2018 IL App (1st) 151950-U

No. 1-15-1950

Order filed May 8, 2018

Second Division

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 7768
	)	
GEORGIO GAINES,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Neville and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition reversed and remanded for second stage proceedings.

¶ 2 Defendant Georgio Gaines appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that the trial court erroneously dismissed his petition where he made an arguable claim of actual

innocence by providing witness affidavits that exonerated him. For the following reasons, we reverse and remand for second stage proceedings under the Act.

¶ 3 Following a jury trial, defendant was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), and sentenced to 50 years' imprisonment. We set forth the facts of the case in defendant's direct appeal (*People v. Gaines*, 2015 IL App (1st) 113533-U), and we recite them here to the extent necessary to our disposition.

¶ 4 Defendant was tried in a joint jury trial with codefendant Frederick Smith for the murders of Carlton Hamilton and George Fletcher.[1] He was 15 years old at the time of the murders and was tried as an adult pursuant to the automatic transfer provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-130 (West 2006)). The evidence at trial established that Hamilton had been murdered at approximately 6:30 p.m. on August 9, 2006, and Fletcher had been murdered at approximately 1 a.m. on August 10, 2006. Chicago police detective Kevin Scott testified that he found a "burned out" green Mercury minivan in an alley at 950 East 86th Street on the morning August 10, 2006.

¶ 5 Kathy Ross testified that Fletcher was her fiancé, and he had a drug problem. On August 10, 2006, Ross learned that Fletcher had been murdered, and her 1993 green Mercury van, which Fletcher had been driving, had been burned.

¶ 6 Spencer Williams testified that he remembered little about the events that took place on August 9, 2006, concerning Hamilton's death. Williams could not recall whether Hamilton was shot and killed or whether he was present when Hamilton was killed. He later testified he gave aid to Hamilton after he was shot multiple times and was present when Hamilton died. Williams

[1] Codefendant Smith is not a party to this appeal.

could not recall seeing a van drive past the scene. He further could not recall how he arrived at the police station, nor could he recall looking at pictures or speaking with police officers and an assistant State's Attorney. Williams did not remember giving a statement, testifying before the grand jury on September 6, 2006, or viewing two line-ups. Although Williams recalled testifying at a hearing on October 5, 2010, he could not recall the substance of his testimony.

¶ 7 At the time of trial, Williams was incarcerated on an armed habitual criminal conviction and had a prior burglary conviction. He recalled writing letters to the State's Attorney's office and various judges while his case was pending. He acknowledged his signature on letters requesting a reduced sentence or work release and threatening not to testify in defendant's trial if he did not receive work release. He acknowledged that he did not receive work release and that it would have been beneficial to his burglary case if he told police he had information regarding Hamilton's murder, but claimed he just wanted to clean up violent crimes in his community.

¶ 8 Chicago police detective Kathleen Chigaros testified that she spoke on the scene with Williams shortly after Hamilton's shooting. Williams informed her that he had been walking nearby when he observed a green minivan approaching. The van slowed down, and defendant and Smith started shooting from the vehicle. Williams believed a third person named Winston was also in the van. Williams then observed Smith and defendant exit the van and approach Hamilton. He heard someone yelling "finish him, finish him," and then saw Smith fire additional shots at Hamilton. Smith and defendant drove away in the van.

¶ 9 Assistant State's Attorney (ASA) Donna Norton testified that, on September 5, 2006, she took a handwritten statement from Williams. Williams' statement was admitted into evidence, and Norton read it aloud to the jury. Williams stated that he was walking when he observed

Hamilton and Maurice Barbee standing on South Cornell Avenue. He observed a green Mercury minivan approach, and defendant was hanging out of the front passenger window holding a handgun. When the van approached Hamilton, defendant fired several shots and Hamilton fell to the ground. While defendant was shooting, the van's sliding door opened and someone fired several additional shots. Williams ran into a gangway and observed the scene from behind a fence. He saw Smith standing over Hamilton holding a handgun and someone inside the van yelled, "Finish him. Finish him." Smith fired three additional shots, and then returned to the van, which drove away slowly. Williams again saw defendant and Smith inside the van.

¶ 10 The trial court admitted a transcript of Williams' grand jury testimony, which ASA Francisco Lamas read to the jury. Williams' grand jury testimony was substantially consistent with his handwritten statement. A court reporter read portions of Williams' testimony from an October 5, 2010, hearing, which was also consistent with his grand jury testimony and handwritten statement.

¶ 11 Chicago police detective James Braun testified that, at the scene, Williams identified Smith and defendant as Hamilton's shooters and stated that he believed Winston Gibbons was the third person with them. Williams identified Smith and defendant in two photographic arrays, and later identified both in separate lineups.

¶ 12 Maurice Barbee acknowledged that he had prior convictions for possession of a stolen motor vehicle, driving under the influence of alcohol, and driving on a suspended license. He testified that, on August 9, 2006, he was talking to Hamilton outside on South Cornell at approximately 6:30 p.m. He observed a green van approaching, and Smith was in the front passenger seat aiming a machine gun. Barbee ran to the side of a house and heard four or five

shots. However, he could not see what occurred. Following the shots, Barbee emerged from the side of the house and observed Hamilton on the ground. Smith and another person, whom he could not see, exited the van. Smith was holding a gun. Barbee heard someone inside the van say, "finish him" and watched Smith stand over Hamilton. Barbee ran back toward the house and heard several additional shots. He eventually returned to the street and saw Hamilton on the ground.

¶ 13 Barbee did not speak with police until the following day. He identified Smith as the shooter and picked Smith out of a lineup. Barbee identified photos of the burned van as the van that Smith was in on the day in question. Detective Braun testified that Barbee was unable to identify defendant in a photographic array, but stated that Barbee had a better view of Smith.

¶ 14 Ralph Jones testified that he and Anthony Williams (Anthony) lived at 8241 South Drexel Avenue in August 2006. At approximately 7:30 p.m. on August 9, Jones returned home to find Fletcher inside his apartment. Jones had previously gotten high with Fletcher, but did not know how Fletcher got inside his apartment. Fletcher appeared anxious and repeatedly looked out the window. Macon entered the apartment through the back door around 8 p.m. and then left with Anthony. Anthony returned after 15 or 20 minutes, and Macon returned 15 to 20 minutes after Anthony. Macon's hand was red and blistered. Jones gave him some ice, and Macon fell asleep at the table.

¶ 15 At approximately 1 a.m., defendant, Smith, and Gibbons entered the apartment. Fletcher and Smith were arguing. Jones observed something sticking out of Gibbons' sweatshirt and that defendant had a .9-millimeter gun. Smith asked Fletcher, "Why you worried about that raggedy a*** van? I just got jacked for my money and my dope." Smith then stated, "We gonna take care

of you, man. We gonna take care of you. We got you, man. We gonna take care of you. We got you." Smith went on to say, "You all take care of him, man." Defendant, Fletcher, and Gibbons went outside.

¶ 16 Shortly thereafter, Jones heard four or five gunshots, and defendant and Gibbons ran inside the apartment. Jones asked, "Why you all run back up in here after that[?]" and defendant responded, "Didn't nobody see us, man." Defendant told Smith, "It's done, man." Defendant had a pistol under his sweatshirt and half of the gun was alongside his leg.

¶ 17 Jones acknowledged that he used heroin and crack and that he had a prior retail theft conviction. He did not mention defendant when he spoke with detectives on August 12, 2006, but later told them about defendant when he was in jail and spoke with detectives on September 21, 2006. Jones did not call the police after a neighbor told him that Fletcher was dead outside his door because it would not have been safe for him "to be talking." The morning after the incident, he received a call from someone who told him that Fletcher was missing.

¶ 18 Detective Braun testified that he went to Jones' residence on August 12, 2006, for an interview. Jones appeared to be afraid and provided short answers. Braun spoke with Jones again on September 21, 2006, after learning Jones was in jail. During that conversation, Jones was "very forthcoming" and gave names of the people that were in his apartment the night of the incident.

¶ 19 Pierre Macon acknowledged that he was incarcerated at the time of trial and had prior convictions for residential burglary and criminal drug conspiracy. He testified that he lived near Jones and sometimes went to his apartment, but denied being there on August 9, 2006. Macon denied ever seeing Anthony, Gibbons, Fletcher, or Smith at Jones' apartment. He also denied

seeing the men and defendant in the alley behind Jones' apartment on August 9, 2006. Macon acknowledged that his hands were burned on August 9 and 10, but denied burning the van.

¶ 20 Macon testified that the police picked him up at court in 2007 and forced him into an "interrogation room." He denied telling detectives that he saw Anthony, Smith, and defendant in the van. Macon further denied telling detectives that Smith offered him money to burn the van and that he burned himself in the process. He acknowledged that he gave a handwritten statement to an ASA, but denied making many of the statements therein, claiming the police forced those statements.

¶ 21 Macon did acknowledge making the following statements to the ASA. He agreed to burn the van because he wanted money and was afraid of Smith. Anthony drove him to 85th Street, and he lit the van on fire, burning his hand and face by doing so. He then returned to Jones' apartment and observed Fletcher, who was upset. Macon was in pain so he lay down for three hours. Upon waking, he observed Smith, defendant, Fletcher, Jones, Gibbons, and Anthony in the apartment. Defendant and Gibbons each held a gun, and went into a room and closed the door. He heard Fletcher and Smith talking. Fletcher left at some point.

¶ 22 Macon acknowledged testifying to the following before a grand jury on January 10, 2007. When he first went to Jones' apartment, Anthony, Smith, and defendant got out of Fletcher's green van. Anthony was driving, Smith was in the passenger seat, and defendant was in the backseat. Macon returned to Jones' apartment at approximately 8 or 9 p.m., and defendant, Anthony, Smith, and Gibbons were in the alley with Fletcher's green van. Smith asked Macon to burn the van, and Anthony and Macon drove to 84th Street and Ingleside Avenue, where Macon lit the van on fire. Macon thereafter returned to Jones' apartment and fell asleep. When he awoke

several hours later, defendant, Smith, Fletcher, Jones, and Gibbons were in the apartment. Smith told Fletcher that his van had stopped at 78th Street and Western Avenue, but Smith would "take care of him in one hot second." Smith then instructed defendant and Gibbons to "take care of him" and motioned with his head toward the door. Fletcher, defendant, and Gibbons left the apartment, and both defendant and Gibbons were holding guns. After three minutes, Macon heard seven or eight shots. Shortly thereafter, defendant and Gibbons returned to the apartment and went into Anthony's room and shut the door. Fletcher was not with them.

¶ 23 On cross-examination, Macon testified that his memory was fresher when he spoke with detectives in September 2006. At that time, he did not mention defendant being involved in the shootings. When he spoke with detectives in January 2007, he was questioned for more than 10 hours. The detectives told him that his September 2006 story was not good enough, and they threatened to charge him with arson and Fletcher's murder. They further told Macon that if he told them what they wanted to hear, he could go home. Macon maintained that he signed the written statement because of his background, the police officers' statements, and his fear of being imprisoned. Macon was never charged with arson or murder.

¶ 24 ASA Geraldine D'Souza read aloud the following portions of Macon's written statement. Macon stated that on the afternoon of August 9, 2006, he was outside Jones' apartment and observed Anthony driving Fletcher's van with Smith in the passenger seat and defendant in the backseat. Macon left the apartment and returned around 8 or 9 p.m. When he returned, Macon saw Fletcher, who was upset that his van had been gone for so long. Macon lay down, and when he awoke, Smith, defendant, Fletcher, Jones, Gibbons, and Anthony were in the apartment. Smith told Fletcher that, "[t]he van stopped on Western, but we're going to take care of you right

now." Smith subsequently instructed defendant and Gibbons to "Go take care of him, man," and motioned to the door with his head. Fletcher, defendant, and Gibbons left. Approximately three minutes later, Macon heard seven or eight gunshots, and defendant and Gibbons returned to the apartment, each holding a gun. They went inside a bedroom and closed the door. When Macon asked Smith for money, Smith replied, "No you ain't getting nothing. Get out of 82nd or I'll do something to your b*** a*** and your b*** a*** family."

¶ 25 Detective Ambrose Resa testified that, on September 5, 2006, when he interviewed Macon, he observed what appeared to be a burn on Macon's hand and discoloration on his face. No one threatened to charge Macon with murder, arson, or any other crimes during the interview.

¶ 26 Detective Braun also testified that he observed burns on Macon's hand, arm, and face on September 5, 2006. Braun spoke with Macon again on January 8, 2007, and he provided more information. Braun did not threaten to charge Macon with any crimes, but he confronted Macon with information that indicated Macon burned the van.

¶ 27 Chicago police officers Mark Hein and Emmet McClendon testified that they arrested defendant at around 11:45 p.m. on September 4, 2006, at a residence on South Escanaba Avenue. Sergeant Waller knocked on the door of the residence and announced his office. Both Hein and McClendon observed defendant in the front window. McClendon saw that he was holding a blue steel weapon, and someone said, "he's got a gun." Defendant left the window, and the door opened. The officers entered and found defendant in the kitchen with his hands up. Defendant told the officers not to shoot and stated that the gun was in the garbage can. McClendon detained defendant, and Hein recovered a semi-automatic handgun from the garbage. The gun's magazine contained 11 live rounds and 1 in the chamber.

¶ 28 Forensic investigator Carl Brasic testified that he processed the Fletcher crime scene. He found 11 fired cartridge cases, fired bullets, and bullet fragments. Seven of the cartridge cases were .40-caliber cases and four were .9-millimeter cases, which indicated that at least two guns were used. Forensic testing revealed that the four .9-millimeter cases were fired from the gun recovered from defendant.

¶ 29 The parties stipulated that, if called, medical examiner Kendall V. Crowns would testify that he examined Fletcher's body and his cause of death was multiple gunshot wounds. The manner of death was homicide. Crowns would further testify to the wounds Fletcher sustained and the bullet and jacket fragments recovered from his body. He would identify certain photographs as depicting Fletcher's wounds and the recovered jacket and bullet fragments.

¶ 30 For the defense, Dominique Jackson testified that, on September 4, 2006, she was at her mother's home on South Escanaba with her mother, defendant, her mother's partner, and defendant's young cousin. Defendant had been living "[o]ff and on" at her mother's residence. At approximately 11:45 p.m., Jackson and defendant were in the kitchen when she heard a "loud banging" at the front door. The police entered through the front and back doors. The officers asked about a gun and searched the apartment. Jackson eventually told the police that the gun was in the garbage can. She stated that Gibbons brought the gun to her mother's house the week prior and gave it to defendant, who put it in the garbage can.

¶ 31 The jury found defendant guilty of first degree murder of Fletcher, but not guilty of the murder of Hamilton. The court subsequently sentenced defendant to 50 years' imprisonment.

¶ 32 On direct appeal, defendant argued that the automatic transfer provision of the Juvenile Court Act was unconstitutional, the trial court abused its discretion by overruling defense

objections to certain autopsy photographs, and his 50-year prison sentence was excessive. We affirmed defendant's conviction and sentence on direct appeal. *Gaines*, 2015 IL App (1st) 113533-U.

¶ 33 On February 15, 2015, while his direct appeal was pending, defendant mailed to the court a *pro se* postconviction petition. In his petition, defendant claimed that newly discovered evidence, in the form of witness affidavits, supported his claim of actual innocence. He alleged the State's witnesses at trial were questionable, and denied being involved in Fletcher's murder.

¶ 34 In support of his petition, defendant attached the affidavits of Winston Gibbons, Anthony Williams, and Brittney Worship. In his affidavit, Gibbons averred that defendant "had no knowledge or nothing to do with the murder" of Fletcher. Gibbons further averred that he "and an unknown accomplence [*sic*] murder George Fletcher." Several days prior to defendant's arrest, Gibbons went to Rhonda Jackson's apartment and told defendant and Dominique Jackson to hold onto a .9-millimeter handgun. Gibbons stated he was coming forward because it "was the right thing to do."

¶ 35 Anthony Williams, in his affidavit, stated,

> "On August 9, 2006 [defendant] was never at 8241 S. Drexel I just said that because the police said they was going to lock me up for murder so I told them that he was so they would lock me up for murder and I never saw him in George Fletcher van I just said that because I knew that that's what they wanted to hear and I feel bad about what I didn't mess up the next man life."[2]

[2] Based on his affidavit, it appears that Anthony Williams spoke with police prior to trial. However, he did not testify in defendant's trial.

¶ 36 In her affidavit, Brittney Worship averred that she was an eyewitness to Fletcher's murder. She lived a block away from where the murder occurred and observed Gibbons and "an unknown accomplice" chasing Fletcher down the street while shooting at him. She further averred that "the unknown accomplice was not [defendant]. [Defendant] was not a participant nor was he even around when [she] eyewitnessed [*sic*] this murder." Worship stated she did not come forward as a witness sooner because if she had been "labeled as a snitch by the gangs [she] would surely die." She moved out of her neighborhood and her safety was no longer "in question."

¶ 37 On May 4, 2015, the trial court entered an order summarily dismissing defendant's postconviction petition, finding defendant failed to demonstrate a colorable claim of actual innocence, and therefore, his claim was frivolous and patently without merit. The trial court found that the witnesses' affidavits failed to support a claim of actual innocence. With regard to Gibbons' affidavit, the trial court reasoned his proposed testimony was not newly discovered because Gibbons was a codefendant in defendant's trial proceedings and pled guilty to conspiracy to commit murder based on a factual basis which identified defendant as Fletcher's killer. As to Anthony Williams' affidavit, the court found his proposed testimony irrelevant to defendant's conviction because it pertained to Hamilton's murder, of which defendant was acquitted. With respect to Brittney Worship's affidavit, the court found her proposed testimony was not of such a conclusive character that it would likely change the result on retrial. This appeal followed.

¶ 38 On appeal, defendant asserts that the trial court erred by dismissing his petition at the first stage of proceedings because he set forth the gist of a meritorious claim of actual innocence

based on the newly discovered evidence of three witnesses, two of whom would completely exonerate him. We address each affidavit in turn.

¶ 39 The Act allows criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). At the first stage of postconviction proceedings, the trial court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition may be summarily dismissed as "frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges,* 234 Ill. 2d 1, 11-12 (2009); *People v. Tate,* 2012 IL 112214, ¶ 9. A claim has no arguable basis when it is based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as those that are fantastic or delusional. *People v. Brown,* 236 Ill. 2d 175, 185 (2010).

¶ 40 To survive the first stage, a petition need only present the gist of a constitutional claim. *People v. Allen*, 2015 IL 113135, ¶ 24. Presenting a "gist" of a constitutional claim is a low threshold, and only limited detail is necessary for the petition to proceed beyond the first stage of postconviction review, as opposed to setting forth a claim in its entirety. *Hodges,* 234 Ill. 2d at 9; *People v. Williams,* 364 Ill. App. 3d 1017, 1022 (2006). We review the summary dismissal of a petition *de novo. Hodges*, 234 Ill. 2d at 9.

¶ 41 The wrongful conviction of an innocent person violates due process under the Illinois Constitution and, thus, a freestanding claim of actual innocence is cognizable under the Act "and should be resolved as any other brought under the Act." See *People v. Washington,* 171 Ill. 2d 475, 489 (1996). Therefore, to succeed on a claim of actual innocence, a petitioner must present

evidence that is (1) newly discovered, (2) material and noncumulative, and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96 (citing *Washington,* 171 Ill. 2d at 489). Evidence is newly discovered if it was discovered after trial and the defendant could not have discovered it sooner through due diligence. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009).

¶ 42 In this case, we find that defendant's postconviction petition and corresponding affidavits were sufficient to present the gist of a claim of actual innocence. The affidavits set forth material and noncumulative claims which, taken as true, suggest that defendant did not participate in the murder of Fletcher with Gibbons. Both Worship and Gibbons averred that defendant was not involved in Fletcher's murder. Gibbons, who did not testify at defendant's trial, averred that he murdered Fletcher with an "unknown accompl[ice]" and defendant had no knowledge of the murder. He further averred that he told defendant and Dominique Jackson to hold onto the .9-millimeter handgun. The latter part of his affidavit is corroborated by Jackson's testimony at trial. The contents of Gibbons' affidavit, therefore, qualifies as newly discovered evidence because it was not available until Gibbons came forward after trial. Moreover, defendant could not have discovered Gibbons' statement earlier because no amount of due diligence could have forced Gibbons to violate his fifth amendment right against self-incrimination against his will. See *People v. Molstad*, 101 Ill. 2d 128, 134-35 (1984) (affidavits of codefendants stating defendant was not present at the time of the crime constituted newly discovered evidence where purported testimony would have prejudiced codefendants at trial and no amount of due diligence could have forced them to violate their fifth amendment rights).

¶ 43 Worship averred that she witnessed Gibbons and an unknown accomplice murder Fletcher, but did not see defendant near the scene. There were no eyewitnesses at trial, and Worship's affidavit suggests that she actually witnessed the murder. Thus, Worship's averments were material and noncumulative. Further, Worship averred that she purposely did not come forward with her knowledge of the crime because she feared for her safety while she lived in Jones' neighborhood. Because Worship never came forward and, based on the record before us, appears to have been completely unknown to everyone prior to her sworn affidavit, her purported testimony constituted new evidence that could not have been discovered at the time of trial.

¶ 44 Finally, Williams' affidavit raises further doubt regarding whether defendant was present at Jones' apartment on the day of the murder. Taken together with the other affidavits and the dubious and often inconsistent trial testimony, we find that defendant's petition presents newly discovered evidence that would probably change the result on retrial. Accordingly, we find that defendant presented the gist of a claim of actual innocence, and his postconviction petition, therefore, should proceed to the second stage of proceedings under the Act.

¶ 45 In reaching this conclusion, we reject the State's contention that the contents of Gibbons' affidavit is rebutted by the factual basis of his guilty plea. Regardless of the factual basis for the plea, it is not contained within the record on appeal, and we therefore decline to consider it. See *People v. Brown,* 249 Ill. App. 3d 986, 994 (1993) (appellate court will not consider matters outside the record).

¶ 46 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand for proceedings consistent with this order.

¶ 47 Reversed and remanded.