

SIXTH DIVISION
March 29, 2013

No. 1-11-2215 & 1-11-3763
Consolidated

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).

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. 06 CR 15632
)	
JOSE GARCIA-SANDOVAL,)	Honorable
)	Garritt E. Howard,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Lampkin and Justice Reyes concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defendant failed to present a colorable claim of actual innocence in his successive post-conviction petition, the trial court did not err in denying him leave to file the petition; we affirm.
- ¶ 2 Defendant Jose Garcia Sandoval appeals from orders of the circuit court summarily dismissing his *pro se* post-conviction petition (No. 1-11-2215) and denying him leave to file a successive *pro se* petition (No. 1-11-3763) under the Post-Conviction Hearing Act (Act). 725

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ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant does not address the summary dismissal of his initial post-conviction petition. Instead, he only contends that his successive petition sufficiently presented a colorable claim of actual innocence based on the allegedly exculpatory affidavit of a codefendant. We affirm.

¶ 3 Following a bench trial, defendant was found guilty of first degree murder and aggravated battery and was sentenced to a term of 20 years' imprisonment for murder to run consecutive with a period of probation for aggravated battery. Defendant's conviction stemmed from a traffic altercation that resulted in the victim, Javier Sandoval¹, being beaten by defendant and codefendants Felipe Gomez and Ricardo Guzman.² Defendant was tried in a severed but simultaneous bench trial with his codefendants.

¶ 4 As relevant to this appeal, the evidence at trial showed that the victim's friend, Victor Gutama, testified that during the early morning hours of June 12, 2006, he and the victim left a bar and proceeded to drive home. As Gutama was driving his green Ford with the victim in the passenger seat, he noticed another car, which was blue, following him. When the blue car attempted to pass him, it sideswiped his car. Gutama sped up and the blue car chased him. The two cars engaged in a high speed chase, which ended when Gutama lost control of his car and hit a sidewalk and curb. The blue car pulled up to Gutama's car, blocking it in. Gutama and the three men in the blue car all exited their vehicles. The three men grabbed Gutama, and one of the men asked Gutama why he had hit their car, to which Gutama responded that he "did not crash anything." The three men hit and kicked Gutama, but he was ultimately able to run away from the scene and hide. Gutama did not see whether the victim had exited the car.

¹ Javier Sandoval is not related to defendant.

² Codefendants are not a party to this appeal.

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¶ 5 Joni Khoshaba testified that he was driving home in the early morning hours of June 12, 2006, when he saw two cars chasing each other. He then observed the green car against the curb and the blue car parked in such a way that it had blocked the green car. Khoshaba stopped his car, saw somebody run from the scene, and then saw three men kicking the victim. Each of the three men kicked the victim in the head, chest, and body, and their kicks were hard. He saw the victim being kicked about 9 to 10 times. After Khoshaba exited his car and yelled to the men to leave the victim alone, he then walked toward the men. They stopped beating the victim, jumped into their blue car, and drove away. On June 16, 2006, Khoshaba viewed a lineup at the police station and identified defendant as one of the men who beat the victim. He was unable to identify the other two men who had been with defendant that night. Khoshaba also made an in-court identification of defendant.

¶ 6 Dr. Patrick Zimmerman testified that he was the emergency room doctor who examined the victim, who was unconscious and had low oxygen levels, which was consistent with a brain injury. The CAT scan showed the victim had a traumatic head injury, which was consistent with being kicked in the head about 10 to 15 times. On cross-examination, Dr. Zimmerman testified that the victim's injuries were possibly the result of the victim being punched in the face or the front of the head and falling backwards and either hitting a curb or cement.

¶ 7 Dr. Mitra Kalelkar testified that she performed an autopsy on the victim and that he had several contusions on the brain and a fractured skull. In her opinion, the victim was on the ground when the injuries occurred because the majority of the injuries were on the top of his head. She further stated that the injury the victim received on the top of his head was not consistent with somebody falling back and hitting their head on a curb or cement because that would injure the back of the head, not the top. Dr. Kalelkar concluded that the victim's injuries were consistent with being kicked multiple times.

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¶ 8 Defendant testified that on the evening of the incident he was riding in a friend's car when a green car sideswiped it. Both cars sped up and defendant threw an object out of the car window to try to get the green car to stop. When the cars came to a stop, defendant exited the car and approached the driver of the green car, who opened his door, hitting defendant on his knee. Defendant then grabbed the driver, who hit defendant twice. Defendant pushed the driver to the ground and hit him once or twice or kicked him two or three times. The other two men that were riding with defendant also hit or kicked the driver before he fled. Defendant never saw the passenger exit the green car, but he did hear his friends say that they had knocked him down and struck him once.

¶ 9 In finding defendant guilty, the court found Khoshaba's testimony, which was corroborated by Gutama's testimony, credible and did not find defendant's testimony credible. In addition, the court found that although it did not know which of the three offenders administered the kicks that caused the death of the victim, such knowledge was unnecessary where they acted in concert. The court found that each offender was responsible for the blows administered by their accomplices. On appeal, we affirmed defendant's judgment and sentence, and vacated certain fees. *People v. Sandoval*, No. 1-09-0723 (2010) (unpublished order under Supreme Court Rule 23).

¶ 10 On May 24, 2011, defendant filed a *pro se* post-conviction petition, alleging that his counsel failed to argue probable cause and reasonable doubt "correctly," the trial court abused its discretion and denied him a fair trial, and appellate counsel was ineffective for failing to raise the aforementioned issues on appeal. The petition was summarily dismissed by the circuit court, and defendant filed a timely notice of appeal (1-11-2215).

¶ 11 On November 7, 2011, defendant filed a successive post-conviction petition, alleging that the trial court violated his constitutional and due process rights to a jury trial when it accepted his

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jury waiver without ensuring that he knowingly and voluntarily waived his right to a jury trial. He also alleged that he was deprived of his right to effective assistance of counsel where his trial counsel failed to cross-examine Khoshaba about his motive to testify in return for leniency from the State in his pending criminal case. Within defendant's ineffective assistance of counsel argument, defendant added that the record reveals, and an affidavit from his codefendant Ricardo Guzman confirms, that he never hit or kicked the victim. Defendant asserted that only codefendant Felipe Gomez hit the victim.

¶ 12 Defendant attached Guzman's affidavit to his petition. Guzman attested that after the car accident, he saw Victor Gutama hit defendant on the knee with the door of his truck and punch him in the face. Defendant then defended himself from the aggressor, Gutama. Guzman punched Gutama one time and never hit the passenger of the truck, who was the victim in this case. Guzman also attested that he saw Felipe Gomez punch the victim in the face and knock him out, but Guzman never thought the victim died. As a result, the victim fell backwards onto the sidewalk, hitting his head on the pavement. Guzman never saw defendant hit the victim at any time during the events in question. Defendant also attached his own affidavit, attesting, in pertinent part, that Gutama was the aggressor, defendant was merely defending himself against Gutama, and that only Gomez hit the victim.

¶ 13 On November 16, 2011, the circuit court denied defendant leave to file the successive petition, finding that he failed to meet the cause and prejudice test. Defendant filed a notice of appeal from the circuit court's judgment (No. 1-11-3763).

¶ 14 On appeal, defendant only contests the circuit court's denial of his leave to file his successive post-conviction petition. He does not address the summary dismissal of his initial post-conviction petition. As such, any argument regarding the propriety of that dismissal is waived. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("points not argued are waived and shall

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not be raised in the reply brief, in oral argument, or on petition for rehearing"). As to the successive petition, defendant maintains that the trial court erred in denying him leave to file it because he presented a colorable claim of actual innocence based on the exculpatory affidavit of his codefendant, Ricardo Guzman.

¶ 15 We review *de novo* the denial of leave to file a successive post-conviction petition. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (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).

¶ 16 The State initially asserts that defendant's successive petition made no actual innocence claim. The State specifically contends that the pleading set forth only two claims, each with a clear and explicit heading. The headings only revealed claims involving an improper jury waiver and ineffective assistance of counsel. However, within defendant's argument asserting that he was provided ineffective assistance of counsel, he also alleged that "[t]he record reveals, [and] a[n] affidavit confirms, that there [was] physical evidence that [defendant] never hit or kicked the decedent [the victim]. The affidavit asserts that he saw everything and the only person hit[t]ing [the victim] was Felipe Gomez-Ramirez." Construing defendant's petition liberally (*People v. Hodges*, 234 Ill. 2d 1, 21 (2009)), we agree with defendant that the above language raised a claim of actual innocence, despite the fact that it was contained in an argument that was not captioned "actual innocence."

¶ 17 Nevertheless, further proceedings are unwarranted here because defendant failed to present a colorable claim of actual innocence where Guzman's affidavit was not exonerating, was contradicted by the evidence at trial, and did not raise the probability that the result at trial would be different.

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¶ 18 A successive post-conviction 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). However, our supreme court recently determined that when a successive post-conviction petition based upon a claim of actual innocence is filed, "leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided *** that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *People v. Edwards*, 2012 IL 111711, ¶24. In other words, "leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.'" *Edwards*, 2012 IL 111711, ¶24, quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

¶ 19 Although our supreme court did not articulate a standard of review for actual innocence claims, the court determined that the relevant question was "whether petitioner set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶¶30-31 (declining to determine whether to apply an abuse of discretion as opposed to *de novo* review). The court then reiterated that the elements of a successful claim of actual innocence required that the evidence supporting the claim (1) must be newly discovered, (2) material, (3) not merely cumulative, and (4) "of such conclusive character that it would probably change the result on retrial." *Edwards*, 2012 IL 111711, ¶32, citing *Ortiz*, 235 Ill. 2d at 333. A claim of actual innocence must be supported with "new reliable evidence" such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at the defendant's trial. *Edwards*, 2012 IL 111711, ¶32, quoting *Schlup*, 513 U.S. at 324. However, the court cautioned that "[b]ecause 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.

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¶ 20 Here, defendant failed to plead a colorable claim of actual innocence because the facts contained in Guzman's affidavit do not meet the requirements of the fourth factor stated above. As in *Edwards*, the "newly discovered" evidence here "does not raise the probability that, in light of this new evidence, it is more likely than not that no reasonable juror would have convicted" defendant. *Edwards*, 2012 IL 111711, ¶40. In *Edwards*, the court highlighted that a defendant's claim of actual innocence should be supported by new reliable evidence, which could include a trustworthy eyewitness account of the crime. *Edwards*, 2012 IL 111711, ¶32.

¶ 21 *People v. Lofton*, 2011 IL App (1st) 100118, is instructive. In that case, this court determined that the defendant's petition made a substantial showing of actual innocence based on the affidavit of a person purporting to be the actual shooter who stated that the defendant was not present at the shooting. In so finding, this court noted that because the hallmark of actual innocence was total vindication, it would not have been enough for the witness to state that he was the shooter if the defendant was still actively involved in that version of events. *Lofton*, 2011 IL App (1st) 100118, ¶40.

¶ 22 In the case at bar, because Guzman averred that defendant was actively involved in the events in question, he offered no account that would exonerate defendant. Guzman specifically attested that defendant only had an altercation with Gutama, he "never saw [defendant] hit the [victim]," and that Gomez hit the victim causing him to fall. In so stating, Guzman failed to give an alternative version of how the victim died, and even attested that when he left the scene he "never thought anybody had died." Unlike *Lofton*, where the newly discovered evidence exonerated the defendant and identified the actual shooter, Guzman merely stated that he "never saw" defendant hit the victim. This statement does not preclude the notion that defendant may have hit and killed the victim. Instead, it simply shows that Guzman never witnessed defendant

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hit the victim. This is not to say that this court requires that the "real killer" be identified to exonerate defendant, but it is a commentary on the trustworthiness of Guzman's statements.

¶ 23 Furthermore, although Guzman's statements in his affidavit would provide the basis from which to assert a "reasonable doubt argument, *** that is not the standard; the standard is actual innocence." *People v. Green*, 2012 IL App (4th) 101034, ¶36 (Emphasis in original.) As such, Guzman's affidavit is not so conclusive that it would change the result at trial. Following the car accident in question, Khoshaba testified that he stopped his car, saw somebody run from the scene, and then saw three men, including defendant, kicking the victim. Each of the three men kicked the victim in the head, chest, and body, and their kicks were hard. According to Khoshaba, the victim was kicked about 9 or 10 times. Dr. Patrick Zimmerman and Dr. Mitra Kalelkar corroborated Khoshaba's testimony in that the victim's injuries were consistent with being kicked multiple times. Even if Guzman testified that he never saw defendant kick the victim, he did not contradict the testimony of Khoshaba establishing that defendant did kick the victim. Guzman's affidavit was also consistent with Khoshaba's testimony, as well as defendant's testimony, in that it showed defendant was present at the scene and involved in the incident.

¶ 24 Guzman's affidavit also cannot be considered exonerating because it did not address defendant's accountability for the actions of Guzman and Gomez, which was explicitly found by the trial court. In *Edwards*, the supreme court found that the affidavit of a codefendant stating he had acted as the principal offender does little to exonerate a defendant who was present at the murder scene and was convicted of the murder under an accountability theory. *Edwards*, 2012 IL 111711, ¶39. In the present case, codefendant actually averred that defendant was not only present at the crime scene, but also was engaged in a fight with Gutama. Codefendant's affidavit did nothing to rebut the trial court's findings that defendant was accountable for the actions of his codefendants because all three offenders acted in concert, and thus failed to show, in light of the

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new evidence, that it was more likely than not that no reasonable juror would have convicted defendant.

¶ 25 For the foregoing reasons, we affirm both judgments of the trial court.

¶ 26 Affirmed.