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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 96-CF-2965
)	
BRIAN O. SIMMONS,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant’s postconviction petition, specifically a claim of actual innocence, as he could have presented his “newly discovered” evidence at trial.

¶ 2 Defendant, Brian O. Simmons, appeals from an order of the circuit court of Winnebago County dismissing his second amended postconviction petition. Because defendant did not make a substantial showing of actual innocence, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of armed robbery (720 ILCS 5/18-2(a) (West 1996)) and one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 1996)). He opted for a bench trial.

¶ 5 The following evidence was established at defendant's trial. On October 20, 1996, two men entered the KFC restaurant at 1502 Kilburn Avenue in Rockford. The men wore ski masks and latex gloves. One carried a .25 semi-automatic handgun, and the other a short-barreled .38 revolver. One of the men ordered the restaurant owner to put money from the register drawers and the safe into various KFC paper bags. The other man took money and jewelry from the customers. As the robbers fled, the owner called 911.

¶ 6 Officer Scott Mastroianni of the Rockford police department was conducting a traffic stop approximately three blocks from the KFC when he received a radio dispatch of an armed robbery at the KFC. He drove immediately to the KFC.

¶ 7 As Officer Mastroianni approached the KFC, he saw two males exit the restaurant. Both men were wearing white latex gloves, dark clothes, and ski masks. Both were carrying paper bags.

¶ 8 Officer Mastroianni chased the two men as they ran north into an alley behind the KFC. As he drove into the alley, he thought he saw three men, two of them running north and the other running west. He was not sure that he saw a third man, because he was focused on the two men. As the two men ran down the alley, they were dropping items.

¶ 9 When the two men entered the parking lot of Haas Roofing, they split up, with one running across a delivery ramp and the other toward an alley. Officer Mastroianni continued to chase the man who ran toward the alley.

¶ 10 As Officer Mastroianni circled around Haas Roofing, the man he was chasing doubled back and bounced off of the squad car. The man then ran back toward the delivery ramp. Officer Mastroianni then exited his squad car and chased the man on foot. As he chased him, Officer Mastroianni saw that the man had a gun in his hand.

¶ 11 Officer Rodney Burke of the Rockford police department arrived, exited his squad car, and joined the foot chase. The man being chased stopped in front of 1615 Kilburn Avenue. Because the man was still armed, Officer Mastroianni told him repeatedly to drop the gun. When he refused and ran toward Officer Burke, Officer Mastroianni fired his handgun four times, hitting the man and knocking him down. The man was carrying a .25 semi-automatic handgun and wearing latex gloves, a long, dark jacket, and a Bulls cap. He had a ski mask around his neck. The man was identified as Landis Simon.

¶ 12 The police searched the neighborhood around the KFC and Haas Roofing. They found several KFC bags, money, and jewelry. In front of 3019 Wallin Avenue they found a jacket, a pair of off-white latex gloves, some currency, and a .38 revolver. They located a KFC bag containing currency in a grassy area between 3021 and 3025 Wallin Avenue. On the hedge in front of 3025 Wallin Avenue was a KFC bag that contained a bank bag and currency. In court, defendant tried on the jacket found in front of 3019 Wallin Avenue, and the trial court commented that it “appear[ed] to fit [him].”

¶ 13 The State’s fingerprint expert identified two of defendant’s fingerprints on the KFC bag found between 3021 and 3025 Wallin Avenue. He identified three of defendant’s fingerprints on the KFC bag found on the hedge.

¶ 14 Carl Campmeier testified that he operated a machine shop at 3019 Wallin Avenue in Rockford. On the evening of the incident, he left his shop at around 7 p.m. and walked to his

house at 3016 Parkside Avenue. At about 7:15 p.m., he saw a Cadillac park across the street. He saw the two occupants, both black males, exit the vehicle and walk toward the KFC. The two men were wearing dark dress coats and at least one had on a baseball cap. Campmeier had just obtained the registration-applied-for number from the rear window of the Cadillac when he heard shots being fired and tires screeching. After he turned on his police scanner and heard that there was a robbery in progress at Kilburn Avenue and Auburn Street, he called 911 and reported what he had seen regarding the Cadillac and its two occupants. The Cadillac was registered to Simon.

¶ 15 The following morning, while Campmeier was at his shop, he saw the police searching the nearby area. Around 2 p.m., he saw a blue Oldsmobile, with two black males inside, park in front of his shop. The driver, who remained in the car, directed the passenger to an area in which the police had recovered “all the stolen stuff and jackets.” The passenger appeared to be looking into the bushes. Campmeier noted the license-plate number of the Oldsmobile and later provided it to the police. The Oldsmobile was registered to defendant’s brother, Terry Simmons.

¶ 16 After his arrest on November 12, 1996, defendant gave a statement to the police. When asked if he had been at the KFC recently, defendant said no. When asked about his fingerprints on the KFC bags, defendant had no explanation. He added that he was not anywhere near the KFC and was never behind the counter.

¶ 17 Ariel Ellis had accompanied her cousin to the KFC on the evening of the robbery. She remained in the car while her cousin went inside. As she sat in the car, Ellis saw two black men walk up, put on ski masks, pull out guns, and enter the KFC. After the men entered the KFC, Ellis ran across the street to a Burger King and told the staff to call the police.

¶ 18 After Ellis returned to the car, she saw the two men exit the KFC. She then saw a squad car arrive and follow the two men.

¶ 19 In closing argument, defendant contended, among other things, that all that the fingerprints established was that he had possessed the stolen property after the crime and had abandoned it. Defendant argued that the fingerprints did not show that he was in the KFC.

¶ 20 The trial court found defendant guilty of both armed robbery and unlawful possession of a weapon by a felon. In doing so, the court commented, “[c]ould there have been a third person? Could it have been [defendant] standing out there? I suppose.” The court added, “[c]ould somebody have ran out and dropped the bags, taken off, and then could [defendant] have saw this and taken off not having been originally involved in the original design and plan scheme of this armed robbery. I suppose that could be one theory.” In rejecting that theory, the court emphasized that the latex gloves and the .38 revolver were found close to where the bags with defendant’s fingerprints were found. The court concluded that those facts showed that defendant had possessed the gloves and the handgun and that he intentionally participated in the armed robbery. Therefore, the court found defendant guilty of both offenses.

¶ 21 The trial court, finding that defendant was a habitual criminal (see 720 ILCS 5/33B-2(a) (West 1996)), sentenced him to life imprisonment on the armed-robbery conviction. Although the court merged the conviction of unlawful possession of a weapon with the armed-robbery conviction, it sentenced defendant to a concurrent term of seven years in prison on the conviction of unlawful possession of a weapon.

¶ 22 On direct appeal, defendant challenged only his sentence of seven years’ imprisonment. We vacated defendant’s conviction and sentence for unlawful possession of a weapon as violating the one-act, one-crime rule. See *People v. Simmons*, No. 2-98-0201 (1998) (unpublished order under Supreme Court Rule 23).

¶ 23 On July 14, 2000, defendant filed a *pro se* postconviction petition, alleging ineffective assistance of appellate counsel for failing to present newly-discovered evidence of actual innocence. Defendant alleged that his codefendant, Simon, had recently admitted that defendant was not involved in the armed robbery and that he had implicated defendant in an attempt to gain leniency in his case. The trial court found that the petition stated the gist of a constitutional claim and appointed counsel. The State filed a motion to dismiss. The court, finding that there was no substantial showing of appellate counsel's ineffectiveness, and that defendant had failed to submit any supporting affidavit or other evidence, dismissed the petition.

¶ 24 On May 5, 2004, defendant moved to file a successive postconviction petition. The petition alleged that defendant was actually innocent and that the State had knowingly used perjured testimony to obtain his conviction. Defendant included an affidavit of Simon that averred that defendant was not involved in the armed robbery.

¶ 25 According to Simon's affidavit, he and someone named "Howard" committed the robbery and defendant was not involved. Simon averred that defendant and his brother Terry had arrived while the robbery was underway and that Howard threw some of the KFC bags at defendant. Defendant looked in the bags, threw them back to Howard, and ran off. According to Simon, he had previously implicated defendant because he had been coerced to do so by an offer of leniency from the State.

¶ 26 On June 18, 2004, the trial court granted defendant leave to file the successive postconviction petition and appointed counsel. On May 6, 2005, defendant filed an amended postconviction petition, alleging that the State knowingly used perjured testimony and that the State's false promise of leniency to Simon wrongfully denied defendant his best source of exculpatory evidence. Simon's original affidavit was attached to the amended petition.

¶ 27 On August 8, 2005, the State moved to dismiss the amended petition. At the hearing on the motion to dismiss, Judge Doyle found that Simon's affidavit was newly-discovered evidence, which, if credible, would establish a claim of actual innocence. Therefore, the court denied the motion to dismiss and set the matter for a third-stage evidentiary hearing on only the claim of actual innocence.

¶ 28 For several years thereafter, the parties engaged in discovery. The case was eventually transferred to Judge McGraw.

¶ 29 On July 13, 2012, defendant moved for leave to file a second amended postconviction petition. The trial court granted the motion over the State's objection.

¶ 30 On August 13, 2012, defendant filed his second amended postconviction petition. That petition added a claim of actual innocence based on Terry Simmons's proposed testimony. In that regard, the petition alleged that Terry had come forth and stated that he was with defendant outside the KFC when it was robbed. According to the petition, Terry saw an unknown person exit the KFC and throw bags at defendant. Terry did not come forward before because he had feared that his parole would be revoked. Attached to the second amended petition was a report of a defense investigator who was present when Terry provided that information to defense counsel. An affidavit from Terry was not included with the second amended petition.

¶ 31 On December 6, 2012, the State filed a motion to dismiss the second amended petition, contending that Terry's potential testimony was insufficient to support a claim of actual innocence. The State later sought leave to file an amended motion to dismiss that challenged both Terry's and Simon's proposed testimony. Defendant did not object to the amended motion to dismiss, but reserved the right to argue the correctness of Judge Doyle's ruling regarding the actual-innocence claim based on Simon's affidavit. The trial court granted the State leave to file

its amended motion to dismiss. In the amended motion to dismiss, the State incorporated the arguments from its previous motions to dismiss the first and second amended petitions.

¶ 32 At the hearing on the amended motion to dismiss, defense counsel stated that the proceeding was “at the second stage.” Defense counsel explained that the decision to file the second amended postconviction petition was “calculated” because it “open[ed] up the State to go, again, back to all three, and I think to a certain extent I’m not claiming *res judicata* on the claims that Judge Doyle ruled on.”

¶ 33 Defendant’s counsel added that he considered the three claims “intertwined insofar as the [claims] of actual innocence.” To that end, he explained that the use-of-perjured-testimony claim was based on the argument that, because the State had made a deal with Simon, Simon had been unavailable to be a trial witness on behalf of defendant. As for the actual-innocence claims, counsel reiterated that Simon’s testimony was not available until after Simon had learned that he was not getting his anticipated leniency. Likewise, counsel asserted that Terry Simmons could not have come forward earlier, because of his fear of violating his parole.

¶ 34 The trial court dismissed the perjured-testimony claim, because it lacked the factual specificity necessary to establish a substantial showing of a constitutional violation. As for the actual-innocence claims, the court ruled that Terry Simmons’s proposed testimony was insufficient, because it was not in an affidavit. It was also refuted by defendant’s statement to the police that he was not at the KFC during the robbery. Thus, the court found that Terry’s proposed testimony was not likely to change the result of the trial.

¶ 35

II. ANALYSIS

¶ 36 On appeal, defendant contends that the Simon affidavit makes a substantial showing of defendant's actual innocence.¹ In that regard, he maintains that the affidavit is newly discovered, is material and noncumulative, and is likely to change the outcome on retrial.

¶ 37 The Post-Conviction Hearing Act (Act) provides a mechanism by which a person under a criminal sentence can assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1(West 1996). The Act establishes a three-stage process for adjudicating a postconviction petition. *People v. Alexander*, 2014 IL App (2d) 120810, ¶ 23. When a petition proceeds to the second stage, the Act provides for appointment of counsel if the defendant is indigent. *Alexander*, 2014 IL App (2d) 120810, ¶ 24. After counsel has made any necessary amendments to the petition, the State may file a motion to dismiss or an answer. *Alexander*, 2014 IL App (2d) 120810, ¶ 24. If the State files a motion to dismiss, the trial court may conduct a second-stage hearing. *Alexander*, 2014 IL App (2d) 120810, ¶ 24.²

¹ We note that the trial court, in its oral ruling dismissing the second amended petition, did not mention the Simon affidavit. It nonetheless dismissed the actual-innocence claims in their entirety.

² Defendant notes that there was arguably a "procedural anomaly" when the State was allowed to challenge, at the second stage, the actual-innocence claim based on the Simon affidavit after Judge Doyle had already ruled that it made a substantial showing of the denial of a constitutional right. However, he does not specifically raise an issue in that regard in his brief. Even if he did, such a contention would be barred, as he expressly acquiesced in such a procedure in the trial court. See *People v. Carter*, 208 Ill. 2d 309, 319 (2003) (doctrine of invited error prohibits a defendant from agreeing to a procedure in the trial court and later objecting to it on appeal).

¶ 38 At the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *Alexander*, 2014 IL App (2d) 120810, ¶ 25. The second stage requires that the trial court accept as true all well-pleaded facts that are not positively rebutted by the record, and, where the claims are based on matters outside the record, the court is prohibited from fact finding. *Alexander*, 2014 IL App (2d) 120810, ¶ 25. If a substantial showing of a constitutional violation is set forth, the petition must be advanced for a third-stage hearing. *Alexander*, 2014 IL App (2d) 120810, ¶ 25.

¶ 39 To succeed on a claim of actual innocence, a defendant must show that the evidence he presents is: (1) newly discovered; (2) material and noncumulative; and (3) so conclusive that it would probably change the result on retrial. *Alexander*, 2014 IL App (2d) 120810, ¶ 26 (citing *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009)). Actual innocence is not assessed in the context of whether a defendant has been proven guilty beyond a reasonable doubt. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2009). Instead, the measure of actual innocence is whether there is a total vindication or exoneration of the defendant. *Collier*, 387 Ill. App. 3d at 636. An actual-innocence claim is extraordinarily difficult to establish, and courts of review rarely grant such relief. *People v. Coleman*, 2013 IL 113307, ¶ 94.

¶ 40 In addressing defendant's actual-innocence claim, we first decide whether the Simon affidavit constituted newly-discovered evidence. Newly-discovered evidence is that which was discovered since the trial and that could not have been uncovered sooner through due diligence. *Ortiz*, 235 Ill. 2d at 334.

¶ 41 Defendant asserts that Simon's favorable testimony was not available sooner for two reasons: (1) Simon believed that he was going to receive leniency in exchange for his statement implicating defendant in the armed robbery; and (2) Simon, as a codefendant, could not have

been compelled to testify. Both of defendant's contentions fail. First, Simon pled guilty and was sentenced several months before defendant's trial began. Once Simon was sentenced to 45 years in prison, he knew that he was not receiving his anticipated leniency. Second, after being sentenced, Simon could no longer avail himself of the Fifth Amendment. Therefore, because defendant, through due diligence, should have known that Simon was available to testify at his trial, Simon's affidavit does not constitute newly-discovered evidence. Thus, the actual-innocence claim fails on that basis.

¶ 42 Defendant's reliance on *People v. Molstad*, 101 Ill. 2d 128 (1984), is misplaced. In *Molstad*, the defendant filed a posttrial motion based on affidavits in which his codefendants stated that he was not present during the crime. *Molstad*, 101 Ill. 2d at 132. The supreme court held that the affidavits were newly-discovered evidence because, even though the defendant knew of the evidence before trial, the affidavits were prepared after the codefendants were found guilty but before they were sentenced. *Molstad*, 101 Ill. 2d at 134. Therefore, despite due diligence, the codefendants' proposed testimony was unavailable because the defendant could not force his codefendants to waive their right against self-incrimination. *Molstad*, 101 Ill. 2d at 135.

¶ 43 Here, unlike in *Molstad*, Simon had already pled guilty and had been sentenced before trial. Therefore, Simon no longer had any right against self-incrimination that would have been implicated and he would not have otherwise put himself at risk by his testifying on defendant's behalf. See *People v. Jones*, 399 Ill. App. 3d 341, 365 (2010). Had defendant exercised due diligence, he could have obtained Simon's testimony at trial.

¶ 44

III. CONCLUSION

¶ 45 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County dismissing defendant's second amended postconviction petition at the second stage. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal. See 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 46 Affirmed.