

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (3d) 140161-U

Order filed November 2, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 14th Judicial Circuit,
)	Rock Island County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-14-0161
v.)	Circuit No. 99-CF-1019
)	
MARIO ENGLISH, JR.,)	Honorable
)	F. Michael Meersman,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's successive postconviction petition did not state a colorable claim of actual innocence where the only new evidence offered was a vague affidavit from defendant's brother claiming to have committed the offense.

¶ 2 Defendant, Mario English, Jr., appeals the dismissal of his successive postconviction petition. Because we find that defendant failed to present sufficient evidence to state a colorable claim of actual innocence, we affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by information with armed robbery (720 ILCS 5/18-2 (West 1998)) for allegedly robbing a Burger King restaurant in Moline, Illinois, on October 29, 1999.

¶ 5 A jury trial was held. Peggy Simon and Angelene Spranger testified that they were working at a Burger King restaurant in Moline on the date of the incident. Simon and Spranger had just closed the restaurant when a man armed with a gun approached them in the parking lot. The man was wearing a hood. The man told them to give him their money and threatened to shoot Simon in the leg. Simon and Spranger said they did not have any money. The man made them go back inside the restaurant. Simon led him to the office, opened the safe, and put approximately \$1,800 into a bag. The man took the money and threatened to shoot Simon if she looked at him. Simon saw the man's nose, mouth, and mustache but did not get a good look at him.

¶ 6 While the man was yelling at Simon, his hood opened and Spranger saw his face for about a minute. Spranger described the man as a thin, white male with a mustache who was approximately 5 feet 10 inches tall. Several days after the robbery, Spranger helped an officer complete a sketch of the suspect. Spranger later identified defendant as the man who committed the robbery from a photo line-up. Spranger also identified defendant in court as the robber.

¶ 7 Chad Dennison testified that he participated in the Burger King robbery along with defendant and Terry Legel using Jimmy and Thelma Morgan's mother's minivan. Legel and Dennison stayed in the van while defendant went inside the restaurant. Dennison and Legel each received \$400 for their part in the robbery. Dennison admitted that in exchange for his testimony against defendant, the State agreed to reduce the maximum sentence it would seek against Dennison for his role in the Burger King robbery and to drop charges against Dennison in another case.

¶ 8 Thelma Morgan testified that she was defendant's former girlfriend. Thelma heard defendant discussing his involvement in the robbery with Dennison. Defendant stated that he was afraid the woman he robbed in Burger King had seen his face. Defendant put his hooded sweatshirt on like he wore it during the robbery and tried to see how visible his face would have been. On a different occasion, defendant yelled at Thelma because he thought she had told a friend that he had robbed Burger King. Thelma admitted that she was testifying in hopes that her brother, Jimmy, would receive a more lenient sentence in an unrelated case.

¶ 9 Jimmy Morgan also testified that he overheard defendant talk to Thelma about his involvement in the Burger King robbery. Defendant and Thelma were arguing because Thelma had told someone about it. Thelma told defendant that he could get in a lot of trouble. Approximately one week later, Jimmy was in a car with Dennison and defendant. Jimmy asked defendant about the robbery and defendant admitted he had committed the robbery. Jimmy's mother's van was used in the robbery because Thelma stole a key and gave it to defendant. Jimmy admitted that he had pled guilty to attempted armed robbery in an unrelated case and hoped that the judge would take his cooperation into consideration when sentencing him. The State did not promise him any sentencing concessions in exchange for his testimony.

¶ 10 George White testified that he stayed in the same cell block as defendant in the county jail. Defendant showed White a police sketch of the robbery suspect. Defendant told White that the artist did a pretty good job of drawing him and that he was wearing his favorite hooded sweatshirt in the sketch. White admitted that he had pled guilty to the offense of residential burglary in an unrelated case and hoped his sentencing judge would take his cooperation into consideration.

¶ 11 Defendant testified that he did not participate in the robbery but was at the Babylon in Davenport, Iowa, on the night of the robbery. Approximately one week after the robbery, defendant was at a party at Jimmy's house with Dennison, Legel, Fernando Duarte, and several others. Defendant overheard Duarte bragging about how he robbed Burger King and how much money he stole. Duarte was in his twenties, was 5 feet 10 to 11 inches tall, and weighed 155 to 160 pounds. Defendant denied telling White that the police sketch artist did a good job and he was wearing his favorite hooded sweatshirt in the sketch.

¶ 12 The jury found defendant guilty of armed robbery, and the trial court sentenced defendant to 20 years' imprisonment.

¶ 13 Defendant filed a motion for a new trial alleging, among other things, that his attorney was able to locate Legel, a potential witness. An affidavit from Legel was attached to the motion for new trial, which stated that Legel committed the robbery of the Burger King restaurant with Dennison and Duarte. The affidavit stated that Duarte went into the restaurant while Legel and Dennison stayed in a van.

¶ 14 Defendant filed a direct appeal, and this court affirmed defendant's conviction. *People v. English*, No. 3-00-0674 (2002) (unpublished order under Supreme Court Rule 23).

¶ 15 Defendant filed an initial postconviction petition on September 30, 2002, which was summarily dismissed by the trial court as being frivolous and patently without merit. On appeal, we affirmed the trial court's dismissal of defendant's postconviction petition. *People v. English*, 353 Ill. App. 3d 337 (2004).

¶ 16 On December 2, 2013, defendant filed a motion for leave to file a successive postconviction petition, which is the subject of the instant appeal, along with the successive petition. In his motion, defendant alleged that his brother, Anthony English, committed the

robbery. In the successive petition, defendant acknowledged that he testified at trial that he heard Duarte admit to committing the robbery but asserted that Duarte was drunk at that time and could have been joking. Defendant attached an unnotarized affidavit dated September 15, 2012, purportedly signed by Anthony English. The affidavit stated in its entirety:

"i am the one who did these (armed or attempted robberies) [at] burger king in moline, happy Joes in Kewanee, cassanos in quincy and candle light standard in iowa. i'm coming forward with truth. i told people Just blame Mario and not me. When im called to testify, i can give statements that nobody else would know except the person who did the robberies. Mario didn't tell me he stole anything from von maur at northpark in iowa. i lied to the detective i spoke with because another det. named thomas threatened harm to me and pushed my face into a t.v. screen showing terry Legel giving statements. a blue sweater wasn't even stolen the video proves that and it proves Mario didn't say he stole a blue sweater."

¶ 17 The trial court denied defendant's motion for leave to file a successive postconviction petition on the basis that defendant failed to satisfy the cause and prejudice requirement pursuant to section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2012)).

¶ 18 ANALYSIS

¶ 19 On appeal, defendant argues that the cause should be remanded for further postconviction proceedings on his successive petition because he stated a colorable claim of actual innocence based on Anthony's affidavit. Because we find that Anthony's affidavit was not of such conclusive character that it would probably change the result on retrial, we affirm.

¶ 20 The Act only contemplates the filing of one postconviction petition and successive petitions are disfavored by Illinois courts. *People v. Edwards*, 2012 IL 111711, ¶¶ 22, 29. However, the bar against the filing of successive postconviction petitions may be relaxed when a petitioner makes a showing of actual innocence. *Id.* ¶ 23. "[A] petitioner seeking to institute a successive postconviction proceeding must first obtain 'leave of court.' " *Id.* ¶ 24 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010)).

¶ 21 Our supreme court has held that "a trial court should deny leave [to file a successive postconviction petition] only in cases where, as a matter of law, no colorable claim of actual innocence has been asserted." *Id.* ¶ 30. However, the supreme court expressly declined to rule on whether a *de novo* or abuse of discretion standard of review applies in such cases. *Id.* Like in *Edwards*, we find that defendant's claim of actual innocence fails under either standard of review. See *id.*

¶ 22 In order to state a colorable claim of actual innocence, a defendant's motion for leave and supporting documentation must "raise the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* ¶ 31. The evidence in support of a defendant's actual innocence 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)).

¶ 23 In the instant case, assuming that Anthony's affidavit, signed over a year before defendant filed his motion for leave, was "newly discovered" and material, defendant fails to state a colorable claim of actual innocence because Anthony's affidavit was not of "such conclusive character that it would probably change the result on retrial." *Id.* ¶ 32. The affidavit does not contain specific facts supporting defendant's claim that Anthony committed the Burger King

robbery on October 29, 1999. See *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007) (holding that a codefendant's affidavit stating that the defendant was not present during the commission of the offense was not of such a conclusive character that it would probably change the result on retrial where it did not set forth specific facts to support that the codefendant was present at the scene on the date of the occurrence and had first-hand knowledge of the offense).

¶ 24 Anthony's affidavit generally claims that Anthony, rather than defendant, committed four "armed or attempted robberies," one of which was at Burger King in Moline. However, the affidavit does not contain the date of the Burger King robbery. The affidavit claims that Anthony could testify as to details that no one but the robber could know, but does not contain any details concerning the Burger King robbery. Similarly, the affidavit states that Anthony told "people" to blame defendant for the robberies rather than him. However, the affidavit does not specify whether any of the "people" Anthony told to blame defendant were trial witnesses. The remainder of the affidavit concerns an unrelated incident involving the alleged theft of a blue sweater from a Von Maur store in Iowa.

¶ 25 Additionally, multiple trial witnesses linked defendant to the robbery. Dennison testified that he was involved in the commission of the robbery along with defendant. Thelma and Jimmy testified that they heard defendant discuss his involvement in the robbery with others. Spranger, an eyewitness, identified defendant as the perpetrator of the robbery from a photo line-up. Additionally, White testified that defendant told him that the police sketch artist did a good job drawing him and that defendant was wearing his favorite hooded sweatshirt in the police sketch.

¶ 26 Thus, in light of the weight of the trial evidence and the lack of detail in Anthony's affidavit, we find that Anthony's affidavit fails to "raise 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.

¶ 27 We note that the trial court incorrectly applied the "cause and prejudice" test when denying defendant's motion for leave to file a successive petition. Freestanding claims of actual innocence are not subject to the cause and prejudice test. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). However, we may affirm the trial court's judgment on any basis supported by the record. *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005).

¶ 28 CONCLUSION

¶ 29 The judgment of the circuit court of Rock Island County is affirmed.

¶ 30 Affirmed.