

No. 1-11-1710

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. 97 CR 28175
)	
THURMAN BUCKLEY,)	Honorable
)	Joseph S. Kazmierski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Quinn and Connors concurred in the judgment.

ORDER

- ¶ 1 **Held:** This cause is remanded for a third-stage evidentiary hearing; defendant made a substantial showing of actual innocence where the only witness to place defendant at the scene averred that he lied at trial because he disapproved of his sister's romantic relationship with defendant and wanted to get defendant off the "street."
- ¶ 2 Defendant Thurman Buckley appeals from the circuit court's denial of relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). On appeal he contends that the circuit court improperly denied him relief where his petition made a substantial showing of actual innocence based upon the recantation of the only witness at trial who placed defendant near the scene of the shooting.¹ We reverse and remand.

¹ Initially, defendant also contended that his petition should not be treated as a successive petition and that it was timely filed. On appeal, the State concedes these issues.

¶ 3 After a jury trial, defendant was convicted of first degree murder and sentenced to 40 years in prison. Because defendant's postconviction claim is one of actual innocence, it is necessary to set out the trial evidence in some detail.

¶ 4 Defendant and codefendants, Lashon "Trigger" Smith, Vincent "Veno" Taylor, Stanley "Stan" Douglas and Bruce "DaDa" Forrest, were arrested and charged with, *inter alia*, first degree murder after the 1997 shooting death of the victim Montrell Thomas. Defendant was also charged with the attempted first degree murder of Christopher Coleman. Defendant and codefendant Taylor proceeded to separate, yet simultaneous, jury trials.

¶ 5 At trial, Officer Rene Ford testified that when she and her partner responded to a call of shots fired, she saw the victim on the ground bleeding from the upper body. When she asked the victim who shot him, he replied that it was Trigger, DaDa, and "them."

¶ 6 Christopher Coleman, who was incarcerated at the time of trial on a contempt charge and had prior convictions for the possession of a controlled substance and possession of a stolen motor vehicle, testified that he was previously a member of the Gangster Disciples gang (GD). He left the gang in 1998 and would not lie for the gang. At the time of the victim's death, the GDs and the Black Disciples were "at war." Coleman testified that defendant was a member of the Black Disciples. He explained that he knew this because defendant had a tattoo which indicated membership in the Black Disciples.

¶ 7 On the night of the shooting, Coleman and the victim walked down a street together before separating. Around 15 minutes later, Coleman heard "a lot of gunshots." He turned and began running. He was in a vacant lot when he saw defendant and Smith coming through a gate or fence. Smith was holding a machine gun and defendant was holding a gun. They were followed by Taylor, Douglas and Forrest. All three were armed. Although Smith put his gun to Coleman's head, defendant did not stop; rather, he continued running away. When Smith's gun jammed, Coleman flinched and then ran away. As he ran, he heard gunshots behind him. Coleman spoke to the police shortly thereafter and identified defendant as a member of the group

that came through the vacant lot. He later identified defendant in a photographic array. He also identified defendant when defendant was alone in an interview room.

¶ 8 The defense presented the testimony of two alibi witnesses, defendant's cousin Yasheika Cribbs and defendant's uncle Quinn Cribbs, both of whom testified that defendant was in the family kitchen at the time of the shooting. Ultimately, however, the jury convicted defendant of first degree murder, and he was sentenced to 40 years in prison.

¶ 9 On appeal, defendant contended, *inter alia*, that he was not proven guilty beyond a reasonable doubt because Coleman was not credible due to his gang affiliation and prior convictions. In rejecting defendant's contentions and affirming his conviction for first degree murder, this court noted, in pertinent part, that witnesses to crimes of gang violence were likely to be gang members with questionable criminal histories, that Coleman was impeached in several collateral matters, and that Coleman had consistently testified that all five individuals running toward him were armed. See *People v. Buckley*, No. 1-00-3875, order at 8-9, 11 (2002) (unpublished order under Supreme Court Rule 23).

¶ 10 In 2003, defendant filed a *pro se* petition for postconviction relief alleging, among other claims, that he was denied effective assistance of counsel when counsel advised him not to testify, failed to object to improper comments by the State during closing argument, and did not cross-examine certain State witnesses. The petition also alleged that defendant was denied the effective assistance of appellate counsel when counsel failed to challenge trial counsel's effectiveness on direct appeal. The petition was docketed and counsel was appointed.

¶ 11 In 2006, a supplemental petition was filed which alleged that defendant's conviction was improper because it was obtained through perjured testimony. The supplemental petition was supported by the affidavit of Christopher Coleman. In his affidavit, Coleman averred that he falsely accused defendant of running from the area where the victim was killed. He further averred that he did not see defendant and that defendant was not present. Coleman finally averred that he had lied about defendant because he wanted to remove defendant from the streets

and from the life of his sister Sandy with whom defendant was romantically involved. The circuit court subsequently granted the State's motion to dismiss.

¶ 12 On appeal, this court affirmed that judgment because defendant had not shown that the State knowingly used perjured testimony and had not raised a claim of actual innocence. *People v. Buckley*, No. 1-06-2479, order at 4-5 (2008) (unpublished order under Supreme Court Rule 23). Although defendant's petition for leave to appeal was denied, pursuant to a supervisory order, our supreme court directed this court to vacate its judgment and remanded the cause to the circuit court so that defendant could "refashion" his petition to include a claim of actual innocence based upon newly discovered evidence. See *People v. Buckley*, 229 Ill. 2d 673-74 (2008).

¶ 13 In October 2010, counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), and an amended petition. The amended petition relied on Coleman's affidavit to allege that defendant was actually innocent. The State then filed a motion to dismiss. In granting the State's motion, the circuit court stated that it applied the reasoning of *People v. Collier*, 387 Ill. App. 3d 630 (2008), to its analysis of defendant's claim of actual innocence.

¶ 14 At the second stage of proceedings under the Act, the circuit court determines whether the defendant has made a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 35 (Apr. 18, 2013). A "substantial showing" of a constitutional violation at this stage is a measure of the legal sufficiency of a defendant's well-pled allegations of a constitutional violation which, if proved at an evidentiary hearing, would entitle him to relief. *Domagala*, 2013 IL 113688, ¶ 35. Therefore, all well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If a defendant makes a substantial showing that his constitutional rights were violated, the matter proceeds to a third stage evidentiary hearing where the circuit court serves as a fact-finder and resolves evidentiary conflicts, weighs credibility, and determines the weight to be given testimony and evidence. *Domagala*, 2013 IL 113688, ¶¶ 34, 46. This court reviews the

dismissal of a petition at the second stage of proceedings under the Act *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 15 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). A defendant can raise a freestanding claim of actual innocence based on newly discovered evidence in a postconviction proceeding. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). The evidence in support of the claim must be (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result at retrial. *Ortiz*, 235 Ill. 2d at 333. Newly discovered evidence is "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *Ortiz*, 235 Ill. 2d at 334. Thus, here, the relevant inquiry is whether defendant has made a substantial showing of actual innocence such that a third-stage evidentiary hearing is warranted. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 34.

¶ 16 Defendant contends that such a substantial showing of actual innocence was made when the State's sole inculpatory witness recanted his trial testimony. He argues that absent Coleman's testimony placing him in the vacant lot, the testimony of his alibi witnesses would be uncontradicted. The State responds that defendant has not established that the evidence was newly discovered or of such a conclusive character that it would probably change the result at retrial. In other words, the State contends that defendant's claim merely attacks the sufficiency of the evidence at trial.

¶ 17 Our supreme court has defined "newly discovered" evidence as evidence that was discovered since trial and that defendant could not have discovered sooner through due diligence. See *Ortiz*, 235 Ill. 2d at 334. Although evidence is typically not "newly discovered" when it presents facts already known to the defendant prior to or at trial, there does appear to be an exception to the general rule when a witness later recants. *People v. Barnslater*, 373 Ill. App. 3d 512, 523-24 (2007). A defendant will not be precluded from presenting a witness's recantation as

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newly discovered evidence although the defendant knew that the witness was perjuring himself. *Barnslater*, 373 Ill. App. 3d at 524. However, this exception will not apply if the defendant had evidence available at the time of trial to demonstrate that the witness was lying. *Barnslater*, 373 Ill. App. 3d at 524.

¶ 18 Here, Coleman recanted his testimony that defendant was present in the vacant lot and explained that he lied at trial in order to get defendant off the "street" and away from his sister. Although defendant asserted his innocence at trial, presented the testimony of two alibi witnesses, and cross-examined Coleman, it is unclear how defendant could have discovered that Coleman was lying in order to end defendant's relationship with Coleman's sister or convinced Coleman to testify truthfully.

¶ 19 The State, relying in part on *People v. McDonald*, 405 Ill. App. 3d 131, 137 (2010), argues that Coleman's affidavit should not be considered newly discovered evidence because he was extensively cross-examined at defendant's trial. We disagree and find *McDonald* to be distinguishable from the case at bar. In that case, the court concluded that the defendant was properly denied leave to file a successive postconviction petition when the recanted testimony of a witness was not considered newly discovered evidence of actual innocence because the witness was available at the defendant's trial, was extensively cross-examined by defense counsel, and the witness's testimony was corroborated by other evidence. *McDonald*, 405 Ill. App. 3d at 137. Unlike *McDonald*, this case involves an appeal based on the merits of the claim raised in defendant's amended postconviction petition, and does not involve an appeal from a denial of leave to file a successive postconviction petition. In other words, defendant is not required to explain why he did not raise this claim in an earlier postconviction proceeding. See *People v. Edwards*, 2012 IL 111711, ¶¶ 22-23 (to obtain leave of court to file a successive petition, a defendant must either demonstrate actual innocence or satisfy the cause-and-prejudice test).

¶ 20 The second element of a claim of actual innocence is that a defendant must show that the new evidence was material and not cumulative. See *Ortiz*, 235 Ill. 2d at 333. Evidence is

considered cumulative when it "adds nothing to what was already before the jury." *Ortiz*, 235 Ill. 2d at 335. Testimony is not cumulative when it creates new questions in the mind of the trier of fact. *People v. Williams*, 392 Ill. App. 3d 359, 369 (2009). Taken as true, Coleman's affidavit, which stated that he lied when he placed defendant in the vacant lot and that defendant was not present, was material evidence and not cumulative of the evidence before the jury. Coleman was the only witness who testified at trial that defendant was present and defendant presented the testimony of two alibi witnesses who placed him in a family member's kitchen at the time of the shooting. Thus, Coleman's affidavit recanting his trial testimony and explaining why he lied is material to defendant's claim of actual innocence and is not cumulative of what was previously before the jury. *Ortiz*, 235 Ill. 2d at 335.

¶ 21 With regard to the third element, the evidence in Coleman's affidavit is of such a conclusive nature that it would probably change the result on retrial. See *People v. Harris*, 206 Ill. 2d 293, 301 (2002). The testimony of Coleman, the only witness at trial who placed defendant in the vacant lot armed with a gun, was presumably crucial to the jury's determination of guilt beyond a reasonable doubt. Coleman's affidavit averring that he lied because he wanted defendant away from his sister and that defendant was not present in the vacant lot directly contradicts his testimony at trial and is capable of changing the result on retrial. See *Ortiz*, 235 Ill. 2d at 337 ("the evidence of defendant's innocence would be stronger when weighed against the recanted statements of the State's eyewitnesses"). Coleman's testimony that defendant was not present in the vacant lot with a gun and that he only placed defendant there in order to end defendant's relationship with his sister combined with defendant's alibi witnesses would probably change the result on retrial when balanced against Coleman's recanted testimony. See *People v. Molstad*, 101 Ill. 2d 128, 135-36 (1984) (newly discovered evidence of five codefendants, who would testify that defendant was not present at the crime scene, would probably change the result on retrial when balanced against the testimony of a single eyewitness implicating defendant).

¶ 22 The State responds that Coleman's affidavit was not of such conclusive character as to probably change the result on retrial as the facts contained therein merely seek to "reassess" the strength of the State's case against defendant. The State argues that although Coleman averred that he did not see defendant at the scene, that does not "affirmatively establish" that defendant was not present. While mere impeachment evidence will typically not be of such conclusive character as to justify postconviction relief (*People v. Collier*, 387 Ill. App. 3d 630, 637 (2008)), when newly discovered evidence is both exonerating and contradicts the State's evidence at trial, it is capable of producing a different outcome at trial (*Ortiz*, 235 Ill. 2d at 336-37). In the case at bar, although defendant did not make an inculpatory statement and two alibi witnesses placed defendant in a family member's home at the time of the victim's death, Coleman testified that defendant was in the vacant lot with a gun. However, Coleman was the only witness to identify the defendant being present in the vacant lot. Taking the contents of Coleman's affidavit as true, that defendant was not in the vacant lot with a gun and Coleman only placed defendant there in order to end defendant's relationship with Coleman's sister, these facts could be found to exculpate defendant from any involvement in the victim's death and thereby change the result on retrial.

¶ 23 Here, although defendant presented the testimony of two alibi witnesses, he was presumably convicted based upon Coleman's testimony that defendant was present in the vacant lot armed with a gun. On retrial, defendant could not only present the testimony of the alibi witnesses, but that of Coleman who could testify that he lied when he testified that defendant was present. Although recantation testimony is generally considered inherently unreliable (*People v. Steidl*, 177 Ill. 2d 239, 260 (1997)), such a reliability argument is premature at the second-stage of proceedings under the Act. See *Pendleton*, 223 Ill 2d at 473 (all well-pled facts in defendant's petition that are not positively rebutted by the trial record are to be taken as true). Rather, it is for the circuit court, at an evidentiary hearing, to resolve evidentiary conflicts, weigh credibility, and determine the weight to be given to testimony and evidence. *Domagala*, 2013 IL 113688, ¶ 46;

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see also *People v. Morgan*, 212 Ill. 2d 148, 165 (2004) (it is for the circuit court to "to assess the credibility of the recantation testimony after having observed the demeanor of the witness").

Accordingly, we remand this cause for a third-stage evidentiary hearing on the issue of actual innocence.

¶ 24 For the reasons stated above, we reverse the judgment of the circuit court of Cook County and remand for further proceedings.

¶ 25 Reversed and remanded.