2013 IL App (1st) 080708-U

FOURTH DIVISION
June 27, 2013

No. 1-08-0708



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 92 CR 10789 |
| | ) | |
| ANTHONY OLIVE, | ) | Honorable |
| | ) | Ralph Reyna and |
| | ) | Nicholas R. Ford, |
| Defendant-Appellant. | ) | Judges Presiding. |

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Hyman concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Denial of leave to file a successive post-conviction petition affirmed where defendant did not set forth a colorable claim of actual innocence as a matter of law; imposition of $105 frivolous filing fee was proper.

¶ 2 Defendant Anthony Olive appeals from an order of the circuit court of Cook County denying him leave to file his fourth *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). He contends that the court erred in denying him leave to file his successive petition because he stated the gist of a free-standing claim of

actual innocence. Defendant also contends that the court improperly imposed a $105 frivolous filing fee.

¶ 3 This matter is before us on a second supervisory order entered by the supreme court in this case. We previously affirmed the order of the circuit court denying defendant leave to file a successive petition (*People v. Olive,* No. 1-08-0708 (2009) (unpublished order under Supreme Court Rule 23)), and, after reconsidering that decision, pursuant to the initial supervisory order (*People v. Olive,* 236 Ill. 2d 532 (2010)), in light of *People v. Tidwell,* 236 Ill. 2d 150 (2010), and *People v. Ortiz,* 235 Ill. 2d 319 (2010), we concluded that a different result was not warranted (*People v. Olive,* 2011 IL App (1st) 080708-U).

¶ 4 We now vacate that order pursuant to the second directive of the supreme court and reconsider it in light of *People v. Edwards,* 2012 IL 111711. *People v. Olive,* No. 113575 (Ill. May 30, 2012). The parties have filed supplemental briefs on the impact of *Edwards* in the instant matter, and after further consideration, we conclude for the reasons to follow that a different result is not warranted.

¶ 5 The record shows that defendant was sentenced to 50 years' imprisonment on his 1993 jury conviction of the first degree murder of Christopher Revels on April 28, 1992. We affirmed that judgment on direct appeal. *People v. Olive,* No. 1-93- 3449 (1995) (unpublished order under Supreme Court Rule 23).

¶ 6 While his direct appeal was pending, defendant filed a *pro se* post-conviction petition, alleging ineffective assistance of trial counsel and juror bias, which the circuit court summarily dismissed. Defendant then filed two successive *pro se* post-conviction petitions, one of which was captioned as a motion to reduce his sentence, and both were summarily dismissed by the circuit court. In each of the appeals therefrom, we allowed appellate counsel to withdraw and

affirmed the judgment of the circuit court. *People v. Olive,* Nos. 1-95-1942 (1996), 1-98-3092 (1999), 1-06-0135 (2006) (unpublished orders under Supreme Court Rule 23).

¶ 7 Defendant then filed the subject *pro se* post-conviction petition, alleging that newly discovered evidence demonstrated his actual innocence. This newly discovered evidence consisted of affidavits from Marshun McGee, who had not previously testified, and Andre Sherron, who testified for defendant at trial, but had also given inculpatory evidence before the grand jury. In her affidavit, McGee averred that defendant was not the shooter, and as she waited for police to arrive that day, she overheard rival gang members conspiring to frame defendant for the murder. In his affidavit, Sherron recanted his grand jury testimony, as he had in his trial testimony, claiming it had been coerced by the police. The circuit court denied defendant leave to file a successive petition because he failed to satisfy the cause and prejudice test.

¶ 8 On appeal, defendant claims that he presented a free-standing claim of actual innocence and that his cause should be remanded for further proceedings under the Act. We review the denial of defendant's motion for leave to file a successive post-conviction petition *de novo* (*People v. Simmons,* 388 Ill. App. 3d 599, 606 (2009)), and may affirm that decision on any ground of record (*People v. Johnson,* 208 Ill. 2d 118, 129 (2003)).

¶ 9 The Act contemplates the filing of only one post-conviction petition (*Ortiz,* 235 Ill. 2d at 328), but the statutory bar to filing a successive petition may be relaxed where fundamental fairness so requires (*Ortiz,* 235 Ill. 2d at 329 (and cases cited therein)). To that end, section 122-1(f) of the Act prohibits the filing of a successive petition without first obtaining leave of court, which is expressly conditioned on defendant's satisfaction of the cause and prejudice test. *People v. LaPointe,* 227 Ill. 2d 39, 44 (2007). No separate motion seeking leave is mandated by the Act, nor is an explicit request required if the circuit court sees fit to consider the matter and rule of its own accord. *Tidwell,* 236 Ill. 2d at 161. Thus, defendant's failure to separately request leave to

file his successive petition in the instant case did not preclude the circuit court from exercising its discretion and ruling on his petition of its own accord. *Tidwell,* 236 Ill. 2d at 161. Moreover, the supreme court has recognized that, in a non-death penalty case, as here, where defendant sets forth a claim of actual innocence in a successive post-conviction petition, he is not required to show cause and prejudice. *Ortiz,* 235 Ill. 2d at 330.

¶ 10 In this case, defendant claims that he raised the "gist" of an actual innocence claim through the affidavits of two witnesses. We initially observe that the "gist" standard does not apply to successive petitions. *Edwards,* 2012 IL 111711, ¶¶ 24-29. Rather, where a successive petition raises a claim of actual innocence, " 'leave of court should be denied only where 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, *quoted in People v. Wideman,* 2013 IL App (1st) 102273, ¶ 14. A colorable claim of actual innocence is a claim that raises the probability that it is more likely than not that no reasonable juror would have convicted defendant in light of the new evidence. *Edwards,* 2012 IL 111711, ¶¶ 31, 33.

¶ 11 To obtain relief under a theory of actual innocence, the evidence in support of the claim must be newly discovered, material and not merely cumulative, and of such conclusive character that it will probably change the result on retrial. *Edwards,* 2012 IL 111711, ¶ 32 (citing *Ortiz,* 235 Ill. 2d at 333). Evidence is newly discovered when it has been discovered since trial and could not have been discovered earlier in the exercise of due diligence. *Ortiz,* 235 Ill. 2d at 334. In discussing claims of actual innocence based on newly discovered evidence, our supreme court noted that the United States Supreme Court has stated that, " 'Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.' " *Edwards,* 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo,* 513 U.S. 298, 324 (1995)).

¶ 12 As noted above, defendant relies on the affidavits of Andre Sherron and Marshun McGee to establish his claim. Sherron averred that he had seen another individual shoot the victim and that he had seen defendant running from the scene without a gun while shots were still being fired. Sherron claimed that he originally provided this version of events to Chicago police detectives, but they slapped and threatened him until he identified defendant as the shooter and agreed to testify as such before the grand jury. Sherron also claimed that he was paid $300 for his testimony in the grand jury proceedings.

¶ 13 Our review of the record shows that there is no discernible difference between Sherron's affidavit and his testimony at trial that he had seen another individual shoot the victim and that he had told this to police, but that they coerced him into providing a statement and testimony to the grand jury that defendant was the shooter. Under these circumstances, defendant cannot now argue that any part of the material in Sherron's affidavit was "newly discovered" evidence not known to him at or before trial. *Edwards,* 2012 IL 111711, ¶ 34; *People v. Barnslater,* 373 Ill. App. 3d 512, 523-23 (2007).

¶ 14 We also fail to see how McGee, or the facts presented in her affidavit, were unknown to defendant either before or during trial. McGee claimed that defendant "did not shoot [the victim] because I observed the face of the young boy who shot [the victim]," and that immediately after the shooting, she overheard two individuals, Maurice Foggey and Alonzo Portwood, state to a crowd of people that " 'we don't know which one of them [*sic*] Stones shot [the victim], but when the police arrive on the scene and start questioning anyone of you, say that [defendant] shot [him] because [defendant] been giving the G.D.'s a lot of trouble.' " McGee also stated that she had known defendant and had seen him about 20 times in the year leading up to the shooting, but had only learned of his 1993 conviction in 2007.

¶ 15 Defendant acknowledged in his affidavit that he had first met McGee in 1991, the year before the shooting, which further demonstrates that McGee was known to defendant at the time of the shooting. It is thus apparent that McGee's potential testimony could have been discovered sooner through the exercise of due diligence, and that it does not constitute newly discovered evidence. *Ortiz,* 235 Ill. 2d at 334.

¶ 16 Moreover, defendant is entitled to relief on his claim of actual innocence only if the evidence is of such a conclusive character that it would probably change the result on retrial. *People v. Harris,* 206 Ill. 2d 293, 301 (2002). The evidence proffered by defendant in this case is not of such character. Defendant's conviction was based on his own confession and the testimony of two eyewitnesses who positively identified him at, or leaving, the scene of the shooting. At trial, the defense presented witnesses asserting that another boy, Hubert Wilson, shot the victim. Defendant's brother, a friend, Sherron, and defendant, testified to that effect, and claimed that the police had simply coerced any of the statements to the contrary. The jury heard the testimony of these witnesses as well as the same facts presented in the affidavits. We thus conclude that the affidavits of Sherron and McGee do not raise the probability that it is more likely than not that no reasonable juror would have convicted defendant in light of that new evidence; accordingly, we affirm the circuit court's judgement denying defendant leave to file a successive petition. *Edwards,* 2012 IL 111711, ¶ 41.

¶ 17 We have also considered defendant's assertions that in *Edwards,* the supreme court adopted the federal "gateway" standard for successive petitions, and that this court employed a heightened "clear and convincing evidence" standard in affirming the circuit court's judgment denying him leave to file a successive petition. Both assertions, however, are unfounded. There is no "gateway" requirement contained in the Act, and we do not read *Edwards* as creating one. Rather, we observe that the supreme court in *Edwards* merely noted that the legislative history of

the Act supported its conclusion that the "colorable claim of actual innocence" formulation employed by federal courts in the context of the fundamental miscarriage of justice exception should apply to a successive petition, as opposed to the first stage "gist" standard urged by defendant. *Edwards,* 2012 IL 111711, ¶ 28.

¶ 18 The supreme court specifically referenced the statutory requirement that one seeking to file a successive petition first obtain "leave of court" (720 ILCS 5/122-1(f) (West 2008)), and noted the corresponding burden of presenting sufficient documentation to permit the circuit court to make that determination. *Edwards,* 2012 IL 111711, ¶ 24 (citing *Tidwell*, 236 Ill. 2d at 157). The question is whether defendant's request for leave of court and his supporting documentation raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence, and not whether he meets the "gateway" standard of innocence. *Edwards,* 2012 IL 111711, ¶ 31.

¶ 19 In answering that question in the negative, we applied the "colorable claim of actual innocence" standard set forth in *Edwards,* 2012 IL 111711, ¶ 24, and not the heightened clear and convincing evidence standard, as suggested by defendant. We therefore conclude that *Edwards* does not warrant a different result in this case.

¶ 20 We also find no merit in defendant's contention that the circuit court improperly assessed $105 in fees pursuant to section 22-105(b) of the Code of Civil Procedure (735 ILCS 5/22-105(b) (West 2006)), because his petition raised the gist of a claim of newly discovered evidence of actual innocence. The purpose of section 22-105 is to stem the tide of frivolous filing by prisoners who have been convicted and, in most instances, have had their cases subjected to additional forms of appellate review." *People v. Conick,* 232 Ill. 2d 132, 143 (2008). It is also to compensate courts for some of the expense incurred in adjudicating frivolous post-conviction

petitions, whether initial or successive. *People v. Alcozer,* 241 Ill. 2d 248, 261 (2011) (citing *Conick,* 232 Ill. 2d at 141).

¶ 21 The record shows that defendant previously filed a direct appeal and three subsequent petitions, all of which were unsuccessful. Thereafter, the circuit court denied defendant leave to file the subject successive post-conviction petition where he failed to set forth a cognizable claim upon which relief could be granted. Given this history, any determination that the circuit court improperly assessed frivolous filing fees to defendant's third successive post-conviction petition would be incongruous with the purpose of the statute. *Conick,* 232 Ill. 2d at 144. We, therefore, find no error in the assessment of the filing fees under section 22-105(b) of the Code. 735 ILCS 5/22-105(b) (West 2006).

¶ 22 Accordingly, we affirm the order of the circuit court of Cook County denying defendant leave to file a successive petition.

¶ 23 Affirmed.