2019 IL App (2d) 170101-U
No. 2-17-0101
Order filed August 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. AMMAR A. SULEIMAN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 12-CF-742 Honorable John J. Kinsella, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's postconviction petition, which alleged actual innocence: defendant's evidence was insufficient to satisfy section 122-2, and in any event it was merely impeachment evidence.

¶ 2 Defendant, Ammar A. Suleiman, appeals a judgment summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) from his convictions of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(3), (a)(4) (West 2010)) and aggravated battery (*id.* § 12-4(b)(8)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 26, 2012, defendant was indicted, along with Amine Rahmouni, on two counts of armed robbery (*id.* §§ 18-2(a)(1), (a)(2)), one count of aggravated robbery (*id.* § 18-5(a)), two counts of aggravated vehicular hijacking (*id.* §§ 18-4(a)(3), (a)(4)), one count of aggravated battery (*id.* § 12-4(b)(8)), and one count of unlawful possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2010)). The charges stemmed from an incident that occurred on December 2, 2010, during which defendant and Rahmouni attacked the victim, Arnuflo Islas, in a parking lot behind North Park Mall and stole a vehicle owned by Islas's boss. Rahmouni was arrested hours after the incident occurred. Defendant was not arrested until April 11, 2012. On September 24, 2012, Rahmouni pleaded guilty to armed robbery. He received a sentence of nine years, in exchange for his plea and his truthful testimony at defendant's trial. Defendant elected to proceed to a jury trial.

¶ 5 The following relevant testimony was presented at defendant's trial, which began on October 3, 2013. Islas testified that he was attacked by two men on December 2, 2010, at just past 10 p.m., as he was sitting in the passenger seat of his boss's Honda Pilot parked behind North Park Mall. A man entered through the driver's door, put a gun to his side, and demanded money. Islas exited the car, and the man grabbed him and took him to a van, which was parked nearby. A second man, wearing a mask, exited the van holding a tire iron. The man in the mask hit him in the head. Isla struggled with the man, removed the mask, and saw his face. He did not see the face of the man with the gun. The men threw him to the ground. The man with the gun hit him in the stomach, nose, and face. Islas saw the men drive away in the Honda. He was taken to the hospital and treated. While at the hospital, Islas identified Rahmouni.

¶ 6 Rahmouni testified that, at about 10 a.m. on the day of the offenses, defendant called him and asked if he wanted to commit a robbery. Rahmouni had known defendant since 2008 and

they were close friends. Around 4 p.m., Rahmouni and defendant met and drove around together in a "[b]lueish-gray Chrysler minivan" owned by defendant's mother. Rahmouni had seen the van many times because he and defendant would "hang out in that van." The van was missing a front hubcap and the front bumper was "a little low." The van "had a dent in the back and the front," "the left back door didn't open," and one of the taillights did not work. Rahmouni and defendant went to Walmart and purchased a black BB gun that resembled a semi-automatic gun. They drove to the mall and parked behind it. Defendant reversed the van into a parking spot. Rahmouni identified surveillance video from the parking lot, which showed the van enter the parking lot, stop, back up, and park in a parking space. At about 10 p.m., Islas exited the mall and entered a black Honda Pilot that was parked next to the van. According to Rahmouni's version of the events, he entered the Honda, pointed the BB gun at Islas, and demanded money. Rahmouni testified that he was wearing a ski mask; he was not wearing gloves. When Islas exited the car, Rahmouni wrestled with him and struck him in the face. Defendant then exited the van holding a tire iron and struck Islas in the head. According to Rahmouni, defendant was wearing a hoodie and gloves. Rahmouni testified that he grabbed the tire iron from defendant, because he thought that Islas was bleeding too much. Islas reached for the ski mask and pulled it down, exposing Rahmouni's face. Rahmouni threw the tire iron and the gun into the van. Defendant jumped into the van and drove off. Rahmouni jumped into the Honda Pilot, which was still running, and drove away. The police pulled him over and he fled. He was found by the police a few hours later, hiding under a car. Rahmouni identified a picture of the shoes and the shirt that he was wearing on the night of the incident and testified that there was blood on his shoes and shirt. He also identified a picture of the mask that he was wearing. Rahmouni agreed that he asked his lawyer to make a deal with the State because he knew that his DNA had been

found on the tire iron and on the mask, that he had been identified by Islas, and that Islas's blood was on his clothes.

¶ 7 Villa Park police officer Jose Pagan testified that, on December 2, 2010, he responded to a call regarding an armed robbery and vehicle theft. He went to an area in Elmhurst and observed a Honda Pilot that had struck a tree and was on a parkway. A mask was recovered down the street from where the Honda was stopped. Pagan recovered a tire iron from the scene of the incident. Pagan learned from Islas's boss that there was a surveillance camera in the area of the offenses. Pagan obtained and viewed the video taken from the camera.

¶ 8 Pagan continued to investigate the offenses and, on April 10, 2012, he went to defendant's home and took pictures of a van located there. Pagan identified pictures of the van. He described the van as "bluish in color" with "some minor damage." In addition, the front passenger-side hubcap was missing. Pagan met with Rahmouni and showed him the pictures. Pagan also compared the pictures of the van with still images from the surveillance video. Pagan testified that the vehicles "appeared to be like in size, shape." He also "observed that the front passenger side wheel did not have a hubcap on both vehicles."

¶ 9 Ultimately, defendant was taken into custody and he provided a statement. Defendant told Pagan that Rahmouni contacted him on December 2, 2010, and asked him "if he wanted to do a lick." Pagan testified that "do a lick" meant commit a theft or robbery. Defendant told Rahmouni that he was not interested. Defendant and Rahmouni continued to talk throughout the day. Defendant identified the van in the pictures taken by Pagan as belonging to his mother. He stated that he was allowed to drive it. Defendant also told Pagan that he and Rahmouni had gone to different Walmarts at various times and purchased multiple BB guns.

¶ 10 The parties stipulated that the tire iron, a glove, and the mask were analyzed for the presence of DNA. A mixture of two DNA profiles was found on the tire iron: the DNA profiles could not be identified but were consistent with those of Rahmouni and Islas. The major DNA profile observed on the mask matched Rahmouni's DNA profile. The major DNA profile found on the glove matched Islas's DNA profile.

¶ 11 The jury found defendant guilty of armed robbery, aggravated robbery, aggravated vehicular hijacking, unlawful possession of a stolen motor vehicle, and aggravated battery.

¶ 12 On January 7, 2014, the trial court sentenced defendant to concurrent prison terms of 16 years for armed robbery, 16 years for aggravated vehicular hijacking, and 5 years for aggravated battery. Following the denial of his motion for reconsideration of his sentence, defendant timely appealed.

¶ 13 Defendant raised three issues on direct appeal: whether he was denied a fair trial when the trial court sustained an objection made by the State during defense counsel's closing argument; whether his convictions of armed robbery and aggravated vehicular hijacking violated one-act, one-crime principles; and whether the trial court improperly denied his motion to suppress his statement. We vacated defendant's conviction of armed robbery under one-act, one-crime principles, but we otherwise affirmed. See *People v. Suleiman*, 2016 IL App (2d) 140105-U.

¶ 14 On October 31, 2016, defendant filed a *pro se* petition for relief under the Act (725 ILCS 5/122-1 *et seq*. (West 2016)), raising several claims. At issue here is defendant's claim of actual innocence, which is based on his allegation that, after his trial, a new witness, "Michael Robinson,"[1] contacted defense counsel and reported that Rahmouni had told him that he had

[1] Defendant's *pro se* petition identifies the individual as "Michael Robinson." Defendant,

falsely implicated defendant in the offenses. In support, defendant attached a signed letter to counsel. The letter was dated February 15, 2014, and referenced a phone conversation between Robinson and counsel that had taken place a couple of weeks before. Robinson stated that he knew defendant and Rahmouni "from the streets" and that he and Rahmouni were "Maniac Latin Disciple's [*sic*]." Robinson stated that he used to be friends with Rahmouni but that, "[b]ecause of his lies and betrayal," Robinson was "willing to testify" to the following. According to Robinson, "[Rahmouni] admitted to [him] the reason he was going to lie and say [defendant] was with him on the night of the robbery, was because [Rahmouni] felt like [defendant] was not doing enough to bond him out of Jail and [defendant] had sexual relation's [*sic*] with a girl [Rahmouni] was dating at the time of his incarceration while [Rahmouni] was arrested." Robinson further stated that Rahmouni told him that "he was under immense pressure" and that if he didn't "tell on someone then he was going to get a lot of time." Robinson stated that Rahmouni also told him that he had already "tried to give them somebody" but that they did not believe him. Rahmouni told Robinson that, even though defendant was not "the one with him, [Rahmouni] felt they would believe him because, he had borrowed [defendant's] van." Robinson stated that he had additional details about the case and concluded, "I am hoping you will try to come see me as soon as possible so we can discuss them."

¶ 15 On January 9, 2017, the trial court dismissed the petition as frivolous and patently without merit. With respect to defendant's claim of actual innocence, the trial court stated:

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on appeal, refers to the individual as "Michael Robertson," stating that the signature on the letter "clearly identifies" the individual as "Robertson." Although it is possible that the signature reads "Michael Robertson," we do not agree that it is as clear as defendant suggests. Accordingly, we will refer to the witness as Robinson.

> "[Defendant] supports his actual innocence claim with an 'affidavit' of a 'Michael Robinson'. This 'affidavit' is in fact a handwritten letter dated 2-15-14 and addressed to 'Mr. Brodsky' and signed 'Mike Robinson'. It purports to be impeachment of the co-defendant claiming he lied about the [defendant's] involvement in the offence [*sic*]. There is no identification of who he is, or how and when he spoke to the co-defendant. The purpose of having an affidavit requirement is to have the person under oath and an authentication that this person exists and has sworn to the truthfulness of the statement. While this court recognizes that the Courts have relaxed the affidavit technical requirements, it would completely nullify any statutory meaning to the requirement to allow such a statement relating to the impeachment of a trial witness. There must be some reasonable basis for believing such a witness exists and is prepared to testify to such a statement.
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> The 'affidavit' of Robinson appears as likely to be a fabrication as a truthful statement of an actual witness who is willing to so testify. There is nothing to suggest how or why this statement was prepared."

¶ 16 Defendant filed a motion to supplement the *pro se* petition on January 11, 2017. On January 25, 2017, the trial court ruled that, even with the supplement, the petition was frivolous and patently without merit.

¶ 17 Defendant timely appealed.

¶ 18 II. ANALYSIS

¶ 19 Defendant argues that the trial court erred in dismissing his petition. According to defendant, Robinson's letter provided sufficient evidentiary support for purposes of first-stage postconviction proceedings. Further, defendant asserts that the allegations in the petition, taken

as true, state an arguable claim of actual innocence. In response, the State argues that the trial court properly refused to consider the letter and that, even considering the letter, defendant's claim of actual innocence was frivolous and patently without merit.

¶ 20 The Act provides a method by which a defendant may challenge his conviction or sentence based on a substantial denial of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2016); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Proceedings under the Act are commenced by the filing of a petition in the trial court in which the original proceeding took place. 725 ILCS 5/122-1(b) (West 2016). The petition must "clearly set forth the respects in which petitioner's constitutional rights were violated." *Id.* § 122-2. In addition, the petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." *Id.*; see *People v. Allen*, 2015 IL 113135, ¶ 26. The attached materials must show that "the petition's allegations are 'capable of objective or independent corroboration,' [citation] and 'identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations.' [Citation.]" (Emphasis omitted.) *Allen*, 2015 IL 113135, ¶ 43.

¶ 21 "A postconviction proceeding not involving the death penalty contains three distinct stages." *Hodges*, 234 Ill. 2d at 10. This appeal concerns a summary dismissal at the first stage. At the first stage, "the court considers solely the petition's *substantive* virtue." (Emphasis in original.) *Allen*, 2015 IL 113135, ¶ 33. The court may dismiss the petition if the allegations therein, taken as true, render the petition "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition is frivolous or patently without merit if it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 12. 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. *Id.* 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. *Id.* at 16-17. We review the summary dismissal of a postconviction petition *de novo*. *Id.* at 9.

¶ 22 Defendant first argues that Robinson's letter is sufficient to meet the Act's requirement that the petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations." 725 ILCS 5/122-2 (West 2016). In support, defendant relies on *Allen*. In *Allen*, the defendant was convicted of murder and armed robbery for a shooting. *Allen*, 2015 IL 113135, ¶ 1. The defendant filed a *pro se* postconviction petition alleging actual innocence and attached an unnotarized statement from Robert Langford, who claimed to be responsible for the shooting and said that the defendant was not involved. *Id.* ¶ 14. The statement included Langford's prisoner identification number and certified that Langford was its author and that the statement was made under penalties of perjury. *Id.* There were also several attempted fingerprints at the bottom of the letter. *Id.* The trial court dismissed the petition as frivolous and patently without merit, noting, *inter alia*, that Langford's statement was unnotarized. *Id.* ¶ 15. On appeal, the supreme court considered "whether the lack of notarization on this statement renders the petition frivolous or patently without merit." *Id.* ¶ 31. The court concluded that it did not, noting that a lack of notarization "does not prevent the court from reviewing the petition's 'substantive virtue,' as to whether it 'set[s] forth a constitutional claim for relief.' [Citation.]" *Id.* ¶ 34. The court found that "[w]hile not an admissible affidavit in its present form, the Langford statement properly qualifies as 'other evidence' " under section 122-2 of the Act. *Id.* The court found that "[t]he attached evidence must only show the petition's allegations are 'capable of objective or independent corroboration,' [citation] and 'identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations.'

[Citation.]" (Emphasis omitted.) *Id.* ¶ 43. The court found that Langford's statement met this standard. *Id.*

¶ 23 Defendant contends that the present case is analogous to *Allen*. We disagree. Unlike in *Allen*, the letter in the present case does not identify the source and availability of the evidence alleged to support defendant's claim. As the trial court found, the letter provides "no identification of who [the author] is, or how and when he spoke to the co-defendant. *** There must be some reasonable basis for believing such a witness exists." Indeed, defendant himself seems to be confused on the author's identity. Although defendant referred in his petition to the author as "Michael Robinson," on appeal defendant contends that the author's name is actually "Michael Robertson." Regardless, there is nothing in letter indicating where the author resides or how to contact him. The present case is thus readily distinguishable from *Allen*, where the witness was incarcerated, provided his prisoner identification number, certified that he was the author of the letter, and even made an attempt to provide fingerprints. There did not seem to be any issue in *Allen* concerning the actual existence of that witness.

¶ 24 Accordingly, we find that the letter was insufficient evidentiary support for the claims raised in the petition as it did not establish with reasonable certainty the source and availability of the evidence. Thus, the trial court properly dismissed the petition on this basis.

¶ 25 Nevertheless, even considering Robinson's letter, defendant's claim of actual innocence was properly dismissed as it is frivolous and patently without merit. Our supreme court has stated the following concerning claims of actual innocence:

> "The elements of a claim of actual innocence are that 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. [Citations.] We

> deem it appropriate to note here that the United States Supreme Court has emphasized that such claims must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.' [Citation.] The Court added: 'Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.' [Citation.]" *People v. Edwards*, 2012 111711, ¶ 32.

¶ 26 Here, it is not arguable that defendant's new evidence was "of such conclusive character that it would probably change the result on retrial." *Id.* As the State points out, Robinson's letter is nothing more than impeachment evidence, which is typically insufficient to justify postconviction relief. In *People v. Smith*, 177 Ill. 2d 53 (1997), the defendant was convicted of murder. At trial, a Cook County jail inmate testified that the codefendant told her that the defendant had nothing to do with the murder. In a motion for a new trial, the defendant sought to introduce the statements of nine additional inmates who had also been told by the codefendant that the defendant was not involved in the murder. *Id.* at 81-82. On appeal, the supreme court affirmed the trial court's denial of the defendant's motion. In addition to noting that the new testimony was cumulative of the trial testimony of the Cook County jail inmate, the court held that the evidence could, at best, be viewed as impeachment of a prosecution witness, which is an insufficient basis for granting a new trial. *Id.* at 82-83. As in *Smith*, here, Robinson's proposed testimony could have been admitted only to discredit Rahmouni's testimony, which does not afford a basis for a new trial, let alone establish defendant's actual innocence.

¶ 27 We are not persuaded by defendant's reliance on *People v. Cotell*, 298 Ill. 207 (1921), as it is readily distinguishable. In *Cotell*, the defendant was convicted of "the crime of confidence game" based on the testimony of a codefendant. *Id.* at 208. The supreme court described the

codefendant's testimony as "an unusual story" by "an extremely unreliable witness." *Id.* at 212. A motion for a new trial was filed with numerous affidavits attached that "set out positive contradiction of many of the statements of [the codefendant]," and the trial court examined the proposed witnesses. *Id.* at 214. In considering whether the motion was properly denied, the supreme court stated as follows:

> "The rule is, that when it is shown on motion for new trial that there is newly discovered evidence which is not cumulative, in regard to the particular point to which it relates and the importance of which could not have been foreseen, and such newly discovered evidence strengthens the conviction of the court that justice has not been done, a new trial will be granted for further examination of the case." *Id.* at 215.

Applying these principles, the court found that a new trial was warranted, stating: "The reputation of the plaintiff in error in this case was shown by an abundance of evidence to have been good, and the evidence against him was of such a dubious character that we feel that justice requires that a new trial should be granted in order that the newly discovered evidence, together with all the evidence to be offered, might be considered by a jury." *Id.* at 217-18.

¶ 28 *Cotell* is readily distinguishable. First, we note Rahmouni's testimony was not "an unusual story" by "an extremely unreliable witness." More importantly, however, Rahmouni's testimony was not the only evidence against defendant. Surveillance video of the incident showed a minivan that, according to Pagan, was similar (including its missing right front hubcap) to the minivan located in defendant's driveway. Defendant also told Pagan that he had permission to drive the van. In any event, Robinson's letter impeaching Rahmouni is simply not analogous to the numerous affidavits in *Cotell* that positively contradicted the codefendant's "unreliable" testimony (*id.* at 212) and "strengthen[ed] the conviction of the court that justice has

not been done" (*id.* at 215). In sum, it is not arguable that Robinson's letter is "of such conclusive character that it would probably change the result on retrial." See *Edwards*, 2012 IL 111711, ¶ 32.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the judgment of the circuit court of Du Page County summarily dismissing defendant's *pro se* postconviction petition.

¶ 31 Affirmed.