2019 IL App (1st) 160231-U

No. 1-16-0231

April 29, 2019

First Division



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 16459 |
| | ) | |
| CHARLES THOMPSON, | ) | Honorable |
| | ) | Clayton J. Crane, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court properly denied defendant leave to file a *pro se* third successive postconviction petition where he failed to raise a colorable claim of actual innocence based on newly discovered evidence from an eyewitness.

¶ 2 Defendant Charles Thompson appeals from the denial of his *pro se* motion for leave to file a third successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He argues he should be permitted leave to file a third successive

postconviction petition because he adequately set forth an actual innocence claim based on newly discovered evidence. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Following a 2004 jury trial, defendant was convicted of first degree murder of Daniel Cruz and sentenced to an aggregate term of 65 years' imprisonment, including a 25-year enhancement for personally discharging the gun that caused Cruz's death. We set forth the facts of the case in defendant's appeal from the trial court's denial of his motion for leave to file a second successive postconviction petition (*People v. Thompson*, 2016 IL App (1st) 141438-U), and we recite them here to the extent necessary to our disposition.

¶ 5 At trial, the evidence established that defendant shot Cruz after a traffic collision because Cruz refused to pay for the damage caused to defendant's vehicle. Two witnesses observed defendant and Cruz arguing after the collision and subsequently heard gunshots. One witness testified defendant had two large silver guns and identified him as the shooter in a physical lineup. Defendant had gunshot residue on his hands and later confessed that he shot Cruz because he was angry about the damage to his car.

¶ 6 Montine Osbey testified that, on June 2, 2002, around 3 a.m., she was sitting on top of her parked car near the 2700 block of North Hoyne Avenue. Osbey was speaking with her friend, Yontami Dukes, who was stopped in traffic on Hoyne in defendant's car with defendant sitting in the passenger seat. There were two cars, including a maroon car, in front of defendant's car and one car, driven by Cruz, driving the opposite direction on Hoyne. The passengers in Cruz's car and the passengers from a different car "jumped out and started beating up the boys" in the maroon car. The people in the maroon car tried to get away and reversed into defendant's car.

¶ 7 Following the collision, Osbey observed defendant walking toward Cruz, who was standing with his friends in a courtyard of a building. When defendant reached Cruz, Osbey could not see the two men because they were out of sight. However, she heard arguing about someone getting a car fixed followed by gunshots. The gunshots came from the direction where defendant and Cruz had been standing. Cruz then ran through Osbey's courtyard, fell to his knees, and yelled, "I been shot. I been shot," to his brother Ivan Suarez. Suarez ran toward Cruz and said, "He's coming, he's coming." Osbey saw defendant walking towards Cruz, who stood up and ran. Osbey first testified she did not see anything in defendant's hand, and later testified she saw something in his hands but could not tell what he was holding.

¶ 8 Suarez, who was familiar with defendant from their neighborhood, testified that on the day in question he saw Cruz, wearing a gray shirt, and defendant arguing on Hoyne. Suarez did not know what their argument was about. Following the argument, Cruz walked toward a courtyard and defendant left and said, "I'll be right back." About 25 minutes later, defendant walked within about five feet of Suarez, holding two "big silver guns." Defendant walked to the courtyard where Cruz had entered, and said, "Where's that n*** at with the gray shirt on?" Defendant started chasing Cruz through the courtyard. Suarez lost sight of the men when they turned a corner, but heard four or five gunshots. Cruz ran toward Suarez stating he was shot, as he fell down. As Suarez was lifting Cruz, Cruz said that defendant was coming towards them again. Suarez turned around and saw defendant approaching them. Cruz let Suarez go and ran in the opposite direction of defendant. Suarez stood in the courtyard because he was scared and defendant was "just standing there with two big guns." After several minutes, Suarez ran past defendant and called his sister.

¶ 9 Suarez spoke with police on the scene and told them who shot Cruz. He identified defendant as the shooter at the police station. Suarez again identified defendant in a physical lineup later that afternoon.

¶ 10 Chicago police officer Gilbert Lucio testified that he responded to a dispatch about a shooting on Hoyne. Suarez identified defendant as the shooter at the scene. Lucio knew defendant by face and name from his experience working near that neighborhood. Based on the information Lucio learned after speaking to various witnesses, he drove approximately one mile from the crime scene, where he observed defendant walking. Lucio then took defendant into custody. Approximately 20 minutes elapsed since Cruz was shot. Defendant did not have any firearms on his person.

¶ 11 Chicago police detective Timothy Thompson testified he interviewed defendant on the day of the shooting after advising defendant of his *Miranda* rights. Defendant indicated that he understood his rights and gave Detective Thompson his version of the shooting. Defendant's account of the incident regarding the car was substantially similar to Osbey's testimony, but defendant added that Cruz sideswiped his car. Defendant further stated that he and Cruz argued about the damage to defendant's car. Defendant wanted Cruz to pay for the damage, but Cruz refused and drove away. Defendant observed Cruz in the area shortly thereafter and followed Cruz into a courtyard where Cruz pointed a .380 caliber semiautomatic gun at defendant. Someone known as "Little J" then gave defendant a .380 caliber revolver, and defendant shot Cruz three times. Cruz ran away and defendant gave the gun back to Little J. Detective Thompson was never able to identify Little J.

¶ 12 After defendant gave his version of events, Detective Thompson arranged a lineup. Suarez identified defendant in the lineup. Detective Thompson also contacted the State's Attorney's Office and interviewed defendant again in the presence of assistant state's attorney (ASA) Daniel Faermark. ASA Faermark advised defendant of his *Miranda* rights, and defendant again indicated he understood. Detective Thompson told defendant that other witnesses to the incident stated Cruz was holding a cell phone, not a gun, and defendant acknowledged Cruz could have been holding a cell phone. When Detective Thompson asked about defendant's previous statement describing the gun Cruz was holding, defendant replied, "All right, man, I was really really angry about my car being damaged *** I saw him later that night, I chased him in the courtyard and shot him three times."

¶ 13 ASA Faermark corroborated Detective Thompson's testimony regarding defendant's statement. Although ASA Faermark gave defendant different options for memorializing his statement, defendant refused to memorialize it. Defendant told ASA Faermark to write down his statement, but defendant refused to sign it. ASA Faermark then wrote defendant's statement, but defendant did not participate in any way.

¶ 14 Chicago police forensic investigator Thomas Hanley testified that he collected gunshot residue samples from defendant's hands at 7:05 a.m. on June 2, 2002. Forensic scientist Mary Wong, an expert in gunshot residue testing, testified she analyzed the samples from defendant's hands, which tested positive for the presence of gunshot residue. She opined that, to a reasonable degree of scientific certainty, defendant either discharged a firearm or that both of his hands had been in the environment of a discharged firearm.

¶ 15 The Cook County medical examiner that performed Cruz's autopsy testified that a bullet entered Cruz's lower right back in a direct path and there was evidence of close-range firing. The cause of Cruz's death was a gunshot wound to the back and the manner of death was homicide.

¶ 16 The jury found defendant guilty of first degree murder and the court sentenced defendant to a total of 65 years' imprisonment. We affirmed on direct appeal. *People v. Thompson*, No. 1-04-0535 (2005) (unpublished order under Supreme Court Rule 23).

¶ 17 Defendant subsequently filed several unsuccessful collateral challenges. After an evidentiary hearing, the trial court denied defendant's initial petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)), and we affirmed the court's order after allowing appellate counsel leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Thompson*, No. 1-09-0797 (2010) (summary order). We also affirmed the denials of defendant's motions for leave to file three of four successive postconviction petitions. *People v. Thompson*, No. 1-11-1907 (2012) (summary order) (affirming the trial court's order denying defendant leave to file his first successive petition after granting appellate counsel's motion to withdraw pursuant to *Finley*); *People v. Thompson*, 2016 IL App (1st) 141438-U (affirming the trial court's order denying defendant leave to file a second successive postconviction petition); *People v. Thompson*, No. 1-16-3043 (2018) (summary order) (affirming the trial court's order denying defendant leave to file a fourth successive petition after granting appellate counsel's motion to withdraw pursuant to *Finley*).[1]

[1] The motion for leave to file a successive petition in *Thompson*, No. 1-16-3043 (2018) was defendant's fourth successive petition, filed after the motion for leave to file a third successive petition at issue in the instant case. However, because counsel moved to withdraw in case no. 1-16-3043, that appeal was resolved prior to the resolution of the petition in the case at bar.

¶ 18 On September 18, 2015, defendant mailed a *pro se* motion for leave to file a third successive postconviction petition. In his motion, defendant asserted, *inter alia*, a claim of actual innocence based on newly discovered evidence. He alleged that an eyewitness, Gary Allard, witnessed Cruz have an altercation with rival gang members, which escalated and ended with two white men shooting Cruz. Defendant claimed he did not know that Allard witnessed the shooting until they spoke in 2015 at Menard Correctional Center. Defendant asserted Allard's proposed testimony would probably change the result on retrial because the State's evidence relied heavily on his "alleged" confession.

¶ 19 Defendant attached a proposed successive petition wherein he recounted the testimony at trial. In his petition, he claimed both Suarez and Osbey testified they heard Cruz say, "they shot me." He also asserted Suarez's testimony at trial was biased, self-serving, and "contrary to human experience." Defendant further claimed generally that confessions "may" be unreliable because "they are coerced" and "involuntary." Finally, he indicated the gunshot residue found on his hands could be caused by "a variety of factors inherent within the environment which caused the positive test," such as "cross contamination of peoples, places, and things, etc." and that the positive GSR results did "not establish that he is in fact responsible for or guilty of first degree murder."

¶ 20 In support of his petition, defendant attached a notarized affidavit from Allard dated June 30, 2015. Allard averred that at around 2 a.m. on the day in question, he was on the 2700 block of Hoyne in a courtyard near his girlfriend's residence with several Latin King gang members. Allard heard someone on Hoyne say, "We got some deuces." The voice came from an area where more Latin King members were sitting inside their cars talking to each other. Allard ran to

the corner where he watched the Latin King members get out of their cars and "try to take three white deuce boys" out of a burgundy car. He saw Cruz take a bat and break the window of the burgundy car. The "deuce boys" then reversed their car and struck the front bumper of a black car stopped behind them. The black car "reversed" down the street and the Latin Kings continued to "go after" the burgundy car until it hit Osbey's car. Cruz and another gang member parked their car, and Cruz walked up to defendant, who had exited the black car. Cruz and defendant were "in each other's face[s] like they were going to fight." The other Latin Kings present pulled Cruz away from defendant.

¶ 21 Allard further averred Osbey told the Latin Kings she was calling the police because they "f*** her car up." Because she was calling the police, Allard and the Latin Kings members fled to Leavitt Street. As they were walking, Allard observed "two white boys carrying handguns" walking toward them. The two white men stopped, yelled, "Deuce love b***" and shot at them. Allard ran and heard someone say, "I'm hit, I'm hit." He turned around and saw Cruz on the ground saying he was hit. Allard ran into a nearby house and later heard Cruz died from being shot. Allard did not say anything about what he witnessed because he did not want to be a snitch and feared his own gang would "put a possible death violation" on him for associating with the Latin Kings members. He also did not know that anyone had been arrested for Cruz's murder. However, in May 2015, at the gym in Menard Correctional Center, Allard spoke with defendant, whom he remembered being around the 2700 block of Hoyne on several prior occasions. When he found out that defendant was imprisoned for Cruz's murder, Allard "took it upon [himself] to let [defendant] know" that he was present when Cruz was shot and killed by the "Deuce Boys." Allard gave defendant his statement because it was the "right thing to do" and he knew defendant

was not one of the white men that killed Cruz. He further averred he would testify to the facts provided in his affidavit.

¶ 22 On November 20, 2015, the trial court denied defendant's motion for leave to file a successive petition in a written order. The court found that while Allard's affidavit is newly discovered and noncumulative, it was not material because it was not probative of defendant's innocence. The court pointed out Allard averred he was running away before the shooting began and did not see who shot Cruz, nor did he see where defendant was at the time of the shooting or which of the two unidentified men shot Cruz. Thus, the court concluded the evidence did not exculpate defendant. The court also found the affidavit was clearly contradicted by the record because multiple eyewitnesses saw defendant chase Cruz with a gun and defendant confessed to shooting Cruz. The court therefore found it was not so conclusive that it would probably change the result on retrial. This appeal follows.

¶ 23 ANALYSIS

¶ 24 On appeal, defendant contends the trial court improperly denied him leave to file a successive postconviction petition because he set forth a colorable claim of actual innocence based on newly discovered evidence from an eyewitness to Cruz's murder.

¶ 25 The Act provides a means for criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). However, the Act generally contemplates the filing of only one petition. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). Prior to filing a successive petition, a defendant must first obtain "leave of court." See 725 ILCS 5/122-1(f) (West 2014); *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010).

¶ 26 In order to file a successive petition, a defendant must satisfy the cause and prejudice test or the "fundamental miscarriage of justice" exception, set forth as a claim of actual innocence. *People v. Edwards,* 2012 IL 111711, ¶¶ 22-23; 725 ILCS 5/122-1(f) (West 2014). Where, as here, the defendant seeks to relax the bar against successive postconviction petitions on the basis of actual innocence, the court should deny such leave only when 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." *Edwards*, 2012 IL 111711, ¶ 24. Leave of court should be granted only where the supporting documentation raises the probability that " 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' " *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). We review the trial court's denial of leave to file a successive petition *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13.

¶ 27 Postconviction petitions may assert freestanding claims of actual innocence based on newly discovered evidence under the due process clause of the Illinois Constitution. *Ortiz*, 235 Ill. 2d at 333. To succeed on a claim of actual innocence, a petitioner must present evidence that is (1) newly discovered, (2) material and noncumulative, and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96 (citing *People v. Washington*, 171 Ill. 2d 475, 489 (1996)).

¶ 28 Here, we find defendant failed to state a claim of actual innocence because even assuming Allard's proposed testimony is newly discovered, material, and noncumulative, it is not so conclusive that it would probably change the result on retrial in light of the substantial evidence presented against defendant. As the trial court noted in its written order, Allard did not

see who shot Cruz; rather, he only saw Cruz say he had been "hit." Further, defendant's contention that the affidavit supports the evidence that Osbey and Suarez testified Cruz said, "they shot me" is rebutted by the record and was specifically rejected by this court in prior proceedings. *Thompson*, 2016 IL App (1st) 141438-U, ¶ 31. At trial, both Osbey and Suarez testified defendant and Cruz argued and defendant chased Cruz through a courtyard before hearing several shots fired and Cruz saying, "I've been hit." Suarez testified defendant had two big guns as he chased Cruz. He further testified that as he was helping Cruz to his feet, Cruz said, "he's coming," and Suarez observed defendant walking towards them. Following the shooting, Suarez identified defendant as the shooter to police and in a physical lineup. Defendant subsequently confessed to the shooting and his hands tested positive for gunshot residue. In light of this evidence, we cannot say that Allard's proposed testimony raises the probability that " 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' " *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Schlup*, 513 U.S. at 327).

¶ 29 In reaching this conclusion, we are not persuaded by defendant's argument that Allard's proposed testimony would change the result on retrial because the evidence against him was "weak." As recounted above, two witnesses saw defendant and Cruz arguing after the collision and heard gunshots from their direction; one of the witnesses, who was familiar with defendant from the neighborhood, saw defendant on the scene with two guns and identified him as the shooter from a lineup; defendant's hands tested positive for gunshot residue; and he told a detective and an assistant state's attorney that he shot Cruz because he was angry about his car being damaged. We decline defendant's invitation to characterize this evidence as "weak," and note that defendant's contention amounts to a challenge to the sufficiency of the evidence, which

is insufficient for a claim of actual innocence. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40 (noting the hallmark of actual innocence is " 'total vindication' or 'exoneration' ") (quoting *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008)); see also *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36 (evidence of actual innocence must support total vindication, "not merely present a reasonable doubt").

¶ 30 Additionally, although defendant's proposed petition claims generally that confessions are unreliable and the "environment" could account for the positive gunshot residue test, he provides no new reliable evidence that would support these conclusions. See *Edwards*, 2012 IL 111711, ¶ 32 (noting that actual innocence claims "must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.' ") (quoting *Schlup*, 513 U.S. at 324).

¶ 31 We are likewise not persuaded by defendant's argument that Allard's affidavit corroborates other affidavits he submitted with several of his earlier postconviction petitions. The earlier affidavits were not attached to the instant petition, were not considered by the trial court in this case, and have been rejected in prior proceedings. See *Thompson*, No. 1-09-0797, and *Thompson*, 2016 IL App (1st) 141438-U, ¶ 33; see also *People v. Blair*, 215 Ill. 2d 427, 446 (2005) (barring claims which have been previously decided).

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we affirm the trial court's denial of defendant's motion for leave to file a third successive postconviction petition.

¶ 34 Affirmed.