FOURTH DIVISION
September 24, 2015

No. 1-13-3260

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. 97 CR 8783
	)	
JOSEPH WILSON,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm the judgment of the circuit court denying defendant leave to file his successive *pro se* post-conviction petition where his claim of actual innocence was not supported by newly discovered evidence of such a conclusive character that it would probably change the outcome on retrial.

¶ 2 Defendant Joseph Wilson appeals from the circuit court's order denying leave to file his successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). Defendant contends that his petition presented a colorable claim of actual innocence based on the attached affidavit of Tirnell Williams, the State's eyewitness, recanting his trial testimony. We affirm.

¶ 3 Cephus Bernard Williams was beaten by fellow inmates in Cook County Jail on January 24, 1996, resulting in him having to use a breathing tube in his throat from February 1996 onwards. The breathing tube had to be cleaned regularly to prevent blockage. During a cleaning of the tube on July 17, 1996, it became blocked and Williams died from being unable to breathe. An investigation begun the night the victim was attacked led to first degree murder charges against defendant and codefendants Jerome Rucker and Frank Pitts, who both pled guilty to attempted murder and are not parties to this appeal. Defendant was found guilty of murder after a jury trial, and was sentenced to a second life term as he was then serving a life sentence for an earlier murder.

¶ 4 As relevant to this appeal, inmate Alonzo Fleming testified at trial that he was delivering dinner trays on the day of the incident when an unknown inmate asked him to deliver a note. Fleming slid the note underneath the door of the "day room," an area where inmates spend time when they are not locked in cells, and saw defendant pick up the note. When Fleming was first questioned about the murder in January 1997, he said police threatened to charge him if he failed to cooperate. Fleming was shown a picture of defendant, who Fleming identified as the recipient of the note. Fleming was not shown a photo array and said he knew that police wanted him to make a positive identification.

¶ 5 Inmate Timothy Hale testified that he saw Fleming pass a note under the door of the day room, and then saw an inmate pick up the note and walk away with other inmates, who were members of the New Breed gang. Hale was not asked to identify defendant at trial. Hale later heard a commotion and saw the victim lying at the top of the stairs and bleeding.

¶ 6 Inmate Bobby Berry testified at trial that he did not know the victim and defendant, but admitted he thought they were in the New Breed gang. Berry denied seeing a note slipped under

the day room floor. He saw 15 to 20 inmates congregating near a cell, walked near the cell, and saw inmates wrestling inside, but did not identify defendant as being involved, and did not see defendant beat the victim or lay him at the top of stairs. However, Assistant State's Attorney David Studenroth testified that Berry implicated defendant and his codefendants in the beating of the victim. Berry told Studenroth that he saw the victim, defendant, and codefendants enter a cell, saw the victim try to leave the cell, and later saw defendant and codefendants carry the victim from the cell. Before the grand jury, Berry testified to that effect, and that he saw a note passed to codefendant Rucker in the day room.

¶ 7 Tirnell Williams testified that on January 24, 1996, he was sitting on the stairs when he saw an inmate slide a note under a door to the day room, defendant pick up the note, and then walk with codefendants Rucker and Pitts to the cell defendant shared with the victim. As defendant passed by Williams, he told Williams to make sure no one came upstairs. The victim was also walking toward his cell with defendant and codefendants. The four men went into the cell and closed the door. Williams heard screaming and moaning coming from the cell, and, when he looked through the window in the cell door, he saw Rucker pick up and drop the victim and Pitts kick the victim while defendant watched. Williams heard defendant say that they would have to kill the victim if he reported the attack. He then saw defendant and codefendants carry the victim out of the cell, lay him at the top of the stairs, and wipe blood from their shoes. Williams waited a year to tell police what he saw because he was frightened other inmates might hear him talk to investigators. Williams denied receiving consideration in exchange for his testimony against defendant, but records showed that the State dropped one unlawful use of weapon charge against him and gave him $700 in "relocation money."

¶ 8 No correction officers witnessed these acts, but they heard inmates yelling that someone had been hurt. Sheriff O'Lillian Baker testified that she found the victim at the top of the stairs bleeding. Baker also testified that Tirnell Williams informed her later that night that defendant and Pitts were involved in the incident. Sheriff Maisenbach testified that he spoke with defendant that night in his cell and did not see any blood on him. Sheriff Harry Glass testified that he investigated the cell where defendant and the victim were assigned and saw no evidence of foul play in the cell. Sheriff Stanley Augstyniak, an Internal Affairs investigator, interviewed inmates the day after the attack, but the investigation was suspended pending the victim's recovery, and the victim was never interviewed before his death.

¶ 9 The jury found defendant guilty of first degree murder and the trial court sentenced him to natural life imprisonment. Defendant appealed, and this court affirmed defendant's conviction. *People v. Wilson*, No. 1-99-4037 (2001) (unpublished order under Supreme Court Rule 23).

¶ 10 In February 2004, defendant filed his first *pro se* post-conviction petition, which was dismissed by the circuit court at the second stage. Defendant appealed the dismissal, and this court affirmed. *People v. Wilson*, 2011 IL App (1st) 092900-U.

¶ 11 On April 19, 2013, defendant filed the successive *pro se* post-conviction petition that is the subject of this appeal, alleging actual innocence based on newly discovered evidence. Defendant supported his petition with an affidavit from Tirnell Williams, dated July 18, 2012. In his affidavit, Williams states that he "told all false information" regarding the events that occurred on January 24, 1996. In particular, Williams indicates that he lied to Sheriff Baker about the incident because he wanted to talk to her as she was a "beautiful woman, whom I liked being around," and defendant never put him "on security" as he was a rival gang member. Williams further states that he did not hear defendant say that the victim should be killed.

Williams attests that he made these false statements because detectives threatened to charge him on the case. However, because the threat of being charged no longer exists, Williams wanted to tell the truth.

¶ 12 On June 20, 2013, the circuit court entered a written order denying defendant leave to file the successive petition. In doing so, the court held that defendant's claim of actual innocence cannot afford him relief under the Act. In particular, the court stated that even if Williams had not testified, the result of defendant's trial would not change where there were multiple eyewitnesses who testified that they saw defendant receive a note passed to him under the day room door, and inmate Berry saw defendant in a cell with two other inmates fighting, the victim being prevented from leaving, and defendant and two others carry the body out of the cell and wipe the cell down for blood. This testimony matched Williams' testimony exactly, and thus the outcome of defendant's trial would not change had Williams not testified at trial.

¶ 13 On appeal, defendant contends that his petition adequately alleged a claim of actual innocence because Williams' affidavit recanting his testimony provides newly-discovered, material, and non-cumulative evidence likely to change the result on retrial.

¶ 14 We have held that our review of a circuit court's denial of a motion to file a successive post-conviction is *de novo*. *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 59. We acknowledge that the Illinois Supreme Court in *People v. Edwards*, 2012 IL 111711, ¶ 30, declined to decide whether an abuse of discretion or *de novo* standard of review applies to decisions granting or denying leave to file a successive petition raising a claim of actual innocence. However, applying either standard, our conclusion is the same. See, *e.g.*, *People v. Simon*, 2014 IL App (1st) 130567, ¶ 58.

¶ 15 A successive post-conviction petition that sets forth a claim of actual innocence is not subject to the general cause and prejudice test for such petitions. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). However, our supreme court determined that when a successive post-conviction petition based upon a claim of actual innocence is filed, "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." *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.'" *Id*., quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

¶ 16 The elements of a successful claim of actual innocence require that the evidence supporting the claim (1) must be newly discovered, (2) material, (3) not merely cumulative, and (4) "of such conclusive character that it would probably change the result upon retrial." *Edwards*, 2012 IL 111711, ¶ 32 (citing *Ortiz*, 235 Ill. 2d at 333). Our supreme court in *Coleman* clarified that "[n]ew means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. Material means the evidence is relevant and probative of the petitioner's innocence. Noncumulative means the evidence adds to what the jury heard. And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result." (Internal citations omitted.) *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 17 Here, defendant failed to plead a colorable claim of actual innocence because Williams' affidavit was not of such a conclusive character that it would probably change the result on retrial. As in *Edwards*, the "newly discovered" evidence here "does not raise the probability that,

in light of this new evidence, it is more likely than not that no reasonable juror would have convicted" defendant. *Edwards*, 2012 IL 111711, ¶ 40. In *Edwards*, the court highlighted that a defendant's claim of actual innocence should be supported by new reliable evidence, which could include a trustworthy eyewitness account of the crime. *Edwards*, 2012 IL 111711, ¶ 32.

¶ 18 The evidence presented by Williams in his affidavit does not include a trustworthy eyewitness account of the crime. Instead, the evidence is more akin to that presented by the defendant in *People v. Collier*, 387 Ill. App. 3d 630 (2008). In that case, the defendant attached affidavits of two witnesses recanting their trial testimony. The first witness averred that he did not witness the murder and falsely identified the defendant at trial, while the second witness averred that she fabricated her testimony to match the first witness. *Id*., 632. This court held that those "affidavits measured against their trial testimony address considerations of credibility that go to reasonable doubt, not actual innocence." *Id*., 637. "'[A]ctual innocence' is not within the rubric of whether a defendant has been proved guilty beyond a reasonable doubt. [Citation.] Rather, the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' [Citation.]." *Id*., 636.

¶ 19 Similarly, in the case at bar, none of the allegations in Williams' affidavit go to actual innocence. At best, they merely impeach or contradict Williams' trial testimony. As pointed out by the State in its brief, it is significant that Williams does not aver that defendant did not participate in the commission of the offense, nor does Williams provide any information as to defendant's whereabouts at the time of the offense. In essence, Williams attests that, contrary to his trial testimony, he did not witness the attack. Therefore, Williams' affidavit does not exonerate defendant, and it is not of such a conclusive character that it would probably change the result on retrial. This is particularly true where there was substantial evidence, outside of

Williams' trial testimony, establishing defendant's guilt. Inmate Fleming slid a note underneath the door of the day room and saw defendant pick it up. Inmate Hale saw Fleming pass a note under the door of the day room, and then saw an inmate pick up the note and walk away with other inmates, who were members of the New Breed gang. Hale later heard a commotion and saw the victim lying at the top of the stairs and bleeding. Although inmate Berry did not identify defendant at trial as being one of the offenders, he implicated defendant in the crime when he spoke to an assistant State's Attorney, and testified to that effect before the grand jury.

¶ 20 In his reply brief, defendant asserts that the term "total vindication" is not the proper standard to use in evaluating actual innocence claims. To support his contention, defendant asserts that the total vindication standard has been rejected by our supreme court in *Ortiz*, and, more recently, in *Coleman*. Defendant maintains that *Ortiz* held that a defendant need only show that the evidence "directly contradicts" the State's evidence, such that "the evidence of defendant's innocence would be stronger when weighed against" the State's evidence." *Ortiz*, 235 Ill. 2d 337. We disagree with defendant that, following *Ortiz*, a claim of actual innocence is not based on total vindication. In fact, in *Anderson*, this court held that *Ortiz* was in agreement with the *Collier* court's determination that, to proceed to second-stage proceedings, a successive petition must be based on newly discovered evidence that could potentially exonerate the defendant. *People v. Anderson*, 401 Ill. App. 3d 134, 140-41 (2010) (citing *Collier*, 387 Ill. App. 3d 636). Moreover, this court has continued to hold that the hallmark of actual innocence means total vindication or exoneration. See *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36; *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40; *People v. Jarrett*, 399 Ill. App. 3d 715, 724 (2010) (post-*Ortiz* cases holding that the hallmark of actual innocence is total vindication or exoneration).

¶ 21 Defendant similarly argues that our supreme court in *Coleman* expressly rejected the argument that actual innocence means total vindication or exoneration when it stated that courts "should not redecide the defendant's guilt in deciding whether to grant relief," and, if that were the case, the remedy would be outright reversal and not a new trial. *Coleman*, 2013 IL 113307, ¶ 97. Defendant further points out that the supreme court held that "[p]robability, not certainty, is the key as the trial court in effect predicts what another jury would likely do," and cited approvingly to an appellate court decision for the proposition that "[n]ew evidence need not be completely dispositive of an issue to be likely to change the result upon retrial." *Id.*, citing *People v. Davis*, 2012 IL App (4th) 110305, ¶¶ 62-64. We first note that the *Coleman* court's statements were made in the context of how a trial court will typically review evidence of an actual innocence claim presented at an evidentiary hearing, which was not held in the case at bar as the circuit court denied defendant leave to file his successive petition. Nevertheless, the above statements do not reject the notion that the hallmark of an actual innocence claim is total vindication from the crime. As stated above, defendant must show that the new evidence could *potentially* exonerate him, and he has failed to make that showing.

¶ 22 We are also not persuaded by defendant's argument that the circuit court's ruling was "based on a misapprehension of the strength of the evidence." We agree with the State that the circuit court properly assessed the strength of the evidence in finding that the outcome of the trial would not have changed had Williams not testified. Nevertheless, we are not constrained by the reasoning of the circuit court, and may affirm the dismissal of a post-conviction petition on any basis supported by the record because we review the judgment, not the trial court's reasoning. *Anderson*, 401 Ill. App. 3d at 138. Here, defendant was required to set forth a colorable claim of

actual innocence in his successive petition and supporting documentation (*Edwards*, 2012 IL 111711, ¶ 24), and, as explained above, he failed to satisfy this requirement.

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 24 Affirmed.