2017 IL App (3d) 140606-U

Order filed September 7, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0606 Circuit No. 98-CF-874
GREGORY SCOTT WILSON,	)	Honorable David A. Brown,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held*: The second-stage dismissal of the defendant's successive postconviction petition was reversed and remanded for an evidentiary hearing because affidavits provided by the defendant regarding the victim's aggressive or violent character was newly discovered, material, and noncumulative, supporting a claim of self-defense, entitling the defendant to a third-stage evidentiary hearing.

¶ 2 The defendant, Gregory Scott Wilson, appealed from a judgment dismissing his *pro se* successive petition for postconviction relief without an evidentiary hearing

¶ 3 FACTS

¶ 4 The defendant was tried by a jury and found guilty of first degree murder, armed violence, solicitation of unlawful delivery of a controlled substance, and unlawful possession of a weapon by a felon. The charges arose from the stabbing death of Victor Williams in 1998. A witness, Jonathan Pickett, testified that he was a friend of Williams, and they were both hanging out on a street corner in the early morning hours of September 26, 1998. According to Pickett, the defendant drove up and Williams approached the driver's side door. Pickett testified that the defendant was attempting to buy drugs from Williams. Pickett walked up to stand next to Williams and testified that there was also a passenger in the car with the defendant. Pickett told Williams not to drive off or another man across the street would shoot up his car. Williams poured some drugs into the defendant's hand, but then the defendant drove away without paying Williams. Williams was leaning into the car and grabbed onto the car door. Pickett ran behind the car, yelling at Williams to let go. The car continued up the street, zigzagging, with Williams holding onto the side of the car.

¶ 5 The defendant was interviewed by the police, where he said he drove away without paying for the drugs after feeling threatened. Williams hung onto the car and was hitting the defendant in the face while they struggled for control of the car. The detective testified that the defendant said that the defendant stabbed Williams. However, in the video-recorded interview, the defendant stated that he grabbed his knife and then hit a curb and a tree. He did not know that he stabbed Williams. That was consistent with his testimony at trial. The defendant denied that he told the detective that he knew he stabbed Williams.

¶ 6 The jury was instructed on second degree murder and self-defense, but found the defendant guilty of first degree murder. The defendant was sentenced to concurrent terms of 38

years for first degree murder and 15 years for armed violence. On direct appeal, the defendant argued that his first degree murder conviction should be reduced to second degree and challenged his sentence. This court affirmed his convictions, but remanded for resentencing on the armed violence conviction. *People v. Wilson*, No. 3-99-0367 (2001) (unpublished order under Supreme Court Rule 23).

¶ 7 Subsequently, the defendant retained attorneys Ronald Hamm and Ronald Hanna as postconviction counsel, and they filed a postconviction petition on December 17, 2002. The petition alleged that trial counsel was ineffective for failing to adequately consult with the defendant and for failing to investigate Helen Sanders, an eyewitness who was listed in the police report. An evidentiary hearing was held, where Sanders testified that, on the night in question, she was walking home and saw a car swerving with a man hanging out of the car from the waist down. Trial counsel testified that she discussed the case with the defendant but could not remember Sanders's name. The trial court denied the petition, and this court affirmed. *People v. Wilson*, No. 3-04-0497 (2006) (unpublished order under Supreme Court Rule 23).

¶ 8 On February 9, 2009, the defendant filed a motion for leave to file a successive postconviction petition based on newly discovered eyewitness testimony. The defendant did not attach a petition, but did attach the affidavit of Gene Johnson, which alleged that Johnson saw a man choking and hitting a driver as the men fought over the steering wheel. The defendant alleged that Sanders's statement was relevant when considered with the new evidence. The trial court granted leave to file and appointed counsel. That appointed counsel, Tom Sheets, filed a Rule 651(c) certificate stating that he made the necessary amendments to the defendant's petition, but there was no *pro se* nor amended petition ever filed. The defendant filed a motion to supplement, adding the affidavits of Raymond King and Raymond Paul. King's affidavits

attested that Williams and Pickett had reputations as "stick up men" and that they had attempted to break into his home. Paul was the victim of a robbery by Williams. The motion for leave to file was granted, and the defendant filed *pro se* the amended successive postconvition petition on April 9, 2013. The State filed a motion to dismiss the petition. The trial court granted the State's motion to dismiss, pursuant to 725 ILCS 5/122-1(f) (West 2012), finding that the defendant did not specify the basis for his alleged "newly emerged" evidence. But the court noted that the defendant could file another motion for leave to file to specifically address that defect.

¶ 9 On December 17, 2013, the defendant filed a new motion for leave to file a successive postconviction petition. The trial court granted the defendant's motion for leave to file, and the petition was filed on January 31, 2014. The defendant elected to proceed *pro se*. The petition alleged actual innocence and ineffective assistance of his first postconviction counsel, Hamm and Hanna. The defendant argued that King's affidavits were newly discovered because they could not have been discovered prior to trial, and the criminal histories of Williams and Pickett, and Paul's affidavit, would have been discovered if Hann and Hamm had investigated the case. The defendant asserted that all of the evidence in the petition would have made a significant different upon retrial.

¶ 10 After a hearing, the trial court granted the State's motion to dismiss the petition. The trial court found that the defendant had not made a substantial showing of actual innocence. The criminal histories of Williams and Pickett and Paul's affidavit were not newly discovered evidence because they could have been discovered through due diligence. Sanders's affidavit was not newly discovered because it was submitted with the defendant's first postconviction petition. The trial court found King's affidavits to be newly discovered, but found that they would not have changed the result on retrial because there was no argument about who was the aggressor.

The trial court found that the defendant failed to establish a claim of self-defense because he did not say that he stabbed Williams to protect himself or because he was afraid but rather claimed to have accidentally stabbed Williams. The trial court dismissed the defendant's claim of ineffective assistance of postconviction counsel, finding that the defendant did not have a constitutional right to such counsel. That also could have been raised in the appeal from the denial of his first postconviction petition. The defendant appealed.

¶ 11 ANALYSIS

¶ 12 The defendant argues that the trial court erred in concluding that the case hinged solely on the jury's determination of whether the incident was an accident because the defendant also presented evidence of self-defense at trial. Thus, the trial court erred in finding that King's affidavits probably would not have changed the result on retrial vis-à-vis the self-defense argument, especially considered with Sanders's affidavit and Williams's criminal history.

¶ 13 The Post-Conviction Hearing Act provides a remedy to a criminal defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. 725 ILCS 5/122-1 *et seq.*; *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). The Act contemplates only one postconviction proceeding, but there are two bases upon which the bar against successive proceedings will be relaxed. *People v. Edwards*, 2012 IL 111711, ¶ 22. First, when a petitioner can establish "cause and prejudice" for the failure to raise the claim earlier. 725 ILCS 5/122-1(f). Second, the bar may be relaxed when there has been a fundamental miscarriage of justice, in which case the petitioner must show actual innocence. *Edwards*, 2012 IL 111711, ¶ 23. In this case, the defendant argues that he has presented new, material, noncumulative evidence of actual innocence that is so conclusive that it would probably change the result on retrial. See *People v. Sanders*, 2016 IL 118123, ¶ 24.

¶ 14 A petitioner seeking to file a successive postconviction proceeding must first obtain leave of court. *Edwards*, 2012 IL 111711, ¶ 24. Leave to file a successive petition will be granted if it is clear that the petition and documentation set forth a colorable claim of actual innocence or raise the probability that it is more likely that not that a reasonable juror would not have convicted in light of the new evidence. *Id.* The standard applicable to second stage postconviction petitions also applies for successive petitions: a petitioner must make a substantial showing of actual innocence such that an evidentiary hearing is warranted. *Sanders*, 2016 IL 118123, ¶ 37. When a trial court dismisses a petition for postconviction relief at the second stage of proceedings, we review that dismissal *de novo*. *People v. Wingate*, 2015 IL App (5th) 130189, ¶ 24.

¶ 15 In this case, the trial court found that King's affidavits were newly discovered, material, and noncumulative because there was no evidence of Williams's aggressive or violent character presented at trial and no suggestion that diligence by trial counsel would have uncovered the evidence. The trial court found that the remainder of the defendant's evidence, i.e., Sanders's affidavit, Paul's affidavit, and Williams's criminal history, was not newly discovered. The trial court granted the State's motion to dismiss, though, concluding that the issue of Williams being the aggressor was not in dispute. The defendant argues that this is incorrect. Although the defense of accident was raised, the defendant contends that the preceding events could put the stabbing in the context of self-defense. See *People v. Brooks*, 130 Ill. App. 3d 747, 751 (1985) (even though a shooting occurred during and as a result of the struggle and was in that sense accidental, the preceding events could place the shooting in the context of self-defense). The State contends that the defendant is not actually arguing actual innocence, because he is not claiming to be innocent of murder, only guilty of a lesser offense.

¶ 16 According to *People v. Barnslater*, 373 Ill. App. 3d 512, 521 (2007), actual innocence requires that a defendant be free of liability not only for the crime of conviction, but also of any related offenses. So, to the extent that the defendant argues that he is actually guilty of second degree murder rather than first degree murder, he is not making a claim of actual innocence. *People v. Wingate*, 2015 IL App (5th) 130189, ¶ 34. However, to the extent that the defendant is arguing that his claim of self-defense would lead to his total acquittal, the defendant has arguably stated a claim of actual innocence.

¶ 17 To raise a claim of self-defense, a defendant must show the following to support the use of force: 1) that force was threated against the defendant; 2) that the defendant was not the aggressor; 3) that the danger of harm was imminent; 4) that the threatened force was unlawful; 5) that the defendant believed a danger existed, the use of force was necessary to avert the danger, and the kind and amount of force was necessary; and 6) that the defendant's beliefs were reasonable. *People v. Morgan*, 187 Ill. 2d 500, 533 (1999). The defendant argues that he presented evidence that the events prior to the stabbing, driving away, swerving, and grabbing his knife, were all because he feared for his life. King's affidavits, then, corroborated the defendant's version of events and were relevant to show that Williams was the aggressor. The State contends that King's affidavits were not admissible as *Lynch* evidence because there was no conflict in the accounts of the events and no evidence that Williams was the aggressor. See *People v. Lynch*, 104 Ill. 2d 194 (1984) (when self-defense is properly raised, evidence of the victim's aggressive and violent character may be admissible).

¶ 18 The defendant argued both accident and self-defense to the jury, and the jury was instructed on self-defense. There was a dispute in the evidence whether Williams was struggling with the defendant and the defendant feared for his life, or whether the defendant was trying to

steal drugs. Thus, the King affidavits went to the issue of who was the aggressor, which was relevant to the defendant's claim of self-defense. That evidence, considered in light of all the evidence, old and new, was sufficient to make a substantial showing of actual innocence so that a third-stage evidentiary hearing was warranted. See *People v. Coleman*, 2013 IL 113307, ¶ 97 ("Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence, both new and old, together."). Thus, we remand for an evidentiary hearing on the defendant's claim of actual innocence.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Peoria County is reversed and remanded.

¶ 21 Reversed and remanded.

¶ 22 JUSTICE WRIGHT, dissenting.

¶ 23 During the jury trial, defendant’s defense was predicated on his lack of intent to harm the victim. First, defendant carefully described how he ended the drug transaction by fleeing from the scene in his car. Second, defendant told the jury that he did not make any attempt to lash out at the victim with the knife. Finally, defendant explained to the jury that the fatal stab wound resulted from the motion of the vehicle as defendant’s car jumped a curb. Not surprisingly, the “car did it” defense was rejected by the jury.

¶ 24 Relying on *Lynch*, the trial court thoughtfully concluded that the information in King’s affidavits qualified as newly discovered, material, and noncumulative, but found this information was not conclusive on the issue of actual innocence. Therefore, the trial court found that defendant failed to make a substantial showing of actual innocence such that an evidentiary hearing was warranted. The case law provides that “conclusive” means the evidence, when

considered along with the trial evidence, would probably lead to a different result upon retrial. *People* v. *Ortiz,* 235 Ill. 2d 319, 336-37 (2009).

¶ 25 Here, King's affidavits[1] described an incident in June of 1994 when the victim and Pickett knocked on King's door, five years before this offense. According to King's affidavit, King knew the victim and Williams were "stick-up" men who robbed anyone they encountered. Consequently, instead of opening the door, King retrieved his gun, fired at the men, and both men ran away from King's doorstep.

¶ 26 According to King's affidavits, the victim did not behave aggressively and instead ran away from the area when King discharged his firearm. The trial judge found the case at trial "hinged upon" whether the jury believed defendant's account that the victim's death was entirely accidental and "not on whether the victim was the aggressor." I agree. Self defense can never be accidental. The two defenses are mutually exclusive. Respectfully, I would affirm the trial court's well-reasoned decision finding that King's affidavits did not contain any conclusive evidence supporting defendant's claim of actual innocence.

¶ 27 Consequently, I conclude King's affidavits do not contain evidence, when considered along with the trial evidence, that would probably lead to a different result upon retrial. See *Ortiz,* 235 Ill. 2d at 336-37. For this reason, I would affirm the trial court's dismissal and also deny defendant's request to amend his petition with respect to the grounds involving the purported ineffective assistance of counsel.

[1]King's affidavit actually includes three separate affidavits dated May 2009, February 2011, and July 2013. These affidavits state the same general allegations except that King's most recent affidavit states that the victim and Pickett were known to be gang members and "stick-up men."