

No. 1-13-1865

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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. 03 CR 10179
)	
CHANCELLOR AARON,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Denial of leave to file successive post-conviction petition was erroneous as it stated a newly-discovered claim of actual innocence; recantation by a key eyewitness was of such conclusive character as to probably change the outcome upon retrial.
- ¶ 2 Following a jury trial, defendant Chancellor Aaron was convicted of first degree murder and sentenced to 45 years' imprisonment. We affirmed the judgment on direct appeal. *People v. Aaron*, No. 1-06-3187 (2008)(unpublished order under Supreme Court Rule 23). We also affirmed the summary dismissal of his 2009 post-conviction petition. *People v. Aaron*, No. 1-10-

0056 (2012)(unpublished order under Supreme Court Rule 23). Defendant now appeals from a 2013 order denying him leave to file a successive post-conviction petition. On appeal, he contends that he has presented a colorable claim of actual innocence because a key trial witness has recanted his identification of defendant as the killer. For the reasons stated below, we reverse the denial of leave and remand for further proceedings on the successive petition.

¶ 3 Defendant and codefendant Kirk Horshaw were charged with first degree murder and attempted first degree murder for, on or about May 7, 2002, allegedly fatally shooting Aaron Crawford and shooting at Daniel Wesley. The State went to trial against defendant in 2005 on first degree murder alone.

¶ 4 At trial, Wesley testified that he was with Crawford on a street corner when they saw defendants across the street. Wesley and Crawford were in the Black Disciples gang and defendants were in the rival Gangster Disciples; Wesley knew defendant for over seven years. Crawford and Horshaw argued, but when Horshaw drew a gun, Wesley fled. He saw both defendant and Horshaw firing guns but did not see who shot Crawford. When the shooting stopped, Crawford was lying on the ground. Wesley, and a fellow Black Disciple who Wesley knew only as Jermaine, went over to Crawford and took him to the hospital in a car. When Wesley was interviewed by police on the night of the shooting, he described seeing defendant holding a gun. Wesley was arrested several months later on unrelated charges and pled guilty to a weapons offense. When he was arrested again in April 2003, he gave a statement to police and an Assistant State's Attorney (ASA) implicating defendant in the Crawford shooting; Wesley pled guilty to weapons charges (though another charge was dismissed) and received a prison sentence. Wesley also testified before the grand jury in May 2003. In December 2004, defendant's brother asked Wesley to give a statement to defense counsel Joseph Breen. Wesley

signed an exculpatory statement provided by Breen, to the effect that he saw the faces of both shooters but neither was defendant. Wesley testified that the statement was untrue but denied that defendant's brother or anyone else threatened him into making the statement.

¶ 5 Karen Lockett testified that, on May 7, 2002, she was looking out her kitchen window when she saw defendant remove a gun from a cylindrical can, such as a coffee can, in a vacant lot. As she took a telephone call in an adjoining room, she heard several firecrackers or gunshots so she phoned 911. When she returned to the window, she saw defendant and another man fleeing the scene while yet other men put a man into a car and drove away. In July 2002, Lockett identified defendant in a lineup and gave a written statement to a detective and ASA. She identified the man with defendant in a December 2002 lineup. She admitted that, in her July 2002 statement, she did not mention seeing defendant with a gun, but she maintained at trial that she did see defendant with a gun on the day in question. Lockett described defendant at trial as about 150-160 pounds but possibly as much as 200 pounds, and appearing "pretty much the same" as during the incident except for having a somewhat more slender face.

¶ 6 A detective testified to interviewing Wesley on the night of the shooting, during which Wesley identified defendant and codefendant from a photographic array but said that he did not see whether defendant had a gun at the time of the shooting. The detective also separately showed the array to Jamaine (or Jermaine) Williams, who identified defendant and codefendant. In July 2002, the detective interviewed Lockett and showed her a lineup from which she identified defendant. Lockett said when the detective first spoke with her that she saw defendant with a gun, but Lockett then said in the statement to the ASA that she did not see defendant with a gun. Lockett also viewed a lineup in December 2002 and identified codefendant. The detective

who arrested defendant in April 2003 estimated that defendant weighed about 250 pounds upon arrest.

¶ 7 The forensic evidence established that 11 shell casings of two different calibers, fired from two guns, were found at the scene. The parties stipulated that Crawford died of a gunshot wound.

¶ 8 On this evidence, the jury found defendant guilty and the court sentenced him to 45 years' imprisonment including a 20-year firearm enhancement.

¶ 9 On direct appeal, defendant contended that trial counsel was ineffective for not (1) moving to dismiss the charges on speedy-trial grounds, (2) moving to admit Wesley's statement to Breen as substantive evidence, (3) objecting to evidence of prior consistent statements by Wesley and Lockett, and (4) objecting to a jury instruction on prior inconsistent statements. In affirming the judgment, we found in relevant part that defendant was not prejudiced by counsel's decision not to request to admit Wesley's statement substantively, nor by the jury instruction, because it was reasonable trial strategy to use the statement as impeachment rather than substantively in light of Wesley's testimony recanting the statement and explaining the circumstances. We also found that the evidence of defendant's guilt was not closely balanced because Wesley's testimony was corroborated by Lockett's testimony and the forensic evidence that there were two shooters.

¶ 10 In his October 2009 post-conviction petition, defendant claimed that the evidence was insufficient to convict him, that trial counsel was ineffective for not challenging Lockett's lineup identification as unduly suggestive, that direct appeal counsel was ineffective for not raising said claims, and that his conviction was void for the lack of a *placita* in the record. On appeal from the December 2009 summary dismissal of the petition, defendant contended that he presented the

gist of meritorious claims of ineffective assistance by trial and appellate counsel based on Lockett's suggestive lineup identification. We affirmed, finding that the record belied the claim that defendant was significantly taller and bigger than anyone else in the lineup. For the first time on appeal, defendant contended that the lineup was also suggestive because he was wearing a monitoring bracelet on his ankle, based on a photograph from the record in codefendant's then-pending appeal (*People v. Horshaw*, No. 1-11-1072) that defendant appended to his reply brief. We found that the appendix to a brief can contain only matters in the instant record, that a new claim cannot be raised in a reply brief, and that we would not take judicial notice of a photograph from codefendant's case based on defendant's speculation of its connection to his case.

¶ 11 Defendant filed the instant motion for leave to file a successive petition in January 2013, alleging that the State knowingly used perjured testimony from Wesley, that he could not have known that Wesley recanted under oath during codefendant's 2010 trial until after that trial, and that Wesley's testimony would likely change the outcome of a new trial because Lockett's testimony was not credible. Defendant claimed that Wesley's testimony at codefendant's trial is newly-discovered evidence of defendant's actual innocence.

¶ 12 Attached to the motion and proposed petition, in relevant part, was the transcript of Wesley's direct testimony in codefendant's trial. Wesley testified that he had been drinking and smoking marijuana on the day in question. That night, he was standing outside when he heard shots, saw Crawford on the ground, and fled alone. Wesley sheltered until the shooting ended and then returned to Crawford, bringing him to the hospital with his friend Jamaine Williams. After leaving the hospital, Wesley and Williams went to a restaurant near the scene where police detectives saw the blood on Williams' shirt and asked questions. Wesley told the detectives he did not know anything, but the detectives took him to the police station. The detectives put him

and Williams in separate rooms and forced Wesley to identify photographs from an array. Wesley acknowledged identifying defendant and giving a statement but testified that "it was script" and explained that "When you are getting shot at, you don't really, who is that shooting? You are trying to get away." At the time Wesley spoke to the detectives, he was intoxicated, did not know what he was saying, and was just trying to get out of the police station. Wesley could not recall giving another statement to police in April 2003. He acknowledged testifying before the grand jury in May 2003 and at defendant's trial but could not remember the content of his testimony when asked in detail about giving testimony implicating defendants in the shooting. Wesley admitted that he was serving a Minnesota prison sentence for aggravated robbery as of codefendant's trial and had two prior felony convictions in Illinois for gun offenses.

¶ 13 On May 9, 2013, the circuit court denied defendant leave to file a successive petition. The court found that the content of Wesley's recantation testimony was known to defendant at the time of trial. The court also found that the new evidence would not have affected the outcome of his case because his trial already included evidence of contradictory statements by Wesley and because Wesley's inculpatory account was corroborated by Lockett.

¶ 14 On appeal, defendant contends that his proposed successive petition presents a colorable claim of actual innocence because Wesley, "the State's only eyewitness to the shooting," has recanted his identification of defendant as the shooter.

¶ 15 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) generally allows a defendant to file only one post-conviction petition. *People v. Coleman*, 2013 IL 113307,

¶ 81. There are two exceptions to this rule under which a successive petition may be considered: (1) when a defendant can show either cause and prejudice (that is, objective cause for, and prejudice from, not raising a claim earlier) or (2) state a claim of actual innocence. *Id.*, ¶ 82-83.

¶ 16 In order to succeed on a claim of actual innocence, a defendant must present new, material, non-cumulative evidence that is so conclusive it would probably change the result on retrial. *Id.*, ¶ 83-84. Evidence is new if it was discovered after trial and could not have been discovered earlier through the exercise of due diligence, material if it is relevant and probative of the defendant's innocence, and non-cumulative if it adds to what the jury or court heard at trial. *Id.*, ¶ 96. In considering a claim of actual innocence, the circuit court, generally, first reviews the proposed evidence to determine whether it is new, material, and noncumulative, then (if so) whether that evidence places the trial evidence in a different light and undermines the court's confidence in the factual correctness of the guilty verdict. *Id.*, ¶ 97. "This is a comprehensive approach and involves credibility determinations that are uniquely appropriate for trial judges to make. But the trial court should not redecide the defendant's guilt in deciding whether to grant relief." *Id.* That is because "[p]robability, not certainty, is the key" and the circuit court "in effect predicts what another jury would likely do, considering all the evidence, both new and old, together." *Id.* A witness's recantation of his prior testimony is usually viewed as inherently unreliable and does not merit a new trial except in extraordinary circumstances. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 63, citing *People v. Steidl*, 177 Ill. 2d 239, 260 (1997).

¶ 17 Here, we find that defendant has stated a claim of actual innocence based on Wesley's recantation at codefendant's trial. This evidence is material, non-cumulative, and newly-discovered; defendant could not know Wesley would recant until after codefendant's trial, which was after defendant's initial post-conviction petition was filed and dismissed. The evidence is also of such conclusive character that it would probably change the result on retrial. While the circuit court correctly noted that the jury in defendant's trial already heard evidence that Wesley gave contradictory statements, the weight of the contradictory statements then and now differs.

Wesley firmly maintained an inculpatory account in defendant's trial, renouncing the Breen statement and plausibly explaining the circumstances, while Wesley gave an exculpatory account in his direct testimony in codefendant's trial. "Because there was no physical evidence linking the defendant to the crime scene, and further given that the evidence against the defendant was comprised solely of witness testimony, we believe that this specific situation warrants a review of [a key trial witness's] new recantation" in further post-conviction proceedings. *Steidl*, 177 Ill. 2d at 261. Similarly, in light of the role of Wesley's testimony in defendant's trial, the issues with Lockett's testimony, and the absence of physical evidence linking defendant to this crime, the new evidence from Wesley creates a distinct possibility of a different outcome on retrial that should be addressed in further post-conviction proceedings. We find that the circuit court erred in denying defendant leave to file his successive petition and therefore remand for second-stage proceedings including the appointment of counsel. *People v. Wrice*, 2012 IL 111860, ¶ 87.

¶ 18 Accordingly, the judgment of the circuit court is reversed and this case is remanded for second-stage post-conviction proceedings on defendant's successive petition.

¶ 19 Reversed and remanded with directions.