FIRST DIVISION
June 27, 2011

No. 1-09-1949

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. 99 CR 19701
	)	
JOSEPH TALACH,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hall and Justice Hoffman concur in the judgment.

O R D E R

HELD: Defendant's claim of actual innocence must fail when the alleged "newly discovered" evidence was known to defendant prior to and during his trial.

Defendant, Joseph Talach, appeals from an order denying him leave to file a *pro se* successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)). Defendant contends the trial court erred because newly discovered evidence established that he was actually innocent of attempted murder. Defendant also contends the imposition of fees pursuant to section 22-105 of the Illinois Code of Civil Procedure (the Code) (see 735 ILCS 5/22-105 (West 2008)), violated his constitutional rights to due process and equal

protection. We affirm.

Following a jury trial, defendant was convicted of attempted murder and sentenced to 30 years in prison.[1] Defendant and codefendant, Joseph Koonce, were both charged by indictment with attempted murder after an incident during which the victim, Michael Rasor, was hit several times with a baseball bat.

The matter proceeded to a joint jury trial. At trial, the evidence established, through the testmony of Gilardo Arreola and Cook County Sheriff Officers Leonard Jagielski and Dimas Hernandez, that defendant hit the victim several times with a baseball bat. Defendant, on the other hand, testified that one of the victim's companions had the bat and must have hit him with it.

The jury found defendant guilty of attempted murder, and he was sentenced to 30 years in prison. Codefendant was acquitted. This court affirmed defendant's conviction and sentence on appeal. *People v. Talach*, No. 1-02-0177 (2004) (unpublished order under Supreme Court Rule 23).

In 2005, defendant filed a *pro se* postconviction petition alleging, among other claims, that he received ineffective assistance of counsel because counsel failed to present the testimony of certain eyewitnesses who could have supported defendant's version of the events, *i.e.,* he acted in self-defense. The trial court summarily dismissed the petition as frivolous and patently without merit, and this court affirmed that judgment on appeal. *People v. Talach*, No. 1-05-1667 (2006) (unpublished order under Supreme Court Rule 23).

In May 2009, defendant filed the instant *pro se* successive postconviction petition alleging,

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[1]The facts of this case were set out at length on direct appeal and will be repeated here only to the extent necessary to decide this appeal.

inter alia, a claim of actual innocence in that it was codefendant who hit the victim with a baseball bat. In his affidavit, defendant alleged that, after he punched out the window of a white car, he was attacked by the car's occupants. Codefendant then hit the victim with a baseball bat as the victim was about to strike defendant with a beer bottle. Defendant further alleged that he never identified codefendant as the offender because they were fellow gang members.

Attached to the petition was the affidavit of Carlos Nunez, who alleged that he saw defendant punch out the driver-side window of a white car. During the ensuing fight, a man exited a blue car with a baseball bat, and hit one of the passengers in the white car. Mr. Nunez then "sped away." He never told anyone what he had seen because he was afraid of gang retaliation. He subsequently met defendant when they were incarcerated in the same facility. After overhearing a conversation during which defendant explained his case, Mr. Nunez approached defendant, indicated he had witnessed the incident, and offered to testify.

Also attached to the petition were the affidavits of Nicole Rada and Jacqueline Talach. Ms. Rada alleged that defendant was driving a blue car on the night of the incident. Ms. Talach, defendant's sister and codefendant's fiancé, alleged that codefendant confessed to her in 2002 that it was he, rather than defendant, who hit the victim with a baseball bat. Ms. Talach further alleged that codefendant was killed by rival gang members shortly after the conversation, but she had remained silent because she feared gang retaliation.

The trial court denied defendant leave to file the successive *pro se* postconviction petition, dismissed the petition, and found the claims raised therein to be frivolous and patently without merit. In rejecting defendant's claim of actual innocence, the court highlighted the fact that multiple

witnesses had alleged defendant struck the victim. The court determined this claim was frivolous and patently without merit because it was a "newly concocted" defense couched as a claim of actual innocence. Based in part upon this finding, the court imposed $105 in fees and court costs pursuant to section 22-105 of the Code.

On appeal, defendant contends his *pro se* successive petition must advance to second-stage proceedings under the Act because it presented new and noncumulative evidence of his actual innocence, *i.e.*, the affidavits of Ms. Talach and Mr. Nunez alleging that codefendant was the person who struck the victim.

The Act provides a mechanism through which a criminal defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1; *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Multiple postconviction petitions are disfavored under the Act, and a defendant wishing to file a successive postconviction petition must first obtain leave of court. *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Generally, leave to file is only granted when a defendant "demonstrates cause for his *** failure to bring the claim in his *** initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2008); see, also, *Tidwell*, 236 Ill. 2d at 161. However, a defendant who sets forth an actual innocence claim in a successive postconviction petition is excused from showing cause and prejudice. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). This court reviews the trial court's denial of leave to file a successive postconviction petition *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010).

Under the due process clause of the Illinois Constitution of 1970 (Ill. Const. 1970, Art. 1, §

2), a defendant may raise a "free-standing" claim of actual innocence based on newly discovered evidence in a postconviction proceeding. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). To obtain relief pursuant to a claim of actual innocence under the Act, the supporting evidence must be new, material, noncumulative, and of such a conclusive nature, that it would probably change the result of a retrial. *People v. Hickey*, 204 Ill. 2d 585, 601-02 (2001). "Newly discovered" evidence is evidence unavailable at trial and evidence a defendant could not have discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002); see also *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (2010) (when the evidence at issue presents facts a defendant knew prior to, or during trial, it is not "newly discovered", even if the source of those facts may have been unavailable, uncooperative, or unknown).

This court first rejects defendant's contention that it was improper for the trial court to address his claim of actual innocence at the "summary" dismissal stage. See *People v. Mack,* 336 Ill. App. 3d 39, 44-45 (2002) (stating, in *dicta,* that *People v. Boclair*, 202 Ill. 2d 89 (2002), appeared to prevent the trial court from summarily dismissing postconviction petitions for a failure to present evidence of actual innocence in a timely manner). Defendant cites no authority, holding a successive *pro se* postconviction petition alleging a claim of actual innocence progresses automatically to the second stage of review under the Act. On the contrary, this court has held that, in order for a successive petition to proceed to the second stage of proceedings under the Act, it must be based on newly discovered evidence that could potentially exonerate the defendant. *People v. Anderson*, 401 Ill. App. 3d 134, 140 (2010).

Here, the affidavits of Ms. Talach and Mr. Nunez alleging that codefendant, rather than

defendant, struck the victim with a baseball bat were not "newly discovered" evidence establishing defendant's actual innocence. Generally, in order for evidence to qualify as "newly discovered", the facts which comprise it must be new and discovered since the defendant's trial. *Jarrett*, 399 Ill. App. 3d at 723. The affidavits do not constitute newly discovered evidence because defendant was aware of these facts prior to and during his trial. *Jarrett*, 399 Ill. App. 3d at 723.

Here, defendant argues he had no way to know sooner that Mr. Nunez witnessed the incident or that codefendant confessed to Ms. Talach, but his affidavit in support of the instant successive petition indicates he saw codefendant strike the victim with a baseball bat. Thus, because defendant knew of the facts contained in the affidavits prior to and at his trial, even though he did not know of the existence of these potential witnesses, the affidavits do not constitute "newly discovered" evidence. See *People v. Davis*, 382 Ill. App. 3d 701, 712-13 (2008) (the affidavit of an eyewitness to the defendant's arrest was not newly discovered evidence, even though the defendant did not know what the witness had seen or would testify to, when the affidavit did not contain any facts defendant was not aware of prior to or at his trial). Thus, defendant's claim of actual innocence must fail.

Were this court to assume the allegations raised in Ms. Talach's and Mr. Nunez's affidavits constituted newly discovered evidence, the facts contained in the affidavits are not of such a conclusive character that they would change the result if defendant was retried. See *Hickey*, 204 Ill. 2d at 601-02. Here, three witnesses identified defendant as the person who struck the victim with a baseball bat and testified consistently regarding the details of the incident. See *Talach*, No. 1-02-0177, Order at 14 (noting the "detail, clarity, and corroboration of the witness testimony about the brutal nature of the one-sided attack"). There is no indication in the record that any of these

eyewitnesses has recanted his identification of defendant. See *Ortiz*, 235 Ill. 2d at 336-37 (finding that the newly discovered evidence would probably change the result on retrial when it directly contradicted the recanted testimony of the State's witnesses). Thus, the addition of Ms. Talach's and Mr. Nunez's testimonies would require the fact finder to determine which version of events and which witnesses were most credible. See *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001) (a fact finder faced with conflicting versions of events is entitled to choose among those versions; it need not accept a defendant's version from those competing versions). Because the facts contained in the affidavits are not of such a conclusive character that they would probably change the outcome of a retrial, defendant has failed to allege a claim of actual innocence under the Act (*Hickey*, 204 Ill. 2d at 601-02), and the trial court properly denied him relief.

Defendant next contends the imposition of fees pursuant to section 22-105 of the Code denied him due process and equal protection under the law. See 735 ILCS 5/22-105 (West 2008).

This argument was recently rejected by our supreme court in *People v. Alcozer*, No. 108109 (Ill. Mar. 24, 2011). There, the court determined that section 22-105 does not impinge upon a prisoner's fundamental right of access to the courts because fees are assessed only after a legal document is found to be frivolous. *Alcozer*, No. 108109, slip op. at 10. The court also rejected the defendant's equal protection claim, finding that section 22-105 is rationally related to the legislature's goal of stemming the tide of frivolous filings by prisoners and applies only to those prisoners who file frivolous pleadings, which is a permissible distinction related to the purpose of the classification. *Alcozer*, No. 108109, slip op. at 14.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.