a few blocks from Evergreen Apartments. Clark knew defendant, and defendant agreed to give the men a ride. A police officer stopped them a block later. The officer pulled defendant out of the vehicle first. Clark stated they should put the blame on defendant since they did not know him that well. According to Spice, defendant “had no involvement in, nor participated or planned in [*sic*] the commission of the offense for which he was falsely implicated in.”

¶ 6 In January 2012, the trial judge entered an order advancing the petition to the second stage of postconviction proceedings and appointed the public defender to represent defendant. Appointed counsel filed an amended petition that the trial court dismissed in May 2013 on the State’s motion. Defendant appealed. In August 2016, this court reversed and remanded for further second-stage postconviction proceedings and appointment of new counsel. *People v. Jones*, No. 4-15-0269 (August 17, 2016) (unpublished order under Supreme Court Rule 23).

¶ 7 In May 2017, a different assistant public defender filed an amended postconviction petition raising a claim of actual innocence supported by the same affidavit from

Spice. The amended petition alleged that Spice's evidence was new, material, noncumulative, and so conclusive it likely would change the result on retrial. The amended petition also alleged that Spice's affidavit corroborated defendant's trial testimony and that Spice's testimony constituted evidence unavailable at defendant's trial because Spice was awaiting trial on the same charges. Subsequently, the State filed a motion to dismiss which the trial court denied in June 2017.

¶ 8 On August 18, 2017, the trial judge conducted a third-stage evidentiary hearing where Spice was the sole witness to testify. Spice testified that on April 6, 2008, he arrived at the scene of the shooting with Clark and McNabb in a vehicle driven by someone other than defendant. Spice knew the name of the driver but refused to divulge it. Spice arrived at the scene of the shooting in a purple two-door Grand Am, not defendant's white vehicle.

¶ 9 Spice testified defendant was not at the scene of the shooting. Rather, Spice, Clark, and McNabb ran from the scene after the shooting and flagged defendant down as he was driving a few blocks away. Defendant agreed to give the three men a ride, and police stopped them less than a block later. Spice testified a police officer took either him or Clark out of the vehicle first, not defendant.

¶ 10 Spice further testified that after defendant went to trial and received his sentence, Spice pleaded guilty to the same charge as the defendant. Spice stated that while his case was pending, no one came to talk to him on defendant's behalf. Spice testified that prior to April 6, 2008, he did not know defendant. Spice maintained the accuracy and truthfulness of his affidavit. According to Spice, he came forward to prevent defendant's continued incarceration for something he did not do.

¶ 11 At the conclusion of the evidentiary hearing, the trial court denied defendant's amended petition for postconviction relief. In making its determination, the court considered the amended petition for postconviction relief, Spice's supporting affidavit, Spice's evidentiary-hearing testimony, the common law record, and all relevant testimony within the report of proceedings. The court agreed that Spice's testimony was newly discovered evidence because the evidence was not available at the time of defendant's trial. However, the trial judge stated, "the [p]etitioner must set forth a colorable claim of actual innocence." Specifically, the "evidence must be material and noncumulative[,] and the evidence must be of such a conclusive character that it would probably change the result on retrial."

¶ 12 The trial court found the newly discovered evidence did not negate the testimony provided to the jury at defendant's trial. The court cited multiple witnesses' testimony to support its determination. Specifically, the court pointed to Nadia King's testimony that defendant drove the white vehicle from which Spice emerged just prior to the shooting. The court also noted Clark's and McNabb's testimony that defendant drove the white vehicle and was present at the scene of the shooting. Paul Bridges's testimony particularly impressed the trial judge. Bridges testified that he saw defendant's white vehicle at the scene of the shooting and observed four males enter the vehicle and drive away after the shooting. The court stated Bridges, a neighbor who witnessed the shooting, "ha[d] no dog in the fight[,]" and the court did not believe he was motivated to lie.

¶ 13 The trial court noticed that Spice's testimony contradicted the trial testimony of King, Clark, and McNabb. The court found Spice not worthy of belief based on his recollection that the vehicle at the scene of the shooting was purple. Also, the court found it troubling that Spice refused to identify the driver of the vehicle. The court stated, "that leads to one of two

conclusions: [o]ne, is that Mr. Spice may be protecting that person because he doesn't want to see him get caught up in a scenario where he could, or might, be charged himself for the crime, notwithstanding Mr. Spice's assumption that the [s]tatute of [l]imitations hasn't run; the other scenario is that there is no other person besides the defendant who was the driver. And it's that other scenario, the second scenario, that the [c]ourt, based upon Mr. Spice's testimony, is finding that it was the defendant, that, basically, Mr. Spice was making it up as he went along ***[.]” The court did not find Spice to be a credible witness or his testimony to be of such a conclusive character that it would probably change the result on retrial.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant argues the trial court erred by denying his postconviction petition after an evidentiary hearing because Spice's testimony was newly discovered evidence that was sufficient to require reversal of defendant's conviction and remand for a new trial.

Defendant contends the court held defendant to an incorrect standard at the evidentiary hearing. The State maintains the court held defendant to the correct standard at the evidentiary hearing, and the court's denial of his postconviction petition was not manifestly erroneous. We affirm.

¶ 17 A. Standard of Review

¶ 18 During the third stage of postconviction proceedings, a defendant has the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261, 277, 794 N.E.2d 275, 286 (2002). Defendant asserts *de novo* review applies where the court applied the wrong standard at the evidentiary hearing. On the other hand, the State argues the manifestly erroneous standard is appropriate. After considering, in totality, the remarks made by the trial court when ruling on defendant's petition, we find that while the court stated the no

reasonable juror standard applied, the court applied the proper standard. Specifically, the court properly stated in entering its ruling that, “The court would find that the testimony of Mr. Spice is not of such a conclusive character that it would probably change the result on retrial.” After an evidentiary hearing where fact-finding and credibility determinations are involved, the trial court’s decision will not be reversed unless manifestly erroneous. *People v. Coleman*, 183 Ill. 2d, 366, 385, 701 N.E.2d.1063, 1073-74 (1998). Thus, the manifestly erroneous standard applies.

¶ 19 A ruling is manifestly erroneous only if it contains an error that is clearly evident, plain, and indisputable. *People v. Ortiz*, 235 Ill. 2d 319, 333, 919 N.E.2d 941, 949 (2009). A court of review applies the manifestly erroneous standard in recognition of “the understanding that the post[-]conviction trial judge is able to observe and hear the witnesses at the evidentiary hearing and, therefore, occupies a ‘position of advantage in a search for the truth’ which ‘is infinitely superior to that of a tribunal where the sole guide is the printed record.’ ” *Coleman*, 183 Ill. 2d at 384 (quoting *Johnson v. Fulkerson*, 12 Ill. 2d 69, 75, 145 N.E.2d 31, 35 (1957)). Having established the proper standard of review, we now consider whether defendant’s claim of actual innocence based upon newly discovered evidence warrants reversal of defendant’s conviction and remand for a new trial.

¶ 20 B. Actual Innocence

¶ 21 To raise a claim of “actual innocence” in postconviction proceedings, defendant must present evidence that is (1) new, in that it could not have been discovered prior to trial through due diligence; (2) material to the issue of defendant’s innocence; (3) noncumulative of the evidence presented at trial; and (4) sufficiently conclusive that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96, 996 N.E.2d 617. Defendant

contends the trial court overlooked key evidence in ruling that Spice's testimony was not of such a conclusive character that it would probably change the result on retrial. There is little dispute as to whether Spice's testimony was new, noncumulative, and material. The State notes that below, the prosecution agreed Spice's affidavit constituted new evidence. The trial court agreed and went on to find defendant could not have discovered the evidence prior to trial. However, the State argues the court properly found the new evidence to be insufficient to raise a probability that the result of the trial would have been different given the new evidence.

¶ 22 In reaching this conclusion, the trial court considered testimony presented at the postconviction hearing, transcripts of the trial proceedings, the common law record, and the orders of the appellate court in earlier appeals. The court found Spice's testimony to be newly discovered evidence but determined the evidence was not of such a conclusive character that it would probably change the result on retrial. In large part, the court based its decision on its finding that Spice's testimony lacked credibility.

¶ 23 Spice's testimony was suspect given its inconsistency with the trial testimony. The trial testimony overwhelmingly established that a white vehicle was involved in the shooting. Specifically, the trial testimony revealed that Spice arrived at the scene of the shooting in a white vehicle, got out of the vehicle, took a shotgun out of the trunk of the vehicle, and began firing into the crowd of people. King, Clark, and McNabb identified defendant as the driver of the white vehicle. However, Spice testified at the postconviction hearing that he arrived at the scene of the shooting in a two-door purple Grand Am, not a white vehicle. The trial court noted the complete absence of any other evidence suggesting the presence of a purple vehicle at the scene of the shooting on April 6, 2008.

¶ 24 Bridges's testimony further corroborated a white vehicle being present at the scene of the shooting, where Bridges observed four males enter a white vehicle and drive away after the shooting. Bridges's testimony also discredits Spice's testimony that he, Clark, and McNabb ran from the scene of the shooting and encountered defendant a few blocks away. The trial court justifiably found Spice's testimony lacked believability where Spice, Clark, and McNabb ran from the scene of the shooting when they had a vehicle available to them at the scene.

¶ 25 Inconsistencies also existed between Spice's hearing testimony and defendant's trial testimony. According to defendant, his vehicle overheated and he was sitting on the side of the road when Clark approached him asking for a ride. In contrast, Spice testified that after they ran from the scene of the shooting, they flagged defendant down as he was driving a few blocks away. Also, defendant testified he was the first person taken out of the vehicle after the police pulled them over. However, Spice testified either he or Clark was the first person taken out of the vehicle. These discrepancies further support the assessment of the trial court that Spice's testimony lacked credibility.

¶ 26 Defendant contends that the trial court should not have used Spice's refusal to name the driver of the vehicle against him because Spice was simply trying to protect that individual. We defer to the court's judgment where it expressly considered and rejected the theory that Spice was simply protecting the driver of the vehicle. The court determined Spice was making up testimony to protect defendant who was the driver of the vehicle at the scene of the shooting.

¶ 27 Defendant relies on *People v. Molstad*, 101 Ill. 2d 128, 461 N.E.2d 398 (1984), and *Coleman*, 2013 IL 113307, to support his argument that Spice's testimony requires reversal

of his conviction and remand for a new trial. We find *Molstad* and *Coleman* distinguishable. In *Molstad*, 101 Ill. 2d at 134-36, the supreme court granted the defendant, who presented an alibi defense at trial, a new trial where multiple co-defendants, including one who was acquitted, came forward and contradicted the testimony of a single eyewitness who identified the defendant as one of the assailants in the alleged crime. In *Coleman*, 2013 IL 113307, ¶¶ 113-14, our supreme court reversed the defendant's conviction and remanded for a new trial based on newly available testimony of multiple eyewitnesses who contradicted the testimony of two eyewitnesses putting the defendant at the scene of an armed robbery. Here, the newly discovered evidence does not involve the testimony of multiple new witnesses whose testimony was consistent with each other and with other evidence presented at trial. Instead, it involved a single witness whose postconviction-hearing testimony was contrary to a majority of the testimony presented at trial.

¶ 28 Defendant also cites *Ortiz*, 235 Ill. 2d at 336-37, where a single witness came forward with new evidence and the supreme court reversed the defendant's conviction and remanded for a new trial. However, the trial court in *Ortiz* never made credibility findings regarding the new witness but instead found the new evidence merely cumulative. *Id.* at 334-35. *Ortiz* is therefore not analogous to our case where the trial court found Spice incredible and rejected his testimony.

¶ 29 Ultimately, the trial court found suspect Spice's claim that he came forward because he did not want to see an innocent person incarcerated for something he did not do. The long delay before Spice inexplicably came forward just as defendant filed a postconviction petition weighs against Spice's explanation for coming forward with new information to prevent an injustice.

¶ 30 We conclude the trial court properly found Spice's evidentiary-hearing testimony not credible or believable. We will not substitute our judgment for that of the trial judge who presided over the evidentiary hearing and made credibility determinations. We therefore find the court's decision to deny defendant's postconviction petition was not manifestly erroneous, and we affirm the court's judgment.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 33 Affirmed.

¶ 34