THIRD DIVISION
September 9, 2015

No. 1-13-1292

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. 99 CR 28086
	)	
OCTAVIO GARCIA,	)	Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JAMES FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm the circuit court's denial of leave to file a successive *pro se* postconviction petition because the petition failed to establish a colorable claim of actual innocence.

¶ 2 Defendant Octavio Garcia appeals from the denial of his *pro se* motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). On appeal, defendant contends that the circuit court erred because his petition set forth a colorable claim of actual innocence based upon newly discovered evidence,

i.e., an eyewitness who "confirms" defendant's contention that he shot the victim in self-defense. We affirm.

¶ 3 After a jury trial, defendant was found guilty of the first degree murder of the victim Juan Aguilera, and sentenced to 35 years in prison. The State's theory of the case was that defendant fatally shot the victim after discovering his wife had an affair with the victim while defendant was incarcerated out-of-state.

¶ 4 At trial, the victim's brother, Hector Aguilera, testified that when he and the victim arrived at the employee parking lot on the morning of December 3, 1999, defendant was there. Defendant exited a white car, so the victim began to drive in reverse. Defendant approached the passenger side of the truck in which the men were riding and fired a gun. Although the victim "backed off very fast," defendant "placed himself" in front of the truck and fired again. After the victim "received" the second shot, he moved the gear shift "all the way down" and the truck moved slowly forward.

¶ 5 Raul Figueroa, who was also in the parking lot that morning, testified that a truck arrived in the parking lot and then began to back away. Defendant began to yell and exited a white car. Defendant followed the truck as it backed away and fired a gun at it. Defendant then walked in front of the truck and fired again. Defendant returned to the white car, got into the passenger seat, and was driven away by a companion.

¶ 6 The defense theory at trial was that defendant shot the victim in self-defense. In support of this theory, defendant testified that his wife told him that the victim was "bothering" her at work by asking her out and kissing her against her will. After defendant tried to speak with the victim in order to straighten things out, the victim followed defendant's car several times and

drove by his house. The victim also came to defendant's home and threatened to run him over with a truck.

¶ 7 On the day of the victim's death, defendant drove with two friends to the business where his wife and the victim both worked. He dropped one friend off. Shortly thereafter, he pulled over so that he and his remaining friend could urinate. Defendant was just zipping up when he saw lights and noticed a truck making a u-turn. The truck hit defendant's car and then backed up. The victim was driving the truck. The truck then came right toward defendant, so defendant took a revolver out of his jacket pocket. After his prior run-ins with the victim, defendant had begun carrying a gun for protection. As the truck came toward him "very fast," defendant fired his gun at the front of the truck in order to frighten the driver. Defendant then fired again. He believed that the victim was going to run him down and shot in order "to get the truck off me."

¶ 8 Ultimately, the jury found defendant guilty of first degree murder, and he was sentenced to 35 years in prison. Defendant's conviction and sentence were affirmed on direct appeal. See *People v. Garcia*, No 1-01-3312 (2003) (unpublished order under Supreme Court Rule 23).

¶ 9 In 2004, defendant filed a *pro se* postconviction petition alleging ineffective assistance of counsel. Private counsel then filed an amended postconviction petition alleging ineffective assistance of trial and appellate counsel. The circuit court dismissed the petition upon the State's motion, and this judgment was affirmed on appeal. See *People v. Garcia*, No. 1-09-0297 (2011) (unpublished order under Supreme Court Rule 23).

¶ 10 In 2012, defendant filed a *pro se* motion for leave to file the instant successive postconviction petition. The petition alleged, *inter alia*¸ a claim of actual innocence based upon the newly-discovered eyewitness testimony of Marcos Garcia, which supported defendant's

assertion that he shot the victim in self-defense. The petition further alleged that Garcia was not related to defendant.

¶ 11 In an affidavit attached to the petition, Garcia averred that he and Raul Antillon were in a parking lot when they saw a man exit a white car and urinate. The man went to the front of the car to smoke while the car's passenger exited and urinated. Then, a black SUV arrived. The SUV's driver and passenger began to get out of the vehicle and yelled that the driver of the white car was not going to get away "this time." At this point, the driver of the white car pulled a gun from his jacket pocket. The SUV's passenger yelled that "he" had a gun and the men got back into the SUV and drove off. However, the SUV made a u-turn and began "speeding" back toward the white car. The driver of the white car jumped on the hood of the car and fired the gun. The SUV then backed up. The SUV's driver and the driver of the white car stared at each other, and the SUV began to drive "directly" at the driver of the white car. The driver of the white car shot the gun again and the SUV slowed down as though "the driver's foot came off the gas pedal." The driver of the white car then jumped into his car and drove off. Garcia and Antillon ran away, because Garcia was a suspect in another murder and did not want to be arrested. The men joked that if the driver of the white car had waited just "a little bit longer" to urinate, he would not have shot anyone. Garcia further averred that when he met defendant in prison and they discussed why they were incarcerated, he realized that defendant was driver of the white car.

¶ 12 The circuit court subsequently denied defendant leave to file the *pro se* successive postconviction petition. It is from this judgment that defendant appeals.

¶ 13 On appeal, defendant contends that the circuit court erred when it denied him leave to file the instant *pro se* successive postconviction petition because the petition presented a colorable

claim of actual innocence based on newly discovered evidence, that is, Garcia's affidavit which "confirms" defendant's testimony that he shot at the victim's truck in self-defense.

¶ 14 Generally, a defendant is limited to filing only one postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). See also 725 ILCS 5/122-3 (West 2012) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."). However, a defendant is allowed to file a second or successive postconviction petition when he sets forth a claim that he is actually innocent of the crime of which he was convicted. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). "[I]n order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96. "Evidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt." *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36.

¶ 15 "Newly discovered" evidence is evidence that "was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Coleman*, 2013 IL 113307, ¶ 96. "Material" means that the evidence is relevant and probative of the defendant's innocence. *Id.* "Noncumulative" means the evidence adds to what the jury heard at trial. *Id.* "[C]onclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result" upon retrial. *Id.* See also *People v. Washington*, 171 Ill. 2d 475, 489 (1996) (the most important element of a claim of actual innocence is whether the evidence is of such conclusive character that it would probably change the result on retrial).

¶ 16 In the case at bar, defendant contends that Garcia's testimony is newly discovered, material, noncumulative, and would change the result at retrial. He argues that he had no way to

know that Garcia was present at the time of the shooting and did not learn what Garcia saw until the two men met in prison. Defendant further argues that Garcia's testimony is material to the central issue at trial, *i.e.*, whether defendant acted in self-defense and is not cumulative because "it is not cumulative a call a witness to corroborate" defendant's testimony. Defendant finally argues that the addition of this new evidence would probably change the result upon retrial because Garcia's testimony supplies a "first-person" account of what occurred at the crime scene, directly contradicts the testimony of the State's witnesses, and "significantly enhances" the credibility of defendant's testimony.

¶ 17 The State responds that Garcia's affidavit is not "newly discovered" evidence because defendant could have discovered Garcia sooner, and the content of Garcia's affidavit is merely cumulative to the self-defense theory presented by the defense at trial. The State further argues that Garcia's potential testimony is not so conclusive that it would probably change the result on retrial; rather, this evidence attacks the sufficiency of the evidence.

¶ 18 Initially, we note that "newly discovered" evidence is evidence that was unavailable at trial and that a defendant could not have discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002). In other words, it is the *facts* comprising the evidence that must be new and undiscovered as of trial, despite the exercise of due diligence. *People v. Montes*, 2015 IL App (2d) 140485, ¶¶ 23-24; see also *People v. Jones*, 399 Ill. App. 3d 341, 364 (2010) (collecting cases) ("evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of those facts may have been unknown, unavailable or uncooperative"). The testimony of a potential alibi witness cannot be considered newly discovered, because a defendant would be aware of the factual content of such

testimony at, or prior to trial (*Harris*, 206 Ill. 2d at 301), and the affidavit of an eyewitness is not considered newly discovered when it "does not contain any facts that defendant would not have known at or prior to his trial" (*People v. Davis*, 382 Ill. App. 3d 701, 712 (2008)). In those cases when a defendant is aware of the underlying facts contained in the affidavit of an eyewitness, those facts are not transformed into newly-discovered evidence simply because defendant was not aware of the source of those facts. See, *e.g.*, *People v. Jarrett*, 399 Ill. App. 3d 715, 724 (2010).

¶ 19 In the case at bar, the facts contained in Garcia's affidavit support the version of events to which defendant testified at trial, *i.e.*, defendant shot at the victim's truck as the truck drove toward him. The information contained in Garcia's affidavit was, therefore, comprised solely of facts already known to defendant at or before trial; these facts are not transformed into "newly discovered" evidence simply because defendant was not aware that Garcia was present at the time of the shooting. See *Jarrett*, 399 Ill. App. 3d 724; but see *Adams*, 2013 IL App (1st) 111081, ¶ 33 (witnesses' affidavits were "newly discovered" because the defendant testified he was not present at the scene when the crime occurred and he would have had no way of knowing that the witnesses saw the offense).

¶ 20 More importantly, even if this court were to adopt a liberal definition of "newly discovered" and agree with defendant that Garcia's affidavit was "newly discovered" evidence, his claim of actual innocence must fail because the evidence contained in Garcia's affidavit is not of such a conclusive nature that it would probably change the result on retrial. *People v. Edwards*, 2012 IL 111711, ¶ 32. In other words, claims of actual innocence "must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy

eyewitness accounts, or critical physical evidence—that was not presented at trial.' " *Id.*, quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

¶ 21 *People v. Lofton*, 2011 IL App (1st) 100118, is instructive. In that case, the defendant filed a second postconviction petition claiming that he was actually innocent based on an affidavit of another person who claimed to be the actual shooter and alleged that the defendant was not at the scene of the crime. *Id.* ¶ 33. The court determined that the affidavit constituted "newly discovered" evidence because, accepting as true that the defendant was not at the scene of the shooting, the defendant could not have known the identity of the shooter until that person contacted the defendant and made such an admission. *Id.* ¶ 37. The court then determined that evidence indicating that someone else shot the victim and that the defendant was not present was "certainly" material. *Id.*¶ 38. Finally, the court noted that the hallmark of actual innocence is total vindication, and, therefore, "[i]t would not have been enough for [the affiant] to state that he was the shooter if [the defendant] was still actively involved." *Id.* ¶ 40. Ultimately, the court reversed the dismissal of the defendant's petition and remanded for an evidentiary hearing. *Id.*

¶ 22 Similarly, in *People v. Adams*, 2013 IL App (1st) 111081, the defendant raised a claim of actual innocence based upon the "newly discovered" affidavits of two witnesses averring that someone else committed the murder. In support of his claim, the defendant argued that because he left the scene before the crime occurred, he had no way to know that these people were present at the time of the offense or what they saw. The court determined that the two affidavits were "newly discovered" because defendant, who had testified at trial that he was not present when the victim was beaten, did not have "any reason to seek [these witnesses] out," that is, he did not know that they were present. *Id.* ¶ 33. The court further determined that the facts alleged

in the affidavits, that the defendant was not present and that someone other than the defendant killed the victim, were material, noncumulative and capable of changing the result on retrial. *Id.* ¶¶ 35, 37. Accordingly, the reviewing court reversed the denial of the defendant's motion for leave to file a successive postconviction petition. *Id.* ¶ 39

¶ 23 Here, on the other hand, Garcia's proposed testimony, that defendant shot at the truck as it came toward defendant, would provide an account of the shooting which supports defendant's version of events. However, the addition of this testimony would only provide the basis to assert a reasonable doubt argument, as other evidence at trial supported defendant's conviction. Specifically, two eyewitnesses testified that the defendant shot at the truck as it backed away. In the case at bar, there is no indication that either of the State's witnesses has recanted his testimony, thus, at retrial, the addition of Garcia's testimony would merely serve to support defendant's version of events and contradict the testimony of the State's witnesses.

¶ 24 The facts of the case at bar are similar to that of *People v. Sanders*, 2014 IL App (1st) 111783, *pet. for leave to appeal granted*, No. 118123 (Nov. 26, 2014). In that case, the defendant raised a claim of actual innocence based upon, *inter alia*, a witness's affidavit that a codefendant acted alone. However, the court concluded that the affidavit was not of such a conclusive character that it would probably change the result on retrial, when, in contrast to that witness's version of events, "there was substantial credible evidence" at trial indicating that the codefendant did not act alone. *Sanders*, 2014 IL App (1st) 111783, ¶ 23.

¶ 25 Similarly, here, although Garcia's affidavit avers that the truck drove toward defendant, the fact remains that two witnesses testified at trial that defendant shot at the truck as it backed away. Accordingly, we cannot conclude that the information contained in Garcia's affidavit

raises "the probability that it is more likely than not that no reasonable juror would have convicted [defendant] in the light of the new evidence." *Edwards*, 2012 IL 111711, ¶ 31. Rather, we find that at best the evidence contained in Garcia's affidavit merely affects the issue of the sufficiency of the evidence and therefore does not totally vindicate defendant. See *Adams*, 2013 IL App (1st) 111081, ¶ 36 (evidence of a defendant's actual innocence must support his total vindication or exoneration, not merely present a reasonable doubt).

¶ 26 Ultimately, because Garcia's affidavit was neither "newly discovered" evidence nor of such a conclusive character that it was likely to change the outcome upon retrial, defendant has failed to assert a colorable claim of actual innocence, and the circuit court properly denied his *pro se* motion for leave to file a successive postconviction petition for relief. *Edwards*, 2012 IL 11171, ¶¶ 23-24.

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.