

No. 1-09-2597

**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).

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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. 01 CR 15671
	)	
PERNELL BROWN,	)	Honorable
	)	Lawrence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE McBRIDE delivered the judgment of the court.  
Justices Palmer and Taylor concurred in the judgment.

**ORDER**

¶ 1 *Held:* Order denying defendant leave to file successive post-conviction petition affirmed where defendant failed to set forth a colorable claim of actual innocence based on alleged newly discovered evidence.

¶ 2 Defendant Pernell Brown appeals from an order of the circuit court of Cook County denying him leave to file a successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He contends that the court erred in

denying his request based on his failure to satisfy the cause and prejudice test where he raised a claim of actual innocence based on a newly discovered eyewitness.

¶ 3 We initially affirmed the circuit court's decision denying defendant leave to file a successive post-conviction petition on August 26, 2011, finding that he failed to provide an affidavit from one of the alleged eyewitnesses, and that the affidavit of the other did not constitute newly discovered evidence, nor was of such a conclusive nature that it would probably change the result on retrial. *People v. Brown*, No. 1-09-2597 (2011) (unpublished order under Supreme Court Rule 23). Thereafter, the supreme court entered a supervisory order directing this court to vacate that order and reconsider the matter in light of *People v. Edwards*, 2012 IL 111711. *People v. Brown*, No. 112976 (Ill. May 30, 2012). We have done so, and, for the reasons that follow, we conclude, consistent with the supreme court's ruling in *Edwards*, that the circuit court did not err in denying defendant leave to file a successive petition.

¶ 4 The record shows that defendant was found guilty of first degree murder in connection with the January 16, 2001, shooting death of Robert Byrd in a sandwich shop, and sentenced to an aggregate term of 50 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Brown*, No. 1-04-2048 (2006) (unpublished order under Supreme Court Rule 23).

¶ 5 On December 26, 2006, defendant filed his first *pro se* postconviction petition, alleging ineffective assistance of trial and appellate counsel, and asserting his actual innocence. The trial court summarily dismissed his petition, and we affirmed that order in *People v. Brown*, No. 07-0406 (Nov. 7, 2008) (unpublished order under Supreme Court Rule 23).

¶ 6 In June 2009, defendant filed a *pro se* motion for leave to file a successive petition and the instant successive *pro se* postconviction petition, alleging newly discovered evidence demonstrating his actual innocence. That evidence consisted of his own affidavit and one from Martell Halbert.

¶ 7 In his affidavit and pleadings, defendant proclaimed his innocence and alleged that David Payton, his late half-brother, was the real offender. He also stated that, in early 2007, he learned that two witnesses, Martell Halbert and Mario Nixon, were present at the scene of the shooting but had never been interviewed by police. Although they are visible on the surveillance footage of the shooting, defendant averred that in January 2007, he talked with Halbert over the telephone, and that he (Halbert) subsequently signed an affidavit. Although Nixon has not provided an affidavit, defendant asserted that he "would be willing" to sign one, but that he has been unable to contact him.

¶ 8 In his affidavit, Halbert averred that, early on the morning of the shooting, he and Nixon had been walking to the sandwich shop where the incident occurred. Payton offered to give the men a ride, drove them to the sandwich shop, and left. About 10 or 15 minutes later, Payton returned to the shop with a pistol and fired several gunshots at the victim "without hesitation." Halbert was never interviewed by police and was unaware that he had been captured on the surveillance camera in the store.

¶ 9 The circuit court denied defendant leave to file a successive petition because he failed to satisfy the cause and prejudice test. The court found that any allegations involving Nixon were without a legal basis because defendant had not provided an affidavit from him. As to Halbert, the court found, based on defendant's own affidavit, that Halbert and the set of facts presented by him should have been known to him at or before trial. 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.

¶ 10 Our review of the order denying defendant's motion for leave to file a successive postconviction petition is *de novo*. *People v. Simmons*, 388 Ill. App. 3d 599, 606 (2009). As such, we review the judgment of the court, not the reasons cited, and may affirm on any basis

supported by the record if the judgment is correct. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 11 The Act contemplates the filing of only one post-conviction petition (*People v. Ortiz*, 235 Ill. 2d 319, 328 (2009)); however, the statutory bar to a successive petition may be relaxed where fundamental fairness so requires (*Ortiz*, 235 Ill. 2d at 329 (and cases cited therein)). 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). However, in a non-death penalty 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.

¶ 12 Although the circuit court incorrectly relied on the cause and prejudice test in denying defendant leave to file his successive petition, the supreme court held that remand was unnecessary where defendant's request to file a successive petition based on actual innocence may be resolved as a matter of law. *Edwards*, 2012 IL 111711, ¶ 31. The question is whether defendant set forth a colorable claim of actual innocence, *i.e.*, did defendant's request for leave of court raise the probability that it was more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Edwards*, 2012 IL 111711, ¶ 31.

¶ 13 To obtain relief under a theory of actual innocence, the evidence in support of the claim must be newly discovered, material to the issue and not merely cumulative of other evidence, 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 found since trial and could not have been discovered earlier in the exercise of due diligence. *Ortiz*, 235 Ill. 2d at 334. Defendant asserts that he established an actual innocence claim through his pleadings, the notarized affidavit of Halbert, and the proposed affidavit of Nixon.

¶ 14 Initially, we note that the failure to attach the necessary affidavits, records, or other evidence, or explain their absence is "fatal" to a post-conviction petition. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). Here, defendant failed to attach an affidavit from Nixon and states only that he "is still seeking a way to contact" him.

¶ 15 According to his pleadings, defendant learned of Nixon and Halbert at the same time. The record shows that defendant secured an affidavit from Halbert more than two years before he filed his petition, but failed to secure one from Nixon. Although defendant claims that Nixon "would be willing" to sign an affidavit, he provides no additional explanation for his inability to obtain it prior to filing his petition, or how he came by that assurance from Nixon. Without an affidavit, there is no legal basis to consider the purported testimony of Nixon. *Collins*, 202 Ill. 2d at 66.

¶ 16 In his affidavit, Halbert averred that he had seen Payton enter the sandwich shop and shoot the victim "without hesitation." He also stated that he was never questioned by police and had only recently learned that he had been "caught" on the surveillance footage.

¶ 17 Our review of the record, including the facts outlined in our order affirming defendant's conviction on direct appeal (*Brown*, No. 1-04-2048, order at 1-11), shows that the surveillance footage in question was available to defendant before trial, and was played at trial on at least two occasions. In addition, defendant acknowledged in his affidavit that the two witnesses were visible on the surveillance footage. It thus follows that defendant should have discovered Halbert at or before trial through the exercise of minimal due diligence (*Ortiz*, 235 Ill. 2d at 333), and that this evidence is therefore not newly discovered (*Edwards*, 2012 IL 111711, ¶ 37).

¶ 18 Finally, we note that a 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. *Edwards*, 2012 IL 111711, ¶ 32; *Harris*, 206 Ill. 2d at 301. The evidence proffered by

defendant here is not of such character. Defendant was convicted on the testimony of multiple occurrence witnesses who positively identified him at the scene of the shooting and on a surveillance videotape.

¶ 19 At trial, defendant attempted to show that Payton shot the victim. Defendant's mother testified that Payton had, on one prior occasion, identified himself as defendant, and that Payton had been living in Chicago at the time of the shooting. A friend of defendant's testified that defendant was living with her in Indianapolis at that time. The court, as fact finder, heard and rejected the testimony of these witnesses. The supporting material presented by defendant through Halbert's affidavit sets forth a similar set of facts, and does not raise "the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *Edwards*, 2012 IL 111711, ¶ 24, quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

¶ 20 Defendant thus failed, as a matter of law, to meet his burden (*Edwards*, 2012 IL 111711, ¶ 41), and we therefore affirm the order of the circuit court of Cook County denying him leave to file a successive petition.

¶ 21 Affirmed.