2011 IL App (2d) 091077-U
No. 2—09—1077
Order filed August 17, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. NELSON MUNOZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 97—CF—2352 Honorable Helen S. Rozenberg, Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

Held: The trial court properly denied defendant's postconviction petition asserting newly discovered evidence of actual innocence: the evidence was not newly discovered, as defendant did not show that he could not have discovered it earlier, and the evidence was not conclusive, as it consisted of hearsay and other questionable testimony.

¶ 1 Defendant, Nelson Munoz, appeals the trial court's order denying, after an evidentiary hearing, his postconviction petition. Defendant contends that he produced conclusive, newly discovered evidence of his actual innocence. We affirm.

¶ 2 On August 26, 1997, Justin Gordon shot and killed Mario Lara in Bedrosian Park in Waukegan. Defendant was charged as an accomplice in Lara's murder.

¶ 3 At defendant's jury trial, Jason Banks testified that, on August 26, 1997, he was 13 years old and was playing basketball in Bedrosian Park. He saw defendant, whom he recognized, and another Hispanic male get out of a car and enter the park. Lara drove by the park and defendant began "jumping around" and shouting that he had shot at Lara before.

¶ 4 Banks testified that, immediately after seeing Lara, defendant approached Gordon near the park's entrance. Defendant reached into the belt of his pants and handed Gordon a gun. Gordon cocked the gun and placed it in his pants. Later, as Banks was riding his bike home, he saw Gordon approach Lara's car and fire five shots into it. Lara slumped back into the seat.

¶ 5 Shannon Soto Mayor testified that on August 26, 1997, he was also 13 years old. On August 26, 1997, he was playing basketball with Banks when he saw two Hispanic men approach an African-American man. One of the Hispanics passed a gun to the African-American man, who then walked toward the car in which Lara was riding. Although Soto Mayor could not identify defendant in court, the State introduced evidence that, six days earlier, Soto Mayor had identified defendant from a photo array as the man who handed the gun to the shooter.

¶ 6 Detective Brian Hanna testified that he interviewed defendant in connection with the shooting. After being read his *Miranda* rights, defendant agreed to talk, but refused to sign a statement. Defendant said that he encountered Gordon at Bedrosian Park. Defendant saw Lara driving by and recognized him as a member of a rival gang. Gordon asked defendant if he had a gun. Defendant took a gun out of his waistband and gave it to Gordon. He saw Gordon approach the

victim's car and point the gun into it. He heard several shots. Later, Gordon came by defendant's house, returned the gun, and asked him to get rid of it.

¶ 7 The jury found defendant guilty of first-degree murder and the trial court sentenced him to 46 years' imprisonment. On direct appeal, this court affirmed. *People v. Munoz*, No. 2—98—0387 (2000) (unpublished order under Supreme Court Rule 23).

¶ 8 In 2008, defendant filed a postconviction petition, arguing that newly discovered evidence cast doubt upon his guilt. Defendant also asserted that trial counsel was ineffective. Attached to the petition was the affidavit of Kevin Anderson. The affidavit is handwritten and difficult to read, but appears to state as follows:

"On Aug. 26, 1997 around 6:30 p.m. I was at the park at Utica & Liberty playing ball. While there I seen [*sic*] the guy I knew by the name of Benny Moralas [*sic*]. I noticed him around the park around 7:00 p.m. He was standing at the corner of Liberty & Utica watching the scene closely. I didn't realize what was happening at the time, but shortly after I seen him some gun shoots [*sic*] rang out. I didn't see no Nelson Munoz period anywhere at any of these times. All I seen was Benny Moralas [*sic*] before the shooting and shortly before the shooting started. Again I didn't see the trigger move and Nelson Munoz was not there or over there, he was standing by the fence. I observed Benny Moralas [*sic*] wearing black watching the scene right before the shooting. There were no threats or promises made to me to write this. This is what I observed."

¶ 9 In his own affidavit attached to the petition, defendant averred that his trial counsel never mentioned Anderson as a witness and that defendant became aware of Anderson only in November 2007.

¶ 10 The trial court advanced the petition to a third-stage hearing. At the hearing, Anderson testified that he was at Bedrosian Park on August 26, 1997, but did not see the shooting. He did not see defendant give a gun to Gordon. He did not see Benny Morales give a gun to Gordon. Anderson responded to most other questions by invoking his fifth-amendment rights.

¶ 11 Defendant also called Rashirley Santiago, although she was not mentioned in the petition. She testified that in July 2009 she picked up defendant's brother, Milton Munoz, and drove to defense counsel's office. Other than acknowledging that she lived in Waukegan and had three children, she answered additional questions by invoking her fifth-amendment privilege. She refused to say what she told defense counsel in July 2009.

¶ 12 Milton Munoz testified that, while he was at a party, Santiago sent him a text message indicating that she had some information about his brother's case. He later talked to her and she stated that she would be willing to help his brother. Sometime in July 2009, she picked him up at his home and they drove to defense counsel's office. According to Milton Munoz, Santiago told defense counsel that, on the day of the shooting, her brother, Diara Morales, and Benny Morales went to the park. They stopped and her brother got out of the car. Diara and Benny also got out. According to Munoz, Santiago "said that she seen Benny give Justin the gun and gunshots—everybody got in the car and left." Santiago then apologized, saying that she could not believe that no one had come forward before.

¶ 13 The trial court granted the State's motion for a directed finding. Defendant timely appeals.

¶ 14 Defendant contends that, taken together, the testimony of Anderson, Santiago, and Milton Munoz establishes that Benny Morales, and not defendant, handed the gun to Gordon on the day of the shooting. Defendant argues that the only eyewitness testimony at his trial came from two 13-

year-olds, one of whom recanted his previous identification of defendant, and that, given the weakness of the State's case, the new evidence would likely have changed the outcome.

¶ 15 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122—1 *et seq*. (West 2008)) provides a defendant a means to challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield,* 217 Ill. 2d 177, 183 (2005)). To be entitled to postconviction relief, a defendant must show that he or she has suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122—1(a) (West 2008). The Act creates a three-stage process. *People v. Gomez*, 409 Ill. App. 3d 335, 338 (2011). If the petition advances to the third stage, the trial court conducts an evidentiary hearing. 725 ILCS 5/122— 6 (West 2008); *People v. Edwards,* 197 Ill. 2d 239, 246 (2001). When a petition is advanced to a third-stage evidentiary hearing, where fact-finding and credibility determinations are involved, we will not reverse a trial court's decision unless it is manifestly erroneous. *People v. Beaman,* 229 Ill. 2d 56, 72 (2008); *Pendleton,* 223 Ill. 2d at 473.

¶ 16 The due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence. *People v. Morgan,* 212 Ill. 2d 148, 154 (2004); *People v. Washington,* 171 Ill. 2d 475, 489 (1996). The evidence in support of the claim must be newly discovered; material and not merely cumulative; and " 'of such conclusive character that it would probably change the result on retrial.' " *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009), quoting *Morgan*, 212 Ill. 2d at 154. To be considered "newly discovered," evidence must have been not only unavailable at trial, but of such nature that it could not reasonably have been discovered earlier. *Morgan*, 212 Ill. 2d at 154.

¶ 17 Initially, defendant has not shown that the evidence he presented was truly newly discovered. Although defendant's affidavit establishes that he did not in fact know about it before trial, he has done nothing to show why he could not have discovered it earlier. Anderson apparently knew defendant at the time of the shooting—as he claimed to have recognized him in the park and thus it is not clear why he waited nearly 10 years to come forward, or why he suddenly decided to do so in 2007. See *People v. Cunningham*, 267 Ill. App. 3d 1009, 1017 (1994) (affidavit not admissible as newly discovered evidence where, *inter alia*, defendant did not demonstrate his diligence in obtaining it).

¶ 18 Moreover, we agree with the State that the evidence was not conclusive. Conclusive evidence is that which would " 'probably change the result on retrial.' " *Ortiz*, 235 Ill. 2d at 333. The evidence here fell far short of that standard. At the hearing, Anderson substantively answered only a few questions. He responded to most questions by invoking the fifth amendment. In his brief, defendant relies on Anderson's affidavit to supplement his testimony. The State does not object to this and, in fact, relies on Anderson's affidavit in its own argument. Thus, we consider both sources of information.

¶ 19 Anderson testified at the hearing that he did not see defendant hand Gordon a gun. However, he also did not see Benny Morales, or anyone else, hand Gordon a gun. In his affidavit, he averred that he "didn't realize what was happening at the time." In other words, Anderson simply was not paying much attention until he heard the gunshots. Anderson's testimony that he did not see defendant, or anyone else, hand the gun to Gordon does not contradict the eyewitness accounts, or defendant's confession, that defendant gave Gordon the gun.

¶ 20 Defendant also argues that it is a fair inference from Anderson's affidavit that Anderson saw defendant in a different area of the park from where the shooting occurred. Thus, at a minimum, Anderson's affidavit provided defendant an alibi. We disagree.

¶ 21 Anderson appears to contradict himself on this point. After initially stating that he did not see defendant "anywhere at any of these times," he states that, immediately the gunshots drew his attention, he saw defendant "standing by the fence." In any event, as the trial court pointed out, the affidavit gives no indication of where "the fence" was in relation to where the shooting occurred. Presumably, it was close by, or else Anderson could not plausibly claim to have witnessed the immediate aftermath of the shooting and simultaneously seen defendant in a completely different area of the park. Thus, Anderson's affidavit does not conclusively demonstrate that defendant was not present near the scene of the shooting.

¶ 22 Defendant also relies on the testimony of Santiago and Milton Munoz. Neither of these witnesses helps defendant. As noted, Santiago testified to virtually nothing of substance at the hearing. Other than admitting that she lives in Waukegan, has three children, and drove to defendant's attorney's office in July 2009, she answered virtually all other questions by invoking the fifth amendment. Clearly, we cannot say that this testimony conclusively proves defendant's innocence.

¶ 23 Defendant's brother, Milton Munoz, testified to the substance of what Santiago purportedly told defendant's attorney. However, although the trial court evidently gave defendant the benefit of the doubt by overruling the State's objection, this testimony would appear to be hearsay in its truest form. See *People v. Williams*, 238 Ill. 2d 125, 143 (2010) (hearsay rule generally prohibits introduction of an out-of-court statement offered to prove the truth of the matter asserted).

Generally, newly discovered evidence consisting of hearsay does not warrant relief in a collateral attack on a conviction. *People v. Cole*, 215 Ill. App. 3d 585, 587 (1991). Here, defendant's brother, who was obviously biased, testified to the purported content of a third party's statement. We cannot say that the trial court manifestly erred by finding that this evidence was not conclusive.

¶ 24 The judgment of the circuit court of Lake County is affirmed.

¶ 25 Affirmed.