

No. 1-09-0608

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FOURTH DIVISION
March 31, 2011

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 147
)	
LAMONTREAL GLINSEY,)	Honorable
)	Bertina E. Lampkin,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Gallagher and Justice Pucinski concurred
in the judgment.

O R D E R

HELD: Where defendant's claim of actual innocence was not supported by newly discovered evidence of so conclusive a character that it would probably change the result on retrial, the trial court properly denied defendant leave to file his successive *pro se* postconviction petition.

Defendant Lamontreal Glinsey appeals from the trial court's order denying leave to file his successive *pro se* petition for

relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant contends that his petition adequately presented a claim of actual innocence based on the attached affidavit of Casanova Johnson, the State's eyewitness, recanting his trial testimony. We affirm.

After a jury trial, defendant was convicted of the first degree murder of Harry Hudson on November 6, 1998, based on his accountability for the actions of codefendant Antoine Anderson. Defendant and Anderson were tried separately.

Defendant gave a written statement implicating himself in the murder of Hudson when he was interviewed by the police. In his statement, defendant said that he, Anderson, and Johnson were members of the Gangster Disciples. Anderson wanted to get back at another gang, the Black Disciples, for shooting his brother. They went to an area known as the "rock block" and got a rifle from "Little Guy." They took the rifle to the side of Johnson's building that faced a liquor store known as a Black Disciple hangout. Defendant fired the gun twice at the store and then it jammed. They had Little Guy unjam the rifle, then went back to the side of Johnson's building. Defendant saw Hudson get shot as Anderson was firing toward the store.

Before trial, defendant moved to suppress his custodial statement, alleging that he was not advised of his *Miranda* rights and the interviewing detectives physically coerced the statement.

At the motion hearing, Detective John Murray testified that he and his partner advised defendant of his *Miranda* rights when they interviewed him around 3:30 p.m. on November 14, 1998. Defendant initially denied involvement in the murder, but gave a statement substantially similar to his written statement after the detectives informed him his alibi witnesses had been interviewed. Later, Assistant State's Attorney Laura Forester interviewed defendant with Murray. She advised defendant of his *Miranda* rights, then asked Murray to leave the room. When Murray reentered, defendant agreed to submit a handwritten statement which Forester took at 1:35 a.m. on November 15, 1998. Forester took a picture of defendant once the statement was completed. During his statement, when asked how he had been treated by the police, defendant said "the police have treated him okay." Neither Murray nor his partner ever hit defendant. Murray testified to substantially the same at trial.

Defendant testified that he was arrested on November 14, 1998, and was never advised of his *Miranda* rights. When defendant denied his involvement in the murder, Murray hit him twice on his back shoulder with the handle of his pistol and Murray's partner hit defendant on the right side of his face five times with closed fists. When defendant met with Forester, he told her the detectives had hit him but could not recall her response. Defendant said he never saw the statement, and that

the photograph allegedly taken by Forester was actually taken before he was interviewed. Defendant testified to substantially the same at trial.

For the purposes of the hearing, the parties stipulated that a photograph dated November 16, 1998, was taken of defendant when he was admitted to jail.

The court denied defendant's motion to suppress. In its ruling the court specifically found Murray's testimony to be credible and defendant's testimony to be not credible. The court saw no injuries or swelling in the photographs, and stated that it believed "defendant gave his statement voluntarily of his own free will without threats of coercion, duress, physical force or intimidation of any kind."

At trial, Casanova Johnson testified that he and defendant were with Anderson when he found out his brother had been shot. Anderson said he was "going to lace," or kill, the Black Disciples. On the night of the murder, defendant, Anderson and Johnson were at Anderson's house with Denise Brown, Iesha Bridewell and others when they heard shots outside. When the shooting stopped, defendant, Anderson and Johnson went to the rock block, and got a rifle from a man called "Bird." They went to the side of Johnson's building and defendant fired the gun toward the store. The gun jammed and they took it back to Bird, who unjammed it, then they split up. Anderson, Johnson and

defendant regrouped on the side of Johnson's building around 9 p.m. Anderson handed defendant the rifle, which he shot at the store "about five times." Anderson then fired at the store and Johnson saw Hudson get shot. They all fled from the scene.

Denise Brown testified that on the night of the murder, she saw defendant, Johnson, Anderson and two others standing at the side of Johnson's building. Anderson was holding a rifle behind his back and told her to hurry home. On her way home she heard four gunshots. Brown never saw defendant with the gun.

Iesha Bridewell corroborated Johnson's testimony that defendant was in the room when Anderson found out his brother was shot and that on the night of the murder they were together at Anderson's house when they heard shots outside. She testified that Anderson then grabbed a rifle from behind the refrigerator and said he was going to shoot. Defendant, Johnson, Jesse Locket and the others walked out with Anderson. Bridewell went home. About 15 minutes later she heard shooting coming from the direction of Johnson's building; however, she did not mention hearing shots in her statement to the police.

Jesse Locket testified that he heard the shots from a nearby building but it was too dark to see anyone. However, in a signed, handwritten statement, Locket said that he saw Anderson holding a rifle with Johnson on the side of Johnson's building. He saw Anderson aim and fire the gun at the store, then run away.

Assistant State's Attorney Laura Forester's testimony corroborated Murray's testimony from the motion to suppress hearing. She additionally testified that when she asked Murray to leave the interview room she asked defendant how he had been treated by the police. "He indicated to [her] that he had been treated fine and that he didn't have any problems." Forester did not notice any injuries on defendant's face or body.

Officer Antonio Artis testified that he interviewed defendant at lockup on November 15, 1998. He did not notice any visible injuries or swelling on defendant's face or body.

Benny Ybarra, a paramedic at Cermak Hospital, testified that he interviewed and screened defendant as a new detainee on November 16, 1998. He did not document seeing any injuries on defendant during his examination.

Defendant testified that he was never with Anderson or Johnson on the evening of the shooting. He was in front of his aunt's house with his friend Charlie when they heard shooting. He had no idea Anderson was planning on shooting the Black Disciples.

The jury found defendant guilty of first degree murder and the trial court sentenced him to 45 years in prison. Defendant appealed, and this court affirmed defendant's conviction. *People v. Glinsey*, No. 1-01-0089 (2003) (unpublished order under Supreme Court Rule 23).

On December 9, 2003, defendant filed his first *pro se* postconviction petition, which was summarily dismissed by the trial court. Defendant appealed the dismissal, and this court affirmed the trial court's dismissal after granting defense counsel's motion for leave to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Glinsey*, No. 1-04-1173 (2005) (unpublished order under Supreme Court Rule 23).

On October 22, 2008, defendant filed the successive *pro se* postconviction petition that is the subject of this appeal, alleging, among other things, actual innocence based on newly discovered evidence. Defendant supported his petition with an affidavit from Johnson, dated March 7, 2007. In his affidavit, Johnson states that he falsely testified before the Grand Jury and at trial due to the interviewing detectives using "assaults, threats and coercion [*sic*]." He "was never present during such incidents, let alone a witness to such crimes being committed."

On January 26, 2009, the trial court entered a written order denying defendant leave to file the successive petition. In addition to ruling that defendant failed to establish cause and prejudice, the trial court also found that Johnson's affidavit did not meet the test for newly discovered evidence that supports a claim of actual innocence.

On appeal, defendant contends that his petition adequately alleged a claim of actual innocence because Johnson's affidavit is newly discovered, material, not cumulative, and of such a conclusive nature that the result would probably be different on retrial.

We review *de novo* the denial of leave to file a successive postconviction petition. *People v. Gillespie*, Nos. 1-08-3016 & 1-10-0702, slip op. at 16 (Dec. 29, 2010). Accordingly, we may affirm based on any reason supported by the record because we review the judgment, not the trial court's reasoning. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

A successive postconviction petition that sets forth a claim of actual innocence is not subject to the general cause and prejudice test for such petitions. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). An actual innocence claim can be based on newly discovered evidence. *Ortiz*, 235 Ill. 2d at 333. Such evidence must be (1) newly discovered, (2) material, (3) not merely cumulative, and (4) "of such conclusive character that it would probably change the result on retrial." *Id.* In the present case, defendant has not met the fourth factor.

To satisfy the fourth factor, the evidence of actual innocence must do more than merely advance a reasonable doubt argument but, rather, requires the purported evidence to "be of such conclusive character that it would provide total vindication

or exoneration and probably change the result on retrial." *People v. Munoz*, No. 1-08-3571, slip op. at 10-11 (Dec. 22, 2010) (citing *Anderson*, 401 Ill. App. 3d at 140-41).

The actual innocence standard was met in *Ortiz* where the claim was supported by a newly discovered eyewitness to the crimes (Hernandez) who testified that the defendant was not present during the commission of the crimes. *Ortiz*, 235 Ill. 2d at 335-37 (granted a new trial after an evidentiary hearing based on defendant's actual innocence claim).

Similarly, the actual innocence standard was established where a new affiant (Molina) averred that he witnessed the shooting, and named a man other than the defendant as the shooter. *Munoz*, No. 1-08-3571, slip op. at 8, 17 (allowed the defendant to file a successive postconviction petition).

In addition, the defendant demonstrated an actual innocence claim in his third postconviction petition, which was prepared by counsel, where two of four actual offenders (Chambers and Hamelin) had provided "affidavits stating that they were pressured to wrongly identify" the defendant and the other two offenders (Johnson and Taylor) had provided affidavits exonerating the defendant. *People v. Williams*, 392 Ill. App. 3d 359, 370 (2009) (allowed the defendant to file his third postconviction petition). This court found "[t]he fact that Johnson and Taylor provide attestations exonerating defendant is

sufficient to create a new question of defendant's innocence in the eyes of the trier of fact." *Id.*

In contrast to *Ortiz*, *Munoz*, and *Williams*, the present actual innocence claim is predicated on Johnson's affidavit which expressly provides that he did not witness the crime. An affidavit from an individual who has no personal knowledge concerning the subject crime cannot support a defendant's claim of actual innocence. *Gillespie*, Nos. 1-08-3016 & 1-10-0702, slip op. at 33 (affirmed the denial of leave to file successive postconviction petitions).

Even an affidavit of a codefendant may not be sufficient to support a claim of actual innocence based on newly discovered evidence if it does not vindicate the defendant. *Anderson*, 401 Ill. App. 3d at 141. In *Anderson*, the defendant was convicted of first degree murder and attempted first degree murder based on accountability for the shootings committed by codefendant. At trial, the State entered the defendant's custodial statement in which he stated he knew the codefendant had a gun. *Anderson*, 401 Ill. App. 3d at 136. The codefendant's affidavit stated that the defendant was not armed and did not assist in the shooting. *Anderson*, 401 Ill. App. 3d at 137. This court found that even if the codefendant's statement "would provide a basis to argue the existence of a reasonable doubt, *** that is not the standard as addressed in *Collier* [*People v. Collier*, 387 Ill. App. 3d 630

(2008)] and affirmed in *Ortiz*." *Anderson*, 401 Ill. App. 3d at 141. Accordingly, the codefendant's affidavit, at best, could be considered in weighing the defendant's inculpatory custodial statement but was not sufficient to establish actual innocence because it did not vindicate the defendant. *Anderson*, 401 Ill. App. 3d at 140-41 (affirmed the order denying leave to file a successive postconviction petition alleging an actual innocence claim).

Here we find that defendant's petition did not set forth a claim of actual innocence based on the affidavit of Johnson because Johnson attested that he did *not* witness the crimes and also offered no personal knowledge which would exonerate defendant. At best, Johnson's affidavit only provided a possible basis to argue reasonable doubt, which is not the standard for an *actual* innocence claim.

Furthermore, Johnson's recantation is not so conclusive that it would change the result at trial. Brown testified that she saw defendant, Anderson and Johnson as she was walking by Johnson's building, right where the shooting occurred. Anderson was holding the rifle, and just after she left them, she heard shots. Bridewell saw Anderson get the rifle from behind the refrigerator and run outside with defendant, Johnson, and others. Shortly after, she heard shots. Bridewell was also present with defendant when Anderson found out his brother was shot and stated

that he wanted to shoot the Black Disciples. Even if Johnson testified he was not present for the "incidents", he did not contradict defendant's statement or, more importantly, the testimony of Brown and Bridewell establishing that defendant knew Anderson wanted to shoot the Black Disciples, was present with Anderson when he had the gun, and was seen at the scene of the shooting minutes before shots were heard.

Defendant also argues that Johnson's affidavit is conclusive because it corroborates defendant's theory that the police physically coerced defendant's confession. However, defendant fully litigated this issue before trial in the hearing for his motion to suppress the statement, and at trial through his own testimony and the cross-examination of the detectives. At the motion hearing, the trial court specifically found that defendant's testimony was not credible, Detective Murray's testimony was credible and the photographs of defendant showed no sign of injury. Furthermore, at trial, Forester testified that defendant told her he was not mistreated and she did not notice any injuries, Officer Artis testified that he did not notice any injuries on defendant at lockup, and Benny Ybarra testified that he did not document any injuries when he examined defendant as a new detainee. Based on the record, defendant's arguments are not persuasive.

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

Affirmed.