

2019 IL App (1st) 161217-U

No. 1-16-1217

Order filed March 27, 2019

Third 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. 01 CR 26204
	)	
TIMOTHY ROBINSON,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE COBBS delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

**ORDER**

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

¶ 2 Defendant Timothy Robinson 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 2016)). 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. We affirm.

¶ 3 Following a 2003 bench trial, defendant was convicted of first degree murder of Ahmed Mayo and sentenced to a total of 45 years' imprisonment. We affirmed on direct appeal over defendant's contentions that his first-degree murder conviction should be: reversed because he reasonably believed his life was in danger when he shot Mayo; or, in the alternative, reduced to second-degree murder because he believed in the need for self-defense, but his belief was unreasonable. *People v. Robinson*, No. 1-03-1412 (2005), *modified*, (unpublished order under Supreme Court Rule 23). Because we set forth the facts of the case in detail on defendant's direct appeal, we recite them here to the extent necessary to our disposition.

¶ 4 Defendant's conviction stemmed from the shooting death of Mayo. After a party, defendant shot Mayo, who was seated in his car. The State's theory of the case was that defendant shot Mayo out of revenge because the two men had an altercation two days prior, and Mayo had threatened to kill defendant in front of his girlfriend, Tangela Holcomb. The defense theory of the case was that defendant shot Mayo in self-defense because he feared for his life due to their prior altercation.

¶ 5 Demetrick Washington testified that, on September 25, 2001, he and defendant went to a party with Roger Scoby. Holcomb was also at the party. The three men left at some point to get marijuana in Washington's vehicle. Washington was driving, Scoby was in the front passenger seat, and defendant was in the back seat. As they were leaving, defendant noticed Mayo in his vehicle. Defendant told Washington to "circle the block." Washington followed defendant's direction, but also drove around the block because he wanted to speak to Mayo himself.

¶ 6 After circling the block, Washington pulled up next to Mayo's car and got out to speak with him. Washington could not see Mayo's hands. As he was walking, he heard gunshots and glass shattering. Following the shots, Washington ran back to his car and drove away. He did not see Mayo reaching for anything in the car, but following the shooting, defendant said Mayo had been leaning over in his car. Washington acknowledged he did not tell the assistant state's attorney (ASA) or the grand jury that defendant had stated Mayo was reaching for something.

¶ 7 Scoby testified Mayo was "leaning down a little bit, like he was reaching for something" prior to the shooting. Scoby acknowledged he did not tell the ASA or include in his written statement that he had observed Mayo reaching for anything. The rest of Scoby's testimony was substantially similar to Washington's.

¶ 8 There was no gun recovered from Mayo's car. The parties stipulated that Mayo sustained five gunshot wounds.

¶ 9 Defendant testified that, on September 23, 2001, he was with Holcomb at her sister's residence. Holcomb had a child with Mayo. Mayo arrived at the residence and struck defendant in the face with a tire iron, shocked him with a stun gun, and threatened to kill him if he saw defendant with Holcomb again. Defendant received stitches and filed an aggravated battery complaint against Mayo. The officer that defendant reported the incident to testified that she instructed defendant to call 911 if he saw Mayo again.

¶ 10 On September 25, 2001, defendant went to a party with Washington. Holcomb was also at the party. Defendant brought a gun with him because he was afraid of Mayo. After Holcomb received a call from Mayo, defendant left the party with Washington and Scoby. In

Washington's car, defendant heard a car horn and observed Mayo's car nearby. Defendant told Washington to drive away because he did not want to be near Mayo.

¶ 11 Washington drove around the block, but stopped in front and to the side of Mayo's car. Defendant remained in the backseat of the car and observed Mayo, who was inside his car. Mayo's window was rolled up, and defendant saw Mayo lean over and reach under the passenger seat. Defendant fired four or five shots at Mayo. Defendant testified that he intended to hit Mayo because he believed Mayo was reaching for a gun and would have shot him. Defendant continued firing because he "wanted to make sure" he hit Mayo. He did not intend to shoot Mayo until he saw Mayo reach under the seat. Following the shooting, defendant went home and threw the gun away.

¶ 12 On cross-examination, defendant testified that Mayo did not threaten to shoot him on September 23, 2001. Defendant shot Mayo because he feared for his life, but he did not see a gun or other weapon in Mayo's hand prior to the shooting. Mayo did not speak to defendant prior to the shooting. Mayo was turning towards defendant with his hands "coming up" as defendant fired the first shot.

¶ 13 The court found defendant guilty of first degree murder and explicitly rejected his theory of self-defense, instead characterizing the shooting as "revenge." It noted that neither Washington nor Scoby indicated prior to trial that Mayo had been leaning over before the shooting. The court also noted that there was a "cooling-off period" in between the incident between Mayo and defendant on September 23rd and the shooting two days later. The court pointed out that Mayo's car door and window were closed, no weapons were recovered from Mayo's car, and Mayo did not threaten or speak to defendant or his friends at the time. Thus, the

court found defendant did not have a reasonable belief that he needed to defend himself or others.

¶ 14 Defendant filed a posttrial motion, challenging the sufficiency of the State's evidence. The court denied defendant's posttrial motion, ruling that Mayo was not the aggressor on the night of the shooting. It reiterated that defendant did not have a reasonable or unreasonable belief that Mayo was going to cause him harm. The court subsequently sentenced defendant to 45 years' imprisonment, which included a 25-year firearm enhancement.

¶ 15 On direct appeal, defendant argued, *inter alia*, his conviction should be reversed because he believed his life was in danger when he shot Mayo or, alternatively, it should be reduced to second degree murder because his belief in the need for self-defense was unreasonable. We affirmed his conviction and ordered his mittimus corrected. *Robinson*, No. 1-03-1412 (2005).

¶ 16 Defendant subsequently filed an initial petition for postconviction relief under the Act, which was dismissed in 2006. He did not appeal the dismissal. In January 2007, defendant filed a petition for relief for judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)). In September 2007, the trial court dismissed the section 2-1401 petition. On appeal, we affirmed the dismissal and allowed counsel to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Robinson*, No. 1-07-2822 (2009) (unpublished order under Supreme Court Rule 23). Defendant thereafter filed a motion for leave to file a successive postconviction petition that was denied by the trial court in 2012. He did not appeal the denial.

¶ 17 On October 28, 2013, defendant filed a motion for leave to file a second successive petition, arguing, *inter alia*, a claim of actual innocence based on an unnotarized letter allegedly

from Washington stating that Washington “perjured himself” at trial. The motion was denied by the trial court in 2014. On appeal, we affirmed the denial and allowed counsel to withdraw pursuant to *Finley*, 481 U.S. 551. *People v. Robinson*, No. 1-14-0992 (2015) (summary order).

¶ 18 On January 20, 2016, defendant filed the third successive postconviction petition at bar. In his *pro se* petition, defendant argued that newly discovered evidence proved he was actually innocent. He alleged his defense theory at trial was that he acted in self-defense because Mayo reached for a weapon on the night in question and that an eyewitness “saw [Mayo’s] weapon taken from vehicle that [Mayo] possessed.”

¶ 19 In support of his petition, defendant attached a notarized affidavit from Darius Perkins, dated October 11, 2013. Perkins averred that, on the night of the shooting, he heard gunshots while inside his house. When the shots ceased, Perkins looked outside and observed a car with its lights on parked “halfway in the space.” He watched “a dark skin female” come out of a building and approach the car. The woman opened the passenger side door, screamed “baby get up,” and “came out the car holding a silver object in her hand which appeared to be a gun.” The woman returned to the building and then reemerged with other people. Perkins called 911, and the operator informed him they had received several calls. Perkins eventually walked outside and observed a man slumped over in the car gasping for air. Perkins “stayed there” until police arrived but no one spoke with him about what happened.

¶ 20 Defendant also attached his own unnotarized “affidavit” to his petition. In the “affidavit,” defendant stated he feared for his life and shot Mayo in self-defense. He further stated Mayo was in possession of a gun at the time of the shooting.

¶ 21 The trial court treated defendant's petition as a motion for leave to file a successive postconviction petition and denied the motion, finding it "frivolous and patently without merit." Defendant timely appealed.

¶ 22 On appeal, defendant argues he should be granted leave to file a successive postconviction petition because Perkins' affidavit constituted newly discovered evidence which corroborated the defense theory at trial that defendant was in fear that his life was in danger when the shooting occurred.

¶ 23 The Act allows criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). However, generally only one petition is permitted under the Act. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009); 725 ILCS 5/122-3 (West 2016). A defendant must first obtain "leave of court" in order to file a successive postconviction petition. See 725 ILCS 5/122-1(f) (West 2016); *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010).

¶ 24 The bar against successive proceedings is relaxed only where the defendant can 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. 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. In other words, the court should grant leave to file a successive petition based on actual innocence 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.

¶ 25 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)).

¶ 26 Here, the trial court did not err in denying defendant leave to file his successive postconviction petition. First, defendant failed to demonstrate the evidence contained in Perkins’ affidavit was newly discovered. Evidence is newly discovered if it was not available at the defendant’s original trial and that the defendant could not have discovered sooner through diligence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). The Perkins affidavit was dated October 11, 2013, and defendant’s second motion for leave to file a successive postconviction petition was filed October 28, 2013. Although on appeal defendant claims he did not know about Perkins because Perkins did not speak with police and was not mentioned in any reports, he does not explain why the affidavit was not mentioned in or attached to his earlier motion for leave to file a successive petition, which was dated after he obtained the affidavit. Instead, in his reply brief, he argues that he received the affidavit shortly before filing his second successive petition and speculates he possibly did not receive it prior to filing his second successive postconviction.



This is insufficient to demonstrate that he could not have discovered the purported testimony in Perkins' affidavit sooner through due diligence.

¶ 27 Further, even assuming Perkins' affidavit is newly discovered, material, and noncumulative, it is not of such a conclusive character that it would probably change the result on retrial. Defendant testified at trial that he did not see Mayo with a gun. Thus, even if Perkins testified that he observed a woman taking a gun out of Mayo's vehicle *after* the shooting, it could not have changed the outcome of the trial because, according to defendant's own testimony, he was not aware that Mayo had a gun at the time of the shooting.

¶ 28 Moreover, an actual innocence claim is not a challenge to whether the defendant was proved guilty beyond a reasonable doubt, but is instead an assertion of " 'total vindication' or 'exoneration.' " *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40 (quoting *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008)). Defendant's claim that Perkins' affidavit merely corroborates his self-defense claim at trial falls far short of "total vindication or exoneration." *Id.* (internal quotation marks omitted). To prove self-defense, defendant must establish some evidence of each of the following elements: (1) force was threatened against a person; (2) the person threatened was not the aggressor; (3) the danger of harm was imminent; (4) the use of force was unlawful; (5) the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable. *People v. Jeffries*, 164 Ill. 2d 104, 127-128 (1995).

¶ 29 Perkins' affidavit, at most, corroborates defendant's subjective belief that his life was in danger. It does not, however, support any other elements of self-defense, which were rebutted at trial. See *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 64 (a claim of self-defense fails if the

State negates any one of the elements of self-defense). Critically, on direct appeal, we found that the evidence showed defendant was the initial aggressor and he was not in imminent danger, thus negating self-defense. *Robinson*, No. 1-03-1412 at \*9. Because Perkins' affidavit does not change this evidence, defendant's proposed successive petition fails to state a claim of actual innocence. See, e.g., *People v. Jarrett*, 399 Ill. App. 3d 715, 724 (2010) (postconviction petition failed to state claim of actual innocence where the claims set forth in petition and supporting documentation did not rebut trial testimony that the defendant was the initial aggressor).

¶ 30 In light of the foregoing, we affirm the trial court's denial of defendant's motion for leave to file a successive postconviction petition.

¶ 31 Affirmed.