

No. 1-10-0462

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from
) the Circuit Court
Plaintiff-Appellee,) of Cook County
)
v.) No. 89 CR 19350
)
ERIC LANGHAM,) Honorable
) Nicholas R. Ford,
Defendant-Appellant.) Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Lampkin concurred in the judgment.

ORDER

- ¶ 1 **Held:** Trial court's orders denying defendant leave to file *pro se* a fourth successive petition for postconviction relief and imposing \$105 in filing fees and court costs are affirmed over defendant's contentions that he presented the gist of a constitutional claim of actual innocence based on newly discovered evidence and that the court erred in imposing the fees because his petition was not frivolous.
- ¶ 2 Defendant Eric Langham appeals from an order denying him leave to file *pro se* a fourth successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et*

seq. (West 2008)). The court also assessed defendant a total of \$105 in fees and court costs for filing a frivolous petition. Defendant contends that his petition should be remanded for further proceedings under the Act because he alleged the gist of a constitutional claim of actual innocence based on newly discovered evidence. He also contends the circuit court erred in imposing the fees because his petition was not frivolous. We affirm.

¶ 3 This case arises from the shooting death of Steven Anderson on August 23, 1989. Defendant and codefendants Michael Hampton, Terrance Lemons and Deetreal Perteet were charged with first degree murder and jointly tried. Defendant was convicted on evidence showing that he and his codefendants shot and killed Steven in a dispute over money. At defendant's 1990 jury trial, Jarvis Evans and Jonathon Anderson, the victim's brother, testified they were present at the scene of the shooting and saw codefendant Hampton fire the first shot at Steven, after which defendant and his codefendants began to shoot Steven. Evans and Jonathon said Steven was not armed at the time of the shooting. Robert Lee and Rodney McNeal testified that they were present at the scene of the shooting and that Steven was not armed at the time. Defendant presented a theory of self-defense based on the testimony of three witnesses that Steven was armed at the time of the shooting. The jury found defendant guilty of first degree murder.

¶ 4 Defendant filed a motion for a new trial, based on an affidavit from Lee, who averred he had lied at defendant's trial by testifying that Steven was not armed at the time of the shooting although Steven was armed with an assault weapon. The trial court denied the motion, finding Lee's affidavit to be cumulative of the evidence presented at trial. The court then sentenced

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defendant to 60 years' imprisonment.

¶ 5 This court affirmed that judgment on direct appeal. *People v. Langham*, No. 1-90-2706 (1992) (unpublished order under Supreme Court Rule 23). We found the evidence sufficient to sustain defendant's conviction and that the trial court did not err in denying his motion for a new trial based on Lee's affidavit. We noted that Lee's affidavit was cumulative of the evidence presented at trial and would not change the jury's verdict because three defense witnesses testified that Steven was armed at the time of the shooting. *Langham*, No. 1-90-2706, slip op. at 12.

¶ 6 On March 28, 1991, while his direct appeal was pending, defendant through counsel filed a postconviction petition, alleging that he was not the initial aggressor and that Steven was armed at the time of the shooting. Defendant attached to his petition an affidavit from Anthony Perteet, who averred that Steven had been armed with an assault rifle at the time of the shooting. The circuit court held an evidentiary hearing. The court denied defendant's petition, finding Perteet's testimony incredible. We dismissed defendant's appeal from that order for want of prosecution. *People v. Langham*, No. 1-92-2155 (1993) (unpublished order under Supreme Court Rule 23).

¶ 7 On December 4, 2001, defendant through private counsel filed a successive petition for postconviction relief with codefendants Lemons and Hampton, raising a claim of actual innocence based on newly discovered evidence. Defendant claimed he had acted in self-defense because Steven had been armed with an assault rifle and was the initial aggressor. Defendant attached to his petition affidavits from Anthony Perteet, Deetreal Perteet, Rodney McNeal, Carolyn Hampton and Edward Carmody, averring that Steven and his companions were armed

and the initial aggressors on the night of the shooting. The court granted the State's motion to dismiss defendant's petition, finding that the proffered affidavits did not present newly discovered evidence but were merely cumulative of the evidence presented at trial and on direct appeal. We affirmed that dismissal on appeal, noting that "defendant's theory of self-defense against an armed victim has been receiving consideration within the judicial system for more than a decade, and the doctrine of *res judicata* applies nowhere if not here." *People v. Langham*, No. 1-03-3231, slip op. at 6 (2005) (unpublished order under Supreme Court Rule 23).

¶ 8 On January 30, 2004, while defendant's successive petition for postconviction relief was pending, defendant filed a second successive petition, alleging the State committed a *Brady* violation. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Defendant also alleged: a courtroom deputy acquainted with the victim's family had influenced the jurors during trial; prosecutorial misconduct; and ineffective assistance of trial and postconviction counsel. The court denied defendant leave to file the petition, finding that he did not show cause and prejudice for his failure to raise these claims in his earlier petitions. We affirmed that order on appeal. *People v. Langham*, No. 1-06-2526 (2007) (unpublished order under Supreme Court Rule 23).

¶ 9 On April 4, 2005, while defendant's appeal from the dismissal of his second successive petition for postconviction relief was pending, defendant filed a third successive petition, alleging: the trial court erred in not holding a hearing on the issue of whether the courtroom deputy influenced the jurors; his grand jury indictment should be dismissed because it was based on false testimony; and ineffective assistance of trial and postconviction counsel. The court

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dismissed the petition. We affirmed that order on appeal, after granting the State Appellate Defender's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). *People v. Langham*, No. 1-05-2466 (2006) (unpublished order under Supreme Court Rule 23).

¶ 10 On September 22, 2009, defendant filed *pro se* a fourth successive petition for postconviction relief, raising a claim of ineffective assistance of trial counsel based on counsel's failure to cross-examine the deputy, after the court questioned the deputy about allegations of interfering with the jury. Defendant asked the court to grant him a new trial because he had a "free-standing claim of actual innocence" based on a substantial violation of his constitutional rights as a result of counsel's deficient performance. Defendant attached to his petition an affidavit from the victim's brother Jonathon, who averred that his family was close with the deputy and that the deputy assured his family that defendant "would get everything that was coming to [him]." Jonathon also averred that Steven was armed with an AK-47 assault rifle at the time of the shooting. He said he did not know who fired the first shot or how many of defendant's friends had guns. Jonathon averred that he lied at trial when he testified that his group of friends was not armed. He said that he did not come forward with this information sooner because the truth would have hurt his family.

¶ 11 In a written order, the circuit court denied defendant leave to file his fourth successive petition, finding that he failed to establish cause for not raising his ineffectiveness claim during his initial postconviction proceeding or prejudice from the absence of that claim. The court also assessed defendant a \$90 filing fee plus \$15 in mailing costs for filing a frivolous petition under

section 22-105 of the Code of Civil Procedure (Code) (735 ILCS 5/22-105 (West 2008)).

¶ 12 Defendant first argues on appeal that the court erred in denying him leave to file his fourth successive postconviction petition because he presented the gist of a constitutional claim of actual innocence supported by an affidavit from the victim's brother.

¶ 13 The Act contemplates the filing of only one postconviction petition absent leave of court. *People v. Morgan*, 212 Ill. 2d 148, 153, 817 N.E.2d 524 (2004); 725 ILCS 5/122-3 (West 2008). The strict application of this statutory bar will be relaxed only when fundamental fairness so requires. *People v. Pitsonbarger*, 205 Ill. 2d 444, 458, 793 N.E.2d 609 (2002). Fundamental fairness allows the filing of a successive petition only where the petition complies with the cause-and-prejudice test adopted in *Pitsonbarger* and codified in section 122-1(f) of the Act. *Pitsonbarger*, 205 Ill. 2d at 459; 725 ILCS 5/122-1(f) (West 2008). To satisfy this test, a defendant must show cause by identifying an objective factor that impeded his ability to raise a specific claim during his first postconviction proceeding and prejudice by demonstrating that the claim not raised during his first postconviction proceeding so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f)(1)(2) (West 2008).

¶ 14 Even if a defendant cannot establish cause and prejudice, his failure to raise the claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice. *People v. Ortiz*, 235 Ill. 2d 319, 329, 919 N.E.2d 941 (2009) (citing *Pitsonbarger*, 205 Ill. 2d at 459). A defendant may demonstrate such a miscarriage of justice by establishing his actual innocence. *Ortiz*, 235 Ill. 2d at 329 (citing *Pitsonbarger*, 205 Ill. 2d at 459).

¶ 15 Here, defendant does not contend that the court should have granted him leave to file his

fourth successive postconviction petition because he established cause and prejudice but, rather, because he stated the gist of a claim of actual innocence based on newly discovered evidence.

We note that, as pointed out by the State, defendant did not raise a *per se* claim of actual innocence in his fourth successive petition. Rather, he raised an ineffective assistance claim and said he had "a free-standing claim of actual innocence" because his constitutional rights were violated based on counsel's deficient performance. The Act provides that any issues to be reviewed must be presented in the petition filed in the circuit court (725 ILCS 5/122-3 (West 2008)), and our supreme court has held that a defendant may not raise an issue for the first time on appeal (*People v. Jones*, 211 Ill. 2d 140, 148, 809 N.E.2d 1233 (2004)).

¶ 16 To the extent that we may glean a claim of actual innocence from a defendant's petition, we consider whether the defendant has made a sufficient showing to establish such a claim. *People v. Collier*, 387 Ill. App. 3d 630, 636, 900 N.E.2d 396 (2008). To prevail on a claim of actual innocence, a defendant must present evidence that (1) was discovered since trial and could not have been discovered sooner through the exercise of due diligence; (2) is material to the issue and not merely cumulative; and (3) is so conclusive that it will probably change the result on retrial. *Ortiz*, 235 Ill. 2d at 333-36. Defendant maintains that Jonathon's affidavit satisfies these criteria.

¶ 17 First, Jonathon's affidavit does not constitute newly discovered evidence. "An unbroken line of precedent holds that evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of those facts may have been unknown, unavailable or uncooperative." *People v. Jones*, 399 Ill. App. 3d 341, 364, 927 N.E.2d

710 (2010). Here, the evidence in Jonathon's affidavit that Steven was allegedly armed at the time of the shooting was known to defendant, who relied on a theory of self-defense at trial. Although Jonathon refused to come forward with this information sooner because the truth would have hurt his family, his lack of cooperation does not render this evidence newly discovered. See *Jones*, 399 Ill. App. 3d at 364.

¶ 18 This aside, even accepting the allegations in Jonathon's affidavit as true, the proposed evidence is merely cumulative of the evidence presented at trial. "Evidence is considered cumulative if it does not add anything to what was presented to the jury, and evidence is noncumulative if it creates new questions in the mind of the trier of fact." *People v. Williams*, 392 Ill. App. 3d 359, 369, 910 N.E.2d 627 (2009). In his affidavit, Jonathon averred that Steven was armed at the time of the shooting. Three defense witnesses testified at trial that Steven was armed and the initial aggressor. Despite this evidence, the jury found defendant guilty of first degree murder. We cannot say that Jonathon's affidavit would add to the evidence that was presented to the jury or that it would raise new questions in their minds.

¶ 19 We also cannot say that Jonathon's affidavit is so conclusive that it would change the result on retrial. Jonathon averred that he did not know whether defendant was armed on the night of the shooting or who fired the first shot. Jonathon said that "out of nowhere a shot rang out" and "shots were coming from all directions." This evidence does little to exonerate defendant because it does not contradict the evidence presented at trial that codefendant Hampton initiated the shooting, after which defendant and his codefendants continued to shoot Steven. See *People v. Broughton*, 344 Ill. App. 3d 232, 237-38, 799 N.E.2d 952 (2003) (actual innocence

claim rejected, in part, because statement in codefendant's proffered affidavit failed to exonerate the defendant). Defendant failed to state a claim of actual innocence in his fourth successive petition and was properly denied leave to file it.

¶ 20 We are unpersuaded by defendant's argument that in light of our supreme court's decision in *People v. Hodges*, 234 Ill. 2d 1, 912 N.E.2d 1204 (2009), the State was required to demonstrate that the petition had no arguable basis either in law or in fact. Contrary to defendant's argument, the circuit court did not hold his petition to a higher standard of review than is appropriate for the procedural posture of this case. Unlike *Hodges*, defendant's petition here was not reviewed in the framework of a first-stage summary dismissal because this was not a first-stage summary dismissal case. Rather, the court denied defendant leave to file a fourth successive postconviction petition. The standard of review for evaluating a first-stage dismissal, as set forth in *Hodges*, 234 Ill. 2d at 12-13, does not apply.

¶ 21 Defendant next argues that the court erred in imposing \$105 in filing fees and court costs because his petition was not frivolous. He claims that, contrary to the court's fees order, his petition had evidentiary support in the form of Jonathon's affidavit and an arguable basis in law and fact.

¶ 22 In its fees order, the court cited section 22-105 of the Code, noting defendant's petition was frivolous and patently without merit in that:

"(1) it lacks and arguable basis in either law or in fact; and

(2) the allegations and other factual contentions do not have evidentiary support or, if specifically so identified, are not likely to have evidentiary support

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after a reasonable opportunity for further investigation or discovery[.]” 735 ILCS
5/22-105(b)(1), (4) (West 2008).

The court then assessed defendant a \$90 filing fee plus \$15 mailing cost for the frivolous filing. We find the imposition of this \$105 amount to have been wholly proper where, as mentioned, defendant did not raise a claim of actual innocence and his ineffectiveness claim was previously considered by the court on two occasions and is now barred by *res judicata*. See *People v. Gale*, 376 Ill. App. 3d 344, 356, 876 N.E.2d 171 (2007).

¶ 23 For the reasons stated, we affirm the circuit court's orders denying defendant leave to file *pro se* a fourth successive petition for postconviction relief and assessing a total of \$105 in fees and costs.

¶ 24 Affirmed.