

SIXTH DIVISION
DATE: September 26, 2014

No. 1-12-2779

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. 06 CR 23416 |
| |) | |
| CORY PAIGE, |) | Honorable |
| |) | Mary Margaret Brosnahan, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

O R D E R

¶ 1 *Held:* Summary dismissal of defendant's *pro se* post-conviction petition is affirmed.

¶ 2 Defendant, Cory Paige, appeals from an order of the circuit court of Cook County denying his *pro se* petition for relief under the Post-Conviction Hearing Act (Act)) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends that the court erred in dismissing his petition where he presented an arguable basis of claims that the State perpetrated a fraud upon him at trial and actual innocence.

¶ 3 Defendant and his codefendants, Alejandro Serrano and Juan Gonzalez, were found guilty of first degree murder in connection with the fatal shooting of Julian Robles on September 12, 2006. Defendant's jury trial was severed from that of Serrano and that of Gonzalez, who was tried *in absentia*, and defendant was subsequently sentenced to 40 years' imprisonment. This court affirmed that judgment on direct appeal and corrected the mittimus to reflect defendant's presentence custody credit.¹ *People v. Paige*, No. 1-09-0516 (2011) (unpublished order under Supreme Court Rule 23).

¶ 4 On March 1, 2012, defendant filed a *pro se* post-conviction petition alleging that the State "intentionally perpetrated a fraud" by having Nicole Torres report that several men wearing "hoodies" approached her and issued threats against her sister, Reyna Ortiz, and their family in order to prevent Ortiz from testifying against defendant. The trial transcript reveals that the State informed the court outside the presence of the jury that Ortiz told the prosecutors that men wearing hoods went to her sister's home and threatened her to make sure she did not testify against defendant. The State noted that Ortiz and her mother had met with a relocation unit, and that it needed to disclose this so that no allegation could be made by the defense that Ortiz' testimony was in exchange for compensation by the State. The State also noted that Ortiz had not yet received any money from the State, but once suitable relocation housing has been found, the State will help Ortiz with moving expenses and her first month's rent. Based on the information of the threat provided by the State, defense counsel informed the court that he would not

¹ Serrano was sentenced to 50 years' imprisonment, and Gonzalez has not yet been sentenced. The codefendants are not parties to this appeal.

examine the witness on the relocation issue. The court informed the parties that if defense counsel cross-examined Ortiz about the possibility that she would receive benefits after the trial, then the State would be allowed to inquire as to why she was requesting relocation.

¶ 5 Defendant thus alleged in his post-conviction petition that the State gave money to its primary witness, Ortiz, and that, as a means of preventing the defense from bringing this up at trial, intentionally and knowingly concocted a scheme with her sister, Torres, to allege that men wearing "hoodies" threatened her to prevent her from testifying against defendant at trial. He maintained that he was thereby precluded from questioning Ortiz on the compensation issue because she would have testified falsely that she was threatened. He maintained that this was a *Brady v. Maryland*, 373 U.S. 83 (1963), violation, which he could not raise on direct appeal because he did not have Torres' affidavit which was a matter outside the record.

¶ 6 Defendant further alleged actual innocence based on the affidavit of his codefendant, Serrano, who averred that Serrano would testify that defendant did not enter the van until well after the shooting was committed. Defendant also alleged that Serrano's counsel prohibited Serrano from testifying at defendant's trial, and that Serrano is taking a substantial risk in submitting his affidavit because the gang to which Ortiz belongs is dangerous and has male counterparts in prison. Defendant further alleged that if he had Serrano as a witness, counsel would have pursued the allegation of "hooded men," and investigated Ortiz' background and gang involvement more closely.

¶ 7 In support of his petition, defendant attached an affidavit from Torres, who averred that on December 2, 2008, she came up with a plan with Ortiz to have the "County" pay for her living

expenses since the "County" wanted her to testify against defendant. Ortiz stated that she would give some of the money to Torres and allow Torres to use her new place. Torres averred that she asked Ortiz what would happen if the State found out they were making up the threat, and Ortiz told her that the State wanted defendant "really bad," and she got the idea from talking with one of the State's Attorneys who told her that it would "be really helpful if [Ortiz] was threatened by gang members before trial." After hearing that, Torres agreed to go along with the story. Ortiz told her that she would need to say that she was approached by men wearing "hoodies," who told her that they were there because of Ortiz testifying against defendant. She further averred that Ortiz told her to state that, "they are going to kill my sister and family." Torres further averred that she spoke to a State's Attorney who told her not to worry, and that all that mattered was that some "gang scum was [] removed from the streets." She averred that she was paid \$500 for saying that she was threatened.

¶ 8 Defendant also attached an affidavit from Serrano, who averred that he (Serrano) was not guilty of the offense, that Ortiz and Veronica Rodriguez were responsible for the shooting as part of a gang initiation, and that defendant entered the van at 1:45 a.m. on September 12, 2006, after the shooting had taken place. While defendant was in the van, however, he angered the women, who then framed him for an offense he had no part of, and during which he was not present. Serrano averred that he did not testify for defendant at his trial because his attorney told him not to say anything, and that he was now willing to testify to the contents of this affidavit.

¶ 9 In further support of his petition, defendant attached his own affidavit in which he maintained the innocence of himself and Serrano. He averred that in December 2009, he learned

that Torres had some information for him concerning her sister, and the "hooded" men. He averred that this information was outside the record so he had no choice but to raise it in a post-conviction petition. Defendant further averred that in January 2012, he received a note from Serrano regarding what he wanted to testify to at trial, but did not because his life would have been jeopardized and his counsel told him to remain silent.

¶ 10 The trial court dismissed defendant's petition as frivolous and patently without merit. In doing so, the court noted in its written order that, contrary to defendant's contention that he was unduly limited in his cross-examination of Ortiz, the trial court's ruling that the State could examine Ortiz about the threats at trial if defendant went into the compensation issue was found proper on appeal. The court further noted that it was unclear from Torres' affidavit whether it was the State or she and Ortiz who had made up the story regarding the threats, and that even if Torres' affidavit were true, it would not affect the outcome of defendant's trial because Torres' testimony places defendant in the van as part of the group that shot at the victim. Torres did not state that Ortiz' testimony was false, and at the time of trial, Ortiz had not received any money from the State. The court further observed that, in addition to Ortiz' testimony, the evidence against defendant was substantial where Rodriguez' testimony corroborated that of Ortiz. The court additionally noted that Omar Barba had witnessed the shooting and identified the van from which the shooter emerged; that witnesses saw the occupants of the van throw a gun later determined to have killed the victim out of the van window; and that police pursued the van from which defendant fled. The court thus found that the threats had no bearing on defendant's trial.

¶ 11 The court also rejected defendant's claim of actual innocence. The court found that the affidavit from Serrano is not newly discovered evidence because it presents facts already known to defendant at or prior to trial, even though the source of these facts may have been unknown, unavailable or uncooperative. The court further explained that Serrano was asserting his own innocence in his affidavit, which was executed three years after his own trial; thus, his admissions had no bearing on his ultimate conviction.

¶ 12 On appeal, defendant first contends that he presented an arguable claim that the State perpetrated a fraud. He maintains that the State encouraged Torres and Ortiz to falsely claim that they had been threatened by men in "hoodies" in order to prevent Ortiz from testifying against defendant, and that the claim should have been allowed to proceed.

¶ 13 At the first stage of post-conviction proceedings, defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring only that defendant plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of the dismissal of a post-conviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 14 Here, defendant maintains that the State intentionally perpetrated a fraud by having Torres falsely report that she was threatened by hooded men to prevent Ortiz from testifying against him. He maintains that the State solicited a false claim of witness intimidation to subvert his efforts to cross-examine Ortiz about her anticipated compensation in exchange for her

testimony, which disrupted the truth seeking process and violates *Brady v. Maryland*, 373 U.S. 83 (1963).

¶ 15 As an initial matter, we observe that if the content of an affidavit is no more than hearsay, it is insufficient to support a claim under the Act. *People v. Brown*, 2014 IL App (1st) 122549, ¶56. Here, Torres averred in her affidavit that her sister, Ortiz, told her that an Assistant State's Attorney told her that it would be really helpful if she was threatened by gang members prior to trial. This is clearly hearsay, and defendant has not presented any reason why he could not obtain an affidavit from Ortiz. *Brown*, 2014 IL App (1st) 122549, ¶¶58, 60. In the remainder of the affidavit, Torres stated that she and Ortiz "came up with the plan" regarding the threat so that Ortiz' living expenses would be paid by the State. Defendant thus has failed to provide the required supporting evidence (735 ILCS 5/122-2 (West 2012)) for his claim that the State suggested or told Ortiz and Torres to make up the plan regarding the threat from the hooded men.

¶ 16 Furthermore, on direct appeal, defendant contended that the alleged threats prevented him from raising the compensation issue. Thus, the issue is barred by *res judicata* (*People v. Blair*, 215 Ill. 2d 427, 443 (2005)), and his attempt to reconfigure it as a *Brady* violation is not well taken. A finding that the issue is not *res judicata* would invite piecemeal litigation, where defendant could rephrase an issue over and over until this court has addressed every possible permutation of the claim. *People v. Barrow*, 195 Ill. 2d 506, 522 (2001).

¶ 17 That said, we further find that Torres' affidavit does not, contrary to defendant's contention, present an arguable *Brady* due process violation. To establish such a violation, defendant must allege that the nondisclosed evidence at issue was favorable to him because it is

either exculpatory or impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

¶ 18 Defendant claims that the false threat prevented him from bringing up the compensation issue, *i.e.*, the tainted testimony, where the court held that if defendant asked about the compensation, the State could present testimony regarding the threat. However, on direct appeal, we found that defendant was not unduly restricted in his cross-examination of Ortiz and could have examined her regarding the compensation issue. *Paige*, No. 1-09-0516, at 15-16. Moreover, the record also shows that at the time of trial, Ortiz had not been compensated for relocating, and thus, there was no tainted testimony as defendant claims.

¶ 19 We also find that there was no arguable prejudice resulting to defendant where the evidence of his guilt was overwhelming, and Torres did not indicate in her affidavit that the evidence presented was false. *People v. Moore*, 199 Ill. App. 3d 747, 764-65 (1990). In particular, Ortiz' testimony that defendant was responsible for the shooting was corroborated by Rodriguez; a witness observed a person throw a gun from the van in which defendant was located shortly after the shooting; this gun was found to be the source of the victim's fatal wounds; and defendant fled from police after being pursued in the van. *People v. Price*, 158 Ill. App. 3d 921, 927 (1987) (flight and disposal of weapon are indicative of consciousness of guilt). Accordingly, defendant failed to present an arguable constitutional claim of fraud by the State warranting further proceedings under the Act. For these reasons, we find no arguable *Brady* violation.

¶ 20 Defendant further contends that he presented an arguable claim of actual innocence based on Serrano's affidavit, in which Serrano averred that Ortiz and Rodriguez shot the victim as part of a gang initiation, and that defendant did not enter the van until after the shooting, at which time he angered the women, who, in turn, framed him.

¶ 21 To be entitled to relief under the theory of actual innocence based on newly discovered evidence, the supporting evidence must be new, material, non-cumulative, and of such conclusive character that it would probably change the result on retrial. *Barrow*, 195 Ill. 2d at 540-41. Newly discovered evidence must be evidence that was not available at defendant's trial, and that defendant could not have discovered through due diligence. *Barrow*, 195 Ill. 2d at 541. Evidence is not considered newly discovered even if its source was uncooperative, unknown or unavailable, as long as it involves facts found to be known to defendant prior to or at trial. *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007).

¶ 22 Here, defendant presented the affidavit of his codefendant, Serrano, as newly discovered evidence. However, Serrano's averment that defendant came into the van after the shooting is information that would have been known to defendant at the time of trial, and, accordingly, is not newly discovered evidence. *Barrow*, 195 Ill. 2d at 541.

¶ 23 Defendant, nonetheless, maintains that Serrano's averment that Ortiz and Rodriguez shot the victim and framed him with the murder was not known to him at trial, and that he did not discover this until Serrano executed the affidavit in question. This information, however, is completely contradicted by the record which shows that Barba testified that he saw a *man* jump out of the van, shoot the victim, and then go back into the van. *Hodges*, 234 Ill. 2d at 16-17;

People v. Garcia-Sandoval, 2013 IL App (1st) 113763, ¶17; *People v. Jones*, 399 Ill. App. 3d 341, 360 (2010). In addition, Gladys Barba testified that at the time in question she heard gunshots, looked outside, and saw a *man* jump into the van. Moreover, Serrano's affidavit is not of such conclusive character that it would change the outcome of the trial where there was overwhelming evidence that defendant was one of the men in the van who shot the victim and was thus responsible for the murder. Ortiz and Rodriguez testified that defendant exited the van with Serrano shooting, and Omar Barba's testimony corroborated the testimony that a male, who was riding in the van in question, shot the victim; Gladys Barba's testimony corroborated the fact that a man was seen jumping back into the van after the gunshots were fired; and testimony was presented that defendant, after being pursued by police in the van, exited the van and fled on foot. *People v. Harris*, 206 Ill. 2d 293, 302 (2002). Thus, the representations made by Serrano in his affidavit failed to establish actual innocence, and this claim was properly rejected by the court. *People v. Anderson*, 401 Ill. App. 3d 134, 141-42 (2010).

¶ 24 In light of the foregoing, we affirm the order of the circuit court of Cook County summarily dismissing defendant's post-conviction petition.

¶ 25 Affirmed.