FOURTH DIVISION
May 14, 2015

Nos. 1-12-1592 & 1-12-3556 (cons.)

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. 93 CR 12311(07)
	)	
DELANDIS ADAMS,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.[*]
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's successive postconviction petition failed to state colorable claim of actual innocence because it was not supported by newly discovered evidence. Trial court did not err in declining to recharacterize defendant's motion to vacate his sentence as successive postconviction petition.

¶ 2 In 1995, defendant Delandis Adams, along with several codefendants, was convicted of the murder of Darren Payton. At defendant's jury trial, two witnesses—Ronald Glover and Devon Fountain—identified defendant as a member of a group of Conservative Vice Lords who held Payton captive in a house, beat him, and put him in the trunk of a car. Payton's body was found in the trunk of a car the next day.

[*] This case was recently reassigned to Justice Ellis.

¶ 3 After his conviction, defendant filed a postconviction petition that included an affidavit from Fountain and an affidavit from codefendant Darnell Luckett. Both of these affidavits asserted that defendant was not involved in Payton's murder. That petition was dismissed and this court affirmed the dismissal. *People v. Adams*, No. 1-06-1502 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 Defendant now appeals from the dismissal of his second postconviction petition, in which he asserted a claim of actual innocence. Defendant's petition included more detailed affidavits from Fountain and Luckett, as well as his own affidavit attesting that the police framed him. We affirm the dismissal of defendant's petition because these affidavits did not constitute newly discovered evidence. Defendant has not shown that he could not have presented them in earlier posttrial proceedings.

¶ 5 Defendant also appeals from the denial of his motion to vacate his sentence, which he filed after he appealed from the dismissal of his second postconviction petition. Defendant asks this court to recharacterize his motion as a successive postconviction petition and to remand with directions that the trial court consider his motion as such. We reject defendant's claim. Pursuant to *People v. Stoffel*, 239 Ill. 2d 314 (2010), we may not consider whether the trial court erred in declining to recharacterize his motion as a successive postconviction petition. Therefore, we have no basis to reverse the trial court's judgment. We affirm the trial court's denial of defendant's motion to vacate his sentence.

¶ 6 I. BACKGROUND

¶ 7 This court has set out the facts surrounding defendant's conviction and initial postconviction proceedings in detail in defendant's prior appeals. *People v. Adams*, No. 1-06-1502 (2008) (unpublished order under Supreme Court Rule 23); *People v. Adams*, No. 1-99-2402

(2004) (unpublished order under Supreme Court Rule 23); *People v. Adams*, No. 1-95-4009 (1998) (unpublished order under Supreme Court Rule 23). We will only reiterate those facts necessary to resolve this appeal.

¶ 8 At defendant's trial, Fountain testified that defendant, as well as Luckett, were members of a group who kidnapped, beat, and killed Payton. In 2005, defendant filed a postconviction petition that claimed that his trial attorney was ineffective for failing to impeach Fountain with an affidavit in which Fountain recanted his trial testimony. Defendant's petition included the affidavit, dated April 22, 1997, which said that Fountain had been "pressured into being a state witness" when the police told him either to testify against defendant or face charges for Payton's death. Fountain asserted that he did not know who killed Payton, that he only implicated defendant because the police "really wanted" defendant. Fountain also said he tried to give defendant an affidavit reflecting this information prior to defendant's trial, but that defendant's trial attorney would not draft it because Fountain had given defendant's attorney a false name.

¶ 9 Defendant's 2005 petition also included an affidavit from Luckett, dated January 28, 1999. Luckett attested that he killed Payton with the help of codefendant Dawn Royal and a man named Paul Hawkins, who was never charged. He said that defendant was not involved in the crime. Luckett was "more than willing to testify for the Defense" even though he did not testify at trial. The trial court dismissed defendant's 2005 petition after second-stage postconviction proceedings and this court affirmed that judgment. *Adams*, No. 1-06-1502 (2008) (unpublished order under Supreme Court Rule 23).

¶ 10 On September 8, 2010, filed the successive postconviction petition at issue in this appeal. That petition asserted a claim of actual innocence, supported by new affidavits from Fountain and Luckett, as well as defendant's own affidavit. Fountain's new affidavit, dated October 30,

2009, said that, at the time he spoke to the police, he was drunk and "high off marijuana laced with crack." Fountain said that he did not "see anybody kill" Payton. Detectives McDermott and Boylan told Fountain that if he did not say that defendant was involved, he would be charged with Payton's murder, "which was carrying the death[ ]penalty." Fountain's affidavit stated, "Like I said before, they really wanted [defendant]."

¶ 11 Luckett's new affidavit, dated June 29, 2009, reiterated that he killed Payton along with Royal and Hawkins. He said that Hawkins "setup [*sic*] the entire" kidnapping and murder. According to Luckett, Payton was a well-known heroin dealer whose money he, Royal, and Hawkins planned to steal. Luckett said that he knew "for a fact" that defendant was not present when Payton was killed. Luckett claimed that he did not testify at trial on the advice of his attorney. Luckett said that, after his arrest, Detectives McDermott and Boylan "kept asking" him about defendant's involvement, even though Luckett had not told defendant about their plan to kill Payton.

¶ 12 Defendant's own affidavit asserted that he was innocent. Defendant alleged that the McDermott and Boylan "had an axe to grind" with him because he had been acquitted of a crime for which McDermott had previously arrested him. Defendant claimed that McDermott told him, "I know you are innocent of this crime, but you got away with the last one I had you on."

¶ 13 The trial court dismissed defendant's successive petition, finding that neither Fountain's nor Luckett's affidavit constituted newly discovered evidence. On April 4, 2012, defendant appealed that judgment in case number 1-12-1592.

¶ 14 On August 28, 2012, defendant filed a *pro se* motion titled, "Motion To Vacate Sentencing As Void And Remand For Resentencing." In this motion, defendant alleged that the State presented perjured testimony during his sentencing hearing. In support of that contention,

he attached an affidavit from Kareem Collins who, at defendant's sentencing hearing, testified that defendant robbed him and struck him with a gun in 1992. In his affidavit, Collins said that defendant did not rob him; rather, he and defendant had simply been in a fight. Collins claimed that two Area 2 police detectives arrived at his house and told him that they would "put a case on" him if he did not testify that defendant robbed him in 1992.

¶ 15 Defendant also attached an affidavit from Gerald Walker. At defendant's sentencing hearing, Cook County correctional officer Servando Velez testified that he saw defendant attempt to stab another inmate. Velez testified that Walker, who was one of defendant's fellow inmates, was injured when he tried to intervene. In his affidavit, Walker said that defendant did not stab him. Walker said that defendant simply tried to stop a riot that had broken out.

¶ 16 Finally, defendant attached another affidavit from Fountain dated May 29, 2008. In this affidavit, Fountain again attested that his trial testimony was false. Defendant alleged that Fountain's perjured testimony affected his sentencing proceedings because, at his sentencing, the trial court relied upon the facts contained in Fountain's testimony as a reason to aggravate defendant's sentence.

¶ 17 The trial court made no findings regarding defendant's motion to vacate his sentence. The trial court simply stated, "Remand for resentencing is denied. Defendant to be notified. Off call." Defendant appealed that judgment in case number 1-12-3556. We consolidated defendant's two appeals.

¶ 18 II. ANALYSIS

¶ 19 A. Actual Innocence (No. 1-12-1592)

¶ 20 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) offers defendants an avenue to raise constitutional challenges to their convictions in collateral

proceedings. Generally, a defendant may only file one postconviction petition. 725 ILCS 5/122-1(f) (West 2010). However, a defendant may file a successive petition where it presents a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶ 24. The evidence supporting a claim of actual innocence must be newly discovered, material, not cumulative of the trial evidence, and of such a conclusive character that it would probably change the result on retrial. *Id.* ¶ 32. 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). While the Illinois Supreme Court has not clarified whether a *de novo* or abuse-of-discretion standard of review applies when reviewing whether a defendant states a colorable claim of actual innocence in a successive petition, we do not need to decide which standard applies in this case because defendant's claim fails under either one. See *Edwards*, 2012 IL 111711, ¶ 30 (declining to decide which standard of review to apply because defendant's actual innocence claim failed under either standard).

¶ 21 None of the evidence supporting defendant's claim of actual innocence is newly discovered. It is self-evident that defendant's own affidavit cannot be newly discovered to him; he was necessarily aware of that evidence throughout the case. Moreover, both Fountain and Luckett previously provided defendant with affidavits saying that he was not involved in Payton's death. Although they did not relay precisely the same information in the earlier affidavits as they do in the affidavits supporting defendant's latest filing, they are substantially the same. More to the point, even if there is some minimally new information contained in the new affidavits, new information is not the sole criterion for considering evidence to be newly discovered; defendant must also show that he could not have uncovered the information earlier through due diligence. *Ortiz*, 235 Ill. 2d at 334. Defendant's successive petition identified no

valid reason why he could not have obtained this information earlier, nor has he identified any such reason on appeal. Absent such a reason, defendant "is not permitted to develop the evidentiary basis for a [postconviction] claim in a piecemeal fashion in successive postconviction petitions." *People v. Davis*, 2014 IL 115595, ¶ 55; see also *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21 (evidence available at prior post-trial proceeding is not newly discovered); *People v. English*, 403 Ill. App. 3d 121, 133 (2010) (affidavit of alibi witness, of whom defendant was aware when he filed his initial postconviction petition, was not newly discovered).

¶ 22 While defendant contends that his incarceration prevented him from "conduct[ing] in depth *** interviews" with Fountain and Luckett, this argument is unpersuasive. Defendant has been continually incarcerated since his conviction in 1995. The fact that defendant was able to obtain affidavits from Fountain and Luckett years before he filed his successive petition belies his claim that his incarceration precluded him from communicating with them. Moreover, he identified no change in the circumstances of his incarceration to explain why he could *not* obtain the full extent of Fountain's and Luckett's testimony for his initial petition, but he *could* obtain those additional details for his successive postconviction petition. Thus, neither Fountain's nor Luckett's affidavit is newly discovered.

¶ 23 Finally, defendant argues that his own affidavit "has new weight" because Detective McDermott was implicated in the 2006 Report of the Special State's Attorney regarding the abuse of suspects at the Area 2 police station. This report does not make defendant's affidavit newly discovered. Defendant has been aware of his own potential testimony since the incident occurred, but he never presented it. He cannot reasonably claim that information he has possessed for years is now new to him. If anything, the report *itself* may have been newly

discovered evidence, but defendant does not make that argument here.[1] The mere existence of this report does not excuse defendant's failure to present his own affidavit during his initial postconviction proceedings.

¶ 24 B. Recharacterization Of Motion To Vacate Sentence (No. 1-12-3556)

¶ 25 Defendant recognizes that his *pro se* motion to vacate his sentence was an improper vehicle to collaterally attack his sentence. However, he contends that his motion to vacate his sentence was, in substance, a successive postconviction petition. Defendant urges us to recharacterize his motion to vacate as a successive postconviction petition and to remand, giving him an opportunity to amend his motion in postconviction proceedings.

¶ 26 In *People v. Shellstrom*, 216 Ill. 2d 45, 52-53 (2005), the Illinois Supreme Court held that, where a *pro se* pleading raises allegations that would be cognizable in postconviction proceedings, the trial court "*may* treat the pleading as a postconviction petition, even where the pleading is labeled differently." (Emphasis added.) However, the court added that there was no "*requirement* that the [trial] court do so." (Emphasis in original.) *Id.* at 53, n.1. Subsequently, in *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010), the Illinois Supreme Court reaffirmed that a trial court has no obligation to recharacterize a pleading as a postconviction petition. The court stressed that the trial court's decision not to recharacterize a filing as a postconviction petition is left entirely to its discretion and may not form the basis of a claim of error on appeal. *Id.*

¶ 27 In this case, defendant recognizes the holding of *Stoffel* but attempts to frame his argument to avoid its consequences. Rather than alleging that the trial court erred in failing to recharacterize his motion to vacate as a successive postconviction petition, defendant urges *this*

[1] Defendant's decision not to assert that the report is newly discovered evidence on appeal is understandable. Defendant did not attach or refer to the report in his successive petition. We have declined to consider the report for the first time on appeal where the defendant fails to present it to the trial court. *People v. Anderson*, 375 Ill. App. 3d 121, 138-39 (2007).

court to do so on appeal. This is a distinction without a difference. The trial court already declined to recharacterize defendant's motion. Consequently, if we directed the trial court to reconsider defendant's motion as a successive postconviction petition, we would necessarily be reversing the trial court's decision *not* to recharacterize defendant's motion. In doing so, we would be performing the very act that the Illinois Supreme Court instructed us not to perform in *Stoffel*. Because we may not contravene *Stoffel*, we reject defendant's claim.

¶ 28 Defendant cites *People v. McNett*, 361 Ill. App. 3d 444 (2005), as authority for his contention that we can recharacterize his petition on appeal, but *McNett* is distinguishable. In that case, the defendant filed a motion labeled, " 'Motion to Vacate Illegal Sentence and Void Plea Agreement,' " arguing that his sentence was unauthorized by statute and thus void. *Id.* at 446. On appeal, the court recognized that, in order to attack his sentence, the defendant was required to file either a postconviction petition or a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002)). *McNett*, 361 Ill. App. 3d at 447. For purposes of analyzing the defendant's appeal, however, the court determined that it did not matter how defendant's motion was classified because the ultimate issue was purely legal in nature and because, significantly, "the parties raise[d] no issue concerning the procedure used by the trial court" when it dismissed the defendant's motion. *Id.*

¶ 29 Here in contrast, defendant's claim focuses *entirely* on the procedures used by the trial court in denying his motion. This distinction is critical. In *McNett*, the appellate court was free to recharacterize the defendant's motion because recharacterization would have had no effect upon the central question in the case: whether the defendant's sentence was authorized by law. Here, if we recharacterized defendant's motion, it would not only affect the outcome of this case, it would *be* the outcome. Defendant raises no arguments about the substantive merits of the allegations in

his motion; he only challenges the procedures used by the trial court in denying it. However, as we explained above, recharacterization would improperly invade the trial court's prerogative not to recharacterize defendant's motion as a postconviction petition.[†]

¶ 30 Because we may not recharacterize defendant's petition without running afoul of *Stoffel*, we may only review the trial court's judgment regarding defendant's motion to vacate. Defendant has conceded that the trial court did not err in dismissing that motion as an improper means of challenging his sentence. We agree with defendant's concession, as he filed his motion to vacate nearly 17 years late. See 730 ILCS 5/5-8-1(c) (West 1994) (motion to reconsider sentence must be filed within 30 days of the sentence); *McNett*, 361 Ill. App. 3d at 447 (Illinois law does not recognize a freestanding motion to vacate a void order).

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the judgment of the circuit court. Defendant failed to present newly discovered evidence to support his claim of actual innocence. The trial court did not err in not recharacterizing defendant's motion to vacate his sentence as a successive postconviction petition.

¶ 33 Affirmed.

[†] We should add that, though we find *McNett* distinguishable, if it were not distinguishable from our case, then we would be required to resolve a conflict between *McNett* and *Stoffel*, and we would obviously follow the later supreme court decision of *Stoffel*.