**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).

2011 IL App (3d) 090881-U

Order filed October 25, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) Appeal from the Circuit Court |
| | ) of the 14th Judicial Circuit, |
| | ) Rock Island County, Illinois, |
| Plaintiff-Appellee, | ) |
| | ) Appeal No. 3-09-0881 |
| v. | ) Circuit No. 94-CF-306 |
| | ) |
| LYNN BROOKS, JR., | ) Honorable |
| | ) Walter D. Braud, |
| Defendant-Appellant. | ) Judge, Presiding. |

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JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the judgment.

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**ORDER**

¶ 1 *Held*: The trial court did not err in denying the defendant leave to file a successive postconviction petition.

¶ 2 The defendant, Lynn Brooks, Jr., was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 1994)), aggravated battery with a firearm (720 ILCS 5/12-4 (West 1994)), and aggravated discharge of a firearm (720 ILCS 5/24-1.2 (West 1994)). The defendant appeals the trial court's denial of his motion for leave to file a successive postconviction petition. The defendant argues that the trial court erred in denying leave to file the petition because he raised a

claim of actual innocence. We affirm.

¶ 3 FACTS

¶ 4 The defendant was charged with first degree murder, aggravated battery with a firearm, and aggravated discharge of a firearm for a March 1993 shooting in Rock Island. At trial, three witnesses testified that they saw the defendant with a gun that matched the description of the murder weapon. Terrance Slater stated that the defendant pulled the gun out of his shirt and began shooting after a verbal altercation between rival gangs. When the first volley of shots ended, Slater saw that Eric Harvard had been shot. Vernon Orr testified that he saw the outline of a gun in the defendant's pants before the shots were fired. According to Orr, during the first volley of shots, he was struck in the leg by bullets fired from the defendant's direction. Several witnesses also testified that a second volley was fired a short time after Harvard and Orr were allegedly shot.

¶ 5 On November 11, 1994, the defendant was convicted of first degree murder for the shooting death of Harvard, aggravated battery with a firearm for shooting Orr, and aggravated discharge of a firearm. The court sentenced the defendant to a combined term of 70 years in prison. On direct appeal, we affirmed the court's judgment and sentence. *People v. Brooks*, No. 3-95-0027 (1997) (unpublished order under Supreme Court Rule 23).

¶ 6 In February 1998, the defendant filed a motion for an extension of time to file a postconviction petition. The court found that the motion for leave was filed more than one month after the statutory deadline and denied the defendant leave to file the petition. See 725 ILCS 5/122-1(c) (West 1996). The defendant appealed, and we affirmed the court's decision. *People v. Brooks*, No. 3-98-0353 (1999) (unpublished order under Supreme Court Rule 23).

¶ 7 On September 18, 2009, the defendant filed a motion for leave to file a successive postconviction petition. The motion alleged that new evidence had been discovered in 2008 that proved the defendant's innocence. An affidavit from David Greer was attached to the motion. Greer averred that he was present during the March 1993 shooting. He stated that he was at a nearby park in Rock Island when he heard gunshots. Greer then moved towards the scene. At the scene, he noticed that Harvard had been shot. Greer averred that shots were fired a second time as people began to gather around Harvard. He then ran for cover, and he heard Orr yell as he was struck in the leg by a bullet from the second volley. However, Greer was unable to identify the shooter or the direction the shot came from. Greer concluded that Harvard and Orr were shot at separate times "at least 3 to 5 minutes apart."

¶ 8 Greer's affidavit further noted that he did not come forward at the trial because he did not know the details of the case against the defendant. He also stated that he did not want to get involved in the case because of his "former [gang] affiliation," which might have been seen as a betrayal.

¶ 9 The court denied the defendant's motion for leave to file a successive postconviction petition. The court noted that the defendant had not made a showing of prejudice and that "the [d]efendant offer[ed] no satisfactory reason for Greer not testifying at trial." The court concluded that the defendant had failed to establish cause and prejudice. The defendant appeals.

¶ 10 ANALYSIS

¶ 11 On appeal, the defendant argues that it was error for the court to deny his motion for leave to file a successive postconviction petition because he alleged a claim of actual innocence. The Post-Conviction Hearing Act contemplates the filing of only one postconviction petition.

*People v. Morgan*, 212 Ill. 2d 148 (2004). However, a successive postconviction petition may be filed if a defendant is granted leave of the court. 725 ILCS 5/122-1(f) (West 2008). Leave of the court may be granted if a defendant "demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2008).

¶ 12 However, a defendant need not establish cause and prejudice in his motion for leave to file a successive postconviction petition if he can show a valid freestanding claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319 (2009). "To win relief under [this] theory, the evidence adduced by defendant and establishing his actual innocence must first be newly discovered, *i.e.*, it must be evidence (1) that was not available at defendant's original trial and (2) that defendant could not have discovered sooner through diligence." *People v. Simmons*, 388 Ill. App. 3d 599, 614 (2009). Furthermore, the defendant's evidence must be material, noncumulative, and "of such conclusive character that it would probably change the result on retrial." *Simmons*, 388 Ill. App. 3d at 614.

¶ 13 We review the denial of the defendant's motion for leave to file a successive postconviction petition *de novo*. *People v. Williams*, 392 Ill. App. 3d 359 (2009).

¶ 14 We initially consider whether the trial court erred in imposing the cause and prejudice test. This requires a determination of whether the defendant's motion for leave to file a successive postconviction petition alleged a valid claim of actual innocence, which rendered the cause and prejudice test inapplicable. See *Ortiz*, 235 Ill. 2d 319.

¶ 15 We note that Greer's affidavit asserts that his testimony was not known or available at trial because Greer did not know of the defendant's trial and would have been uncooperative as a

result of his rival gang affiliation. Consequently, it could be found that the Greer affidavit represents newly discovered evidence.

¶ 16 However, Greer's potential testimony was not material. Greer's affidavit was not exculpatory because he admitted that he did not know who the shooter of Orr was or the direction the shots came from. Greer did aver that Orr was shot in the second volley, minutes after Harvard. However, Greer's affidavit does not allege that he actually saw Orr shot in the second volley but only heard him yell. Also, his statements were cumulative of several other witnesses who testified that there was some time between the volleys of gunshots.

¶ 17 We therefore find that the evidence was not material, was cumulative, and was not of such a conclusive character that it would have changed the result on retrial. Consequently, the defendant has not alleged an actual innocence claim sufficient to grant leave to file a successive postconviction petition.

¶ 18 Thus, the trial court properly reviewed defendant's motion for leave to file a successive postconviction petition using the cause and prejudice test. The trial court did not err.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 21 Affirmed.