2018 IL App (1st) 162756-U

FIRST DIVISION
December 24, 2018

No. 1-16-2756

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 00 CR 344801
	)	
	)	
DARRELL JARRETT,	)	Honorable
	)	Arthur F. Hill, Jr.
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Mikva and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in denying petitioner leave to file his successive postconviction petition.

¶ 2 Petitioner appeals from the circuit court's denial of his motion for leave to file his second successive postconviction petition. Petitioner argues that the trial court improperly denied him leave to file where he established: 1) actual innocence based on an affidavit from Devon Joshua; 2) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963); and 3) the State presented perjured testimony. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Petitioner Darrell Jarrett was convicted of first degree murder after a jury found that petitioner, along with codefendant Travoy Williams, shot and killed Anthony Harris and William Key. The evidence adduced at their joint trial was as follows.

¶ 5 On December 29, 1999, Tarimako Allen was driving in her brown van and picked up Linda McGee, petitioner, and Williams on the west side of Chicago. McGee sat in the front passenger seat, petitioner sat behind McGee, and Williams sat behind Allen. As they approached the intersection of West Lexington Street and South Sacramento Boulevard, Williams told Allen to go west on Lexington. They drove down the block and approached a black Chevrolet Lumina on the south side of the street, in which the victims, Harris and Key, and an unidentified third individual were sitting.

¶ 6 Harris and Key were in the front seats of the Lumina and the third individual sat in the backseat. They spoke to Devon Joshua, who was standing outside of the car next to the driver's side window. Four feet behind the Lumina, Barbara Starling was sitting in her car, a white Plymouth.

¶ 7 Allen had driven just past the Lumina when petitioner asked Williams, “Is that the guys [sic]?” Williams told petitioner he believed so, and told Allen to stop and back up. Allen testified that Williams spoke briefly with the people in and around the Lumina, and then pushed her head down toward the steering wheel. Allen stated that she heard multiple gunshots very close to her, and McGee testified that it was Williams who drew a revolver and began firing multiple times at the Lumina. McGee ducked down in the backseat of the van. Starling also testified that the first set of gunshots came from the front driver's side of Allen's van.

¶ 8 When the shooting began, Harris and Key escaped the Lumina through the driver's side window, while Joshua ducked down next to the car. Starling testified that Harris and Key ran toward a vacant lot through a gangway as petitioner - whom she knew by the nickname “Meat Man”- got out of the van by a passenger side door, walked to the back of the van, and fired multiple times toward Harris and Key. Harris and Key both died of gunshot wounds.

¶ 9 Joshua testified that he was standing next to the Lumina talking to Harris and Key, who were both sitting inside. After he saw Williams fire several shots, Joshua took cover behind the sedan. Joshua then saw petitioner, whom he knew as “Meat Man,” get out of the van. Joshua ducked down lower, but he saw petitioner's feet walk toward the curb. Joshua then heard several more gunshots.

¶ 10 Allen heard several shots from the backseat of the van, followed by several more from outside of the van. After the shooting, Allen saw petitioner get back into the van, although she did not see petitioner leave the van after the shooting started. Allen was then told to drive to petitioner's brother-in-law's apartment near the intersection of North Hamlin Avenue and West Fulton Street.

¶ 11 Chicago police officer Michael Cronin testified that petitioner's brother-in-law allowed him into the apartment and gave him permission to search it. Officer Cronin saw petitioner leave a room and arrested him, and arrested Williams after finding him in a bedroom in the apartment. He then returned to the room from where petitioner had emerged and found a plastic bag containing a .45-caliber Colt revolver, a .45-caliber Glock revolver, and a .25-caliber pistol. Subsequent forensic tests indicated that bullets recovered from the crime scene were consistent with the guns found in petitioner's brother-in-law's apartment.

¶ 12 Petitioner testified that when Allen's van stopped next to the Lumina, he got out of the van to see if a particular person was there, but as he walked to the back of the van, he heard gunshots. When he heard the shots, petitioner believed someone was trying to shoot at him, so he pulled out his gun and returned fire into a crowd of people he saw running around him.

¶ 13 On May 9, 2003, the jury found petitioner guilty of two counts of first degree murder and one count of aggravated discharge of a firearm. On September 4, 2003, the trial court sentenced petitioner to life in prison.

¶ 14 On direct appeal he argued ineffective assistance of counsel for failing to file a motion to suppress the guns discovered in the home where petitioner and codefendant were arrested. We affirmed petitioner's conviction and sentence. *People v. Jarrett*, 2005 IL App (1st) 032859-U. His petition for leave to appeal was denied September 29, 2005. *People v. Jarrett*, 216 Ill. 2d 710 (2005).

¶ 15 On March 14, 2006, petitioner filed a *pro se* post conviction petition and raised eight issues: 1) the trial court's instruction on accountability improperly lowered the State's burden of proof; 2) the State's accountability theory was not charged in the indictment: 3) the indictment was vague; 4) his sentence violated the proportional penalties clause of the Illinois constitution; 5) the State suppressed material exculpatory evidence that law enforcement had taken a blood sample from him in violation of his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963); 6) the Illinois warrantless arrest statute was unconstitutionally vague; 7) his trial counsel was ineffective for failing to object to the accountability instruction and the State's use of an accountability theory in closing argument; and 8) his appellate counsel was ineffective for failing to challenge trial counsel's ineffectiveness regarding the accountability instruction. The trial

court summarily dismissed his petition on May 31, 2006, and this court affirmed. *People v. Jarrett*, 2008 IL App (1st) 062766-U. His petition for leave to appeal was denied. *People v. Jarrett*, 233 Ill. 2d 579 (2009).

¶ 16 On June 11, 2007, Jarrett sought leave to file a successive *pro se* post conviction petition alleging: 1) actual innocence based on newly discovered evidence; 2) ineffective assistance of trial and appellate counsel; and 3) a *Brady* violation. On September 5, 2009, the trial court dismissed the petition and on March 18, 2010, this court affirmed. *People v. Jarrett*, 399 Ill. App. 3d 715 (2010). On September 29, 2010, his petition for leave to appeal was denied. *People v. Jarrett*, 237 Ill. 2d 573 (2010)

¶ 17 On March 18, 2014, Jarrett filed a 2-1401 petition (735 ILCS 5/2-1401 (West 2012)), alleging that the trial court gave jurors an improper accountability instruction. The trial court dismissed the petition on April 28, 2014, finding that petitioner did not state a claim that can properly be raised in a petition for relief from judgment, that the petition was barred by the doctrine of *res judicata*, and that the petition was meritless. This court affirmed.

¶ 18 On January 20, 2016, petitioner sought leave to file a second successive postconviction petition wherein he alleged: 1) actual innocence; 2) the State committed a *Brady* violation; and 3) the State presented perjured testimony. The petition was supported by exhibits allegedly showing the testimony of a key prosecution witness was false. On June 24, 2016, the trial court denied the motion for leave to file in a written order. Petitioner filed a timely notice of appeal.

¶ 19 ANALYSIS

¶ 20 Petitioner argues that the circuit court erred when it denied him leave to file a second successive postconviciton petition because he raised a claim of actual innocence. Petitioner

claims that he is actually innocent of the murders of Harris and Key and that the affidavit of Devon Joshua proves his actual innocence.

¶ 21 The Post Conviction Hearing Act (Act) (725 ILCS 5/2-122-1 *et seq*. (West 2014)), allows criminal petitioners to collaterally attack a prior conviction and sentence where there was a substantial violation of his or her constitutional rights. *People v. Gosier*, 205 Ill.2d 198, 203 (2001). In order for a petitioner to successfully challenge a conviction or sentence pursuant to the statute, he or she must demonstrate that there was a substantial deprivation of federal or state constitutional rights. *People v. Morgan*, 187 Ill.2d 500, 528 (1999).

¶ 22 The Act contemplates the filing of only one postconviction petition and restricts the use of successive petitions. *People v. Evans*, 186 Ill. 2d 83, 89 (1999); 725 ILCS 5/122-1(f) (West 2014). For the court to order an evidentiary hearing on a successive postconviction petition, the petitioner must meet either the cause and prejudice test (725 ILCS 5/122-1(f) (West 2014)), or he must present new evidence of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). With respect to claims of actual innocence, our supreme court has stated:

> "Substantively, in order to succeed on a claim of actual innocence, the petitioner must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. *Washington*, 171 Ill. 2d at 489. New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. See [*People v. Burrows*, 172 Ill. 2d 169, 180 (1996)]. Material means the evidence is relevant and probative of the petitioner's innocence. *People v. Smith*, 177 Ill. 2d 53, 82-3 (1997). Noncumulative means the evidence adds to what the jury heard. [*People v. Mostad*, 101 Ill. 2d 128, 135 (1984)]. And conclusive means the evidence,

> when considered along with the trial evidence, would probably lead to a different result. *Ortiz*, 235 Ill. 2d at 336-37." *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 23 In determining whether the evidence is so conclusive as to probably change the result on retrial, the court must engage in a balancing test of the evidence before it. *Id*. ¶ 97. In *Coleman*, our supreme court specified that, once the postconviction court determines that the evidence presented at the third-stage evidentiary hearing was new, material, and noncumulative:

> "the trial court must then consider whether that evidence places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict. This is a comprehensive approach that involves credibility determinations that are uniquely appropriate for trial judges to make. But the trial court should not redecide the petitioner's guilt in deciding whether to grant relief. * * * 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." *Id*.

¶ 24 Here, petitioner claims that the affidavit of Devon Joshua, which petitioner appended to his successive postconviction petition, supports his claim of actual innocence. In his affidavit, Devon Joshua averred that he testified at trial that he witnessed petitioner get out of the van and shot a gun, but that was not true. In his affidavit, Joshua stated that he only testified that he saw petitioner get out of the van and shoot because he was being pressured by the police to say that he saw a second shooter. In the affidavit, Joshua stated that he did not see petitioner get out of the van or shoot a gun. He also stated that he did not see Williams pointing a gun in his direction and when the shooting began, he immediately hid under a car to avoid being shot.

¶ 25 While Joshua's affidavit could possibly be considered newly discovered, there is no possibility that Joshua's new testimony would change the result at a retrial. Joshua did not testify at trial that he saw petitioner hold a gun, point a gun or shoot a gun. *People v. Jarrett*, No. 1-06-2766 (August 22, 2008) (unpublished order pursuant to Supreme Court Rule 23). Rather, at trial, Joshua testified that when the shooting started, he took cover behind the van and saw petitioner exit the van, but did not see what happened next. This testimony is substantially similar to what Joshua alleged in his affidavit. The only difference being whether Joshua saw petitioner exit the van. Furthermore, and far more significant to our analysis, petitioner himself testified at trial that he got out of the van with a gun and opened fire. Joshua's testimony that he did not see petitioner get out of the van or fire any shots would make no difference on retrial. In short, Joshua's affidavit does not support petitioner's claim of actual innocence.

¶ 26 Petitioner also claims that the circuit court erred in denying him leave to file his second successive postconviction petition because he established the necessary cause and prejudice for his claims that the State committed a *Brady* violation when it failed to disclose the coercion tactics alleged in Joshua's affidavit and the State violated his right to due process by presenting perjured testimony from Joshua based on Joshua's affidavit.

¶ 27 As previously stated, the Act contemplates the filing of one postconviction petition. To obtain leave to file a successive postconviction petition, the trial court may grant leave to file a successive postconviction petition under section 122-1(f) only if the petitioner demonstrates cause for the failure to bring the claim in the initial postconviction proceedings and that prejudice results from that failure. Section 122-1(f) further provides that "(1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim

during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2014). Leave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings. *People v. Pitsonbarger*, 205 Ill. 2d 444, 463 (2002).

¶ 28 Petitioner sought leave to file his *Brady* and perjury claims by invoking the cause and prejudice provision in section 122-1(f) (725 ILCS 5/122-1(f) (West 2014)), in his proposed second successive postconviction petition. Petitioner alleged a *Brady* violation based on the affidavit that he procured from Joshua. Petitioner claims that the State violated *Brady* when it failed to disclose that Joshua allegedly initially told police that he never saw petitioner get out of the van and fire any shots because he could not see from where he was hiding under the car.

¶ 29 Even if we were to find that petitioner met the cause portion of the cause and prejudice test, he did not establish the requisite prejudice. *Brady* requires the prosecution to disclose evidence that is favorable to a petitioner and that is material to guilt or to punishment. *Brady*, 373 U.S. at 87; *People v. Pecoraro*, 175 Ill. 2d 294, 305 (1997). To establish a *Brady* violation, a petitioner must show that "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008).

¶ 30 Contrary to petitioner's argument, Joshua's affidavit is not material for *Brady* purposes. As previously discussed, the content of Joshua's affidavit was substantially similar to his testimony at trial. At trial, Joshua did not testify that he saw petitioner hold a gun, point a gun or shoot a gun. Joshua's affidavit reflects that he inaccurately recalled his trial testimony. Even if the State failed to disclose that Joshua initially told police that he never saw petitioner get out of the van and fire any shots because he could not see from where he was hiding under the car, there is not a reasonable probability that Joshua's alleged initial statement to police would alter the result of the trial because petitioner himself took the stand and testified that he got out of the van and fired the gun into a crowd of people running around him. *People v. Jarrett*, 399 Ill. App. 3d 715, 718 (2010). Because petitioner's *Brady* claim lacks merit, he cannot establish the requisite prejudice for failing to raise this claim in his initial postconviction petition.

¶ 31 Petitioner next argues that the trial court erred when it found that he failed to establish the prejudice necessary to be granted leave to file his second successive postconviction petition. Petitioner alleges that he could not have raised this issue in an earlier postconviction petition because he was unaware that Joshua initially told police that he never saw petitioner exit the van or shoot a gun until May 15, 2015, when Joshua signed the affidavit. While petitioner has established cause, he has again failed to establish prejudice.

¶ 32 The State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process. *People v. Jimerson*, 166 Ill. 2d 211, 223 (1995). A conviction obtained by the knowing use of perjured testimony violates due process and must be set aside if there is "any reasonable likelihood that the false testimony could have affected the jury's verdict." *People v. Olinger*, 176 Ill. 2d 326, 345 (1997).

¶ 33 There is simply no evidence that the State was aware that Joshua's testimony was false. The only "evidence" petitioner provided to establish that the State knew Joshua's testimony was false is Joshua's affidavit in which Joshua states that he initially told the police that he never saw petitioner exit the van or shoot the gun. However, as previously stated, Joshua testified at trial that he saw petitioner exit the van, but did not see what happened next. Just because Joshua now alleges that his trial testimony was inconsistent with his alleged initial statement to the police does not mean that his trial testimony was false. It is equally possible that his alleged initial statement to police was false. In any event, whether Joshua saw or did not see petitioner exit the van is meaningless where petitioner testified that he got out of the van and fired his gun. We therefore find that petitioner has failed to establish the necessary prejudice to meet the cause and prejudice test for his perjury claim. Accordingly, the trial court properly denied petitioner leave to file his second successive postconviction petition.

¶ 34 CONCLUSION

¶ 35 In light of the foregoing, we affirm the trial court's ruling denying petitioner leave to file his second, successive postconviction petition.

¶ 36 Affirmed.