2012 IL App (2d) 100903-U
No. 2-10-0903
Order filed April 9, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. AVERY L. BINION, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 99-CF-2071 Honorable Timothy Q. Sheldon, Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

Held: The trial court did not err in its first-stage dismissal of defendant's successive postconviction petition alleging actual innocence.

¶ 1 Following a jury trial, defendant, Avery L. Binion, was convicted based on accountability of three counts of first-degree murder (720 ILCS 5/9-1(a)(2) (West 1998)), one count of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(2) (West 1998)), and one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 1998)). He was sentenced to concurrent terms of life imprisonment and 20 years' imprisonment.

¶ 2 Defendant now appeals from the first-stage dismissal of his third petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/art. 122 (West 2010)). Defendant argues that the petition sufficiently alleges the gist of a claim of actual innocence based on newly discovered evidence that some of his co-defendants were recanting their testimony against him. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant's first jury trial resulted in a mistrial due to a deadlocked jury. Defendant's second trial took place in May 2002. We provided a detailed recitation of the testimony in defendant's direct appeal. *People v. Binion*, No. 2-03-0453 (2005) (unpublished order under Supreme Court Rule 23). Basically, according to the evidence presented by the State at that trial, defendant was the Elgin gang leader of the Black Disciples (BDs). On August 15, 1999, defendant had a meeting at his house with gang members Sherman Williams, Willie Buckhana, and Jeff Lindsey. Defendant distributed guns to them. The following day, on August 16, 1999, defendant had another meeting at his house with the aforementioned gang members as well as gang members Willie McCoy, Chris Smith, and Kewhan Fields. Defendant discussed how individuals living in apartment 23 of the Schoolhouse Apartments in Elgin were giving fellow gang member Willie Fullilove a hard time about a safe Fullilove had stolen from them. Defendant gave Fields a gun, and he sent the armed gang members to confront apartment 23's occupants. Fullilove lived in apartment 12 of the Schoolhouse Apartments, and the men gathered at Fullilove's residence before proceeding upstairs to apartment 23. There, some of the men opened fire on individuals in and around the apartment, resulting in the deaths of Anthony Cooper, Taiwan Jackson, and Tremayne Thomas, and the injury of Corey Boey. On direct appeal, this court affirmed defendant's convictions. *Binion*, No. 2-03-0453.

¶ 5 Defendant filed a *pro se* postconviction petition in 2006. He alleged, among other things, that his trial counsel was ineffective for failing to call a series of witnesses who would have provided favorable testimony, including testimony that he was not in charge of the street gang, did not possess or pass out the guns used in the crime, was not in charge of the confrontation that led to the shootings, and was not responsible for the shootings. Defendant listed six witnesses (Frederick Neal, Eric Smith, Kewhan Fields, Cedric Sander, Quinzerick Span, and Byron Lemon) and summarized their expected testimony. Defendant included a 2003 affidavit from Fullilove stating that Fullilove did not give any weapons to defendant on August 14 or 15, 1999, nor did Fullilove make any statements with respect to weapons being sent to the BDs or anyone else. The trial court dismissed defendant's postconviction petition, and this court affirmed. *People v. Binion*, No. 2-06-0542 (2008) (unpublished order under Supreme Court Rule 23).

¶ 6 In 2008, defendant filed a *pro se* motion for leave to file a successive postconviction petition. He alleged that Williams signed an "affidavit" (which was unsworn) stating that Williams was coerced by detectives and prosecutors to testify falsely against defendant at his trial, that there was never a meeting at defendant's house on August 15 or 16, 1999, and that defendant did not have any prior knowledge or intent of the crimes that took place at the Schoolhouse Apartments. The trial court denied defendant's motion, and this court affirmed. *People v. Binion*, No. 2-09-0206 (2010) (unpublished order under Supreme Court Rule 23).

¶ 7 Before this court resolved the appeal from the first successive petition, defendant filed a *pro se* motion for leave to file a second successive petition on June 9, 2010. That motion and accompanying petition are the subject of the instant appeal. Defendant alleged that he had cause for failing to previously raise his claims because he now had newly-obtained affidavits from Fields,

Lindsey, and Buckhana. Defendant also alleged actual innocence. In addition to attaching the newly-obtained affidavits, defendant attached a copy of Williams's affidavit that was included in defendant's 2008 petition and a copy of Fullilove's 2003 affidavit.

¶ 8 All three of the newly-obtained affidavits were dated in March 2010. Fields averred in his affidavit that: on August 15 or 16, 1999, he did not receive any weapons from defendant; he did not have a phone conversation with defendant on August 16, nor did he attend a meeting at defendant's house that day; on August 16, he never heard defendant instruct others to kill anyone, nor did he hear defendant say to go to the Schoolhouse Apartments and "take care of that business"; he was "pressured and coerced" by "Detective Sergeant Mark Brictson" into making a false statement implicating defendant; and on August 16, defendant did not have any prior knowledge "of any criminal scheme." Fields further averred that on August 16, Fullilove called people over to his apartment to talk about the problems he was having with the victims upstairs. Fields was present, and Williams and Buckhana "were the ones giving all the orders to each co-defendant if things got out of hand, by [*sic*] killing the victims in the upstairs apartment." Fields was signing the affidavit "to correct a wrong doing [*sic*] that has been done against" defendant.

¶ 9 Lindsey's affidavit was similar to Fields' affidavit. Lindsey averred that: defendant did not give him a gun on August 15 or 16, 1999; he did not receive a phone call from defendant on August 16 and did not talk to him about "a gun being brought to [defendant]"; he did not have a conversation with Williams about defendant saying to bring a gun; he did not participate in a meeting at defendant's house on August 15 or 16; on August 16, while visiting Fullilove at Fullilove's apartment, he heard Williams and Buckhana "planning and scheming, [*sic*] to kill the victims that was [*sic*] at a [*sic*] upstairs apartment"; defendant did not have any prior knowledge "of any type of

criminal planning of the murders" that took place; defendant did not help, plan, or aid Lindsey by providing him any type of weapons or advice on August 16 "to commit any criminal activity or murders." Lindsey further averred that on August 16, Fullilove called several people over to his apartment to talk about the problems he was having with the victims upstairs. Lindsey was there, and he witnessed Williams and Buckhana "conversate [*sic*] a plan, and agree to commit murder." Lindsey was signing the affidavit "to expose the truth in this matter."

¶ 10 Buckhana's affidavit stated as follows. Prior to the murders, he was approached by Elgin detectives Jeffery Adams and Sean Rafferty and asked to be an informant. They had a personal grudge against defendant. They asked Buckhana to purchase drugs from defendant so that they could get a warrant for defendant's home and send him back to prison. Buckhana refused. Regarding the shootings, Buckhana was not at defendant's home on August 16, 1999, and he did not attend a gathering or meeting there, but he was coerced by Elgin Detective Gorocowski and others to falsely say he was. He was "on DRUGS AND [WAS] A KNOWN DOPE FIEND AND DID NOT HAVE ANY KNOWLEDGE OF ANY GATHERING OR MEETING ON AUGUST 15th OR 16th, OF 1999." Those same dates, he did not see defendant pass out guns to anyone or observe any firearms being removed from a large black duffle bag at defendant's home. He was coerced to falsely say otherwise. On August 15 and 16, he also did not hear defendant say anything like " 'fuck this shit' "; " 'you all meet at Bay-Bay[1]['s] crib' "; " 'take care of yall business' "; "do what you have to do"; or " 'make sure everyone is dead.' " Police told him to use those phrases in a taped statement. He was making the affidavit to correct a wrong that had been done against defendant by fabricated, coerced statements.

[1]Bay Bay was Fullilove's nickname.

¶ 11 The trial court issued its ruling on August 16, 2010. The trial court stated that the affidavits did not provide the requisite support for an actual innocence claim because it was unlikely that they could be considered new evidence, in that all of the witnesses' identities were known to defendant since trial. Defendant did not explain why he was not previously able to obtain the affidavits. Williams' affidavit was not valid because it was not notarized. Further, the affidavits consisted primarily of recanted testimony, which was inherently unreliable, and conflicted with evidence presented at trial. For example, the affiants denied that any phone calls took place on August 15 and 16, but the appellate court noted phone records indicating that such calls were made. The trial testimony of many of the affiants was also corroborated by other witnesses who had not recanted. Fullilove's affidavit was not even a full recantation of his trial testimony.

¶ 12 The trial court further stated that even if the affidavits could be considered new and non-cumulative evidence, the evidence was not of such conclusive character that it would likely change the result on retrial. The witnesses' credibility was highly suspect because they were members of the same gang, of which defendant was their leader, and the witnesses now directly contradicted their prior testimony. There was also case law that witness recantations do not present a constitutional claim in the absence of the State lacking diligence or knowingly using false testimony. The coercion defendant alleged did not establish that the prosecution knew that the witnesses allegedly perjured themselves.

¶ 13 The trial court concluded that defendant had failed to present the gist of an actual innocence claim, and it therefore summarily dismissed his petition. Defendant timely appealed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues that the trial court erred by summarily dismissing his postconviction petition, because it states the gist of a constitutional claim of actual innocence. The Act creates a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). In the first stage, the trial court independently determines, without input from the State, whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). This is true if the petition is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record, or a fanciful factual allegation. *Id.* at 16-17. At the first stage, the petition's allegations, liberally construed and taken as true, need to present only "the gist of a constitutional claim." *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The petition needs to set forth just a limited amount of detail and does not need to set forth the claim in its entirety. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Also, at the first stage, the trial court evaluates just the petition's substantive claims and not its compliance with procedural rules. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The trial court is not allowed to engage in any fact finding or credibility determinations at this stage, and all well-pleaded facts not positively rebutted by the record are taken as true. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 23. If the petition is frivolous or patently without merit, the trial court must dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2008). Otherwise, the proceedings move on to the second stage. *Harris*, 224 Ill. 2d 115. We review *de novo* a trial court's first-stage dismissal of a postconviction petition. *People v. Shaw*, 386 Ill. App. 3d 704, 708 (2008); see also *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010) (we review *de novo* a trial court's denial of leave to file a successive postconviction petition).

¶ 16 A claim of actual innocence based on newly discovered evidence is a constitutional claim cognizable under the Act. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Such a claim is also an exception to the general rule that a defendant filing a successive postconviction petition must show cause for failing to bring the claim in the initial postconviction petition and prejudice resulting from that failure. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). To prevail on a claim of actual innocence, the evidence must be newly discovered in that it was not available at the defendant's original trial, and the defendant could not have discovered it sooner through diligence. *Morgan*, 212 Ill. 2d at 154. The evidence must also be material, noncumulative, and of such conclusive character that it would probably change the outcome on retrial. *Id.*

¶ 17 We agree with the trial court that the affidavits here do not constitute newly discovered evidence, which is required to sustain a claim of actual innocence. Defendant argues that the evidence is newly discovered because the affidavits are dated long after his trial; at the time of trial, these witnesses had implicated defendant and had not indicated that they were lying; and it is doubtful that they would have talked to the defense at that time as they had their own legal problems and several were working out deals with the State on their charges. However, even accepting defendant's statement, evidence is not generally considered newly discovered when it presents underlying facts defendant knew before the trial, though the source of those facts may have been unknown, unavailable, or uncooperative. *People v. Barnslater*, 373 Ill. App. 3d 512, 523-24 (2007). There is an exception to this rule for recantations, but this exception does not apply if a defendant had evidence available at the time of trial to show that the witness was lying. *Id.* at 524. Here, defendant presented testimony from his next-door neighbors and his live-in fiancé that they did not see Buckhana, McCoy, Lindsey, Smith, or Williams at defendant's house on August 15 or 16, 2009.

A friend of defendant's testified that he visited defendant for much of the day on August 16, 1999, and did not see Buckhana, McCoy, Lindsey, Smith, Williams, or Fields at the house. *Binion*, No. 2-03-0453, slip order at 16-18. Thus, defendant had already presented evidence intending to show witnesses were lying about gang meetings at his house on August 15 and 16, 1999, and correspondingly about his involvement in the shootings.

¶ 18 Moreover, defendant is apparently equating newly discovered evidence as evidence that was not available just at the time of the original trial, but as stated, a defendant must also show that he could not have discovered the evidence sooner through diligence. *Morgan*, 212 Ill. 2d at 154. Evidence is not considered newly discovered if it was available at a prior posttrial proceeding. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21. The defendant has the burden of showing due diligence on his part. *Id.* Here, Fullilove's and Williams's affidavits are clearly not newly discovered evidence because they were actually used in prior posttrial proceedings, those being defendant's first and second postconviction petitions, respectively. As for Fields's, Lindsey's, and Buckhana's affidavits, which are dated in 2010, defendant states that the men only recently provided him with affidavits, but defendant makes no mention of *why* he was unable to obtain the affidavits when he filed his prior postconviction petitions, or that he even sought the affidavits prior to 2010. See *People v. Harris*, 206 Ill. 2d 293, 301 (2001) (the mere fact that affidavits are dated at a time after the trial does not make the evidence newly discovered); *cf. People v. Knight*, 405 Ill. App. 3d 461, 466 (2010) (the defendant alleged that the witnesses were previously unwilling to testify and were only now willing to come forward because gangs no longer controlled the prisons). Thus, defendant failed to allege facts showing that he could not have discovered the evidence sooner, disqualifying it as newly discovered evidence and justifying the petition's first-stage dismissal.

¶ 19 We further agree with the trial court that, to the extent that defendant's allegations are based on the use of false or perjured testimony, the allegations are also insufficient. In order to raise a constitutional claim based on the use of false testimony, a defendant must allege that the State either knowingly used false testimony or at least showed a lack of diligence in allowing the use of the testimony. *People v. Brown*, 169 Ill. 2d 94, 106 (1995). Here, the affidavits themselves mention police coercion, but there are no allegations that the State knowingly used false testimony or lacked diligence in allowing certain testimony.

¶ 20 Finally, we agree with the trial court that the evidence is not of such conclusive character that it would likely change the outcome on retrial, which provides an independent basis for dismissing the petition. See *Morgan*, 212 Ill. 2d at 154. A defendant must show a fair probability that, in light of all of the evidence, including the newly discovered evidence, the fact finder would have entertained a reasonable doubt of his guilt. *People v. Manrique*, 351 Ill. App. 3d 277, 280 (2004). As the trial court noted, the recantation of testimony is regarded as inherently unreliable, and courts will not grant a new trial on such a basis except in extraordinary circumstances. *Morgan*, 212 Ill. at 155. Defendant argues that to refuse to consider any evidence that contradicts trial evidence renders a postconviction petition alleging actual innocence a toothless remedy, because the entire point is to consider evidence that by definition contradicts trial evidence. However, the issue is not that all contradictory evidence is automatically suspect, but that recantations in particular are regarded as inherently unreliable, though they will still be considered.

¶ 21 Defendant also argues that in order to conclude that the recantations were unbelievable, the court made credibility decisions on the pleadings, but in the first stage of postconviction proceedings all well-plead factual allegations must be taken as true. While we agree with the principle that all

well-plead facts must be regarded as true in the first stage, a postconviction claim must present the gist of a claim for relief which is meritorious when considered in light of the record of the trial court proceedings. *People v. Deloney*, 341 Ill. App. 3d 621, 627 (2003). Thus, while we may not strictly make credibility assessments in the first stage, a postconviction petition is subject to summary dismissal if it has no arguable basis in fact, and we must therefore assess whether the factual allegations are irrational or wholly incredible. *People v. Jones*, 399 Ill. App. 3d 341, 362-63 (2010).

¶ 22 Here, Fullilove's affidavit simply states that he did not give defendant any weapons or guns or make any statements about weapons being sent to the BDs or anyone else. Fullilove did not disavow his extensive trial testimony, in which he stated that he had spoken to defendant about stealing the safe and Fullilove's subsequent conflict with the people in apartment 23; defendant called him on August 15 and told him that a few gang members would be coming over to defendant's house the next day to discuss the safe and other issue; Buckhana called Fullilove the next morning and asked why he had not been at the meeting at defendant's house that morning; defendant called later that morning and said a few people would be coming by Fullilove's apartment, and about 10 to 15 minutes later, Williams, Smith, Fields, Buckhana, McCoy, and Lindsey arrived at Fullilove's apartment. Buckhana, who had a gun, said that "they were about to go upstairs to see if the issue at hand [regarding the safe] could be squashed." Accordingly, Fullilove's affidavit has scant effect. Williams did testify at trial that at the August 15, 1999, meeting at defendant's house, defendant showed the group guns and drugs and said that Fullilove was donating them to the gang. Williams, Lindsey, and Buckhana each took a gun. Thus, Williams attributed the statement about the guns' origin to defendant rather than Fullilove, and defendant's distribution of the guns was infinitely more significant than the origin of the guns.

¶ 23 Williams's affidavit was the sole subject of our prior order in this case. We stated:

> "Williams's affidavit merely contradicts the evidence, including his testimony and his statement to the police, that Williams received calls from defendant on August 15 and 16, 1999; that he attended the meetings those days; and that he observed various acts by defendant and others at the meetings. Evidence that merely impeaches a witness is ordinarily not so conclusive to justify postconviction relief. [Citations.] That is especially so here. Williams's assertions are so limited and so inherently implausible that it is all but certain that they would make no difference. We have difficulty imagining a reasonable jury giving them any weight." *Binion*, No. 2-09-0206, slip order at 6.

We further described the evidence at trial as "overwhelming" that defendant was the gang leader; that he held two meetings; that the safe controversy was the meetings' topic; and that the second meeting was followed directly by the arrival of gang members, excluding defendant, at the Schoolhouse Apartments, where they shot four men in apartment 23. *Id.* We noted that Matthews, Fullilove, Carlisle, and Keys all testified that they had spoken with defendant about the Fullilove controversy in the approximately 24 hours before the shootings, and this and other testimony established that defendant was the gang leader and commanded the people committing the crimes. *Id.* at 7. We stated that Williams's affidavit provided, at most, weak grounds for impeaching some of his trial testimony and statements to police, and even if a factfinder believed the few specific factual allegations, the result of defendant's trial would almost surely be the same. We concluded that defendant had therefore failed to satisfy the actual innocence test. *Id.* at 8.

¶ 24 Regarding the new affidavits by Fields, Lindsey, and Buckhana, none of these individuals testified at defendant's second trial. Their allegations would impeach Williams's testimony about:

the existence of meetings at defendant's house; defendant's act of passing out guns; and defendant's instructions to go to the Schoolhouse Apartments and confront the occupants of apartment 23. However, as we mentioned in our prior order, evidence that just impeaches a witness will typically not be of such conclusive character as to justify postconviction relief. *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008). Also, as we mentioned in the direct appeal, Fullilove's and Williams's trial testimony was corroborated, in part, by other State witnesses, those being Matthews, Carlisle, Keys, and Lucy. *Binion*, No. 2-03-0453, slip order at 24. Given that: BD gang members and individuals in apartment 23 gave testimony corroborating defendant's involvement in the dispute between Fullilove and apartment 23's occupants regarding the stolen safe; Lucy's and Fullilove's testimony corroborated Williams's trial testimony about gang meetings at defendant's house on August 15 and 16, 1999; Matthews, who lived in apartment 23, testified that defendant called him on August 16 and said that he was going to bring some guys to "holler" about the safe issue and that Matthews should stay put; Fullilove testified that defendant called on August 16 and said that a few people would be coming by Fullilove's apartment, and about 10 to 15 minutes later gang members showed up; and that it is undisputed that the gang members subsequently proceeded to apartment 23 and shot people in and around the apartment, there is little probability that the recantations of Fields, Lindsey, and Buckhana of their statements to police (which also implicated defendant) based on unspecified police coercion would cause a factfinder to entertain a reasonable doubt of his guilt. *Cf. Harris*, 206 Ill. 2d at 302 (based on overwhelming evidence of guilt, codefendants' affidavits were not of such conclusive character that they would probably change the outcome on retrial, and court affirmed second-stage dismissal). Thus, defendant's petition lacks an arguable basis that the

evidence was of such conclusive character that it would likely change the result on retrial, and the trial court did not err in dismissing it on this ground as well.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of the Kane County circuit court.

¶ 27 Affirmed.