2018 IL App (1st) 160232-U

No. 1-16-0232

Order filed March 30, 2018

Fifth Division

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 20249
	)	
TYRIN SMITH,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant leave to file a successive post-conviction petition where defendant failed to raise a colorable claim of actual innocence.

¶ 2 Following a jury trial, defendant Tyrin Smith was convicted of first degree murder and sentenced to 50 years' imprisonment. On direct appeal, this court affirmed the judgment and sentence of the trial court. *People v. Smith*, No. 1-07-0177 (2009) (unpublished order under Supreme Court Rule 23). We also affirmed the trial court's dismissal of defendant's subsequent

pro se petition and amended petition under the Illinois Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). *People v. Smith*, 2016 IL App (1st) 133565-U. While the appeal of the dismissal of defendant's initial petition was pending, he moved for leave to file a successive post-conviction petition, which the trial court denied. Defendant appeals, contending that his petition set forth a colorable claim of actual innocence based on the newly discovered affidavit of another witness. We affirm.

¶ 3 Defendant was charged with, *inter alia*, the first degree murder of Daniel DuPree, arising from a robbery and shooting that occurred in Chicago on June 9, 2002. We restate only the trial evidence pertinent to the current appeal.

¶ 4 At trial, DeCarlos Toro testified that, on June 9, 2002, around 10:40-11:00 p.m., he was in a parking lot at the corner of Kildare Avenue and Monroe Street with a group of other men discussing an earlier Mike Tyson fight. Amongst the group were Jay Arthur Mackey, Pierre Norris, Berklin "Owens" Fowles, and Daniel DuPree. A man, who Toro identified in court as defendant, walked up to Norris and "upped a gun" to his head. Defendant was "about three feet" away from Toro, and Toro "clearly" saw his face. Defendant was carrying a shiny chrome gun and told the men to throw their money to the ground. He took Toro's baseball cap off his head and told the men to put their money into it. Toro saw defendant's face because defendant was "basically in front of [his] face."

¶ 5 After taking the hat with the money in it, defendant told the men to cross over a guardrail and lie on the ground. Toro, Mackey, and DuPree stepped over the railing. Toro heard a gunshot and tried to get to the ground as quickly as he could. He heard another gunshot, then a groan from DuPree, followed by a third gunshot. DuPree was "groaning, gasping for air." Defendant

ran to a car and drove off. Toro had never seen defendant prior to this incident and did not know who he was. One month later, he positively identified defendant in a police lineup. Toro described defendant as having braids and wearing shorts and a bandana at the time of the shooting. Toro identified a photo of DuPree as the person who had been shot by defendant.

¶ 6 Berklin Fowles identified defendant at trial as the shooter. He testified that he was with the group of men in the parking lot when defendant walked up to Norris and put a gun to his head. Fowles was "right next to" defendant and could see his face. Defendant ordered the men to "give [their] money up," and they threw their money onto the ground. Toro took off his hat, scooped up the money, and gave it to defendant.

¶ 7 Defendant told the men to cross the guardrail, take three steps back, and lie on their stomachs. Fowles did not want to lie down, so he "hesitated," and began "running" when defendant started shooting. Fowles returned to the parking lot area to see defendant run to his car. A few weeks later, Fowles positively identified defendant in a police lineup.

¶ 8 Jay Arthur Mackey identified defendant at trial as the shooter. Mackey testified that he saw defendant exit the rear of a green car and walk up to the group of men. He walked directly past Mackey and was about one to two feet away from him. There was nothing covering defendant's face. Defendant "grabbed" Norris and placed a shiny, semi-automatic weapon to Norris' head. Defendant ordered the men to throw their money to the ground and collected it in Toro's hat. He then ordered them to cross the rail, take three steps back, and lie on their stomachs. They took one step over the rail "when the shots went off." Mackey saw defendant fire one shot into the air and two more at the group.

¶ 9 Mackey stated defendant was dressed in a white doo-rag, "corn rolls," headband, basketball jersey, and shorts or jogging pants. He testified that defendant wore a Mavericks jersey, but told detectives on the night of the shooting that defendant was wearing a Seattle Mariners jersey. He stated, "I wasn't really paying attention to his clothing. I looked at him in the face though." About one month after the shooting, Mackey recognized defendant in the neighborhood and called the police. He positively identified defendant in a police lineup.

¶ 10 Chicago police officer Larry Neuman lived in the "immediate vicinity" of where the incident occurred. Upon returning home from work, Neuman noticed a group of young men standing next to the rail at a vacant lot across the street. Sometime after midnight, Neuman heard gunshots from the vicinity of the young men. He looked to the area and saw a young man, who he identified in court as defendant, running to a green car. Defendant was carrying a "silver cylindrical object," which Neuman believed to be a gun. The streetlights were lit and Neuman was able to get a "distinctive look" at defendant's face as he ran towards the car. Neuman was about 25-35 feet away from the vehicle. He did not attempt to make an arrest of defendant. One month after the shooting, he positively identified defendant in a police lineup.

¶ 11 During cross-examination, Neuman described defendant as wearing a white scarf, doo-rag, braids that were hanging, a dark shirt, with maybe a "collar or something heavy in the back" that "might even have been like a summertime hoody."

¶ 12 The parties stipulated that Officers Burke and Cano, if called to testify, would testify that they interviewed Toro on the night of the incident. Toro told them (1) defendant was wearing a white headband, gray shirt, and dark pants, (2) defendant's car was light gray in color, and (3) defendant's gun was described as blue steel and not chrome.

¶ 13 A deputy medical examiner testified that DuPree's death from a gunshot wound to the chest was homicide. The State presented forensic evidence, none of which tied defendant to the crimes.

¶ 14 The court denied defendant's motion for a directed verdict and motion for a mistrial. The jury found defendant guilty of first degree murder. The court denied defendant's motion for a new trial and sentenced him to 50 years' imprisonment.

¶ 15 On direct appeal, this court affirmed the judgment of the trial court, rejecting defendant's argument that he was not proven guilty beyond a reasonable doubt because the identification evidence was vague and uncertain. *People v. Smith*, No. 1-07-0177 (2009) (unpublished order under Supreme Court Rule 23). Defendant filed a *pro se* post-conviction petition and an amended petition, through his attorney, under the Act, alleging, *inter alia*, ineffective assistance of trial counsel and ineffective assistance of appellate counsel. The trial court granted the State's motion to dismiss and this court affirmed that dismissal. *People v. Smith*, 2016 IL App (1st) 133565-U. On June 1, 2015, while the appeal of the dismissal of defendant's initial petition was pending, he moved for leave to file a successive post-conviction petition, which alleged actual innocence and cause and prejudice based on the newly discovered affidavit of a witness, Mark Smith.

¶ 16 Smith's affidavit, dated February 17, 2015, stated that he met defendant around July 2013 in prison. They spoke casually for about four months. Around December 2013, defendant showed Smith some photos and Smith realized defendant was the brother of two of his friends. Smith knew their brother was incarcerated for murder and when defendant shared the details of the crime, Smith "remembered that night." On June 8, 2002, he had lost a $500 bet on the Mike

Tyson and Lennox Lewis fight. Around 10:00 p.m., Smith was walking towards the corner of Monroe and Kildare to buy marijuana when he saw a group of men sitting on a guardrail. When he was about 35 feet from the men, he noticed a man approaching them, and assumed the man was going to buy marijuana as well. As he got closer, Smith recognized the person as Turon Houston, someone he had "known for over six years" and "since the 6th grade."

¶ 17 Just as Smith was about to call out to Houston to say hello, he saw Houston pull out a silver gun and point it at the men on the guardrail. Smith "stooped down by the steps of a building," approximately 25 feet away, and watched Houston rob the men. Smith heard loud talking as Houston was walking backwards. Then Houston started shooting in Smith's direction. Smith and the "other guys" ran away. Because Smith knew of Houston's "violent background," "bringing this to police attention wasn't an option out of fear for [his] life and rep as a snitch." Smith felt compelled to come forward once he realized someone who he knew was incarcerated for a crime he did not commit. Smith did not know defendant prior to meeting in prison. Once he realized who defendant was, Smith explained what he had seen and done on the night of the incident, and agreed to provide an affidavit. He was willing to testify in court if needed.

¶ 18 On July 22, 2015, the trial court denied defendant leave to file his successive post-conviction petition. In a written order, the court stated that Smith's affidavit was "newly discovered" and "material and noncumulative," but was not so conclusive that it would probably change the result at trial. The court found that, given that four witnesses identified defendant as the shooter, and no new reason existed to doubt their credibility, the testimony of one person having seen a different person shoot the victim would not have changed the outcome at trial.

¶ 19 On appeal, defendant contends that the trial court erred by denying him leave to file a successive post-conviction petition where Smith's affidavit supported a claim of actual innocence. Defendant argues that none of the State's witnesses knew "the offender," but Smith knew Houston since grade school, giving his identification inherent credibility and eliminating the possibility of a misidentification. Had Smith's evidence been available at trial, defendant submits that it would have been opposed only by State witnesses "who contradicted each others' descriptions of the crime and their own prior descriptions of the offender." Defendant maintains that only the trier of fact may weigh Smith's credibility against the State's witnesses, thus a hearing on the petition is necessary. He claims Smith's affidavit supports a colorable claim of actual innocence as it raises the probability "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."

¶ 20 The Act allows a defendant to challenge a conviction if it resulted from a substantial denial of his constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. Edwards*, 2012 IL 111711, ¶ 21. The Act is not a substitute for an appeal, rather a collateral attack on a final judgment. *Id.* The Act provides that "[o]nly one petition may be filed by a petitioner *** without leave of the court." 725 ILCS 5/122-1(f) (West 2014). But, a petitioner may be granted leave to file a successive post-conviction petition if the petition establishes "cause and prejudice" or states a "colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶¶ 22-24. Here, defendant maintains that his petition states a colorable claim of actual innocence. Although our supreme court has not determined the appropriate standard of review for claims of actual innocence, defendant's claim fails whether reviewed for an abuse of discretion or *de novo*. See *Id.* ¶ 30.

¶ 21 On an actual innocence claim, "leave of court [to file a successive post-conviction petition] 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 new evidence.' " *Id.*

¶ 22 To establish a claim of actual innocence, the evidence in support of the claim must be (1) new, meaning that it was discovered after trial and with due diligence could not have been discovered prior, (2) material and noncumulative, meaning that it is relevant and probative of the petitioner's innocence and is an addition to what the jury heard at trial, and (3) conclusive, meaning that when considered with the evidence presented at trial, it would "probably lead to a different result." *People v. Coleman*, 2013 IL 113307, ¶ 96. "A claim of actual innocence is not a challenge to whether the defendant was proved guilty beyond a reasonable doubt, but rather an assertion of total vindication or exoneration." *People v. House*, 2015 IL App (1st) 110580, ¶ 41. "Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all of the evidence, both new and old, together." *Coleman*, 2013 IL 113307, ¶ 97.

¶ 23 We find that the trial court did not err in denying defendant leave to file his successive post-conviction petition. Viewed in conjunction with the evidence presented at trial, Smith's affidavit does not support a finding of actual innocence. As the trial court correctly found,

Smith's affidavit constituted newly discovered evidence and was material and non-cumulative, but was not conclusive such that it would probably lead to a different result at defendant's trial.

¶ 24 Taking Smith's affidavit as true, he saw Houston rob the men and fire the shots. However, as we found on direct appeal, four credible witnesses identified defendant in a lineup and at trial as the perpetrator of the crimes, having seen his face at the time of the crime. *People v. Smith*, No. 1-07-0177 (2009) (unpublished order under Supreme Court Rule 23). DeCarlos Toro testified that he was three feet away from defendant and clearly saw his face. Toro also saw defendant's face when defendant removed his hat. Berklin Fowles was "right next to" defendant and could clearly see his face. Jay Arthur Mackey clearly saw defendant's face when he was only one to two feet away from him. Further, one month after the shooting, Mackey recognized defendant in the neighborhood and called the police. Officer Larry Neuman heard gunshots and saw defendant run into a green car carrying what he thought was a gun. Neuman could clearly see defendant's face in the light of a streetlight.

¶ 25 We previously concluded the identifications of defendant by the four witnesses was sufficient to prove him guilty beyond a reasonable doubt. *Id.* Any inconsistencies in the witnesses' testimony regarding Toro's hat, where each man was standing during the shooting, and what defendant was wearing were not regarding critical facts to the identification. *Id*. Similarly, any inconsistencies between the witnesses' testimony and their previous statements were not fatal to their credibility. *Id*. We found the inconsistencies went to the weight the jury gave to each man's testimony and declined to usurp the jury's role as the trier of fact to resolve these conflicts in the evidence. *Id*.

¶ 26 Smith's affidavit cannot support a claim of actual innocence because it does not exonerate defendant. See *House*, 2015 IL App (1st) 110580, ¶ 41. It provides no conclusive evidence that Houston was in fact the shooter. Given the four eyewitnesses who testified and identified defendant at trial, and no new reason to doubt their credibility, the testimony of another witness claiming to have seen a different person commit the crime is not so conclusive " 'that it would probably change the result [of defendant's trial] on retrial.' " *Edwards*, 2012 IL 111711, ¶ 40 (quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)). Smith's affidavit does not 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.' " *Id.* ¶ 24 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Thus, defendant failed to assert a colorable claim of actual innocence as a matter of law and the trial court correctly denied him leave to file the successive petition. *Id.* ¶¶ 40-41.

¶ 27 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 28 Affirmed.