2015 IL App (3d) 130738-U

Order filed January 28, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0738 Circuit No. 86-CF-378
SHERMAN GIBSON,	)	
Defendant-Appellant.	)	Honorable Robert P. Livas, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice McDade and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant failed as a matter of law to state a colorable claim of actual innocence in a successive postconviction petition where he did not introduce any newly discovered evidence.

¶ 2 Defendant, Sherman Gibson, was convicted of first degree murder in 1992 (Ill. Rev. Stat. 1985, ch. 38, ¶ 9-1(a)(2)). In 2012, defendant filed a motion for leave to file a fourth successive postconviction petition. In the petition, defendant claimed actual innocence based on newly discovered evidence. The circuit court denied leave. Defendant appeals, arguing that the

evidence put forth in affidavits accompanying his petition should be considered newly discovered where the affiants were previously unwilling to testify out of fear for their lives. We affirm.

¶ 3 FACTS

¶ 4 On January 29, 1986, defendant was charged by indictment with murder (Ill. Rev. Stat. 1985, ch. 38, ¶ 9-1(a)(2)). The indictment alleged that Robert Lofton, Vernon Hicks, and defendant killed Leon Smallwood by stabbing him with a knife.

¶ 5 Defendant's case was severed from his codefendants, and defendant faced his first jury trial in October and November of 1986. The jury was unable to reach a verdict, and the court declared a mistrial. The matter proceeded to a second jury trial in January of 1987. The jury found defendant guilty of murder, and the court sentenced him to death. This conviction, however, was reversed by the Illinois Supreme Court, which remanded the cause for a new trial. *People v. Gibson*, 136 Ill. 2d 362 (1990).

¶ 6 In May and June of 1992, defendant faced his third jury trial. At this trial, Larry Eckstine testified that in October of 1985, he was an inmate in E House at Stateville Correctional Center. Eckstine was a member of the Black Disciples street gang, while fellow inmates Hicks, Lofton, defendant, and Smallwood were members of the Metro street gang.

¶ 7 On the morning of October 15, 1985, Eckstine saw defendant, Smallwood, and Hicks standing inside cell 415, and Lofton was standing in the doorway. While in cell 416, Eckstine heard a rumbling sound coming from cell 415. Eckstine peered into cell 415, where he saw Lofton hitting Smallwood, defendant holding a shank, and Smallwood attempting to grab the shank. A curtain was then placed over the door, blocking Eckstine's view of the cell. Eckstine later saw Hicks run out of cell 415 carrying a blood-stained towel.

¶ 8 Stateville medical technician Robert Cattaneo went to cell 415 at the request of an inmate around 8:30 a.m. When he arrived, the cell was in disarray, and Smallwood was dead with a stab wound to his chest. Death had likely occurred within two hours of the body being found. Captain Clyde Nash of Stateville testified that after Smallwood's body was discovered, defendant was found in Lofton's cell, 260.

¶ 9 Master Sergeant Hayden Baldwin of the Illinois State Police testified that he found bloodstains inside cell 415, on the wall between cells 414 and 415, above the lock of cell 260, and on the wall in the staircase just below the second floor—the floor on which cell 260 was located. He seized a baseball cap, jacket, and pair of boots from cell 260 to be examined by the crime lab. He also took a pair of pants from defendant that appeared to be stained with blood.

¶ 10 Defendant testified that he shared cell 415 with Smallwood in October of 1985. When defendant returned from breakfast on the morning of October 15, Smallwood was still asleep. Defendant then moved some of his property to cell 260. He wanted to move to a lower floor because his ankles and knees were hurting. He denied striking or stabbing Smallwood.

¶ 11 On June 10, 1992, the jury found defendant guilty of murder and eligible for the death penalty. Ultimately, the jury rendered a no-death verdict, and the court sentenced defendant to a term of natural life imprisonment. We affirmed defendant's conviction and sentence. *People v. Gibson*, No. 3-92-0566 (1995) (unpublished order under Supreme Court Rule 23).

¶ 12 From 1995 through 2003, defendant filed three *pro se* postconviction petitions. Each of these petitions was dismissed. On November 13, 2012, defendant filed his fourth *pro se* petition for postconviction relief. In the fourth petition, defendant asserted that, *inter alia*, he had newly discovered evidence of innocence, contained in the affidavits attached to the petition. These included affidavits from Eugene Horton and defendant.

¶ 13 In Horton's affidavit, Horton stated that Stateville inmate Willie Lyons—whom Horton referred to as a "notorious killer and gang chief"—admitted to Horton that Lyons had "planned and directed" the murder of Smallwood. According to Horton, Lyons gave him a note "around the year of 1992," in which Lyons warned defendant and Horton not to talk about Lyons' involvement in Smallwood's murder.[1] Lyons threatened to "beat [them] with pipes and cut [them] up into small pieces" if they did not heed his warning. Horton was afraid of Lyons, and would testify if proper arrangements were made for "assistance and protection."

¶ 14 In defendant's affidavit, defendant stated that he was innocent of Smallwood's murder. He averred that on October 15, 1985, around 7 a.m., he was standing by the phone booth in Stateville when he saw Lyons exit cell 415 with a shank in his hand and blood on his shirt. According to defendant, Lyons approached him and struck defendant in the face. Lyons then told defendant not to tell anyone what he had witnessed, or Lyons would have defendant "beaten with pipes and then cut *** into pieces." Defendant averred that he never mentioned Lyons—"[o]ut of fear of death"—until he told Horton in 1992. Defendant stated that he would be willing to testify in court if given protection.

¶ 15 On January 15, 2013, defendant filed a motion for leave to file a successive postconviction petition. On February 19, 2013, the trial court denied defendant leave. Defendant appeals, arguing that his petition stated a colorable claim of actual innocence based on newly available evidence found in the affidavits from himself and Horton, and that he is therefore entitled to leave to file the petition.

¶ 16 ANALYSIS

[1] Horton recreated the note and attached his recreation to the affidavit, asserting that he "vividly recollect[ed] the following exact words that Willie Lyons wrote[.]"

¶ 17 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a statutory remedy to criminal defendants claiming substantial violations of their constitutional rights at trial. *People v. Edwards*, 2012 IL 111711. Though only one postconviction proceeding is contemplated under the Act, our supreme court has indentified "two bases upon which the bar against successive proceedings will be relaxed." *Id*. ¶ 22. In the matter *sub judice*, defendant argues that leave should be granted under the " 'fundamental miscarriage of justice' exception." *Id*. ¶ 23 (quoting *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). "In order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a petitioner must show actual innocence." *Edwards*, 2012 111711, ¶ 23.

¶ 18 A petitioner seeking to file a successive petition must first obtain leave of court. *People v. Tidwell*, 236 Ill. 2d 150 (2010); see 725 ILCS 5/122-1(f) (West 2012). A defendant has the burden of obtaining leave, and "must submit enough in the way of documentation to allow a circuit court to make that determination." *Tidwell*, 236 Ill. 2d at 161.

¶ 19 In *Edwards*, the supreme court clarified the standard that a petitioner claiming actual innocence must meet in order to obtain leave to file a successive petition. *Edwards*, 2012 IL 111711. The court held that "leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *Id*. ¶ 24.

¶ 20 As a general matter, a trial court's decision to grant or deny leave of court is reviewed for an abuse of discretion. See, *e.g.*, *People ex rel. Graf v. Village of Lake Bluff*, 206 Ill. 2d 541 (2003). However, because the denial of leave to file a successive postconviction petition pursuant to a claim of actual innocence turns on a question of law, we will review the matter *de*

novo. See *Edwards*, 2012 IL 111711 (suggesting, though not deciding, that *de novo* review is appropriate in same context).

¶ 21 "The elements of a claim of actual innocence are that the evidence in support of the claim must be 'newly discovered'; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial." *Id.* ¶ 32 (quoting *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009)). Our supreme court has defined newly discovered evidence as "evidence that was unavailable at trial and could not have been discovered sooner through due diligence." *People v. Harris*, 206 Ill. 2d 293, 301 (2002).

¶ 22 I. Affidavit of Eugene Horton

¶ 23 In his affidavit, Horton claimed that Lyons admitted to "plan[ning] and direct[ing]" the murder of Smallwood. Horton also indicated that Lyons had threatened to kill both defendant and Horton if they spoke of Lyons' involvement in the murder. Horton implied that he did not testify initially for fear of Lyons, and that he would be willing to testify now if given protection.

¶ 24 We find that Horton's affidavit does not constitute newly discovered evidence and is, as a matter of law, inadequate to support a claim of actual innocence. Horton claimed only that Lyons gave him a threatening note in 1992, with no indication of whether this note arrived before or after defendant's third trial. More importantly, the affidavit makes no mention of when Horton actually acquired the knowledge of Lyons' purported involvement in the murder of Smallwood. Though defendant, in his affidavit, stated that he first told Horton about Lyons in 1992, it remains unclear whether this occurred before or after defendant's trial. Horton's affidavit simply provides no basis to believe that Horton did not have such knowledge at the time of trial,

or that this evidence was otherwise unavailable.[2] Because Horton's affidavit did not even purport to introduce new evidence, it cannot stand as the basis for a claim of actual innocence.

¶ 25 II. Affidavit of Sherman Gibson

¶ 26 In defendant's affidavit, he stated that on the morning of Smallwood's murder, he was standing by the phone booth in Stateville when he saw Lyons exit cell 415 with a shank in his hand and blood on his shirt. Lyons struck defendant in the face and threatened to have him killed if defendant spoke of what he had witnessed. Defendant alleged that this threat, and the fear of death, prevented him from testifying to what he saw.

¶ 27 On its face, defendant's affidavit plainly does not present any newly discovered evidence. Defendant was armed with the knowledge of Lyons' involvement in Smallwood's murder when defendant testified at his own trial. Defendant argues, however, that because he did not divulge this information at trial since he was in fear for his life, the evidence offered in his affidavit should be considered newly available.

¶ 28 In making his argument, defendant relies primarily on this court's decision in *People v. Knight*, 405 Ill. App. 3d 461 (2010). In *Knight*, the defendant pled guilty to first degree murder under a fully negotiated plea agreement in 1993. In 2002, he filed a *pro se* petition for postconviction relief, which was dismissed as untimely. In 2003, the defendant filed a subsequent petition for postconviction relief on the grounds of actual innocence, supported by

[2] Defendant argues that both his and Horton's evidence should be considered "newly available" because both originally declined to testify out of fear for their lives. Horton's affidavit, however, does not contain such an assertion. Horton merely notes a fear of Lyons and a present willingness to testify if given protection. Defendant's argument, with respect to defendant's own affidavit, is discussed *infra*.

numerous affidavits. The affidavits alleged that the defendant had been coerced by gang leaders to plead guilty to a crime he did not commit. That petition was also dismissed, giving rise to the appeal at issue in *Knight*. On appeal, the State, again, argued that the defendant's petition—treated as a first petition—was untimely under the Act.

¶ 29 The *Knight* court pointed out that the Act bars the bringing of an initial postconviction petition more than three years after the date of conviction " 'unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.' " *Knight*, 405 Ill. App. 3d at 465 (quoting 725 ILCS 5/122-1(c) (West 2000)). The court found that culpable negligence " 'contemplates something greater than ordinary negligence and is akin to recklessness.' [Citation.] *** The definition *** comports with the long-held view that the Act in general must be liberally construed[.]" *Knight*, 405 Ill. App. 3d at 465 (quoting *People v. Marino*, 397 Ill. App. 3d 1030, 1033 (2010)).

¶ 30 This court found that the defendant's delay in claiming his plea was coerced, and the delay in presenting new evidence of innocence, was not caused by the defendant's culpable negligence. The court rejected the State's argument that the defendant had failed to explain why the affiants were previously unavailable, pointing out that the petition alleged that the gang leader who had orchestrated the guilty plea was now deceased. The court found the allegation sufficient to find that the delay was caused by "the continued presence of the very coercive force that caused defendant to plead guilty." *Knight*, 405 Ill. App. 3d at 466. The court also pointed out that the petition alleged that the affiants were only now willing to come forward with their information "because gangs no longer control the prison." *Id*.

¶ 31 For a number of reasons, our reasoning in *Knight* does not support defendant's present contention. Foremost, the *Knight* decision utilized an entirely different standard—the

defendant's culpable negligence—than the one utilized in this appeal. A court reviewing the dismissal of a *successive* petition under the Act is not concerned with a defendant's culpable negligence, but only with the unavailability of evidence at the time of trial, or whether evidence could have been discovered through due diligence. Indeed, while the standard applied to an initial postconviction petition is to be liberally construed (see *Marino*, 397 Ill. App. 3d 1030), successive postconviction petitions "are disfavored by Illinois courts." *Edwards*, 2012 IL 111711, ¶ 29.

¶ 32 Further, the *Knight* decision rested on what the court found to be a suitable explanation for why the defendant and his affiants had not come forward sooner, and why they were coming forward at that time. There is no such explanation in the present case. While defendant alleges that his fear of Lyons prevented him from testifying originally, he does not explain why he is now willing to testify against Lyons. In fact, even defendant's present willingness to testify is contingent upon his receiving protection. The record shows no such attempts to procure protection at any of defendant's original trials, and it remains unclear why defendant is only now seeking this remedy. See also *Edwards*, 2012 IL 111711, ¶ 37 (finding "the efforts expended" to be "insufficient to satisfy the due diligence requirement").

¶ 33 Defendant has not sufficiently alleged that his purported knowledge was unavailable at trial and that it could not have been discovered sooner through due diligence. To the contrary, defendant's affidavit establishes that the evidence was always available. His willingness to testify if given protection actually *confirms* that his evidence could have been available originally through the exercise of due diligence. Therefore, after a thorough review of defendant's petition and supporting documentation, we find that defendant cannot, as a matter of law, state a colorable claim of actual innocence. At best, Horton's affidavit established that

Lyons may have planned and orchestrated Smallwood's murder. It does not establish that defendant did not participate.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Will County is affirmed.

¶ 36 Affirmed.