2016 IL App (1st) 122452-UB

THIRD DIVISION
June 22, 2016

No. 1-12-2452

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. 00 CR 19274
	)	
RICHARD SHARP,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Denial of defendant's *pro se* request for leave to file a successive post-conviction affirmed where defendant failed to present a colorable claim of actual innocence.

¶ 2 Defendant Richard Sharp appeals from an order of the circuit court denying him leave to file a second, successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). Defendant had been convicted in 2002 for the first degree murder of Andrew Jackson based on accountability. He contends that he presented a

colorable claim of actual innocence based on two exculpatory, albeit unnotarized, affidavits, including one from his codefendant. We affirm.

¶ 3 This court previously held that in this successive post-conviction case defendant completely failed to comply with the supporting affidavit requirements of section 122-2 of the Act. *People v. Sharp*, 2014 IL App (1st) 122452-U. We noted that the affidavits were not notarized, nor was there any explanation as to why they were not. Under those circumstances, we found that defendant's failure to comply with the requirements of section 122-2 could not be excused (See *People v. Wideman*, 2013 IL App (1st) 102273, ¶18), and we found no error by the circuit court in denying him leave to file a second successive post-conviction petition.

¶ 4 Defendant appealed to the supreme court which issued a supervisory order directing this court to vacate our judgment. *People v. Sharp*, Ill. No. 118333 (Sept. 30, 2015, supervisory order). The supreme court further directed that we address whether the circuit court erred in finding that the attached affidavits did not offer such conclusive evidence that they would change the result of defendant's trial, and that defendant failed to satisfy the cause and prejudice test, notwithstanding that the affidavits were not notarized. Accordingly, we vacate our prior order and address these issues on appeal.

¶ 5 This court previously affirmed defendant's 2002 jury conviction for first degree murder based on accountability and sentence of 28 years' imprisonment. *People v. Sharp*, No. 1-02-3730 (2004) (unpublished order under Supreme Court Rule 23). The conviction arose from a gang related incident on June 21, 2000, in the area of 111th Street and Vernon Avenue in Chicago, in which defendant was the driver of a vehicle carrying codefendants, Eric English and Steve

Shempert,[1] who fired gunshots at opposing gang members, killing Andrew Jackson.

The evidence at trial is set forth fully in our decision affirming the conviction on direct appeal. *People v. Sharp*, No. 1-02-3730 (2004) (unpublished order under Supreme Court Rule 23). In brief, the evidence showed that defendant was arrested and initially denied his involvement in the shooting several times. However, when confronted with information police had gathered from their investigation, defendant told police officers that he participated in the shooting. He told them that he had agreed to drive two armed individuals to shoot at members of the Gangster Disciples (GD's) in retaliation for an earlier shooting.

¶ 6 Defendant then gave a videotaped statement that was published to the jury. In this videotaped statement, defendant admitted his involvement in the shooting. He stated that he was a member of the Black Disciples (BD's) gang, which was at war with the GD's. According to defendant's statement, at 10:30 p.m. on June 21, 2000, he was driving a borrowed car when he was flagged down by fellow gang members and ordered by Orlando Coleman to take Steve Shempert and Eric English to conduct a drive-by shooting of GD's. Defendant did not initially want to take them but, when reminded that the GD's had tried to kill his cousin earlier that day, defendant "got hyped up" and agreed to take them. English and Shempert got in the car and defendant drove to 111th Street and Vernon Avenue in Chicago. As he approached Vernon, English told him to slow down because he saw some GD's. Defendant slowed down, and English and Shempert began shooting out of the car. After five shots were fired, English instructed

[1] Shempert was sentenced to 27 years' imprisonment and English was sentenced to 21 years' imprisonment for first degree murder. They are not parties to this appeal.

defendant to drive away. Defendant drove back to Coleman who ordered him to "get the **** off the block with that hot *** car." Defendant drove home and returned the car.

¶ 7 Toby Davidson testified at defendant's trial that he was also a member of the BD's. He saw defendant driving a car at 10:30 p.m. on June 21, 2000. Defendant told Davidson he was going to go shoot at the GD's, and defendant retrieved two guns from his mother's house while Shempert and English waited in the car. They then drove away.

¶ 8 Defendant testified that, after being arrested for the murder of Jackson, he told police officers what they wanted to hear because Detective Golden threatened to lock up his fiancé and take away his kids. He told police and an assistant State's attorney (ASA) that he knew English but did not know Shempert. As they were driving, English told him to stop the car. Before he knew what was happening, he saw guns and heard gunshots, and said, "what's wrong with ya'll. Ya'll crazy." English then pointed the gun at him and told him to drive away.

¶ 9 Defendant further testified that, after his arrest, Detective Golden physically abused him, hitting him in the head and causing him to pass out. After he came to, he did what the detective told him to because he did not want to be hit again. The detective then told defendant what to tell the ASA. Defendant thought he could go home after his confession.

¶ 10 Defendant admitted driving to 111th Street and Vernon Avenue the night Jackson was shot but denied being a member of the BD's and driving to the area for the purpose of retaliation. He further testified that some of his videotaped statements were not true.

¶ 11 On direct appeal, this court affirmed defendant's jury conviction for first degree murder based on accountability and his sentence of 28 years' imprisonment. *Sharp*, No. 1-02-3730.

¶ 12 In 2005, defendant filed his initial *pro se* post-conviction petition, which was dismissed. This court affirmed the dismissal of defendant's petition, after granting appointed counsel leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Sharp*, No. 1-05-3690 (2007) (unpublished order under Supreme Court Rule 23). In 2007, defendant filed a *pro se* motion for leave to file a successive post-conviction petition, which the circuit court denied. Defendant did not appeal that decision.

¶ 13 In 2012, defendant filed the instant *pro se* motion for leave to file his second successive post-conviction petition. Defendant's motion was based on actual innocence, and he attached two unnotarized affidavits, one from Shempert and one from Andre Tyson. These affidavits were signed beneath a paragraph that declared, under penalty of perjury, that everything contained herein is true and accurate to the best of their knowledge and belief. Defendant alleged he could not have obtained the affidavits earlier during trial, and they completely exculpated him and would probably change the result on retrial.

¶ 14 Shempert stated in his affidavit that at 10:30 p.m. on June 21, 2000, he was standing with Coleman, English, Twan and Bubbles when defendant drove up. Coleman walked up to defendant, and talked to him briefly, then told Shempert and English to walk with him, Twan and Bubbles. Twan gave Shempert and English guns, and Coleman told them they were going to shoot at the "unplugs." Shempert told him he was not going to do it, and Coleman told him if he did not do it, he was "done." Coleman then told them not to tell defendant because if he found out what they were about to do, he would not go. Shempert wanted to tell defendant, but did not do so because he was afraid of Coleman. English told defendant to drive to 111th Street and Vernon Avenue, and once there, English immediately started shooting out of the window at some

people, and Shempert did as well. Defendant started panicking and yelling, and English told him to shut up and drive. When defendant refused, English pointed a gun at defendant and threatened to kill him if he did not drive away. Defendant drove away at gunpoint to the location where he met Coleman earlier. Coleman told defendant to get the car off the street, and that if he told anybody, he would take it out on defendant's mother. Shempert apologized for not "telling the true story sooner," but stated that since the incident, he had matured a lot, learned to live righteously and justly, and his conscience could no longer accept the fact that an innocent man was imprisoned for something he had nothing to do with and no knowledge of at the time.

¶ 15 Tyson stated in his affidavit that he was standing at the corner of 112th Street and Vernon Avenue when he heard five gunshots. About 10 seconds later, he saw defendant pull up in a car with two men, one of whom was pointing a gun at defendant and arguing with him. Tyson ran down the block to see what happened, and was told by one of the "older brothers" not to say anything, so he went home. Tyson stated that he made it his "business from then on to stay away from the guys on Vernon [Avenue]."

¶ 16 The circuit court denied defendant leave to file another successive post-conviction petition, finding that he had not sufficiently supported his allegation of actual innocence based on newly discovered evidence. The court noted that neither attached affidavit was notarized, and that affidavits filed pursuant to the Act must be notarized to be valid. As a consequence, the court found that the affidavits had no legal effect. The court further found that the attached affidavits did not offer such conclusive evidence that they would change the result of defendant's trial, in that the evidence was not new, but, rather, cumulative to defendant's testimony presented at trial, and that defendant failed to satisfy the cause and prejudice test.

¶ 17 On appeal, defendant maintains that he presented a colorable claim of actual innocence based on the affidavits of Shempert and Tyson. The State initially responds that defendant failed to satisfy the requirements of section 122-2 of the Act where the affidavits he provided are not notarized, and that this failure is fatal to his petition. Defendant replies that the lack of notarization should not be used as a basis to deny him leave from filing his successive petition, and that, in the alternative, the signed statements qualified as "other evidence" in support of his allegations.

¶ 18 In our previous decision, we did not address whether defendant presented a colorable claim of actual innocence as we affirmed the circuit court on the basis that the affidavits were not notarized. The supreme court's supervisory order directs us to "address whether the trial court erred in finding that the attached affidavits did not offer such conclusive evidence that they would change the result of defendant's trial and that defendant failed to satisfy the cause and prejudice test, notwithstanding that the affidavits are not notarized."

¶ 19 Under section 122-1 of the Act, defendant may file only one post-conviction petition without leave of court. 725 ILCS 5/122-1(f) (West 2012). Leave of court may be granted only if defendant demonstrates cause for his failure to bring the claim in his initial petition and prejudice resulting from that failure or by presenting a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶31. We review denial of leave to file a successive petition *de novo. People v. Wilson*, 2014 IL App (1st) 113570, ¶31; *People v. Adams*, 2013 IL App (1st) 111081, ¶30.

¶ 20 The supreme court directs us to consider the trial court's determination that defendant failed to satisfy the cause and prejudice test. Defendant, however, raised only actual innocence in

his motion for leave to file a successive post-conviction petition. Where a defendant sets forth a claim of actual innocence in his petition, he is excused from showing cause and prejudice. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). The Illinois constitution provides post-conviction petitioners the right to assert a free standing claim of actual innocence. *Id.* at 331. Further, it is difficult to imagine a scenario where a meritorious actual innocence claim could not meet the cause and prejudice test. *Id.* at 332. Accordingly, a successive petition claiming actual innocence is not subject to the cause and prejudice test. *Id.* at 331-32.

¶ 21 To be entitled to relief under the theory of actual innocence, the supporting evidence must be new, material, non-cumulative, and of such conclusive character that it would probably change the result on retrial. *People v. Barrow*, 195 Ill. 2d 506, 540-41 (2001). All three elements of actual innocence must be proved. *People v. English*, 403 Ill. App. 3d 121, 133 (2010). Newly discovered evidence must be evidence that was not available at the defendant's trial and he could not have discovered sooner through diligence. *Barrow*, 195 Ill. 2d at 541. It is considered conclusive if it raises the probability that, in light of the new evidence, it is more likely than not that no reasonable juror would have convicted the defendant. *People v. Sanders*, 2014 IL App (1st) 111783, ¶23 (citing *Edwards*, 2012 IL 111711, ¶40).

¶ 22 We find that defendant has not presented a colorable claim of actual innocence where the supporting evidence is not of such conclusive character that it would more likely than not change the result on retrial. In Shempert's affidavit, he explained that defendant was not told of the plan to shoot the other gang. English and Shempert immediately started shooting out of the car window, when defendant panicked and yelled. When English told defendant to shut up and drive, and defendant refused, English pointed a gun at defendant and threatened to kill him if he did not

comply. Defendant then drove away at gunpoint. Tyson stated in his affidavit that, while near the location of the shooting, he heard five gunshots, and 10 seconds later, saw defendant pull up in a car with two men, one of whom was pointing a gun at defendant and arguing with him.

¶ 23 The evidence at trial established that defendant admitted in a videotaped statement that he knew Shempert and English wanted him to drive to find GD's to shoot in retaliation for GD's shooting at his cousin earlier in the day. Defendant admitted he agreed to drive them, and slowed down when they saw GD's. Shempert and English fired at the GD's and defendant then drove away. Although defendant testified at trial that he only confessed to driving to the shooting because he was physically abused by police and they had threatened to lock up his fiancé and take away his children, the videotaped statement provided strong evidence of his guilt. Furthermore, another member of defendant's gang, Toby Davidson, testified that defendant told him that he was going to shoot at the GD's. Davidson then saw defendant retrieve two guns from his mother's house while Shempert and English waited in the car, and drive away.

¶ 24 Given this trial evidence, we cannot find that the proposed testimony of Shempert and Tyson would probably change the result on retrial. The hallmark of actual innocence means total vindication or exoneration. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). Proposed testimony that leaves open the possibility that defendant was actively involved in the crime does not qualify as evidence of actual innocence. See *Edwards*, 2012 IL 111711, ¶39. Here, the affidavits of Shempert and Tyson do not raise the probability that, if the affiants testified, it is more likely than not that no reasonable juror would have convicted defendant. *Id.* ¶40.

¶ 25 First, Tyson did not witness the actual shooting, therefore his testimony would not vindicate defendant. Second, the affidavits are cumulative to defendant's testimony presented at

trial that he was unaware of the plan to shoot the other gang members and, after Shempert fired his gun, defendant refused to drive, but English pointed a gun at defendant and told him to drive or he would kill him. See *People v. Mitchell*, 2012 IL App (1st) 100907, ¶46 (citing *Ortiz*, 235 Ill. 2d at 333). The affidavits of Shempert and Tyson cannot overcome the evidence presented at trial, including defendant's videotaped confession and the incriminating testimony of another member of his gang, to exonerate defendant. Furthermore, the affidavits do not indicate that the testimony was unavailable at trial, *i.e.*, was newly discovered. Shempert only states that he was sorry for not telling the "true story sooner," but does not indicate when he would have told the truth, and defendant has not alleged that he could not discover the evidence sooner through due diligence. Tyson gives no explanation for his delay. The evidence in the affidavits was not newly discovered, noncumulative and of such conclusive character that it would probably change the outcome of defendant's case on retrial. Accordingly, we find that the affidavits failed to establish actual innocence. See *Anderson*, 401 Ill. App. 3d at 141-42.

¶ 26 Defendant's reliance on *People v. Williams*, 392 Ill. App. 3d 359 (2009), is misplaced. In *Williams*, 392 Ill. App. 3d at 361-62, 369, as here, the defendant had confessed. He presented the affidavits of two accomplices stating that he was not the fifth participant in the crimes and that they had identified him as a participant under pressure from police. This court found the affidavits were clearly material and had the potential to change the result on retrial. However, unlike here, the affidavits in *Williams* were not cumulative to the evidence at trial. *Williams*, 392 Ill. App. 3d at 369. Moreover, unlike in *Williams*, there is evidence besides the defendant's confession corroborating his participation in the case. Davidson testified at trial that he was a member of defendant's gang, defendant told him that he was going to shoot opposing gang

members and he saw defendant retrieve guns for the shooting and then drive away with Shempert and English. Davidson has not recanted his testimony. In light of defendant's videotaped confession, and Davidson's testimony, we find that the affidavits of Shempert and Tyson are not of such conclusive character as to likely change the result on retrial. *Anderson*, 401 Ill. App. 3d at 141-42. Thus, the trial court properly dismissed defendant's petition in this case, and evaluation under the cause and prejudice test is not required as defendant alleged actual innocence. *Edwards*, 2012 IL 111711, ¶31; *English*, 403 Ill. App. 3d at 134.

¶ 27 In light of the foregoing, we affirm the order of the circuit court of Cook County denying defendant leave to file his second successive post-conviction petition.

¶ 28 Affirmed.