2012 IL App (1st) 101524-U

FOURTH DIVISION
March 29, 2012

No. 1-10-1524

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. 86 CR 1952
	)	
ELBERT WILLIAMS,	)	Honorable
	)	Lawrence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant's claim of actual innocence was not newly discovered, material, or of such conclusive character that it would probably change the result on retrial, the trial court properly denied defendant leave to file his successive *pro se* post-conviction petition.

¶ 2 Defendant Elbert Williams appeals from an order of the circuit court denying him leave to file a successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant contends that he stated the gist of an

actual innocence claim based on the newly discovered evidence in Arnold Joyner's affidavit. We affirm.

¶ 3 Following a 1987 jury trial, defendant was convicted of two counts of murder because he admittedly shot and killed Larry Crittendon and Napolean (Nate) Williams on January 21, 1986, at 54th and Dearborn Streets in Chicago. At trial, Margaret McMillan testified that at about 3:45 a.m. on the date in question, she went to her bedroom window after hearing two gunshots. She heard more gunshots and saw a flame emitting from a gun that was being held by a man wearing a brown jacket, later identified as defendant. According to McMillan, the man holding the gun was firing towards the ground. Lenia Clayton testified that at about 3:30 a.m. on January 21, she heard arguing outside of her bedroom window. When she looked out of her window, she saw defendant fire two shots at a second man, who during this time was talking and throwing up his hands. Clayton heard a third man say, "Bones,[1] what are you going to shoot me for. Don't shoot me." Clayton heard two more shots and saw the third man fall. She then testified that defendant returned to the first victim and fired his gun again.

¶ 4 Defendant advanced a claim of self-defense and testified that he was previously shot by Nate, who was accompanied by Larry, on January 6, 1986. Defendant further testified that on January 21, 1986, he shot Nate and Larry in self-defense where the victims forced him and his girlfriend to drive them to 54th and Dearborn Streets and tried to force him to go into a building. Defendant asserted that when he refused, Larry reached into his pocket and started to pull out something. In response, defendant shot both men and left the scene with his girlfriend. After the jury convicted defendant of two counts of murder, the trial court sentenced him to natural life imprisonment.

[1] Defendant apparently had the nickname "Bone."

¶ 5 On direct appeal, this court affirmed his convictions and sentence. *People v. Williams*, 205 Ill. App. 3d 751 (1989). Defendant subsequently filed several unsuccessful collateral challenges to his convictions, many of which we detailed in our order disposing of his fifth post-conviction petition. *People v. Williams*, No. 1-04-2459 (2005) (unpublished order under Supreme Court Rule 23).

¶ 6 On March 10, 2010, defendant filed the successive *pro se* post-conviction petition at bar, alleging a claim of actual innocence based on newly discovered evidence. According to defendant's petition, Arnold Joyner, if called to testify, would state that an individual named Larry attempted to hire him to kill defendant in 1985. Defendant attached an affidavit signed by Joyner, notarized, and dated January 26, 2010. Joyner attested that in November 1985, "Don Larry," a/k/a "Gangster Larry," asked him to help him kill "Bone." Joyner attested that he was afraid of Larry and refused to participate. Joyner further averred that he was subsequently imprisoned in December 1985 and was released in February 1986. Upon his release, Joyner stated that he heard "Don-Gangster Larry" was dead and "Bone" was in prison for killing him. Joyner then met defendant at Stateville where Joyner told defendant that "Larry" had solicited him to aid in killing defendant. On April 9, 2010, the circuit court denied defendant leave to file his successive petition.

¶ 7 On appeal, defendant contends that the circuit court erred in denying him leave to file his successive post-conviction petition because his petition presented a viable claim of actual innocence. He argues that the affidavit of Joyner established that he was innocent of the murders.

¶ 8 The question on appeal is whether the trial court erred when it denied defendant leave to file his successive petition, which we review *de novo*. *People v. Williams*, 392 Ill. App. 3d 359, 367 (2009).

¶ 9 The Act contemplates the filing of only one post-conviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). For a claim in a successive petition to be considered on its merits, the petition must meet the cause-and-prejudice test, *i.e.*, the defendant must establish good cause for failing to raise the claimed error in prior proceedings and actual prejudice resulting from the error. *People v. Tenner*, 206 Ill. 2d 381, 393 (2002). However, the cause and prejudice requirements do not apply where the successive petition presents a freestanding claim of actual innocence. *Pitsonbarger*, 205 Ill. 2d at 459; see also *People v. Ortiz*, 235 Ill. 2d 319, 329 (2009).

¶ 10 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, was material and noncumulative, and was of such conclusive character that it would probably change the result on retrial. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Here, defendant's affirmative defense of self-defense, if established, would have exonerated him of murder. See *People v. Eveans*, 277 Ill. App. 3d 36, 47 (1996) (self-defense is a justifying and exonerating circumstance). However, defendant's actual innocence claim fails because it could not be considered newly discovered, material, or of such conclusive character that it could possibly change the result on retrial.

¶ 11 First, defendant's claim is not newly discovered evidence. "Evidence is not newly discovered when it presents facts already known to the defendant at or prior to trial, though the sources of those facts may have been unknown, unavailable, or uncooperative." *People v. Gillespie*, 407 Ill. App. 3d 113, 131 (2010). Here, Joyner's affidavit claims that "Larry" offered him money to kill defendant. This evidence is not newly discovered because, in his petition, defendant specifically states that Larry's alleged offer to Joyner is "material to petitioner's long ago claim that Williams and Crittendon were trying to kill petitioner and, that someone paid Crittendon to kill petitioner." Moreover, defendant acknowledged at trial that one of the

detectives that interviewed him after his arrest told him that an individual named "Tubb" had a "contract out on [his] life." Defendant's statements clearly indicate that he was aware of the alleged plot to kill him before Joyner provided his affidavit. Furthermore, defendant testified at trial that Larry was with Nate when Nate shot defendant on January 6, 1986. Despite the fact that defendant was unaware of Joyner's knowledge of the plot to kill him, he knew of the underlying facts prior to trial, and thus the evidence cannot be considered newly discovered.

¶ 12 Second, Joyner's affidavit is not material. Materiality is demonstrated by showing that the favorable evidence could put the entire case in such a different light as to undermine confidence in the verdict. *People v. Smith*, 352 Ill. App. 3d 1095, 1102 (2004). Here, Joyner's affidavit only refers to a conversation between Joyner and "Larry" in November 1985, which was about two months before defendant shot and killed the victims. Joyner does not attest to any of the events that occurred on the night of shooting in question, nor does he claim that he was at the scene or saw what happened. He was unable to corroborate defendant's assertions that he was forced into a car by the victims, that they tried to force him into a building, and that he shot them after Crittendon reached into his pocket. In addition, Joyner was unable to identify the "Larry" whom he spoke to as the victim Larry Crittendon.

¶ 13 Third, Joyner's affidavit is not so conclusive as to change the outcome on retrial. Here, as this court found on direct appeal, the evidence supports the murder convictions and shows that defendant knowingly and intentionally killed the two victims. *Williams*, 205 Ill. App. 3d at 762. In detailing the evidence on direct appeal, we specifically noted that defendant shot one victim twice at close range, while he was waving his hands to ward off harm, returned to where the second victim was located, shot him at close range despite his pleas, and then returned to where the first was located and fired another shot. *Williams*, 205 Ill. App. 3d at 760.

¶ 14 Only the testimony of defendant supports his notion that he attempted to avoid the shooting and fired his gun in self-defense. There was no evidence in the record of any prior dispute between defendant and the victims other than defendant's claim, and no weapon was found on either victim following the January 21 shooting. Moreover, the trier of fact believed the testimony of both eyewitnesses, McMillan and Clayton, was credible and corroborated each other's version of the events. Defendant's account, on the other hand, was uncorroborated at trial, and remains so despite Joyner's affidavit. As previously stated, Joyner could only testify to a conversation with "Larry" that happened months before the shooting. He cannot testify to the events surrounding the shooting because he was not present. In fact, Joyner's affidavit does not even indicate that he would be willing to testify to the contents of his affidavit in court. See *People v. Brown*, 371 Ill. App. 3d 972, 982 (2007) (stating that an affidavit must not only identify the source of the evidence, but must also identify the availability of the evidence). We thus find that Joyner's affidavit is not of such a conclusive character that the result of the case on retrial would change. In turn, we find defendant has not demonstrated a claim of actual innocence.

¶ 15 In reaching this conclusion, we find *Ortiz*, 235 Ill. 2d at 319, relied on by defendant, clearly distinguishable from the case at bar. In *Ortiz*, 235 Ill. 2d at 335-37, our supreme court granted the defendant a new trial after an evidentiary hearing based on defendant's actual innocence claim. The supreme court found that the actual innocence standard was met where the claim was supported by a newly discovered eyewitness to the crimes who testified at the evidentiary hearing that the defendant was not present during the commission of the crimes. *Ortiz*, 235 Ill. 2d at 326-27. In contrast to *Ortiz*, the present actual innocence claim is predicated on Joyner's affidavit which expressly provides that he did not witness the crime. An affidavit from an individual who has no personal knowledge concerning the subject crime cannot support a defendant's claim of actual innocence. See *Gillespie*, 407 Ill. App. 3d at 135 (finding that

affidavits which merely affirm that the affiants had no personal knowledge concerning the murder cannot support a claim of actual innocence).

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 17 Affirmed.