

THIRD DIVISION  
April 13, 2016

No. 1-13-3043

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 5385
	)	
ALAN WHITE,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Justices Lavin and Pucinski concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Circuit court's summary dismissal of defendant's *pro se* postconviction petition affirmed over his contention that he set forth an arguable claim that his trial counsel was ineffective for failing to investigate and present various witnesses at his trial and an arguable claim of actual innocence.

¶ 2 Following a simultaneous jury trial with separate counsel, defendant Alan White and codefendant Demond Carter were convicted of first-degree murder and attempted first-degree murder in connection with the shooting death of Chester Alexander and the shooting of Derrick Nelson on July 6, 2006. The circuit court sentenced defendant to 50 years in prison for first-

degree murder and a consecutive 10-year sentence for attempted first-degree murder. On direct appeal in *People v. White*, 2011 IL App (1st) 092852, this court affirmed his conviction and sentence. Defendant now appeals the circuit court's summary dismissal of his *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)), contending the court erred in dismissing the petition where: (1) it presented an arguable claim of ineffective assistance of counsel for failing to investigate and present several witnesses in his defense and (2) it presented an arguable claim of actual innocence. For the reasons that follow, we affirm.

¶ 3 At trial, the State presented testimony from eight occurrence witnesses – Lamarius Brooks, Derrick Nelson, Davon Turner, Jeremy Johns, Charles Henderson, Tyrone Thomas, Michael Pitchford and Shukeyina Godfrey – but none of them identified either defendant or Carter as the shooters. The State confronted the witnesses with their prior statements, in which they implicated defendant and Carter as the shooters. The witnesses denied making the statements, and the State subsequently introduced the prior statements as substantive evidence.

¶ 4 The testimonial evidence showed that on the evening of July 6, 2006, Lamarius Brooks, known as "Bobo" and a member of the Traveling Vice Lords gang, was selling drugs on the corner of West Wilcox and South Keeler in Chicago – an area controlled by the Four Corner Hustlers gang. Defendant and Carter were part of the Gangster Disciples and Four Corner Hustlers gangs, although trial testimony did not specify to which gang each belonged. Defendant and Carter pulled up to Brooks in a car, and Carter asked him for cocaine. Brooks gave Carter the drugs, but Carter did not pay for them. Instead, he told Brooks to "get the f\*\*\* on," meaning

leave the intersection. All three began arguing as Brooks walked toward the house of his girlfriend, ReRe, on the 4200 block of West Wilcox. Carter then snapped his fingers, and defendant hit Brooks over the head with a gun. Brooks then ran into ReRe's house to treat his head which was bleeding, and defendant and Carter went to a porch at a house across the street and several houses down from ReRe's house.

¶ 5 Inside ReRe's house, Brooks called Chester Alexander to come pick him up so he could "get away from there." Brooks returned outside with a towel on his head while defendant and Carter were still on the porch across the street. Tyrone Thomas heard Brooks, who was "loud," "upset," and "running his mouth, steady talking, talking about wait until his man come pull up," referring to Alexander, another member of the Traveling Vice Lords gang. Eventually, Alexander picked Brooks up in a Range Rover, and they drove to a gas station where they met several other individuals, including Charles Henderson. They returned to the area near ReRe's house and observed defendant and Carter on the same porch as before. Henderson testified that the group returned to "[d]uke it out" but with "fists" only. Derrick Nelson, Davon Turner, Jeremy Johns and Thomas were near ReRe's house when the group returned. Shortly thereafter, gunshots rang out. While trying to run into ReRe's house, Nelson was shot once in the back. Alexander ran away from the house toward South Keeler.

¶ 6 When Shukeyina Godfrey heard shooting in front of ReRe's house, she ran away from the gunshots and toward South Keeler where she saw Alexander near the intersection of West Wilcox and South Keeler. After the shooting stopped, Godfrey saw a white van turn onto South Keeler from West Wilcox, but Godfrey continued to run. She again heard gunshots, this time

coming from the location she had just been. In a prior statement of Turner's, he stated he saw a white minivan stop on South Keeler, the vehicle's side door open and then saw "bright flashes of light and heard gunfire coming from" the minivan. Alexander was later found wounded in the grass at 142 South Keeler with four gunshot wounds, and he died as a result of his injuries.

¶ 7 In Brooks' prior statements, he stated that he saw Carter go to the porch across the street after he took Brooks' drugs. From the ground near that location is where Brooks saw a black male shooting a firearm. At trial, Brooks denied he stated a black male was shooting at him from across the street.

¶ 8 In Nelson's prior statements, he stated defendant and Carter were on a porch across the street after their argument with Brooks, and the gunshots came from people on that porch. He stated that defendant might have been the shooter. During the shooting, both defendant and Carter entered a white minivan driven by a female, and the van drove off toward South Keeler. In photo arrays, Nelson identified defendant as the person who hit Brooks in the head with a firearm and as one of the people to enter the white minivan during the shooting, and Carter as someone who argued with Brooks and entered the white minivan during the shooting. Nelson made similar identifications of both in lineups. At trial, Nelson denied these statements and testified that Chicago Police Detective Daniel Gallagher coerced him into implicating defendant and Carter.

¶ 9 In Turner's prior statements, he stated he observed defendant "standing by a gate on ground level near the porch" shooting a firearm in his direction. He also identified Carter as shooting a firearm at him and the rest of the people outside ReRe's house. In photo arrays, Turner

identified defendant as the shooter by the gate and Carter as the shooter on the porch. Turner made a similar identification of defendant in a lineup. After the shooting, he said he saw individuals who looked like Carter and defendant shooting from a white minivan, which was being driven by a female. At trial, he denied identifying defendant and Carter as the shooters. He, however, recalled that defendant hit Brooks over the head with "something shiny."

¶ 10 In Johns' prior statements, he stated that both defendant and Carter were the shooters on the night in question. In particular, he stated defendant was the shooter "[o]n the side of the porch by the gate." In photo arrays, Johns identified defendant as the one who hit Brooks in the head with a firearm and Carter as someone shooting at him from across the street. Johns made a similar identification of Carter in a lineup. At trial, Johns failed to recall identifying the shooters and testified that Gallagher coerced him into signing his written statement and told who to identify in the photo arrays. He, however, recalled that defendant hit Brooks over the head with a firearm.

¶ 11 In Henderson's prior statements, he identified Carter as shooting from the porch and selected him from both a photo array and lineup. At trial, Henderson did not recall these identifications, explaining that he constantly used drugs and was high every day.

¶ 12 In Thomas' prior statements, he stated Carter fired a weapon toward ReRe's house from across the street. In photo arrays, Thomas identified defendant as the individual who hit Brooks in the head with a firearm and Carter as someone pointing a weapon in his direction and shooting. Thomas made similar identifications of both in lineups. At trial, Thomas did not recall these identifications and testified that Gallagher coerced him into writing the content of his

written statement and identifying defendant and Carter. He, however, recalled that defendant hit Brooks over the head with a firearm.

¶ 13 In Pitchford's prior statements, he stated a Range Rover pulled up near the scene of the crime, and he saw Carter outside on the porch. He thought something might happen, so he walked away and later heard gunshots. After the gunshots stopped, he saw a white minivan driven by Tanisha Nash, whom he knew as Carter's girlfriend. Because the windows were tinted, he could not see the two individuals behind the driver in the van. At trial, Pitchford said he signed his statement without reading it because he had heroin on him and Gallagher told him he would not be charged with possession of it if he signed the statement.

¶ 14 Chicago Police Detective Daniel Gallagher testified to the various witness identifications of defendant and Carter. He denied the allegations that he coerced or threatened any witnesses. Various assistant state's attorneys testified as to the witnesses' prior statements, both written statements and grand jury testimony. The assistant state's attorneys testified that the witnesses stated their statements were given voluntarily, they never claimed they were coerced or threatened by the police and they were not under the influence of either alcohol or drugs at the time of the statements.

¶ 15 Chicago Police Detective John Rawski, an expert on gangs, testified that the Brick Yard Fours, a gang affiliated with the Four Corner Hustlers, controlled drug transactions around the area of the crime. He said sometimes gangs would encroach on other gangs' territories and try to sell drugs. Initially, the encroaching gang would be confronted and told to leave. If they

declined, "there would be problems," including the possibility of people being beaten, threatened or shot.

¶ 16 After the shooting, the police collected evidence from the scene and determined that at least three and as many as seven firearms were used.

¶ 17 Six months after the shooting, police conducted a search warrant at an apartment on the 4200 block of West Le Moyne and encountered Montrell Knight, a member of the Gangster Disciples. At the apartment, police recovered nine firearms, two of which were later determined to have been used in the instant crimes.

¶ 18 After argument and deliberation, the jury found both defendant and Carter guilty of first-degree murder and attempted first-degree murder. The trial court subsequently sentenced defendant to 50 years in prison for murder and a consecutive sentence of 10 years in prison for attempted murder, for an aggregate sentence of 60 years in prison.

¶ 19 Defendant appealed in a consolidated appeal with Carter, arguing: (1) the circuit court abused its discretion by admitting cumulative prior inconsistent statements and by sending copies of these statements to the jury; (2) he was denied effective assistance of counsel because his trial counsel failed to request jury instructions on self-defense and second-degree murder; (3) he was denied effective assistance of counsel because his trial counsel failed to move to strike or move for a mistrial when a witness testified that one of the detectives claimed that Carter had "beat so many murders;" (4) the court committed reversible error when, through its comments at trial, it suggested that the jury should need little time to reach a verdict; and (5) the court violated defendant's right to a jury trial when it enhanced his sentence by 15 years based on the

possession of a firearm. This court affirmed defendant's conviction and sentence in *People v. White*, 2011 IL App (1st) 092852.

¶ 20 On December 27, 2012, defendant filed the instant *pro se* postconviction petition, alleging, in pertinent part, his trial counsel was constitutionally ineffective for failing to call witnesses Tanisha Nash, Tara Moran and Donald Rogers, who would have established defendant was not at the scene of the crime when the shooting occurred. Supporting this claim, defendant attached affidavits from Nash, Moran and Rogers, and police reports indicating Nash's white minivan was used in the commission of the crimes and that it was parked near the scene after the shooting. Defendant also alleges that he was actually innocent of the murder of Alexander and argues the evidence points to Adarius James, known as "Pig," as Alexander's murderer. Supporting this claim, defendant attached affidavits from Nash, Moran, Rogers, Marquis Walker, Montrell Knight, Demond Coffee, Yanong Woods and Tira Brock.

¶ 21 In a written order on March 20, 2013, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit.

¶ 22 In addressing defendant's ineffective assistance of counsel claim, the court found trial counsel's decision to not call Rogers was not unreasonable because Rogers did not witness the shooting and did not know of defendant's whereabouts at the time of the shooting. It also found counsel's decision to not call Nash was not unreasonable because her alleged testimony that her white minivan was inoperable on the day of the shooting would have been self-serving and would not have changed the outcome of defendant's trial. The court observed that, had Coffee and Woods testified to the statements in their affidavits, defendant still would have been



convicted. Lastly, the court noted that Brock's affidavit was neither signed nor notarized, and thus, declined to consider it.

¶ 23 In addressing defendant's actual innocence claim, the court noted that, assuming *arguendo* defendant's evidence was newly discovered, the evidence would not have affected the outcome of his trial. The court found the statements in Knight's affidavit concerning Pig being involved in Alexander's death were inadmissible hearsay, and the rest of his affidavit merely established that Knight purchased the guns used in the shooting from Pig. The court noted that Moran's affidavit was neither signed nor notarized, and thus, declined to consider it. Lastly, the court stated that in Walker's affidavit, he admitted he could not identify the shooter and merely attested to defendant's whereabouts an hour prior to the shooting.

¶ 24 On appeal, defendant first contends that his postconviction petition sets forth an arguable claim that his trial counsel was arguably ineffective for failing to investigate and present at his trial witnesses Montrell Knight, Donald Rogers, Tanisha Nash and Tara Moran, where their testimony would have contradicted the State's case and shown that defendant was not at the scene of the shooting when it occurred.

¶ 25 The Post-Conviction Hearing Act ("Act") (725 ILCS 5/122-1 *et seq.* (West 2012)), allows review of a defendant's claim where there was a "substantial denial of his \*\*\* rights" under either, or both, the Illinois Constitution or United States Constitution in the proceedings that resulted in his conviction. 725 ILCS 5/122-1(a)(1) (West 2012). At the first stage of the Act, which is where the instant petition remains, the circuit court must determine whether the defendant's petition is "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West

2012). A petition is considered "frivolous" or "patently without merit" when it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition will have "no arguable basis either in law or in fact" when it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* Where the record contradicts a defendant's legal theory, his theory is meritless. *Id.* "Fanciful factual allegations include those which are fantastic or delusional." *Id.* at 17. If the circuit court determines that the petition is frivolous or patently without merit, the court will dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012).

¶ 26 The circuit court should not dismiss a petition at the first stage of the Act if it "alleges sufficient facts to state the gist of a constitutional claim." *People v. Allen*, 2015 IL 113135, ¶ 24. All well-pled facts in the petition and any supporting affidavits are taken as true. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). We review a first-stage dismissal *de novo*. *Allen*, 2015 IL 113135, ¶ 19.

¶ 27 A claim of ineffective assistance of counsel is reviewed pursuant to the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hodges*, 234 Ill. 2d at 17. To prevail, the defendant must show that his counsel's performance was deficient and the deficiency prejudiced him. *Id.* At the first stage of the Act, "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Id.*

¶ 28 Defendant alleges he was arguably prejudiced by counsel's failure to investigate and call Knight, Rogers, Nash and Moran because the statements, as attested to in their affidavits, would have contradicted the State's case and shown that Pig controlled the area in question, he

confronted Brooks and he instigated the shootout with Alexander. Further, defendant argues Moran would have testified that defendant left the scene well before the shooting occurred and was not on the porch when the gunshots rang out. Lastly, Nash would have testified that her white van was inoperable on the night in question, which also would have damaged the State's case regarding how Alexander was murdered. We disagree.

¶ 29 First, Knight's affidavit, while included in defendant's petition, is used solely in his actual innocence argument. Nowhere in the petition does defendant argue trial counsel's ineffectiveness for failing to call Knight as a witness. Therefore, defendant has forfeited any claim of ineffective assistance of counsel concerning not investigating and presenting Knight as a witness. See *People v. Jones*, 213 Ill. 2d 498, 505-08 (2004). Even if we found defendant's argument concerning Knight not forfeited, his affidavit would not help defendant. Knight's affidavit merely establishes that he bought the firearms, which were found during the execution of a warrant in Knight's apartment and connected to the shooting, from Pig. It does nothing to disprove that defendant was involved in the shooting. In fact, at Knight's apartment, the police only recovered two firearms determined to have been used in connection with the shooting, and the evidence at trial indicated that at least three and as many as seven guns were used in the commission of the crime.

¶ 30 Next, counsel could not be ineffective for failing to investigate and present Rogers as a witness. Rogers' name does not appear in any police reports in the record, the State's answer to discovery or defendant's answer to discovery. Additionally, the petition does not state that defendant told his trial counsel about Rogers. Furthermore, Rogers' affidavit lacks any notion

that trial counsel should have been aware of him. Rogers never attests to telling defendant's trial counsel anything. Rather, Rogers states that he told Carter's trial counsel what he knew and came to court to testify, but Carter's counsel told Rogers he was not needed. Although there is a reference to Rogers in one of the exhibits in defendant's petition, it consists of Rogers' name and phone number handwritten in a memo to Carter's counsel from a woman named "Charity Morgan," who, from the record, does not appear to be involved in any way with defendant's case. Although defendant argues in his reply brief that Rogers' name appeared in Carter's amended answer to discovery, we cannot assume defendant's trial counsel would look at all of the filings of Carter's counsel. Therefore, nothing in the record demonstrates that defendant's trial counsel should have been aware of Rogers. See *People v. Humphries*, 257 Ill. App. 3d 1034, 1043 (1994) ("An attorney cannot be said to be ineffective for failing to call a witness whose identity and potential testimony are, through no fault of the attorney, unknown to him or her.")

¶ 31 Next, regarding the final two witnesses, Nash and Moran, although defendant argues that his trial counsel was arguably deficient for not investigating and presenting them as witnesses, we will limit our analysis to whether defendant was arguably prejudiced by counsel's failure to call them as witnesses because a discussion of any strategic reasons for not investigating and calling them at the first stage of the Act is inappropriate. See *People v. Tate*, 2012 IL 112214, ¶ 22 (noting that the State's strategy argument was "inappropriate for the first stage" of postconviction proceedings); *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 46 (stating "we do not consider arguments related to strategy when reviewing first-stage postconviction petitions"). In turn, prejudice is shown if defendant can establish a reasonable probability exists that the

outcome of his trial would have been different absent counsel's alleged errors. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 34.

¶ 32 Nash's affidavit does not help defendant's contention. Initially, we note that she makes no claim that the evidence in her affidavit would be available to defendant. In concluding her affidavit, she avers that she was "willing to testify at any criminal proceedings for Demond Carter, including an evidentiary hearing." Nash never once mentions testifying on behalf of defendant at an evidentiary hearing. However, because Nash does not admit to wrongdoing in the affidavit, "there is no reason to suspect that [s]he may not testify in accordance with [her] affidavit" for defendant, as well. *People v. Smith*, 2015 IL App (1st) 140494, ¶ 25 (finding where a witness has not admitted to wrongdoing in a postconviction affidavit, an affirmative statement that the witness would testify to the facts contained therein is unnecessary).

¶ 33 In Nash's affidavit, she expressly states she "wasn't there when the [shooting] happened" and instead was "down the block with [her] friend at the candy store." She additionally states that she never dated Carter and actually did not even know him that well. Finally, she states her white minivan was inoperable at the time of the shooting, thus she asserts "it is impossible that it was used in whatever happened." At most, Nash's affidavit, if taken as true, demonstrates that she was not the getaway driver for defendant and Carter. It does not, however, demonstrate that defendant and Carter were not the shooters or that they did not enter a white van during the shooting.

¶ 34 Turning to Moran's affidavit, we note that it does not contain her signature. In *People v. Enis*, 194 Ill. 2d 361, 380 (2000), our supreme court held that "[a] claim that trial counsel failed

to investigate and call a witness must be supported by an affidavit from the proposed witness." In *People v. Harris*, 224 Ill. 2d 115, 142 (2007), our supreme court held that witness affidavits without their signatures did not satisfy the requirement of *Enis*. Therefore, the lack of Moran's signature on her affidavit is fatal to it supporting defendant's ineffective assistance of counsel claim.

¶ 35 Even overlooking this defect, Moran's purported testimony would not help defendant make out a postconviction claim of ineffective assistance of counsel. In the affidavit, Moran states that she was defendant's girlfriend at the time of the shooting. She and defendant got into an argument on West Wilcox on the day in question while defendant was in his car. While they were arguing, Moran noticed another argument occurring between "Bonobo" and some others "guys" where Bonobo got hit in the head with a gun. She observed Pig with his "group" near Bonobo. After his argument with Moran, defendant left the scene. Moran also saw Carter, who was looking for his son, but he eventually left, too. Approximately 30 minutes later, a Range Rover appeared at the scene of the shooting and its driver, who she believed was Alexander, had a gun. She saw Bonobo walk toward Alexander, and then heard gunshots. Moran acknowledges that she "couldn't really get a sense of who was shooting at whom," but attests that neither defendant nor Carter "were on the porch that night," defendant in particular because "[he] pulled up, argued with [her], and then he left." This statement merely assumes that defendant was not at the scene of the crime because he left at least 30 minutes earlier and is not a well-pled fact that must be accepted as true because it merely amounts to a nonfactual conclusion. See *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007). Even if this statement was well pled, her affidavit

would be the only one to have any relevance to whether defendant was one of the shooters because, if taken as true, defendant was not on the porch when the shooting occurred.

¶ 36 In light of Moran's affidavit being the only one to potentially cast doubt upon defendant being one of the shooters, her purported testimony would have to be considered in light of the evidence already adduced at trial. As discussed, there were many State witnesses who implicated defendant and Carter as either the shooters or men entering a white van during the shooting. Accepting as true her statements and assuming she testified to them at defendant's trial, it is not arguable that there is a reasonable probability the outcome of defendant's trial would have changed when considered with the overwhelming evidence the State elicited of defendant being involved in the shooting. Therefore, defendant cannot demonstrate he was arguably prejudiced by trial counsel's alleged errors and his postconviction claim of ineffective assistance of counsel fails.

¶ 37 In reaching this conclusion, we reject defendant's reliance on *Hodges*, 234 Ill. 2d 1 and *People v. Tate*, 305 Ill. App. 3d 607 (1999).

¶ 38 In *Hodges*, 234 Ill. 2d at 18-21, our supreme court found that three witnesses that the defendant's trial counsel allegedly failed to investigate and present would have stated the victim killed by the defendant had a weapon, thus arguably supporting the defendant's theory at trial of second-degree murder based on an unreasonable belief of self-defense. In contrast, here, all the witnesses except for Moran failed to support the notion that defendant was not the shooter. And, as discussed, Moran's testimony alone, in light of the other evidence adduced at trial, would not arguably demonstrate prejudice.

¶ 39 In *Tate*, 305 Ill. App. 3d at 612-13, the appellate court reversed and remanded the defendant's postconviction petition for an evidentiary hearing, reasoning that "[t]he record does not reflect whether counsel made a professionally reasonable tactical decision not to call the witnesses or whether, as defendant maintains, counsel failed to call them as the result of incompetence." In contrast, here, we have determined that defendant suffered no arguable prejudice as a result of his trial counsel's alleged errors. Thus, the reasoning here is different from *Tate*.

¶ 40 Accordingly, the circuit court correctly determined defendant's ineffective assistance of counsel argument to be frivolous and patently without merit.

¶ 41 Defendant next contends that his postconviction petition sets forth an arguable claim of actual innocence by presenting newly discovered evidence, specifically, affidavits showing that he left the scene of the crime prior to the shooting and the shooting, in fact, was perpetrated by Adarius James, known as Pig.

¶ 42 Under the Act, a claim of actual innocence is cognizable "because the imprisonment of an innocent person violates the due process clause of the Illinois Constitution, as do procedural barriers to having a claim of innocence adjudicated on the merits." *People v. Henderson*, 2014 IL App (2d) 121219, ¶ 24 (citing *People v. Washington*, 171 Ill. 2d 475, 489 (1996)). At the first stage of the Act, newly discovered evidence supporting an actual innocence claim must be arguably "new, material, noncumulative \*\*\* [and] so conclusive it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 43 In *Coleman*, our supreme court clarified that:



"New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. Material means the evidence is relevant and probative of the petitioner's innocence. Noncumulative means the evidence adds to what the jury heard. And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result." (Internal citations omitted.) *Id.*

An actual innocence claim based on newly discovered evidence should focus on whether the evidence "would totally vindicate or exonerate the defendant." *People v. Flowers*, 2015 IL App (1st) 113259, ¶ 33. " '[A]ctual innocence' is not within the rubric of whether a defendant has been proved guilty beyond a reasonable doubt. [Citation.] Rather, the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' " *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (quoting *People v. Jones*, 362 Ill. App. 3d 31, 34 (2005); *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999)). An actual innocence claim is "extraordinarily difficult to meet" (*Coleman*, 2013 IL 113307, ¶ 94), and "[c]ourts rarely grant postconviction petitions based on claims of actual innocence." *People v. Wallace*, 2015 IL App (3d) 130489, ¶ 14.

¶ 44 Defendant argues that his newly discovered evidence undermines the State's case to the point that it is "arguable that he would be acquitted on retrial," pointing to the evidence contained in the affidavits from Marquis Walker, Donald Rogers, Demond Coffee and Yanong Woods. We disagree.

¶ 45 Assuming *arguendo* that this evidence would qualify as newly discovered, material and noncumulative, having considered all the affidavits together, the evidence contained therein is

not arguably of such a conclusive character that, along with the evidence adduced at trial, it probably would lead to a different result on retrial.

¶ 46 First, Coffee and Woods' affidavits contain the same basic details and pertain to Carter's cause. Coffee is Carter's son, and Woods is Coffee's friend. In their affidavits, they attest that they were with Carter on the day in question and drove to the area of the crime to recruit basketball players to form an AAU team that Carter wanted to create. After Carter exited the car and began talking with some individuals, Coffee exited to see what was happening and observed his dad arguing with them. Carter and Coffee both returned to the vehicle and left the scene. Coffee and Woods dropped Carter off at his girlfriend's house around 7:30 or 8 p.m. Defendant also notes that Carter provided an affidavit corroborating the statements of Woods and Coffee. While the evidence in Coffee and Woods' affidavits could affect Carter's case, their potential testimony would not arguably vindicate or exonerate defendant, who is not mentioned in either affidavit.

¶ 47 Next, in Walker's affidavit, he states that Pig controlled the area where the crime occurred and that Pig confronted Brooks about selling drugs there. Additionally, sometime before the shooting occurred, Walker saw Carter, who was looking for his son, at the scene of the shooting but then Carter left. Similarly, Walker states he saw defendant arguing with his girlfriend, but then defendant left the scene. Approximately an hour after defendant left, Walker saw a Range Rover and a white van appear. He states the occupants of both vehicles exited and, shortly thereafter, shooting erupted. Walker, however, did not see who was shooting at whom, and he avers that "[defendant] and [Carter] were not out there when the shooting happened" because

"[t]hey had left." This statement merely assumes that defendant was not at the scene of the crime because he left an hour earlier and is not a well-pled fact that must be accepted as true because it merely amounts to a nonfactual conclusion. See *Barnslater*, 373 Ill. App. 3d at 519. Moreover, considering Walker did not see who was shooting at whom and cannot attest to defendant's whereabouts when the crimes occurred, his potential testimony would not arguably vindicate or exonerate defendant.

¶ 48 Next, in Rogers' affidavit, he states that at some point on the night in question, while he was driving to a liquor store, he saw two groups approaching one another, Alexander's group and Pig's group. He believes the confrontation was a result of Alexander's group selling drugs on the block that Pig controlled. Rogers states that he continued driving and then heard gunshots. He avers that he knew defendant and did not "remember seeing him out there." Similar to Walker's testimony, Rogers does not attest to seeing the shooting occur, and therefore, his potential testimony likewise would not arguably vindicate or exonerate defendant.

¶ 49 Defendant argues the foregoing affidavits portray a different scene than that which the State portrayed at trial, namely that Pig controlled the block where the shooting occurred and he confronted Brooks about selling drugs there, which led to the shootout. However, these facts merely contradict the trial testimony that Carter confronted Brooks about selling drugs on the block. They do not show defendant's actual innocence. See *Collier*, 387 Ill. App. 3d at 637-38 (stating an affidavit that merely impeaches or contradicts trial testimony makes a claim of reasonable doubt, not of actual innocence). Notably, the affidavits do not show that defendant

was not the shooter; they merely impeach witnesses as to the State's theory regarding the motive for the shooting.

¶ 50 Defendant also argues that his actual innocence claim is bolstered by Nash and Knight's affidavits, which were used to support his ineffective assistance of counsel claim. However, as previously discussed, Nash at most exonerates herself as the getaway driver, and her affidavit does nothing to exonerate defendant from the crimes. And Knight's affidavit establishes that he bought two of the guns connected to the crime from Pig. But at least three, and at most seven, firearms were used in the shooting. Moreover, tying the guns to Pig does nothing to vindicate defendant and arguably show his actual innocence.

¶ 51 There was ample evidence at trial from multiple witnesses that defendant and Carter confronted Brooks about selling drugs on the block, that upon an order from Carter, defendant hit Brooks over the head with a pistol, and that defendant was one of the shooters. While, at trial, many of the State's witnesses denied making statements implicating defendant and Carter as the shooters, the substantive admission of their prior inconsistent statements does not diminish the quality of the evidence and it may be accorded the same weight as direct testimony from witnesses. See *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 23 (stating "[t]he trier of fact may consider a prior inconsistent statement introduced as substantive evidence \*\*\* the same as direct testimony by that witness"). All told, the affidavits relied upon by defendant to support his actual innocence claim taken together are not arguably of such a conclusive character that, when considered along with the evidence adduced at trial, would probably lead to a different result on retrial.

¶ 52 Defendant's petition also includes affidavits from Tira Brock and Tara Moran supporting his actual innocence claim. However, on appeal, he has abandoned using their affidavits in support of the claim.

¶ 53 Finally, defendant argues that because his petition was "nearly identical" to a postconviction petition filed by Carter, and Carter's petition was advanced to an evidentiary hearing, the same result should occur in his case. Defendant cites to Carter's postconviction petition and a transcript from Carter's postconviction case in which the State requested leave to file an answer to Carter's amended postconviction petition and a request for discovery concerning the evidence that would be heard at an evidentiary hearing. The affidavits attached to Carter's petition, which are identical to the ones attached to defendant's petition, were clearly written for Carter, not defendant, as many of the affidavits fail to mention defendant or merely mention him in passing. Thus, it is not impossible that Carter's petition could survive first-stage proceedings where the alleged exculpatory evidence focused on him.

¶ 54 For the foregoing reasons, we affirm the order of the circuit court of Cook County, dismissing defendant's postconviction petition as frivolous and patently without merit.

¶ 55 Affirmed.