2012 IL App (1st) 091083-U

SECOND DIVISION
September 25, 2012

No. 1-09-1083



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. 01 CR 5087 |
| | ) | |
| TONIAC JACKSON, | ) | Honorable |
| | ) | Kevin M. Sheehan, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE CONNORS delivered the judgment of the court.
Justices Karnezis and Cunningham concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Circuit court's order denying defendant leave to file a successive post-conviction petition affirmed where defendant failed to set forth a colorable claim of actual innocence as a matter of law.

¶ 2 Defendant Toniac Jackson appeals from the denial of 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 2008). He contends that the circuit court erred in denying his motion because he presented a non-frivolous claim of actual innocence based on newly discovered evidence, and was exempt from satisfying the cause and prejudice test.

¶ 3 We initially affirmed the circuit court's decision denying defendant leave to file a successive post-conviction petition on November 16, 2010, finding that only one of defendant's

supporting affidavits constituted "newly discovered evidence," and that neither affidavit established his actual innocence. *People v. Jackson*, No. 1-09-1083 (2010) (unpublished order under Supreme Court Rule 23). Thereafter, the supreme court entered a supervisory order directing this court to vacate that order and reconsider the matter in light of *People v. Edwards*, 2012 IL 111711. *People v. Jackson*, No. 111917 (Ill. May 30, 2012). We have allowed the parties to submit supplemental briefs on the impact of *Edwards* in the instant case, and after considering the matter further, we conclude that the circuit court did not err in denying defendant leave to file a successive petition.

¶ 4 The record shows that defendant and co-defendants Richard Hodges and David Jackson (David), who are not parties to this appeal, were charged with nine counts of first degree murder, six counts of attempted first degree murder, four counts of aggravated discharge of a firearm, and two counts of unlawful use of a weapon by a felon. The three cases were severed, but tried simultaneously. At the close of defendant's bench trial, the court found him guilty of first degree murder, aggravated discharge of a firearm, and unlawful use of a weapon by a felon. He was then sentenced to 50 years' imprisonment for first degree murder, which included a 20-year enhancement for personally discharging a firearm during the commission of the murder, to be served consecutively with concurrent terms of 10 years for aggravated discharge of a firearm, and 5 years for unlawful use of a weapon by a felon.

¶ 5 This court affirmed that judgment on direct appeal over defendant's claims that the State failed to prove him guilty beyond a reasonable doubt of aggravated discharge of a firearm, that the trial court improperly considered a witness' grand jury testimony in finding him guilty, and that the statute mandating the 20-year enhancement on his murder sentence was unconstitutional. *People v. Jackson*, No. 1-03-3216 (2005) (unpublished order under Supreme Court Rule 23).

¶ 6 On July 22, 2005, defendant filed a *pro se* post-conviction petition, alleging, *inter alia*, that he was denied his right to testify and that his trial counsel was ineffective for failing to allow him to do so. The circuit court summarily dismissed defendant's post-conviction petition, and this court affirmed that dismissal on appeal. *People v. Jackson*, No. 1-05-3985 (2007) (unpublished order under Supreme Court Rule 23).

¶ 7 On February 18, 2009, defendant filed a *pro se* motion for leave to file a successive post-conviction petition in which he asserted a "free standing claim of actual innocence" pursuant to *People v. Washington*, 171 Ill. 2d 475 (1990). Defendant attached to his motion an affidavit from Dontay Sanders stating that he witnessed the crime and did not see defendant shoot anyone; and an affidavit from David Jackson stating that defendant was on the ground when the shooting started, and that he did not own or toss the murder weapon. Defendant also included his own affidavit stating that on the date of the incident, he did not have a gun, did not argue with, or shoot at, the victim, that he did not plan or agree to assist Hodges in the shooting, and that he recently discovered that Sanders had witnessed the incident. The trial court denied defendant's motion, noting that he had failed to satisfy the cause and prejudice test, and "made no showing that the absence of the claim now presented so infected the trial that his resulting conviction or sentence violated due process."

¶ 8 Defendant here contends that the circuit court improperly denied his motion because he set forth a non-frivolous claim of actual innocence, and was excused from showing cause and prejudice. The State agrees that defendant was excused from such a showing, but maintains that the denial of defendant's motion was proper because the representations in defendant's affidavits did not constitute newly discovered evidence or exonerate him from the crime. The court's decision to deny defendant leave to file a successive petition is controlled by statute, and we

review the court's compliance with statutory procedure *de novo*. *People v. Barber*, 381 Ill. App. 3d 558, 559 (2008), citing *Woods v. Cole*, 181 Ill. 2d 512 (1998).

¶ 9 The Act contemplates the filing of only one post-conviction petition, and the strict application of this statutory bar will be relaxed only when fundamental fairness so requires. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456-458 (2002). In order to determine whether fundamental fairness requires an exception to the bar on successive petitions, we generally employ the cause and prejudice test. *Pitsonbarger*, 205 Ill. 2d at 459. However, the supreme court has recognized that defendant need not establish cause and prejudice in a motion for leave to file a successive petition if he can show a valid freestanding claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 330-331 (2009).

¶ 10 To do so, defendant's petition must be based on newly discovered evidence that could potentially exonerate him. *People v. Anderson*, 401 Ill. App. 3d 134, 140 (2010), citing *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). This requires supporting evidence that is new, material, noncumulative, and of such conclusive character as would probably change the result on retrial. *People v. Simmons*, 388 Ill. App. 3d 599, 614 (2009).

¶ 11 Here, the record shows that James Wilson gave a pre-trial statement to an assistant State's Attorney (ASA) stating that on the date of the incident, defendant got into an argument with the victim at a gas station, then both defendant and Hodges chased and shot at the victim. At trial, Wilson recanted his statement and denied that defendant had shot the victim. Hodges also gave a pre-trial statement to an ASA, stating that he, defendant and David drove to the gas station together, and that he and defendant shot at the victim, but claimed that it was in self-defense. In addition, Chicago police officer John Haritos testified that when he heard gunshots that night and saw people running to a Geo Tracker, he followed the vehicle until it pulled over, and he saw defendant exit the passenger side and drop a gun.

¶ 12 To support his present claim of actual innocence, defendant proffered the affidavit of Sanders, who stated that he was currently incarcerated, and was at the station where the shooting occurred. Sanders averred that he arrived at the gas station in the same van as the victim, and that defendant was not fighting with the victim that night. He also stated that while he was ducking in the back seat of the van, he saw defendant drop to the ground during the shooting. He further averred that he never lost sight of defendant and did not see him shoot anyone, but saw Hodges shooting and chasing the victim. Sanders further stated that he would have testified on defendant's behalf, but he was unaware that he could have come forward to "tell [his] story."

¶ 13 Defendant also proffered the affidavit of his co-defendant David Jackson, in which he contradicted his prior statement to an ASA. He claimed that defendant was not arguing with the victim on the date of the crime, and that he did not have a gun. David further attested that he owned the gun that the police saw defendant throw out of a car, and that it was he who discarded it. He also stated that he did not testify to these facts at trial because his attorney told him that he did not need to do so. Defendant contends that these affidavits are newly discovered evidence which establish that he did not shoot at the victim and was not accountable for Hodges' actions because he was unaware that Hodges had a gun.

¶ 14 Newly discovered evidence is evidence that was unavailable at trial and could not have been discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002). However, evidence is not newly discovered when it presents facts already known to defendant, even if the source of those facts had been unknown, unavailable or uncooperative. *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (2010).

¶ 15 There is no indication that Sanders +was interviewed by police after the crime and he did not admit to having witnessed the shooting until at least a year after the trial. Sanders claimed in his affidavit that he was ducking down inside a van during the shooting, and thus defendant may

not have seen him during the incident. In addition, and unlike Wilson, Sanders had not given a prior statement identifying defendant as the shooter. In *People v. Hodges*, 234 Ill. 2d 1, 8 (2009), the supreme court found that Sanders' testimony was newly discovered evidence, since he was unknown as a witness when the trial of Hodges, David and defendant took place. Accordingly, we find that Sanders' testimony qualifies as newly discovered evidence. *Ortiz*, 235 Ill. 2d at 334.

¶ 16 In contrast, if David was in the same vehicle as defendant after the incident, defendant had to know before trial that it was David who discarded the gun, even if David had been unwilling to testify to those facts at trial. Although defendant could not have compelled David to testify in his favor, we find that his testimony was not newly discovered evidence because it presented facts already known to defendant. *Jarrett*, 399 Ill. App. 3d at 723.

¶ 17 That said, we further find that defendant is unable to establish that the proposed testimony of either Sanders or David was of such conclusive character that it would probably have changed the result on retrial. The supreme court has held that, in addition to being newly discovered, evidence in support of an actual innocence claim must be material to the issue, and not merely cumulative of other trial evidence. *Ortiz*, 235 Ill. 2d at 334. A claim of actual innocence does not involve an analysis of whether the evidence at trial was sufficient to establish defendant's guilt beyond a reasonable doubt; the hallmark of such a claim means exoneration, or total vindication. *People v. Savory*, 309 Ill. App. 3d 408, 415 (1999).

¶ 18 In this case, taking Sanders' affidavit as true, his representation that defendant did not shoot at the victim would be cumulative of Wilson's recanted trial testimony denying defendant's participation in the shooting. Moreover, testimony that defendant was not fighting with the victim and dropped to the ground during the shooting could be used in considering the weight of Wilson's pre-trial statement to the ASA; however, it does not exonerate him, since it does not

negate his presence at the scene with the other shooter and his capture with David after fleeing with him from the scene. *Anderson*, 401 Ill. App. 3d at 141.

¶ 19 Similarly, David's averment that the gun police saw defendant drop belonged to him does not exonerate defendant's accountability for the crime, which was established by the evidence at trial. *Anderson*, 401 Ill. App. 3d at 141. However, even assuming, *arguendo*, that Sanders' affidavit casts doubt on whether defendant was a shooter, it does not constitute the exonerating evidence required for a claim of actual innocence. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). Sanders' affidavit does not contradict Officer Haritos' testimony that it was defendant who dropped the weapon, or Hodge's statement that defendant shot at the victim. In addition, David's representation that he threw the gun out of the vehicle does not vindicate defendant, since it could only be used in weighing Officer Haritos' trial testimony that he saw defendant exit the vehicle and discard a handgun. *Anderson*, 401 Ill. App. 3d at 141. Accordingly, we find that the new evidence presented by defendant fails to establish his actual innocence.

¶ 20 In reaching that conclusion, we find that defendant's reliance on *Hodges*, 234 Ill. 2d 1, and *Ortiz*, 235 Ill. 2d 319, is misplaced. In *Hodges*, 234 Ill. 2d at 8, Sanders' testimony pertained to the victim's actions, as that defendant raised a claim of self-defense; while here, Sanders' affidavit relates to a different set of facts, *i.e.*, defendant's actions during the incident, dropping to the ground during the shooting. Moreover, the new evidence in *Ortiz*, 235 Ill. 2d at 326-337, was that defendant was not observed at the crime scene, while here, neither Sanders nor David negated in their affidavits defendant's presence at the scene, or that the bullets recovered from the scene and the victim were fired from the gun defendant was seen discarding as he exited the same vehicle as David, and his capture with David after both fled from the scene.

¶ 21 We also find that our conclusion is not foreclosed by the supreme court's recent decision in *Edwards*. In that case, the supreme court held that leave of court should only be denied where

it is clear from a review of the successive petition and supporting documentation that defendant cannot set forth a colorable claim of actual innocence as a matter of law. *Edwards*, 2012 IL 111711, ¶ 24. In other words, "leave of court should be granted when [defendant's] 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.' " *Edwards*, 2012 IL 111711, ¶ 24, quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

¶ 22 Here, as discussed above, we find that the proposed testimony of Sanders and David was not of such conclusive character that it would probably have changed the result on retrial. To the extent that defendant questions the import of this finding in light of *Edwards*, we clarify that the affidavits of Sanders and David 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. *Edwards*, 2012 IL 111711, ¶ 24.

¶ 23 In reaching that conclusion, we have considered defendant's assertions that, in *Edwards*, the supreme court adopted the federal "gateway" standard for successive petitions, and that this court employed a much stricter standard, akin to a "clear and convincing evidence" standard, in affirming the circuit court's order denying defendant leave to file a successive petition. We find both assertions unfounded.

¶ 24 Initially, we observe that there is no "gateway" requirement contained in the Act, and, contrary to defendant's claim, we do not read *Edwards* as creating one. In *Edwards*, the supreme court 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 in that case. *Edwards*, 2012 IL 111711, ¶ 28.

¶ 25 Indeed, the supreme court referenced the statutory requirement that one seeking to file a successive petition first obtain "leave of court" (725 ILCS 5/122-1(f) (West 2008)), and noted his corresponding burden of providing sufficient documentation to permit the circuit court to make that determination. *Edwards*, 2012 IL 111711, ¶ 24, citing *People v. Tidwell*, 236 Ill. 2d 150, 157, 161 (2010). The question then is not, whether defendant meets the "gateway" standard of innocence, as defendant suggests, but rather, whether his 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. *Edwards*, 2012 IL 111711, ¶ 31. As discussed above, we answered that question in the negative and find no merit to defendant's contrary claim. In doing so, we adhered to the "colorable claim of actual innocence" standard set forth in *Edwards* (*Edwards*, 2012 IL 111711, ¶ 24), and did not apply the stricter clear and convincing evidence standard, as suggested by defendant, in finding that his affidavits were not "exonerating" enough.

¶ 26 For the foregoing reasons, we conclude that the circuit court erred in using the cause and prejudice test in this case, but affirm its decision denying defendant leave to file a successive petition based on the preclusion doctrines addressed in *Ortiz*. *Edwards*, 2012 IL 111711, ¶ 41; *Anderson*, 401 Ill. App. 3d at 141.

¶ 27 Affirmed.