

2011 IL App (1st) 080708-U  
No. 1-08-0708

**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).

FOURTH DIVISION  
August 4, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 92 CR 10789
	)	
ANTHONY OLIVE,	)	Honorable
	)	Ralph Reyna and
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judges Presiding.

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PRESIDING JUSTICE LAVIN delivered the judgment of the court.  
Justices Fitzgerald Smith and Salone concurred in the  
judgment.

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**O R D E R**

**HELD:** Order denying leave to file successive post-conviction petition affirmed where defendant failed to provide newly discovered evidence that demonstrated his actual innocence.

¶ 1 Defendant Anthony Olive appeals from an order of the circuit court of Cook County denying him leave to file his fourth

*pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1, *et seq.* (West 2006)) because he failed to meet the cause and prejudice test. He contends that the court erred in denying him leave to file his successive petition because he stated the gist of a free-standing claim of actual innocence. Defendant also contends that the court improperly imposed a \$105 frivolous filing fee.

¶ 2 This court previously affirmed the order entered by the circuit court based on defendant's failure to seek leave to file a successive petition. *People v. Olive*, No. 08-0708 (December 4, 2009) (unpublished order under Supreme Court Rule 23)). The supreme court has since entered a supervisory order directing us to vacate our previous order and to reconsider our decision in light of *People v. Tidwell*, 236 Ill. 2d 150 (2010), and *People v. Ortiz*, 235 Ill. 2d 319 (2010). We have done so, and now affirm the circuit court's ruling for the reasons set forth below.

¶ 3 Following a 1993 jury trial, defendant was found guilty of first degree murder in connection with the April 28, 1992, shooting death of the victim, Christopher Revels, and sentenced to 50 years' imprisonment. On direct appeal, we affirmed that judgment (*People v. Olive*, No. 1-93-3449 (1995) (unpublished order under Supreme Court Rule 23)); and we adopt the necessary facts outlined in that order to resolve the issue raised by defendant here.

¶ 4 While defendant's direct appeal was pending, defendant filed a *pro se* postconviction petition, alleging ineffective assistance of trial counsel and juror bias, which the court summarily dismissed. Defendant then filed two successive *pro se* postconviction petitions, one captioned as a motion to reduce his sentence, both of which the trial court summarily dismissed. In each of the appeals from these decisions, we allowed appellate counsel to withdraw and affirmed the judgment of the trial court. *People v. Olive*, Nos. 1-95-1942 (1996), 1-98-3092 (1999), 1-06-0135 (2006) (unpublished orders under Supreme Court Rule 23).

¶ 5 Defendant then filed the instant *pro se* postconviction petition, alleging that newly discovered evidence demonstrated his actual innocence. The newly discovered evidence consisted of affidavits from Marshun McGee, who had not previously testified, and Andre Sherron, who testified for defendant at trial, but had also given inculpatory evidence before the grand jury.

¶ 6 In her affidavit, McGee averred that defendant was not the shooter, and as she waited for police to arrive that day, she overheard rival gang members conspiring to frame defendant for the murder. In his affidavit, Sherron recanted his grand jury testimony, as he had in his trial testimony, claiming it had been coerced by the police.

¶ 7 In a written order, the circuit court denied defendant leave to file a successive petition because he failed to satisfy

the cause and prejudice test. Defendant now challenges that ruling on appeal, claiming that he presented a free-standing claim of actual innocence and that his cause should be remanded for further proceedings under the Act. We review the denial of defendant's motion for leave to file a successive postconviction petition *de novo*. *People v. Simmons*, 388 Ill. App. 3d 599, 606 (2009).

¶ 8 The Act contemplates the filing of only one post-conviction petition (*Ortiz*, 235 Ill. 2d at 328); however, the statutory bar to filing a successive petition may be relaxed where fundamental fairness so requires (*Ortiz*, 235 Ill. 2d at 329 (and cases cited therein)). To that end, section 122-1(f) of the Act prohibits the filing of a successive petition without first obtaining leave of court, which is expressly conditioned on defendant's satisfaction of the cause and prejudice test. *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007).

¶ 9 No separate motion seeking leave is mandated by the Act, nor is an explicit request required if the circuit court sees fit to consider the matter and rule of its own accord. *Tidwell*, 236 Ill. 2d at 161. Thus, defendant's failure to separately request leave to file his successive petition in the instant case did not preclude the trial court from exercising its discretion and ruling on his petition of its own accord. *Tidwell*, 236 Ill. 2d at 161. Moreover, the supreme court has

clarified that, in a non-death case, as here, where defendant sets forth a claim of actual innocence in a successive post-conviction petition, he is not required to show cause and prejudice. *Ortiz*, 235 Ill. 2d at 330.

¶ 10 To obtain relief under this theory, the evidence in support of the claim must be newly discovered, material and not merely cumulative, and of such conclusive character that it will probably change the result on retrial. *Ortiz*, 235 Ill. 2d at 333. Evidence is newly discovered when it has been discovered since trial and could not have been discovered earlier in the exercise of due diligence. *Ortiz*, 235 Ill. 2d at 334. In addition, the evidence relied upon must be material to the issue and not merely cumulative of other evidence. *Ortiz*, 235 Ill. 2d at 334.

¶ 11 Defendant claims here that he raised the "gist" of an actual innocence claim through the notarized affidavits of Andre Sherron and Marshun McGee. Sherron averred in his affidavit that he had seen another individual shoot the victim and that he had seen defendant running from the scene without a gun while shots were still being fired. Although he originally provided this version of the facts to Chicago police detectives, Sherron claimed that they slapped and threatened him until he identified defendant as the shooter and agreed to testify as such before the

grand jury. Sherron also asserted that he was paid \$300 for his testimony in the grand jury proceedings.

¶ 12 Our review of the record shows that there is no discernible difference between Sherron's affidavit and his testimony at trial that he had seen another boy shoot the victim and that he had told this to police, but that they coerced him into providing a statement and testimony to the grand jury that defendant was the shooter. Thus, defendant cannot now argue that any part of the material in Sherron's affidavit was not known to him at or before trial, and, as such, it does not comprise "newly discovered" evidence. *People v. Barnslater*, 373 Ill. App. 3d 512, 523-24 (2007).

¶ 13 Next, we fail to see how McGee, or the facts presented in her affidavit, were unknown to defendant either before or during trial. McGee claimed that defendant "did not shoot [the victim] because I observed the face of the young boy who shot [the victim]," and that immediately after the shooting, she overheard two individuals, Maurice Foggey and Alonzo Portwood, state to a crowd of people that " 'we don't know which one of them [sic] Stones shot [the victim], but when the police arrive on the scene and start questioning anyone of you, say that [defendant] shot [him] because [defendant] been giving the G.D.'s a lot of trouble.' " McGee also stated that she had known defendant and had seen him about 20 times in the year leading up

to the shooting, but had only learned of his 1993 conviction in 2007.

¶ 14 In his own affidavit, defendant acknowledged that he had first met McGee in 1991, the year prior to the shooting, which further demonstrates that McGee was known to defendant at the time of the shooting. In addition, McGee claimed to be present at the scene of the shooting, and, thus, through the exercise of minimal due diligence, defendant should have discovered her and the facts she presented in her affidavit. *Ortiz*, 235 Ill. 2d at 333.

¶ 15 In addition, those facts parallel the facts presented by defendant at trial, in his direct appeal, and his subsequent post-conviction petitions. Thus, defendant cannot now argue that McGee's version of the facts was not known to him at any time prior to, or during, his trial. We, therefore, find that because neither of the affidavits relied upon by defendant support his claim that these witnesses were not previously known to him (*People v. Gillespie*, 407 Ill. App. 3d 113, 131 (2010)), nor that he did not know their version of the facts at any time prior to or during trial (*People v. Harris*, 206 Ill. 2d 293, 301 (2002)), the affidavits do not qualify as "newly discovered" evidence (*Barnslater*, 373 Ill. App. 3d at 523).

¶ 16 Finally, we observe that defendant is entitled to relief on his claim of actual innocence only if the evidence is

of such a conclusive character that it would probably change the result on retrial. *Harris*, 206 Ill. 2d at 301. The evidence proffered by defendant is not of such character. Defendant was convicted based on his own confession and the testimony of two eyewitnesses who positively identified him at, or leaving, the scene of the shooting.

¶ 17 Defendant launched a defense at trial that another boy, Hubert Wilson, shot the victim. Defendant's brother, a friend, Sherron, and defendant, testified to that effect, and asserted that the police had simply coerced any of the statements to the contrary. The jury heard the testimony of these witnesses and the same set of facts which is presented in the affidavits. As such, they are not of such a conclusive nature to probably change the result on retrial (*Harris*, 206 Ill. 2d at 301); and, we, accordingly, affirm the trial court's judgment denying defendant leave to file a successive petition.

¶ 18 Defendant next contends that the trial court improperly assessed \$105 in fees pursuant to section 22-105(b) of the Code of Civil Procedure (735 ILCS 5/22-105(b) (West 2006) (the Code)), because his petition raised the gist of a claim of newly discovered evidence of actual innocence. We disagree.

¶ 19 "[T]he purpose of section 22-105 is to stem the tide of frivolous filing by prisoners who have been convicted and, in most instances, have had their cases subjected to additional

forms of appellate review." *People v. Conick*, 232 Ill. 2d 132, 143 (2008). The purpose of section 22-105 is to compensate courts for some of the expense incurred in adjudicating frivolous postconviction petitions, whether initial or successive. *People v. Alcozer*, 241 Ill. 2d 248, 261 (2011), citing *Conick*, 232 Ill. 2d at 141. The record shows that defendant filed a direct appeal and three subsequent petitions, all of which were unsuccessful. In this case, the court denied defendant leave to file a fourth postconviction petition where he failed to set forth a cognizable claim upon which relief could be granted. Given this history, any determination that the trial court improperly assessed frivolous filing fees to defendant's third successive postconviction petition would be incongruous with the purpose of the statute. See *Conick*, 232 Ill. 2d at 144. We, therefore, find no error in the assessment of the filing fees under section 22-105(b) of the Code. 735 ILCS 5/22-105(b) (West 2006).

¶ 20 Accordingly, we affirm the order of the circuit court of Cook County.

¶ 21 Affirmed.