

No. 1-11-1908

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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
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	No. 02 CR 25411
	)	
ERIC BLACKMON,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE QUINN delivered the judgment of the court.  
Presiding Justice Harris and Justice Simon concurred in the judgment.

**ORDER**

¶ 1 *HELD:* Denial of leave to file a successive post-conviction petition affirmed where defendant did not set forth a colorable claim of actual innocence, or satisfy the cause and prejudice by submitting an affidavit in support of a previous claim of ineffective assistance of trial counsel.

¶ 2 Defendant Eric Blackmon appeals from an order of the circuit court of Cook County denying him leave to file a successive petition for relief under the Post-Conviction Hearing Act

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(Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that the circuit court erred in denying his request for leave where he set forth a cognizable claim of actual innocence based on the affidavits of two witnesses who would have exonerated him of murder, and satisfied the cause and prejudice test by submitting an affidavit in support of a previous claim of ineffective assistance of trial counsel. For the following reasons, we affirm.

¶ 3 The record shows, in relevant part, that following a 2004 bench trial, defendant was convicted of first degree murder for his part in the shooting death of Tony Cox. The evidence at trial established that on the afternoon of July 4, 2002, Cox and Richard Arrigo were with defendant and a companion on the sidewalk near Roosevelt and Pulaski Roads, in Chicago, when defendant distracted Cox as his companion pulled out a gun and shot Cox twice in the head. Defendant subsequently fired two more shots into Cox's head, and the shooters then fled across Pulaski. Defendant was subsequently identified as the second shooter by two eyewitnesses who were driving near the intersection at the time, one of whom nearly hit the shooters with her car as they ran across the street in front of her car.

¶ 4 For the defense, Tomeka Wash and Selena Leavy testified that they had been at a cookout about one mile away on the date in question and saw defendant there cooking throughout the afternoon. Terrance Boyd also testified that he had met with Cox near the corner of Roosevelt and Pulaski that day, that he walked away while Cox discussed business with Eric Bridges and George Davis, and that he then saw Bridges shoot Cox.

¶ 5 The trial court ultimately found that defendant had intentionally or knowingly murdered Cox and personally discharged a firearm in the course of the crime, and sentenced him to an

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aggregate term of 60 years' imprisonment, including a 20-year enhancement for his discharge of a firearm. This court affirmed that judgment on direct appeal, but vacated defendant's surplus convictions and ordered that his mittimus be corrected to reflect a single conviction for murder. *People v. Blackmon*, No. 1-05-1377 (2007) (unpublished order under Supreme Court Rule 23).<sup>1</sup>

¶ 6 On March 31, 2008, defendant filed a *pro se* petition for postconviction relief alleging, *inter alia*, that trial counsel was ineffective for failing to call Richard Arrigo to testify that defendant was not one of the shooters. In support, he attached an interview of Arrigo conducted by a defense investigator in which Arrigo complained of being "harassed and threatened by members of the Chicago Police Department," and stated that "the persons the police were identifying as the offenders were in fact the wrong people." Arrigo stated that police had shown him photos and asked him to view lineups, but that "he refused to identify the wrong persons" and "would not have any problem in court telling a jury that he felt that the police wanted him to identify the wrong people in this shooting." Defendant also attached police reports which further indicated that Arrigo did not identify defendant in a photo array or in a lineup.

¶ 7 In addition to these materials, defendant attached an unsigned page stating that Arrigo's affidavit was "not attached due to some unfore seeable [*sic*] circumstances and not due to any negligence on [defendant's] part," specifically Arrigo's delay in having his affidavit notarized and delays in the institutional mail. He stated that Arrigo "has still expressed his willingness to testify on [his] behalf," and requested that the court "allow him to supplement his petition with Mr. Arrigo's affidavit once [he] has received it," or, alternatively, "excuse the absence of th[e]

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<sup>1</sup> The foregoing facts were set forth in this court's order on direct appeal.

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affidavit and consider [his] claim, in its entirety, as though the affidavit was attached." He never supplemented his petition with Arrigo's affidavit, however, and the circuit court summarily dismissed his petition on May 9, 2008. The court noted that the decision to call a witness is a matter of trial strategy which does not constitute ineffectiveness unless counsel failed to subject the State's case to meaningful adversarial testing, and that trial counsel did meaningfully test the State's case with two alibi witnesses and one eyewitness contradicting the State's eyewitness. This court subsequently affirmed that dismissal on appeal, finding that there was "no reason to set aside the usual deference to counsel's trial strategy" where defendant failed to provide an affidavit from Arrigo despite the passage of over a month between the filing and the dismissal of the petition. *People v. Blackmon*, No. 1-08-2028 (2010) (unpublished order under Supreme Court Rule 23).

¶ 8 On March 23, 2011, defendant filed a *pro se* motion for leave to file a successive petition for postconviction relief, and the petition itself, alleging that he was actually innocent based upon newly discovered evidence. In support, he attached to his petition affidavits from Latonya Thomas (dated September 13, 2010) and Lajuan Webb (dated April 25, 2010).

¶ 9 Thomas averred that on the afternoon of July 4, 2002, she was working at Hair Fanatic Salon and Barbershop, at 1141 South Pulaski Road, in Chicago, when her attention was drawn to the street outside by what she thought were fireworks. She looked through the front window of the salon and saw a man fall to the ground outside the business south of the salon, then observed "a darked [*sic*] skinned African-American man about 5' 7" tall with a white T-shirt on step into view and shoot the man as he was attempting to get up off of the ground." At that point, she

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crouched down on the side of a chair and saw "a man nicknamed 'Pee' (Real Name Unknown) who was in his late twenties, about 5' 9" tall approach the man that was lying on the ground and shoot him several more times." Pee and the other man then ran north on Pulaski, and when Thomas exited the salon, she saw the man who had been shot lying on the sidewalk near the curb and bleeding from his face. Several people were crowded around him, and police arrived within minutes and cordoned off the area. She did not speak with police, however, because she "was fearful that those guys might have found out and tried to do something to [her]." She averred that she is confident of the shooters' identities because she has seen them hanging out near the salon "countless times," and that defendant was not one of them.

¶ 10 Webb averred that he also worked at Hair Fanatic Salon and Barbershop on the date in question. About 4 p.m., he heard five or six gunshots outside the barbershop, and everyone in the front waiting area ducked and lay on the floor. Two black males with guns then ran past the barbershop: the first man was about six-feet-tall, wearing a baseball cap, a light colored t-shirt, and dark shorts, and he put a dark colored gun in his waistband; the second man was about 5' 5" tall, wearing a white t-shirt and dark shorts, and he was holding a gun down by his side. Webb had seen the two men near the barbershop before. A police officer subsequently came to the barbershop to ask questions, "but everyone had basically left already." Webb gave his name to the officer, who told him that a detective would contact him for more information about the shooting, but no one ever contacted him about the shooting, and he never knew that someone had been arrested for it. He averred that defendant was not one of the men he had seen running past the barbershop with a gun.

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¶ 11 In addition to claiming actual innocence, defendant further claimed that trial counsel was ineffective for failing to call Arrigo to testify at trial. Although he acknowledged raising this claim in his initial postconviction petition, he nonetheless argued that he could satisfy the cause and prejudice test for leave to file a successive petition. As for "cause," defendant claimed that "having the affidavit mailed to him was the only way he could have gotten it, and he insured [*sic*] that it was mailed in a secure and timely fashion," but that "the actions of the staff at Stateville Correctional Center was [*sic*] unreasonable when it took more than two months to give the petitioner his mail and this alone impeded his ability to have this crucial evidence to support his claim during the initial post-conviction proceedings." With respect to prejudice, he claimed that "for a defendant not to have key exculpatory evidence at trial, due to counsel'[s] negligence, clearly undermines the resulting conviction and violates the petitioner's right to a fair trial and due process."

¶ 12 Defendant attached to his petition a supporting affidavit from Arrigo which was notarized on February 27, 2008. In that affidavit, Arrigo averred that on the afternoon of July 4, 2002, Cox came by his restaurant, Fat Albert's Restaurant, 1143 South Pulaski Road, in Chicago, and spoke with him inside for about one hour. They then stepped out onto the sidewalk in front of the restaurant for some additional conversation, and two black males approached them. One of the men was about 25-years-old and about 5' 9" tall, with a medium complexion, a muscular build, and a short "afro" hairstyle; the other was in his 20's and about 5' 6" tall, with a dark complexion and a medium build. Cox acknowledged the men and stepped away, and Arrigo turned to lock the door of the restaurant. Arrigo then heard a gunshot and turned towards the men as Cox fell to

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the ground clutching the side of his head. The shorter man shot him again, and the second man approached and shot Cox in the face two or three more times. The men then fled north on Pulaski, and Arrigo remained with Cox until police and an ambulance arrived.

¶ 13 Arrigo averred that he gave police a statement and a description of the assailants after the shooting and spoke with detectives several times during the following months. The detectives eventually asked him to view a photo array containing seven images, and he informed them that none of the photos were of the shooters. The detectives then "blatantly pointed out the photos of 2 men and attempted to coerce him into identifying them as the perpetrators of the crime," specifically defendant and another individual, but he refused to identify them because they were not the shooters. This angered the detectives, and "they began to imply that his failure to identify the men meant that he was somehow involved, an allegation that [he] unequivocally denies." Thereafter, police began harassing him at his restaurant "by continuously showing up and threatening him," and "at one point the detectives even took him down to the police station and held him for several hours for no reason," all of which he believes was done to intimidate him into identifying the wrong offenders. He was eventually asked to view a lineup and went to the police station where a detective instructed him and a few other witnesses about the process. During that conversation, "he and the other witnesses were allowed to view the prior photo array and discuss the incident amongst themselves." Arrigo then viewed the lineup, which included defendant and the other individual previously identified by the detectives, but he did not identify anyone as the shooter.

¶ 14 In addition to Arrigo's affidavit, defendant attached to his petition a United States Postal

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Service mailing label showing that Arrigo sent defendant a package on March 4, 2008. He also attached four grievances that he filed with the Illinois Department of Corrections in which he complained that he had not received the package from Arrigo (filed on March 17, 2008, March 24, 2008, April 6, 2008, and April 13, 2008). A counselor responded to his first grievance stating, "The mailroom is understaffed and severely backed up right now but I notified the mailroom supervisor and they will try and get your legal mail to you as soon as possible."

¶ 15 On May 20, 2011, the circuit court denied defendant leave to file his successive post-conviction petition. With respect to defendant's claim of actual innocence, the court found that the evidence he presented was not of such conclusive character as to probably change the result on retrial because Webb's and Thomas' views of the shooting were not reliable, they first viewed defendant's picture nearly eight years after the shooting, and he had presented alibi witnesses at trial who testified that he was not at the scene of the shooting. The court further found that defendant did not demonstrate due diligence in presenting the affidavits, noting that he could have sought the witnesses out sooner given that they worked right near the crime, and that Webb's name would have been in police reports if he had, in fact, given police his name. As for defendant's claim of ineffective assistance of trial counsel, the court found that the issue was *res judicata* because the court had previously addressed it on the merits. The court also found that defendant could not demonstrate prejudice from the failure to assert the claim earlier because "there is scant probability that [he] would have prevailed." This appeal follows.

¶ 16 Defendant maintains that the circuit court erred in denying him leave to file his successive postconviction petition. Our supreme court has recognized that only one post-

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conviction proceeding is contemplated under the Act. *People v. Edwards*, 2012 IL 111711, ¶ 22. That said, the supreme court has provided two bases upon which the bar against successive post-conviction proceedings will be relaxed. *Edwards*, 2012 IL 111711, ¶ 22. The first is where defendant establishes "cause and prejudice" for failing to raise his claim earlier. *Edwards*, 2012 IL 111711, ¶ 22; see 725 ILCS 5/122-1(f) (West 2010). The second is the "fundamental miscarriage of justice" exception under which defendant must show actual innocence. *Edwards*, 2012 IL 111711, ¶ 23. We review *de novo* the denial of leave to file a successive postconviction petition. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 17 Defendant first claims that he set forth a colorable claim of actual innocence based on newly discovered evidence where Thomas and Webb averred in their affidavits that he was not one of the shooters or gunmen observed running from the crime scene. The State responds that neither Thomas's affidavit nor Webb's affidavit constitute newly discovered evidence because Webb was known to defendant at or before trial, Thomas could have been found with due diligence, and neither affidavit is of such conclusive character that it would probably change the result on retrial.

¶ 18 Where defendant seeks to relax the bar against successive post-conviction petitions on the basis of actual innocence, leave of court should be denied only where it is clear from a review of the successive petition and supporting documentation that, as a matter of law, defendant cannot set forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 24. "Stated differently, leave of court should be granted when [defendant's] supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him

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in the light of the new evidence.' " *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

¶ 19 To establish a claim of actual innocence, defendant must present evidence that is newly discovered; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32. Evidence is considered "newly discovered" if it has been discovered since the trial and could not have been discovered sooner through due diligence. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). It is considered cumulative when it adds nothing to what was already before the jury. *Ortiz*, 235 Ill. 2d at 335.

¶ 20 We note that defendant initially claims that the circuit court incorrectly relied on the cause-and-prejudice test in denying him leave to file his successive petition. In support, he cites a sentence in the court's conclusion paragraph which states: "Based upon the foregoing discussion, the court finds that [defendant] has failed to satisfy the cause and prejudice test set forth by the legislature." Defendant appears to have overlooked the court's substantive analysis of his actual innocence claim, which never mentions cause or prejudice, as well as the court's express recognition that "the Illinois Supreme Court has stated that a showing of actual innocence will excuse a failure to show cause and prejudice." In any event, we review the circuit court's judgment, not its reasoning, 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).

¶ 21 Here, defendant raised a claim of actual innocence supported by two witnesses' affidavits which were obtained in 2010, nearly eight years after the shooting and six years after trial. In the first affidavit, Latonya Thomas averred that she was working at a hair salon on the afternoon of

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Cox's murder and saw the shooting through the front window while crouched next to a chair.

She identified a man nicknamed "Pee" as the second shooter, and stated that she had previously seen the shooters hanging out near the salon, and that defendant was not one of them. In the second affidavit, Lajuan Webb averred that he was also working at the salon on the afternoon in question and saw two black males run past with guns after the shooting. He similarly stated that he had seen the two men around the salon before, and noted that defendant was not one of them.

¶ 22 Although defendant claims that Thomas's and Webb's affidavits could not have been discovered sooner with due diligence in light of the "greater resources of the prosecution" and the fact that they "were never tracked by police investigation as potential critical witnesses familiar with the gunmen," we find no merit to this claim. The salon where Thomas and Webb worked was directly next door to the restaurant outside of which Cox was shot. While any reasonable investigation would have included inquiries as to who was working at the salon at the time of the shooting and what they saw, it took nearly eight years for defendant to contact Thomas and Webb and obtain their affidavits. There was no apparent obstacle to obtaining this information, either. Webb stated that he gave his name to a police officer, thus indicating that he was willing to talk; and Thomas, though she did not voluntarily speak with police because she was afraid that the shooters might find out and retaliate, did not indicate that she would have refused to answer questions from a defense investigator. Defendant's allegation that the prosecution had greater resources is completely irrelevant, as the amount of the State's resources would in no way have impeded the defense's ability to conduct a diligent investigation. Under the circumstances, we see no reason why Thomas and Webb could not have been discovered sooner with some due

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diligence. *Ortiz*, 235 Ill. 2d at 334.

¶ 23 We further find that the affidavits of Thomas and Webb are not of such conclusive character as to probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32. Here, defendant was found guilty of first degree murder based on the testimony of two eyewitnesses who identified him as one of Cox's shooters. Both were driving near the intersection of Roosevelt and Pulaski at the time of the shooting, and one nearly hit the shooters as they ran across the street in front of her car. Although defendant presented alibi testimony from two defense witnesses who stated that they had seen defendant at a cookout at the time of the shooting, and testimony of an eyewitness who stated that Eric Bridges shot Cox, the court necessarily rejected this evidence in finding defendant guilty. Now, defendant offers the proposed testimony of two eyewitnesses who waited nearly eight years to tell anyone their observations of the shooting. Thomas, who viewed the shooting out the front window of the salon next door while crouched behind a chair, averred that defendant was not one of Cox's shooters, and that a man nicknamed "Pee" was the second shooter. Webb, who viewed the shooting from the salon while ostensibly ducked down or lying on the floor, did not even see the shooting, but averred that two black males with guns ran past the barbershop, neither of whom was defendant.

¶ 24 Given that Thomas did not come forward for nearly eight years after the shooting, viewed the incident while crouched behind a chair inside the business next door, and merely contradicts two other eyewitnesses for the State who were out on the street at the time and have already been found credible enough to convict defendant, we find that Thomas' proposed testimony would not

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likely change the result on retrial. We also find that Webb's affidavit does not offer defendant the "total vindication" or "exoneration" which are the hallmarks of actual innocence where he did not even see the shooting. *Anderson*, 401 Ill. App. 3d at 141. We therefore cannot say that the affidavits of Thomas and Webb raise the probability that it is more likely than not that no reasonable juror would have convicted defendant in light of the new evidence, and conclude that defendant has failed to set forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 24.

¶ 25 Defendant next contends that he demonstrated cause and prejudice for failing to submit Arrigo's affidavit in support of his previous claim of ineffective assistance of trial counsel, and should have been allowed to assert his claim anew in a successive postconviction petition. The State responds that defendant raised his ineffective assistance of trial counsel claim in his first petition, had it reviewed by the trial court, and is trying to relitigate an issue that was resolved against him, which he is barred from doing under the principle of *res judicata*.

¶ 26 "[G]enerally, postconviction petitions are subject to the doctrine of *res judicata*, so that all issues actually decided on direct appeal or in the original postconviction petition are barred from being relitigated in subsequent petitions." *People v. Anderson*, 402 Ill. App. 3d 1017, 1029 (2010) (citing *People v. Blair*, 215 Ill. 2d 427, 443 (2005)). Any claim not raised in an initial postconviction petition is also waived. 725 ILCS 5/122-3 (West 2010). Leave of court may be granted to file a successive petition, however, where defendant demonstrates cause for his failure to raise a claim in his initial post-conviction proceedings and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2010). To show "cause," defendant must identify an

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objective factor that impeded his ability to raise the specific claim during his initial post-conviction proceedings. 725 ILCS 5/122-1(f)(1) (West 2010). To show "prejudice," defendant must demonstrate that the claim not raised so infected his trial that the resulting conviction violated due process. 725 ILCS 5/122-1(f)(2) (West 2010).

¶ 27 We agree with the State that defendant's ineffective assistance of trial counsel claim is barred by *res judicata*. The record shows, and defendant does not dispute, that he raised the instant ineffective assistance of trial counsel claim in his initial postconviction petition. The trial court summarily dismissed his petition on the grounds that counsel's failure to call Arrigo was a matter of trial strategy, and this court affirmed the summary dismissal of that petition on appeal for the same reason. His claim was thus decided on its merits and is barred from being re-litigated in a subsequent petition. *Anderson*, 402 Ill. App. 3d at 1029.

¶ 28 We also find that defendant has failed to satisfy the cause and prejudice test with respect to his failure to provide Arrigo's affidavit in his initial postconviction proceedings. The record shows that the same basic information presented in Arrigo's affidavit, *i.e.*, that police tried to coerce him into wrongly identifying defendant as a shooter, was already presented in the initial postconviction proceedings through the defense investigator's interview of Arrigo and police reports. Although Arrigo's affidavit now makes clear that this would be his proposed testimony, the circuit court and this court have already concluded that counsel's decision not to call Arrigo was a matter of trial strategy considering the same information. The affidavit does not persuade us further that counsel's failure to call Arrigo so infected defendant's trial that the resulting conviction violated due process, and thus defendant cannot establish the prejudice required to

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obtain leave to file a successive postconviction petition. 725 ILCS 5/122-1(f) (West 2010).

¶ 29 His reliance on *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1309 (2012) is also misplaced. In that case, the United States Supreme Court held that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1320. This case does not involve federal habeas review, nor was defendant required to raise his ineffective assistance of trial counsel claim during his postconviction proceeding. *Martinez* is therefore inapplicable here.

¶ 30 For the reasons stated, we affirm the order of the circuit court denying defendant leave to file his successive postconviction petition.

¶ 31 Affirmed.