2012 IL App. (1st) 092799 & 101482-U

FIRST DIVISION
March 26, 2012

Nos. 1-09-2799 & 1-10-1482 (consolidated)

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. 03 CR 19202
	)	
WENDELL WEAVER,	)	Honorable
	)	Lawrence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

MODIFIED ORDER UPON DENIAL OF REHEARING

Held: We affirmed the dismissal of defendant's post-conviction petition where it failed to make a substantial showing of actual innocence, ineffective assistance of trial counsel, and knowing use of perjured testimony. We also affirmed the dismissal of defendant's section 2-1401 petition on the basis that it was untimely filed.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Karnezis concurred in the judgment.

¶ 1 Defendant, Wendell Weaver, appeals the second-stage dismissal of his post-conviction petition and the dismissal of his section 2-1401 (735 ILCS 5/2-1401 (West 2008)) petition for post-judgment relief. Petitioner contends: (1) his post-conviction petition makes a substantial showing of actual innocence, he was denied the effective assistance of trial counsel, and his indictment and conviction were wrongfully obtained through the knowing use of perjured testimony; and (2) his section 2-1401 petition similarly makes the requisite showing that his indictment and conviction

were wrongfully obtained through perjured testimony. We affirm.

¶ 2 Defendant was charged with the first-degree murder of the victim, Randy Sanders. At trial, Danny Callico, age 29, testified on behalf of the State that he was a friend of the victim and they sold drugs together at Trumbull and Chicago Avenues. At the time of trial, Mr. Callico was serving a 10-year sentence for the sale of heroin.

¶ 3 On April 4, 2002, at approximately 8:30 p.m. or 9 a.m., Mr. Callico met with Jeffrey Smith, Lamont Delaney, and the victim, on Madison Street in Chicago. The four men drove away in the victim's new Chrysler automobile, returning at approximately 12:30 p.m. or 1 p.m. Upon their return, Mr. Smith departed and the victim began to drive away with Mr. Callico and Mr. Delaney as passengers. Mr. Callico rode in the front-passenger seat and Mr. Delaney rode in the back seat. For a time, the men parked outside a McDonald's restaurant and smoked marijuana.

¶ 4 The victim then drove to Madison Street, turning right on Laramie Avenue and right again onto Service Drive. While stopped at a stop sign at the intersection of Service Drive and Washington Boulevard, gunshots were fired into the victim's car. Mr. Callico crouched down on the floor when he heard the shots and, looking out the driver-side window, he saw defendant outside the window firing shots into the car.

¶ 5 The victim was struck by bullets and slumped over the steering wheel, but his foot was still on the gas pedal and the car was thrust forward across Washington Boulevard, ultimately crashing into the steps of a church on the opposite side of the street. Mr. Callico stated that as the car crossed Washington Boulevard, he felt the impact of the victim's car striking another car.

¶ 6 When the victim's car came to a halt, Mr. Callico got out and ran down LeClaire Avenue to Madison Street and then into a barber shop, where he called the police and reported the shooting.

Then he returned to the scene and saw an ambulance transporting the victim to a hospital. Mr. Callico did not talk to police at the scene because he was afraid the shooters still were in the vicinity.

¶ 7 A few days after the shooting, on April 11, 2002, Mr. Callico spoke to the police and told them he believed defendant and two other persons, "Octavious" and "Lupe" were involved in the shooting. However, he did not specifically identify defendant as the shooter because, as Mr. Callico explained, he believed "basically we was going to take care of that ourselves," *i.e.*, that he and his friends would shoot defendant.

¶ 8 Approximately one year later, while Mr. Callico was incarcerated on a narcotics offense, he informed police that defendant was the shooter.

¶ 9 Chicago Police Officer Stephen Dockett testified he arrived at the scene of the shooting on April 4, 2002, at approximately 1 p.m. Officer Dockett saw the victim's car crashed into a church on the northeast corner of Leamington Avenue and Washington Boulevard. The victim had been shot and was slumped over the wheel of the car. Officer Dockett placed markings on shell casings found at the scene.

¶ 10 Chicago Police Officer William O'Connor testified that on the date of the shooting, he and his partner took photographs of the scene and laid out markers for firearms evidence. The officers found 17 cartridge cases at the scene, some fired from a .45 automatic weapon and others fired from a .9 millimeter Luger.

¶ 11 Cook County Medical Examiner Dr. Scott Denton testified he performed an autopsy on the victim and saw external evidence of three gunshot wounds. The first gunshot wound was on the left side of the head, 3¼ inches above the ear canal. Dr. Denton examined the wound and recovered "two fragments of yellow copper jacket covering a bullet." Dr. Denton traced the wound course

through the skull, and discovered that it went through the left part of the mid-brain, the right and left frontal parts of the brain, and then exited the skull and the scalp on the right forehead. The direction of the wound was back to front.

¶ 12 Dr. Denton testified the second gunshot wound was on the right upper-back area, 14½ inches beneath the top of the head. Dr. Denton traced course of the wound through the skin of the back, through the muscle and through the shoulder bone in the back. It then "went through the muscle area of the shoulder and then lodged or terminated with a bullet in the right biceps area with a medium caliber copper jacketed bullet. And the direction of that wound [was] back to front." The course of the wound was consistent with the victim having his hands on the steering wheel and being shot from outside the driver-side window.

¶ 13 Dr. Denton testified the third gunshot wound he saw was on the left upper back area, 14½ inches beneath the top of the head. The bullet "went through the muscle and the tissue in the shoulder area, went beneath the armpit, and then terminated or lodged right in the upper pec [sic] muscle area just in front of the armpit or the upper chest muscle, and there was a *** lead medium caliber bullet just beneath the skin and the muscle of the left shoulder." The direction of the wound was back to front.

¶ 14 Dr. Denton testified he recovered the bullet lodged in the right-biceps area and the bullet lodged in the upper pectoral muscle area.

¶ 15 Dr. Denton testified that while performing the internal exam, he discovered an old gunshot wound scar on the left front of the chest area beneath the armpit and slightly in front of the armpit. Underneath that scarring, "there was an oxidizing or rusting old bullet that the body was encapsulating with scar tissue, and that was in the muscle and skin just beneath the left chest, and

[that] was there for some time." The bullet had been there for at least several months and, possibly, for several years.

¶ 16 Dr. Denton testified defendant died from multiple gunshot wounds and the manner of death was homicide.

¶ 17 Chicago Police Officer Rogilio Pinal testified that on September 9, 2002, at 2:24 p.m., he was on duty at 3943 W. Roosevelt Road, when he saw defendant place a handgun in his waist. Defendant looked at the officer, pulled out the handgun and ran southbound. Officer Pinal, who was in civilian dress, chased defendant on foot, repeating, "Stop, police." Officer Pinal's partner began chasing defendant in the squad car. As defendant ran down an alley, he turned and pointed the handgun at Officer Pinal. Officer Pinal pointed his own weapon at defendant but did not shoot. Defendant continued running and tossed the handgun into a vacant lot, where it was recovered by Officer Pinal. The gun was a .9 millimeter semi-automatic handgun. Officer Pinal continued to chase defendant and, ultimately, arrested him in the rear-basement porch area of 1229 S. Komensky Avenue. At the time of his arrest, defendant had 13 items of suspect crack cocaine on his person.

¶ 18 Illinois State Police Forensic Examiner Jon Flaskamp, who specializes in firearm and tool mark examinations, testified he received cartridge cases recovered from the scene and determined that some were .45-caliber cartridge cases, and there were two different sets of .9 millimeter cartridge cases, meaning there were at least "three firearms represented by the groups of cartridge cases." Mr. Flaskamp determined that three of the cartridge cases, as well as bullets recovered from the trunk of the victim's car, from the driver-side rear door, and from the front dash by the windshield, were all fired from the gun recovered from defendant. Mr. Flaskamp received the bullets recovered by Dr. Denton in his autopsy. Mr. Flaskamp determined, the bullet that entered the

victim's right back area and lodged in the right biceps, was fired from the gun recovered from defendant. Mr. Flaskamp was unable to determine whether the bullet that entered the left side of the victim's head, and the bullet that entered the victim's left back area, also came from defendant's gun. Mr. Flaskamp determined that the older bullet in the victim's chest, came from a different gun.

¶ 19 Clifton Lewis, a retired bus driver, testified on defendant's behalf. Mr. Lewis testified that in the early afternoon of April 2, 2002, he was driving a car with his daughter, Rosemarie, age 39. Mr. Lewis turned eastbound from the corner of Laramie Avenue onto Washington Boulevard when he heard shots fired. Mr. Lewis stopped his car to avoid a crash and observed two cars side-by-side, and a passenger in one car, shooting into the other car. Mr. Lewis was unable to identify the passenger. Mr. Lewis saw the second car run into the steps of the church. At that point, Rosemarie called the police on her cell phone. Mr. Lewis drove away to finish an errand, then he returned to the scene to tell police what he had observed. Mr. Lewis stated Rosemarie lives in Indianapolis, Indiana, has cancer and, therefore, she was unable to travel to court to testify.

¶ 20 The jury convicted defendant of first-degree murder. Defendant filed a motion for a new trial, claiming he was denied the right to counsel of his choice and the effective assistance of counsel. Defendant also filed a supplemental motion for a new trial claiming the trial court erred in permitting the State to introduce evidence of the details of his apprehension and arrest, specifically, the fact that he pointed the murder weapon at Officer Pinal. The trial court conducted a hearing on August 31, 2005, after which it denied defendant's motions.

¶ 21 Thereafter, defendant filed a motion requesting an evidentiary hearing on his prior claims of the denial of his right to counsel of choice and for ineffective assistance of counsel. Following a hearing on September 28, 2005, the trial court denied defendant's motion, and on that same day,

sentenced defendant to 40 years' imprisonment. On October 13, 2005, the trial court denied defendant's motion to reconsider his sentence.

¶ 22 Defendant appealed his conviction, alleging: (1) the trial court erred in granting the State's motion to disqualify defense counsel for a conflict of interest; (2) defendant received ineffective assistance of counsel; (3) the trial court improperly refused to conduct an evidentiary hearing regarding his claims that he was denied his counsel of choice and received ineffective assistance of counsel; and (4) the trial court erred in denying his motion *in limine* to bar the State from using other-crimes evidence. On March 29, 2007, we affirmed the judgment of the trial court. See *People v. Weaver*, No. 1-05-3496 (2007) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Weaver*, 225 Ill. 2d 673 (2007).

¶ 23 On June 25, 2008, defendant filed a petition for post-conviction (725 ILCS 5/122-1 *et seq*. (West 2008)) and post-judgment relief (735 ILCS 5/2-1401 (West 2008)), but on September 4, 2008, the petition was amended to be only a post-conviction petition. In his petition, defendant argued: (1) he is actually innocent of the victim's murder, as newly-discovered evidence demonstrates that the only testimony offered against him was false and/or mistaken; (2) the State violated his right to due process by requiring Mr. Callico to give false evidence against him and by failing to disclose to the defense that Mr. Callico was coerced into giving false identification testimony; and (3) his trial counsel was ineffective for failing to discover and present available evidence that Mr. Callico's testimony was false, and the murder was committed by another person named Gary Mullen (also known as Lupe), not by defendant, and defendant was not in possession of the murder weapon on September 9, 2002. Defendant attached his own affidavit and the affidavits of Danny Callico,

Monique Tolliver, Lamont Delaney, Jason Dortch, and Monique Davis.

¶ 24 Defendant stated in his affidavit that he told his trial counsel he "was innocent and had no involvement in or knowledge of the shooting" of the victim. Defendant stated that on September 9, 2002, he was standing with his brother Napoleon and some other people outside a restaurant when a police car pulled up and two officers approached. Defendant saw Michael Haywood, also known as Pierre, drop a gun to the ground and everyone running, including defendant. The police caught defendant and charged him with unlawful use or possession of the gun that Pierre had dropped. Defendant told his attorney he was innocent of this charge, and he gave names of the people who had witnessed the event, including Napoleon, Tawanica Adams, Monique Davis, and Fabian Smith, all of whom could verify he was not the person who dropped the gun.

¶ 25 Danny Callico stated in his affidavit that on the afternoon of April 4, 2002, he was in a car with the victim and Lamont Delaney. The victim was driving, Mr. Callico was in the front-passenger seat, and Mr. Delaney was in the back seat. They stopped at a stop sign at Madison Street and Laramie Avenue, where Mr. Callico saw a "heavy-set, light-skinned, black male approach the driver's side of the car, coming from the rear." There was another man behind this man, but Mr. Callico "didn't get a look at the second man." Both men were on foot. The two men started shooting at their car. Mr. Callico immediately ducked down onto the floor. The car surged forward and crashed into some concrete steps in front of a church. Mr. Callico exited the car and ran away.

¶ 26 Mr. Callico stated in his affidavit that about one week later, he met with detectives who asked him about the shooting and showed him some photographs. Mr. Callico told them he did not see either of the shooters. In June 2002, Mr. Callico went to trial on a drug case and was found guilty and was sentenced to 10 years' imprisonment. About a year later, he was brought to the courthouse

at 26th Street and California Avenue and questioned by several detectives. They told him they had recovered the gun used in the shooting of the victim and it had come from defendant. They told him about another shooting done by defendant's "crew" and that defendant had been "beating a lot of cases." They asked Mr. Callico to "put [defendant] at the scene." Mr. Callico knew defendant as someone who sold drugs, and initially, he did not believe the detectives because he did not believe defendant to be a violent person. However, they eventually convinced him defendant was involved in the shooting. Mr. Callico also "understood that the police would make things difficult for [him] when [he] got out of jail if [he] refused to assist them" in the case against defendant. Mr. Callico eventually agreed to say defendant "was the person [he] saw approach the car and start shooting, even though this was not true." Mr. Callico later testified at defendant's trial that he saw defendant "fire" at their car on April 4. This testimony "was not the truth."

¶ 27 Lamont Delaney stated in his affidavit that on the afternoon of April 4, 2002, he was in a car with the victim and Mr. Callico. The victim was driving, Mr. Callico was in the front-passenger seat, and Mr. Delaney was in the back seat. Near Madison Street and Laramie Avenue, Mr. Delaney saw the victim's frightened face in the rear view mirror, heard gunshots fired at the car, and dove to the floor. Mr. Delaney "did not see the shooter or shooters." When the car crashed to a stop, Mr. Delaney saw the victim slumped over the wheel, covered in blood. Mr. Delaney and Mr. Callico fled. Within an hour of the shooting, Mr. Delany met with Mr. Callico at a friend's basement apartment. They talked about what had happened and who might have been responsible. During this conversation, Mr. Callico stated he had not seen the shooter or shooters and had no idea who was responsible for the shooting. Mr. Delaney also told Mr. Callico he had not seen the shooter, either. No one asked Mr. Delaney to testify at defendant's trial. Had he been asked to testify, he would have

testified about what he knew and would have told the truth.

¶ 28 Monique Tolliver stated in her affidavit that she was the former girlfriend of Gary Mullen, also known as Lupe. They were together from 1993 to 2000, and had three children together. In early 2002, Ms. Tolliver was living on the west side of Chicago with her mother, sister, and her three children. Lupe was living with a woman named Celeste, also on the west side. He came by almost every day to see the kids. In February or March 2002, Lupe moved to an apartment in Downer's Grove. On April 4, 2002, Ms. Tolliver's nephew came by and told her he heard Lupe had killed the victim. The next night, around 10:30 p.m., Lupe and his friend Pierre picked her and the children up and drove them to his new apartment in Downer's Grove. After the kids went inside the bedroom, Ms. Tolliver asked Lupe to tell her what happened. Lupe told Ms. Tolliver he had discovered the victim was responsible for the killing of one of Lupe's friends. Lupe and Pierre went searching for the victim, and Pierre pointed him out. Lupe killed the victim in retaliation for his friend's death. Lupe told her the killing occurred on Washington Boulevard near Laramie Avenue, next to a big church. Lupe and Pierre were "laughing about it." [1]

¶ 29 Ms. Tolliver stated that 10 days later, on April 14, 2002, Lupe was shot and killed. After Lupe died, Ms. Tolliver and defendant became friends. She knew defendant was in jail "but never knew, until recently, what he was in jail for." She had "no idea" he had been charged with the victim's murder. No one asked her to testify at defendant's trial. Had she been asked, she would have testified about what she knew and would have told the truth.

¶ 30 Jason Dortch stated in his affidavit that on April 4, 2002, he was at home when his cousin

[1]Defendant cursorily states in his appellate brief that Ms. Tolliver's affidavit reveals that Lupe told her Pierre was the second shooter of the victim. Our review of Ms. Tolliver's affidavit finds no such statement by Lupe to her identifying Pierre as the second shooter.

Lupe came by, and they had a conversation in the back room. Lupe told him the victim had killed a guy named Rudy and that he (Lupe) had killed the victim. Lupe showed him the gun, a .45-caliber Colt automatic with a pearl handle. The next Sunday, Lupe was shot and killed. About two weeks after Lupe's death, the police questioned Mr. Dortch about the victim's shooting. Mr. Dortch told the police he had heard Lupe had killed the victim in retaliation for the victim's killing of Rudy. No one asked Mr. Dortch to testify at defendant's trial. Had Mr. Dortch been asked to testify, he would have testified about what he knew and would have told the truth.

¶ 31 Monique Davis stated in her affidavit that on the day defendant was arrested, she and her nephew were walking west on Roosevelt Road toward Pulaski Road. A group of men were standing outside a restaurant. Defendant got out of a car and walked toward the restaurant. Ms. Davis knew defendant because his son used to play with her nephew. A police car pulled up and two officers got out of the car and approached the group of men. One of the men standing outside the restaurant dropped a gun and everyone ran. Ms. Davis does not know the name of the man who dropped the gun, but she knows defendant was not the person who dropped the gun.

¶ 32 Ms. Davis stated defendant ran east on Roosevelt Road, then cut into a vacant lot. She and her nephew continued walking. As they turned the corner on Komensky Avenue , she saw defendant was on the ground and a police officer was standing over him hitting him with a baton. No one asked her to testify at defendant's trial. Had she been asked to testify, she would have testified about what she knew and would have told the truth.

¶ 33 On January 29, 2009, the State filed a motion to dismiss defendant's petition for post-conviction relief. The State claimed defendant's evidence was not newly discovered, that it did not establish his actual innocence, that no evidence supported his claim that prosecutors denied him due

process by requiring Mr. Callico to give false testimony against him, and that his trial counsel provided him with effective representation. The trial court granted the State's motion to dismiss. The court found the affidavits of Mr. Delaney, Ms. Tolliver, Mr. Dortch and Ms. Davis were not newly-discovered evidence, contained inadmissible hearsay, and were untrustworthy. The court found the only arguably newly-discovered evidence was Mr. Callico's affidavit, but it lacked foundation and failed to demonstrate police coercion because the police only told him to tell the truth. The court found the finding of the jury warranted the presumption that Mr. Callico's trial testimony was truthful and his affidavit was false. Further, the trial court found Mr. Callico's affidavit did not prove defendant was not one of the shooters, therefore, his affidavit did not establish defendant's actual innocence. The trial court also found trial counsel made the strategic decision not to call certain witnesses and did not commit ineffective assistance.

¶ 34 On June 26, 2009, defendant filed a motion to reconsider the dismissal of his post-conviction petition. Defendant attached second affidavits from Mr. Dortch, Ms. Tolliver, and Ms. Davis, in which they each stated they were never contacted by defendant's attorneys prior to trial. Defendant also attached his own second affidavit, in which he stated he had no involvement in the murder of the victim, was not one of the shooters, was not involved in any planning or discussions about the killing, and had no foreknowledge that the killing was to occur.

¶ 35 Defendant also attached new affidavits from Leonard Goodman, Javaris Walker, and Shawn Ivy. Mr. Goodman stated in his affidavit he is an attorney who was retained in October 2007 to represent defendant in connection with his filing of his post-conviction petition. In December 2007, Mr. Goodman obtained and reviewed transcripts, police reports and pleadings in the case, and began contacting witnesses who had relevant information. On January 7, 2008, he spoke on the phone with

Mr. Callico, who agreed to meet with him. On January 10, 2008, Mr. Goodman met with Mr. Callico at a restaurant in Lincoln Park, where Mr. Callico admitted he had falsely identified defendant as the shooter, but stated he did not want to sign an affidavit if it meant he would be prosecuted for perjury. Mr. Goodman encouraged Mr. Callico to consult an attorney.

¶ 36 Mr. Goodman further stated in his affidavit, that on March 10, 2008, he spoke with Mr. Callico's attorney, Charles Fitzgerald, and told Mr. Fitzgerald he would like Mr. Callico to sign an affidavit stating he had lied at defendant's trial. Mr. Goodman faxed a copy of a draft affidavit to Mr. Fitzgerald. On June 10, 2008, Mr. Goodman met again with Mr. Callico in Lincoln Park, where Mr. Callico signed the affidavit.

¶ 37 Javaris Walker stated in his affidavit he was incarcerated with Mr. Callico in 2004 and 2005, and they became friends in prison. After getting out of prison, Mr. Walker ran into Mr. Callico in late 2006 or early 2007, at a liquor store, where they had a conversation in which Mr. Callico admitted defendant did not shoot the victim, but that Lupe "did it." A short while later, Mr. Walker had a conversation with Shawn Ivy, who he has known most of his life, and who is friends with defendant. Mr. Walker told Mr. Ivy about his conversation with Mr. Callico. Mr. Ivy asked to be introduced to Mr. Callico.

¶ 38 Mr. Walker further stated in his affidavit, that in the summer of 2007, he drove with Mr. Ivy to the corner of Ohio Street and Trumbull Avenue, where they found Mr. Callico "hanging out" with five other persons. Mr. Walker got out of the car and asked Mr. Callico if he would speak with Mr. Ivy. Mr. Callico agreed, and Mr. Ivy got out of the car and spoke with him about defendant's case. Mr. Walker was present during this conversation, in which Mr. Callico told Mr. Ivy he was "willing to tell what really happened but he didn't want to go to jail for perjury." Mr. Walker was never

contacted by defendant's trial attorney.

¶ 39 Shawn Ivy stated in his affidavit that he has known defendant for more than 25 years and knew defendant had been convicted of murder and sent to prison. Defendant always maintained his innocence. During a phone conversation in the summer of 2007, defendant told Mr. Ivy that Mr. Callico had falsely identified defendant as the shooter. Defendant asked Mr. Ivy to locate Mr. Callico "and ask him to tell the truth." Mr. Ivy was friends with Javaris Walker, who also happened to be friends with Mr. Callico. Mr. Walker had told Mr. Ivy: "Callico had admitted to him that he had lied about [defendant] and that he knew [defendant] was not the one who had shot his friend." Mr. Ivy asked Mr. Walker to introduce him to Mr. Callico.

¶ 40 Mr. Ivy stated that in the late summer of 2007, he and Mr. Walker drove to Trumble Avenue and Ohio Street, where they met with Mr. Callico. Mr. Ivy asked if Mr. Callico would be willing to meet with defendant's new attorney and tell the truth. Mr. Callico said "he knew that [defendant] didn't do the shooting. But he didn't want to go back to jail for lying on the stand." Mr. Ivy and Mr. Callico met again about three weeks later at Ohio Street and Trumble Avenue, and Mr. Callico stated he would "tell the truth but not if he had to go back to court." Mr. Callico promised to meet with defendant's attorney. In mid-May 2008, Mr. Ivy and Mr. Callico met for a third time at Ohio Street and Trumbull Avenue, and Mr. Callico told Mr. Ivy he had testified against defendant at trial in exchange for the police officers' promise that they would not arrest him on an unrelated drug-conspiracy charge. Mr. Callico told Mr. Ivy he was now willing to sign the affidavit recanting his trial testimony.

¶ 41 The State filed a response to defendant's motion to reconsider the dismissal of his post-conviction petition, arguing the dismissal order was correct, that it was too late for defendant to file

his additional affidavits, and the affidavits should be stricken. On August 13, 2009, defendant filed a "motion to recast [his] motion to reconsider as [a] motion to amend and reconsider [his] post-conviction petition." In the motion to recast, defendant moved to amend his post-conviction petition to include the additional affidavits from himself, Mr. Dortch, Ms. Tolliver, Ms. Davis, Mr. Goodman, Mr. Walker, and Mr. Ivy, and then he requested the court reconsider the dismissal of his post-conviction petition in light of the additional affidavits. On September 10, 2009, the trial court granted defendant's motion to amend the post-conviction petition to include the additional affidavits, but then it denied the motion to reconsider the dismissal of his post-conviction petition.

¶ 42 On November 2, 2009, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In his petition, defendant contended his indictment was rendered void, and his conviction was rendered "flawed and tainted," by Mr. Callico's allegedly perjured testimony. Defendant attached the same affidavits from Mr. Callico and Mr. Delaney that he had filed with the original post-conviction petition. Defendant also attached the same affidavits from Mr. Goodman, Mr. Ivy, and Mr. Walker he had attached to his motion to reconsider the dismissal of his post-conviction petition. On May 17, 2010, the trial court dismissed defendant's section 2-1401 petition, finding it was untimely and not supported by an adequate factual basis to entitle him to an evidentiary hearing.

¶ 43 Defendant appeals the dismissal of his post-conviction petition (No. 1-09-2799) and his section 2-1401 petition (No. 1-10-1482). We consolidated the appeals on November 9, 2010.

¶ 44 I. Defendant's Post-Conviction Petition

¶ 45 First, we address the dismissal of defendant's post-conviction petition. A post-conviction proceeding "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). Such a proceeding "allow[s] inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). "Thus, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived." *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002).

¶ 46 In a noncapital case, the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2008)) creates a three-stage procedure of postconviction relief. In the first stage, the trial court independently reviews the petition and determines whether it is "frivolous" or "patently without merit." 725 ILCS 5/122-2.1 (a)(2) (West 2008); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the post-conviction petition is not so summarily dismissed, it advances, as here, to the second stage, where the State may file a motion to dismiss the petition and the trial court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *Id*. at 10-11. If the petition fails to make a substantial showing of a constitutional violation, it is dismissed; if such a showing is made, the post-conviction petition advances to the third stage, where the trial court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2008). Petitioner is not entitled to an evidentiary hearing on a post-conviction petition as a matter of right; rather, to require an evidentiary hearing, the allegations in the petition must be supported by the record in the case or by accompanying affidavits. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). "In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in accompanying affidavits are taken as true." *People v. Orange*, 195 Ill. 2d 437, 448 (2001). Credibility determinations are not made at the second stage of the proceedings. *People v. Hall*, 217

Ill. 2d 324, 336 (2005). A second-stage dismissal of a post-conviction petition is reviewed *de novo*. *Coleman*, 183 Ill. 2d at 389.

¶ 47 A. Defendant's Claim of Actual Innocence

¶ 48 Defendant here contends the circuit court erred in dismissing his post-conviction petition because it made a substantial showing of actual innocence. "The wrongful conviction of an innocent person violates due process under the Illinois Constitution and, thus, a freestanding claim of actual innocence is cognizable under the Post-Conviction Hearing Act." *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007). The evidence in support of the claim must be newly discovered, meaning "it must be evidence that was not available at a defendant's trial and that he could not have discovered sooner through due diligence." *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). The evidence also must be material and non-cumulative and "of such conclusive character that it would probably change the result on retrial." *Id*., *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). However, " 'actual innocence' is not within the rubric of whether a defendant has been proved guilty beyond a reasonable doubt. [Citation.] Rather, the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' " *Collier*, 387 Ill. App. 3d at 636 (quoting *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999)). See also *People v. Lofton*, 2011 IL App (1st) 100118 ¶ 40; *People v. Jarrett*, 399 Ill. App. 3d 715, 724 (2010) (post-*Ortiz* cases holding that the hallmark of actual innocence is total vindication or exoneration).

¶ 49 Defendant argues that his post-conviction petition raised a substantial showing of actual innocence, and in support, he cites the affidavits he attached to the post-conviction petition from Mr. Callico, Mr. Delaney, Mr. Dortch, and Ms. Tolliver. As discussed, Mr. Callico stated in his affidavit that there were two shooters, one, a heavy-set light-skinned black male, and the other, a man who

he was unable to "get a look at." Mr. Callico stated his trial testimony identifying defendant as one of the shooters was false, and that he had only identified defendant because officers told him to do so, or else they would make things "difficult" for him. Mr. Delaney stated in his affidavit that he did not see the shooters, and that after the shooting, Mr. Callico told him he had not seen the shooters either. Mr. Dortch stated in his affidavit that his cousin, Lupe, had admitted killing the victim and had shown Mr. Dortch the .45-caliber Colt automatic he had used in the shooting. Ms. Tolliver stated in her affidavit that Lupe told her he had shot the victim after discovering the victim bore responsibility for the killing of one of Lupe's friends. Lupe told Ms. Tolliver that he and Pierre had been driving around looking for the victim, and Pierre eventually pointed him out. Lupe then "pulled up on [the victim.] The look on his face was priceless. He looked so scared. And that's when I let it go."

¶ 50 None of these affidavits exonerate or provide total vindication of defendant. At trial, forensic examiner Jon Flaskamp testified there were multiple .45-caliber cartridge cases and two different sets of .9-millimeter cartridge cases recovered from the scene, meaning there were at least "three firearms represented by the groups of cartridge cases." Mr. Flaskamp determined that one of the three newer bullets recovered from inside the victim was shot by the gun recovered from defendant, but he was unable to determine whether the other two bullets were shot by that same gun. In dismissing defendant's post-conviction petition, the trial court determined from Mr. Flaskamp's testimony, and from Mr. Callico's affidavit, that there were "at least two shooters." The court stated that even taking as true the testimony in the affidavits that Lupe was one of the shooters, "that certainly wouldn't mean that the defendant was not the other shooter." We agree. As none of the affidavits from Mr. Callico, Mr. Delaney, Mr. Dortch and Ms. Tolliver indicate defendant could not

have been one of the multiple shooters who shot the victim, they do not provide him with the "exoneration" and "total vindication" necessary for a claim of actual innocence under the Post-Conviction Hearing Act. Rather, the affidavits merely impeach Mr. Callico's trial testimony. We have held, "evidence which merely impeaches a witness does not afford a basis for granting a new trial." *People v. Chew*, 160 Ill. App. 3d 1082, 1086 (1987).

¶ 51 Also, with regard to Mr. Dortch's and Ms. Tolliver's affidavits, we note they contain Lupe's hearsay statements admitting to the shooting. We have held, "[a]s a general rule, hearsay affidavits are insufficient" to warrant post-conviction relief based on a claim of actual innocence. *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003). Defendant argues, though, that Lupe's statements, here, were sufficiently reliable to be admitted under the statement-against-penal-interest exception to the hearsay rule. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). In *Chambers*, the United States Supreme Court held, where there are sufficient indicia of trustworthiness of an extrajudicial statement in which the declarant admitted to committing the crime, the statement may be admissible under the statement-against-penal-interest exception. The Court provided four indicia of trustworthiness: (1) the statement is made spontaneously to a close acquaintance shortly after the occurrence of the crime; (2) the statement is corroborated by other evidence; (3) the statement is self-incriminating and against the declarant's interests; and (4) there is adequate opportunity for cross-examination of the declarant. *Id.* at 300-01.

¶ 52 In denying defendant's post-conviction petition, the trial court here noted that Lupe's statements admitting to the shooting did not fall within this hearsay exception, because there was no independent corroboration of his statements against interest, and because his death, 10 days after the shooting, prevented him from being cross-examined. We agree with the trial court, and we further

note that Lupe's alleged statement to Ms. Tolliver did not fall within this hearsay exception because it was not made spontaneously, but rather was made the night after the murder, and only after Ms. Tolliver asked Lupe to tell her what had happened. As Lupe's hearsay statements do not fall within the statement-against-penal-interest-exception to the hearsay rule, Mr. Dortch's and Ms. Tolliver's affidavits based on those hearsay statements are insufficient to warrant post-conviction relief premised on actual innocence.

¶ 53 Defendant next argues the trial court erred in denying his motion to reconsider the dismissal of his post-conviction petition. In support, defendant cites the affidavits attached to the motion from Mr. Walker and Mr. Ivy. As discussed, Mr. Walker stated in his affidavit that he became friends with Mr. Callico while they were both in prison together. In late 2006 or early 2007, after getting out of prison, Mr. Walker ran into Mr. Callico at a liquor store. Mr. Callico told Mr. Walker defendant "didn't do the shooting and that [Lupe] did it.' " Mr. Ivy similarly stated in his affidavit, that in the late summer of 2007 and mid-May 2008, Mr. Callico told him defendant was not the shooter and he had only identified defendant because the police had otherwise threatened to charge him with a drug conspiracy. Mr. Callico told Mr. Ivy the shooter was someone who was now dead (*i.e.*, Lupe).

¶ 54 Thus, Mr. Walker's and Mr. Ivy's affidavits contain Mr. Callico's hearsay statements recanting his trial testimony. As discussed above though, such hearsay affidavits generally are insufficient to warrant post-conviction relief based on a claim of actual innocence. *Morales*, 339 Ill. 3d at 565. Defendant makes no argument that Mr. Callico's hearsay statements fall within an exception to the hearsay rule.

¶ 55 Further, neither Mr. Walker's nor Mr. Ivy's affidavit exonerates or totally vindicates

defendant, as required to assert a claim of actual innocence. As discussed above, Mr. Callico's earlier affidavit stated there were two shooters. In Mr. Walker's and Mr. Ivy's affidavits, Mr. Callico identifies only one of those shooters (Lupe), but he makes no statement that he saw the other shooter. Mr. Callico's statements to Mr. Walker and Mr. Ivy, that Lupe was the one shooter he saw at the scene, did not necessarily mean defendant could not have been the other shooter.

¶ 56 For all the foregoing reasons, we affirm the dismissal of defendant's post-conviction petition premised on his claim of actual innocence and the denial of his motion to reconsider said dismissal.

¶ 57 B. Defendant's Claim of Ineffective Assistance of Counsel

¶ 58 Next, defendant contends the trial court erred in dismissing his post-conviction petition because it made a substantial showing of ineffective assistance of trial counsel for failing to investigate and call Ms. Tolliver, Mr. Dortch, Mr. Delaney and Ms. Davis as trial witnesses. To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant must show first, "counsel's representation fell below an objective standard of reasonableness" *(id*. at 688), and second, he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

¶ 59 To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of the *Strickland* test. If we can dispose of defendant's ineffective-assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 60 Defendant argues his trial counsel's failure to investigate and call Ms. Tolliver and Mr. Dortch constituted ineffective assistance where their respective affidavits indicate they would have

testified Lupe admitted to the shooting. Defendant argues their testimony would have significantly bolstered his claim of innocence. However, as discussed above, Lupe's hearsay statements to Ms. Tolliver and Mr. Dortch were inadmissible and, as such, defendant was not prejudiced by his counsel's alleged failure to investigate and call Ms. Tolliver and Mr. Dortch as trial witnesses.

¶ 61 Further, defendant's claim of ineffective assistance of counsel with respect to Mr. Dortch is waived because it could have been raised on direct appeal. Specifically, during a hearing on the State's motion *in limine*, the prosecutor stated for the record, that when interviewed by police, Mr. Dortch told detectives that three days after the murder, Lupe admitted to committing the shooting. As the record on direct appeal made mention of Mr. Dortch and of his potential testimony identifying Lupe as the shooter, defendant was made aware of and could have raised the issue of his trial counsel's alleged ineffective assistance for failing to call Mr. Dortch as a witness. Defendant failed to raise the issue on direct appeal, waiving review thereof. *Pitsonbarger*, 205 Ill. 2d at 456.

¶ 62 Defendant argues his trial counsel's failure to investigate and call Mr. Delaney constituted ineffective assistance where Mr. Delaney's affidavit indicates he would have impeached Mr. Callico's trial testimony identifying defendant as one of the shooters. Specifically, Mr. Delaney would have testified that directly following the shooting, Mr. Callico stated he did not see the shooters. Defendant's claim is barred by *res judicata* because it was raised and rejected on direct appeal in *People v. Weaver*, No. 1-05-3496 (2007) (unpublished order under Supreme Court Rule 23).

¶ 63 Finally, defendant argues his trial counsel's failure to investigate and call Ms. Davis constituted ineffective assistance where her affidavit indicates she would have testified she was present at the time of defendant's arrest and saw an individual other than defendant drop the gun. Defendant raised a similar claim on direct appeal, that his trial counsel was ineffective for failing to

investigate and call Fabian Smith, Napoleon Weaver, and Tawanica Adams, all of whom would have testified to seeing someone other than defendant drop the gun. We held that trial counsel had engaged in trial strategy by failing to call these witnesses. *Id.* Ms. Davis' affidavit indicates she would have given the same testimony as Fabian Smith, Napoleon Weaver, and Tawanica Adams. Because defendant already litigated his claim of ineffective assistance of counsel for the failure to investigate and call a witness to testify to seeing someone other than defendant drop the gun, that claim is barred by *res judicata*. See *e.g.*, *People v. Erickson*, 183 Ill. 2d 213, 224-26 (1998) (holding ineffective assistance of counsel claim raised in second post-conviction petition is barred by *res judicata* where defendant raised a similar claim supported by different evidence in the first post-conviction petition).

¶ 64 C. Defendant's Claim of the Knowing Use of Perjured Testimony

¶ 65 Next, defendant contends the trial court erred in dismissing his post-conviction petition because it made a substantial showing that the State's knowing use of Mr. Callico's perjured testimony at trial violated defendant's due process rights, rendering both the indictment against him and his conviction void. Defendant argues that since Mr. Callico "originally-and truthfully-informed police he did not see the shooters, and then changed his story and only identified [defendant] after police threatened and coerced him, the police knew Callico's testimony was false. That knowledge can then be imputed to the prosecutors in [defendant's] case, who relied solely upon Callico's false testimony to have [defendant] indicted and who relied heavily upon that false testimony at trial." In support, defendant cites *People v. Martin*, 46 Ill. 2d 565, 568 (1970), in which the supreme court held the State is charged with the knowledge of its agents, including the police. Defendant further argues the State ignored its obligations under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), by failing

to disclose to the defense that "Callico was coerced by detectives to falsely identify [defendant] as the shooter."

¶ 66 Defendant's contentions are without merit. In denying defendant's post-conviction petition, the trial court stated in pertinent part:

> "The only specific *verbatim* statement and, therefore, the only factual basis the defendant has for this claim is that he says he was told–again, by we don't know whom–quote, 'We need you to put [defendant] at the scene,' end quote. That's the sum total of how he claims the police suborned perjury from Danny Callico. He's not alleging anybody ever told him, 'We need you to lie, we need you to say [defendant] was there even if he wasn't or even if that's not true, or even though we know and you're telling us you didn't see him there, we need you to say that you did.'
>
> On the other hand, the evidence shows that when he spoke to [police] a week after the murder, he [stated] he was in the car with Randy Sanders and Lamont Delaney. He told them about the shooting and running from the scene. He told them about [defendant], but he didn't tell them that he was at the scene shooting but that he thought he might have been involved in the shooting.
>
> So to say to him after [defendant] is arrested with the gun, which is linked to the shooting, 'We need you to put [defendant] at the scene,' is really nothing more than to say if you saw [defendant] at the scene, we need you to tell us the truth and tell us that you saw him there.
>
> That's about as far as you can get from saying we need you to lie, we need you to falsely accuse and testify falsely that [defendant] was there and that you saw him shooting

when you and we know he wasn't there. That is simply asking him to cooperate and tell the truth and does not in any way support the allegation that the police coerced Callico to lie or perjure himself.

Furthermore, there is absolutely no statement in his affidavit that Callico ever told the detectives or anyone else at the time he was interviewed, at the time he testified before the Grand Jury, or when he testified at trial that he was lying or not telling the truth when he identified the defendant as the person he saw approach the car and start shooting.

Callico goes on to say again someone, somehow, we don't know who or how, quote, 'convinced him [defendant] was involved in the shooting.' This is again the guy who told the police a week after the shooting that he believed [defendant] was involved. So what convincing did he need?

He then says, ' I also understood *** the police would make things difficult for me when I got out of jail if I refused to assist them in the case against [defendant].' Whatever that might mean, 'assist,' another conclusion. No facts. There is not a single fact alleged to support his conclusions in terms of what was said to him by whom and certainly nothing even remotely close to 'unless you agree to testify falsely that [defendant] was the shooter, even though he wasn't, something specific is going to happen to you.' What the defendant alleges here is about as weak as you can get to support the ultimate assertion or conclusion that he was forced to testify falsely that he saw the defendant open fire on the car."

¶ 67 We agree with the trial court's finding that there was nothing in Mr. Callico's affidavit indicating either the police officers forced him to perjure himself, or were otherwise aware of any perjury committed by him. We also note there was nothing in any of the other affidavits indicating

the police forced Mr. Callico to perjure himself, or were otherwise aware of any such perjury. Mr. Ivy's affidavit was the only other affidavit referencing police involvement with Mr. Callico. Mr. Ivy stated, therein, that Mr. Callico told him the police officers "wanted [defendant] bad" and they told Mr. Callico they would not arrest him on an unrelated drug conspiracy charge if he testified against defendant. These statements by police officers to Mr. Callico came after he had identified defendant as possibly having some involvement in the shooting and after defendant had been arrested on the charge of possessing the gun. Thus, the officers did not provide Mr. Callico with defendant's name and did not ask him to perjure himself but, instead, they merely followed up with Mr. Callico after he identified defendant and after defendant's arrest. We note, as in Mr. Callico's affidavit, there is no statement anywhere in Mr. Ivy's affidavit that Mr. Callico ever told the officers he was lying about his identification of defendant. As the police officers had no knowledge of any perjury by Mr. Callico, defendant's argument that such knowledge is imputed to the State, fails. As there is no evidence in the record of any knowing use of perjured testimony by the State, we affirm the dismissal of defendant's post-conviction petition.

¶ 68 II. Defendant's Section 2-1401 Petition

¶ 69 Next, we address the dismissal of defendant's section 2-1401 petition. "Section 2-1401 *** provides a comprehensive statutory procedure by which final orders, judgments, and decrees may be vacated after 30 days from their entry. Although a section 2-1401 petition is usually characterized as a civil remedy, its remedial powers extend to criminal cases. [Citation.] A section 2-1401 petition for relief from a final judgment is the forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition. [Citations.] A

section 2-1401 petition, however, is 'not designed to provide a general review of all trial errors nor to substitute for direct appeal.' [Citation.] Points previously raised at trial and other collateral proceedings cannot form the basis of a section 2-1401 petition for relief." *People v. Haynes*, 192 Ill. 2d 437, 460-61 (2000). We review the trial court's dismissal of a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 70 Defendant's section 2-1401 petition alleged his indictment and conviction were wrongfully obtained through Mr. Callico's perjured testimony. The trial court noted, to the extent the section 2-1401 petition was alleging the knowing use of perjured testimony, such a claim was barred by *res judicata* because it had previously been raised in the post-conviction petition.

¶ 71 The trial court proceeded to find, to the extent the section 2-1401 petition was based on the *unknowing* use of perjured testimony, such a claim was not barred by *res judicata*, as it was not specifically raised in the post-conviction petition. However, the court dismissed defendant's claim, finding that his section 2-1401 petition was untimely filed.

¶ 72 A section 2-1401 petition must be filed "not later than 2 years after the entry of the [final] order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years." 735 ILCS 5/2-1401(c) (West 2008).

¶ 73 Defendant's conviction became final and appealable when he was sentenced on September 28, 2005, meaning his section 2-1401 petition could be timely filed no later than September 28, 2007. Defendant filed his section 2-1401 petition on June 25, 2008, approximately nine months after the two-year deadline had passed. Accordingly, the trial court correctly found defendant's section 2-1401 petition was not timely filed.

¶ 74 Defendant argues, though, that Mr. Callico's failure to sign an affidavit admitting to his perjury until June 2008 constituted fraudulent concealment, tolling the two-year statute of limitations of section 2-1401. "To make a successful showing of fraudulent concealment, the defendant must 'allege facts demonstrating that his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief and must offer factual allegations demonstrating his good faith and reasonable diligence in trying to uncover such matters before trial or within the limitations period.'" *People v. Coleman*, 206 Ill. 2d 261, 290 (2002) (quoting *People v. McLaughlin*, 324 Ill. App. 3d 909, 918 (2001)).

¶ 75 Defendant argues that the affidavits of Mr. Goodman, Mr. Ivy, and Mr. Walker, support his claim of fraudulent concealment. Mr. Goodman stated in his affidavit, that defendant retained him as his post-conviction attorney in October 2007, that he met with Mr. Callico in January 2008, and that Mr. Callico admitted then to committing perjury at trial but refused to sign an affidavit. Mr. Goodman stated he encouraged Mr. Callico to consult an attorney, that he (Mr. Goodman) later faxed an affidavit to Mr. Callico's attorney, and that Mr. Callico finally signed the affidavit in June 2008. Mr. Ivy stated in his affidavit that he had known defendant for more than 25 years, and that during the summer of 2007, defendant asked Mr. Ivy to find Mr. Callico and ask him to tell the truth. Mr. Ivy stated that in the late summer of 2007, he and Mr. Walker met with Mr. Callico, who admitted to his perjury, but stated he would not sign an affidavit because he did not want to go to jail "for lying on the stand." Mr. Callico finally agreed to sign the affidavit in mid-May 2008. Mr. Walker stated in his affidavit, that he helped set up the initial meeting between Mr. Ivy and Mr. Callico in the summer of 2007, and that Mr. Ivy initially did not want to sign an affidavit because he did not want to go to jail for perjury.

¶ 76 In rejecting defendant's claim of fraudulent concealment, the trial court noted there was no reason given why defendant waited until the summer of 2007, almost two years after his conviction, to ask his long-time friend Mr. Ivy to find Mr. Callico and ask him to tell the truth. The trial court also noted Mr. Ivy "had no trouble finding Danny Callico after speaking with the defendant and meeting with him several times and connecting him with Mr. Goodman, who also had no trouble contacting Danny Callico by phone first and then very shortly afterwards, within a matter of a week or two, meeting with him in person." The trial court concluded, "[t]he fact that Callico's affidavit wasn't secured any sooner does not mean that it couldn't have been obtained any sooner."

¶ 77 We agree defendant failed to show reasonable diligence where he waited almost two years before trying to locate Mr. Callico and secure his affidavit. In the absence of reasonable diligence in attempting to secure Mr. Callico's affidavit within the limitations period, defendant's claim of fraudulent concealment fails and we affirm the dismissal of his section 2-1401 petition on the basis that it was not timely filed.

¶ 78 For all the foregoing reasons, we affirm the circuit court. As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 79 Affirmed.