

No. 1-12-1731

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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. 84 C 14268
	)	
MARVIN BRYANT,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

**ORDER**

¶ 1 *Held:* Circuit court's order summarily dismissing defendant's motion for leave to file a successive post-conviction petition affirmed where defendant failed to present a colorable claim of actual innocence therein; extended-term sentence for aggravated battery convictions proper where defendant was sentenced to natural life in prison for Class X offenses; second conviction for home invasion vacated because it lacked statutory authorization, thus rendering it void.

¶ 2 Defendant Marvin Bryant 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 2012)). He contends, *inter alia*, that he

sufficiently presented a colorable claim of actual innocence to file his successive petition, based on the allegedly exculpatory affidavit of a codefendant.

¶ 3 The record shows that defendant and his four codefendants, William Glover, Marvin Barber, David DuPree, and Markus Hunter,<sup>1</sup> who are not parties to this appeal, were charged in a multi-count indictment with offenses that stemmed from an incident that occurred on the night of December 7, 1984, at an illegal gambling club run by Eddie Morris at 3735 South Ellis Avenue in Chicago, Illinois. During this incident, Morris, his family, and patrons of his club were accosted and robbed at gunpoint, and, following a joint jury trial, the accused were found guilty of armed robbery, home invasion, and aggravated battery. Defendant was sentenced as a habitual criminal, pursuant to the Habitual Criminal Act (Ill. Rev. Stat. 1985, ch. 38, ¶ 33B-1(e)), to a term of natural life in prison for seven counts of armed robbery and two counts of home invasion, concurrent with 10-year extended terms for three counts of aggravated battery. This court affirmed that judgment on direct appeal. *People v. Glover et. al.*, 173 Ill. App. 3d 678, 682-86 (1988). The facts, as taken from that opinion, show as follows:

¶ 4 On December 7, 1984, shortly before 1 a.m., Chicago police officer John Fason was directed via radio to proceed to 3735 South Ellis. Morris operated a club on the first floor and basement of the building at that address, and lived with his family on the second floor. Upon arriving at that address, Officer Fason saw a woman on the second floor indicating that he should enter, so he kicked in the door and entered the building with two other officers. After speaking with people at the scene, Officer Fason arrested Glover and another officer arrested Hunter.

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<sup>1</sup> We note that Hunter's name is spelled "Marcus" throughout the record, however, he identified himself as "Markus" in the affidavit at issue in this appeal, and signed his name with that spelling.

Officer Fason found a loaded gun behind a video game and another officer recovered a .32 caliber gun from a vent next to the bar on the first floor.

¶ 5 Officer Robert Andler arrived a few minutes after Officer Fason broke the door in, and as he pulled up, Officer Andler saw a man run out of the building. Officer Andler saw other officers looking for that man, and one of those officers found DuPree lying on the ground between the garbage cans and the shrubs of a nearby house. That officer arrested DuPree and found \$350 in small bills upon searching him. Another officer found a carbine pistol in the shrubs next to the building. Other officers saw defendant and Barber running down the street away from the club, and the officers chased them for a few blocks before they succeeded in arresting them. The officers found several articles of jewelry when they searched defendant.

¶ 6 Clarence Spears testified that after midnight on December 7, 1984, while he was playing a video game on the first floor of the club, he saw DuPree and Barber enter the club and noticed that Barber had a gun in his hand. Barber went to the bar, took money out of the cash register, and took cigarettes from behind the bar. DuPree blocked the front door, so Spears went to the back staircase, which led to the basement. In the basement, he saw people lined up facing the wall with their hands on the wall. He saw Glover holding a small revolver and defendant holding a larger gun which he identified as one of the guns which the police later recovered. Glover told people one at a time to step away from the wall, then he searched them and took their valuables. Spears saw Glover take Alfred Johnson's watch, then strike Johnson with his gun, which discharged. When Glover finished taking money and jewelry from everyone in the basement he instructed them to remain in the room for ten minutes, then broke the lights and went upstairs with defendant. Spears identified a gun which police recovered at the scene as the

gun which Barber carried, and he identified a gold cross which police found in defendant's pocket as the cross which Glover took from Spears.

¶ 7 Wade Curry testified that he was in the kitchen on the first floor after midnight on December 7, 1984, when he saw Hunter with a gun pointed at the head of a woman who worked in the club. Hunter told Curry to open the door to the basement and go downstairs. The woman followed Curry and Hunter followed her, keeping the gun pointed at her. Curry saw Glover and defendant in the basement. Hunter went upstairs after asking someone where Morris was. Glover told everyone to get against the wall. He took Curry's money and jewelry and then told him to stand against the opposite wall. Curry saw Glover strike Johnson with his gun and saw the gun discharge. He also saw Glover strike Norman Jeter with a gun because Jeter took too long to remove his jewelry. DuPree came down to the basement, also carrying a gun, and he left with Glover and defendant when Glover broke the lights. Curry identified guns which the police recovered as the guns which Hunter and defendant carried that night.

¶ 8 Norman Jeter testified that he was in the basement of the club on December 7, 1984, when he saw defendant enter and look around the room. Defendant left and he returned shortly thereafter carrying a gun. He cocked the gun and said, "You all know what this is." Jeter testified that Glover came in carrying a pistol and told everyone to get against the wall. Jeter's description of the robbery mostly corroborated Curry's testimony. Alfred Johnson and Larry Niles further corroborated Curry's description of the robbery, and Johnson added that he fell to the floor and passed out when the gun with which Glover hit him discharged. He has lost all vision in one eye and part of the bullet remains lodged in his head.

¶ 9 Rosalind Morris, Eddie Morris' wife, testified that after midnight on December 7, 1984, while she was sitting in her kitchen, Hunter came into the kitchen carrying a pistol, ripped the

phone off the wall, and asked her where Morris was. She told him Morris was at the back. Hunter pointed the gun at her head and walked next to her to the back of the house. Rosalind knocked on the bathroom door. When Morris opened it, Hunter pushed his way into the bathroom and then he took Rosalind and Morris back to their bedroom. Hunter asked, "where's the money?" Morris and Rosalind insisted that they did not have any money. Hunter took another phone off the bedroom wall, then took a bank full of quarters, an answering machine, some money and jewelry, and put them in a pillowcase. He told Morris to go downstairs but left Rosalind in the bedroom to get dressed. Hunter took the pillowcase and told Rosalind he would come back in a minute to get her. Once he got downstairs, Rosalind picked up another telephone in the bedroom, dialed 911, and told police an armed man was robbing her home. Shortly thereafter, she saw a police car pull up and she went to the window and waved to the officers. Barber came to her bedroom carrying a gun, cursed when he saw the police cars out front, then began to run.

¶ 10 Morris' testimony substantially corroborated Rosalind's account. Morris added that when Hunter took him downstairs, he saw defendant taking cigarettes and whiskey from the bar. He acknowledged that police had raided his club more than 50 times, charging him with keeping a disorderly house, keeping a gambling house, and selling liquor without a license.

¶ 11 In June 2001, defendant filed a *pro se* post-conviction petition, which was denied on July 16, 2001. Defendant filed a second *pro se* post-conviction petition on August 23, 2004, and this court affirmed the second-stage dismissal of that petition after granting appellate counsel's motion for leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Bryant*, No. 1-08-0754 (2009) (unpublished order under Supreme Court Rule 23).

¶ 12 On January 25, 2012, defendant filed a motion for leave to file the successive post-conviction petition at bar, along with the successive post-conviction petition. In his petition, defendant claimed, (1) that his indictment is void and defective where he was charged with multiple counts of home invasion for a single entry to a single dwelling, (2) that his extended-term sentence for aggravated battery is void because it was not the most serious offense of which he was convicted, and (3) his actual innocence based on the newly discovered evidence in the form of an affidavit from his codefendant Markus Hunter.

¶ 13 In the attached affidavit, Hunter averred, *inter alia*, that (1) he did not previously make a statement in this case because he did not want to incriminate himself and his lawyer advised him to remain silent, (2) on the night of the incident he was buying alcohol on the first floor of Morris' club when Morris pulled a gun on him, (3) he never robbed, shot or "home invaded" [*sic*] anyone in the basement, first floor or second floor of the club, nor did he plan or know about anyone else doing so, and (4) he has known defendant for a number of years and "at no time did [he] see [defendant] rob, shot [*sic*], or home invade [*sic*] anyone."

¶ 14 On April 20, 2012, the circuit court denied defendant's motion for leave to file a successive post-conviction petition. In doing so, the court observed that a defendant raising a claim of actual innocence in a successive petition is excused from showing cause and prejudice, then found that Hunter's affidavit could qualify as newly discovered evidence, but that Hunter's potential testimony would not have changed the result of defendant's trial. The court further found that defendant's claim that his indictment was defective was waived because it could have been raised on direct appeal or in his initial post-conviction petition. The circuit court also found that defendant had failed to demonstrate that fundamental fairness mandated that he should be

granted leave to file his successive petition, that the petition was frivolous and patently without merit, and that he had failed to satisfy the cause and prejudice test.

¶ 15 On appeal, defendant contends that the circuit court erred in denying him leave to file a successive post-conviction petition because he presented a colorable claim of actual innocence. He further contends that in reaching its determination, the circuit court failed to apply the proper test, as illustrated by its reference to the cause and prejudice test.

¶ 16 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 on any basis supported by the record, as we review the judgment, not the circuit court's reasoning. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 17 In general, the Act contemplates the filing of only one petition (*People v. Guerrero*, 2012 IL 112020, ¶ 15), and expressly provides that any claim of the substantial denial of constitutional rights not raised in the original or amended petition is waived (725 ILCS 5/122-3 (West 2012)). A defendant seeking to file a successive post-conviction petition must first obtain leave of court, which, generally, may be granted where defendant demonstrates cause for his failure to bring the claim in his initial post-conviction petition and prejudice as a result of that failure. 725 ILCS 5/122-1(f) (West 2012). However, where defendant sets forth a claim of actual innocence in a successive post-conviction petition, he is excused from showing cause and prejudice. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). In such a case "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).

¶ 18 In this case, as in *Edwards*, defendant raised a claim of actual innocence. Although in this case the circuit court initially recognized the inapplicability of the cause and prejudice test to such a claim, in ultimately denying defendant's request for leave to file, the court stated that defendant failed to meet the requirements of that test. However, any error by the court in utilizing that test does not require reversal (*Anderson*, 401 Ill. App. 3d at 140-41), for the question before us is whether defendant set forth a colorable claim of actual innocence (*Edwards*, 2012 IL 111711, ¶ 31).

¶ 19 The elements of a successful claim of actual innocence are that the evidence supporting the claim be (1) newly discovered, (2) material, and not merely cumulative, and (3) "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. The State maintains that the evidence here was not newly discovered because defendant could have discovered Hunter's potential testimony sooner through due diligence.

¶ 20 In his affidavit, Hunter averred that he did not previously make a statement in this case because he did not want to incriminate himself and his lawyer advised him to remain silent. As one of the codefendants in this case, Hunter had a right to avoid self-incrimination, which no amount of due diligence could have forced him to violate, and, accordingly, his affidavit was unavailable at trial and the evidence therein qualified as newly discovered. *Edwards*, 2012 IL 111711, ¶ 38, and cases cited therein.

¶ 21 That said, we examine whether the evidence was of such conclusive character that it would probably change the result on retrial. In his affidavit, Hunter averred that at no time did

he see defendant "rob, shot [*sic*], or home invade [*sic*] anyone" on the night of the incident. This statement, however, does not preclude the possibility that defendant was present or that he engaged in those activities, but rather, simply shows that Hunter did not observe defendant doing so. In this respect, this case is unlike *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40, where the newly discovered evidence provided in the affidavit exonerated defendant and identified the actual shooter. Here, by contrast, the evidence presented at trial showed that defendant was found fleeing the scene while in possession of property that was stolen during the incident, and Hunter's affidavit does not conflict with this evidence.

¶ 22 Moreover, defendant appears to lose sight of the fact that, as the State argued during closing argument, the evidence showed that he was one of a group involved in a joint criminal enterprise, and thus would be accountable for the actions of all of his codefendants. Similar circumstances were evident in *Edwards*, 2012 IL 111711, ¶ 39, where a codefendant averred that he was actively involved in the shooting at issue, but did not assert that defendant was not present during the shooting, and the supreme court found that his affidavit did little to exonerate defendant who was convicted of the murder under the theory of accountability. The supreme court thus held that the affidavit did not raise the probability that, in light of the new evidence, it is more likely than not that no reasonable juror would have convicted defendant, and, accordingly, that defendant failed to assert a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶¶ 39-41.

¶ 23 Here, as in *Edwards*, Hunter did not aver that defendant was not present at Morris' club on the night of the incident. Thus, his averment that he did not see defendant engage in any of the charged activities does little to exonerate defendant where, based on the evidence presented, he would be accountable for his own actions as well as for the actions of his codefendants.

Further, we note that Hunter also avers that he, Hunter, never "robbed, shot, or home invaded [sic]" anyone on the night of the incident, and that he did not "plan or know" about "anyone else" robbing the club that night. However, this statement does not negate the possibility that the other codefendants in this case engaged in the actions for which they were charged and convicted, and for which defendant would be held accountable.

¶ 24 Accordingly, as in *Edwards*, Hunter's affidavit does not raise the probability that, in light of the new evidence, it is more likely than not that no reasonable juror would have convicted defendant, nor is the affidavit of such conclusive character that it would probably change the result on retrial. *Edwards*, 2012 IL App 111711, ¶¶ 39-41. We thus find that defendant has failed to assert a colorable claim of actual innocence, and that the circuit court properly denied his motion for leave to file a successive post-conviction petition.

¶ 25 In reaching this conclusion, we have considered defendant's argument that this court may not make any credibility determinations at this stage of post-conviction proceedings. Without addressing the merits of this argument, we note that in reaching our conclusion, no credibility determinations were warranted where Hunter's averments, at face value, failed to present a colorable claim of actual innocence. Hunter's further averment that, on the night of the incident, police "coerce[d]" members of opposite gangs "to make statements and testify falsely against [him] and [defendant] and others," lacks any specificity regarding who did so and does not compel us to make any credibility determinations between Hunter and any of the witnesses who testified at trial.

¶ 26 Notwithstanding the procedural impediment to raising claims for the first time on appeal, defendant requests that we correct the sentencing order where judgments and sentences were entered that were not statutorily authorized. Defendant first contends that the extended-term

portions of his aggravated battery sentences are void because they were not statutorily authorized, and must be vacated. Defendant correctly points out that section 5-8-2 of the Unified Code of Corrections (Code) provides that the trial court can impose an extended-term sentence only for the offense within the most serious class of offense of which he was convicted. 730 ILCS 5/5-8-2(a) (West 1984). He thus contends that the imposition of extended-term sentences for multiple counts of aggravated battery were improper where he was sentenced to natural life in prison for his Class X convictions of home invasion and armed robbery.

¶ 27 The State responds that the extended-term sentences were proper pursuant to *People v. Terry*, 183 Ill. 2d 298, 305 (1998), where the supreme court held that when a defendant is sentenced to death or natural life in prison, an extended-term may be imposed on the next most serious offense of which he is convicted. Defendant replies that the holding in *Terry* is limited to cases where the most serious offense of which defendant was convicted is murder. He further argues that because his natural life sentence was imposed pursuant to the Habitual Criminal Act, which is a sentence enhancement provision, his extended-term sentences for aggravated battery are improper. We disagree.

¶ 28 In *People v. Calderon*, 393 Ill. App. 3d 1 (2009), defendant was convicted of aggravated kidnapping, residential burglary, and two counts of robbery, then sentenced to a term of natural life in prison for aggravated kidnapping pursuant to the Habitual Criminal Act, with concurrent sentences of 30 years for residential burglary and 14-year extended-terms for each robbery conviction. *Calderon*, 393 Ill. App. 3d at 2-3. On appeal, this court cited *Terry* in determining that where defendant is sentenced to a term of natural life imprisonment, section 5-8-2 of the Code permitted the trial court to impose an extended-term sentence on the next most serious offense. *Calderon*, 393 Ill. App. 3d at 12. In reaching that determination, this court did not

interpret *Terry* to be limited to cases involving murder, or find an improper extended sentence imposed pursuant to section 5-8-2 of the Code after a term of natural life in prison was imposed under the Habitual Criminal Act. Under that reasoning, we likewise find here that the trial court did not err in sentencing defendant to extended-term sentences for his aggravated battery convictions.

¶ 29 Defendant also contends that the imposition of dual convictions for home invasion based upon a single entry constitutes a double jeopardy violation and requests that we vacate one of his home invasion convictions. The State responds that defendant has waived his right to raise this issue at this time because he failed to raise it on direct appeal or in his original or amended post-conviction petitions. The State further maintains that defendant's second conviction and sentence for home invasion is merely voidable, and thus not subject to collateral attack. Defendant replies that the conviction is void, and thus may be attacked at any time.

¶ 30 A void judgment is subject to direct or collateral attack at any time, but a voidable sentence is not subject to collateral attack. *People v. Davis*, 156 Ill. 2d 149, 155-56 (1993). The key element in determining whether a sentence is void or merely voidable is jurisdiction. *Davis*, 156 Ill. 2d at 155. A judgment is void when entered by a court without jurisdiction of subject matter or the parties, or that lacks the inherent power to make or enter the order at issue. *People v. Wade*, 116 Ill. 2d 1, 5 (1987). Defendant maintains that pursuant to the home invasion statute, the court lacked the power to enter judgment on two home invasion convictions.

¶ 31 The supreme court has found that the plain language of the home invasion statute demonstrates "that a single entry will support only a single conviction, regardless of the number of occupants." *People v. Cole*, 172 Ill. 2d 85, 102 (1996). Accordingly, multiple convictions based upon a single entry exceed limitations of the home invasion statute and violate the one-act,

one crime doctrine, as well as constitute a double jeopardy violation. *People v. Hicks*, 181 Ill. 2d 541, 549 (1998); *People v. Cowart*, 389 Ill. App. 3d 1046, 1050 (2009).

¶ 32 Here, the record reflects that defendant was charged with the commission of, and sentenced on, two counts of home invasion. The charges stemmed from the single entry into "the dwelling place of Eddie Morris and Rosalind Morris" and the separate infliction of injuries on Eddie and Rosalind. Based on the supreme court's holding in *Cole*, 172 Ill. 2d at 102, we find that defendant cannot be convicted of more than one count of home invasion in this case.

Accordingly, the judgment entered on the second conviction for home invasion is void and must be vacated. *People v. Thompson*, 209 Ill. 2d 19, 24-29 (2004), see also *Hicks*, 181 Ill. 2d at 544 (holding that because a defendant can only be convicted of one count of home invasion for one entry, the surplus convictions "must be vacated").

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County denying defendant leave to file a successive post-conviction petition, find no error in the imposition of extended-term sentences for the aggravated battery convictions, and vacate defendant's conviction and sentence for home invasion in Count 10 pursuant to Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994). See *People v. Cunningham*, 365 Ill. App. 3d 991, 994 (2006).

¶ 34 Affirmed; conviction and sentence for Count 10 vacated.