

No. 1-12-1087

**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).

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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. 03 CR 11681
	)	
WILLIE GODARD,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE COBBS delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Defendant is allowed leave to file a successive postconviction petition, to be considered along with the defendant's initial postconviction filing, because the affidavit in support of the successive petition meets the requirements for a claim of the defendant's actual innocence based on newly discovered evidence.
- ¶ 2 Defendant Willie Godard appeals the circuit court's order denying his motion for leave to file a successive postconviction petition under the Postconviction Hearing Act (the Act) (725 ILCS 5/122-1 et seq. West 2010)). Defendant contends his successive filing presented a freestanding claim of actual innocence based on newly discovered evidence, as supported by an

affidavit of a claimed eyewitness to the offense. We reverse the circuit court's order and remand for further proceedings on defendant's successive petition.

¶ 3 Following a jury trial in 2007, defendant was convicted of two counts of first-degree murder and one count of the concealment of a homicidal death for the May 6, 2003, strangulation killing of Vernice Carpenter, who was his neighbor on the 12th floor of an apartment building at 655 West 65th Place in Chicago. Defendant was sentenced to two concurrent 50-year terms for murder and a consecutive 2-year term for concealing the death.

¶ 4 Before trial, the State filed a motion to present proof of other crimes evidence, namely an altercation between Carpenter and defendant at about 6:30 p.m. on May 5. The motion asserted that a witness named Georgia Harrington would testify that defendant entered Carpenter's apartment "uninvited and armed with a knife" and entered Carpenter's bedroom, where defendant and Carpenter struggled. Harrington would testify that defendant left Carpenter's apartment with two knives. The State asserted that evidence was probative of defendant's motive and intent to kill Carpenter. In the hearing on the motion, the State noted that defendant mentioned the altercation in his videotaped statement to police, which would be introduced at trial. The trial court granted the motion over defendant's objection that the evidence was unduly prejudicial.

¶ 5 The State's evidence included defendant's confession and the testimony of Lorenzo Dowdy, a tenant patrolman in the building. At trial, Dowdy testified that at 6 a.m. on May 6, 2003, he had just started a routine patrol when he saw defendant in the stairwell ascending from the 10th floor to the 11th floor. Dowdy testified defendant was sweating and that defendant did not respond when Dowdy asked "What's up with you?" Dowdy's first stop on the 10th floor was the incinerator room, where he discovered Carpenter's body. Investigators found defendant on a

terrace on the 4th floor of the building, and a Chicago police officer testified defendant was acting "dazed and confused," as if he was under the influence of alcohol or had just woken up.

¶ 6 A forensic investigator testified that he examined the incinerator room and identified a smear mark in the dust on the inside of the door. The investigator recovered a t-shirt from defendant that appeared to have dust or dirt on the back. Fingerprints were recovered from the inside and outside of the door, and DNA was taken from the victim's fingernails and hair. The parties stipulated that neither the fingerprints nor the DNA matched defendant.

¶ 7 After defendant was taken to the police station, his interrogation, which stretched over the course of more than three days, resulted in a videotaped statement in which he admitted to killing Carpenter. Defendant stated that he encountered Carpenter in an elevator on the 10th floor and that he choked her after she started hitting him. He said she had "pulled a knife" on him the previous night. Defendant admitted he did not see a weapon on Carpenter prior to choking her for between 7 and 12 minutes.

¶ 8 In the defense case, an investigator for the office of the Cook County public defender testified that he took photographs of defendant on May 10 that depicted bruises and injuries to his face, left arm and back. Defendant's sister and father testified that defendant did not have full use of his right hand due to surgery on his forearm and had a history of depression. In rebuttal, the paramedic who performed intake on defendant testified that defendant did not describe any history of mental illness or medications.

¶ 9 In closing argument, defense counsel told the jury that the "only evidence presented to you on second-degree [murder] was presented \*\*\* in the State's case." Defense counsel asserted the State did not prove that defendant committed first-degree murder and "did not prove this man

on trial is the one that did it." The jury was instructed on first-degree murder and second-degree murder based on the mitigating factor of defendant's unreasonable belief in the need for self-defense.

¶ 10 On direct appeal, defendant argued his trial counsel was ineffective for the following reasons: (1) failing to file a motion to quash his arrest and suppress his videotaped statement; (2) failing to present a coherent theory of defense, including the failure to argue that he was the aggressor and that Carpenter provoked him or that his actions were otherwise justified; and (3) failing to order a fitness hearing or raise questions about his competence based on evidence in the record as to his medications, drug problem and depression.

¶ 11 This court held that probable cause existed to arrest defendant based on his prior altercation with the victim and Dowdy's testimony. The court further held that no evidence suggested that defendant's statement was not given voluntarily and therefore, defendant was not prejudiced by trial counsel's decision to not seek its suppression. *People v. Godard*, No. 1-07-1682 (2009), at 17 (unpublished order under Supreme Court Rule 23).

¶ 12 Defendant also argued that his trial counsel was ineffective for failing to support a theory of second-degree murder by asserting he had an unreasonable belief that his actions were justified. The decision on direct appeal states that "[d]efendant maintains that the victim's death arose from a verbal and physical battle gone horribly wrong." *Godard*, No. 1-07-1682, at 17. He also argued that counsel should have contended Carpenter's death resulted from a mutual struggle in which he was provoked. Noting defendant's admission that he choked Carpenter for between 7 and 12 minutes, this court concluded that the evidence indicated that defendant acted with "disproportionate violence" and did not support an instruction for second-degree murder

based on provocation. *Godard*, No. 1-07-1682, at 17-20. The court also rejected defendant's remaining contentions on appeal, with the exception of his argument that his convictions on two murder counts violated the one-act, one-crime rule. The court vacated one of defendant's murder convictions and affirmed in all other respects. *Godard*, No. 1-07-1682, at 33-34.

¶ 13 On August 23, 2010, defendant filed an initial post-conviction petition, alleging he was denied the effective assistance of trial counsel. In that *pro se* filing, he asserted his trial counsel provided deficient representation by failing to present evidence that his confession was involuntary. Defendant alleged he told counsel before trial that during his police interrogation, he was handcuffed and beaten by police and was told what to say in his videotaped statement. Defendant further asserted he did not receive requested pain medications and that the absence of those medications affected his mental and physical state. He contended that based on those facts, his counsel should have filed a motion to suppress his confession.

¶ 14 In an October 2010 written order, the circuit court dismissed defendant's petition as frivolous and patently without merit. The court found defendant's claims of ineffective assistance of counsel were barred by waiver because he could have raised them in his direct appeal. The court further stated that defendant's claim that his confession was involuntary was barred by *res judicata* because he had unsuccessfully raised that claim on direct appeal.

¶ 15 On appeal in September 2012, this court reversed and remanded for further proceedings on defendant's initial petition under the Act. *People v. Godard*, 2012 IL (1st) 103355-U. This court found defendant's claims were not procedurally barred because the facts underlying his claims of the involuntary nature of his confession were not part of the record on direct appeal. Moreover, we held that defendant "has alleged a number of facts, which, when taken as true,

support his claim that his videotaped confession was involuntary," and that a motion to suppress his confession, which we described as the prosecution's "primary and strongest piece of evidence," as involuntary was likely his strongest defense. *Id.* ¶¶ 20-21. Accordingly, this court held that defendant's claim of ineffective assistance of counsel for the failure to file a motion to suppress his conviction had an arguable basis in law and fact and therefore, defendant's entire petition must advance to the second stage of postconviction review. *Id.* ¶¶ 21-22. Further action on defendant's initial petition remains pending in the circuit court.

¶ 16 On October 19, 2011, defendant filed a *pro se* motion for leave to file a successive postconviction petition raising a freestanding claim of actual innocence. In the motion, defendant asserted that he presented a meritorious claim of actual innocence based on newly discovered evidence, namely the affidavit of Michael Johnson, who attested he witnessed Carpenter's murder and that it was committed by someone other than defendant.

¶ 17 Johnson's affidavit contains the following attestations. At about 5:30 a.m. on May 6, 2003, Johnson was selling drugs on the 9th floor of 655 West 65th Place and heard a struggle on the floor above. As Johnson approached the door of the 10th floor incinerator room, which was "partially cracked open," he observed a "light-skinned drug addict choking [*sic*] a woman, and speaking in a low voice telling her: Bitch, I'll kill you, you Bitch you stole and smoked up my shit. I watched transfixed as this addict actually strangled this woman to death." Johnson knew defendant from the apartment building and that he encountered defendant in prison in July 2011. Defendant was not the person he saw strangling Carpenter. Also attached to the petition was defendant's signed and notarized affidavit that he did not kill Carpenter and that he only confessed to the crime under physical coercion by police.

¶ 18 On December 9, 2011, the circuit court denied defendant leave to file his successive petition. The circuit court concluded defendant had not met the cause and prejudice tests to bring a successive petition, finding that Johnson's affidavit that defendant did not kill Carpenter conflicted with defendant's argument on direct appeal that his trial counsel was ineffective for failing to support a theory that he killed Carpenter in self-defense.

¶ 19 Defendant filed a motion for reconsideration of that ruling, asserting that he was not required to satisfy the cause and prejudice requirements because he was asserting a claim of actual innocence. On February 17, 2012, the court held defendant was not entitled to post-conviction relief because he had not satisfied the criteria for an actual innocence claim, namely that the evidence must be newly discovered, material, non-cumulative and of such conclusive character that it would probably change the result on retrial. The court stated defendant did not maintain his innocence in the crime until the filing of his successive petition. Defendant now appeals that ruling.

¶ 20 On appeal, defendant renews his argument that his successive postconviction petition presents a colorable claim of actual innocence via the affidavit of Johnson, who averred that he witnessed the crime and that someone other than defendant killed Carpenter.

¶ 21 The Act provides a statutory remedy to criminal defendants who claim that a substantial violation of their constitutional rights occurred at trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. Although the Act contemplates the filing of only one post-conviction petition, our supreme court has provided two avenues under which the bar against successive proceedings will be relaxed. *Id.* In addition to allowing a successive filing under the Act when the defendant can establish cause and prejudice, the bar to successive petitions can be relaxed under what is known

as the "fundamental miscarriage of justice" exception. *Id.* ¶ 21, citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Under this exception, a defendant may submit a successive petition asserting a freestanding claim of actual innocence based on newly discovered evidence. *Edwards*, 2012 IL 111711, ¶ 24.

¶ 22 Evidence in support of a claim of actual innocence must be: (1) newly discovered; (2) material, (3) non-cumulative, and (4) of such conclusive character that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32. Such claims must be accompanied by "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Id.*, citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995). When a defendant raises a claim of actual innocence, at issue is whether the defendant's petition and supporting documentation "raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *People v. Eddmonds*, 2015 IL App (1st) 130832, ¶ 13. We review *de novo* the denial of leave to file a successive postconviction petition. *Id.* ¶ 14.

¶ 23 We now consider whether Johnson's affidavit meets the requirements for newly discovered evidence of defendant's actual innocence. The State fails to address the elements that the evidence be material and non-cumulative and has therefore waived its ability to challenge them. Turning to the requirements that the evidence of actual innocence must be newly discovered and of such conclusive character that it would probably change the result on retrial, we find that Johnson's affidavit meets both of those tests.

¶ 24 Newly discovered evidence is "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *People v. Ortiz*, 235 Ill.



2d 319, 334 (2009). By comparison, evidence is not newly discovered where it presents facts "already known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable or uncooperative." *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008). Johnson stated in his affidavit that he saw the victim being attacked in the incinerator room, "backed away from the door" and then left the building immediately. Johnson said that although he knew defendant from the building, he did not know that defendant had been charged with the victim's murder until the two men encountered each other in prison in July 2011. Johnson's statement that he witnessed the murder therefore came to light after defendant's 2007 trial, and there is no indication that defendant could have known earlier about Johnson's potentially exonerating account.

¶ 25 The State contends that Johnson could have been discovered by defendant through the exercise of due diligence based on Johnson's averment that he knew defendant from the building and defendant knew that Johnson sold drugs on the 9th floor. The State argues that defendant "could have attempted to locate Johnson to determine if Johnson heard or saw anything on the day of the murder." However, although Johnson states in his affidavit that he knew defendant, there is no indication that Johnson lived in the building or that defendant knew Johnson until they met in prison. Moreover, Johnson does not state that he had previously told anyone what he had witnessed. The State's position places an undue burden on defendant to pursue an individual who was apparently unknown to him until 2011.

¶ 26 To meet the final requirement for an actual innocence claim, Johnson's affidavit must be "of such conclusive character that it would probably change the result on retrial." *Id.* at 333; see also *People v. Washington*, 171 Ill. 2d 475, 489 (1996) (describing this requirement as the most

important element of an actual innocence claim). Evidence of actual innocence must support "total vindication" or exoneration of the offense, not merely the impeachment of a witness or the raising of a reasonable doubt as to the defendant's guilt. *Collier*, 387 Ill. App. 3d at 637, citing *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999); see also *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36. Here, Johnson attested that he witnessed the crime as it occurred and saw the perpetrator's face, and that person was not defendant. Therefore, Johnson's affidavit provides support for a potential claim of defendant's exoneration in this crime.

¶ 27 To review the State's proof against defendant, no witnesses to the crime were presented at trial, and the physical evidence did not link defendant to Carpenter. Defendant's confession represented the prosecution's "primary and strongest piece of evidence," as this court noted in its decision on defendant's initial post-conviction petition. *Godard*, 2012 IL (1st) 103355-U, ¶ 18. Because the validity of defendant's confession is still being litigated on this court's remand of the proceedings on the original petition, Johnson's averments have the potential to produce a different result upon retrial. See *People v. Williams*, 2012 IL App (1st) 111145, ¶ 41 (abrogated on other grounds by *People v. Davis*, 2014 IL 115595) (newly discovered evidence would likely change the result of the defendant's trial where the only evidence that linked the defendant to the crime was his confession and no witness identified the defendant as being involved).

¶ 28 The State contends that defendant's present claim of actual innocence conflicts with his confession and his position on direct appeal that he committed the crime but did not bear legal responsibility. However, when the circuit court considered the request for leave to file the instant petition in October 2010, the court did so on the record before it, without knowing that this court in September 2012 would remand for further proceedings on defendant's initial petition based on

the arguable claim of counsel's ineffectiveness in failing to challenge the validity of defendant's confession. Rather than being conflicting, defendant's challenge to his confession and his actual innocence claim are inherently interrelated. See, *e.g.*, *People v. Anderson*, 402 Ill. App. 3d 1017, 1031-32 (2010) (defendant's actual innocence claim was based on his allegation that his confessions were coerced). The State's argument that defendant has not presented any evidence in this case to support his claim that his confession was involuntary is misplaced; those facts were alleged by defendant in obtaining this court's ruling that his trial counsel was arguably ineffective in failing to file a motion to suppress his confession. See *Godard*, 2012 IL (1st) 103355-U, ¶ 20.

¶ 29 Accordingly, the circuit court's order denying defendant leave to file his successive postconviction petition is reversed. Defendant may file his successive petition in the circuit court, and proceedings on that petition are to be merged with the proceedings on defendant's initial petition.

¶ 30 Reversed and remanded with directions.