

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (4th) 121060-U

NO. 4-12-1060

Order filed May 1, 2014

Modified upon denial of rehearing June 17, 2014

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
ANTHONY JAMERSON,)	No. 09CF946
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's postconviction petition was proper where the "newly discovered evidence" established only that defendant did not own the gun found on defendant's person and neither exonerated nor totally vindicated defendant.

¶ 2 Following an August 2009 trial, a jury convicted defendant, Anthony Jamerson, of armed violence (720 ILCS 5/33A-2(a) (West 2008)). In October 2009, the trial court sentenced defendant to 20 years' imprisonment. In September 2012, defendant filed a petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)), asserting a claim of actual innocence. In October 2012, the court entered a written order dismissing defendant's petition as frivolous and patently without merit. On appeal, defendant argues the court erred in summarily dismissing his petition because it presents the "gist" of a constitutional claim. We affirm.

¶ 3

I. BACKGROUND

¶ 4

In June 2009, the State charged defendant with armed violence, a Class X felony (720 ILCS 5/33A-2(a) (West 2008)). The State alleged defendant, while armed with a dangerous weapon, a Hi-Point semiautomatic pistol, committed the offense of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)). In August 2009, the matter proceeded to jury trial, at which the following evidence was presented.

¶ 5

On May 29, 2009, several officers with the Champaign County sheriff's department, the Urbana police department Street Crimes Unit, and the Metro Special Weapons and Tactics (SWAT) team executed a search warrant at 1414 West Eads Street in Urbana, Illinois. When officers arrived at the address, a maroon Chevrolet Caprice was observed parked outside the residence. Defendant was in the backseat of the vehicle. Officers removed defendant and the driver, Prentice Jackson, from the vehicle and performed a pat-down search for officer safety. During the search of defendant, Deputy Craig Dilley saw a handgun in the right front pocket of the lightweight "sweatshirt coat jacket" defendant was wearing. Officer Matthew Bain seized the weapon from defendant's pocket. Officer Jay Loschen recovered 2.2 grams of a substance, which later tested positive for cocaine, from the right front pocket of the pants defendant was wearing.

¶ 6

At trial, defendant's defense was he did not knowingly possess the gun found in the pocket of the coat he was wearing. In support of this theory, defendant testified, in the early morning hours on May 29, 2009, he was riding in the Caprice with Prentice Jackson. Both men were drinking alcohol and defendant had used crack cocaine that evening. When Prentice and defendant reached the area of 1414 West Eads Street, Prentice decided he was too drunk to continue driving to defendant's residence and pulled the vehicle to the curb. Both defendant and

Prentice "were getting sleepy." Defendant left the front seat of the Caprice and entered the backseat. In the backseat, defendant found a coat and draped it over himself. The coat was "puffy and it covered *** half of [defendant's] body." Defendant did not put his arms in the sleeves of the coat. (However, when his attorney asked him if the police found the gun "in the jacket he was wearing," defendant responded "yes." Further, on cross-examination defendant responded yes to the question, "Did the officers take this gun out of the jacket pocket that you were wearing?") The coat did not belong to defendant, and he was not aware a gun was inside one of its pockets. Defendant fell asleep and was awakened when officers arrived on scene to execute the search warrant.

¶ 7 The State called Officer Loschen in rebuttal. Officer Loschen clarified defendant had his arms in both sleeves of the coat. Officer Loschen further testified defendant denied ownership of both the coat and the pants he was wearing. Officer Loschen testified defendant appeared intoxicated at the time of his arrest.

¶ 8 On this evidence, the jury found defendant guilty of armed violence. In October 2009, the trial court sentenced defendant to 20 years' imprisonment. That same month, defendant filed a motion to reduce the sentence, which the court denied following a January 2010 hearing.

¶ 9 On direct appeal, defendant challenged the 20-year sentence, contending (1) the mandatory minimum sentence of 15 years' imprisonment for armed violence with a handgun violated the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11); or (2) in the alternative, the trial court abused its discretion by imposing a 20-year prison term. This court affirmed. *People v. Jamerson*, No. 4-10-0036 (May 31, 2011) (unpublished order under Supreme Court Rule 23).

¶ 10 In September 2012, defendant *pro se* filed a postconviction petition alleging a

due-process claim of actual innocence. Specifically, defendant's petition alleged in May 2012, defendant received a letter from the Champaign County public defender, Randall Rosenbaum. The letter informed defendant the public defender's office had received a handwritten letter, signed by "Lil Steve," from defendant's mother. (The record does not contain the letter signed by "Lil Steve.") The letter included an affidavit signed by Steve Jackson (it appears "Lil Steve" is Steve Jackson's nickname). Jackson's affidavit stated as follows:

"[On] May 28, 2009[,] Prentiss [*sic*] Jackson picked me up earlier that day to just ride around and kick it. It was around 5:00 when he dropped me off[.] [I]t was only us at the time. I didn't realize I left my coat in the car until later that night and when I tried to call Prentiss [*sic*] to let him know to bring me my coat cause it was a gun in there he never picked up. Reason why I'm saying something is [be]cause I didn't want Anthony [Jamerson] to get all this time for a gun that [is] not even his."

¶ 11 Defendant also attached to his petition his own affidavit. Defendant's affidavit stated, following his arrest in this case, he asked Prentice Jackson who owned the coat, to which Jackson replied he did not know. Defendant also stated, following his arrest in this case, "a Detective Mr. Shephard told [defendant] that the handgun found in said coat was stolen."

¶ 12 Defendant asserted this affidavit supported his theory of innocence—he did not knowingly possess the handgun recovered from the pocket of the coat. Defendant argued postconviction relief was required where, as here, the evidence is new, material, noncumulative, and of such a conclusive character it would probably change the result on retrial. Further, defendant alleged he could not have obtained this new evidence through the exercise of due

diligence because he "could not have forced Jackson to incriminate himself."

¶ 13 In October 2012, the trial court dismissed defendant's petition, finding it frivolous and patently without merit. The court's order stated, in pertinent part:

"The testimony at trial was that when the Defendant was confronted by the police, the weapon was seen by the officer protruding from the pocket of the jacket that defendant was wearing. The Defendant asserts that 'Lil Steve's' affidavit establishes a freestanding claim of actual innocence. Actually, 'Lil Steve's' affidavit established that he, 'Lil Steve,' owned the gun. Ownership of the weapon was not and is not the issue. Possession of the weapon was and is the issue. The Defendant possessed and was armed with the weapon when confronted by the police.

Also, this information is not newly discovered. The Defendant claimed at trial that the coat was not his. As the defendant states in his affidavit, he asked Prentice Jackson, who owned the coat in question[,] Jackson claimed he didn't know. The fact that the individual arrested with the Defendant was not forthcoming with the information now claimed by Defendant, does not make it newly discovered."

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant argues the trial court erred by summarily dismissing his petition for postconviction relief where his petition presented the "gist" of a claim of actual

innocence. Further, defendant argues, as a matter of law, his claim was "arguably new, material, noncumulative, and conclusive." On this basis, defendant asserts the court's order must be reversed and the matter remanded for second-stage proceedings and appointment of counsel under the Act.

¶ 17 The Act provides a three-stage process through which a defendant may obtain a remedy for the substantial denial of his constitutional rights at trial. *People v. Edwards*, 197 Ill. 2d 239, 243-44, 757 N.E.2d 442, 445 (2001). "At the first stage, the trial court, without input from the State, examines the petition *only* to determine if [it alleges] a constitutional deprivation unrebutted by the record, rendering the petition neither frivolous nor patently without merit." (Emphasis and alteration in original; internal quotations omitted.) *People v. Bowens*, 2013 IL App (4th) 120860, ¶ 11, 1 N.E.3d 638. A postconviction petition is frivolous or patently without merit only where "the allegations, taken as true and liberally construed, fail to present the 'gist of a constitutional claim.'" *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445 (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). In other words, the petition must have an arguable basis either in law or in fact. *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1202 (2010). To have an arguable basis in law, the petition must not be premised on an "indisputably meritless legal theory, such as one that is completely contradicted by the record." *Id.* To have an arguable basis in fact, the petition may not be based "upon a fanciful factual allegation, such as one that is clearly baseless, fantastic[,] or delusional." *Id.* Our review in this case is *de novo*, because a trial court's decision to dismiss a postconviction petition at the first stage as frivolous and patently without merit is a question of law. *Edwards*, 197 Ill. 2d at 247, 757 N.E.2d at 447.

¶ 18 Freestanding claims of actual innocence based on newly discovered evidence are

cognizable under the Act. To succeed on a claim of actual innocence, "the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96, 996 N.E.2d 617. Evidence is "new" where the evidence is discovered after trial and could not have been discovered earlier through the exercise of due diligence. *Id.* Evidence is "material" if it is relevant and probative of the defendant's innocence. *Id.* Evidence is "noncumulative" if it adds to what the jury heard. *Id.* Evidence is "conclusive" if it, when considered with the trial evidence, would probably lead to a different result. *Id.* Failure to establish any one of these elements precludes relief on a claim of actual innocence.

¶ 19 At trial, defendant admitted possessing the cocaine found in his pants but maintained he did not knowingly possess the firearm on which the armed-violence charge was based. "A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois law," except certain offenses. 720 ILCS 5/33A-2(a) (West 2008). "A person is considered armed with a dangerous weapon *** when he or she carries on or about his or her person or is otherwise armed with a Category I, Category II, or Category III weapon." 720 ILCS 5/33A-1(c)(1) (West 2008); see 720 ILCS 5/33A-1(c)(2), (c)(3) (West 2008) (defining Category I, Category II, and Category III weapons). This court has held a defendant must have knowledge of the presence of the weapon. *People v. Adams*, 265 Ill. App. 3d 181, 186, 638 N.E.2d 254, 258 (1994). In *Adams*, we explained when a person has a knife in his or her pocket, the normal inference is the person knew he or she had a knife in his or her possession. *Id.* Of course, the person is allowed to introduce evidence to rebut the inference of knowledge. *Id.*

¶ 20 Defendant states Steve Jackson's affidavit is *arguably* of such conclusive character it would probably change the result at trial because, "[h]ad Steven Jackson testified at trial, the

State's case would have stood or fallen on whether the jury believed beyond a reasonable doubt that a drunk and sleepy 19-year-old noticed that the large coat he was using to warm himself contained a handgun." We disagree.

¶ 21 Steve Jackson's affidavit, if true, when considered with the trial evidence, probably would not lead to a different result on retrial. See *People v. Washington*, 171 Ill. 2d 475, 489, 665 N.E.2d 1330, 1337 (1996). Rather, Jackson's affidavit merely asserts defendant did not own either the coat or the gun in question. If Jackson were to testify consistently with his affidavit, a reasonable juror could still find defendant knowingly possessed the gun given the State's evidence defendant was wearing the jacket at the time of his arrest. See *Adams*, 265 Ill. App. 3d at 186, 638 N.E.2d at 258 (in the context of armed violence, defendant's knowledge is a reasonable inference drawn from the fact the defendant was wearing the garment in which the weapon was found). Further, defendant testified he did not own the gun and did not know the gun was in the pocket of the jacket he was wearing. Jackson's affidavit is cumulative to the testimony of defendant on the issue of ownership. Jackson could not testify to any knowledge defendant may or may not have had with respect to the gun in the jacket pocket. Jackson's affidavit does not contradict the State's evidence because the State never presented any evidence defendant was the owner of the jacket and gun. The State presented evidence defendant was wearing the jacket that contained the gun in its front pocket. Thus, defendant did not establish the evidence would, arguably, probably change the result at trial. Therefore, defendant's petition lacks an arguable basis in law and the trial court properly dismissed his postconviction petition.

¶ 22 More fundamentally, we agree with the trial court defendant missed the mark with his postconviction petition claiming actual innocence. In this case, ownership of the jacket and gun was never the issue. The issue was whether defendant carried on or about his person or was

otherwise armed with the gun while possessing cocaine. The State presented evidence (1) defendant was found in the backseat of a car; (2) he was wearing a jacket when officers removed him from the vehicle; (3) during the search of defendant, officers found a handgun in the front pocket of this jacket; and (4) police officers recovered 2.2 grams of a substance containing cocaine from defendant's pants pocket. Jackson's statement does not contradict this evidence and does not preclude a finding of guilt.

¶ 23

III. CONCLUSION

¶ 24 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 25

Affirmed.