

2013 IL App (1st) 111065-U

SIXTH DIVISION
August 30, 2013

No. 1-11-1065

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. 96 CR 18495
)	
MARCO HENDERSON,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Lampkin and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's dismissal of defendant's petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) was proper where defendant's newly discovered evidence did not sufficiently support his claim of actual innocence.

¶ 2 Defendant Marco Henderson appeals from the circuit court's dismissal of his petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). On appeal, defendant contends that this court should remand for an evidentiary

hearing because his petition presented newly discovered evidence supporting his claim of actual innocence. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the 1996 shooting death of six-year-old Gentile Herron. Following a bench trial, defendant was convicted of first degree murder and sentenced to 40 years in prison. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Henderson*, No. 1-97-3502 (1999) (unpublished order under Supreme Court Rule 23). In the course of doing so, we set forth the underlying facts of the case in detail. Due to the nature of defendant's current claims, those facts will be repeated here to some extent.

¶ 4 At trial, Ossie Mae Williams testified that about 9:30 p.m. on June 21, 1996, she was walking along the 600 block of Long Avenue in Chicago with her two young nephews and her son, Gentile. At an intersection, she heard a car screech and turned to look. The car moved through the intersection and Williams saw "a guy" wearing a black shirt with white lettering standing in the middle of the street, shooting. She could not say which direction the shooter was pointing his gun but stated that she heard three or four shots. Williams grabbed the boys and dropped to the ground. When the shooting stopped, Williams saw blood coming from her son's face. Gentile was pronounced dead at the hospital. On cross-examination, Williams acknowledged that she knew defendant and that she did not tell the police that he was the person standing in the street.

¶ 5 Tasha Fentry testified that about 9:30 p.m. on the night in question, she could see defendant out her living room window, standing under a street light. A car rolled past and defendant fired a shot at it. Tasha dropped to the floor. She heard three more shots, followed by someone screaming.

¶ 6 Tiffany Fentry testified that around 9:15 p.m. on the night in question, she was on her porch and saw defendant standing near the street, lifting up his shirt to passing cars and displaying a gun. After Tiffany went inside the house, she heard four shots and called the police.

¶ 7 Chicago police detective Kevin McDonald testified that he was assigned to investigate the shooting. On June 29, 1996, he spoke with defendant, who had been arrested pursuant to a warrant. Defendant, who was accompanied by his aunt and pastor, was advised of his constitutional rights. Defendant then told Detective McDonald that on the night of the shooting, he had been on the 600 block of Long Avenue when a car belonging to a rival gang drove up the street. Defendant saw someone in the car put a clip into a weapon and fire at him. Defendant returned fire with a revolver he was carrying and ran away. Defendant also stated "that there was another P-Stone on the street; someone named Twin who fired somewhere in the neighborhood of 16 or 17 shots at the car."

¶ 8 Detective McDonald testified that he informed defendant his story conflicted with information he had received from other witnesses. The detective left defendant for a few hours, and then returned with an Assistant State's Attorney. Defendant related to them that on the night in question, he was working security for the P-Stone gang and had been given a revolver for that purpose. That evening, he noticed a car belonging to a rival gang coming up the street. When the car's occupants flashed gang signs at him, defendant pulled out his gun and fired at the car several times. He also fired at the car as it drove away.

¶ 9 Defendant then agreed to give a court-reported statement, which was introduced into evidence. In the statement, defendant related that on the night in question, he was acting as security for the Black P Stones. Around 9:30 p.m., he saw a car belonging to a rival gang turn onto Long Avenue. When the driver threw a gang sign and the passenger made a motion like he was reaching for a gun, defendant fired twice at the car. As the car drove away, defendant fired

two more shots at it. When defendant heard a woman talking about her baby, he ran from the scene. Defendant stated that no one else fired any shots and he did not see anyone else with a gun.

¶ 10 Following our affirmance on direct appeal, defendant filed a series of unsuccessful collateral attacks on his conviction. See *People v. Henderson*, Nos. 1-00-1348 (2001), 1-03-1864 (2005), 1-10-2994 (2011) (unpublished orders under Supreme Court Rule 23), 1-06-2596 (2007) (appeal dismissed for want of prosecution).¹

¶ 11 As relevant to this appeal, on November 14, 2005, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2004)), and on March 8, 2006, filed a *pro se* supplemental section 2-1401 petition. The petition included, among other things, a claim of actual innocence based on newly discovered evidence in the form of an affidavit executed by Marshall Payne. In the affidavit, which was not dated or notarized, Payne stated that as he drove along the 600 block of Long Avenue "on the night in question," he was shot at by a person known to him as "Twin." Payne averred that defendant "never fired a shot at me nor pointed a gun in my direction." Payne explained that he did not come forward earlier "because I was in a little trouble myself, plus I did not know someone was killed on the night in question." While the section 2-1401 petition was pending, defendant mailed to the clerk of the court a second successive *pro se* postconviction petition and a motion for appointment of counsel.

¶ 12 On July 10, 2006, the trial court allowed defendant the opportunity to argue his section 2-1401 claims in open court. After hearing arguments from defendant and the prosecutor, the trial court orally denied the petition. In a written order, the trial court also denied leave to file the second successive postconviction petition and denied the motion for appointment of counsel.

¹We note that defendant also has an appeal pending in case No. 1-13-0038.

¶ 13 On appeal, this court determined that the section 2-1401 hearing did not comply with the general principles of procedural due process of law. We found that the trial court's notice of the section 2-1401 hearing was constitutionally defective where the record showed that at the hearing, defendant was unaware of the nature of the proceedings against him and the notice was not given in sufficient time to enable him to prepare his arguments or retain counsel. For these reasons, we reversed the dismissal of the section 2-1401 petition and remanded for further proceedings. *People v. Henderson*, Nos. 1-06-2465 & 1-06-2472 (cons.) (2008) (unpublished order under Supreme Court Rule 23).

¶ 14 On remand, defendant orally argued his petition. During argument, defendant stated that he met Marshall Payne for the first time in late 2005. He described Payne as "the intended victim" of the shooting and asserted that Payne did not come forward earlier because he was in trouble with the law himself, feared incarceration, and did not know someone had been killed. Following argument, the trial court dismissed the petition for failure to show existence of a meritorious defense or claim. The trial court also denied leave to file a successive postconviction petition and denied the motion for appointment of counsel. Defendant appeals.

¶ 15 Section 2-1401 provides a comprehensive statutory procedure for defendants to challenge final orders, judgments, and decrees more than 30 days after they have been entered. *People v. Haynes*, 192 Ill. 2d 437, 460 (2000). The purpose of a petition brought pursuant to section 2-1401 is to correct errors of fact unknown at the time of trial but which, if then known, would have prevented the judgment. *People v. Coleman*, 206 Ill. 2d 261, 288 (2002). The petition "must be supported by affidavit or other appropriate showing as to matters not of record" (735 ILCS 5/2-1401(b) (West 2010)) and must be filed not later than two years after the entry of the order or judgment (735 ILCS 5/2-1401(c) (West 2010)). Because proceedings under section 2-1401 are subject to the usual rules of civil practice, the State's failure to answer a defendant's

petition with a responsive pleading results in an admission of all well-pleaded facts and renders the petition ripe for adjudication. *People v. Vincent*, 226 Ill. 2d 1, 9-10 (2007). An unanswered petition is subject to *sua sponte* dismissal if it fails to state a cause of action. *Vincent*, 226 Ill. 2d at 14. A trial court's dismissal of a section 2-1401 petition without an evidentiary hearing is reviewed *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 16 On appeal, defendant contends that this court should remand for an evidentiary hearing because his section 2-1401 petition presented newly discovered evidence supporting his claim of actual innocence. Defendant argues that his petition may not be dismissed as untimely because he exercised the requisite due diligence to excuse the late filing. Specifically, defendant argues that Marshall Payne's potential testimony was not known to him until late 2005. He further asserts that Payne's affidavit constitutes substantial evidence of actual innocence, as it contains facts that both controvert the trial evidence indicating defendant was the shooter and that are consistent with defendant's initial statement to the police that "Twin" was the shooter. Defendant argues that Payne's affidavit, taken as true, is material, noncumulative, and could change the trial's outcome.

¶ 17 The State takes issue with the timeliness of defendant's petition and the fact that Payne's affidavit is not dated or notarized. We need not address these concerns because the substance of Payne's affidavit is insufficient to support defendant's claim of actual innocence.

¶ 18 In order to justify relief under section 2-1401, a petitioner's newly discovered evidence must be (1) so conclusive that it would probably change the result if a new trial is granted; (2) discovered after the trial; (3) of such a character that it could not have been discovered prior to the trial in the exercise of due diligence; (4) material to the issues; and (5) not merely cumulative to the trial evidence. *People v. Hallom*, 265 Ill. App. 3d 896, 906 (1994).

¶ 19 Here, Payne averred in his affidavit that as he drove along the 600 block of Long Avenue on the night in question, he was shot at by a person known to him as "Twin" and that defendant "never fired a shot at me nor pointed a gun in my direction." Critically, Payne does not assert in his affidavit that defendant was not present when the shooting took place. Thus, Payne's statement that "Twin" was the principal offender does not exonerate defendant, as defendant could still be convicted of murder under a theory of accountability. See *People v. Edwards*, 2012 IL 111711, ¶ 39 (finding that a co-offender's affidavit stating the defendant "had nothing to do with this shooting" was not exonerating because it did not indicate the defendant was not present during the crime).

¶ 20 Moreover, the evidence offered against defendant at trial was overwhelming. Tasha Fentry testified she saw defendant shoot at the passing car, and defendant confessed to the shooting. In his initial statement to the police, defendant placed himself on the street alongside "Twin," with both of them shooting, and in his two subsequent statements, he identified himself as the sole shooter. Given that Payne's proposed testimony that defendant "never fired a shot at me nor pointed a gun in my direction" merely contradicts Tasha Fentry's testimony and defendant's confessions, we cannot find that Payne's proposed testimony would probably change the result on retrial.

¶ 21 Although Payne's affidavit could be considered new evidence, it is not of such conclusive character that it would probably change the result if a new trial were granted. Accordingly, relief is not justified under section 2-1401 and the trial court did not err in dismissing defendant's petition.

¶ 22 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 23 Affirmed.