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2019 IL App (1st) 153597-U

FIFTH DIVISION
Order filed: August 16, 2019

Nos. 1-15-3597 and 1-16-0403, cons.

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. 05 CR 13833
	)	
SAMUEL COGGS,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the orders of the circuit court that denied both the petitioner's leave to file a successive postconviction petition and his motion to reconsider that denial because the petitioner did not state a colorable claim of actual innocence.

¶ 2 The petitioner, Samuel Coggs, appeals from the orders of the circuit court of Cook County denying both his motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2014)) and his motion to

reconsider that denial. He contends that his successive postconviction petition presents a colorable claim of actual innocence based on an affidavit that states another individual confessed to being the actual perpetrator. For the reasons that follow, we affirm.

¶ 3 In May 2005, a grand jury indicted the petitioner on two counts of first degree murder and one count of attempted first degree murder, stemming from a shooting that took place on September 30, 1995, that killed Keith Blumenberg and wounded Dameon Johnson. The following factual recitation summarizes the evidence presented at the petitioner's bench trial.

¶ 4 Chandra Allen testified that, in September of 1995, she had known the petitioner for a few months. On September 14, 1995, Allen purchased a 9 mm firearm for protection. When she told the petitioner of the firearm, he requested that she purchase a firearm for him. She initially refused but ultimately relented when the petitioner became more forceful. On September 26, 1995, Allen purchased a 9 mm Glock at the petitioner's request. On September 29, 1995, Allen picked up the gun from the shop and gave it to the petitioner.

¶ 5 The next day, at about 8:00 p.m., Allen was with friends at 93rd Street and Paxton Avenue when she agreed to let the petitioner and Brian King borrow her car. The petitioner and King left, heading toward the intersection of 93rd Street and Stony Island Avenue. Allen recalled that her car was returned to her at about 8:45 p.m., after which she noticed squad cars and ambulances traveling toward the intersection of 92nd Street and Blackstone Avenue. A few days later, Allen met with the petitioner and asked him if he used her car in a shooting. He responded that she should "keep her mouth closed." Allen also asked the petitioner what happened to the gun she purchased for him, and he told her that he no longer had it and to report it stolen. The

petitioner then threatened to kill her if she said anything. Allen reported the gun stolen on November 30, 1995.

¶ 6 Subsequently, on October 6, 2004, Allen was questioned by police regarding the 9 mm Glock she had purchased. Initially, Allen told the officers that she purchased the weapon for another man, who then gave it to the petitioner. She told the officers that the petitioner used the weapon to conduct a drive-by shooting. Later in the interview, Allen told the officers that she lied about giving the weapon to another man and acknowledged that she purchased it for the petitioner.

¶ 7 Brian King testified that he had known the petitioner for four or five years, as they were both members of the same gang: the Boss Pimps. He also testified that, at the time of the shooting, the Boss Pimps were feuding with a rival gang—The Blackstones—over narcotics sales. King acknowledged that he is a convicted felon.

¶ 8 King testified that, at about 8:30 p.m., on September 30, 1995, he was at 93rd Street and Paxton Avenue when the petitioner arrived, driving Allen's car. The petitioner told King to get into the car, which he did. The petitioner then drove to 92nd Street and Blackstone Avenue. There, the petitioner slowed down, pulled out a gun, and started shooting out of the driver's side window "at the car." When the shooting started, King slumped down in his seat to avoid any potential return fire. King explained that the petitioner used one hand to shoot and the other to cover his face. King testified that once the petitioner ran out of bullets, he continued driving until they arrived at the intersection of 93rd Street and Phillips Avenue. The petitioner then exited the car and told King to return it to Allen, which King did that night. King testified that he had not

gone to the police before 2005 because he was afraid they would charge him with something and because he knew that gang members who "snitched" on others could be killed.

¶ 9 Michelle "Nike" Lee testified at trial that on September 30, 1995, she was living at 92nd Street and Harper Avenue with her aunt. That night, at about 8:45 p.m., she was on Blackstone Avenue, in between 92nd Street and 93rd Street, with Blumenberg, Johnson, Chris Love, and Zarrie Washington. She testified that Blumenberg and Johnson were standing in the street next to the driver's door of Washington's car, a red Chevrolet Malibu. She saw a dark car slowly driving southbound down Blackstone Avenue. The car stopped about 10 to 12 feet away from her, and the driver exited. Lee identified the petitioner in court as the driver, whom she recognized from the neighborhood as a member of the Boss Pimps street gang. She also knew that the Boss Pimps and the Blackstones were rivals. Lee testified that the petitioner had a gun in his hand, and he was facing in a northerly direction toward Washington's car. The petitioner raised the gun and opened fire "randomly" toward 92nd Street. Lee testified that the petitioner fired "at least" 9 times. She testified that, when the shooting started, she ran toward her house. She returned when the shooting stopped and saw Blumenberg lying on the ground and bleeding. She explained that she did not talk to the police at that time because she was afraid. She also testified that she did not go to the police before 2004 because she was being threatened. On cross-examination, Lee acknowledged that her testimony in front of the grand jury did not indicate that she ran to her house when the shooting started.

¶ 10 At trial, Johnson testified that, on September 30, 1995, he had been affiliated with, but not a member of, the Blackstones street gang for about 7 to 8 years. On the night in question, Johnson was standing by Washington's car, a red Chevrolet Malibu that was parked on the west

side of Blackstone Avenue, with Blumenberg and Love. Johnson and Blumenberg were standing in the street, watching a portable television that Washington was holding as he sat in the driver's seat of his car. Johnson heard gunshots coming from his left, which was the south side of Blackstone Avenue. He ran northbound toward 92nd Street and hid under a porch. Once he was under the porch, he felt a burning sensation on his back. After the shooting stopped, he came out from under the porch and saw Blumenberg lying on the ground with a bullet wound to his head.

¶ 11 After speaking to the police, Johnson went home and was unable to lay on his back. He had his father examine his back, and his father discovered a wound, indicating that Johnson was grazed by a bullet. Johnson did not seek medical attention.

¶ 12 Carl Brasic, a Chicago Police Department (CPD) forensic investigator, testified that he and his partner took pictures of the scene, both close ups and overall photos. The photographs revealed that several vehicles in the immediate vicinity had bullet damage. The photographs depicted the following damage to vehicles: bullet damage to the fender on the driver's side and blood on the street near the driver's side door to a red Chevrolet Malibu located at 9244 South Blackstone Avenue; a metal fragment in the roof and bullet damage to the windshield of a maroon vehicle located at 9243 South Blackstone Avenue; a fired bullet that was recovered from the windshield of a white vehicle located at 9239 South Blackstone Avenue; and bullet damage to the windshield and a fired bullet were recovered from the interior of a red sports utility vehicle at 9215 South Blackstone Avenue. Brasic also recovered six 9 mm cartridge cases on Blackstone Avenue approximately 150 feet south of the red Chevrolet Malibu.

¶ 13 The parties next stipulated to the testimony of several witnesses, including: Medical Examiner Nancy Jones, CPD Forensic Examiner James van Tilburg, CPD Officer Roberto

Rodriguez, and forensic scientist Jennifer Ulber. The following is a summary of their stipulated testimony.

¶ 14 Jones would have testified at trial that on October 3, 1995, she was employed as a Deputy Medical Examiner for the Cook County Medical Examiner's office and would be qualified as an expert in the field of forensic pathology. She would have testified that she received the body of Blumenberg on October 3, 1995, and she performed an autopsy, which included both an internal and external examination. She would have testified that it was her expert opinion within a reasonable degree of medical certainty that the cause of Blumenberg's death was a gunshot wound to the head and that the manner of his death was homicide.

¶ 15 She also would have testified that during the autopsy, she observed an atypical gunshot wound to the head, from which she removed a deformed lead bullet. She would have testified that the area around the wound showed no evidence of close-range firing and that after concluding the autopsy, she prepared a report detailing her findings. Then, she placed the recovered deformed bullet in a sealed envelope and inventoried it with the CPD.

¶ 16 James van Tilburg, a CPD Forensic Examiner for the Crime Lab Division, would have testified at trial that on October 3, 1995, he received CPD inventory that contained the six cartridge cases found at the scene by Brasic and the deformed lead bullet Dr. Jones found during the autopsy. He would testify that in his expert opinion within a reasonable degree of scientific certainty the six cartridge cases were all fired from the same firearm and that the deformed lead bullet was mutilated and unsuitable for comparison. He then would have testified that he returned the evidence to the CPD Evidence and Recovered Property Division, and from there, the

evidence was sent to the Illinois State Police Forensic Science Center and entered into the Integrated Ballistics Identification System (IBIS).

¶ 17 Officer Roberto Rodriguez would have testified at trial that on September 28, 2003, at about 11:50 p.m., he conducted a traffic stop on a vehicle in which Ben Harvell was riding. He would have testified that, as he was approaching the vehicle, Harvell attempted to hide something under the seat. During the custodial search of the vehicle, Officer Rodriguez recovered a loaded Glock 9 mm pistol under Harvell's seat, along with three live rounds, one magazine, and one spent cartridge. He would have testified that he took custody of the pistol and ammunition, inventoried it, and then sent it to the Illinois State Police Division of Forensic Services for analysis.

¶ 18 Jennifer Ulber would have testified that she was a forensic scientist employed by the Illinois State Police Division of Forensic Services, and the court would have qualified her as an expert in the field of firearms and ammunition identification. She would have testified that, on March 16, 2004, she received the inventoried 9 mm Glock pistol. The test shots fired from that pistol were compared to IBIS, which made an association between the test shots and two of the 9 mm caliber fired cartridge cases that were collected by Brasic. She would have testified that on June 8, 2008, she received all six of the cartridge cases collected by Brasic, and she examined the test fired evidence and the cartridge cases in accordance with accepted scientific procedures. She would have testified that in her expert opinion within a reasonable degree of scientific certainty, all the fired cartridge cases were fired from the same firearm, the 9 mm Glock pistol. She would have testified that the rest of the fired evidence was deformed and unsuitable for further analysis, and she prepared a report of her findings and forwarded it to CPD July 20, 2004.

¶ 19 Detective Scott Rotkvich testified at trial that in 2004, he was a homicide detective in Area 2 Violent Crimes. He was assigned to the homicide investigation of Blumenberg and was given a report from Ulber, which said a gun matching the evidence from Blumenberg's shooting was found. Upon receipt of this information, Detective Rotkvich contacted Alcohol, Tobacco, and Firearms (ATF) Agent James Ferguson to locate the original owner of the firearm.

¶ 20 The State also presented the stipulated testimony of ATF Agent Ferguson, which established that he was contacted by Detective Dave Fidyk, Detective Rotkvich's partner, regarding the purchaser of a 9 mm Glock pistol. When he accessed the ATF online leads database, his inquiry revealed that on September 29, 1995, the firearm was purchased by Allen from the Calumet City Gun Shop.

¶ 21 Detective Rotkvich testified that, after finding out from Agent Ferguson that Allen was the original purchaser of the firearm, he interviewed her on October 6, 2004, at her home. He also met with her the following day, and she identified the petitioner as the person for whom she purchased the gun. Allen also showed him where the petitioner lived.

¶ 22 He then testified that he spoke with Michelle Lee on November 5, 2004, during which she looked at photos and identified the petitioner as the shooter. Lee also identified a photo of a car similar to Allen's as the car she saw the petitioner driving the night of the shooting. On May 18, 2005, the petitioner was taken into custody. The following day, Lee identified the petitioner as the shooter from a lineup.

¶ 23 The petitioner did not testify, and the defense rested without presenting evidence.

¶ 24 At the close of evidence, the circuit court found the petitioner guilty of first degree murder of Blumenberg and attempted first degree murder of Johnson. In announcing its decision,

the circuit court acknowledged the "baggage" that each of the civilian witnesses carried, whether that be their failure to come forward sooner or a felony conviction. The circuit court stated that this baggage was not fatal to the State because their testimony was all corroborated by either the forensic evidence or testimony from someone that they did not know. Specifically, the court found that King's testimony was "very credible". The circuit court then sentenced the petitioner to concurrent terms of 50 and 15 years' imprisonment.

¶ 25 On direct appeal, the petitioner argued the following: the evidence was insufficient to prove him guilty beyond a reasonable doubt; his 50 year sentence was excessive; and the circuit court erred in requesting certain fees and fines. This court affirmed his convictions but altered the fees and fines. *People v. Coggs*, No. 1-07-3306 (December 3, 2009) (unpublished order under Supreme Court Rule 23).

¶ 26 On November 23, 2010, the petitioner filed a *pro* se petition, raising the following arguments: the State knowingly used perjury at trial; his trial and appellate counsel were ineffective; and his mandatory supervised release was unconstitutional. The petition was summarily dismissed, and this court affirmed. *People v.* Coggs, 2013 IL App (1st) 110586-U.

¶ 27 On November 16, 2011, while his initial postconviction petition was still pending on appeal, the petitioner filed a motion for leave to file a successive post-conviction petition. In it, he alleged that the circuit court relied on an improper factor at sentencing; the attempted murder charge was brought beyond the statute of limitations; and he was illegally detained on a defective complaint. The circuit court denied him leave to file his successive petition, and the petitioner filed a notice of appeal. Subsequently, the state appellate defender filed a motion to withdraw

pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), which this court granted. *People v. Coggs*, 2013 IL App (1st) 121738-U (unpublished order under Supreme Court Rule 23).

¶ 28 On October 21, 2015, the petitioner filed his second successive post-conviction petition, raising a claim of actual innocence. This petition was supported by the notarized affidavit of Marshawn Higgins, which attested to the following facts. On the night of the shooting, Higgins arrived on the scene after the shooting but before the police. He spoke with Love, who confessed to him that he mistakenly shot and killed Blumenberg. A few days later, Higgins again encountered Love, who repeated his claim that he shot Love by mistake. According to Higgins, the "Black P. Stone Nation," of which he, Love, and Blumenberg were members, kept that information secret. The petitioner also attached his own notarized affidavit, in which he avers that he is innocent of the murder of Blumenberg and the attempted murder of Johnson. The petitioner's affidavit also explained that he met Higgins for the first time in April of 2015, while serving his prison sentence. On October 28, 2015, the circuit court denied leave to file the successive postconviction petition. In so holding, the circuit court determined that, although the Higgins affidavit was newly-discovered and material, it was not of such character that it would change the result on retrial and relied on inadmissible hearsay. The petitioner filed a notice of appeal, which was assigned appeal No. 1-15-3597.

¶ 29 On December 8, 2015, the petitioner filed a "Motion for Reconsideration for Motion to Leave to File Successive Postconviction Petition," which the circuit court denied. On January 13, 2016, the petitioner filed a second notice of appeal where he appealed both the initial denial of leave to file a successive post-conviction petition and the motion to reconsider, which was

assigned appeal No. 1-16-0403. On September 27, 2017, we granted the petitioner's motion to consolidate the two appeals.

¶ 30 On appeal, the petitioner argues that the circuit court erred in denying him leave to file a successive petition for postconviction relief where he presented a colorable claim of actual innocence.

¶ 31 The Act allows only one postconviction petition to be filed without leave of court. (725 ILCS 5/122-1 *et. seq.* (West 2014)). However, our supreme court has identified two exceptions to this rule. Relevant to this appeal, one of the recognized exceptions relaxes the bar against successive petitions for a petitioner who can demonstrate that they are actually innocent of the crime for which they were convicted. *People v. Sanders*, 2016 IL 118123, ¶ 24. To demonstrate actual innocence, the petitioner must provide evidence that is "(1) newly discovered, (2) not discoverable earlier through the exercise of due diligence, (3) material and not merely cumulative, and (4) of such conclusive character that it would probably change the result on retrial." *Id*. Denying leave to file a successive postconviction petition is proper when it is clear in reviewing the petition and attached documentation that the petitioner cannot support a colorable claim of actual innocence as a matter of law. *People v. Edwards*, 2012 IL 111711, ¶ 24. The denial of a petitioner's motion for leave to file a successive postconviction petition is reviewed *de novo*. *People v. Bailey*, 2017 IL 121450, ¶13.

¶ 32 To support his claim of actual innocence, the petitioner relies solely upon the Higgins affidavit, in which Higgins describes that Love confessed to him on two separate occasions that he shot and killed Blumenberg by mistake. The petitioner argues that Higgins's affidavit is newly discovered, noncumulative, and material evidence that exculpates him and would likely

change the result on retrial. The State responds that Higgins's affidavit, which consists almost entirely of hearsay, is not newly discovered, material, or of such a conclusive character that it would probably change the result on retrial.

¶ 33 We agree with the petitioner that the evidence contained within the Higgins affidavit is new, material, and noncumulative. First, accepting the information in the Higgins affidavit as true, we conclude that the evidence contained therein is newly discovered. The petitioner averred that he and Higgins met for the first time while in prison, and Higgins averred that Love and the other gang members agreed to not reveal the truth about who killed Blumenberg. As such, the petitioner could not have discovered this information earlier through due diligence. See *People v. Molstad*, 101 Ill. 2d 128, 134-35 (1984) (affidavits of codefendants stating defendant was not present at the time of the crime constituted newly discovered evidence because no amount of due diligence on the part of the petitioner could have forced them to violate their fifth amendment right to avoid self-incrimination). The information in the affidavit is also material because it is related to the main issue in this case, whether the petitioner shot and killed Blumenberg and wounded Johnson. See *People v. Adams*, 2013 IL App (1st) 111081, ¶35. Lastly, the affidavit is not cumulative because there was no evidence presented at trial to suggest there was another shooter; thus, the affidavit does add to what the trier-of-fact heard at trial. See *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009).

¶ 34 Before turning to the final element—whether the evidence is of such a conclusive character as to change the result on retrial—we first address the State's argument that the petitioner's actual innocence claim fails because Higgins's affidavit consists almost entirely of inadmissible hearsay. As we have recently addressed, there is an open question about whether

hearsay contained in an affidavit attached to a postconviction petition may be considered during postconviction proceedings in light of our supreme court's amendment to Illinois Rule of Evidence 1101(b)(3) (eff. Apr. 8, 2013) to include "postconviction hearings" as proceedings in which the rules of evidence do not apply. See, e.g., *People v. Shaw*, 2019 IL App (1st) 152994, ¶64-67. Although the State correctly notes that there are Illinois cases that have relied on the "general rule that hearsay is insufficient to support a petition under the Act," many of those cases were decided prior to the rule change made by our supreme court. *Id.* at ¶¶65-66. As such, the continued application of that general rule is now uncertain. However, we need not resolve this question because we conclude that, even if we were to consider Higgins's affidavit in its entirety, including any inadmissible hearsay, the petitioner's claim of actual innocence would still fail.

¶ 35 We now turn to the final element necessary to support a colorable claim of actual innocence: the conclusiveness of the new evidence. "[T]he conclusiveness of the new evidence is the most important element of an actual innocence claim." *People v. Sanders*, 2016 IL 118123, ¶47. "An actual innocence claim does not merely challenge the strength of the State's case against the defendant;" (*People v. Evans*, 2017 IL App (1st) 143268, ¶30) the new evidence must support total vindication or exoneration, not merely a reasonable doubt of the defendant's innocence. (*Adams*, 2013 IL App (1st) 111081, ¶36). In other words, to state a colorable claim of actual innocence, the petitioner's evidence "must raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *People v. Edwards*, 2012 IL 111711, ¶33.

¶ 36 Here, the petitioner relies solely on Higgins's affidavit, in which Higgins avers that Love twice admitted to having shot and killed Blumenberg. However, the claim that Love mistakenly

shot and killed Blumenberg is not supported by either the eyewitness testimony or the forensic evidence presented. To begin, none of the eyewitnesses who testified identified anyone other than the petitioner as having possessed or fired a weapon that night. Lee, for example, testified that the petitioner exited his car and fired "at least" 9 shots "randomly" down the street before fleeing. King likewise testified that he rode in the passenger seat when the petitioner fired his weapon "at the car" while driving on Blackstone Avenue. No witness mentioned Love possessing a weapon or returning fire.

¶ 37 The forensic evidence supports the eyewitness testimony that the petitioner was the sole shooter that night. The only bullet casings recovered from the scene were found 150 feet south of the car where Blumenberg was shot and killed, which is consistent with the theory that the petitioner fired from south of Blumenberg's location. Moreover, the only bullet damage documented was to vehicles north of where Blumenberg stood, indicating that the shooter was firing in a northerly direction, which is also consistent with Lee's testimony. Likewise, Blumenberg's autopsy revealed no evidence of a close-range firing in the area around the wound, supporting the theory that he was shot from a distance. Eyewitness testimony placed Love standing near Blumenberg, watching the portable television Washington had on his lap. Lastly, the bullet casings that were capable of being tested were traceable to a single firearm: the one Allen testified she purchased for the petitioner. Put simply, the eyewitness and forensic evidence presented at trial placed the petitioner at the scene, where he fired multiple shots in the direction where Blumenberg and Johnson were standing. The only piece of evidence supporting the theory that Love actually shot and killed Blumenberg is Love's presence at the scene. Given the evidence presented at trial, Higgins's affidavit does not raise the probability that it is more likely

than not that no reasonable juror would have convicted the petitioner of first degree murder. See *Edwards*, 2012 IL 111711, ¶40.

¶ 38 The petitioner nevertheless argues that the evidence contained within the Higgins affidavit is conclusive enough to potentially change the result on retrial, relying on *People v. Warren*, 2016 IL App (1st) 090884-C. We find *Warren* to be distinguishable from the instant case. In *Warren*, the petitioner attached the affidavits of four witnesses who averred that two individuals confessed to each of them that they committed the crime for which the petitioner was convicted. Even though the State presented two eyewitnesses who identified the petitioner as the perpetrator, we concluded that this evidence would likely change the result on retrial because it would corroborate the testimony of a defense witness who testified at trial that he was in the car with the two individuals named in the affidavit and saw them commit the crime. Here, unlike in *Warren*, the evidence contained in the affidavit is not corroborated by eyewitness testimony at trial stating Love was present at the scene, with a weapon, and killed Blumenberg. Higgins's affidavit is only partly corroborated by testimony that Love was present at the scene. Accordingly, we conclude that *Warren* is sufficiently distinguishable from the present case.

¶ 39 The petitioner also argues that his petition raises a colorable claim that he is actually innocent of the attempted murder of Johnson, relying again on Higgins's affidavit as support. Although Higgins averred that Love's confession was limited to only mistakenly shooting Blumenberg, the petitioner argues that the presence of a second shooter raises the possibility that Love's bullet was the one that grazed Johnson. However, this claim fails for the same reasons as his claim of actual innocence with respect to first degree murder. Accordingly, we affirm the

circuit court's denial of the petitioner's motion for leave to file a successive petition and its subsequent denial of the petitioner's motion to reconsider.

¶ 40 For the foregoing reasons, the judgment of the circuit Court of Cook County is affirmed.

¶ 41 Affirmed.