

No. 1-09-0595

**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).

---

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. 02 CR 13497
	)	
MARCUS SMITH AKA MIRACLE M. SMITH,	)	The Honorable
	)	John P. Kirby,
Defendant-Appellant.	)	Judge Presiding.

---

PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.  
JUSTICES LAVIN and PUCINSKI concurred in the judgment.

**ORDER**

*HELD:* Where defendant failed to raise an actual innocence claim in his postconviction petition, but raised it for the first time on appeal, defendant waived his actual innocence claim for the purposes of this appeal.

Defendant, Marcus Smith, appeals from the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). On appeal he contends that the trial court erred in summarily dismissing his actual innocence claim.

In June 2006, following a jury trial, defendant was convicted of first degree murder, aggravated kidnapping, armed robbery, and residential burglary. He was sentenced to an

aggregate prison term of 80 years. Defendant's conviction and sentence were upheld on appeal. *People v. Smith*, 1-06-2084 (2008) (unpublished pursuant to Supreme Court Rule 23).

Defendant subsequently filed the postconviction petition at bar. Defendant's stated contentions were ineffective assistance of appellate counsel for failing to raise certain issues on direct appeal, including: trial court error in denying his motion to suppress, failure to prove his guilt beyond a reasonable doubt, improper use of his polygraph test in court, a lack of probable cause for his arrest, absence of a probable cause hearing, denial of his right to confront witnesses, and ineffective assistance of trial counsel for failing to interview and call witnesses. Included in defendant's petition was the statement of Gregory Crowder, which asserted that he never implicated defendant in a murder to the police, nor did he witness defendant commit any crime. The record establishes that Crowder did not testify against defendant at trial, but implicated defendant as a party to the crimes at the hearing on defendant's motion to suppress evidence.

On appeal, defendant contends that Crowder's statement, and defendant's challenge to the sufficiency of the evidence, constituted a meritorious claim of actual innocence, and that the trial court erred in not advancing that claim for second-stage proceedings. The State responds that defendant did not assert a claim of actual innocence, and, by raising it for the first time on appeal, he waived the claim. In first-stage summary dismissals of postconviction petitions, we review the trial court's judgment *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998).

The Act provides a remedy for defendants who claim that a substantial violation of their constitutional rights occurred in the proceedings which resulted in their convictions. 725 ILCS 5/122-1 (West 2008). In his petition, defendant must clearly set forth the respects in which his constitutional rights were violated, and attach thereto affidavits, records, or other evidence

supporting the allegations or state why they are not attached. 725 ILCS 5/122-2 (West 2008); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Section 122-2 serves to provide the court with an independent and objective means of corroborating defendant's allegations. *Delton*, 227 Ill. 2d at 254.

At the first stage of post-conviction proceedings, the circuit court determines whether defendant's petition is frivolous and patently without merit. 725 ILCS 5/122-1.2 (West 2008). In *People v. Hodges*, 234 Ill. 2d 1, 12 (2009), the supreme court defined such a petition as one without an arguable basis in law or fact. Initially, we note that defendant does not challenge the dismissal of the other claims raised below, thereby forfeiting them. *People v. Orange*, 195 Ill. 2d 437, 448 (2001).

Before reaching the merits of defendant's actual innocence contention, we must first determine whether such a claim was included in his petition, or whether, as the State argues, defendant is raising this claim for the first time on appeal. Section 122-3 of the Act provides that: "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2008). Interpreting this provision, our supreme court has held: "A post-conviction petitioner may not wait until appeal to formulate the matters that he wishes to assert as grounds for post-conviction relief." *People v. McNeal*, 194 Ill. 2d 135, 153 (2000).

Defendant contends that the statement of Gregory Crowder, viewed liberally, and in conjunction with his sufficiency of the evidence challenge, provided a basis to find a claim of actual innocence. In order to assert a claim of actual innocence defendant must assert that he did not commit the crime of which he was convicted. See *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008)(holding that actual innocence does not concern the State's burden of proof, but actual

exoneration of defendant). Initially, we note that nowhere in defendant's petition did he expressly state that he was innocent or use the phrase "actual innocence."

In addition, the substance of the statement attributed to Crowder was that he did not implicate defendant and did not have any knowledge of defendant's involvement in the crimes charged. At no point does Crowder aver any knowledge of the actual perpetrator of the crimes, or even that he knows that defendant was not involved in the crime. Thus, the statement is not sufficient to assert a claim of actual innocence, where it is not of such a character that it exonerates defendant or obliterates the testimony upon which his conviction was obtained. *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007).

Having found that Crowder's statement did not independently create a claim of actual innocence, we further find that Crowder's statement, when viewed in conjunction with defendant's challenge to the sufficiency of the evidence for his conviction, did not create a claim of actual innocence. We note that actual innocence claims and challenges to the sufficiency of the evidence concern separate subject matters. Actual innocence claims concern the due process violation inherent in an innocent person being wrongfully convicted of a crime (*People v. Ortiz*, 235 Ill. 2d 319, 333 (2009)); whereas, challenges to the sufficiency of the evidence concern the weight of the evidence used to convict a defendant (*People v. Campbell*, 146 Ill. 2d 363, 375 (1992)). The substance of defendant's challenge addresses the State's evidence and the lack of testimony from Crowder, and not evidence of defendant's innocence. In essence, defendant challenges the basis for the jury's finding, rather than setting forth an argument that he is innocent.

Thus, we reject defendant's actual innocence claim and reaffirm the principle that, "[i]f a defendant does not articulate his theory \*\*\* he cannot reasonably expect the court, unaided, to

1-09-0595

divine his intent." *People v. Taylor*, 237 Ill. 2d 68, 77 (2010), citing *People v. Grant*, 71 Ill. 2d 551, 557-58 (1978).

Accordingly, we affirm the order of the circuit court of Cook County.

Affirmed.