2016 IL App (2d) 140783-U
No. 2-14-0783
Order filed September 27, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KARLONDO DUBOISE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 09-CF-838 Honorable Rosemary Collins, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition was affirmed where defendant failed to set forth an arguable claim of ineffective assistance of appellate counsel or actual innocence.

¶ 2 Defendant, Karlondo Duboise, appeals from the first-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial in January 2011, defendant was convicted of attempt first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)), and the jury returned a special verdict form finding that defendant committed the offense while armed with a firearm. The jury also found defendant guilty of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)) and being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008)). The trial court merged the aggravated battery conviction into the attempt first-degree murder conviction. Defendant was sentenced to 35 years' imprisonment on the attempt murder conviction (20 years plus a 15-year enhancement for being armed with a firearm) and 10 years' imprisonment on the armed habitual criminal conviction, to run consecutively to the attempt murder sentence.

¶ 5 Defendant's convictions arose out of the March 17, 2009, shooting and beating of the victim, Felix Harmon. The following facts were undisputed at trial. Felix was married to Brianna Harmon in 2002, and they had a son together. In 2006, while Felix was in prison, Brianna had a daughter with a man named Andrei Byrd (a friend of defendant). Felix was released from prison in 2008, and he moved back into Brianna's house on Searles Avenue in Rockford, Illinois. Animosity eventually developed between Felix and Andrei.

¶ 6 On March 17, 2009, Felix had an argument with Brianna and decided to move out of her house. His sister, Meshonte Harmon, arrived at Brianna's house around 8:30 p.m. to help him move. While Felix was loading his belongings into Meshonte's car, a white Dodge Magnum pulled up in front of Brianna's house. Andrei was driving the Magnum and defendant was the passenger. Felix went to the driver's side door of the Magnum and began fighting with Andrei. As they fought, both Andrei and Felix ended up inside the car. Felix was shot in the neck while inside the car. After Felix was shot, Andrei drove the Magnum to Karen Drive in Rockford, with defendant in the front passenger seat and Felix in the back seat. Felix was bleeding and begging

for his life. Once on Karen Drive, Felix was stripped of his clothes and beaten. When a porch light came on at a nearby house, Andrei and defendant drove away and left Felix in the road. Paramedics eventually arrived and took Felix to Rockford Memorial Hospital. When Meshonte arrived at the hospital, she identified Andrei in a photographic lineup as the driver and defendant as the passenger in the Magnum.

¶ 7 The following evidence was adduced at trial. Felix testified that Andrei was driving the Magnum and that there was a person, whom Felix did not know, sitting in the front passenger seat. While he was walking toward the car to fight Andrei, he noticed that the passenger had a small, black gun. Felix, however, could not see who the passenger was, because it was dark out. After he and Andrei began "tussling," they ended up in the Magnum, with Felix in the back seat. Felix testified that the passenger turned around, placed something "cold" under his chin, and shot him. Meshonte then unsuccessfully attempted to pull Felix out of the car. Felix further testified that while they were driving, he specifically remembered "words being said, 'Let's drive him. Let's drive him to the cornfield and kill him.' " Felix begged for his life before his throat clogged up with blood. When the Magnum stopped, both Andrei and the passenger pulled Felix out of the car, leaned him against the back passenger-side tire, jumped on him, kicked him, and hit him. Felix testified that the passenger yelled "You are going to die tonight."

¶ 8 On cross-examination, Felix acknowledged that he spoke with Detective Richard DeVlieger at the hospital that evening. Felix testified that he could not really remember what he told DeVlieger. Specifically, Felix did not recall telling DeVlieger that Andrei shot him and then pulled him into the vehicle.

¶ 9 Meshonte testified that she attempted to break up the fight by placing herself between Andrei and Felix, but she was pushed down. Andrei and Felix fell into the Magnum after one of

them flipped the other into the car. The passenger got out of the vehicle and "jump[ed] into the fight." Meshonte testified that both the driver and the passenger had guns. She saw "the butt of a gun" in Andrei's pocket, and she saw the passenger pull out a gun. Meshonte testified that she picked up a bottle off of the street and hit Andrei in the head with it; Andrei then began to fight with Meshonte in the street. As Felix attempted to exit the car, the passenger went to the Magnum's passenger door and shot him in the neck. Meshonte grabbed Felix by his leg and tried to pull him out of the car, but Andrei "ripped" her hand off the steering wheel and pushed her into the street. The passenger returned to the passenger seat and Andrei drove the car away. Meshonte testified that she attempted to chase them in her car, but she could not catch up to the Magnum.

¶ 10 Meshonte further testified that when she arrived at the hospital, she gave a statement to police officers and picked out photographs of both Andrei as the driver and defendant as the passenger. She testified that she got a good look at the passenger and would be able to recognize him if she saw him as of the date of her testimony. Nevertheless, she testified that she did not see the passenger in the courtroom. She clarified, "I'm not sure. It has been two years."

¶ 11 On cross-examination, Meshonte denied that she previously testified on direct-examination that Andrei had a gun. She testified that she only saw an "object" in Andrei's pocket. Meshonte testified that she saw defendant pull out a gun. As to her statement to police officers at the hospital on March 17, 2009, Meshonte testified that she did not tell DeVlieger that Andrei had a gun. She also testified that she gave statements to Detectives Mastroianni and Jimenez on the morning of March 18, 2009. Although she acknowledged that she told the detectives that she saw Andrei reach into his pocket and pull out a gun, she testified that that was not a true statement. She also denied that she told the detectives that Andrei shot Felix.

¶ 12 Amber Clapp (n/k/a Amber Cudia) testified that she was at her home on Karen Drive in Rockford, Illinois, on March 17, 2009. After she heard noises outside, she looked out the front door and saw two men standing over another man on the ground. She went to the edge of the driveway and saw both men hitting and kicking the victim, who was not fighting back. Amber testified that she could not see the men's faces. After she yelled at the men, they kicked the victim a few more times, got in the car, and drove away. They left the victim on the ground. Amber called 911, and the ambulance arrived a few minutes later.

¶ 13 Detective Michael McDonald testified that he took an oral statement from defendant on April 14, 2009. The following reflects McDonald's testimony regarding defendant's statement. Andrei asked defendant to accompany him to Brianna's house on March 17, 2009, to pick up his daughter. When they arrived at Brianna's house, Felix went to the driver's door and started to fight with Andrei. Andrei remained seated in the driver's seat as Felix climbed on top of him and started to throw punches. Defendant attempted to leave the car via the passenger's side door, but fell and landed "in a seated position on his rear end" outside of the car. Andrei shot Felix when defendant was outside of the car. Defendant then stood up and leaned toward the open passenger's door; Andrei pulled defendant inside the car and drove away. As they were driving, Felix was in the backseat asking for help. Andrei drove to an unknown location, pulled to the side of the road, and told defendant to exit the car. Andrei pulled Felix out of the car, stripped him, and started "stomping" on him. Defendant stood by and cried. After the porch light came on, they fled the scene and were pursued by someone from Brianna's house. Andrei pulled over and told defendant to get out and run, which defendant did.

¶ 14 The defense called Detective Richard DeVlieger to testify. DeVlieger testified that he spoke with Felix and Meshonte on the night of the incident. He testified that Felix, who was

conscious, stated that Andrei shot him and pulled him into the vehicle. DeVlieger testified that Meshonte stated that Andrei had a gun. Meshonte did not tell DeVlieger at the hospital that she saw the passenger with a gun.

¶ 15 On May 2, 2014, defendant filed a *pro se* petition under the Act alleging ineffective assistance of appellate counsel and actual innocence. Defendant claimed that appellate counsel was ineffective for failing to argue that trial counsel was ineffective on certain grounds. Specifically, defendant alleged that trial counsel was ineffective for failing to interview or call four witnesses to testify. Defendant attached his own affidavit, as well as affidavits from three of the four potential witnesses.

¶ 16 Defendant averred that he was a pretrial detainee at the Winnebago County jail between April 2009 and July 2011. During that time, three other pretrial detainees – Edward Johnson, Vincent Holmes, and Freddie Ware – told defendant that they had spoken to Andrei at the jail, and Andrei stated that defendant was not involved in the shooting of Felix Harmon on March 17, 2009. Defendant averred that he was unable to procure an affidavit from Ware, because Ware had been released from the Department of Corrections. He also averred that Randy Bowman was an eyewitness to the incident on March 17, 2009. Defendant further averred that he provided his trial counsel with the names of those witnesses in October or November 2010, but trial counsel failed to interview or call them to testify.

¶ 17 Bowman averred that, on March 17, 2009, he was at a friend's house on the 3200 block of Searles Avenue in Rockford, Illinois. Bowman saw Andrei drive up to the "mother of his daughter's house" and honk the car horn. Bowman averred that "a man" ran out of the house and attacked Andrei. Bowman further averred that he personally went to the car and saw Andrei and the man "tussling" over a gun. Bowman averred that Andrei was on the bottom of the tussle

when the gun "went off" and the other man dropped. Andrei then yelled for the passenger, who had left the vehicle during the incident, to get back in the car. The car then drove away with the "man" still inside the car. Additionally, Bowman averred that, between November 2009 and May 2010, he was assigned to the same wing as Andrei in the county jail. Andrei told Bowman the details of the incident, and explained that defendant had nothing to do with the "situation." Bowman ultimately averred that defendant did not assist Andrei in any "shape, form, or fashion." Bowman averred that he told defendant about this information and that he was willing to testify, but he was never contacted by defendant's trial counsel.

¶ 18 Johnson averred that in May 2010, he was in the same "pod" as Andrei at the Winnebago County jail. Andrei and Johnson were close friends who discussed private matters. Johnson averred that Andrei had stated that he, not defendant, shot Felix. Johnson also averred that Andrei blamed defendant for making a statement to the police and stated that he (Andrei) was "not going down for this!" Johnson averred that he told defendant about these conversations and his willingness to testify, but he was never contacted by defendant's trial counsel.

¶ 19 Holmes similarly averred that in March 2009, he was in the same pod as Andrei at the Winnebago County jail. Andrei told Holmes that he shot Felix in self-defense, and he repeatedly stated that defendant did not shoot Felix. Holmes averred that he informed defendant about this information and his willingness to testify, but he was never contacted by defendant's trial counsel.

¶ 20 Defendant also included a claim of actual innocence based on newly discovered evidence in his postconviction petition. He attached to his petition a police report that was generated over one year after his trial. The police report related to an incident between Andrei and Brianna Harmon on July 4, 2012. Brianna and Andrei got into a fight, which ultimately ended in a car

crash and the police responding to the incident. Per the report, Brianna told the police that Andrei placed two guns in the back of the car, one of which was a revolver. She consented to a search, and the police recovered both guns. Brianna further told the police that Andrei used the revolver to shoot her ex-husband, Felix Harmon. She explained that Andrei was found not guilty for the shooting of Felix, and the State's Attorney office was looking for the gun. Andrei told the police officer that he was attempting to prevent Brianna from "get[ting] away with the evidence." Andrei then declined to speak to the police officer further, because he was not the "feds or a detective."

¶ 21 Defendant also attached to his petition a letter from the attorney who handled his direct appeal. The letter, dated April 17, 2013, explained that defendant's trial attorney received the July 4, 2012, police report from the State after defendant was convicted and sentenced. Appellate counsel explained that she could not use the information contained within the police report to support the direct appeal, because the report was not in the original trial record. Appellate counsel further advised defendant to consider whether the information in the report could be used in a postconviction petition.

¶ 22 In his petition, defendant claimed that the police report was material, new, and noncumulative evidence that went to the "ultimate issue" of who discharged the gun on the night of March 17, 2009. Defendant alleged that the police report showed that defendant did not personally shoot Felix or participate in Andrei's plan or "common design to accomplish the shooting." He also alleged that the police report established that he did not possess a firearm. Defendant further argued that the police report undermined the "confidence" in the State's evidence and showed that both Felix and Meshonte were untruthful in their testimony at trial.

Defendant ultimately concluded that the evidence would have probably changed the result on retrial.

¶ 23 On July 25, 2014, the trial court dismissed the postconviction petition as frivolous and patently without merit. As to defendant's claim of ineffective assistance of counsel, the court noted that only one affidavit had the notary public seal, and the rest were not actually affidavits. The court also found that the statements contained within the "affidavits" were hearsay and would not have been admissible at trial. The court also noted that defendant failed to attach an affidavit from Andrei, who allegedly made the statements to the affiants. The court did not address Bowman's averment that he witnessed the incident. As to defendant's claim of actual innocence, the court found that the evidence was not new and that the police report did not bear on the guilt or innocence of defendant. The court found that the hearsay statements within the report were speculative about the finding of the firearm used to shoot Felix, and they did not relate to whether defendant was involved in the shooting.

¶ 24 Defendant timely appealed.

¶ 25 II. ANALYSIS

¶ 26 The Act provides a method by which criminal defendants can assert that their conviction and sentence were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Proceedings under the Act consist of three stages. *Hodges*, 234 Ill. 2d at 10. This appeal concerns a summary dismissal at the first stage.

¶ 27 At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether the claim in the petition is frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 10. A postconviction petition is frivolous or patently

without merit only if it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 16. A petition that has no arguable basis in law or in fact is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. An indisputably meritless legal theory is one that is completely contradicted by the record, and a fanciful factual allegation is one that is fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17.

¶ 28 We review the summary dismissal of a postconviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 29 A. Notarization of Affidavits

¶ 30 As a preliminary matter, defendant argues that all four affidavits attached to his petition[1] should be considered when deciding the merit of his claims, despite the trial court's "concern" with the affidavits. Specifically, the statements authored by Bowman and Johnson appear to be signed by a notary public, but they do not bear a notary seal. Following the trial court's ruling on the postconviction petition, the supreme court clarified that a "circuit court may not dismiss [a petition] at the first stage solely for failure to notarize a statement styled as an evidentiary affidavit." *People v. Allen*, 2015 IL 113135, ¶ 34. Here, however, the trial court explicitly stated that the lack of a notary seal was not the basis for its ruling. To the extent that defendant's affidavits are deficient for failing to bear a notary seal, we will treat them as "other evidence" under the Act. See *Allen*, 2015 IL 113135, ¶ 34; see also 725 ILCS 5/122-2 (West 2014).

¶ 31 B. Ineffective Assistance of Counsel

¶ 32 Defendant argues that he sufficiently pleaded a claim of ineffective assistance of counsel to advance to the second stage of postconviction proceedings. His petition alleged that his appellate counsel was ineffective for failing to raise issues concerning trial counsel's failure to

[1] Defendant's own affidavit was one of the four he attached.

call or interview four witnesses to testify. Those witnesses include Bowman, Johnson, Holmes, and Ware.

¶ 33 Ineffective assistance of appellate counsel is determined under the same standard as a claim of ineffective assistance of trial counsel. *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 109. Appellate counsel is not required to raise every conceivable issue on appeal, and counsel is not ineffective for refraining from raising issues that he or she believes are without merit. *Stephens*, 2012 IL App (1st) 110296, ¶ 109. Accordingly, unless trial counsel was ineffective, appellate counsel cannot be ineffective for failing to raise the issue on appeal. See *Stephens*, 2012 IL App (1st) 110296, ¶ 109.

¶ 34 To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). At the first stage of postconviction proceedings, however, a petition alleging ineffective assistance of counsel 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 the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. The failure to satisfy either the deficiency prong or the prejudice prong precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

¶ 35 The State argues that the trial court's summary dismissal of defendant's petition was proper, because defendant failed to attach an affidavit from his trial counsel. The State contends that such an affidavit was necessary because defendant alleged that he told counsel about the prospective witnesses, but he failed to provide any explicit details about his conversation with

counsel regarding those witnesses. The State relies on *People v. Hall*, 217 Ill. 2d 324 (2005), and *People v. Williams*, 47 Ill. 2d 1 (1970).

¶ 36 As a general rule, a defendant must support a petition's allegations by attaching affidavits, records, or other evidence, or explain the absence of such evidence; the unexplained absence of such evidence is fatal to a postconviction petition. See *People v. Collins*, 202 Ill. 2d 59, 66-67 (2002). *Hall* and *Williams* announced an exception to this general rule in cases where a defendant's claim of ineffective assistance are based on what occurred in consultations between the defendant and his attorney in a guilty-plea setting. See *Hall*, 217 Ill. 2d at 333-34; *Williams*, 47 Ill. 2d at 4. In such instances, no explicit explanation for the lack of an affidavit from the attorney is necessary. *Hall*, 217 Ill. 2d at 333-34; *Williams*, 47 Ill. 2d at 4.

¶ 37 Contrary to the State's assertion, the application of the exception announced in *Hall* and *Williams* is not relevant here. Instead, to sustain an ineffective assistance of counsel claim for failure to investigate or call a witness, the defendant's allegations must be supported by an affidavit from that witness that contains the witness's proposed testimony. *People v. Brown*, 2015 IL App (1st) 122940, ¶ 52. Without such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant. *Brown*, 2015 IL App (1st) 122940, ¶ 52. Here, defendant attached affidavits from Bowman, Johnson, and Holmes, thereby providing this court with sufficient evidentiary content to determine whether those proposed witnesses would provide testimony or information favorable to defendant. See 725 ILCS 5/122-2 (West 2014). Defendant also explained why he could not procure an affidavit from Ware. See 725 ILCS 5/122-2 (West 2014). Moreover, defendant averred that he told trial counsel about the prospective witnesses, and Bowman, Johnson, and Holmes all averred that they were never contacted by trial counsel. At the first

stage of postconviction proceedings, we must take these averments as true. See *Hodges*, 234 Ill. 2d at 10. Thus, we do not believe that the trial court's summary dismissal of the petition should be affirmed on the basis that defendant failed to furnish an affidavit from his trial counsel.

¶ 38 1. Randy Bowman

¶ 39 Defendant argues that trial counsel was ineffective for failing to call or interview Bowman. Defendant contends that Bowman's proposed testimony as an eyewitness would have been the "most significant" evidence supporting defendant's trial theory that Andrei shot Felix. Defendant also contends that Bowman's affidavit is consistent both with defendant's statement to Detective McDonald and the initial statements that Felix and Meshonte made at the hospital on March 17, 2009.

¶ 40 Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf are matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *Wilborn*, 2011 IL App (1st) 092802, ¶ 79. The failure to interview witnesses, however, may be indicative of deficient representation when the witnesses are known to trial counsel and their testimony may be exonerating or support an otherwise uncorroborated defense. *People v. Coleman*, 183 Ill. 2d 366, 398 (1998); *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999). Whether trial counsel was ineffective for failing to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005).

¶ 41 Here, the record does not show that trial counsel interviewed or attempted to interview Bowman. Also, as mentioned, we must take as true Bowman's averment that he was never contacted by trial counsel. See *Hodges*, 234 Ill. 2d at 10. Moreover, considerations of trial strategy are generally inappropriate at the first stage of postconviction petitions. See *Tate*, 2012

IL 112214, ¶ 22 ("The State's strategy argument is inappropriate for the first stage, where the test is whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that the defendant was prejudiced"); see also *People v. Wilson*, 2013 IL App (1st) 112303, ¶ 19 ("[A]t a first-stage review of a postconviction petition, when considering a claim of ineffectiveness of trial counsel for failure to call certain witnesses, the court should not consider trial strategy[.]").

¶ 42 Therefore, we examine the prejudice prong under *Strickland*. To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Makiel*, 358 Ill. App. 3d at 108. This prong is satisfied if the defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Makiel*, 358 Ill. App. 3d at 108-09. Again, at the first stage of postconviction proceedings, it need only be arguable that defendant was prejudiced.

¶ 43 Here, defendant does not directly claim that he was arguably prejudiced by counsel's failure to call Bowman. Instead, he contends that Bowman's testimony would have had a "profound impact" on the trial, because his proposed testimony would have presented unbiased eyewitness evidence that "transcended" the credibility contest between Felix, Meshonte, and defendant's statement to detective McDonald. Defendant's argument falls short in that he does not state that the result of the proceeding would arguably have been different.

¶ 44 Nevertheless, even construing defendant's argument liberally (see *Hodges*, 234 Ill. 2d at 21), he failed to adequately plead arguable prejudice for the following reasons. Bowman averred that defendant had gotten out of the car "during the incident" and did not shoot Felix. While these averments may contradict Felix's and Meshonte's testimony that defendant was the

principal in the attempted murder, they do not address the State's alternative theory at trial that defendant was guilty based on accountability. Bowman's affidavit contained no facts that shed light on at what point defendant may have exited the car, whether he participated in the fight between Andrei and Felix at some point or in some manner, or what defendant did when he re-entered the vehicle. Bowman's averment that defendant did not assist Andrei in any "shape, form, or fashion" is merely a legal conclusion. See *Coleman*, 183 Ill. 2d at 381 ("Nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act."). Nor does Bowman's affidavit present facts that relate to whether or not defendant himself had a gun.

¶ 45 Bowman's proposed testimony would not have arguably changed the result of the trial, as the State proceeded also on the alternative theory that defendant was an accomplice in the crime. Defendant's contention that he arguably received ineffective assistance of trial counsel for failure to interview or call Bowman to testify as an eyewitness is thus an indisputably meritless legal theory. Appellate counsel was therefore not arguably ineffective for failing to raise that issue on direct appeal.

¶ 46 2. Bowman, Johnson, Holmes, Ware

¶ 47 Defendant also contends that counsel was arguably ineffective for failing to interview or call Bowman, Johnson, Holmes, and Ware based on their proposed testimony as to Andrei's statements made at the Winnebago County jail. Defendant acknowledges that the proposed testimony is hearsay and that hearsay affidavits are insufficient to require relief in collateral proceedings. He nevertheless argues that we should apply the exception to the rule set forth in *People v. Sanchez*, 115 Ill. 2d 238 (1986).

¶ 48 In *Sanchez*, the defendant in a capital case filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 1990)). *Sanchez*, 115 Ill. 2d at 283. The defendant attached to his petition an affidavit from an investigator, which stated that the investigator had talked to a previously unknown eyewitness who had material facts about the incident. *Sanchez*, 115 Ill. 2d at 283. The affidavit further stated that the witness's affidavit could not be procured because the witness would invoke his fifth amendment right against self-incrimination. *Sanchez*, 115 Ill. 2d at 283.

¶ 49 The *Sanchez* court declined to apply the rule against hearsay affidavits "inflexibly" in capital cases, where procedural fairness and factual accuracy are of paramount importance. *Sanchez*, 115 Ill. 2d at 284. In arriving at its conclusion, the supreme court examined Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013), which governs affidavits in proceedings brought under sections 2-1005 (summary judgment), 2-619 (involuntary dismissal), and 2-301(b) (special appearances) of the Code (735 ILCS 5/2-1005, 2-619, 2-301(b) (West 2014)). *Sanchez*, 115 Ill. 2d at 284-85. Rule 191(b) provides an exception to the general rule against hearsay affidavits in situations where "material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise." *Sanchez*, 115 Ill. 2d at 285 (quoting Ill. S. Ct. R. 191(b)). The court reasoned that, while Rule 191 does not explicitly include affidavits in support of petitions under section 2-1401, the reasoning behind the rule's exception was equally applicable in that setting. *Sanchez*, 115 Ill. 2d at 285.

¶ 50 *Sanchez* is inapposite. This is not a capital case, and defendant has not provided this court with any authority extending the reasoning in *Sanchez* to noncapital cases. See *People v. Perkins*, 260 Ill. App. 3d 516, 520 ("Because different concerns are at issue in [noncapital] cases, we do not feel as compelled to part with the well-established rule that hearsay affidavits are

insufficient to support a petition for relief from judgment."). Additionally, *Sanchez* dealt with a petition for relief from judgment under section 2-1401 of the Code, whereas the present case involves a postconviction petition. Again, defendant provides no authority, nor has our independent research uncovered any, applying Rule 191(b)'s exception to an affidavit attached to a postconviction petition. See *People v. Walker*, 2015 IL App (1st) 130530, ¶ 25 ("Affidavits containing hearsay are insufficient to support a claim under the Act"); see also *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 55 (the defendant's allegations as to what potential witnesses would have testified to were hearsay and were thus insufficient to support a claim of ineffective assistance of counsel under the Act).

¶ 51 Furthermore, defendant provided no explanation in his petition for why he could not have obtained an affidavit from Andrei. See 725 ILCS 5/122-2 (West 2014) ("The petition shall have attached thereto affidavits *** or shall state why the same are not attached."). While defendant argues in his brief on appeal that he could not have obtained one due to Andrei's hostility to defendant, the only reference in the record as to anything even alluding to hostility by anyone is a statement in Johnson's affidavit that Andrei thought that defendant should not have given a statement to the police. Besides the averment being hearsay, it is contradicted by all of Andrei's other hearsay statements in the affidavits that suggest that Andrei was sympathetic to defendant and that Andrei did not mean to get him involved. Moreover, defendant also claims on appeal that there is arguably no reason for Andrei to admit to a shooting for which he was acquitted. We cannot speculate as to whether or not Andrei would have been willing to testify. There are no facts in the record, defendant's petition, or the affidavits attached that suggest whether or not Andrei would have chosen to testify.

¶ 52 Defendant also argues that counsel was ineffective because she could have subpoenaed Andrei for trial and attempted to elicit testimony from him about what he saw and did at the time that Felix was shot. For our purposes, whether counsel should have attempted to subpoena Andrei is irrelevant. Our analysis focuses solely on whether it was arguable that counsel was ineffective for failing to call Bowman, Johnson, Holmes, and Ware. As explained above, the three affidavits from those proposed witnesses were insufficient to support a claim of ineffective assistance of counsel under the Act.

¶ 53 Furthermore, we reject defendant's claim that Bowman, Johnson, Holmes, and Ware could have testified that Andrei made statements against his penal interest, an exception to the hearsay rule. Defendant does not address any of the relevant factors in determining whether the out-of-court statements by Andrei were sufficiently trustworthy to be admitted as evidence. See *Chambers v. Mississippi*, 410 U.S. 284, 300-01 (1973).

¶ 54 Based on the foregoing, counsel was not arguably ineffective for failing to interview or call Bowman, Johnson, Holmes, or Ware to testify at trial. Appellate counsel was not arguably ineffective for failing to raise that issue on direct appeal.

¶ 55 C. Actual Innocence

¶ 56 Defendant further maintains that he sufficiently pleaded a claim of actual innocence based on the July 4, 2012, police report that he attached to his petition. The State responds that the police report is insufficient to support a claim of actual innocence under the Act, because the statements in it are hearsay and contain no indicia of reliability.

¶ 57 To succeed on a claim of actual innocence, the defendant must present new, material, and noncumulative evidence that is so conclusive it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. New evidence means that the evidence was

discovered after trial and could not have been discovered earlier by the exercise of due diligence. *Coleman*, 2013 IL 113307, ¶ 96. Material means that the evidence is relevant and probative of the defendant's innocence. *Coleman*, 2013 IL 113307, ¶ 96. Noncumulative means that the evidence adds to what the jury heard. *Coleman*, 2013 IL 113307, ¶ 96. Conclusive means that the evidence, when considered along with the trial evidence, would probably lead to a different result. *Coleman*, 2013 IL 113307, ¶ 96. At the first stage of postconviction proceedings, the question is whether defendant's petition had an arguable basis either in law or in fact. *People v. Sparks*, 393 Ill. App. 3d 878, 884 (2009).

¶ 58 Defendant relies on *Sparks* in support of his actual-innocence claim. There, after the defendant was convicted of first-degree murder, he filed a postconviction petition alleging that he was innocent of the crime. *Sparks*, 393 Ill. App. 3d at 882. In support, defendant attached the affidavit of an occurrence witness who supported the defendant's version of events that he was not the aggressor. *Sparks*, 393 Ill. App. 3d at 884-85. The appellate court held that the evidence presented by the occurrence witness was newly discovered, noncumulative, material, and could have changed the result of the trial. *Sparks*, 393 Ill. App. 3d at 886-87. Because the jury was presented with two different explanations of the incident, with each side alleging that the other was the aggressor, it was conceivable that the jury could have acquitted the defendant based on the testimony of the occurrence witness. *Sparks*, 393 Ill. App. 3d at 886.

¶ 59 *Sparks* is distinguishable. Here, unlike in *Sparks*, defendant did not attach the affidavit of an occurrence witness. Instead, defendant attached an inadmissible police report that contained only inadmissible hearsay statements from both Brianna and Andrei. As a general rule, inadmissible hearsay is insufficient to support a claim of actual innocence. See *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003); see also *People v. Strausberger*, 151 Ill. App. 3d 832,

834 (1987) ("The general rule is that police reports are not admissible as substantive evidence."). Contrary to defendant's assertion, and unlike in *Sparks*, Brianna did not "come forward" with this testimony. Defendant did not attach an affidavit from Brianna that substantiates the hearsay statements in the police report or otherwise suggests that Brianna would testify as to those statements. Nor did defendant explain why he could not obtain an affidavit from Brianna.

¶ 60 Moreover, the police report is not so conclusive that it would arguably change the result on retrial. The inadmissible hearsay statements made by Brianna, while arguably relevant as to whether defendant was the principal in the offense, shed no light on the State's alternative theory that defendant was guilty as an accomplice. Brianna's hearsay statements do not indicate that Andrei acted alone or suggest that defendant was not somehow involved in the shooting of Felix Harmon. Additionally, Brianna's hearsay statements concerning the revolver that was recovered are speculative, at best, as to whether it was the firearm used to shoot Felix. As defendant notes in his petition, there was no evidence at trial concerning the firearm that was used on March 17, 2009. There are no facts, besides Brianna's hearsay statements, to suggest that the gun recovered from Brianna's car was the same one used to shoot Felix. Felix testified at trial that defendant had a small, black gun, whereas the police in July 2012 apparently recovered a silver revolver. Brianna's statements also fail to provide any facts that arguably suggest that defendant did not have a firearm on the night that Felix was shot.

¶ 61 Furthermore, Andrei's inadmissible hearsay statement that he could not let Brianna get away with the "evidence" is not material. Andrei did not specify to the police what the "evidence" related to, and it is not arguably relevant or probative as to defendant's guilt or innocence for the crimes that he was convicted. Also, defendant did not attach an affidavit or explain why he could not procure one from Andrei.

¶ 62 Thus, we conclude that defendant's actual innocence claim, based on the July 4, 2012, police report was an indisputably meritless legal theory.

¶ 63 III. CONCLUSION

¶ 64 For the reasons mentioned, we affirm the trial court's first-stage dismissal of defendant's postconviction petition.

¶ 65 Affirmed.