2012 IL App (1st) 112189-U

FIFTH DIVISION
November 21, 2012

No. 1-11-2189

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES THIVEL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County 99 CR 21313 Honorable Timothy Chambers, Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

O R D E R

¶ 1 HELD: The trial court properly denied defendant's motion for leave to file a successive postconviction petition.

¶ 2 Defendant James Thivel appeals the trial court's denial of his motion for leave to file a successive postconviction petition, arguing that newly discovered evidence showed that the State admitted perjured testimony and violated *Brady v. Maryland*, 373 U.S. 83 (1963), where Daniel Stryjak, a witness for the State, had a pending drug case, but testified at trial that the charge had been dropped, and his motion for fingerprint testing under section 116-3 (725 ILCS 5/116-3

(West 2010)) should not have been denied.

¶ 3 Following a jury trial, defendant was convicted of the first degree murders of Robert Farberger and Eva Caudell, and sentenced to natural life imprisonment. Caudell was Farberger's girlfriend at the time of the homicides. The evidence presented at trial established that defendant believed Farberger had stolen one of defendant's guns and owed defendant money. A more detailed discussion of defendant's trial can be found in his direct appeal. *People v. Thivel*, No. 1-01-2905 (November 10, 2003) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 Early in the morning of January 10, 1996, Officer Loconsole of the Des Plaines police department discovered the bodies of Farberger and Caudell in a small red car, parked near the intersection of Prairie Avenue and Potter Drive. Both victims had suffered multiple gunshot wounds, including shots to the head. Bullets recovered from the victims' bodies were .380 auto caliber bullets, which could have been fired from a Walther PPK or Walther PP .380 auto caliber or a .32 auto caliber. While all the bullets were .380 caliber, the bullets were different types of ammunition. An expert testified that four bullets were fired from the same weapon, but he could not determine if the remaining bullets had been fired from the same weapon, though these bullets shared the same class characteristics. The parties stipulated at trial that an expert received latent fingerprints lifted from the vehicle where Farberger and Caudell were found and none of the prints matched Farberger, Caudell or defendant.

¶ 5 A path of shoe prints in the snow led from the location of the victims to the residence of 680 Potter Drive. Defendant did not reside at that address, but lived in Wheeling at the time of the homicides with Shane Murray. However, defendant was friends with the residents of 680

Potter and defendant's mother lived nearby in Des Plaines. On the night of the homicides, numerous phone calls were placed from defendant's mother's house to 680 Potter, tow truck companies, one of defendant's friends, and defendant's apartment in Wheeling. Two of the residents of 680 Potter testified for the State.

¶ 6 Jeff Johansen and Daniel Stryjak testified that they were friends with defendant. Stryjak had attended high school with defendant. Stryjak met Farberger through defendant about two years prior to January 1996. Defendant frequently visited 680 Potter for social reasons and for selling and purchasing marijuana. Stryjak testified that in September 1995, defendant had shown Stryjak a handgun and told him it was a "Walther PK."

¶ 7 On January 8, 1996, the day before the homicides, Stryjak went to defendant's apartment to collect some money that defendant owed Johansen. At that time, defendant told Stryjak that Farberger "had ripped [defendant] off and that [Farberger] was going to get his or [defendant] was going to, you know, kick [Farberger's] ass." Stryjak stated that Farberger had money and a 357 handgun belonging to defendant. On January 9, 1996, defendant called Stryjak at around 9 p.m. and said he was coming over to 680 Potter. Farberger also stopped by 680 Potter and called the residence. Stryjak did not let Farberger inside and told him that defendant was not there. Defendant again called around 11 p.m. Stryjak stated that he told defendant that Farberger had been there and said he did not want Farberger around there. Defendant said he would come over and explain what was going on. Johansen had gone to a movie that evening after work with his sister and did not get home until around 11 p.m. Around midnight, Johansen answered a phone call from defendant and defendant said he was not coming over.

¶ 8 Justin Milici, defendant's friend, testified that defendant had obtained a .380 Walther PPK from some teenagers and it held up to eight bullets. Milici stated that at the shooting range, defendant would sometimes "vary ammunition and sometimes vary powder strengths from ammunition to try to achieve greater target accuracy." Milici explained that "[t]he magazine would be loaded with more than one type of ammunition it's very fair to say." Defendant told Milici that his 357 Magnum was missing and defendant believed that Farberger had taken it. Defendant was also upset that he had given Farberger $1200.

¶ 9 In January 1996, Raymond Felkel was working as a relief tow truck driver for Dave's Towing. At approximately 1:00 a.m. on January 10, 1996, he received a call for a tow at the corner of Potter and Seminary in Des Plaines. The call was made from defendant's mother's home. When Felkel arrived at the corner of Potter and Seminary, there were two or three people waiting for him. He dealt primarily with one person while the others waited near a van in the parking lot of an office building, located off to the side. Felkel described the man as smaller in stature and probably younger than himself. Felkel was 31 and defendant was 24 or 25 at the time of the murders. Felkel explained that the man was dressed for winter, wearing a hat and possibly gloves. He was also wearing "plastic framed, slightly larger than average" glasses. Defendant wore glasses at trial.

¶ 10 The individual directed Felkel to a mid 80's style Nissan sports car that was parked "maybe a hundred feet" from the corner of Potter and Seminary. Defendant's car, a Dodge Omni, was not operable that night and was parked in the drive at 680 Potter. Defendant's brother, Jeffrey Thivel, owned a 8008 Nissan X200, two-door hatchback that had been having battery

trouble. The individual asked Felkel to jumpstart the sports car. Felkel was unable to start the car, and the individual indicated that he wanted it towed. Felkel hooked the car up for the tow, and the individual asked at that time if Felkel could jump start the van before towing the car. Felkel was able to jump start the van and towed the car to defendant's mother's house.

¶ 11 In July 1999, the police showed Felkel a photo array to have him identify the towed vehicle. He identified a car that was the same style. Felkel was also shown a photograph of a van and asked if that was the same van he jump started, and Felkel responded that it could be and the van had no door handle. The police presented a photo array of individuals to Felkel, but Felkel was unable to identify the individual who requested the tow in January 1996.

¶ 12 Shane Murray testified that he was defendant's roommate in Wheeling and knew that defendant owned guns. In the weeks before the murder, Murray became aware that defendant was angry with Farberger because defendant thought Farberger had taken his favorite gun and stated that he was "going to get him for that." Later, defendant stated to Murray, "Remember that thing I was talking about? Well, I did it." Murray understood that to mean that defendant had done something to Farberger and, when Murray asked defendant if the police would be involved, defendant answered that they would be and asked Murray to say that he had been there all night and had taken a phone call from his brother at 12:30 a.m.

¶ 13 Defendant later moved to Oregon and lived with Misty Wilson. Wilson testified that while living together, defendant made several incriminating statements to her including saying, "Oh, I did that; and it wouldn't work that way," in reference to a police show on television where two people were getting killed. Defendant also told her that "if a friend screwed him over," "[h]e

would screw them over too. And he would make sure that it was in such a way that nobody would be able to find out how it was done." He said that "if he was going to commit a crime, it would be somewhere dark where there wasn't anybody to watch." He also explained that "if he were going to commit a crime, he would arrange his own -- he would get himself there. He would not rely on other people." Defendant described that "the best way to kill anybody is to shoot them in the head" and said "that if, you know, you are killing two people, one person has time to react and can create a harder target." Defendant told Wilson that a gun used in the commission of a crime should never be thrown under water; instead, he divulged, "dismantling a gun and spreading the pieces might work" to get rid of the gun.

¶ 14 Defendant's brother Jeffrey Thivel testified for the defense. Jeffrey stated that in January 1996, he lived with his mother in Des Plaines. He said that he made calls to towing companies about a jump start for his car, but stated that he did not have anyone come out that night. He also admitted to making all the phone calls from his mother's residence the night of January 9, 1996. Jeffrey testified that he called defendant's apartment around 12:30 a.m. and spoke with defendant for five minutes.

¶ 15 Following deliberations, the jury found defendant guilty of first degree murder in the deaths of Farberger and Caudell. On direct appeal, defendant alleged that the evidence was insufficient to sustain his conviction, various trial errors denied him a fair trial, the trial court erred in denying his motion to suppress based on an illegal search and seizure, and ineffective assistance of counsel. Defendant's conviction and sentence were affirmed on appeal. See Thivel, No. 1-01-2905.

¶ 16 In September 2004, defendant filed his first *pro se* postconviction petition. Defendant subsequently filed an amended *pro se* postconviction petition in November 2004. In his amended petition, defendant argued that his appellate counsel was ineffective for failing to raise multiple claims of ineffective assistance of trial counsel on direct appeal, he had new evidence that Wilson's testimony was taken out of context and he never made any incriminating statements to her, his trial counsel was ineffective for failing to cross-examine Felkel about his motive to falsely accuse defendant, and his trial counsel was ineffective for failing to raise the illegal entry and search was based on the lack of a warrant and lack of probable cause. In December 2004, the trial court summarily dismissed defendant's postconviction petition, finding that the petition failed to state a claim and was patently without merit. The dismissal of defendant's postconviction petition was affirmed on appeal. See *People v. Thivel*, 1-05-0590 (May 7, 2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 17 In February 2011, defendant filed a *pro se* motion for leave to file a successive postconviction petition, together with the successive postconviction petition. In his motion for leave to file, defendant argued that his petition presented a claim of newly discovered evidence sufficient to satisfy the cause and prejudice test. In his successive petition, defendant argued that (1) the State failed to correct perjured testimony, knowingly used perjured testimony, and failed to disclose a deal made with a key State's witness in violation of defendant's due process rights and *Brady v. Maryland*, 373 U.S. 83 (1963), (2) the trial court abused its discretion when it limited the cross-examination of two key witnesses as to bias, interest and motive to testify falsely, (3) appellate counsel was ineffective for failing to raise the limitation of cross-

examination, and (4) defendant requested testing of the unidentified fingerprints found at the crime scene pursuant to section 116-3 (725 ILCS 5/116-3 (West 2010)). In June 2011, the trial court denied defendant's motion for leave to file successive postconviction petition and dismissed the petition.

¶ 18 This appeal follows.

¶ 19 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2004)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2004); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999).

¶ 20 However, the Post-Conviction Act only contemplates the filing of one postconviction petition with limited exceptions. 725 ILCS 5/122-1(f) (West 2010); see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). Under section 122-1(f), a defendant must satisfy the cause and prejudice test in order to be granted leave to file a successive postconviction petition. 725 ILCS 5/122-1(f) (West 2010).

> "For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to

> raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010).

¶ 21 Both elements of the cause and prejudice test must be satisfied to prevail. *Pitsonbarger*, 205 Ill. 2d at 464. "In the context of a successive post-conviction petition, however, the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the statute." *Pitsonbarger*, 205 Ill. 2d at 458 (citing 725 ILCS 5/122-3 (West 1996)). The supreme court in *Pitsonbarger* also recognized an exception for a fundamental miscarriage of justice. *Pitsonbarger*, 205 Ill. 2d at 459; see also *People v. Edwards*, 2012 IL 11711, at ¶23. "To demonstrate such a miscarriage of justice, a petitioner must show actual innocence or, in the context of the death penalty, he must show that but for the claimed constitutional error he would not have been found eligible for the death penalty." *Pitsonbarger*, 205 Ill. 2d at 459. We review the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Pitsonbarger*, 205 Ill. 2d at 456.

¶ 22 "Where, as here, the death penalty is not involved and the defendant makes no claim of actual innocence, Illinois law prohibits the defendant from raising an issue in a successive postconviction petition unless the defendant can establish a legally cognizable cause for his or her failure to raise that issue in an earlier proceeding and actual prejudice would result if defendant were denied consideration of the claimed error." *People v. Brown*, 225 Ill. 2d 188, 206

(2007) (citing *Pitsonbarger*, 205 Ill. 2d at 459-60). "A defendant must establish cause and prejudice as to each individual claim asserted in a successive postconviction petition to escape dismissal under *res judicata* and waiver." *People v. Guiterrez*, 2011 IL App (1st) 093499, at ¶12.

¶ 23 Here, defendant first contends that his claim that the State admitted prejured testimony and violated *Brady v. Maryland* based on newly discovered evidence satisfied the cause and prejudice test. Specifically, defendant asserts that on cross-examination, Stryjak admitted that he had a pending charge of unlawful possession of a controlled substance, but stated that "[t]he charges have been dropped." Defendant argues that this testimony was false because at the time of trial in April 2001, Stryjak had a pending court date later that month on this charge and had received drug school. Defendant maintains that the State knew this testimony was false and he could not have raised this claim earlier because the memorandum of orders and written complaints from Stryjak's pending case were not discovered by defendant until after he filed his original postconviction petition.

¶ 24 However, defendant could have discovered Stryjak's pending court date earlier because his trial counsel refers to the pending April 30 court date in the trial record. During Stryjak's cross-examination, defense counsel had questioned Stryjak about his involvement in the sale of marijuana. Defense counsel then asked if Stryjak had a pending criminal charge. Following an objection by the State, the following colloquy took place in a sidebar.

> "DEFENSE COUNSEL: Your Honor, Mr. Stryjak currently has pending in this very courthouse an unlawful possession of a controlled substance charge against him. His next court date is

April 30.

THE COURT: What's he charged with?

DEFENSE COUNSEL: Unlawful possession of a controlled substance.

THE COURT: Okay.

DEFENSE COUNSEL: I can think of no more than a classic definition of bias that he's testifying for the State and the State currently has charges."

¶ 25 It is clear from the transcript of defendant's trial that defense counsel was aware that Stryjak had a pending court date for April 30 at the time of trial. This trial transcript was filed with defendant's direct appeal and his initial postconviction proceedings. Defendant cannot establish "cause" under the cause and prejudice test because no objective factor impeded his ability to raise this claim earlier. Stryjak's pending court date was easily discoverable from the transcript of defendant's trial. Defendant forfeited this claim by failing to raise it on either direct appeal or his initial postconviction proceedings. Accordingly, defendant cannot satisfy the cause and prejudice test as to this claim.

¶ 26 We need not address defendant's claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), because the record has established that defense counsel was aware of Stryjak's pending court date and the State did not fail to disclose information favorable to defendant.

¶ 27 Defendant also contends that the trial court erred in denying his request for fingerprint analysis under section 116-3 (725 ILCS 5/116-3 (West 2010)) that was included in his successive

postconviction petition.

¶ 28 Section 116-3 of the Code of Criminal Procedure of 1963 permits a defendant to obtain forensic testing of physical evidence when such testing was not available at the time of his or her trial and when certain statutory requirements have been met. *People v. Savory*, 197 Ill. 2d 203, 208 (2001). Section 116-3 provides:

> "(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint, Integrated Ballistic Identification System, or forensic DNA testing, including comparison analysis of genetic marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5-4-3 of the Unified Code of Corrections, on evidence that was secured in relation to the trial which resulted in his or her conviction, and:
>
> (1) was not subject to the testing which is now requested at the time of trial; or
>
> (2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. Reasonable notice

of the motion shall be served upon the State.

(b) The defendant must present a prima facie case that:

(1) identity was the issue in the trial which resulted in his or her conviction; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant;

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community.

(d) If evidence previously tested pursuant to this Section reveals an unknown fingerprint from the crime scene that does not

> match the defendant or the victim, the order of the Court shall direct the prosecuting authority to request the Illinois State Police Bureau of Forensic Science to submit the unknown fingerprint evidence into the FBI's Integrated Automated Fingerprint Identification System (AIFIS) for identification." 725 ILCS 5/116-3 (West 2010).

¶ 29 According to the supreme court, "in order to present a *prima facie* case for forensic testing, the defendant must show that identity was the central issue at trial and that the evidence to be tested was subject to a sufficiently secure chain of custody. The trial court then must determine whether this testing will potentially produce new, noncumulative evidence that is materially relevant to the defendant's actual-innocence claim." *People v. Johnson*, 205 Ill. 2d 381, 393 (2002).

¶ 30 Defendant relies on section 116-3 to seek testing of the fingerprint recovered from the vehicle in which Farberger and Caudell were discovered. The stipulation presented at trial stated that the fingerprints did not match defendant, Farberger or Caudell. Defendant requested that the unknown fingerprints would be run through the FBI's AIFIS database for identification. The State responds that postconviction petition is not the proper method to present this motion because a motion under section 116-3 is a stand alone motion and the results of which could provide an evidentiary basis for a postconviction petition.

¶ 31 While the supreme court has recognized that a section 116-3 motion "seeks to initiate a separate proceeding, independent of any claim for post-conviction or other relief" (*Savory*, 197

Ill. 2d at 210), none of the cases cited by the State have held that section 116-3 motion filed within a postconviction petition should be dismissed as premature under procedural grounds. Specifically, the State cites two Illinois Supreme Court cases, *Johnson* and *People v. Shum*, 207 Ill. 2d 47 (2003). In both cases, the defendant included a request for forensic testing in a postconviction petition and referred to section 116-3, which had been enacted, but was not yet effective. *Johnson*, 205 Ill. 2d at 392; *Shum*, 207 Ill. 2d at 63. However, in *Johnson*, section 116-3 was in effect at the time the trial court entered its order. *Johnson*, 205 Ill. 2d at 392.

¶ 32 In *Johnson*, the defendant was found guilty of first degree murder, attempted murder, rape, aggravated kidnaping and deviate sexual assault and was sentenced to death. The surviving victim tentatively identified the defendant as her assailant from a photo array and then positively identified him in a lineup. The defendant argued in his postconviction petition that the State possessed forensic evidence that would establish his innocence. The defendant, citing section 116-3, asked the court to test the rape kit taken from the surviving victim for DNA evidence because the results would cast doubt on whether he had committed the crimes. *Johnson*, 205 Ill. 2d at 390-91. The court noted that the defendant had not provided any evidence of actual innocence, but he contended that the DNA testing would provide such evidence. *Johnson,* 205 Ill. 2d at 392.

¶ 33 The State argued that the defendant was not entitled to DNA testing under section 116-3, but the supreme court found that the State had previously conceded before the trial court that DNA testing was not available at the time of the trial in 1984. Further, the supreme court found that even if the State had not conceded, the defendant's petition set forth a *prima facie* case for

DNA testing. *Johnson*, 205 Ill. 2d at 394.

> "A favorable result on a DNA test of the [rape] kit would significantly advance the defendant's claim that he did not rape [the surviving victim,] which, in turn, would significantly advance his claim that he did not murder [the deceased victim.] 'If the available DNA evidence is capable of supporting such determination, there is no valid justification to withhold such relief if requested on postconviction review.' " *Johnson*, 205 Ill. 2d at 396-97 (quoting *People v. Dunn*, 306 Ill. App. 3d 75, 81 (1999)).

¶ 34 Similarly, in *Shum*, the defendant was convicted of murder, feticide, attempted murder and two counts of rape and was sentenced to death. The surviving victim identified the defendant as the assailant and had been acquainted with him through her boyfriend. The defendant raised a claim for DNA testing in his postconviction petition. The trial court denied the request because "the Post–Conviction Hearing Act is not a vehicle for enforcing criminal procedural rules but instead is a means to evaluate whether constitutional deprivations occurred during the proceeding leading to defendant's conviction." *Shum*, 207 Ill. 2d at 55. The trial court also noted that the defendant's claim that the DNA testing would exonerate him was speculative because identity was not an issue at trial since the surviving victim knew the defendant. *Shum*, 207 Ill. 2d at 55.

¶ 35 The supreme court found that identity was at issue because the only direct evidence was the surviving victim's identification of the defendant, who had denied his involvement in the

case. *Shum*, 207 Ill. 2d at 66. The court further noted that this case was presented under "unique temporal circumstances" because the defendant was able to refer to the language of section 116-3, but unable to raise the claim in an independent motion, which left a postconviction petition as his only option. *Shum*, 207 Ill. 2d at 67. "Given the unusual facts of this 20–year–old case, little would be served by requiring defendant to replead the contents of this portion of his postconviction petition in a section 116–3 motion before the trial court when the petition otherwise clearly meets the requirements of section 116–3." *Shum*, 207 Ill. 2d at 67. The supreme court reversed the trial court's denial of his request for DNA testing and held that it was premature to evaluate the defendant's claim of actual innocence until the test results were known. *Shum*, 207 Ill. 2d at 67.

¶ 36 Neither of these cases held that a defendant can only raise a section 116-3 motion independent of a postconviction petition or that the inclusion of a section 116-3 request in a postconviction petition prevented consideration of the request. *Shum* suggested that a section 116-3 motion should precede a postconviction petition, but declined to dismiss the request and require the defendant to file a new motion containing the same arguments presented in that case. While the preferred procedure would be to file a section 116-3 motion prior to a postconviction petition, we decline to dismiss defendant's section 116-3 request and consider it in the interest of judicial economy.

¶ 37 Turning to defendant's section 116-3 request for the unknown fingerprints to be submitted to AIFIS, the State concedes that defendant "can demonstrate that identity was the primary issue at trial and that the chain of custody was unbroken." However, the State maintains that defendant

cannot establish that the results of the fingerprint testing, even if the identity was discovered, would contradict or eliminate the evidence against defendant. Defendant argues that results would be materially relevant because the evidence at trial was circumstantial and defendant presented an alibi.

¶ 38 "[E]vidence which is 'materially relevant' to a defendant's claim of actual innocence is simply evidence which tends to significantly advance that claim." *People v. Savory*, 197 Ill. 2d 203, 213 (2001). Whether the evidence is materially relevant "requires a consideration of the evidence introduced at trial, as well as an assessment of the evidence defendant is seeking to test." *Savory*, 197 Ill. 2d at 214.

¶ 39 In *Savory*, the defendant was convicted in the first degree murders of a brother and sister. The defendant requested DNA testing on a bloodstain from a pair of pants recovered from the defendant's home. At his 1981 trial, the bloodstain was shown to be the same blood type as one of the victims. *Savory*, 197 Ill. 2d at 207. The supreme court concluded that DNA testing of the bloodstain was not materially relevant to the defendant's claim of actual innocence because "the testimony regarding the possible source of the bloodstain on the pair of trousers was only a minor part of the State's evidence in this case." *Savory*, 197 Ill. 2d at 214-15. The majority of the State's case against the defendant was based on his knowledge of the crime scene that only the perpetrator could have known and his statements to others about the murders. *Savory*, 197 Ill. 2d at 215. "Under these circumstances, a test result favorable to defendant would not significantly advance his claim of actual innocence, but would only exclude one relatively minor item from the evidence of guilt marshaled against him by the State." *Savory*, 197 Ill. 2d at 215.

¶ 40 Here, the results of the fingerprint testing would not be materially relevant to defendant's claim of actual innocence. This court previously found in defendant's direct appeal and his initial postconviction appeal that the evidence presented was "overwhelming." See *Thivel*, No. 1-01-2905, at 23; *Thivel*, No. 1-03-0590, at 8.

¶ 41 The evidence at trial showed that defendant was angry with Farberger and believed Farberger had taken one of defendant's guns and owed defendant money. Both Stryjak and Milici testified that defendant owned a .380 Walther PPK and Milici stated that defendant liked to vary his ammunition. This testimony was consistent with the crime scene. The bullets recovered from the victims were .380 caliber bullets fired from the same handgun, but were different types of ammunition. Defendant also made incriminating statements to both Murray weeks before and immediately after the murders, and later to Wilson in Oregon. Specifically, defendant told Murray that he thought Farberger had taken his gun and that he was "going to get him for that." Defendant also told him, "Remember that thing I was talking about? Well, I did it." Murray understood defendant to mean that he had done something to Farberger, and defendant indicated that the police would be getting involved. Defendant then told Murray to act as his alibi. Later, defendant also told Wilson in Oregon "Oh, I did that; and it wouldn't work that way," in reference to two people being killed on television. Defendant also said the best way to kill people was to shoot them in the head and that the best way to dispose of a weapon was to dismantle it. In addition, Felkel testified that he responded to a call made from defendant's mother's house in Des Plaines for a tow truck at Potter and Seminary. While Felkel could not identify defendant, he identified cars similar to defendant's brother's Nissan and a van. Defendant's brother testified

that he did not call a tow that night.

¶ 42 The unknown fingerprints were presented at trial as a stipulation that the fingerprint recovered from the victim's car did not match defendant, Farberger or Caudell. Even if the fingerprint was tested and identified as an individual's fingerprint, that evidence would not overcome the overwhelming evidence presented against defendant. There would be no way to know when the fingerprints were made in the car and does not indicate guilt. In contrast, the DNA testing of the rape kits in *Johnson* and *Shum* would substantially advance the defendants' claims of actual innocence. We find the circumstances of this case to be more in line with *Savory*. We conclude that any evidence obtained from fingerprint testing would not be materially relevant because it would not significantly advance defendant's claim of actual innocence. Accordingly, we affirm the trial court's dismissal of defendant's successive postconviction petition.

¶ 43 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 44 Affirmed.