

No. 1-10-0864

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. 04 CR 21267
)	
ANTHONY HOUSTON,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Quinn and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held:* Where, in initial stage of post-conviction review, defendant presents an arguable claim of actual innocence by way of an attestation of an individual that he, and not defendant, committed the instant crime, summary dismissal of the petition should be reversed; defendant's petition is remanded for second-stage post-conviction proceedings.

¶ 2 Defendant Anthony Houston appeals the circuit court's summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, defendant contends his petition presented an arguable claim of actual innocence because the petition was accompanied by the confession of his prison cellmate

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to the crime for which defendant was convicted. We reverse and remand for second-stage post-conviction proceedings.

¶ 3 Defendant was convicted of first degree murder in the January 2, 2003, shooting death of Kawan Murray. The State presented the theory that defendant, while riding in a car driven by Jimmie Walls, shot Murray in retaliation for the earlier beating of Ebony Houston, who is the brother of defendant and Walls. Walls was initially a co-defendant in this case; however, immediately before trial, the State dismissed the charges against Walls and proceeded to trial against defendant alone.

¶ 4 At defendant's jury trial, Brandi Hicks and Lovette Miles testified that between 11 and 11:15 a.m. that day, they witnessed the shooting from a second-story window of the building where Murray lived in the 6100 block of Artesian Avenue in Chicago. Hicks and Miles observed a green car pull up alongside Murray's car as Murray parked his vehicle near the building. The passenger in the green car fired seven shots at Murray; however, neither witness could see the gunman's face. Chicago police officer Daniel Aguilera testified that immediately after the shooting, he spoke with Hicks and Miles, who described the car from which the shots were fired as a "turquoise green Grand Am."

¶ 5 Shantwann Smith, defendant's cousin, testified that he received a call from defendant at about 11:15 a.m. on the day of the shooting after which he and his girlfriend, Christina Lampton, drove to a gas station where they met defendant and Walls, who were in Walls' green Pontiac. Defendant told Smith the police had been to defendant's house and he planned to drive to Indiana because police were looking for him "for a homicide or something" involving K-Dub, which was the victim's nickname.

¶ 6 The prosecution impeached Smith with his earlier statement to an assistant State's Attorney that when Smith met Walls and defendant at the gas station, defendant said they "got"

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K-Dub. Smith also was impeached with his February 2003 grand jury testimony that defendant and Walls told him that they shot the victim after pulling their car alongside the victim's car.

¶ 7 At trial, Smith disavowed his earlier accounts in which he implicated defendant in the shooting. Smith testified that defendant's involvement was merely "the story that I heard on the street." Smith said he offered those initial accounts because he had been held at the police station for five days and police had threatened to charge Smith with the crime because he resembled Walls. On cross-examination, Smith stated that when he met defendant and Walls, they were in a green Pontiac Grand Prix.

¶ 8 Lampton testified that she and Smith met defendant and Walls at the gas station as Smith had described. Walls was in the driver's seat of a teal-colored Pontiac, and defendant was in the front passenger seat. Smith got into the Pontiac with the two other men while Lampton remained in their vehicle. The couple returned to Walls' house with defendant and Walls, where defendant stated that police were trying to blame him for the shooting.

¶ 9 The State impeached Lampton with her grand jury testimony that at Walls' house, she overheard defendant admit that he shot the victim. On cross-examination, Lampton said she initially told a detective that she did not hear defendant say anything but eventually gave the detective her account of defendant's admission as "the story that was going around on the street." Lampton said she gave the statement inculcating defendant because the detective threatened to charge Smith, with whom she has a child, with murder.

¶ 10 The State presented evidence that arrest warrants were issued for defendant and Walls in October 2003. Walls was arrested in Indiana in May 2004, and defendant was arrested in Texas in August 2004. In October 2003, the gun used in the instant shooting was recovered by police during a traffic stop of a person unrelated to this offense.

¶ 11 For the defense, Tiffany Houston, defendant's wife, testified that on the morning of January 2, 2003, defendant and his sister took their black car to a mechanic. About 10 or 15

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minutes after defendant left, police came to the Houstons' residence seeking to question defendant about a murder. Houston said one officer spoke to defendant on the phone after she called defendant. The officers left and then returned 20 or 25 minutes later, speaking with defendant on the phone again and threatening him. That night, Smith and Lampton picked up Houston and they drove to another location and picked up defendant. The group then drove to Indiana, where defendant and Houston were dropped off at a motel. On cross-examination, Houston stated that when the police first came to her door, it was "morning, going into noon time," which she clarified as being between 11 a.m. and noon.

¶ 12 In a sidebar discussion, the prosecution argued that the defense attempted to present an alibi for defendant through his wife's testimony and that defense counsel had not listed an alibi defense in its answer to discovery. The trial court agreed and struck the portion of Houston's testimony regarding defendant's whereabouts on the morning of the shooting.

¶ 13 The jury found defendant guilty of first degree murder and also found that defendant personally discharged a firearm that proximately caused Murray's death. The trial court sentenced defendant to 60 years in prison.

¶ 14 On direct appeal, defendant challenged the sufficiency of the evidence, pointing to the disavowed statements of Smith and Lampton and the absence of physical evidence linking him to the shooting. Defendant also argued, *inter alia*, that the trial judge erred in striking his wife's testimony as an impermissible account of an alibi. This court rejected those contentions and affirmed defendant's conviction and sentence. *People v. Houston*, No. 1-07-0146 (2008) (unpublished order under Supreme Court Rule 23).

¶ 15 On December 15, 2009, defendant filed a *pro se* petition seeking post-conviction relief contending his actual innocence. In support of that claim, defendant attached to his petition an affidavit of Hershel Morgan, who was defendant's cellmate in Stateville Prison. In his affidavit, Morgan attested that he, and not defendant, shot the victim while riding in a car driven by Smith.

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Also attached to the petition was Walls' affidavit stating that he and defendant did not commit the shooting. Walls stated that he wanted to testify on defendant's behalf but did not do so after the State threatened to re-indict him for the instant crime.

¶ 16 Defendant's petition also set out numerous theories of ineffectiveness of trial and appellate counsel, including that his trial counsel's performance was deficient because counsel failed to preserve the ability to raise an alibi defense. On February 8, 2010, the circuit court dismissed defendant's petition as frivolous and patently without merit.

¶ 17 Before reaching the substance of defendant's post-conviction claims, we address the State's challenge to the validity of the statements that defendant has attached to his petition from Morgan, Walls and Tiffany Houston. Although defendant's own affidavit and his statement of the veracity of his petition's claims were notarized, the statements of Morgan, Walls and Houston were not notarized. Thus, the State argues those documents cannot be considered as affidavits.

¶ 18 Pursuant to the Act, a post-conviction petition must be accompanied by affidavits to support the petition's allegations. 725 ILCS 5/122-2 (West 2008). This court has declined to uphold summary dismissal of a post-conviction petition based on the lack of notarization of an accompanying affidavit offered in support of the petition's claims. See, e.g., *People v. Terry*, 2012 IL App (4th) 100205, ¶ 23 ("the failure to attach a notarized affidavit to a post-conviction petition is not an appropriate reason to summarily dismiss the petition at the first stage"); *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 72 (modified on denial of rehearing) (failure to notarize affidavit in support of petition does not invalidate petition at first stage of post-conviction review). Thus, at this first stage of post-conviction review, we will not disregard the affidavits attached to a post-conviction petition based on the absence of notarization. We therefore proceed to consider the substance of defendant's post-conviction claims, which we review *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 19 At this initial stage of a post-conviction proceeding, the circuit court is concerned with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The court considers the substantive merit of a petition and may dismiss the petition if the allegations there, taken as true, render the petition frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition can be dismissed as frivolous or patently without merit at the first stage of post-conviction review if it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12.

¶ 20 Defendant asserts he set forth an arguable claim of actual innocence based on Morgan's statement that he committed the crime. Defendant averred in his petition that in 2009, he shared a cell with Morgan in Stateville Prison and that when Morgan learned the details of the instant crime, Morgan confessed to defendant that he, in fact, shot the victim. According to the Illinois Department of Corrections (IDOC) records on the Department's website, of which this court may take judicial notice (*People v. Steward*, 406 Ill. App. 3d 82, 93 (2010)), Morgan was admitted into custody in 2006 and is serving a life sentence for a murder conviction in Woodford County.

¶ 21 Morgan stated in his affidavit, dated May 29, 2009, that on January 2, 2003, he and a friend, J.D., met to buy drugs from J.D.'s friend "Twan." Twan asked Morgan to assist him in an assault in exchange for Twan returning to Morgan the \$1,600 that Morgan spent on drugs. Twan and Morgan drove around and spotted Murray, whom Twan called K-Dub. Morgan said Twan pulled his car alongside Murray's car, and Morgan fired several shots at Murray.

¶ 22 Morgan attested that he, J.D. and Twan did not discuss the shooting afterward and the topic did not arise until Morgan and defendant shared a prison cell and Morgan overheard defendant "speaking with our neighbor about where they are from and [defendant] saying they identified him by a green car and that the guy they say he killed was K-Dub." Defendant acknowledged in his petition he was not sure if Smith is the "Twan" to whom Morgan refers as

his co-offender. Defendant contended he could not speak to Morgan to verify the identity of Twan because he and Morgan apparently are no longer cellmates in the maximum security facility.

¶ 23 A freestanding claim of actual innocence is cognizable under the Act because a wrongful conviction of an innocent person violates due process under the Illinois Constitution. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). For a claim of actual innocence to be viable, the evidence presented by the defendant must be newly discovered, material, non-cumulative and of such conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 24 We first address the requirement that the evidence must be newly discovered. Evidence is newly discovered if it came to light since the trial and could not have been discovered earlier through due diligence. *Ortiz*, 235 Ill. 2d at 334. Morgan's affidavit meets that test because Morgan apparently was not known to defendant until they met in prison.

¶ 25 The second requirement is that the evidence be material and not merely cumulative. Evidence is considered cumulative when it does not add anything to what was previously before the jury. *Ortiz*, 235 Ill. 2d at 335. Taking as true and liberally construing the facts alleged in defendant's petition, as we are required to do at this initial stage of post-conviction proceedings (see *People v. Gaultney*, 174 Ill. 2d 401, 418 (2002)), Morgan fired the fatal shots at the victim while riding in a car driven by "Twan," who shares a nickname with Shantwann Smith, a witness who inculcated defendant before a grand jury. The only eyewitnesses to the shooting viewed the events from a second-story window and could not see the faces of the driver and gunman seated in the car. No physical evidence tied defendant to the shooting. Although Smith and Lampton implicated defendant in the crime, both recanted their grand jury testimony at trial. Lampton, the mother of Smith's child, testified at trial that she inculcated defendant because police threatened

to charge Smith in the case. Moreover, Morgan's affidavit is not cumulative of any testimony presented at trial because no evidence was presented of a different, unknown shooter.

¶ 26 Finally, the evidence at issue must be so conclusive that it would probably change the result on retrial. *Ortiz*, 235 Ill. 2d at 333. The hallmark of an actual innocence claim is that the defendant presents evidence that exonerates him of the crime. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (differentiating the establishment of a defendant's actual innocence from the casting of a reasonable doubt on the version of events presented at trial that led to defendant's conviction). Morgan's account of the shooting does not implicate defendant in the crime in any manner but instead indicates that Morgan was the gunman and acted with Smith to shoot the victim. Morgan's affidavit, taken as true, exonerates defendant of the crime.

¶ 27 Because defendant has set forth the requirements of an actual innocence claim based on Morgan's affidavit, we cannot say that defendant's post-conviction petition lacks an arguable basis in law or in fact. Defendant's actual innocence claim warrants remand of the petition for second-stage post-conviction proceedings. At the second stage of post-conviction review, the court may appoint counsel for an indigent defendant, and counsel has the opportunity to amend the defendant's claims. 725 ILCS 5/122-4 (West 2008). Because partial summary dismissals are not allowed under the Act and the circuit court must docket the entire petition for further post-conviction proceedings (see *People v. Rivera*, 198 Ill. 2d 364, 370-71 (2001)), we need not consider defendant's argument that his petition stated an arguable claim that his trial counsel provided ineffective assistance by failing to specify an alibi defense in its answer to the prosecution's discovery request.

¶ 28 In defendant's remaining contention on appeal, he asserts, and the State agrees, that the trial court erred in entering judgment on two counts of first degree murder and sentencing him to two concurrent prison terms when this case involved only one decedent. See *People v. Crespo*, 203 Ill. 2d 335, 340-41 (2001) (a single murder victim can give rise to only a single conviction of

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murder). Our review of IDOC records confirms that two murder counts were entered against defendant. Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), the mittimus is corrected to reflect a single conviction on Count 7 (intentionally or knowingly killing the victim while personally discharging a firearm causing the victim's death), along with the corresponding 60-year sentence.

¶ 29 In summary, because defendant's petition presents an arguable claim of actual innocence, the dismissal of the petition as frivolous and patently without merit is reversed, and the petition is remanded to the circuit court for second-stage proceedings under the Act. We also order the mittimus corrected to reflect a single murder conviction.

¶ 30 Reversed and remanded; mittimus corrected.