

No. 1-11-3074

**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).

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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. 99 CR 2341
	)	
RICHARD CAMPBELL,	)	Honorable
	)	Carol Howard,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice ROCHFORD and Justice REYES concurred in the judgment.

**ORDER**

¶ 1 **Held:** Order denying defendant leave to file successive post-conviction petition affirmed where defendant failed to set forth a colorable claim of actual innocence based on alleged newly discovered evidence.

¶ 2 Defendant Richard Campbell 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)). Defendant incorrectly asserts on appeal that the circuit court granted him leave to file a successive post-conviction petition, advanced his petition to the second stage of proceedings, and then erroneously dismissed his petition without appointing him

counsel and allowing the State to file a motion to dismiss. Based on defendant's misunderstanding of the procedural posture of this case, he requests that his cause be remanded back for second stage proceedings. We affirm.

¶ 3 Following a jury trial, defendant was found guilty of first degree murder in connection with the July 20, 1998, gang shooting death of Terrence Willis, and sentenced to 50 years' imprisonment. As relevant to the case at bar, the record shows that Mark Franklin testified that he, Kijel Grant, Keith Curry, and Terrence Willis were at Cornelius Poe's house.<sup>1</sup> Willis bought \$150 worth of crack cocaine from Grant on credit. Later that same day, Grant spoke to Franklin, Curry and defendant and told them that he was going to kill Willis because he was not going to pay him the owed money. After this conversation, Grant and Willis left the house, and Franklin understood that if Grant returned with Willis, Grant would kill him. Defendant also left the house to go to the residence of William Gore, another gang member. Several minutes later, Grant returned with Willis, and they, along with Franklin, drove to pick up defendant, who entered the car holding a .357 revolver. They proceeded to a nearby alley and pulled over. All four men exited the car, Grant walked to the side of a garage, and returned holding a .32 automatic. Grant and defendant then raised their guns and shot Willis several times.

¶ 4 Defendant was arrested on December 26, 1998, in connection with the murder of Willis. A couple of days later, he gave a statement to Assistant State's Attorney Nancy Nazarian. In it, defendant stated that he was at Poe's house on July 20, 1998, and heard Grant talking to Curry and Franklin about a man who owed Grant money for drugs. Subsequently, he got into a car with Grant, Franklin, and Willis, believing that he was going to help them beat Willis. After Grant stopped the car in a nearby alley, Grant shot Willis multiple times. Grant, Franklin, and

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<sup>1</sup>Grant and Franklin, who are not subject to this appeal, were codefendants.

defendant then fled the scene, and defendant left Chicago to live with a friend in Alabama a few days after the incident.

¶ 5 Joseph Thibault from the Illinois State Police Forensic Science Center analyzed the bullets collected at the crime scene. He testified that the 15 bullets fired were from two different calibers, 10 of which were from a .32-caliber and 5 of which were from a .38 to .357 caliber.

¶ 6 The jury found defendant guilty of first degree murder, and the court sentenced him to 50 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Campbell*, No. 1-01-2203 (2003) (unpublished order under Supreme Court Rule 23).

¶ 7 On September 10, 2003, defendant filed his first *pro se* post-conviction petition, alleging various claims of ineffective assistance of trial and appellate counsel and prosecutorial misconduct. The petition advanced to the second stage where the trial court granted the State's motion to dismiss. We affirmed the dismissal of defendant's post-conviction petition after granting the motion of the State Appellate Defender for leave to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Campbell*, No. 1-09-1080 (2010) (unpublished order under Supreme Court Rule 23).

¶ 8 While the appeal of the dismissal of defendant's initial post-conviction petition was pending, he filed a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), challenging various jury instructions. The State filed a motion to dismiss, which the circuit court granted. We affirmed that judgment on appeal after granting the motion of the State Appellate Defender for leave to withdraw as counsel pursuant to *Finley*, 481 U.S. at 551. We also corrected the mittimus to reflect one conviction for first degree murder and one sentence for that conviction. *People v. Campbell*, 1-11-0047 (2012) (unpublished summary order under Supreme Court Rule 23).

¶ 9 On March 23, 2011, defendant filed the instant *pro se* motion for leave to file a successive petition and a successive *pro se* post-conviction petition, alleging newly discovered evidence demonstrating his actual innocence. That evidence consisted of documents attached to his successive petition, including his own affidavit, the affidavits of Reginald Williams, Naa'man Logan, Amir Jackson, and the transcripts of portions of Cornelius Poe's testimony from Kijel Grant's trial, which showed that Poe stated he did not see defendant coming to or from Poe's house on the night of the murder.

¶ 10 Defendant, Williams, Logan, and Jackson all attested in their affidavits that on the date of the incident in question, defendant was living in Huntsville, Alabama. Defendant specifically attested that he had been living in Alabama since 1997, was staying with Williams, Logan, and Jackson, and was with "at least one or two of them every night doing something." Williams, Logan, and Jackson, attested that defendant was living with them in the "same community" at the time of the incident.

¶ 11 In his motion for leave to file and his successive petition, defendant indicated that he told police he was living in Huntsville at the time of the murder, and that he gave police Williams' contact information to verify his alibi. Defendant did not have the contact information for Logan and Jackson, and thus did not tell police about them. Defendant also stated that he told his appellate counsel on direct appeal and his post-conviction counsel about these alibi witnesses, but they never made any further inquiries. Defendant did not receive the alibi affidavits until November of 2010.

¶ 12 Defendant also noted in his motion for leave to file and his successive petition that he was coerced and physically beaten into signing a false statement. He stated that new evidence of police corruption and misconduct at the Area 2 police station emerged, showing that police torture under the command of Lieutenant Jon Burge had occurred for over 10 years. Attached to

his successive petition were the transcripts of his testimony from a pretrial motion to suppress his statements, where he testified that police punched him in his ribs and chest during interrogation. He also attached the handwritten statement he had signed, and noted that his coerced statement was the primary evidence used against him.

¶ 13 On August 31, 2011, the circuit court dismissed defendant's successive petition because he failed to show newly discovered evidence of actual innocence that would require an evidentiary hearing. In doing so, the court found that defendant "fail[ed] to make a substantial showing of a constitutional violation." The court reiterated this finding in a written order, which also stated that the information in defendant's successive petition was not new because it was available prior to trial. The court also found that the new evidence was refuted by the record, which showed that Franklin testified as to defendant's presence at the shooting, as well as defendant's own statement. The trial court finally stated that although the evidence of police misconduct cited by defendant in his successive petition was new, it was insufficient where he presented no facts to support his own claims.

¶ 14 Defendant now challenges that ruling on appeal, claiming that the circuit court granted him leave to file his successive petition, and advanced his petition to the second stage where the court erroneously *sua sponte* dismissed it without appointing counsel and without giving the State an opportunity to file a motion to dismiss. He thus asserts that his cause must be remanded back to the second stage for proper proceedings under the Act. The State responds that the circuit court neither granted defendant leave to file a successive petition, nor did it *sua sponte* dismiss the successive petition at the second stage. Instead, the State asserts that the court denied defendant's motion for leave to file his successive petition because he failed to state a colorable claim of actual innocence. We agree with the State.

¶ 15 To institute a successive post-conviction proceeding, the defendant must first obtain leave of court and defendant bears the burden to obtain such leave before his claims can proceed. *People v. Edwards*, 2012 IL 111711, ¶ 24, relying on *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). As defendant acknowledges, *Edwards* reaffirmed the holding in *Tidwell* that "it is incumbent upon [a petitioner], by whatever means, to prompt the circuit court to consider whether 'leave' should be granted, *and obtain a ruling on that question*." (Emphasis added.) *Id.* Defendant failed to satisfy this burden because the instant record includes no explicit ruling on whether leave should be granted. Moreover, defendant's argument that his filing such motion satisfied the burden of prompting the court to grant such leave is disingenuous because the filing of such motion with a successive petition is simply a necessary pleading and does not alleviate defendant's burden to obtain a ruling on his motion. Rather, the absence of an explicit ruling allowing defendant to file his successive petition supports the opposite conclusion, *i.e.*, no such leave was granted.

¶ 16 Nevertheless, defendant maintains that his successive petition was advanced to the second stage and improperly dismissed. Defendant's argument is based on the assumption that the court granted him leave to file the successive petition at bar. This assumption ignores the procedural posture of the case and the fact that there was never an explicit granting of leave to file a successive petition on the record. Defendant then uses the facts that the court never appointed him counsel and the State never filed a motion to dismiss to claim that the court erroneously dismissed his successive petition at the second stage. However, the reason that the court did not appoint counsel and the State did not file a motion to dismiss indicates the court never granted him leave to file his successive petition, and, therefore, the successive petition was never advanced to the second stage.

¶ 17 Furthermore, defendant's position that his successive petition was advanced to the second stage relies on the circuit court's finding that defendant "fail[ed] to make a substantial showing of a constitutional violation," which is the standard applied at second-stage post-conviction proceedings. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). To the extent the language used by the court could be viewed as inconsistent with a denial of leave to file the successive petition, we are not persuaded otherwise because the totality of the record, the procedural posture of the case, and the court's analysis demonstrate that it denied relief, *i.e.*, leave to file the successive petition, because defendant's successive petition did not demonstrate a colorable claim of actual innocence.

¶ 18 "[L]eave 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*, at ¶ 24. This standard counters defendant's contention that the circuit court granted him leave to file his petition because the court considered the merits of his actual innocence claim. In fact, a court must consider the merits of a claim of actual innocence in order to determine whether the claim is a colorable one, thereby warranting leave to file a successive petition.

¶ 19 We conclude that the denial of relief here constituted a denial of leave to file the successive petition which advanced an actual innocence claim. The supreme court has not yet decided whether such circuit court decision should be reviewed for an abuse of discretion or *de novo*. *Edwards*, at ¶ 30. We find that under either standard of review, the circuit court did not err in its denial of leave to file the successive petition based on a claim of actual innocence.

¶ 20 The Act contemplates the filing of only one post-conviction petition; however, the statutory bar to a successive petition may be relaxed where fundamental fairness so requires. *People v. Ortiz*, 235 Ill. 2d 319, 328-29 (2009). Section 122-1(f) of the Act prohibits the filing of

a successive petition without first obtaining leave of court, which is conditioned on defendant's satisfaction of the cause and prejudice test. *Edwards*, at ¶ 22. However, 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. Instead, to obtain relief under a theory of actual innocence, the evidence in support of the claim must be newly discovered, material to the issue and not merely cumulative of other evidence, and of such conclusive character that it will probably change the result on retrial. *Edwards*, at ¶ 32, citing *Ortiz*, 235 Ill. 2d at 333.

¶ 21 Here, defendant asserts in his motion for leave to file and his successive petition that he established an actual innocence claim through the affidavits of Williams, Logan, Jackson, and the attached transcripts of Poe's testimony from Grant's trial. We find, however, the "newly discovered" evidence here "does not raise the probability that, in light of this new evidence, it is more likely than not that no reasonable juror would have convicted" defendant. *Edwards*, at ¶ 40. Here, the evidence against defendant was substantial. Franklin, an eyewitness who participated in the crime, testified that both defendant and Grant shot the victim multiple times. His testimony was corroborated by the physical evidence, which showed that bullets and cartridge cases from two different guns were recovered and were consistent with the caliber of guns Franklin described. In addition, Franklin's testimony is corroborated in part by defendant's own statement, where defendant admitted to being at the scene of the murder.

¶ 22 In contrast, defendant's alleged alibi witnesses provide nothing but conclusory statements in regards to defendant being in Alabama at the time of the crime. The witnesses only provided general statements that they all lived in the same "community," but none of them provided any addresses or contact information to verify the claim. More importantly, none of the affiants actually stated that they were with defendant on the day of the crime, and thus their potential



testimony could not conclusively show that defendant was not present at the scene of the crime. See *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40 (stating the hallmark of actual innocence is total vindication).

¶ 23 Defendant attempts to bolster his alibi with Cornelius Poe's testimony from Kijel Grant's trial. Defendant specifically asserts that Poe's testimony established that he was not at Poe's house on the date the murder occurred. Poe's testimony, however, does not support defendant's claim of actual innocence because it fails to show that defendant was not at the scene of the crime. In fact, Poe testified that William Gore told him that defendant was in the car with Grant and Franklin on the day of the murder, refuting defendant's alibi that he was in Alabama.

¶ 24 Defendant also asserts that the investigations determining that there was torture at Area Two Police Headquarters supported the allegations made in his pretrial motion that he was beaten into giving a false statement, thus providing further evidence that he was actually innocent. Defendant relies on *People v. Nicholas*, 2013 IL App (1st) 103202, ¶ 47, which held that the defendant established the requisite cause and prejudice necessary to escape dismissal of his claim that his confession was the result of physical coercion where the defendant consistently claimed his confession was the product of physical abuse occurring during a period of time and under circumstances strikingly similar to those documented in a 2006 report detailing torture of arrestees by detectives.

¶ 25 Here, however, defendant has failed to provide any new evidence to corroborate his allegation that police coercion was used against him. Absent a connection to defendant's case, his statements regarding torture at the police station do not provide the necessary support for his claim. Although defendant testified at a pretrial hearing that he was punched in his ribs and chest during interrogation, the record is devoid of evidence that he suffered any injuries consistent with his claim of coercion. The assistant State's Attorney testified at the hearing on defendant's

motion to suppress his statements that there was no indication that defendant was beaten, defendant told her that police treated him "fine," and defendant told her that there were no threats or promises made to get him to cooperate. Moreover, in denying defendant's motion to suppress, the court specifically found that defendant's statements to police were voluntary and his testimony at the hearing that he was beaten was not credible. Based on the record, defendant's general allegations of torture at the police station are not of such a conclusive character as to change the result on retrial. See *People v. Maxwell*, 173 Ill. 2d 102, 120-22 (1996) (affirming the dismissal of the defendant's post-conviction petition over his claims that reports establishing physical abuse and coercion of confessions at Area 2 were not available to him at the time of his trial).

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

¶ 27 Affirmed.