2017 IL App (1st) 151216-U
No. 1-15-1216

THIRD DIVISION
March 15, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08 CR1057
	)	
ANDRE MAMON,	)	
	)	The Honorable
Defendant-Appellant.	)	Stanley Sacks,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's postconviction petition affirmed over his contentions that he set forth an arguable claim of actual innocence and ineffective assistance of trial counsel.

¶ 2 Defendant Andre Mamon 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 2016)). He contends that the circuit court erred in summarily

dismissing his petition as frivolous and patently without merit because he presented an arguable claim of actual innocence and ineffective assistance of trial counsel.

¶ 3 BACKGROUND

¶ 4 Following a jury trial, defendant was found guilty of first degree murder for the fatal shooting of Leon Henry on December 5, 2007, and sentenced to an aggregate term of 52 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence over his claims that the State failed to prove him guilty of first degree murder beyond a reasonable doubt and that the trial court's imposition of a 15-year enhancement based on his use of a firearm to commit murder violated the principles of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *People v. Mamon*, 2011 IL App (1st) 101214-U.

¶ 5 On January 16, 2015, private counsel Thomas C. Brandstrader, who also represents defendant in this appeal, filed the subject postconviction petition on defendant's behalf alleging actual innocence and ineffective assistance of trial counsel. Attached to the petition was an affidavit, dated June 26, 2013, from defendant's brother, Myles Swift, who averred as follows:

> "I, MYLES SWIFT, (DOB 10/4/1986), am the brother of ANDRE MAMON, and state the following under the penalties of perjury.
>
> 1. I was with my brother in the early morning hours of *December 7, 2007*, in a Kia vehicle being driving [*sic*] by Xavier Finley.
>
> 2. Also in the vehicle were Jeremy Wilson and Lanell Mensa.
>
> 3. On our way to Chinatown to eat, the vehicle stopped at a gas station at 79th and Crandon.
>
> 4. At the gas station there was an altercation with a person I know as 'Leon' and several other individuals both male and female.

5. During the altercation, I was struck from the rear and suffered a serious eye injury.

6. We all returned to the car (except Lanell who left on foot) and Andre told Finley to drive me to the hospital which was a few blocks away.

7. As we drove along 78th Street to the hospital, Leon appeared in front of the car and started the confrontation all over.

8. Finley and Andre got out of the car and approached Leon when I heard shots coming from two different directions.

9. Finley and Andre were unarmed and did not fire the shots and ran back to the car.

10. We left the area immediately and returned to my home." (Emphasis added.)

¶ 6 Also attached to the petition was defendant's own affidavit, dated October 3, 2014, in which he averred as follows:

"1. I am incarcerated on the above judgment and conviction in the Illinois Department of Corrections.

2. I am innocent of the crime for which I stand convicted.

3. I retained counsel, Robert Willis, upon indictment for representation in the criminal matter.

4. Retained counsel failed to conduct an investigation into the existence of the occurrence witness, Myles Swift, despite his availability and willingness to testify consistent with the affidavit attached to this petition.

5. Retained counsel advised me that I should not testify as my prior convictions would be admitted in cross examination yet never attempted to challenge said admission via a motion *in limine*.

6. Retained counsel never spoke to me or discussed with me the possibility of requesting a lesser included instruction to first degree murder and thus I was left in the dark and was unaware of any alternative to trial counsel's 'all or nothing' approach. If properly advised I would have requested a lesser included offense based on the evidence presented.

7. I have read the petition for post-conviction relief filed on my behalf and the issues and allegations are true and correct to the best of my knowledge, belief and information and I attest to them under the punishment of perjury."

¶ 7 The circuit court summarily dismissed the petition as frivolous and patently without merit in a detailed written order entered on April 6, 2015. As relevant to this appeal, the court found defendant's conclusory assertion that he "is actually innocent of the offense for which he stands convicted and incarcerated," was insufficient under the Act. The court noted that defendant did not specify the basis for his claim, nor did he support his claim with any facts or evidence tending to show that he is truly innocent. The court observed that defendant's claim of actual innocence was "so thoroughly sanitized of facts that there are none to be taken as true," and that defendant did not explain how the evidence, if any, of his innocence was sufficient to undermine the testimony of two eyewitnesses, who separately identified defendant as the shooter in a photographic array and a lineup. Accordingly, the court concluded that defendant's "threadbare claim" of actual innocence could be dismissed as legally insufficient.

¶ 8 Moreover, the court considered and rejected the sufficiency of Swift's affidavit in support of his actual innocence claim for two reasons. First, the court found that Swift's affidavit was not newly discovered evidence "because the affidavit itself admits that Swift and [defendant] were together when the shooting occurred," and thus defendant "undoubtedly knew of Swift's

testimony before trial, and even if he did not, he could have easily discovered Swift's testimony through an ounce of diligence." The court also found its conclusion was further compounded by the fact that Swift is defendant's brother. Second, the court found that Swift's affidavit was not of such conclusive character that it would likely change the outcome on retrial, particularly in view of credible testimony from two eyewitnesses and their independent, positive identifications of defendant as the shooter. The court further observed that Swift's affidavit was entirely inconsistent with the defense theory at trial that defendant was not present when the shooting occurred, which further supported the conclusion that Swift's affidavit would not change the outcome on retrial.

¶ 9 Next, the court considered and rejected defendant's claims of ineffective assistance of trial counsel for: (1) failing to interview, investigate, and call Swift as an "occurrence witness" at trial; (2) denying his right to testify by failing to file a motion *in limine* to either preclude or limit the use of his prior convictions; and (3) failing to discuss and tender a jury instruction on a lesser-included offense. First, the court found that defendant failed to show that trial counsel's failure to call Swift as a witness fell below an objective standard of reasonableness and that the outcome of his trial would have been different but for trial counsel's alleged deficient performance. Second, the court found defendant's claim that he was denied his right to testify in his own defense was rebutted by the record showing that he was advised of his right to testify and defendant "plainly and unambiguously" informed the court that he did not want to testify. Moreover, to the extent that this ineffectiveness claim was premised upon trial counsel's failure to file a motion *in limine* to limit evidence of his prior convictions, the court found this argument was waived because it was not raised on direct appeal, and defendant failed to show any exceptions that would excuse the application of the waiver doctrine. Third, the court found that

defendant also waived his final claim of ineffective assistance because it was of record and was not raised on direct appeal. For these reasons, the court dismissed defendant's postconviction petition as frivolous and patently without merit.

¶ 10 Defendant now appeals the dismissal, and our review is *de novo* (*People v. Hodges*, 234 Ill. 2d 1, 9 (2009)), which does not mean that we will examine anew each issue presented in a postconviction petition; rather, we will consider, without deference to the circuit court's decision, only those issues that the appellant has clearly defined and supported with cohesive argument and citation to relevant authority (*People v. Snow*, 2012 IL App (4th) 110415, ¶ 79).

¶ 11 ANALYSIS

¶ 12 The Act provides a three-stage mechanism to review postconviction petitions. *People v. White*, 2014 IL App (1st) 130007, ¶ 18. "Atypically, defendant [here] is represented by counsel at the first stage of postconviction proceedings." *Id.* The applicable standards at the first stage of proceedings, however, remain the same. *Id.* At this stage, " 'the [circuit] court considers the petition's substantive virtue rather than its procedural compliance.' " *People v. Allen*, 2015 IL 113135, ¶ 24 (quoting *People v. Hommerson*, 2014 IL 115638, ¶ 11). A petition may be summary dismissed as frivolous and patently without merit only if it has no arguable basis in law or in fact. *Hodges*, 234 Ill. 2d at 16. A petition lacks an arguable basis either in law or in fact when it is based, respectively, on "an indisputably meritless legal theory," *e.g.*, one that is completely contradicted by the record, or "a fanciful factual allegation," *e.g.*, one that is "fantastic or delusional." *Id.* at 16-17. A petition must also set forth sufficient facts showing that its allegations are capable of objective or independent corroboration. *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 19. Put another way, although defendant need only set forth the gist of a constitutional claim, section 122-2 (725 ILCS 5/122-2 (West 2016)) of the Act requires

that defendant clearly set forth the manner in which his constitutional rights were violated, and attach affidavits, records, or other supporting evidence, or an explanation for their absence. *Id.*

¶ 13 A postconviction actual innocence claim is confined to arguments based on newly discovered evidence. *People v. Wallace*, 2015 IL App (3d) 130489, ¶ 14. In other words, the evidence supporting a claim of actual innocence must be *arguably* new, material, noncumulative, and of such conclusive character that it would likely change the outcome on retrial. (Emphasis added.) *Mabrey*, 2016 IL App (1st) 141359, ¶ 23. "Evidence is new if it was discovered after trial and could not have been discovered earlier through the exercise of due diligence, material if it is relevant and probative of the defendant's innocence, and non-cumulative if it adds to the evidence heard at trial." *Id.* Defendant bears the burden of showing due diligence. *People v. Walker*, 2015 IL App (1st) 130530, ¶ 18. Evidence, however, is not newly discovered if it was available at a posttrial proceeding or " 'presents facts already known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable or uncooperative.' " *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21 (quoting *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008)). The conclusive character of the alleged new evidence is the most important element of an actual innocence claim. *People v. Sanders*, 2016 IL 118123, ¶ 47.

¶ 14 Moreover, actual innocence is synonymous with total vindication or exoneration. *People v. Calhoun*, 2016 IL App (1st) 141021, ¶ 30. For that reason, an actual innocence claim is "extremely difficult to meet," and "courts of review have granted postconviction relief on actual-innocence claims in only three reported cases since 1996." *People v. Coleman*, 2013 IL 113307, ¶ 94; *Wallace*, 2015 IL App (3d) 130489, ¶ 14. The failure to state a freestanding claim of actual innocence can fail as a matter of law. *Wallace*, 2015 IL App (3d) 130489, ¶ 17 (citing *People v. Edwards*, 2012 IL 111711, ¶¶ 31, 36-37).

¶ 15 Here, defendant's actual innocence claim premised upon Swift's affidavit fails as a matter of law because he ignores the due diligence requirement of newly discovered evidence. *Wallace*, 2015 IL App (3d) 130489, ¶ 18. Notwithstanding the requirement that defendant show due diligence in the discovery of the purported newly discovered evidence, defendant's postconviction petition does not assert any such diligence. *Snow*, 2012 IL App (4th) 110415, ¶ 22. Defendant's own averment regarding Swift's "availability and willingness to testify" is *prima facie* evidence that defendant knew his brother was a potential witness to the shooting. *Wallace*, 2015 IL App (3d) 130489, ¶ 19.

¶ 16 More importantly, accepting the contents of Swift's affidavit as true, Swift cannot conclusively prove defendant was not the shooter (*Wallace*, 2015 IL App (3d) 130489, ¶ 20) given the strong evidence of defendant's guilt, and thus Swift's affidavit is not arguably so conclusive that it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt (*Mabrey*, 2016 IL App (1st) 141359, ¶ 30). Accordingly, we conclude that defendant failed to set forth an arguable claim of actual innocence requiring further proceedings under the Act. *Mabrey*, 2016 IL App (1st) 141359, ¶ 30. In so concluding, we reject defendant's argument that the circuit court essentially and improperly weighed the credibility of his postconviction petition and Swift's affidavit against defendant's theory at trial that defendant was not present when the shooting occurred. Evidence that merely impeaches or contradicts trial testimony will typically not be of such conclusiveness as to warrant postconviction relief. *Id.* (citing *Collier*, 387 Ill. App. 3d at 636-37). We find this to be the case here.

¶ 17 Defendant next contends that the circuit court failed to apply the more lenient formulation of the *Strickland* test as articulated in *People v. Tate*, 2012 IL 112214, when considering and dismissing his claims of ineffective assistance of trial counsel. A petition

alleging ineffective assistance of counsel is assessed under a "more lenient formulation" of the well-known two-part test articulated in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *Tate*, 2012 IL 112214, ¶ 19. Specifically, a petition alleging ineffective assistance may not be summarily dismissed if (1) it is "*arguable*" that counsel's performance fell below an objective standard of reasonableness, and (2) it is "*arguable*" that defendant was prejudiced thereby. (Emphases in original.) *Id.* (quoting *Hodges*, 234 Ill. 2d at 17).

¶ 18 Because our review of the dismissal order entered by the circuit court is *de novo*, we may nonetheless affirm the summary dismissal of a postconviction petition on any proper ground, notwithstanding the rationale provided by the circuit court. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003). In this case, however, defendant, or more precisely private counsel, offers no citation to relevant authority or further argument on these claims of ineffective assistance of counsel aside from a single sentence: "The trial court in the instant matter did much more than take a 'quick look' at the record and in fact made observations and deductions which went far beyond fact finding and were indeed arguments usually found and reserved for second and third stage post conviction procedures." Under these circumstances, we find that defendant has forfeited these claims by failing to comply with Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016). *People v. Macias*, 2015 IL App (1st) 132039, ¶ 88.

¶ 19 CONCLUSION

¶ 20 For the reasons stated, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's postconviction petition.

¶ 21 Affirmed.