

No. 1-12-0079

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
Respondent-Appellee,)	Cook County.
)	
v.)	No. 97 CR 16978
)	
LEE WILLIAMS,)	Honorable
)	Charles P. Burns,
Petitioner-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court
Justices Simon and Liu concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's denial of leave to file a successive postconviction petition should be affirmed where petitioner Williams did not show due diligence in discovering the location of an alibi witness, and the issue of ineffective assistance of trial counsel is barred by *res judicata* since it had been raised in Williams' first postconviction petition.

¶ 2 Defendant, Lee Williams, appeals the circuit court's denial of his petition for leave of court to file a successive postconviction petition. On appeal, Williams contends the court erred in denying his petition because he presented a colorable claim of actual innocence based on the

newly discovered evidence of an alibi witness. Alternatively, Williams contends that he satisfied the cause and prejudice test by alleging that his trial counsel provided ineffective assistance for failing to investigate an alibi witness. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 Williams appeals the dismissal of his successive postconviction petition. The trial court entered judgment on the petition on October 27, 2011. Williams' notice of appeal was mailed on November 28, 2011 and stamped by the clerk on December 13, 2011. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rule 651(a) governing appeals in postconviction proceedings. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 651(a) (eff. Feb. 6, 2013).

¶ 5 BACKGROUND

¶ 6 Williams was convicted after a jury trial of first degree murder and armed robbery. The evidence at trial established that on December 1, 1995, at around 4 p.m., Omar Shabana was working at Highway Food and Liquor located at 5300 West Harrison in Chicago, Illinois. Ismail Farraj, a candy salesman, entered the store around 4:15 p.m. to inquire whether Shabana needed to place a candy order. Shabana asked Farraj to sit down for a few minutes, and after he sat down a masked man wearing a hooded jacket came into the store. The man pointed a gun at Shabana and said, "hold up, motherfucker." Farraj described the man as being 5'7" tall, not very heavy with dark, black skin, and holding a silver gun.

¶ 7 When the man could not open the cash register, he told Shabana, "Open the cash register or I will shoot." Shabana obeyed and when the man saw the opened cash register he said, "That's all you got?" He held his gun to Shabana's head. Shabana reached under the register

and gave the man some extra bills. The man again said, "That's all motherfucker?" and Shabana replied that he had a lot of bills to pay that day. The man responded, "Fuck you," and shot Shabana who then fell on top of Farraj. The man ran out of the store. Husni Ibrahim was working in the back, slicing meat. He was unaware that the gunman had entered the store and when he heard the gunshot, he pressed the alarm button. After the police arrived, Farraj gave them a description of the man.

¶ 8 After interviewing some individuals, the police focused on an apartment complex located at 308-10 South Lockwood. He eventually issued a stop order for Williams based on the information he collected. One and a half years later, on June 5, 1997, the police responded to a call of a domestic dispute at 310 South Lockwood. Williams' mother was in the apartment arguing with Williams. Williams identified himself as Sean Williams and stated that he should go to his grandmother's house. Officer Jackie Campbell offered to take him.

¶ 9 On the way to his grandmother's house, Officer Campbell told Williams she was familiar with his mother because she had been to her apartment before to look for Charlie Brown in connection with a robbery/homicide. Williams stated that Brown was his brother and he was not involved in any robbery or homicide. Williams offered to talk to detectives in order to clear his brother's name. When they arrived at the police station, Officer Campbell placed Williams in an interview room. When told that Williams had information on the robbery/homicide, Detective Weigand pulled the stop file on the case and realized that Williams was the person for whom the order was issued. Detective Weigand then secured Williams in the interview room.

¶ 10 When Detectives Benigno and Collins entered the interview room, they removed Williams' handcuffs and gave him his *Miranda* warnings. Williams first stated that he was at the scene but took no part in the shooting. He also stated that the same store had been robbed

about a week earlier by three people, and they also were at the scene of the shooting. Williams eventually told detectives that he committed the murder alone because he had a drug habit and needed money. He stated that he wore a ski mask and hoodie, and carried a rusty revolver. The victim walked backward as Williams approached the cash register and his gun went off. Williams then reached over, opened the register and took the money before running out of the store. When ASA Kathleen Muldoon arrived, Williams gave her a handwritten statement. In the statement, Williams states that after the robbery he went to TWA, a beauty salon, to meet up with his "play cousin" Sharon. Williams also gave a handwritten statement to Detective Benigno regarding the previous robbery.

¶ 11 Kevin Casey, who worked as a lock-up keeper with the Chicago Police Department, stated that he performed a visual examination on Williams on June 6, 1997, which revealed no injuries. When asked whether he felt any pain, Williams answered no.

¶ 12 Williams testified in his own defense. He stated that on December 1, 1995, he was working as a salesman for L & E Sales. He traveled in his work and on that day he was "[s]omewhere else" but he did not recall the location. Williams also stated that the police beat him and would not allow him to use the bathroom regularly. They would beat him if he did not cooperate. Williams testified that when police asked where he was on December 1, 1995, he told them he was at his job and he gave them his work phone number. When he asked to use the phone, the police said no and then slapped him and hit him in the stomach. Police continued to beat him as they interrogated him. Williams eventually signed a statement that he did not read. Williams testified that the female ASA made up everything in the statement, including the part where he said he went to TWA beauty salon after the shooting.

¶ 13 On cross-examination, Williams acknowledged that his company paid for his ticket to Tampa, Florida, departing Chicago on December 14, 1995, and that the company paid for a ticket only when a person first starts working. In rebuttal, the owner of L & E Sales testified that Williams did not work for the company in November of 1995, and started working on December 15, 1995. He stated that the company bought a bus ticket to Florida for Williams when he first started working. In May or June of 1997, Williams was fired due to "an insubordination problem."

¶ 14 The jury found Williams guilty of first-degree murder and armed robbery. The trial court sentenced him to 100 years' imprisonment for first-degree murder, and 30 years' imprisonment for armed robbery. Williams appealed, claiming his 100 year extended term sentence should be vacated for failing to articulate a basis for imposing the extended term sentence. This court agreed and remanded the cause for re-sentencing. On remand, the trial court sentenced Williams to 70 years' imprisonment for first-degree murder, and 30 years' imprisonment for armed robbery. This court affirmed the conviction and sentence on appeal. *People v Williams*, No. 1-03-3133 (unpublished order under Supreme Court Rule 23) (1st Dist. Oct. 15, 2002).

¶ 15 On January 9, 2006, Williams filed his first postconviction petition in which he raised numerous claims, including ineffective assistance of trial counsel for failing to investigate and present alibi evidence that at the time of the shooting, he was with Jean Walls and Sharon McDonald at the T.W.A. Beauty Supply Store, and ineffective assistance of appellate counsel for failing to raise the issue on direct appeal. To support his petition, Williams attached his own affidavit stating that if called, Walls and McDonald would testify that he was with them at T.W.A. at the time of the shooting. The trial court dismissed the petition at the first stage,

finding that Williams "fails to offer affidavits from either of those women or from his attorney for that matter, that neither woman was ever contacted or interviewed or in any way available to testify. But more importantly, as to what testimony either of these women could have given on the defendant's behalf. Instead he includes his own one-sentence affidavits regarding their proposed testimony, which is simply insufficient to support a claim of ineffective assistance for failure to call witnesses."

¶ 16 Williams appealed, alleging only that his petition alleged a gist of a constitutional claim that his trial counsel was ineffective for failing to file a motion to quash arrest and suppress his statements, and appellate counsel was ineffective for failing to raise the issue on direct appeal. This court affirmed the dismissal in *People v. Williams*, No. 1-06-0908 (Unpublished Order Under Supreme Court Rule 23) (1st Dist. Feb. 4, 2008).

¶ 17 On September 28, 2011, Williams moved for leave to file a successive postconviction petition. As grounds for relief, Williams alleged that he has newly discovered evidence of his actual innocence in the form of alibi witness Jean Walls. He attached her affidavit which stated that on December 1, 1995, around 10 a.m., Williams came to her beauty supply store to wait on a phone call from her brother, Ricardo. He remained in the store, conversing with the people present, until around 4:30 p.m. when everyone heard police sirens. Williams attached his own affidavit, stating that prior to trial he tried to contact Walls and her mother at their last known addresses but was unsuccessful. He stated that he did not know they had moved to Indiana until he received Walls' affidavit in June, 2011. In the petition, Williams also alleged that he was denied effective assistance of trial counsel, who failed to investigate and present this alibi witness.

¶ 18 The trial court denied the motion, finding that with regard to his actual innocence claim Williams failed to show due diligence. Williams also failed to show that the evidence was new and undiscoverable at the time of trial, since he "knew the witnesses at or prior to the time of trial, despite the fact that he stated he did not know how to contact them." Regarding the ineffective assistance of counsel claim, Williams failed to show why he did not raise the issue on direct appeal. The trial court determined that Williams failed to assert a free standing claim of actual innocence, and failed to satisfy the cause and prejudice test. Williams filed this timely appeal.

¶ 19 ANALYSIS

¶ 20 Williams contends that the trial court erred in denying his motion for leave to file a successive postconviction petition because his petition presented a colorable claim of actual innocence. The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) (Act) provides a mechanism for defendants to challenge their convictions based on constitutional violations. *People v. Tenner*, 175 Ill. 2d 372, 377 (1997). However, a claim for postconviction relief is a collateral proceeding and not an appeal from the underlying judgment. *People v. Edwards*, 2012 IL 111711, ¶21. Furthermore, the Act contemplates only one postconviction proceeding. Therefore, to initiate a successive postconviction proceeding one must obtain leave of court. *People v. Evans*, 2013 IL 113471, ¶10. The trial court's denial of leave to file a successive petition is reviewed *de novo*. *People v. Edwards*, 2012 IL App (1st) 091651, ¶25. We are mindful that "all issues actually decided on direct appeal are *res judicata*, and all issues that could have been raised in the original proceeding but were not are waived." *People v. Orange*, 195 Ill. 2d 437, 448 (2001).

¶ 21 Although the Act contemplates only one postconviction proceeding, case law has provided two bases for allowing a successive postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). First, the court may allow a successive petition if the petitioner can establish cause and prejudice for failing to raise the claim in prior proceedings. *Id.* Under the second basis the petitioner may allege actual innocence, which does not require him to show cause and prejudice. *People v. Ortiz*, 235 Ill. 2d 319, 329-30 (2009). Evidence supporting an actual innocence claim "must be newly discovered, material, noncumulative, and of such conclusive character as would probably change the result on retrial." *People v. English*, 403 Ill. App. 3d 121, 133 (2010); *Ortiz*, 235 Ill. 2d at 333. In order to proceed on a claim of actual innocence, petitioner must prove all three elements of actual innocence (newly discovered, material, and noncumulative). *English*, 403 Ill. App. 3d at 133.

¶ 22 Williams must first show that the evidence is newly discovered. Newly discovered evidence is evidence that was newly discovered since trial and could not have been discovered sooner through due diligence. *Ortiz*, 235 Ill. 2d at 334. In general, evidence is not newly discovered if it presents fact already known to the petitioner at or before trial, "though the source of those facts may have been unknown, unavailable, or uncooperative." *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007).

¶ 23 Williams contends that Walls' affidavit presents newly discovered evidence to support his claim of actual innocence. He argues the evidence is newly discovered because he was unable to locate Walls prior to trial. He found out she and her mother had moved to Indiana when he received Walls' affidavit in June, 2011. We believe, however, that Williams could have obtained Walls' affidavit prior to trial through the exercise of due diligence. Clearly, Williams was aware of this evidence prior to trial. He claims he tried to locate Walls at her last known

address but was unable to do so. However, nowhere in Walls' affidavit does she state when she moved to Indiana after the incident. Walls' affidavit does not state whether anyone tried to contact her about the case, or how she found out that Williams needed her affidavit as an alibi witness. Williams also knew Walls' son, Ricardo, and in fact was allegedly waiting for Ricardo's phone call at the beauty salon when the incident occurred. One assumes that Ricardo would know the whereabouts of his mother, and there is no indication Williams attempted to contact Ricardo. Therefore, Williams has not shown due diligence in obtaining Walls' statement and the alibi evidence does not qualify as newly discovered evidence sufficient to support his successive postconviction petition. See *Edwards*, 2012 IL 111711, ¶37.

¶ 24 In the alternative, Williams argues that his successive petition established cause and prejudice with respect to his claim that trial counsel was ineffective for failing to investigate the alibi witness. We note that Williams the trial court addressed this issue in his first postconviction petition and he did not raise the issue when he appealed the dismissal of that petition. Issues addressed in the initial postconviction petition are barred by *res judicata*. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). Furthermore, according to his testimony and statements, Williams hinted at a different alibi at the time of trial. Williams stated that he may have been out of town working for L & E Sales as a salesman on December 1, 1995. Given contradicting testimony from his employer whether Williams was working for the company on that date, counsel decided to pursue the strategy that the police coerced Williams into making his statements. "Decisions concerning what witnesses to call and what evidence to present on a defendant's behalf are viewed as matters of trial strategy. Such decisions are generally immune from claims of ineffective assistance of counsel." *People v. Munson*, 206 Ill.

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2d 104, 139-40 (2002). Therefore, we find that Williams does not establish cause and prejudice on this issue to support his successive petition.

¶ 25 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 26 Affirmed.