2013 IL App (1st) 100306-U

FIFTH DIVISION
March 15, 2013

No. 1-10-0306

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 87 CR 8638
	)	
ARTHUR ALMENDAREZ,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court erred in granting the State's motion to reconsider the denial of its motion to dismiss defendant's postconviction petition where the original trial judge denied the State's motion to dismiss and ordered a third-stage evidentiary hearing and that ruling was not clearly erroneous.

¶ 2 Following a jury trial, defendant Arthur Almendarez was convicted of first degree murder and aggravated arson. He was sentenced to natural life imprisonment. This court affirmed that conviction on direct appeal. See *People v. Almendarez*, 266 Ill. App. 3d 639 (1994). Defendant subsequently filed a petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2000)). After counsel was appointed to represent him, defendant

filed three supplemental petitions. The trial court denied the State's motion to dismiss and granted defendant a third-stage evidentiary hearing on his claims. However, the judge who granted the evidentiary hearing was transferred to another division before the hearing took place and the case was assigned to a new judge. That judge granted the State's motion to reconsider the denial of its motion to dismiss and ultimately granted the motion to dismiss. On appeal, defendant contends that the original ruling granting an evidentiary hearing was not clearly erroneous and that the trial court erred in granting the motion to reconsider that ruling. Defendant also contends that the court erred in dismissing his claim of actual innocence because he provided newly discovered evidence establishing that he did not commit the crimes. For the reasons that follow, we reverse.

¶ 3 On September 21, 1986, at approximately 4 a.m. there was a fire in a home on 24th Place in Chicago, Illinois. The fire resulted in the death of brothers Julio and Guadalupe Martinez. The police interviewed Jose Ramirez, who said that before the fire started he was in an alley near the Martinez home with friends Rene Rodriguez and Frank Partida. Rodriguez and Ramirez were admittedly drunk and were being helped home by Partida, who had coached many of the young men in the neighborhood in baseball and who was on his way home from work. Ramirez told the detectives that he saw John Galvan and Michael Almendarez (Michael), defendant's brother, walking with two other men down the alley behind the Martinez residence less than a minute before the fire began. The police interviewed Michael, who said that he heard Galvan and Francisco Nanez admit that they were responsible for the fire. After gathering those accounts, police questioned Galvan, who according to the police admitted to setting the fire with defendant and Nanez because they thought members of a rival gang lived in the house. Galvan stated that defendant and Nanez purchased gasoline and Nanez threw a bottle filled with gasoline at the house, after which Galvan threw a lit cigarette to ignite the fire.

¶ 4 The police arrested defendant based upon Galvan's statement. Detectives James

Hanrahan and Vic Switski interviewed defendant, who initially denied involvement in the crime but later gave a handwritten statement indicating he was with Nanez and Galvan on the night of the fire. According to defendant's statement, Galvan said he wanted to "go over and burn" a house on 24th Place to retaliate for an earlier shooting in which Galvan was targeted. Galvan asked defendant and Nanez to go with him to buy gasoline. The three went to a nearby service station, where Galvan held an empty container while defendant pumped gasoline into it. They drove back to 2603 W. 24th Place, where they walked to the alley and stopped by the garage about 20 feet away from that address. Defendant then waited while Nanez and Galvan walked around the garage and returned, telling him to run. Defendant said Nanez and Galvan told him they started the fire by throwing a bottle of gasoline at the house and lighting the liquid with a cigarette.

¶ 5 On September 13, 1988, defendant filed a motion to suppress his statement to police, asserting he was interrogated at the police station by four detectives, including Detectives Switski and Hanrahan, and an assistant State's Attorney. The motion stated that while defendant was in police custody, "he was kicked in the groin area and repeatedly struck in the back of the head" and was "told repeatedly that he was at the scene of the crime." The motion stated that defendant sought to suppress his statements because they were "obtained as a result of psychological and mental coercion." At a hearing on defendant's motion, both detectives testified that no physical abuse occurred and no promises were made to defendant to persuade him to give his written statement. The trial court denied defendant's motion to suppress.

¶ 6 In 1990, defendant and Nanez were tried simultaneously by separate juries.[1] At defendant's trial, Socco Flores, a neighbor of the Martinez family, testified that from her kitchen window she saw someone throw a bottle with a handkerchief stuffed in it at the Martinez house

[1]Galvan's trial was severed.

and that immediately thereafter she saw a fire erupt on the house's porch. Flores could not see the face of the person who threw the bottle and she was unable to identify anyone in a lineup at the police station. The parties stipulated that if called to testify, a detective would state that Flores told him that she saw three Hispanic men standing at the rear of the building that was on fire and that Flores picked Isaac Galvan out of a photo array, saying he resembled the person who threw something at the Martinez residence. Jose Ramirez testified that on the night of the fire he was out drinking with Rene Rodriguez and that on their way home they ran into Frank Partida in the alley by the Martinez residence. Ramirez saw four men walking down the alley at approximately 4 a.m. and Ramirez recognized two of the men as "Michael" and Galvan. He did not see the faces of the other two men. After the fire department arrived, Ramirez saw Isaac Galvan standing near the burning house.

¶ 7 Defendant was found guilty of two counts of first degree murder and aggravated arson. Nanez and Galvan were also convicted of the same offenses by their juries. All three defendants were sentenced to natural life imprisonment. The direct appeals of defendant and Nanez were consolidated, and this court affirmed their convictions and sentences. *People v. Almendarez*, 266 Ill. App. 3d 639 (1994). In a separate appeal, Galvan's conviction and sentence were affirmed. *People v. Galvan*, 244 Ill. App. 3d 298 (1993).

¶ 8 In March 2001, defendant filed a *pro se* postconviction petition claiming that his sentence of natural life imprisonment was unconstitutional and therefore void under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Galvan filed a similar petition and both cases were assigned to Judge Epstein, who appointed the same public defender to represent both defendants. On March 13, 2003, counsel for defendant filed a first supplemental postconviction petition, arguing that defendant's jury instructions and verdict forms were flawed because they did not include the necessary mental state.

¶ 9 In January 2004, the State filed a special motion to dismiss the petition based on

timeliness. Defendant's counsel filed a second supplemental petition in February 2004. The petition specifically asserted that defense counsel was ineffective in failing to present defendant's wife as an alibi witness, for failing to have defendant testify that his confession was the product of police abuse and coercion and for failing to interview Frank Partida and call him as an eyewitness to refute the testimony of the State's witnesses. The petition also described inconsistencies in the statements of defendant, Nanez and Galvan and asserted those differences should have been presented at trial "to support the contention that the statements were the products of police abuse." Finally, the petition alleged that the State had interviewed Partida but failed to turn over to defendant the notes from that interview, which would have been evidence of defendant's innocence.

¶ 10 Attached to the second supplemental petition were affidavits of defendant and Partida. Defendant's affidavit stated he had expected to testify at his trial and expected his attorneys to call his wife and Partida as witnesses. Defendant further stated that both his wife and Partida would have testified on defendant's behalf if they had been called as witnesses.

¶ 11 In Partida's affidavit, dated February 13, 2004, he stated that when he saw Ramirez and Rodriguez in the alley, Rodriguez was drunk and Ramirez and Rodriguez said that they had just smoked a joint laced with other drugs. Partida saw three kids walking into the alley but he did not recognize them. When he asked the others who they were, Rodriguez mumbled something and Ramirez said that he did not know. Partida further stated that he knew defendant and would have recognized him had he been in the alley that night. Partida stated he was questioned by police in May and June 1987 and told them he saw three men in the alley before the fire. Partida said he was shown photos of defendant and Galvan and told the police they "were not there the night of the fire." Partida was also told by an assistant State's Attorney that he would be subpoenaed to testify at trial but he never was and did not learn of the trial until after it was over. Partida was never interviewed by a defense attorney before defendant or Galvan's trials.

¶ 12 Judge Epstein initially presided over defendant and Galvan's supplemental petitions. In September 2004, Judge Epstein denied the State's motion to dismiss and set an evidentiary hearing on the petitions of both defendant and Galvan for December 3, 2004. Judge Epstein also granted the State leave to file a supplemental motion to dismiss, stating that the court would address the motion prior to proceeding with the evidentiary hearing on December 3.

¶ 13 On October 12, 2004, defendant and Galvan filed a joint third supplemental petition. In that petition, defendant argued that his trial counsel was ineffective for failing to present evidence that an identified person, Lisa Velez, had motive and intent to start the fire at the Martinez residence. Defendant further argued that he was denied due process of law when the State failed to disclose that Partida told the police that he saw the three individuals who set the fire and that defendant was not among them. In an effort to bolster defendant's claim that his confession was the result of police coercion and abuse, defendant attached to one of his petitions an affidavit from Galvan that was executed on September 6, 2001.[2] In that affidavit, Galvan stated that Detectives Switski and Hanrahan abused him at the police station and coerced his confession. In his six-page affidavit, Galvan then detailed the techniques these detectives allegedly used to coerce his confession.

¶ 14 In November 2004, the State filed a motion to reconsider the court's denial of the State's previous motion to dismiss and a supplemental motion to dismiss for each defendant. On December 3, 2004, Judge Epstein agreed to continue the case for an evidentiary hearing to January 21, 2005, but stated that would be the final date for the evidentiary hearing. The State asked the court to address the combined motion to reconsider and to dismiss and whether the third supplemental petition had been docketed. Judge Epstein reviewed the third supplemental petition from the bench and stated that he would allow defendant and Galvan to present evidence

[2]It is unclear from the record to which petition the affidavit was attached.

on the issues raised in the supplemental petition. Judge Epstein then asked the State if it had arguments that had not been expressed in writing regarding its combined motion. When the State replied that it did not, Judge Epstein stated that the court would not be hearing oral argument on the motion and that the only way the matter would be adequately disposed of would be with a full, fair and final evidentiary hearing. In order to achieve resolution of the case, Judge Epstein stated that he would allow defendant and Galvan to present arguments and evidence on the issues raised in their petitions. The court then ordered the parties to disclose all witnesses they intended to call on January 21 and said that any further request for a continuance to locate additional witnesses would have to be supported by an affidavit clearly detailing why a continuance was necessary.

¶ 15 On January 10, 2005, postconviction counsel for defendant and Galvan requested a 60-day continuance to investigate allegations of abusive interrogation procedures by Detectives Switski and Hanrahan. Counsel filed a motion to subpoena records of the Chicago Police Department's Office of Professional Standards (OPS) pertaining to those two detectives, one or both of whom interviewed defendant, Galvan and Michael Almendarez. The motion asserted that defense counsel had uncovered other allegations of abusive interrogation tactics by Detectives Switski and Hanrahan which would establish a pattern and practice of abuse by those detectives similar to the kind that Galvan, defendant and his brother were allegedly subject to. The motion described the case of Johnny McGhee, whose conviction was reversed on appeal based on the involuntary nature of his confession.[3] The motion also described other suspects, including McGhee's codefendant Kenneth Fisher, who were allegedly subjected to coercive interrogation by Switski and Hanrahan. The motion cited to a number of other cases that

[3] See *People v. McGhee*, 154 Ill. App. 3d 232 (1987).

involved allegations of coercive interrogations by Switski and Hanrahan.[4] On January 12, 2005, Judge Epstein granted the discovery request and ordered the OPS to produce any records of complaints filed against the two detectives for *in camera* review. After that review, the court allowed the defense access to the records in two criminal cases. One of those cases involved a defendant, Anselm Holman, who claimed that his confession was coerced by Detective Switski. The court ultimately allowed defendant to proceed with DNA testing on evidence from the Holman case. Defendant sought this DNA testing because, if it exonerated Holman, it would strengthen Holman's credibility as a witness at defendant's hearing and bolster defendant's claim that his confession was coerced. The DNA result from Holman was returned as "inconclusive." In August 2005, the State filed a motion for a supervisory order in the Illinois Supreme Court, naming Judge Epstein as the respondent. The State asked the supreme court to direct Judge Epstein to limit the scope of the hearing by precluding defendant and Galvan from introducing any evidence regarding the alleged pattern and practice of torture by members of the Chicago police and to dismiss the petition on timeliness grounds. The Illinois Supreme Court denied the State's motion.

¶ 16 Discovery proceeded in preparation for the evidentiary hearing. In April 2006, the State filed a motion *in limine* seeking to preclude defendant from calling witnesses to support his allegations related to the pattern and practice of police coercion by Area 4 police. Judge Epstein denied the State's motion, stating that he would hear the testimony and expressing his frustration at the length of time it was taking to set a final date for the evidentiary hearing. In response to a discovery request by the State, defendant and Galvan provided the names of people who they

[4]These included *People v. Fisher*, 169 Ill. App. 3d 915 (1988); *Fisher v. Fairman*, 991 F. 2d 799 (7th Cir. 1993); *People v. Ealy,* 146 Ill. App. 3d 557 (1986)*; People v. Cole,* 168 Ill. App. 3d 172 (1988); *People v. Holman*, 250 Ill. App. 3d 503 (1993); *People v. Mitchell*, 228 Ill. App. 3d 167 (1992); *People v. Halman*, 225 Ill. App. 3d 259 (1992); *People v. White*, 117 Ill. 2d 194 (1994); and *People v. Hernandez*, 220 Ill. App. 3d 715 (1991).

identified as having been subject to coercion by Switski and the date of their interrogation.[5] Of the fourteen people identified, the defense said that there would be ten potential live witnesses.

¶ 17 In June 2006, the parties told the court they were prepared for an evidentiary hearing. Shortly thereafter, however, Judge Epstein was transferred to the chancery division and the case was assigned to several different judges over the next 14 months. In September 2007, the case was reassigned to Judge Brosnahan. On September 27, 2007, the parties explained the status of the case to Judge Brosnahan. The State told the court it had been prepared for an evidentiary hearing before Judge Epstein but argued that Judge Epstein never ruled on the State's motion to dismiss but instead simply stated that the case should go to an evidentiary hearing. Defendant told the court that Judge Epstein denied the State's motion to reconsider and supplemental motion to dismiss on December 3, 2004. No progress occurred on the case for several months as the parties reconstructed the record, which apparently was lost during the transfer.

¶ 18 On May 1, 2008, Judge Brosnahan ruled that, based upon her review of the record, Judge Epstein "unequivocally denied" the State's motion to reconsider and advanced the petition for an evidentiary hearing. She also found that there was no pending motion to reconsider at that time and continued the case with the stated intention of advancing it to an evidentiary hearing. On June 2, 2008, counsel for defendant and Galvan filed certificates pursuant to Supreme Court Rule 651(c), stating that counsel had consulted with defendant, examined the record and filed the previous supplemental petitions to present claims of a deprivation of constitutional rights. The certificate stated that there was a "claim of actual innocence involved" as to defendant and Galvan.

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[5]The names and dates of interrogation were James Early, deceased (1982), Johnny McGhee, deceased (1984), Kenneth Fisher (1984), Richie Cole (1984), Anselm Holman (1984), Ruben Young (1985), Laroy Mitchell (1985), Fred Halmon (1985), Michael Almendarez (1987), Francisco Nanez (1987), Corey Lloyd (1988), Carnell Carey (1989), Andre Slater (1989), and Joe Trejo (1989).

¶ 19 In June 2008, the State filed a motion requesting that Judge Brosnahan reconsider the May 1 ruling. Defendant responded by emphasizing that the case involved a claim of actual innocence with coerced confessions. On September 23, 2008, after hearing argument, Judge Brosnahan reversed her prior ruling. Judge Brosnahan stated that after reviewing the record a second time, she did not believe that Judge Epstein had given the State a "fair shake" at the earlier motion to dismiss and that Judge Epstein had improperly collapsed the second and third stage of postconviction proceedings. Judge Brosnahan therefore granted the State's motion to reconsider Judge Epstein's denial of the State's motion to dismiss. The case proceeded to a hearing on the State's supplemental motion to dismiss and, on November 24, 2009, Judge Brosnahan granted the motion to dismiss. Defendant and Galvan filed a motion asking the court to reconsider its decision to grant the motion to dismiss, which the court denied. This appeal followed.

¶ 20 The 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). Where a defendant sets forth a claim of actual innocence based on newly discovered evidence, the usual time limitations for filing a postconviction petition do not apply. 725 ILCS 5/122-1(c) (West 2000); *Ortiz*, 235 Ill. 2d at 330. Moreover, the Act generally contemplates the filing of only one postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). However, fundamental fairness allows the filing of a successive petition where the petition complies with the cause-and-prejudice test. *Pitsonbarger*, 205 Ill.2d at 459. Where a defendant sets forth a claim of actual innocence, the defendant is excused from showing cause and prejudice. *Ortiz*, 235 Ill.2d at 330.

¶ 21 A defendant asserting a claim of actual innocence must show that the supporting evidence is new because it was not available at the time of trial, material and not merely cumulative and "of such conclusive character that it would probably change the result on retrial." *Ortiz*, 235 Ill.

2d at 33. Procedurally, actual innocence claims should be resolved as any other claim brought under the Act. *Ortiz*, 235 Ill. 2d at 333.

¶ 22 At the second stage of proceedings under the Act, the circuit court must determine whether the allegations in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the petition makes such a showing, it should be advanced to the third stage of proceedings where an evidentiary hearing can be held on the allegations in the petition. *Coleman*, 183 Ill. 2d at 381. Resolution of factual disputes and determinations as to the credibility of witnesses cannot be made upon the State's motion to dismiss at the second stage of proceedings but instead can be made following a third-stage evidentiary hearing. *Coleman*, 183 Ill. 2d at 380-81.

¶ 23 On appeal, defendant contends the dismissal of his petition should be reversed because he sufficiently alleged a claim of actual innocence based on newly discovered evidence that his confession was coerced and based on new evidence in the form of an affidavit from Partida indicating that defendant was not at the scene of the crime. Alternatively, defendant argues that remand is required for further proceedings because his postconviction counsel did not amend defendant's petition to adequately present his claim of actual innocence.

¶ 24 In a supplemental brief, defendant raises the additional contention that Judge Epstein's original ruling granting an evidentiary hearing was not manifestly erroneous and that the trial court therefore erred in granting the State's motion to reconsider that ruling. Defendant also has filed a motion seeking to cite our Third Division's recent decision in co-defendant Galvan's appeal from the dismissal of his postconviction petition. See *People v. Galvan*, 2012 IL App (1st) 100305-U (November 30, 2012). Defendant acknowledges that *Galvan* was an unpublished decision. He notes, however, that under Illinois Supreme Court Rule 23, such an unpublished decision "is not precedential and may not be cited by any party except to support contentions of

double jeopardy, *res judicata*, collateral estoppel or law of the case." S. Ct. R. 23(e)(1). Defendant asks that we consider this decision in connection with his current appeal under the doctrines of law of the case and collateral estoppel. We first set forth the decision in *Galvan*.

¶ 25 In *Galvan*, defendant argued, among other things, that the original ruling granting an evidentiary hearing was the law of the case and that the trial court erred in reconsidering that ruling where the facts and issues had not changed and where the ruling was not manifestly erroneous. *Id.* at ¶2. The court first considered whether Judge Epstein in fact denied the State's motion to dismiss or whether, as the State argued, Judge Epstein never ruled on the motion. The court found that "[a]lthough Judge Epstein did not explicitly state that the motion was denied by uttering the word "denied," a detailed review of the record provides sufficient context to conclude that Judge Epstein decided to deny the State's motion and proceed to a third-stage evidentiary hearing." *Id.* at ¶16. The court then found that, contrary to the defendant's argument, Judge Epstein's ruling granting an evidentiary hearing was not the law of case. *Id.* at ¶19. The court then considered whether the trial court erred in reversing Judge Epstein's order denying the State's motion to dismiss and granting an evidentiary hearing and reviewed that issue *de novo*. *Id.* at ¶20. Before considering the issue, the court made the following observations regarding the reasoning for Judge Brosnahan's decision:

> "In her oral ruling on September 23, 2008, Judge Brosnahan stated that she was granting the State's motion to reconsider the prior ruling because she did not believe Judge Epstein had given the State a "fair shake" at its earlier motion to dismiss. In her written ruling of November 24, 2009, Judge Brosnahan characterized her September 23 ruling as being based on the finding that Judge Epstein had "impermissibly collapsed the second and third stages" of the postconviction process. Judge Brosnahan further stated that it appeared that the State's motion to dismiss had never been addressed in any meaningful manner.

Therefore, we must determine whether Judge Brosnahan erred in concluding that Judge Epstein's prior ruling was erroneous." *Id.* at ¶21.

¶ 26 The court concluded that Judge Epstein's denial of the State's motion to dismiss was not erroneous and that the trial court erred in reversing that denial. The case was therefore remanded for a third-stage evidentiary hearing. In so doing, the court reasoned:

"We agree that it would have been preferable if Judge Epstein had explicitly addressed the elements of cause and prejudice for the ineffective assistance claims and if he had explicitly stated that defendant made a substantial showing of a constitutional violation in support of those claims and his actual innocence claim. However, it is well settled that the trial court is presumed to know the law and apply it properly. See, *e.g.*, *People v. Howery*, 178 Ill. 2d 1, 32 (1997); *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 41. The presumption is rebutted only where the record shows strong affirmative evidence to the contrary. *Howery*, 178 Ill. 2d at 32. The record is clear that Judge Epstein read and considered the State's motion to dismiss. His comments also clearly indicate that he rejected the State's arguments for dismissal on procedural grounds. The trial court is not required to explain its ruling on each point. We are not persuaded by the comments highlighted by the State that Judge Epstein did not follow the requirements of the Act. The State points to portions of Judge Epstein's comments that, without context, could lead to one conclusion but, when considered comprehensively, do not support that conclusion. Upon review of the record and the entirety of Judge Epstein's comments, we conclude that the record does not support the State's contention that Judge Epstein failed to follow the procedural requirements of the Act. While some of his comments were arguably inartful and attributable to his obvious frustration with the length of the

> postconviction proceedings and the ongoing delay to which both sides contributed, Judge Epstein was speaking extemporaneously from the bench and other comments make it clear that he considered the State's arguments, gave the State the opportunity to add anything it had not included in writing, ruled that defendant's claims were not procedurally barred, and determined that defendant was entitled to a hearing on the merits of his claims. Judge Epstein's various comments at the subsequent hearings over the 16–18 months prior to his transfer also support the interpretation that he determined that defendant had made a substantial showing of a constitutional violation and was entitled to a hearing on his claims. Thus, we conclude that Judge Epstein's denial of the State's motion to dismiss was not erroneous." *Id.* at ¶26.

¶ 27 Defendant claims that the order in *Galvan* governs our decision in this case under the doctrines of law of the case and collateral estoppel. "[T]he law of the case doctrine bars relitigation of an issue already decided in the same case." *People v. Tenner*, 206 Ill. 2d 381, 395 (2002); *People v. McNair*, 138 Ill. App. 3d 920, 922 (1985) ("a determination of an issue on its merits by an appellate court is final and conclusive upon the parties in a second appeal in the same case, and the issues considered and decided cannot be reconsidered by the same court except on a petition for rehearing"). This doctrine is not applicable here because the appeals filed by Galvan and defendant are not the "same case." Although the two petitions were considered simultaneously by the trial court and involve substantially the same issues, defendant was not a party to Galvan's appeal. Therefore, defendant's appeal to this court is not a "second appeal in the same case" and the law of the case doctrine is inapplicable.[6]

¶ 28 "The collateral estoppel doctrine bars relitigation of an issue already decided in a prior

[6]It is unclear why neither party sought to consolidate defendant's and Galvan's appeals, as doing so would have led to a more expeditious resolution of those appeals.

case." *Tenner*, 206 Ill. 2d at 396. "The doctrine applies 'when a party *** participates in two separate and consecutive cases arising on different causes of action and some controlling fact or question material to the determination of both causes has been adjudicated against that party in the former suit by a court of competent jurisdiction.' " (Emphasis in original.) *People v. Moore*, 138 Ill.2d 162, 166 (1990) (quoting *Housing Authority v. Young Men's Christian Ass'n of Ottawa*, 101 Ill. 2d 246, 252 (1984)). "The collateral estoppel doctrine has three requirements: (1) the court rendered a final judgment in the prior case; (2) the party against whom estoppel is asserted was a party or in privity with a party in the prior case; and (3) the issue decided in the prior case is identical with the one presented in the instant case." *Tenner*, 206 Ill. 2d at 396.

¶ 29 Although not addressed by the parties, our supreme court has held that in criminal cases there is an additional requirement of "mutuality" for collateral estoppel to apply. See *People v. Franklin*, 167 Ill. 2d 1, 13-14 (1995). The mutuality doctrine provides that "neither party [can] use a prior finding as an estoppel against their opponent unless both parties were bound by the prior judgment." *Franklin*, 167 Ill. 2d at 12. Under this doctrine, "a criminal defendant may not use a prior judicial finding against the State unless the defendant himself was bound by the prior finding." *People v. Rodriguez*, 402 Ill. App. 3d 932, 941 (2010); see also *People v. Martinez*, 389 Ill. App. 3d 413, 418 (2009) (mutuality doctrine prohibited the defendant from using the reversal of his codefendant's conviction for his own benefit). Our supreme court's rationale behind requiring mutuality in criminal cases was its recognition that the State often lacks the full and fair opportunity to litigate an issue, that the evidence presented at separate trials and the manner in which that evidence was presented can vary significantly and that "the State may also not present its case as effectively or persuasively in one trial or appeal as it does in another. *Franklin*, 167 Ill. 2d at 14. Our supreme court also found that the mutuality requirement was justified in criminal cases because of the public's strong interest in the enforcement of the criminal law and because the interest in accurate results in every criminal prosecution

outweighed the need for consistent verdicts. *Franklin*, 167 Ill. 2d at 14.

¶ 30 Collateral estoppel does not apply in this case because the mutuality requirement is not satisfied. Defendant was not a party to Galvan's appeal and he was therefore not bound by the judgment rendered therein. Accordingly, defendant cannot use the order in Galvan's appeal as the basis of an estoppel argument against the State in this appeal.

¶ 31 As the State points out, *Galvan* is also not binding on this court. See *O'Casek v. Children's Home & Aid Society*, 229 Ill. 2d 421, 440 (2008) ("the opinion of one district, division or panel of the appellate court is not binding on other districts, divisions, or panels").

¶ 32 Regardless, for the same reasons articulated in *Galvan*, we find that Judge Epstein's denial of the State's motion to dismiss was not clearly erroneous. In the context of discovery orders in which a successor judge revisits an order that required an exercise of discretion by the previous judge, our supreme court has noted that the successor judge should not revise or modify such an order without a compelling reason to do so. *Balciunas v. Duff*, 94 Ill. 2d 176, 188 (1983). The United States Supreme Court has noted that, while a court has the power to revisit its own prior decisions, it "should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." (Internal quotation marks omitted.) *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). In this case, the record clearly establishes that Judge Epstein denied the State's motion to dismiss. Although Judge Epstein did not explicitly state that defendant made a substantial showing in support of his claims, including his claim of actual innocence, the trial court is presumed to know the law and apply it properly. See *Howery*, 178 Ill. 2d at 32. Judge Epstein's comments at various hearings before his transfer support the conclusion that he found defendant had made a substantial showing of a constitutional violation. Judge Epstein's comments also clearly indicate that he considered and rejected the State's arguments for dismissal of defendant's

petition. Judge Epstein was not required to explain his ruling on each point and the record in its entirety does not support the contention that Judge Epstein did not follow the requirements of the Act.

¶ 33 We note that defendant presents an even stronger case than Galvan. Unlike Galvan, there were no eyewitnesses who placed defendant at the scene. There was no physical evidence connecting defendant to the crime and he was convicted based solely upon his handwritten confession. In dismissing defendant's petition, the trial court questioned whether Partida's affidavit was newly discovered evidence. While Partida was not a newly discovered witness, the statements in his affidavit were newly discovered evidence because Partida essentially stated in the affidavit that he told police that defendant was not present at the scene but that the statements ascribed to him by the police were misrepresented. Additionally, the trial court commented that Partida's testimony would not change the outcome of trial as he would be impeached by his statements to police and by an affidavit that he executed in 1995.[7] However, resolution of factual disputes and determinations as to the credibility of witnesses cannot be made upon the State's motion to dismiss but instead can be made following a third-stage evidentiary hearing. *Coleman*, 183 Ill. 2d at 380-81. Defendant therefore should have the opportunity to have Partida take the witness stand and explain, admit or deny any inconsistencies in his prior statements, as is required in any instance of impeachment. See Ill. R. Evid. 613(b) (eff. Jan. 1, 2011) ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is first afforded an opportunity to explain or deny the same and the opposing party is afforded an opportunity to interrogate the witness thereon"). The trial court also commented that the cases cited by defendant involving claims of coercive interrogations by Switski and Hanrahan were not newly discovered evidence because they were available by the time of the conclusion of

[7]It does not appear that defendant attached this 1995 affidavit to his petition.

defendant's direct appeal. The question, however, is whether those cases were available at the time of defendant's trial. See *People v. Morgan*, 212 Ill. 2d 148, 154 (2004) (defining newly discovered as "evidence that was not available at defendant's original trial and that the defendant could not have discovered *** through diligence"). Defendant's trial took place in 1990 and, as set forth above, a number of the cases cited by defendant were published after that date.

¶ 34 We make no finding here concerning the strength of defendant's contentions. We only find that based on the allegations set forth in defendant's petition, Judge Epstein's decision to advance the matter to a third-stage evidentiary hearing was not clearly erroneous. As Judge Epstein's denial of the State's motion to dismiss was not clearly erroneous, we conclude that the trial court erred when it granted the State's motion to reconsider and reversed that denial. We therefore remand this case to the circuit court for a third-stage evidentiary hearing on defendant's postconviction petition.

¶ 35 Reversed and remanded.