

No. 1-09-3003

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).

FIFTH DIVISION
March 25, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 93 CR 27501
	)	
AARON DAVIES,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices HOWSE and EPSTEIN concurred in the judgment.

O R D E R

Held: Denial of motion for leave to file a fifth successive post-conviction petition affirmed where defendant failed to set forth a cognizable claim of actual innocence; order assessing defendant costs and fees of \$105 for frivolous filing affirmed.

Defendant Aaron Davies appeals from an order of the circuit court of Cook County denying his *pro se* motion for leave to file a fifth successive petition for relief under the Post-Conviction

Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). On appeal, he contends that the court erred in doing so where he presented a freestanding claim of actual innocence and demonstrated cause and prejudice for failing to previously assert a *Brady* violation. He also contends that the circuit court's assessment of costs and fees of \$105 pursuant to section 22-105 of the Code of Civil Procedure (Code) (735 ILCS 5/22-105(a) (West 2008)) violated the due process and equal protection clauses of the Illinois and federal constitutions and must be vacated.

On December 7, 1994, defendant and his co-defendant, Ray George, were found guilty of the first-degree murder of Fredrick Williams and the aggravated battery with a firearm of Eric Carter. Defendant was then sentenced on these jury convictions to consecutive, respective terms of 40 and 25 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Davies*, No. 1-95-0640 (1996) (unpublished order under Supreme Court Rule 23). We also affirmed the summary dismissal of two of the three *pro se* post-conviction petitions filed and appealed by defendant (*People v. Davies*, Nos. 1-98-1318 (1998), 1-99-4346 (2002) (unpublished orders under Supreme Court Rule 23)), as well as the circuit court's denial of defendant's request for leave to file a fourth successive post-conviction petition (*People v. Davies*, No. 1-07-1085 (2008) (unpublished order under Supreme Court Rule 23)).

On June 11, 2009, defendant filed the instant motion for leave to file a successive post-conviction petition in which he asserted a claim of actual innocence based on newly discovered evidence, *i.e.*, the affidavit of the aggravated battery victim, Eric Carter. He also alleged that the State violated the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the statements made by Carter to police, and that his trial counsel was ineffective for failing to conduct a proper investigation and interview Carter prior to trial. In support of his motion, defendant attached, *inter alia*, the affidavit of Carter, in which he stated, in relevant part, that defendant was not the shooter, that Carter had told this to a police officer who conducted a photo lineup in the case, and that Carter had told the assistant State's Attorney that he would be able to testify at defendant's trial.

On September 28, 2009, the circuit court denied defendant's motion, finding, *inter alia*, that his actual innocence and *Brady* claims were barred by *res judicata* because they were raised in his fourth post-conviction petition, and that the motion was frivolous as it lacked an arguable basis in law or in fact. Based on its finding that the motion was frivolous, the court assessed \$105 in costs and fees pursuant to section 22-105 of the Code. This appeal follows.

Under the Act, proceedings are initiated by the filing of a petition verified by affidavit in the circuit court in which the conviction took place (725 ILCS 5/122-1(b) (West 2008)); but where, as here, defendant seeks to file a successive post-conviction petition, leave of court must first be obtained (725 ILCS 5/122-1(f)). The Act provides that the circuit court may grant leave to file a successive post-conviction petition where defendant demonstrates cause for his failure to bring the claim in his initial post-conviction proceedings and prejudice as a result of that failure. 725 ILCS 5/122-1(f).

However, the cause and prejudice requirement is excused where defendant sets forth a claim of actual innocence in a successive post-conviction petition. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). In addition, the preclusion doctrine of *res judicata* does not apply where defendant presents newly discovered evidence in support of his claim because, in that situation, he is not making the same "claim." *Ortiz*, 235 Ill. 2d at 332. We review *de novo* the circuit court's denial of defendant's motion for leave to file a successive post-conviction petition. *People v. Anderson*, 402 Ill. App. 3d 1017, 1028-29 (2010).

To succeed on a claim of actual innocence, defendant must present evidence that was not available at trial and could not have been discovered sooner through diligence, that is material and noncumulative, and that is of such conclusive character that

it would probably change the result on retrial. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004).

The record shows that defendant obtained Carter's affidavit 11 years after his conviction. A year later, he used it to support the claims of actual innocence, a *Brady* violation, and ineffective assistance of trial counsel in his fourth successive post-conviction petition. Defendant also stated in that petition that he had explained to his trial counsel that "Eric CARTER could exculpate him at trial."

Defendant relies on the same affidavit to support his present claim of actual innocence based on newly discovered evidence. He maintains that Carter's affidavit is newly discovered evidence because he could not locate Carter earlier due to his own incarceration, his trial counsel's failure to investigate the matter, and Carter's incarceration in another state.

This court has held that evidence is not considered newly discovered when it consists of facts known to defendant at trial, even if the source of the facts was unknown, unavailable, or uncooperative. *People v. Gillespie*, Nos. 1-08-3016, 1-10-0702, slip op. at 27 (Ill. App. Dec. 29, 2010). Because the record here shows that defendant knew the substance of the evidence in Carter's affidavit at trial, that evidence cannot be considered newly discovered even in light of defendant's difficulties in

obtaining it. *Gillespie*, Nos. 1-08-3016, 1-10-0702, slip op. at 27. Under these circumstances, we find that defendant's claim of actual innocence is not supported by newly discovered evidence, and, thus, must fail. *Morgan*, 212 Ill. 2d at 154.

In addition, under the facts of this case, the record shows that the jury was presented with overwhelming evidence of defendant's guilt. As such, Carter's proposed testimony would have merely impeached the State's witnesses at trial rather than exonerate him, and, thus, is not of such conclusive character as to justify post-conviction relief. *People v. Barnslater*, 373 Ill. App. 3d 512, 521, 523 (2007).

Defendant also contends that the State violated *Brady* by suppressing Carter's statement to police, relying on Carter's affidavit in support. However, defendant may not use the same evidence supporting his claim of actual innocence to supplement additional claims of constitutional violations with respect to his trial. *People v. Hopley*, 182 Ill. 2d 404, 444 (1998). Accordingly, we find that defendant has not properly raised a claim of actual innocence to warrant further proceedings under the Act. *Hopley*, 182 Ill. 2d at 444.

Defendant finally contends that the circuit court's assessment of \$105 in costs and fees under section 22-105 of the Code violated his constitutional rights to due process and equal protection. This court has repeatedly rejected these same

arguments raised by defendant here, and we find no reason to depart from our prior decisions in this case. *People v. Jarrett*, 399 Ill. App. 3d 715, 729 (2010); *People v. Smith*, 383 Ill. App. 3d 1078, 1095-96 (2008); *People v. Carter*, 377 Ill. App. 3d 91, 104-06 (2007); *People v. Hunter*, 376 Ill. App. 3d 639, 647-48 (2007); *People v. Gale*, 376 Ill. App. 3d 344, 363 (2007). This includes our determination that *Rinaldi v. Yeager*, 384 U.S. 305 (1966) is factually distinguishable and unpersuasive. *Jarrett*, 399 Ill. App. 3d at 729.

Accordingly, we affirm the orders of the circuit court of Cook County denying defendant's motion for leave to file a fifth successive post-conviction petition and assessing him costs and fees for filing a frivolous petition.

Affirmed.