2016 IL App (1st) 141847-U

FOURTH DIVISION
April 15, 2016

No. 1-14-1847

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 26997 (03)
	)	
FLOYD CUMMINGS,	)	Honorable
	)	Joseph G. Kazmierski,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant leave to file his *pro se* successive postconviction petition because his claim of actual innocence based on newly discovered evidence was not of such a conclusive character that it would probably change the result on retrial.

¶ 2 Defendant Floyd Cummings appeals the trial court's denial of his motion for leave to file a *pro se* successive postconviction petition, arguing that (1) he has satisfied the cause and prejudice test because his Class X armed robbery conviction violates the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) in that the identical offense of armed violence predicated on robbery with a Category III weapon is punished less severely than

armed robbery, as charged in this case; and (2) he has set forth an arguable claim of actual innocence based on an affidavit of an occurrence witness who stated that defendant was not present at the scene of the crime. On defendant's motion, we deconsolidated defendant's appeal in the instant case from his appeal from the dismissal of his section 2-1401 petition, which will be issued under case no. 1-14-3948.

¶ 3 In June 2002, defendant was convicted of armed robbery following a jury trial. The following evidence was admitted at trial. On October 29, 2000, Yashika Jones, Lee Washington, and defendant robbed a Subway Sandwich Shop, located at 5300 South Kimbark Avenue in Chicago (the Subway). Jones was an employee of the Subway, and Washington was her boyfriend. The two planned the robbery and invited defendant to participate. After they were arrested, Jones and Washington confessed to their participation in the robbery and pled guilty to armed robbery. Jones was sentenced to six years while Washington received a sentence of eight years. Both testified against defendant at trial.

¶ 4 At about 10:30 p.m., on October 29, 2000, Jones was working at the Subway with store manager Johnny Johnson. She stepped outside to smoke a cigarette. She spoke with Washington, who was outside with defendant. When Jones entered the Subway again, she did not lock the employee door. Washington and defendant entered the Subway through the unlocked employee door. According to Johnson, Washington carried a baseball bat into the Subway. In contrast, Washington and Jones testified that defendant carried the baseball bat. In a statement that he made to an assistant State's Attorney, defendant claimed that Washington held the baseball bat.

¶ 5 Inside the Subway, defendant grabbed Johnson by the collar. Washington and defendant demanded money and forced Johnson to unlock the petty cash boxes. They took the money

inside the boxes while Jones removed the money from the register in the front of the Subway. Washington and defendant wanted more money from the floor safe, but Johnson was not able to open it.

¶ 6 Defendant used some duct tape he found in the office to tape Johnson's hands, legs, and eyes. At one point, Johnson heard one of the men smashing the television monitors and videocassette recorder (VCR) in the office. Johnson felt debris from the destruction falling on him. Washington claimed that defendant smashed the objects with the baseball bat. Defendant claimed in his statement that Washington destroyed the objects using the baseball bat.

¶ 7 Eventually, Washington and defendant asked Johnson for the keys. One of the men struck Johnson when he said he did not know where the keys were. Defendant claimed that it was Washington who struck Johnson. When Washington and defendant located the keys, Jones used them to open the door. The three left in defendant's car with the money. They went to defendant's house, where they divided the money.

¶ 8 After they left, Johnson was able to free himself and called the police. He identified Jones by name to the officers and said one of the men was Jones's boyfriend, but at that time he did not know Washington's name. He initially identified the third perpetrator as a black male.

¶ 9 Defendant and Washington drove back to the Subway with the intention of removing the floor safe, but as they approached the Subway, they saw the police had arrived at the location. Instead, they went back to defendant's house. Washington and Jones left defendant's house together that night. They were arrested shortly thereafter. Each was in possession of some of the proceeds of the robbery. Washington also had the key to the petty cash boxes.

¶ 10 Washington provided information about defendant to the investigating officers. He told the police that he knew defendant as "Jaybo." Based on information from Washington, the

police went to 53rd Street and Calumet Avenue where they observed defendant. They approached defendant, and he indicated that some people call him, "Jumbo." Defendant agreed to participate in a lineup.

¶ 11 On October 30, 2000, Johnson viewed a lineup and identified defendant as one of the offenders. Defendant initially denied his involvement in the robbery and said he was with his girlfriend Jessica Tibbs, but he subsequently gave a handwritten statement to an assistant State's Attorney, admitting his participation. After hearing all the evidence, which included defendant's statement, the jury convicted defendant of armed robbery.

¶ 12 At the sentencing hearing, the trial court heard evidence that defendant had previously been convicted of murder in 1967 and armed robbery in 1984. Based on these prior convictions, the trial court found defendant to be an habitual criminal and sentenced him to a term of natural life imprisonment pursuant to the Habitual Criminal Act. See 720 ILCS 5/33B-1 (West 2000).

¶ 13 On direct appeal, defendant argued that (1) his sentence for armed robbery was unconstitutional because armed robbery and armed violence predicated on robbery committed with a category III weapon were identical offenses that had disproportionate penalties, (2) his natural life sentence was disproportionate to his involvement in the offense and his codefendants' sentences, and (3) the trial court failed to conduct an adequate inquiry into his posttrial *pro se* claims of ineffective assistance. *People v. Cummings*, 351 Ill. App. 3d 343, 344 (2004). We found that defendant's sentence of natural life imprisonment for armed robbery was not unconstitutionally disproportionate. *Id.* at 349. We also rejected defendant's other claims on appeal and affirmed his conviction and sentence. *Id.* at 353.

¶ 14 In March 2005, defendant filed his first *pro se* postconviction petition, arguing that the Habitual Criminal Act was unconstitutional as applied to the facts of his case because the trial

court improperly considered his 1967 murder conviction, the trial court had discretion to sentence him as an habitual criminal, and the Habitual Criminal Act violated *ex post facto* laws. The trial court dismissed defendant's petition as frivolous and patently without merit. *People v. Cummings*, 375 Ill. App. 3d 513, 515-16 (2007). Defendant filed a motion to reconsider the dismissal based on the same claims, but also asserted new claims of ineffective assistance of trial and appellate counsel for failing to object to defendant's eligibility to be sentenced under the Habitual Criminal Act. The court denied defendant's motion. *Id.* at 516. On appeal, this court affirmed the dismissal of defendant's postconviction petition. *Id*. at 521-24.

¶ 15 In August 2013, defendant filed a motion for leave to file a *pro se* successive postconviction petition. Defendant asserted that he had an eyewitness to the Subway robbery that demonstrated his actual innocence, and that his confession was false and coerced. In his petition, defendant asserted (1) a claim of actual innocence based on an affidavit from a witness named Allen Blanch, an eyewitness to the robbery, (2) a coerced confession, (3) denial of his right to counsel during the lineup and interrogation, (4) ineffective assistance of trial counsel for failing to argue that defendant was deprived of his right to counsel and for failing to inform defendant of the State's offer of a plea offer of 30 years in prison, (5) ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness, and (6) that defendant's Class X conviction and sentence for armed robbery is disproportionate to the penalty for the identical offense of armed violence predicated on robbery with a category III weapon.

¶ 16 Defendant attached an affidavit from Blanch to his petition. In his affidavit, Blanch stated that at around 10:30 p.m., on October 29, 2000, he was at the Subway at "53rd South Kimbark." He saw Jones, Washington, and a man he knew as "Lawrence" enter through the employee door with a baseball bat, beat the manager, and exit about 20 minutes later with the bat

and "money in hand." Blanch further said he knew defendant and he was not present nor involved in the robbery. He did not come forward sooner because he did not know defendant was arrested and convicted until he spoke with defendant in 2013.

¶ 17 Defendant also attached his own affidavit asserting his actual innocence. Defendant stated that he was threatened by police "who promised to drop [him] out a second story window and swore that two people would implicate [him] as their accomplice." Defendant also said that since he was not at the scene of the robbery, he "had no way of knowing who witnessed the crime" and could not have produced the newly discovered evidence sooner.

¶ 18 In December 2013, the trial court issued a written order denying defendant leave to file his successive postconviction petition. The court found that defendant had previously challenged his claim of an unconstitutionally disproportionate sentence. The court found defendant's claim of actual innocence based on Blanch's affidavit to be material and noncumulative, but concluded that it was not newly discovered and was not of such a conclusive character that it would probably change the result on retrial. The court also held that defendant failed to satisfy the cause and prejudice test for his remaining claims.

¶ 19 This appeal followed.

¶ 20 On appeal, defendant argues that the trial court erred in denying his motion for leave to file a *pro se* successive postconviction petition. Initially, we point out that defendant raised the unconstitutionally disproportionate sentence claim in both his section 2-1401 petition and his successive postconviction petition. Since we have already granted defendant his requested relief in the context of his section 2-1401 petition under appeal no. 1-14-3948, we need not consider the issue under the framework of a successive postconviction petition. The only remaining issue on appeal regarding defendant's successive postconviction petition is his claim that he has

presented a colorable claim of actual innocence supported by newly discovered eyewitness evidence.

¶ 21 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2020)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2010); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999).

¶ 22 However, the Post-Conviction Act only contemplates the filing of one postconviction petition with limited exceptions. 725 ILCS 5/122-1(f) (West 2010); see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). The supreme court has recognized two bases upon which the bar against successive proceedings will be relaxed. *People v. Edwards*, 2012 IL 111711, ¶ 22. The first is under section 122-1(f), a defendant must satisfy the cause and prejudice test for failure to raise the claim earlier in order to be granted leave to file a successive postconviction petition. 725 ILCS 5/122-1(f) (West 2010). The second basis to relax the bar against a successive postconviction is "what is known as the 'fundamental miscarriage of justice' exception." *Id.* ¶ 23. "The United States Supreme Court has stated that the exception serves ' "as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty, guaranteeing that the ends of justice will be served in full." ' " *Id.* (quoting *People v.*

Szabo, 186 Ill. 2d 19, 43 (1998) (Freeman, C.J., specially concurring, joined by Heiple, J.) (quoting *McCleskey v. Zant*, 499 U.S. 467, 495 (1991)).

¶ 23 "In order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a petitioner must show actual innocence." *Id.* With respect to those seeking to relax the bar against successive postconviction petitions on the basis of actual innocence, the supreme court has 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. "Stated differently, 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 the light of the new evidence.' " *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). We review the trial court's denial of leave to file a successive postconviction petition *de novo*. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 24 "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." *Edwards*, 2012 IL 111711, ¶ 32 (citing *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009)).

¶ 25 Here, defendant's actual innocence claim is based on an affidavit from Allen Blanch. The affidavit states:

> "1) I have material information relevent [*sic*] to the Above entitled cause, 2.) On Oct 29, 2000 at around 10:30pm I was personally at the Subway Station on 53rd ~~Station~~ South Kimbark, in Chicago, IL: 3.) I saw Yashika Jones, Lee Washington, and a man I known

> [*sic*] as Lawrence enter the station through the employee door with a Baseball Bat, Beat the manger [*sic*], and exit the Station about 20 minutes later with the Bat and money in Hand; 4.) On Oct 29, 2000 I knew Floyd 'Jumbo' Cummings and He was not present nor involved in the Robbery of the Subway Station; 5. I Did Not Come Forward sooner Because I did not know 'Jumbo' was arrested and convicted for this crime until in 2013 when I Talked to him."

¶ 26 In rejecting defendant's claim, the trial court found Blanch's affidavit to be material and noncumulative, but held that it was not newly discovered nor was it of such a conclusive character that it would probably change the result on retrial. Defendant argues that Blanch's affidavit satisfies all four elements, but the State responds that the affidavit does not constitute newly discovered evidence and is not of such a conclusive character that the result would probably change on retrial. We agree that Blanch's affidavit is material and noncumulative, and will focus our review to the contested elements.

¶ 27 Newly discovered evidence has been defined as " 'evidence that was unavailable at trial and could not have been discovered sooner through due diligence.' " *Id.* ¶ 34 (quoting *People v. Harris*, 206 Ill. 2d 293, 301 (2002)). Defendant contends that Blanch's affidavit meets this definition because Blanch explains why he did not come forward sooner, *i.e.*, that he did not know defendant had been convicted of the offense until 2013. Defendant maintains that he could not have discovered Blanch's statement earlier because he was not at the crime scene and would not have known who witnessed the crime. In response, the State asserts that the evidence is not newly discovered because defendant "would have known that he was not present at the crime scene and did not commit the crime, even though he may not have known of potential witnesses

to the crime." The State further argues that defendant failed to raise this claim earlier and did not present any alibi defense at trial. We agree with defendant. The State's assertion puts an undue burden on defendant because if he was not present at the scene, then how could he have known who else may have been there. Blanch's testimony was not available to defendant at trial and could not have been discovered until Blanch informed defendant of his presence at the Subway store on October 29, 2000.

¶ 28 Defendant also argues that Blanch's affidavit is of such a conclusive character that it would probably change the result on retrial. The supreme court has described this element as the "most important." *People v. Washington*, 171 Ill. 2d 475, 489 (1996). "Newly discovered evidence is considered to be of a conclusive nature 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).

¶ 29 The evidence at trial was overwhelming of defendant's guilt. Johnson identified defendant as the third perpetrator of the robbery. Johnson testified consistently at trial that defendant was a participant and was the person who duct taped his hands, ankles, and face. Both codefendants Jones and Washington testified that defendant participated in the robbery of Subway with them. Significantly, defendant gave a handwritten confession about his participation in the robbery to an assistant State's Attorney, which was admitted at trial. Defendant alleged for the first time in his successive postconviction petition that his confession was coerced, but he failed to raise that issue on appeal. Given this considerable evidence against defendant, we cannot say that Blanch's testimony would probably change the result on retrial, such that it is more likely than not that no reasonable juror would have convicted defendant.

Accordingly, we find that the trial court did not err in denying defendant leave to file his *pro se* successive postconviction petition.

¶ 30 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 31 Affirmed.