

2018 IL App (1st) 160507-U

No. 1-16-0507

Order filed February 1, 2018

Fourth 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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 02 CR 27715
	)	
LESHAWN WALKER,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE McBRIDE delivered the judgment of the court.  
Justices Gordon and Ellis concurred in the judgment.

**ORDER**

¶ 1 *Held:* Court did not err in denying leave to file successive postconviction petition, as it did not raise a newly-discovered claim of actual innocence.

¶ 2 Following a 2003 jury trial, defendant Leshawn Walker was convicted of first degree murder and sentenced to 55 years' imprisonment. We affirmed on direct appeal. *People v. Walker*, No. 1-04-0275 (2006)(unpublished order under Supreme Court Rule 23). We also affirmed the summary dismissal of defendant's 2007 postconviction petition. *People v. Walker*,

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No. 1-08-0316 (2009)(unpublished order under Supreme Court Rule 23). Defendant now appeals from an order denying him leave to file a successive postconviction petition, contending that he stated a claim of newly-discovered evidence of actual innocence. We affirm.

¶ 3 Defendant was charged with the first degree murder of Lashawn Randolph and attempted first degree murder of Delwyn Hayes and Drexel Ellis, all allegedly committed by personally discharging a firearm on or about June 18, 2002. Pretrial discovery listed Hayes and Ellis, among others, as potential trial witnesses. At trial, the State proceeded on the charges of first degree murder of Randolph and attempted murder of Hayes. As we summarized the trial evidence in our direct appeal order, we now recite only the portions relevant to our decision. In general, the State's eyewitnesses – Hayes, Randolph's girlfriend Ebonnie Scott, Rogers Britton, and DeMoyne Blakemore – gave a consistent account of the events of June 18, and the defense witnesses – defendant, Victor Worthy, and defendant's girlfriend Tamara Rose – gave another.

¶ 4 The State's account was that Randolph, Hayes, Britton, Blakemore, and others were in front of Hayes's home when a car containing defendant, Worthy, and "John" repeatedly and slowly drove past. Randolph expressed his discomfort with this, so he and the others walked to the home where Randolph and his girlfriend, Scott, lived. There, the car containing defendant, Worthy, and John drove past again. A short time later, defendant, Worthy, and John walked up to the group. Hayes and Worthy argued, with Worthy accusing Randolph of shooting at him and defendant on March 30, 2002. The argument escalated to a wrestling or "tussling" fight between Hayes and Worthy, with nobody else involved. As the fight was occurring, watched by a crowd, defendant shot Randolph in the back of the head and then fired more shots into Randolph as he lay on the ground. Before leaving, defendant also shot Hayes once in the stomach. None of the State witnesses saw Randolph with a gun.

¶ 5 The autopsy evidence revealed that Randolph died of multiple gunshot wounds, including two shots to the back of his head. Defendant gave a statement after his September 2002 arrest. He said that Randolph and other men had shot at him and Worthy in March 2002. He also said that on June 18, 2002, as Worthy and Hayes fought after arguing, defendant shot Randolph as he turned, though defendant did not observe Randolph with a weapon.

¶ 6 As to the defense, defendant and Worthy testified that Randolph and others shot at them on March 30. Worthy testified that, on June 18, he observed Randolph standing with others in front of one home, and observed them a short time later near another. Worthy argued with Randolph and Hayes. During the argument, Randolph went into Scott's home and came out with a gun. Worthy was about to run, but Hayes and others jumped on him and were beating him when he heard gunshots. Rose similarly testified that she observed Randolph come outside and draw a gun, and then heard shots as she ran. Defendant testified that, as Worthy was fighting with Hayes and Blakemore, Randolph walked towards the crowd and drew a gun. Defendant drew his own gun and, when he observed Randolph's gun was pointed at him, fired at Randolph. Randolph dropped his gun upon being shot, and Hayes ran towards it, so defendant shot Hayes and then fled.

¶ 7 The jury, instructed on self-defense and second degree murder, found defendant guilty of first degree murder, committed by personally discharging a firearm, and not guilty of attempted murder. He was sentenced to 55 years' imprisonment, including a 25-year firearm enhancement.

¶ 8 On direct appeal, defendant raised claims of ineffective assistance of trial counsel and challenges to his enhanced sentence. We affirmed his conviction and sentence. In 2007, defendant filed a postconviction petition alleging ineffective assistance of trial counsel for

stipulating to the testimony of the physician who performed Randolph's autopsy, thus not cross-examining him. The circuit court summarily dismissed the petition, and this court affirmed.

¶ 9 Defendant filed this successive postconviction petition in October 2015, claiming newly-discovered evidence of actual innocence from two witnesses. He claimed that Jeffie Freeman was present just before the shooting of Randolph and saw Randolph walking towards defendant with a gun in hand. Freeman could also testify that Randolph shot into Freeman's home a few days before Randolph's death, which defendant argued to be evidence of Randolph's aggressive and violent character. Freeman did not come forward earlier out of fear of Randolph's fellow gang members. Attached to the petition was Freeman's April 2015 affidavit to the same effect, adding that he would not have given this account to defense counsel earlier had he been asked, and that he was now giving it "because my conscience is bothering me." Defendant also claimed that Ellis, who was at the scene of Randolph's shooting, would testify that Randolph went into Scott's home, came out with a gun, and shot at defendant before defendant shot him. He argued that Ellis's testimony was newly-discovered because Ellis did not give his account until his attached "affidavit" as he was afraid to become involved. Ellis's attached May 2015 statement was to the above effect and signed by Ellis but not notarized.

¶ 10 In January 2016, the circuit court denied the petition.

¶ 11 On appeal, defendant contends that the circuit court erred in denying him leave to file a successive postconviction petition that raised a newly-discovered claim of actual innocence.

¶ 12 Generally, a defendant may file only one postconviction petition without leave of the court, which may be granted if the defendant shows an objective cause for not previously raising the claims of the proposed petition and prejudice from not raising them. 725 ILCS 5/122-1(f) (West 2014). Another basis for granting leave to file a successive petition is that the proposed

petition raises a newly-discovered claim of actual innocence. *People v. Sanders*, 2016 IL 118123, ¶ 24. Well-pled factual allegations in a postconviction petition and supporting documentation must be taken as true unless positively rebutted by the record. *Id.*, ¶ 42. Our review of the denial of leave to file a successive petition is *de novo*. *Id.*, ¶ 31.

¶ 13 In order to succeed on a claim of actual innocence, a defendant must present new, material, non-cumulative evidence that is so conclusive it would probably change the result on retrial. *Id.*, ¶ 24. Evidence is new if it was discovered after trial and could not have been discovered earlier by exercising due diligence, material if it is relevant and probative of the defendant's innocence, and non-cumulative if it adds to the evidence heard at trial. *Id.*, ¶¶ 24, 46-47; *People v. Coleman*, 2013 IL 113307, ¶ 96. Evidence is not newly-discovered when it presents facts already known to the defendant before or during trial, even where the source of those facts may have been unknown, unavailable, or uncooperative. *People v. Brown*, 2017 IL App (1st) 150132, ¶ 42. Conclusiveness is the most important element of an actual innocence claim. *Sanders*, ¶ 47. A defendant's new evidence must be so conclusive that it is more likely than not that no reasonable trier of fact would find him guilty beyond a reasonable doubt. *Id.* The new, material, and noncumulative evidence must place the trial evidence in a different light and undermine the court's confidence in the factual correctness of the guilty verdict. *Coleman*, ¶ 97. Actual innocence is a claim of vindication or exoneration, not insufficiency of the evidence or mere impeachment of witnesses. *Id.*; *Brown*, ¶ 39.

¶ 14 Here, we first note that Ellis's statement, attached to the instant petition, is not an affidavit but merely a signed statement. However, we need not expound on that point because we find that defendant's petition and supporting documentation do not present a claim of newly-discovered evidence of actual innocence. We find the documentation is not newly-discovered

evidence. The primary *evidence* or factual proposition defendant seeks to introduce – during the fight, Randolph went into his home and returned with a gun, and thus Randolph was armed when defendant shot him – was not only known to defendant at trial but placed before the jury by his own testimony, as well as the testimony of Worthy and Rose. Only the new *sources* of this evidence, Freeman and Ellis, were unknown, unavailable, or uncooperative.

¶ 15 Moreover, we find the evidence from Freeman and Ellis is not conclusive because it does not place the trial evidence in a new light nor undermine our confidence in the verdict. Freeman avers, as Worthy and Rose already testified, to observing Randolph armed and then hearing but not seeing gunshots. Ellis’s statement that Randolph not only armed himself but fired his gun contradicts defendant’s own testimony that he shot Randolph when Randolph was raising his gun towards defendant. We also find nothing conclusive or exonerating in Freeman’s averment that Randolph shot into his home a few days before Randolph’s death, which is in the same vein as Worthy’s and defendant’s testimony to a March 2002 shooting by Randolph. In sum, positing a trial with the existing trial evidence and Freeman’s and Ellis’s accounts, we cannot conclude that no reasonable trier of fact would find defendant guilty beyond a reasonable doubt.

¶ 16 Accordingly, the judgment of the circuit court is affirmed.

¶ 17 Affirmed.