

No. 1-09-0105

**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).

FIRST DIVISION  
DATE: February 18, 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. 94 CR 19491
	)	
ROBERT SPENCER,	)	Honorable
	)	James M. Schreier,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOFFMAN delivered the judgment of the court.  
Presiding Justice Hall and Justice Lampkin concurred in the judgment.

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**O R D E R**

*HELD:* Where defendant reiterated self-defense claim presented at trial and presented evidence that he did not commit armed robbery, for which he was convicted on accountability theory, defendant did not raise viable claims of actual innocence in support of his successive post-conviction petition; the circuit court's order denying leave to file the successive petition was affirmed.

Defendant Robert Spencer appeals the circuit court's order denying him leave to file a successive *pro se* post-conviction petition. Defendant, who was convicted of first degree murder and armed robbery, contends his successive petition stated a claim of actual innocence because he attached the affidavits of several codefendants stating he acted in his own defense and in their defense. Defendant also alleged in the petition that the State withheld evidence that would have exonerated him of the armed robbery conviction. We affirm.

This case involves the 1994 death of David Morales during a fight with defendant and other members of the Satan Disciples street gang. Defendant's case was severed from that of his codefendants, and defendant's jury trial was held simultaneously with the bench trials of Jimmy Garcia (Jimmy), Robert Schultz and two other codefendants. The State presented evidence that when Morales drove past the group, defendant threw a bottle at Morales's vehicle. After a fight began, defendant ran across the street to get help, and between 15 and 20 Satan Disciples became involved in the altercation. Defendant and Morales, who was seated in his vehicle, struggled with the broken shaft of a golf club, and Morales was stabbed in the chest with the club. Morales died from that injury.

The defense asserted that defendant acted in self-defense and in the defense of Jimmy. Defendant denied throwing a bottle

at Morales's vehicle and testified Morales drove by and, with two other youths, approached him and Jimmy on foot and "beat up" Jimmy. Defendant testified that after he and Morales pulled the club back and forth, defendant saw "some blood," dropped the club, and ran around the vehicle to assist Jimmy, who was hurt. Stereo equipment was taken from the vehicle.

The jury was instructed on three theories of murder: first degree murder, murder committed in the course of a felony, and second degree murder. Defendant was convicted of first degree murder and armed robbery. Defendant, who was 17 years old at the time of the offense, was sentenced to concurrent terms of 50 years and 30 years in prison.

On appeal, defendant argued his 50-year sentence was excessive, and this court affirmed, stating the trial court did not abuse its discretion in imposing that sentence. *People v. Spencer*, No. 1-96-0927 (1997) (unpublished summary order under Supreme Court Rule 23).

In 1998, defendant filed a *pro se* post-conviction petition, again asserting his sentence was an abuse of the trial court's discretion and arguing the evidence was insufficient to prove his guilt beyond a reasonable doubt. The circuit court dismissed the petition as frivolous and patently without merit. On appeal, the State Appellate Defender moved to withdraw from representing defendant pursuant to *Pennsylvania v. Finley*, 481 U.S. 551

(1987), based on the lack of an arguable basis for relief. This court allowed counsel to withdraw and affirmed the dismissal of defendant's petition. *People v. Spencer*, No. 1-98-3106 (1999) (unpublished order under Supreme Court Rule 23).

In 2002, defendant filed a motion to reduce his sentence. The circuit court denied defendant's motion, stating it lacked jurisdiction to consider that argument. After defendant appealed, the Cook County Public Defender moved to withdraw based on *Finley*. This court allowed counsel to withdraw and affirmed the circuit court's ruling. *People v. Spencer*, No. 1-02-0823 (2003) (unpublished order under Supreme Court Rule 23). In 2004, defendant filed an amended motion to reconsider sentence. The circuit court dismissed defendant's motion, and his appeal to this court was dismissed on the State's motion. *People v. Spencer*, No. 1-04-1667 (2006) (dispositional order).

On November 13, 2008, defendant requested leave to file a successive *pro se* post-conviction petition, which is the subject of the present appeal. In his successive petition, defendant alleged he attacked Morales in an attempt to save Jimmy and that he did not engage in a common scheme with his codefendants to steal the stereo equipment. Defendant attached several affidavits in support of his petition. Jimmy attested defendant saved him from being beaten to death and "what [defendant] did was in self-defense because he and I were in eminent [sic]

danger." Schultz stated that defendant "was fighting for his life, due to saving [Jimmy] from being beaten to death." Jimmy and Schultz attested that defendant was not involved in taking the stereo equipment. On December 4, 2008, the circuit court denied defendant leave to file his successive petition.

On appeal, defendant contends the circuit court erred in denying him leave to file his successive post-conviction petition because his petition presented a viable claim of actual innocence. He argues the affidavits of his codefendants establish he was innocent of Morales's murder and the armed robbery.

The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) contemplates the filing of only one post-conviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). A defendant bringing a successive petition faces immense procedural default hurdles that are lowered only where fundamental fairness requires. *Pitsonbarger*, 205 Ill. 2d at 459. For a claim in a successive petition to be considered on its merits, the petition must meet the cause-and-prejudice test, *i.e.*, the defendant must establish good cause for failing to raise the claimed error in prior proceedings and actual prejudice resulting from the error. *People v. Tenner*, 206 Ill. 2d 381, 393 (2002). However, as defendant has attempted in this case, the cause and prejudice requirements can be circumvented if the

successive petition presents a freestanding claim of actual innocence. *Pitsonbarger*, 205 Ill. 2d at 459; see also *People v. Ortiz*, 235 Ill. 2d 319, 329 (2009).

Defendant contends his petition has raised an actual innocence claim as to his murder and armed robbery convictions. Defendant's petition variously invokes the cause-and-prejudice test, uses the phrase "actual innocence," raises assertions of the ineffectiveness of trial and appellate counsel and raises general principles for relief.

The State responds that although defendant used the term "actual innocence" in describing a claim of ineffectiveness of his trial counsel in his successive petition, defendant did not present a true "actual innocence" claim. Evidence of actual innocence has been described as proof of a defendant's "total vindication" or exoneration of the charged crime or crimes. *People v. Anderson*, 401 Ill. App. 3d 134, 141 (2010). As to the murder conviction, defendant claimed in the successive petition that his trial counsel was ineffective for not fully investigating and presenting evidence that he attacked Morales in defense of Jimmy. Defendant also asserted that trial counsel failed to call his grandmother and his girlfriend to corroborate his self-defense argument based on statements he made to them after the incident.

Claims brought under the Act should be "liberally construed to afford a convicted person an opportunity to present questions of deprivation of constitutional rights." *People v. Pack*, 224 Ill. 2d 144, 150 (2007). However, even if defendant's claims pertaining to self-defense are treated as claims of actual innocence as opposed to assertions of trial counsel's ineffectiveness, those contentions do not satisfy the requirements of an actual innocence claim.

To obtain relief under a claim of actual innocence, the evidence presented by the defendant must be newly discovered, *i.e.*, it must be evidence that was not available at the time of trial and that could not have been discovered sooner through due diligence. *Ortiz*, 235 Ill. 2d at 333. In addition, the evidence must be material and not merely cumulative, and also must be "of such conclusive character that it would probably change the result on retrial." *Ortiz*, 235 Ill. 2d at 333. Defendant's affirmative defense of self-defense, if established, would have exonerated him of first degree murder. See *People v. Eveans*, 277 Ill. App. 3d 36, 47 (1996) (self-defense is a justifying and exonerating circumstance). However, the affidavits in support of defendant's successive petition would not alter the result on retrial. Jimmy and Schultz now attest defendant was fighting for his own life and to save Jimmy. Defendant presented that theory at trial via his own testimony. The State also presented

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evidence that defendant was the initial aggressor in the altercation, throwing a bottle at the victim's vehicle.

As to the armed robbery conviction, defendant also claimed in the successive petition that the State failed to disclose evidence that would have exonerated him of that offense, namely that blood found on the stereo equipment did not match his blood. Defendant was convicted of armed robbery on an accountability theory. Therefore, the absence of defendant's blood on the stereo equipment would not exculpate him of that offense.

In conclusion, defendant did not raise any viable claim of actual innocence for the purpose of filing his successive post-conviction petition. Accordingly, the circuit court's order denying defendant leave to file his successive petition is affirmed.

Affirmed.