

FIFTH DIVISION
MARCH 6, 2015

No. 1-12-3054

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. 05 CR 23493 |
| |) | |
| MARIO WILSON, |) | Honorable |
| |) | Stanley Sacks, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Reyes concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Summary dismissal of defendant's postconviction petition affirmed where defendant failed to present an arguable claim of actual innocence.
- ¶ 2 Defendant Mario Wilson appeals from an order of the circuit court of Cook County summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant was charged with numerous offenses in relation to a shooting incident that occurred around 10:30 p.m. on September 22, 2005, near 55th Street and Prairie Avenue in Chicago, Illinois. Following a bench trial, defendant was found guilty of

aggravated battery with a firearm, then sentenced to a 12-year term of imprisonment. In this appeal, defendant contends that in his postconviction petition, he presented an arguable claim of actual innocence and requests a remand for second-stage proceedings.

¶ 3 The evidence adduced at trial showed that on the night of the incident, someone shot a gun numerous times in the direction of Phillip Finley and Dennis Johnson as they walked along the street, resulting in numerous injuries to Johnson, who was struck by five bullets. The evidence presented included the eyewitness testimony of Finley, who knew defendant from the neighborhood and observed him fire the shots and then flee with a gun in hand. Finley testified that he observed defendant's face at the time he fired the shots, as well as shortly thereafter when defendant entered the vehicle in which he made his escape, and that the interior light of that vehicle was on at that time. Finley identified defendant as the shooter at a lineup conducted four days after the shooting, and made an in-court identification of him as the shooter. Finley further testified that defendant was wearing a hoody and shorts at the time of the incident, that defendant's nickname was "Rio," and that he knew defendant to be a member of a gang called the "Met Boys," which was a rival gang of the Black Disciples. Finley denied being a member of the Black Disciples.

¶ 4 Shannon Crenshaw testified that the shooter was wearing a hoody and shorts, but gave conflicting accounts as to what he observed on the night of the shooting and whether he recognized defendant as the shooter, stating that he did not recall certain information he provided to investigating officers after the incident. He acknowledged, however, that on the night of the shooting, he told a detective that the shooter was "a Met Boy from 51st and Calumet named

Mario." Although Crenshaw identified defendant in a lineup conducted four days after the shooting, at trial he testified that defendant looked like the shooter "from a distance," and that he did not identify defendant as the shooter at the lineup, but rather, merely stated that he recognized defendant "from 51st." Crenshaw further testified that Finley was a member of the Black Disciples.

¶ 5 David Griffin also provided eyewitness testimony and stated that although he observed the shooting, he did not remain on the scene to speak with police. Griffin identified defendant as the shooter in a photo array conducted two days after the shooting and in a lineup conducted four days after the shooting. He testified that he recognized defendant as the shooter because he knew defendant beforehand, and observed a tattoo of the initials "MB" on defendant's neck.

¶ 6 Defendant denied being on the scene at the time of the shooting and testified that he was at home with his mother and young son at that time. Defendant acknowledged that his nickname is "Rio" and that he has a tattoo of the initials "MB" on his neck, and testified that those initials stand for "Mario and Brittany." Defendant denied being a member of the Met Boys gang, and testified that a gang by that name does not exist. Defendant's mother, Felicia Skipper, testified that defendant was at home with her and his son at the time of the shooting and that, to her knowledge, defendant never left the house that evening.

¶ 7 After defendant filed a direct appeal, his appointed counsel filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating no issues of arguable merit existed to raise on appeal. Defendant filed a response, contending that (1) the evidence was insufficient to convict him beyond a reasonable doubt, (2) the trial court coached State witnesses and

threatened them with imprisonment when they tried to change their testimony, (3) trial counsel was ineffective, and (4) the State improperly withheld exculpatory evidence. On February 18, 2009, the appellate court granted appointed counsel's motion to withdraw and affirmed defendant's conviction and sentence. *People v. Wilson*, 1-07-0411 (2009) (unpublished order under Supreme Court Rule 23). In doing so, the court addressed and rejected all of the arguments defendant raised in his response.

¶ 8 On June 15, 2012, through private counsel, defendant filed a postconviction petition in which he raised a claim of actual innocence as well as a claim of ineffective assistance of trial counsel for failing to call alibi witness Lenita Williams at trial. In support thereof, defendant attached the affidavit of David Griffin, in which Griffin states, *inter alia*, that he gave false testimony against defendant in connection with Dennis Smith's¹ shooting in order to "get back" at defendant for an altercation that occurred prior to the shooting during which defendant "beat [him] up" in front of a crowd of defendant's laughing friends. Griffin further averred that due to that altercation with defendant, he "lied and identified [defendant] to police by a neck tattoo that [he] remembered from [their] altercation" in order to seem more believable, but that he "in fact *** didn't know who actually did the shooting." Griffin further averred that "[a]t no time did [he] ever see [defendant] on or around the area of the shooting the day of the shooting incident."

¶ 9 Defendant also attached the affidavit of Lenita Williams, who averred, *inter alia*, that defendant was with her at 5110 South King Drive at the time of the shooting. Williams averred

¹ Although Griffin used the name "Dennis Smith," we presume he was referring to the victim Dennis Johnson.

that she dated defendant and Griffin off and on during the same time period and that she has two children with Griffin, who is a member of the Black Disciples gang. She further averred that Griffin told her that he identified defendant as the shooter in this case to police because "folks said he did it," and that "the other BDs were against [defendant]" because of a different shooting incident in which another Black Disciple was charged. Williams further averred that Griffin told her that he was playing basketball at the time of the shooting, and that he was going to identify defendant as the shooter even though he, Griffin, "wasn't even there during the shooting."

¶ 10 On September 7, 2012, the circuit court dismissed defendant's petition as frivolous and patently without merit. In doing so, the court found, *inter alia*, that the contents of Griffin's affidavit were not of such conclusive character that they would probably change the result of retrial. In relation to Williams' affidavit, the court found that it was not newly discovered. Defendant now challenges the propriety of the dismissal order and our review is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Because we review the judgment, and not the trial court's reasoning, we may affirm the order based on any reason supported by the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 11 Defendant maintains that through his postconviction petition and attached affidavits, he has presented an arguable claim of actual innocence. Because defendant has focused solely on his claim of actual innocence, he has abandoned the ineffective assistance of counsel claim he also raised in his petition and forfeited it for purposes of appeal. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 12 At the first stage of postconviction proceedings, a defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Although this requires a limited amount of detail, he is required, under section 122-2 of the Act, to support his allegations with affidavits, records or other evidence, or state why they are not attached. *Hodges*, 234 Ill. 2d at 9-10. If a petition lacks an arguable basis in law or fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *Hodges*, 234 Ill. 2d at 11-12, 16.

¶ 13 A freestanding claim of actual innocence is cognizable under the Act, but it must be based on newly discovered, material, and noncumulative evidence that defendant is innocent of the crime at issue. *People v. Harris*, 206 Ill. 2d 293, 301 (2002). Newly discovered evidence is evidence which was not available at trial and could not have been discovered sooner through due diligence. *Harris*, 206 Ill. 2d at 301. In considering a postconviction proceeding on a claim of actual innocence, we review the record and the testimony of the witnesses at trial together with the allegations in the petition with the affidavits attached. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). A defendant is only entitled to relief on a claim of actual innocence if the evidence is of such conclusive character that it would probably change the result on retrial. *Harris*, 206 Ill. 2d at 301.

¶ 14 Actual innocence is not the equivalent to the question of whether a defendant has been proven guilty beyond a reasonable doubt. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). Rather, the hallmark of an actual innocence claim is that the defendant presents evidence that completely exonerates and vindicates him of the crime. *Collier*, 387 Ill. App. 3d at 636.

Moreover, evidence that merely impeaches a witness will typically not be of such conclusive character as to justify postconviction relief. *Collier*, 387 Ill. App. 3d at 637.

¶ 15 Here, Griffin averred in his affidavit that he lied and told police that defendant was the shooter in this case, when in fact he "didn't know who actually did the shooting." He further averred that "at no time did [he] ever see [defendant] on or around the area of the shooting the day of the shooting incident." We first note that based on his averments, it is unclear whether Griffin was at the scene at the time of the shooting. However, even assuming that he was at the scene at that time, taken as true, his averments do not exonerate defendant, but rather, merely establish that Griffin did not observe defendant in the area at the time of the shooting and that he does not actually know who committed the shooting. In turn, these averments cannot exonerate defendant of the crime because they do not exclude defendant from possibly being the shooter. We thus find that the contents of Griffin's affidavit are not of such conclusive character as to justify postconviction relief, and, accordingly, that he failed to make an arguable claim of actual innocence. See *People v. Edwards*, 2012 IL 111711, ¶¶ 39-40 (where witness failed to assert in affidavit that defendant, who was convicted under theory of accountability, was not present when the shooting took place, contents of affidavit were not of such conclusive character that they would change result on retrial); cf. *Ortiz*, 235 Ill. 2d at 335-37 (actual innocence standard met where new evidence showed that defendant was not present during the commission of the crimes).

¶ 16 In reaching this determination, we have also considered Williams' averments that Griffin told her that he did not witness the shooting and that he identified defendant as the shooter

because "folks said he did it" and that "other BDs were against defendant." However, as with Griffin's averments, taken as true, we find that these statements do not exonerate defendant of the shooting, given that none of these statements exclude defendant from being the shooter. This is particularly so given Williams' averment that according to Griffin, he, Griffin, was not even present at the time of the shooting.

¶ 17 Additionally, although defendant acknowledges that Finley also provided eyewitness testimony and positively identified him as the shooter both to police during the course of the investigation and at trial, he maintains that Griffin was the State's "most critical witness" and that he provided more "weighty" testimony. However, these contentions essentially equate to an attack of the sufficiency of the evidence, which is not a proper issue for a postconviction proceeding. *People v. Frank*, 48 Ill. 2d 500, 504 (1971); see also *People v. Eddmonds*, 143 Ill. 2d 501, 510 (1991) ("[t]he purpose of a post-conviction proceeding is not to determine guilt or innocence"). Given this determination, we need not address whether the evidence is newly discovered and noncumulative.

¶ 18 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.