

No. 1-10-3567

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit
)	Court of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 91 CR 22468
)	
JERRY HARRINGTON,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment and opinion.

ORDER

¶ 1 *Held:* The circuit court erred in granting the defendant leave to file a second successive postconviction petition, where he failed to present a colorable claim of actual innocence.

¶ 2 The defendant, Jerry Harrington, appeals from the dismissal of his second successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)), which alleged actual innocence based on newly discovered evidence. On appeal, the defendant argues that the circuit court erred in (1) dismissing his petition without an evidentiary hearing, where he presented a substantial showing of actual innocence, and (2) refusing his requests to discharge appointed counsel and represent himself. For the reasons set forth below, we vacate the judgment

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of the circuit court and remand the cause for entry of an order denying leave to file the second successive postconviction petition.

¶ 3 The record reveals that the defendant was charged with first degree murder in connection with the June 22, 1991, shooting death of Vera Brown near the Dearborn Homes housing complex. Also charged with the murder was codefendant Dion Warr. Prior to trial, the defendant filed a motion to suppress his inculpatory statements made to police officers and to an assistant state's attorney. After an evidentiary hearing, the trial court denied the defendant's motion, finding that the defendant's statements were admissible. The defendant and Warr were tried in severed, simultaneous bench trials. The evidence presented at trial is summarized as follows.

¶ 4 Levearne Brown testified that, in June 1991, she lived with her 18-year-old daughter, Vera Brown, in a second-floor apartment at 2931 South Federal, a building in the Dearborn Homes housing complex. When Vera came home on June 21, 1991, she was "shook up" and said that codefendant Warr had told her that if she went to 27th Street again, she "would not live to tell it." Ms. Brown stated that she went downstairs and confronted Warr, who was holding a golf club as he stood outside the apartment building. When she asked Warr why he was bothering her daughter, he responded that the matter was none of her business. The following day, Vera left the apartment at approximately 3 p.m. to check on whether any mail had been delivered for her at their former residence on 27th Street. Ms. Brown stated that she heard gunshots a short time later and subsequently was informed that Vera had been shot. She went to the scene and found Vera lying on the ground in front of the building at 2910 Dearborn Street.

¶ 5 Melvin Jefferson testified that, at approximately 3 p.m. on June 22, 1991, he was standing

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near the field house near the Dearborn Homes complex. Jefferson stated that he saw codefendant Warr standing with another black man, who was later identified as the defendant, when Vera Brown exited the store at 2910 Dearborn Street. The defendant and Warr approached Vera Brown as she walked toward a water fountain. Warr pointed at Vera, and the defendant removed a small, silver gun from his waistband, pointed it at Vera, and fired a shot at her. Vera fell to the ground and began screaming as she attempted to crawl away. Warr ran around a nearby building, and the defendant ran toward Vera, stood over her, and fired approximately five more shots at her while she was lying on the ground. The defendant then "met up" with Warr, and they fled the scene together. Jefferson also testified that he related his observations of the event to police officers on the day following the shooting and that he subsequently identified Warr in a lineup.

¶ 6 Jefferson further stated that, on the night before the shooting, he saw Vera Brown at the building on 27th Street, which was controlled by the Gangster Disciples, and told her not to go to the building on 29th Street because it was controlled by the Mickey Cobras, who were fighting with the Gangster Disciples. In addition, Jefferson stated that Warr was a "prince" in the Mickey Cobras gang.

¶ 7 On cross-examination, the attorney for Warr asked Jefferson whether he had made "a statement to Detective Winstead to the effect that *** a person by the name of 'Teeth' had committed the murder." Jefferson denied making such a statement, but acknowledged that he knew Anthony Taylor, who was also known as "Teeth." When Warr's counsel inquired as to whether Jefferson had made any statements to Winstead about "Teeth," Jefferson again said that he had not done so.

¶ 8 Detective Delores Myles testified that she and her partner, Detective Edward Winstead, were

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on duty during the afternoon of June 22, 1991, and they responded to the call regarding the shooting of Vera Brown. Detective Myles stated that she interviewed Melvin Jefferson at the police station and, as a result of that interview, began looking for Warr and for another black male, whom they later learned was named either "Jerry" or "Harvey" Harrington. According to Detective Myles, Jefferson said that he saw an unknown black man pull a small, nickel-plated revolver from his waistband and shoot Brown. He also stated that he had been in the area for a period of time, after having played basketball earlier, and observed the shooting from a distance of about 40 or 50 feet.

¶9 Two months after the shooting, the police received a call from a woman who complained that three men were selling drugs in front of her building and that one of the men was involved in Vera Brown's murder. The caller also provided a physical and clothing description of the man who had been involved in the shooting. The defendant, who was 16 years old at the time, was found sitting on a bench in front of the building. He was arrested at about 12:30 p.m. on a charge of disorderly conduct pursuant to a narcotics investigation and was taken to the police station for the 21st District.

¶10 Detective James Riley testified that he transported the defendant from the 21st District to the Area 1 station at about 8:30 p.m. that night. Riley stated that he took the defendant to a "summary office" and advised him of his *Miranda* rights before questioning him about the shooting of Vera Brown. The interview took place at approximately 9:15 p.m. and lasted for about 20 minutes. According to Riley, the defendant initially identified himself as "Harvey Harrington" and said that he was 19 years old. The defendant also stated that he shot Brown on the instructions of Warr. The defendant explained that Warr gave him a gun and pointed out Brown. The defendant further stated that he walked up to within 10 or 12 feet of Brown and shot her one time, striking her in the leg.

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Brown fell to the ground and was screaming for help while she attempted to crawl away. The defendant said that he then walked up to Brown and fired several more shots at her before fleeing the scene. Riley testified that the defendant said he ran to apartment 402 in the building at 2940 Dearborn Street and stayed there for approximately two weeks before going to stay with his girlfriend in Gary, Indiana for an additional two weeks.

¶ 11 Assistant State's Attorney (ASA) William Toffenetti testified that he met with the defendant at the Area 1 station at about 10: 20 p.m. and advised him of his *Miranda* rights prior to speaking with him about Vera Brown's murder. The defendant, who gave his age as 19 years old, said that he had been treated well by the police and had no complaints. According to Toffenetti, the defendant admitted that he shot Brown on the orders of Warr. When asked about the reason for the shooting, the defendant stated that Brown had persuaded Warr's girlfriend to break off their relationship and also that Warr thought Brown was spying on the Mickey Cobras. The defendant explained that the Mickey Cobras controlled the building at 2910 Dearborn and were rivals of the Gangster Disciples, the gang that controlled the building at 2700 Dearborn. Toffenetti testified that the defendant said he and Warr waited for Brown outside of the building at 2910 Dearborn. When they saw her coming, Warr drew a revolver from his waistband and handed it to him. Warr then pointed at Brown and told him to shoot her. According to Toffenetti, the defendant stated that he fired one shot, striking Brown in the leg. Brown fell to the ground and was screaming as she tried to crawl away. Toffenetti further stated that the defendant said he then ran up to Brown, fired more shots at her, and then ran to another building, where he stayed for two weeks before leaving for Indiana. Toffenetti testified that he asked the defendant to memorialize his verbal confession in a handwritten statement,

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but the defendant asked to speak to an attorney and did not make a handwritten statement.

¶ 12 The prosecution presented the stipulated testimony of the medical examiner, which established that Brown died of multiple gunshot wounds. The defendant did not testify, and the defense rested without presenting evidence.

¶ 13 At the conclusion of the evidence, the trial court found the defendant guilty of murder based on the credible testimony of Melvin Jefferson and on the defendant's inculpatory oral statements. In particular, the court noted that Jefferson's testimony "was not impeached in any material way" and that his testimony was further corroborated by the details in the defendant's statements. The defendant was subsequently sentenced to 60 years' imprisonment.

¶ 14 The defendant's conviction and sentence were affirmed on direct appeal. *People v. Harrington*, No. 1-93-1553 (December 29, 1994) (unpublished order under Supreme Court Rule 23).

¶ 15 In October 1996, the defendant filed a *pro se* postconviction petition, asserting that he had been deprived of his constitutional right to the effective assistance of trial counsel. That petition was summarily dismissed in December 1996. In May 2001, the defendant sought relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000)), alleging actual innocence based on newly discovered evidence. That petition, which was supported by the affidavit of Woodrow Brown, was dismissed in July 2001. In February 2002, the defendant filed a successive *pro se* postconviction petition, alleging actual innocence based on the affidavit of Woodrow Brown. The successive petition was summarily dismissed in April 2002.

¶ 16 In October 2005, the defendant filed a second successive *pro se* postconviction petition, which again asserted actual innocence based on newly discovered evidence. This petition was

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supported by the affidavit of Lakisha Burkes, which attested to the following facts. On the date of the shooting, Burkes lived in the Dearborn Homes housing complex. She had lived in the area for approximately 16 years and knew "most of the people" who "hung out in the area." She knew the defendant, Vera Brown, and Anthony Taylor. Vera Brown occasionally sold marijuana for Taylor, and she often smoked his product and "was short" on the money. Taylor had previously "slapped [Vera Brown] around" because she was "short on his money," and he had warned her not to "keep playing with his money." At about 3 p.m. on the date of the shooting, Burkes saw Taylor yell at Vera Brown and then slap her in the face and hit her in the stomach. Vera swung back at Taylor, who pulled out a gun and pointed it at her. When Taylor told Brown that she "had better get right," she started to turn "like she was dismissing him," and he fired the gun at her. Brown started to crawl away, and Taylor then stood over her and shot her repeatedly.

¶ 17 Burkes also attested that she never told anyone this information because she was "well aware of what would happen if anyone told on Anthony Taylor, who was known to be a leader of his gang and very violent." She left the Chicago area the following night and went to live with her family in Mobile, Alabama. When she returned to the Chicago area in August 2005, she learned that the defendant had been charged with Brown's murder. Burkes attested that she knew that the defendant did not kill Vera Brown and that he was not present when she was killed. Burkes stated that she contacted the defendant's mother, told her what she knew, and agreed to give a statement and to return to Chicago if she was needed to confirm the information contained in the affidavit.

¶ 18 The circuit court appointed counsel to represent the defendant and advanced the petition to the second stage of postconviction proceedings in December 2005. Between December 2005 and

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November 2007, the defendant was represented by an assistant public defender (APD) who subsequently left the office. Beginning in November 2007, the defendant was represented by APD Michael Davidson. During a court appearance in February 2008, the circuit court informed Davidson that the defendant had "corresponded both with *** the clerk of courts and myself and is somewhat impatient and *** since the [prior] attorney left and you have taken over if you want to get a hold of [the defendant] and let him know." Davidson responded that he would contact the defendant and provide him with an update of the status of his petition. Over the next year, the case was continued on several occasions to permit Davidson to complete his investigation of the defendant's claims and prepare an amended petition.

¶ 19 On February 6, 2009, the defendant mailed a "Motion for Withdrawal of Counsel," which was received by the clerk's office on February 18, 2009, and stamped "filed" on February 26, 2009. In that motion, the defendant asserted that neither of his appointed attorneys had consulted with him or taken any action to pursue his postconviction proceeding, and he requested that he be allowed to proceed *pro se*.

¶ 20 On May 21, 2009, APD Davidson informed the circuit court that he had received a letter that the defendant had mailed to the court two weeks earlier, which the court had given to another APD to deliver to Davidson. Davidson informed the court that the letter addressed the defendant's "concerns about his *pro se* issues going forward and knowing what is going to be in this petition." Davidson assured the court that he was "addressing [the defendant's] concerns" and that he was continuing to consult with the defendant on what issues could be advanced because there were "limitations" on raising certain issues since this was the defendant's third postconviction petition.

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¶ 21 On September 24, 2009, Davidson filed an amended postconviction petition, which reasserted the defendant's claim of actual innocence based on Lakisha Burkes' affidavit. Davidson also filed a certificate in accordance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984). On June 29, 2010, the State filed a motion to dismiss the amended petition, asserting, *inter alia*, that the defendant had not been properly granted leave to file a successive postconviction petition and that his evidence of actual innocence was not newly discovered. The case was then continued for the defendant to respond to the State's motion.

¶ 22 On October 6, 2010, Davidson informed the court that he had prepared a response to the State's motion to dismiss, but could not file it because the defendant had written to his supervisor about more issues that he wished to have raised in the proceedings. Davidson explained that his supervisor "is still in the process of addressing that conflict with [the defendant]" and that he hoped the issue would be resolved by early November. The cause was continued to November 4, 2010.

¶ 23 On that date, Davidson filed his response to the State's motion to dismiss, and arguments were presented the following week. The State argued, *inter alia*, that the defendant had not received leave to file the successive postconviction petition. The State also argued that, in light of the strong evidence against the defendant, which included his confession, Burkes' affidavit would not change the result on retrial. Davidson responded by asserting, *inter alia*, that the circuit court had "in effect" granted the defendant's request to file a successive petition.

¶ 24 The circuit court granted the State's motion and dismissed the amended petition, noting that "the wealth of facts [were] taken against the moving party ***." The court further stated that "[a]t this point [Burkes'] testimony *** would not stem the tide ***. The evidence is overwhelming."

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This appeal followed.

¶ 25 On appeal, the defendant claims that the circuit court erred in dismissing his second successive postconviction petition without an evidentiary hearing, where he presented a substantial showing of actual innocence. In response, the State initially argues that the circuit court should have denied the defendant leave to file his second successive petition because it did not present a "colorable claim" of actual innocence. We must agree.

¶ 26 The Act provides a statutory remedy to criminal defendants who claim that substantial violations of their constitutional rights occurred at trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. The remedy provided under the Act is not a substitute for an appeal, but rather, is a collateral attack on a final judgment. *Edwards*, 2012 IL 111711, ¶ 21. As a result, only one postconviction proceeding is contemplated under the Act. *Edwards*, 2012 IL 111711, ¶ 22. Pursuant to section 122-1(f) of the Act, a defendant who seeks to file a successive postconviction petition must first obtain leave of court. 725 ILCS 5/122-1(f) (West 2004); *People v. Tidwell*, 236 Ill. 2d 150, 157, 923 N.E.2d 728 (2010); *People v. LaPointe*, 227 Ill. 2d 39, 44, 879 N.E.2d 275 (2007). Leave will be granted where the defendant has satisfied the cause-and-prejudice test (725 ILCS 5/122-1(f) (West 2004)), or where it is necessary to prevent a fundamental miscarriage of justice, such as where the defendant has shown actual innocence (*Edwards*, 2012 IL 111711, ¶ 23 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609 (2002))).

¶ 27 It is the defendant's burden to obtain leave of court before further proceedings on his postconviction claims can follow. *Edwards*, 2012 IL 111711, ¶ 24 (citing *Tidwell*, 236 Ill. 2d at 157). Consequently, "it is incumbent upon [a petitioner], by whatever means, to prompt the circuit

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court to consider whether "leave" should be granted, and obtain a ruling on that question.' " *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Tidwell*, 236 Ill. 2d at 157). In addition, the defendant "must submit enough in the way of documentation to allow a circuit court to make that determination." *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Tidwell*, 236 Ill. 2d at 161). With respect to a postconviction petition based on actual innocence, leave of court should be denied only where it is clear, from a review of the successive petition and the supporting documentation that, as a matter of law, the defendant cannot set forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 24. Thus, leave of court should be granted when the defendant's supporting documentation raises 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)). Because a trial court should deny leave only in cases where, as a matter of law, no colorable claim of actual innocence has been asserted, we review *de novo* whether leave to file a successive postconviction petition was properly granted. See *Edwards*, 2012 IL 111711, ¶ 30 (noting that this question suggests *de novo* review, but refraining from deciding the applicable standard of review); see also *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441 (2010) (citing *People v. LaPointe*, 365 Ill. App. 3d 914, 923, 850 N.E.2d 893 (2006), *aff'd*, 227 Ill. 2d 39, 879 N.E.2d 275 (2007)).

¶ 28 In order to obtain relief under a theory of actual innocence, the defendant must show that the evidence relied upon is newly discovered, material to the issue and not merely cumulative, and also of such conclusive character that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32; *People v. Ortiz*, 235 Ill. 2d 319, 333, 919 N.E.2d 941 (2009). Claims of actual

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innocence "must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup*, 513 U.S. at 324). " 'Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.'" *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup*, 513 U.S. at 324).

¶ 29 In this case, the defendant's second successive postconviction petition alleged actual innocence based on the affidavit of Lakisha Burkes, who attested that she had witnessed Vera Brown's murder and that Anthony Taylor, not the defendant, was the shooter. We examine Burkes' affidavit to determine whether it raises the probability that it is more likely than not that no reasonable juror would have convicted the defendant in the light of that affidavit. See *Edwards*, 2012 IL 111711, ¶ 24

¶ 30 The record demonstrates that the testimony of Levearne Brown presented credible evidence of the motive for the murder and that codefendant Warr had threatened Vera Brown's life on the day before she was shot. The day after the shooting, Melvin Jefferson told the police that he had witnessed the crime and provided his account of the shooting, which was committed by an unknown man who was with Warr. At trial, Jefferson positively identified the defendant as the shooter and described the murder in detail. Jefferson saw Warr point to Vera Brown just before the defendant pulled a small, silver gun from his waistband and shoot Brown, who fell to the ground. Jefferson also saw the defendant walk over to Brown and shoot her several more times while she was lying on the ground and trying to crawl away.

¶ 31 In his oral confession, the defendant admitted that he shot Vera Brown on the instructions

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of Warr, who pointed to Brown just prior to the shooting. The defendant further stated that, after he shot Brown once, she fell to the ground and attempted to crawl away. He then walked over and stood above her while shooting her several more times. In explaining the reason for the murder, the defendant stated that Brown was targeted by Warr because she had persuaded Warr's girlfriend to break off their relationship and because Warr thought Brown was spying on the Mickey Cobras for their rivals, the Gangster Disciples.

¶ 32 Thus, the record demonstrates that Jefferson's detailed description of the shooting was consistent with the statements given by the defendant to both Detective Riley and to ASA Toffenetti. In addition, Jefferson's account of the gang rivalry that existed in that area was corroborated by the defendant's statements. On appeal, the defendant has argued that Burkes' affidavit would likely change the result on retrial, claiming that his confession was unreliable. Yet, contrary to the defendant's assertion, the voluntariness of his confession was fully litigated in the pretrial motion to suppress, which was denied by the trial court. We also note that this issue was not raised in the second successive postconviction petition.

¶ 33 Considering the evidence presented at trial, we conclude that Burkes' affidavit does not raise the probability that it is more likely than not that no reasonable juror would have convicted the defendant in the light of her affidavit. See *Edwards*, 2012 IL 111711, ¶ 24; see also *People v. Harris*, 206 Ill. 2d 293, 302, 794 N.E.2d 181 (2002) (holding that affidavits purporting to exculpate the defendant are not of such conclusive character to warrant postconviction relief, where the defendant gave a written confession and was identified at trial by two eyewitnesses). Because the defendant failed, as a matter of law, to present a colorable claim of actual innocence, the circuit court

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should have denied him leave to file the second successive postconviction petition. In light of this determination, we need not address the defendant's arguments that the court erred in refusing to advance his petition to a third-stage evidentiary hearing and in refusing his requests to discharge appointed counsel and represent himself.

¶ 34 For the foregoing reasons, we vacate the judgment of the circuit court and remand the cause with instructions to enter an order denying leave to file the second successive postconviction petition.

¶ 35 Affirmed.