

FIFTH DIVISION
March 22, 2013

No. 1-11-0044

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).

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. 91 CR 26586
)	
CARLOS MONTANEZ,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge Presiding.

ORDER

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

HELD: Trial court's summary dismissal of defendant's *pro se* successive post-conviction petition affirmed because defendant failed to submit evidence of his actual innocence or satisfy the cause and prejudice test of the Post-Conviction Hearing Act.

¶ 1 Following a bench trial, defendant Carlos Montanez was convicted of first degree murder,

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armed robbery, armed violence and conspiracy. He was subsequently sentenced to natural life imprisonment for murder concurrent with a 30-year prison term for armed robbery. Defendant's conviction and sentence were affirmed by this court on direct appeal. *People v. Montanez*, No. 1-93-3949 (1995) (unpublished order under Supreme Court Rule 23). In June 2001, defendant filed a post-conviction petition which was summarily dismissed by the trial court and affirmed on appeal in a summary order. *People v. Montanez*, No. 1-01-3449 (2002) (unpublished order under Supreme Court Rule 23). Defendant filed the successive post-conviction petition at issue in this appeal on September 23, 2010. The trial court summarily dismissed defendant's petition and defendant now appeals. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 On September 27, 1991, Thillens Cashier, Inc., an armored car check-cashing service located at 4250 West Shubert in Chicago, was robbed by several armed men. Ted McWherter, an armed guard who was employed by Thillens, was shot during the robbery and subsequently died from his injuries. After a bench trial held in 1993, defendant was sentenced to natural life imprisonment for murder with a concurrent 30-year prison term for armed robbery.

¶ 4 Prior to his trial, defendant filed a motion to suppress. Defendant alleged that he was unable to understand his *Miranda* rights and that his statement was obtained through psychological coercion. In 1992, a hearing was held on his motion at which defendant, Detective Reynaldo Guevara, and Assistant State's Attorney (ASA) Fischer testified. Detective Guevara testified that on October 7, 1991, he interrogated defendant in Spanish after his arrest in the presence of ASA Fischer. Detective Guevara said that defendant did not appear to be under the

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influence of narcotics and that defendant made oral statements, which were not transcribed or written down. ASA Fischer testified that he did not speak Spanish. The trial court subsequently denied defendant's motion to suppress.

¶ 5 At trial, Stanley Amenowicz testified that he was working as a security guard at Thillens when the robbery occurred. Amenowicz, who was accompanied by two other security guards, was assigned to monitor video surveillance cameras from a room containing a cash box and a door which opened to the street. As he watched the monitors, Amenowicz saw four men outside the building running toward the doorway leading to the street. Amenowicz then told Charles Wasilk, another security guard, to take a look. As Wasilk approached the door to the street, the door was pushed open and a gun was pointed through the door and fired. Amenowicz was then forced to kneel on the floor with his head on the desk while someone placed a gun to his head and asked if he had a gun. Someone then removed the cash box and the men ran from the room.

¶ 6 Charles Wasilk testified that after Amenowicz alerted him to the presence of men on one of the monitors, he walked over and viewed the monitors. Wasilk then walked over to and looked through the window. As he was looking through the window, the door opened, and someone pointed a big silver gun into the room. Wasilk then heard a gunshot and moved into the corner. He then heard one of the offenders direct another to take the cash box.

¶ 7 Carmen Maldonado testified that her roommate worked near the Thillens location and on September 27, 1991, Maldonado went there to meet her roommate for lunch and parked in front of Thillens on Shubert. While she waited for her roommate to come out, she saw some workers

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outside that she recognized and two other men that walked inside Thillens. The two men, who were both Hispanic, stayed inside for approximately one and one-half minutes before leaving. She described defendant in court as one of the two men. According to Maldonado, defendant asked the workers outside if they were hiring, and he was directed to go to the front entrance. Maldonado stated that defendant and the other man walked over to a parked car with two other individuals inside instead of going to the front entrance. She subsequently saw the four men enter the building and exit a short time later. Maldonado recognized one of the four men as an acquaintance.

¶ 8 The parties stipulated that Dr. Donoghue, the Medical Examiner of Cook County, if called, would testify that he performed an autopsy on Ted McWherter, the other security guard present in the room. McWherter died from a single gunshot wound to the head.

¶ 9 Defendant, who matched the description of one of the offenders, was arrested and taken to the police station on October 7, 1991. When he was arrested, Montanez had in his possession a .38 caliber revolver with the same serial number as the gun registered to the victim, Ted McWherter. A .44 caliber revolver was recovered at a codefendant's home and a .45 caliber semiautomatic gun was recovered at a different location. Bullet fragments and live .45 cartridges were found at the scene of the shooting. Bullet fragments were also removed from McWherter's body, but could not be matched with a gun; the caliber of those fragments could have been .44 or .45.

¶ 10 Detective Guevara testified he interviewed the defendant at the police station in Spanish. Guevara informed defendant that one of the men previously arrested in connection with the

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shooting had identified defendant as the shooter. He advised defendant of his *Miranda* rights. According to Guevara, defendant then explained that he had planned the robbery two weeks prior to its occurrence and stated that execution of the plan had been delayed in order to obtain additional weapons. Defendant then told Guevara that on September 27, defendant and his accomplices borrowed a van and went to Thillens. When some of defendant's accomplices expressed reservations about the robbery, defendant told them that he would perform the robbery alone if necessary. Defendant then left the van carrying a big gun with a scope and opened the factory door. As he opened the door, defendant saw a guard with a gun stationed inside. He fired a single shot at the guard, and he and his accomplices removed the cash box. Detective Guevara further testified that when he showed defendant a .44 caliber magnum revolver with a scope recovered from one accomplice, defendant identified it as the weapon used to shoot the guard.

¶ 11 Prior to sentencing, defendant made a statement in allocution, acknowledging his presence at the robbery but denying that he killed anyone. After finding defendant eligible for the death penalty, the trial court sentenced defendant to natural life imprisonment for murder, concurrent to a 30-year sentence for armed robbery.

¶ 12 On direct appeal, defendant contended that his life sentence was excessive. This court affirmed, finding that defendant's sentence was not an abuse of discretion. *People v. Montanez*, No. 1-93-3944 (1995) (unpublished order under Supreme Court Rule 23).

¶ 13 Defendant filed his first petition for post-conviction relief in June 2001, challenging his

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life sentence under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).¹ The trial court summarily dismissed the post-conviction petition, which was affirmed on appeal to this court. *People v. Montanez*, No. 1-01-3449 (2002) (unpublished order under Supreme Court Rule 23).

¶ 14 Defendant filed the successive post-conviction petition at issue in this appeal on September 23, 2010. The petition alleged in part that Detective Guevara had threatened to "tear his head off" if he did not tell Guevara what he wanted to hear. The petition also alleged that new evidence would demonstrate that Detective Guevara "systematically used improper techniques to coerce false statements" and that defendant was "actually innocent of the crimes for which he was convicted." The petition further alleged that, if even a fraction of the allegations included had been presented prior to trial, it would have had a dramatic effect on Detective Guevara's credibility.

¶ 15 Defendant's petition relied in part on the post-conviction petitions filed by Gabriel Solache and Arturo Reyes, citing to the appellate court numbers for the appeals from the dismissal of those post-conviction cases. Solache and Reyes both alleged that their confessions were physically coerced by Detective Guevara in 1998, and that there was substantial new evidence that Detective Guevara had systematically used improper techniques, including excessive physical force, to coerce false statements from suspects and others. An appellate court decision in the consolidated appeals of Solache and Reyes was published; *People v. Reyes*, 369 Ill. App. 3d 1 (2006).

¹Although the State contends that defendant filed his first post-conviction petition in 1994, no copy of such petition is in the record. However, the record indicates that defendant filed a motion to reconsider his sentence prior to filing his first post-conviction petition in 2001.

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¶ 16 Defendant's petition also referenced a complaint that had been filed by Melvin Warren with the Chicago Police Department's Office of Professional Standards alleging that Detective Guevara had hit him; noted that a witness in another case, David Velasquez, recanted his identification in a murder case, claiming that he had falsely identified the accused after being threatened by Detective Guevara. This recantation was referenced in the *Reyes* decision. Defendant's petition also cited to *People v. Pena*, 174 Ill. App. 3d 281 (1988), in which the defendant claimed that his confession was involuntary because Detective Guevara repeatedly struck him.

¶ 17 The trial court denied defendant leave to file his successive post-conviction petition in a written order. The trial court ruled that defendant's actual innocence claim was "so bald and so conclusory, it would be difficult if not impossible to analyze his purported evidence based on this criteria." The trial court also stated that defendant failed to attach documentation to support the claim; that the appellate court case numbers for Solache and Reyes were cited without mention of how they supported defendant's claim, and that *Pena* did not constitute newly discovered evidence because it was published prior to defendant's trial.

¶ 18 This timely appeal followed.

¶ 19 ANALYSIS

¶ 20 On appeal, defendant contends that his successive post-conviction petition should be granted because his conviction was primarily based on his confession, which was the result of Detective Guevara's threats of physical violence. Specifically, defendant contends that newly discovered evidence of Detective Guevara's coercion of accused persons to make false confessions and

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witnesses to make false identifications over the years created an arguable claim of innocence.

Alternatively, defendant contends that he made a sufficient showing of cause and prejudice regarding the alleged threat made by Guevara which caused him to give a statement.

¶ 21 The Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), provides a remedy to a criminal defendant whose constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). The Act is not a substitute for an appeal, but rather, is a collateral attack on a final judgment. *People v. Edwards*, 2012 IL 111711, ¶ 21. "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2010).

¶ 22 The Act generally contemplates the filing of only one post-conviction petition. 725 ILCS 5/122-3 (West 2010). However, the bar against successive proceedings will be relaxed in cases where; 1) the defendant can satisfy the cause and prejudice test of the Act; or 2) the "fundamental miscarriage of justice" exception, set forth as a claim of actual innocence. 725 ILCS 5/122-1(f) (West 2010); *Edwards*, 2012 IL 111711, ¶¶ 22, 23.

¶ 23 A petitioner in an initial post-conviction petition need state only a "gist" of a constitutional claim and may be summarily dismissed only if the petition has no arguable basis either in law or in fact. *People v Hodges*, 234 Ill. 2d 1, 11-12 (2009). However, our supreme court has determined the low "gist" standard applicable to initial post-conviction petitions is not applicable to a petitioner filing a successive post-conviction petition. *Edwards*, 2012 IL 111711,

¶ 27. A petitioner filing a successive post-conviction petition can satisfy the "cause and

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prejudice" test by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings and shows prejudice by demonstrating that the claim not raised during his or her initial proceedings so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2010); *Pitsonbarger*, 205 Ill. 2d at 459.

¶ 24 To establish what is known as the "fundamental miscarriage of justice" exception or actual innocence exception in a successive post-conviction petition, the defendant's petition and supporting evidence must set forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 33. To state a colorable claim of actual innocence, the petition and the supporting documentation must 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. See *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009) (the evidence in support of the claim must be newly discovered; material and not merely cumulative; and of such conclusive nature that it would probably change the result on retrial).

¶ 25 A prisoner must file a motion seeking leave of court before filing a successive post-conviction petition. 725 ILCS 5/122-1(f) (West 2010). We note the defendant here filed no formal motion seeking leave to file a successive post-conviction petition in this case. However, a trial court may grant or deny leave to file a successive petition, even in the absence of a motion, based on the contents of the petition and supporting documents. *People v Tidwell*, 236 Ill. 2d 150, 162 (2010). We review the trial court's denial of a motion to file a successive post-conviction petition *de novo*. *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 12.

¶ 26 Actual Innocence Claim

¶ 27 Defendant alleged the following in paragraphs 2 and 3 of his petition:

" 2.) Prior to trial the petitioner moved to suppress his statement on the ground that the statement was involuntary. The petitioner claim [*sic*] that he was an intravenous drug user and that prior to his arrest he had been using both heroin and cocaine, thus, he was under the influence of drugs. He stated that he could read and speak very little english and that he had difficulty understanding the detective, Reynaldo Guevara who interviewed him in spanish. The petitioner claim [*sic*] that Guevara had threatened to tear his head off if he did not tell Guevara what he wanted to hear. At one point during the interview Guevara promised he would release him after he gave Guevara a statement.

3) New evidence will demonstrate that detective Guevara systematically used improper techniques to coerce false statements from suspects and civilians, and that the petitioner is actually innocent of the crimes for which he was convicted."

¶ 28 Additionally, defendant argues that even if a fraction of the allegations included had been presented at trial, it would have had a dramatic effect on Detective Guevara's credibility.

¶ 29 We believe the cases cited by the defendant establish that Detective Guevara has engaged in a pattern of systematic misconduct on several occasions. This division of the First District

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Appellate Court has recently considered allegations that Detective Guevara systematically engaged in misconduct in his treatment of suspects and witnesses and coerced false statements from witnesses in *People v. Almodovar*, 2013 IL App (1st) 101476. In the case at bar, defendant contends that such evidence is new and supports a claim of actual innocence, and his successive petition should have been allowed.

¶ 30 As stated previously, to state a colorable claim of actual innocence, the petition and the supporting documentation must 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. To establish actual innocence in a post-conviction petition, the defendant must present evidence that is newly discovered, is material and noncumulative, and "is of such conclusive character that it would probably change the result on retrial." *Almodovar*, 2013 IL App (1st) 101476, ¶ 59, (quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)).

¶ 31 We concede that defendant has provided abundant evidence that Guevara engaged in misconduct in other cases. However, defendant has failed to allege the critical newly discovered evidence required to demonstrate actual innocence - namely evidence that defendant was not the individual who shot and killed the victim in this case. Defendant argues on appeal that his successive petition alleged his actual innocence or innocence of the sentence of life imprisonment. We note that defendant's petition was verified pursuant to section 1-109 of the Illinois Code of Civil Procedure (735 ILCS 5/1-109 (West 2010)) as a valid affidavit and was not a notarized affidavit as required by section 122-1(b) of the Post Conviction Act. 725 ILCS 5/122-1 (b) (West 2010)). However, even if we were to construe the petition as a valid affidavit,

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a fair reading of defendant's petition merely reveals allegations that his constitutional rights were violated during his interview by Guevara and that additional evidence will show that he is not guilty. Defendant's allegation that he was threatened was not newly discovered evidence because defendant was present when the alleged threat was made in 1991. Defendant's promise that new forthcoming evidence will show that he is not guilty of the crimes is not the conclusive evidence required to state a claim of actual innocence.

¶ 32 Additionally, the newly discovered evidence of Guevara's misconduct at best calls into question Guevara's credibility and perhaps yields impeachment evidence against Guevara. None of the new evidence establishes that defendant was not the individual who shot the victim. Based on this record, we cannot say that it is more likely than not that no reasonable trier of fact would have convicted defendant in light of the new evidence. Accordingly, we find defendant has failed to set forth a colorable case of actual innocence. *Edwards*, 2012 IL 111711, ¶ 31.

¶ 33 Cause and Prejudice Test

¶ 34 Alternatively, defendant alleges that his successive petition satisfies the cause and prejudice test.

¶ 35 A petitioner filing a successive post-conviction petition can satisfy the "cause and prejudice" test by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings and shows prejudice by demonstrating that the claim not raised during his or her initial proceedings so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2010); *Pitsonbarger*, 205 Ill. 2d at 459.

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¶ 36 Here, we find that defendant made no effort to explain his failure to present this claim earlier, thus not satisfying the cause and prejudice test. Moreover, defendant cannot show prejudice.

¶ 37 As stated previously, under the Act, "a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010).

¶ 38 Here, although the newly procured evidence would call into question Guevara's credibility and provide impeachment evidence of his credibility, such evidence did not so infect the trial proceedings that defendant was denied due process. Other evidence presented at trial established that: 1) the gun belonging to the victim, stolen during the robbery, was in defendant's possession when he arrested; and 2) defendant was identified by a witness as one of the men she saw talking to an acquaintance of hers and going in and out of the facility immediately before and after the robbery occurred. We cannot conclude that defendant's conviction and sentence violated due process based on the other evidence before the trier of fact.

¶ 39 We therefore find that defendant's successive post-conviction petition did not meet the cause and prejudice test and was properly dismissed by the trial court.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 42 Affirmed.