

No. 1-10-1637

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 of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 00 CR 10577
)	
FREDERICK LEE,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

¶1 *Held:* The circuit court's order denying defendant leave to file a successive post-conviction petition is affirmed where defendant failed to present a valid affidavit to support his claim of actual innocence.

¶2 Defendant Frederick Lee appeals from an order of the circuit court denying him leave to file a successive *pro se* post-conviction petition. On appeal, defendant contends that the court erred because his petition raised a viable claim of actual innocence that had an arguable basis in law and fact. Defendant argues that his claim was supported by newly discovered evidence which consisted

of an affidavit from a woman who saw the shooting, but did not come forward sooner due to her fear of reprisal from the actual killer. We affirm.

¶ 3 Following a 2002 jury trial, defendant was convicted of first degree murder for shooting Jerry Edwards five times as Edwards sat in a parked car with his girlfriend, Diane Cochran. The evidence presented at trial showed that there was a long history of animosity between the Lee and Edwards families. In February 1998, the families, including defendant and Edwards, were engaged in a street fight. Jerry Edwards signaled to Cochran to get a gun, and she handed a gun to Jerry's brother, Donnell Edwards. Defendant's brother, Wade Lee, was fatally shot during the melee. Donnell, Jerry and Cochran were all charged with Wade Lee's murder. Cochran pled guilty to a charge of unlawful use of a weapon and was sentenced to three years' imprisonment. Donnell Edwards was convicted of first degree murder and sentenced to 40 years' imprisonment. Following a bench trial, Jerry Edwards was acquitted.

¶ 4 Cochran testified at trial that she and Jerry were talking in the car, when she saw a light flash, then saw defendant shooting a gun through the windshield. Defendant fired four or five gunshots into the car, then fled. Cochran knew defendant because he lived across the street from her and had dated her daughter. She had seen defendant nearly every day for two years prior to the shooting, and she identified him as the gunman in a photo array and in court. Cochran testified that she had an unobstructed view of defendant's face as he shot Edwards. Cochran ran to a friend's house and told her to call the police because "Fred shot Jerry." Shortly thereafter she told a police officer at the scene that "Freddie" shot her boyfriend.

¶ 5 For the defense, defendant's father, Wade Taylor, identified a photograph of defendant and his brother Michael, and testified that his two sons looked alike. The trial court sentenced defendant to 30 years' imprisonment for the murder, plus an additional 25 years for personally discharging the firearm that caused Edwards' death, for an aggregate sentence of 55 years in prison. On direct

appeal, this court affirmed defendant's conviction and sentence. *People v. Lee*, No. 1-03-0069 (2004) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal. *People v. Lee*, 217 Ill. 2d 581 (2005).

¶ 6 In February 2006, defendant, through counsel, filed his initial petition for relief under the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq.* (West 2006). Defendant alleged that his trial counsel rendered ineffective assistance because counsel failed to call two alibi witnesses, defendant's uncle and cousin, who would have testified that defendant was with them several miles away from the scene at the time of Edwards' murder. Defendant further alleged that his appellate counsel rendered ineffective assistance because he failed to raise trial counsel's ineffectiveness on appeal. The circuit court found no merit in defendant's allegations and granted the State's motion to dismiss defendant's post-conviction petition. This court affirmed that judgment on appeal. *People v. Lee*, No. 1-08-1963 (2009) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal. *People v. Lee*, 236 Ill. 2d 526 (2010).

¶ 7 On April 6, 2010, defendant filed the instant *pro se* motion for leave to file a successive post-conviction petition raising a claim of actual innocence. Defendant alleged, *inter alia*, that he had obtained newly discovered evidence from an undiscoverable eyewitness, Kristal Sturdivant, who averred in her affidavit that she saw the gunman's face and was reasonably certain that it was not defendant. Defendant attached his *pro se* successive petition to his motion.

¶ 8 Also attached to defendant's petition is a document labeled "AFFIDAVIT" signed by Sturdivant. Therein, Sturdivant stated that she was walking down the street when she saw "an unknown individual" approach the driver's side of a car frequently driven by Jerry Edwards, and saw the person fire a gun at the occupant in the driver's seat. She later learned that it was Edwards who was murdered. Sturdivant further stated that in December 2009 she learned that defendant was

convicted for the murder. She stated that she was "reasonably certain" that defendant was "actually innocent" of the murder because she had "an unobstructed view of the actual killer's face under good lighting conditions" and it was not defendant's face. Sturdivant stated that she had seen defendant in the neighborhood throughout the years which allowed her to identify his "distinctive characteristics." She did not specify such characteristics. Sturdivant stated that she did not come forward with her information earlier because she feared "some form of reprisal from Jerry Edwards' true killer" and was unaware that defendant had been charged with the murder. She stated that she would be willing to testify that the information contained in her document was true and correct. Sturdivant's document is not notarized.

¶ 9 Another document labeled "SUPPLEMENTAL AFFIDAVIT" signed by defendant is also attached to the petition. Therein, defendant affirms the veracity of statements made in his post-conviction petition. This document is not notarized. The formatting of Sturdivant's "affidavit," defendant's "supplemental affidavit," defendant's *pro se* motion and *pro se* successive petition are identical and all appear to have been prepared by the same person.

¶ 10 The circuit court denied defendant's motion for leave to file the successive post-conviction petition. The court stated that defendant failed to meet the cause and prejudice test for successive petitions.

¶ 11 On appeal, defendant contends that the circuit court erred when it denied his motion because his successive petition raised a viable claim of actual innocence that had an arguable basis in law and fact. Defendant argues that his claim was supported by newly discovered evidence which consisted of an affidavit from Sturdivant, who saw the shooting, but did not come forward sooner due to her fear of reprisal from the actual killer. He argues that this new evidence is material because the gunman's identity was an issue at trial. He further argues that the evidence is non-cumulative because Sturdivant is the only person to state that defendant was not the gunman.

Defendant asserts that if Sturdivant would have testified, the jury could have found Cochran's testimony unbelievable, and possibly would have concluded that defendant was not the gunman. Defendant correctly notes that because he raised a claim of actual innocence, he was not required to meet the cause and prejudice test for successive post-conviction petitions.

¶ 12 The State argues that the circuit court properly denied defendant's motion for leave to file his successive post-conviction petition because he failed to present a valid claim of actual innocence. The State contends that the information contained in Sturdivant's statement is cumulative to the theory of defense at trial that he was misidentified as the gunman. The state further argues that Sturdivant's testimony would not be enough to overcome Cochran's testimony, and thus, would not change the outcome of the case at retrial. The State also notes that Sturdivant did not identify the "real" gunman and questions why she would be afraid to come forward.

¶ 13 We review the denial of defendant's *pro se* motion for leave to file a successive post-conviction petition *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2010); *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). Pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)), defendant is prohibited from filing a successive post-conviction petition without first obtaining leave of court. *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Generally, such leave is granted only where defendant establishes cause for his failure to raise the claim in his initial post-conviction proceeding, and prejudice results from that failure. 725 ILCS 5/122-1(f); *Tidwell*, 236 Ill. 2d at 157. However, where the death penalty is not involved, defendant is excused from meeting the cause and prejudice requirement when he raises a claim of actual innocence in his successive post-conviction petition. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009).

¶ 14 To obtain relief under a theory of actual innocence, defendant must present newly discovered evidence that was not available at the time of trial and that he could not have discovered any sooner through due diligence. *Ortiz*, Ill. 2d at 333-34. Such evidence must also be material, noncumulative, and of such conclusive character that it would likely change the result on retrial. *Ortiz*, Ill. 2d at 333.

¶ 15 Section 122-2 of the Act provides that “the petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. 725 ILCS 5/122-2 (West 2010).

¶ 16 In the present case, the defendant alleged in his post-conviction petition that he had obtained newly discovered evidence from an eyewitness who would testify that she had an unobstructed view of the killer's face and that she was reasonably certain that it was not the defendant. None of these allegations are supported by the record. Thus, the defendant was required to support these allegations with sworn affidavits. *Niezgoda*, 337 Ill. App. 3d at 597 (citing *People v. Johnson*, 183 Ill. 2d 176, 191 (1998)).

¶ 17 Our supreme court has held that an affidavit must be sworn to before a person who has legal authority to administer oaths; therefore, a written statement that has not been sworn to before an authorized person does not constitute an affidavit. *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493-94 (2002). Following *Roth*, this court has previously held that an affidavit filed with a post-conviction petition pursuant to the Act must be notarized to be valid, and an affidavit that is not notarized has no legal effect. *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003). The *Niezgoda* court found that where the defendant's post-conviction petition was not supported by an affidavit, the circuit court properly dismissed the petition without an evidentiary hearing. *Niezgoda*, 337 Ill. App. 3d at 597.

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¶ 18 Here, Sturdivant's affidavit was not notarized or sworn before anyone who has authority under the law to administer oaths. Consequently, the affidavits the defendant filed have no legal effect.

¶ 19 Accordingly, we affirm the judgment of the circuit court of Cook County denying defendant leave to file a successive post-conviction petition.

¶ 20 Affirmed.