2016 IL App (1st) 141438-U

SECOND DIVISION
September 20, 2016

No. 1-14-1438

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. 02 CR 16459
	)	
CHARLES THOMPSON,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm the judgment of the circuit court denying defendant leave to file his second successive *pro se* postconviction petition because his claim of actual innocence was not supported by newly discovered evidence of such conclusive character that it would probably change the result on retrial.

¶ 2 Following a 2004 jury trial, Charles Thompson, the defendant, was found guilty of the first degree murder of Daniel Cruz and sentenced to an aggregate term of 65 years'

imprisonment. Defendant appeals from the circuit court's order 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 2012)). He contends that his petition presented a colorable claim of actual innocence based on the attached affidavits of Darrin Nelson and Ronald Van Pelt, who each averred that they witnessed two men other than defendant shooting on the night Cruz was murdered. We affirm.

¶ 3 The evidence adduced at trial showed that, following a traffic collision on June 2, 2002, defendant shot Cruz because Cruz refused to pay for the damage to defendant's vehicle. Two witnesses saw defendant and Cruz arguing after the collision and heard gunshots coming from their direction. One of the witnesses saw defendant on the scene with two large silver guns and identified him as the shooter from a lineup. Defendant's hands tested positive for gunshot residue and he told a detective and assistant state's attorney that he shot Cruz because he was angry about his car being damaged.

¶ 4 At trial, Montine Osbey testified that she was sitting on top of her parked car and talking to Yontami Dukes, who was stopped in traffic near the area of the 2700 block of North Hoyne Avenue. Dukes was seated in the driver's seat of defendant's car and defendant was in the passenger seat. Cruz was driving a car that was also stopped in traffic on Hoyne Avenue. Osbey stated that passengers in Cruz's car, along with passengers from another car, exited their vehicles and started hitting passengers who were in a maroon car. During the fight, the driver of the maroon car drove in reverse and hit defendant's car.

¶ 5 Osbey testified that, shortly after the collision, she saw defendant walking toward Cruz, who was talking with his friends in the courtyard of one of the buildings. Osbey stated that defendant appeared angry as he approached Cruz. Osbey could not see the men in the courtyard,

but stated that she overheard an argument about having a car repaired. She then heard gunshots coming from their direction. Cruz exited the courtyard, fell to his knees, and yelled to his brother Ivan Suarez "I been shot." Suarez then ran toward Cruz and yelled "[h]e's coming, he's coming." At that time, Osbey saw defendant coming towards Cruz, who stood up and continued running.

¶ 6 Suarez testified that he was familiar with defendant before the night of the shooting and that he had seen him around the neighborhood. On the night in question, Suarez saw Cruz arguing with defendant for a few minutes. After the argument, Cruz walked toward a courtyard of one of the buildings. Defendant also left the scene of the argument and said he would be back. About 25 minutes later, defendant returned to the scene. Suarez testified that defendant walked past him, within about five feet, and that defendant was carrying two large silver guns. Defendant walked to the same courtyard as Cruz and began chasing him through the courtyard. Suarez stated that he lost sight of the men, but he heard four or five gunshots. Cruz then ran from the courtyard and told Suarez that "he was shot." Suarez ran towards Cruz and tried to lift him. As he did so, Cruz told Suarez that he was coming towards them. Suarez then saw defendant approaching them. Cruz let go of Suarez and ran in the opposite direction of defendant. Suarez testified that he stood in the courtyard for about three minutes because he was nervous and scared. Suarez also testified that he did not know what to do because defendant was "standing there with two guns." Eventually, Suarez ran past defendant and called his sister.

¶ 7 When police arrived on the scene, Suarez told them what he had seen and that defendant shot Cruz. On the same day, Suarez identified defendant as the shooter at the police station. Later that afternoon, Suarez again identified defendant as the shooter from a lineup.

¶ 8 Chicago police detective Timothy Thompson testified that, about 6:45 p.m., on the date in question, he spoke with defendant at Area 3 Police Headquarters. Before speaking to

defendant, Detective Thompson advised defendant of his *Miranda* rights. Defendant acknowledged that he understood those rights and then detailed his version of events, which was substantially similar to Osbey's trial testimony. Defendant added that the car Cruz was driving sideswiped his car. Defendant and Cruz then argued about repairing the damage to the car. Defendant insisted that Cruz pay for the damage. Cruz refused and drove away from the scene. Shortly after the argument, defendant saw Cruz in the area and followed him into a courtyard. Defendant stated that Cruz pointed a gun at him. After Cruz did so, an individual by the name of "Little J," gave defendant a gun. Defendant then shot Cruz three times. Cruz fled westbound across Hoyne Avenue and defendant returned the gun to Little J.

¶ 9 After defendant's statement, Detective Thompson contacted the State's Attorney's Office. Assistant State's Attorney (ASA) Daniel Faermark went to Area 3 and, along with Detective Thompson, interviewed defendant. Before the interview, ASA Faermark advised defendant of his *Miranda* rights. Defendant acknowledged that he understood those rights and agreed to speak with ASA Faermark and Detective Thompson. During the interview, Detective Thompson informed defendant that other witnesses said Cruz was holding a cell phone in his hand and not a gun. Defendant acknowledged that it could have been a cell phone. When Detective Thompson confronted defendant with the fact that he had had previously described the gun Cruz was holding in his hand, defendant stated "all right, man, I was really really angry about my car being damaged *** I chased him in the courtyard and shot him three times."

¶ 10 ASA Faermark corroborated Detective Thompson's testimony regarding defendant's statement. ASA Faermark added that he explained to defendant the options for memorializing his statement, but defendant refused to have his statement written, videotaped, or typed out by a

court reporter. After the interview, ASA Faermark wrote defendant's statement, but defendant did not participate in that process.

¶ 11 Thomas Hanley, a Chicago police forensic investigator testified that about 7:05 a.m., on June 2, 2002, he collected gunshot residue samples from defendant's hands. Mary Wong, a forensic scientist and expert in gunshot residue testing, testified that she analyzed the samples from defendant's hands and found them positive for gunshot residue. Wong opined that, to a reasonable degree of scientific certainty, defendant either discharged a firearm or that both of his hands had been in the environment of a discharged firearm.

¶ 12 Doctor Kendall Crowns, assistant medical examiner at the Cook County Medical Examiner's Office, performed the autopsy of Cruz's body and testified as an expert in forensic pathology. Dr. Crowns testified that a bullet entered Cruz's lower right back in a direct path and that there was evidence of close-range firing. Dr. Crowns concluded to a reasonable degree of medical certainty that the cause of Cruz's death was a gunshot wound to the back and that the manner of death was homicide.

¶ 13 The jury found defendant guilty of first degree murder. Defense counsel filed a motion for a new trial, which was denied. Defendant also filed a *pro se* "Motion to Correct Ineffective [Assistance] of Counsel" and attached to the motion an affidavit from Yontami Dukes, who was driving defendant's car at the time of the collision. In the affidavit, dated April 2, 2003, Dukes averred that, on June 2, 2002, after she gave her initial statement, police placed her in handcuffs and threatened her. Dukes stated that police told her that if she did not make an additional statement saying that she saw defendant with a gun, she would be charged as an accessory to murder and her children would be taken away from her. As a result of the threats, Dukes made an additional statement saying that, after she heard gunshots, she saw defendant running down

Hoyne Avenue with a gun in his hand. Dukes agreed to make the statement only because she was frightened after being threatened by police. Dukes also averred that she did not see defendant with a gun on Hoyne Avenue that night. After allowing argument, the trial court denied the motion for a new trial.

¶ 14 Defendant was sentenced to 40 years' imprisonment on the murder conviction, plus an additional 25 years for personally discharging a firearm that caused Cruz's death, for an aggregate term of 65 years' imprisonment. Defendant appealed, challenging the constitutionality of the 25-year sentencing enhancement provision. This court affirmed defendant's conviction and sentence. *People v. Thompson*, No. 1-04-0535 (2005) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal. *People v. Thompson*, 221 Ill. 2d 669 (2006).

¶ 15 On June 17, 2005, while his direct appeal was pending, defendant filed a *pro se* post-conviction petition, raising multiple claims of ineffective assistance of trial and appellate counsel. Defendant was appointed counsel, who filed a supplemental post-conviction petition. The circuit court granted, in part, the State's motion to dismiss the petition and held an evidentiary hearing on two of defendant's claims: (1) whether trial counsel was ineffective for failing to move to dismiss defendant's indictment based on Dukes' alleged perjury during proceedings before the grand jury; and (2) whether appellate counsel was ineffective for only challenging the constitutionality of the firearm enhancement provision on appeal. After the evidentiary hearing, the court denied the petition. Defendant appealed, and this court affirmed the circuit court's order after granting appellate counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Thompson*, No. 1-09-0797 (2010) (unpublished order under Supreme Court Rule 23).

¶ 16 On December 15, 2010, defendant filed a *pro se* "Petition for Leave to File Successive Petition for Post-conviction Relief." The court denied defendant leave to file his successive petition. Defendant appealed, and this court affirmed the circuit court's order after granting appellate counsel's motion to withdraw pursuant to *Finley*. *People v. Thompson*, 2012 IL App (1st) 111907-U.

¶ 17 On November 6, 2013, defendant sought leave to file a second *pro se* successive postconviction petition that is the subject of this appeal. In this second successive petition, defendant alleged, as pertinent to this appeal, that he was actually innocent of Cruz's murder. In support of his actual innocence claim, defendant attached the same affidavit from Dukes that he attached to his *pro se* "Motion to Correct Ineffective [Assistance] of Counsel." Defendant also attached affidavits from Darrin Nelson and Ronald Van Pelt.

¶ 18 In Nelson's affidavit, dated March 28, 2013, Nelson averred that about 2:30 a.m., on June 2, 2002, he was sitting in front of his building with some friends when he heard breaking glass. Nelson looked towards Hoyne Avenue and saw Cruz standing in the street, holding a bat, and attacking people in a maroon car. Nelson then walked inside his house because he was on house arrest. From inside his house, Nelson observed "two white boys carrying hand guns run across the street from out of their courtyard and into [his] courtyard." The pair shouted "Deuce Love" and started shooting "in the back." Nelson fell to the floor and, a short time later, saw police cars in the courtyard.

¶ 19 Nelson averred that on the following morning police arrived at his house and questioned him about the shooting. Nelson told police what he saw and heard. Police then informed him that Cruz was the victim and that defendant was in custody. Police threatened to arrest Nelson for violating the terms of his house arrest if he told anyone what he saw on the night in question.

Nelson stated that he remained silent about what he had seen because he was afraid of going back to jail.

¶ 20 In Van Pelt's affidavit, dated January 19, 2012, Van Pelt averred that, sometime before 3 a.m., on June 2, 2002, he was on Hoyne Avenue sitting in front of his friend's house. There, he saw Cruz and a few other people arguing with some boys in a maroon car. Cruz broke one of the windows of the maroon car with a bat. Van Pelt then saw Cruz and defendant arguing. Dukes drove away from the scene. Defendant remained in the area. About five minutes later, a police car drove past the area and Van Pelt went to a friend's house which was on Diversey Parkway. From the window of the house, Van Pelt saw two "white complexioned boys with guns" run across Diversey and into the courtyard. Van Pelt then heard the boys shout "Deuce love" and "King killer" and saw them shoot toward the back of the courtyard. He averred that neither one of the shooters was defendant.

¶ 21 Defendant also attached to his petition three newspaper articles containing information regarding Detectives Alex Guererro and Antonio Martinez, who each pled guilty to several charges stemming from their involvement in gang related crimes.

¶ 22 On March 28, 2014, the circuit court entered a written order denying defendant leave to file the second successive postconviction petition. In doing so, the court found that the affidavits, taken together, were not of such conclusive character that they would probably change the result on retrial given the evidence presented against defendant at trial. Specifically, the court stated that Dukes' affidavit was not newly discovered because it preceded defendant's trial. The court also stated that, although Nelson's affidavit may be considered newly discovered, it was not material to defendant's actual innocence because Nelson did not aver that the two unidentified men shot in the direction of the victim. Finally, the court stated that, even assuming that Van

Pelt's affidavit constituted newly discovered evidence, it was not relevant or probative of defendant's innocence because it failed to establish that the two unidentified men shot the victim.

¶ 23 On appeal, defendant contends that his petition presented a colorable claim of actual innocence based on the newly discovered, exculpatory affidavits from Nelson and Van Pelt, which were of such conclusive character that they are likely to change the result on retrial. The Act generally contemplates the filing of only one postconviction petition and provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or amended petition is waived." *People v. Ortiz*, 235 Ill. 2d 319, 328-29 (2009); 725 ILCS 5/122-3 (West 2012). This statutory bar to a successive postconviction petition will be relaxed when fundamental fairness requires. *Ortiz*, 235 Ill. 2d at 329. Fundamental fairness allows the filing of a successive petition where the petition complies with the cause and prejudice test. *Id.*

¶ 24 However, a successive postconviction petition that sets forth a claim of actual innocence is not subject to the general cause and prejudice test. *Ortiz*, 235 Ill. 2d at 330. Rather, when a successive postconviction petition based upon a claim of actual innocence is filed, "leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided *** that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *People v. Edwards*, 2012 IL 111711, ¶ 24. Stated differently, "leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.' " *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

¶ 25 The elements of a successful claim of actual innocence require that the evidence supporting the claim must be: (1) newly discovered; (2) material; (3) not merely cumulative; and (4) of such conclusive character that it would probably change the result on retrial. *Edwards*,

2012 IL 111711, ¶ 32 (citing *Ortiz,* 235 Ill. 2d at 333). In *People v. Coleman,* 2013 IL 113307, ¶ 96, our supreme court clarified that "[n]ew means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. [Citation.]"

¶ 26 It is unclear whether an abuse of discretion or *de novo* standard of review applies to decisions granting or denying leave to file a successive petition raising a claim of actual innocence. See *People v. Almodovar,* 2013 IL App (1st) 101476, ¶ 59 (applying *de novo* standard of review); see also *Edwards,* 2012 IL 111711, ¶ 30 (declining to decide whether an abuse of discretion or *de novo* standard of review applies to decisions granting or denying leave to file a successive petition raising a claim of actual innocence). However, applying either standard in this case, our conclusion is the same. See, *e.g.*, *People v. Simon,* 2014 IL App (1st) 130567, ¶ 58.

¶ 27 Here, defendant failed to plead a colorable claim of actual innocence because the affidavits of Dukes, Nelson and Van Pelt were not of such a conclusive character that they would probably change the result on retrial. As in *Edwards,* 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,* 2012 IL 111711, ¶ 40. In *Edwards,* the court expressly stated that the United States Supreme Court has emphasized that a defendant's claim of actual innocence should be supported by new reliable evidence, which could include exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence that was not presented at trial. *Id.* ¶ 32, citing *Schlup,* 513 U.S. at 324.

¶ 28 The affidavits of Nelson and Van Pelt, even assuming they constitute new evidence which could not have been discovered sooner through the exercise of due diligence, do not contain references to exculpatory scientific evidence, trustworthy eyewitness evidence or critical physical evidence.

¶ 29 Neither Nelson or Van Pelt provided a trustworthy eyewitness account of the shooting of the victim to support defendant's claim of actual innocence. Nelson merely averred that he saw "two white boys carrying hand guns run across the street from out of their courtyard and into my courtyard" and start shooting "in the back." Nelson did not see the boys shoot Cruz nor did he state that they shot in the direction of Cruz, who Nelson averred was standing on the street. Van Pelt averred that he saw "two white complexioned boys with guns" shoot "toward the back of the court yard." Similarly to Nelson, Van Pelt did not see the two boys shoot Cruz nor did he indicate where Cruz was standing in relation to these two alleged shooters or that they shot in Cruz's direction. Importantly, neither Nelson nor Van Pelt saw the two boys shoot Cruz. That said, we cannot extrapolate from their affidavits that the two boys shot Cruz and that defendant was not the shooter. See *People v. Flowers*, 2015 IL App (1st) 113259, ¶ 35. Rather, from their affidavits, we essentially know only that neither Nelson nor Van Pelt saw defendant in the aftermath of the shooting. *Id.* As such, the information in Nelson's and Van Pelt's affidavits is not of such conclusive character that it would probably change the result on retrial.

¶ 30 This is particularly true where there was uncontradicted evidence presented at trial which established that defendant shot Cruz. Multiple witnesses saw defendant arguing with Cruz. Osbey testified that she heard gunshots from the direction of where defendant and Cruz were arguing and then saw Cruz fall to his knees and yell that he had been shot. Suarez then ran towards Cruz and yelled "he's coming," at which time Osbey saw defendant coming towards

Cruz. Suarez testified that, after defendant argued with Cruz, he returned to the scene with two large silver guns. Defendant then chased Cruz through a courtyard. Suarez heard four or five gunshots and saw Cruz run from the courtyard. Suarez ran towards Cruz, who told him that “he’s coming.” Suarez then saw defendant coming towards them. Shortly after the shooting, Suarez identified defendant as the shooter at the police station and again from a lineup. Defendant's hands tested positive for gunshot residue. Detective Thompson and ASA Faermark testified that defendant told them that he shot Cruz three times because he was angry about his car being damaged.

¶ 31 Defendant argues that the information in Nelson's and Van Pelt's affidavits that there were multiple shooters is supported by the record where Suarez testified that Cruz told him "they shot me." Contrary to defendant's argument, the record shows Suarez testified that Cruz told him "he was shot" not "they shot me" as claimed by defendant. Defendant also argues that the affidavits, which contain evidence of police coercion, corroborate Dukes' affidavit that she was threatened by police and support allegations of police collusion with the Latin Kings street gang. We cannot say that defendant has established any police collusion with street gangs where he failed to show or allege that Detectives Guererro or Martinez were involved in the handling of his case.

¶ 32 Defendant nevertheless maintains that he set forth a colorable claim of actual innocence because his petition, along with the supporting affidavits, pointed out the weaknesses of the evidence presented to the jury as juxtaposed against the new evidence. Defendant's arguments essentially challenge the sufficiency of the evidence to sustain his conviction. However, a claim of actual innocence is not intended to question the strength of the State's case, nor does it concern whether a defendant has been proved guilty beyond a reasonable doubt. *People v.*

Coleman, 381 Ill. App. 3d 561, 568 (2008); *People v. Barnslater*, 373 Ill. App. 3d 512, 520 (2007). Rather, this court has held that, to proceed to second-stage proceedings, a successive petition must be based on newly discovered evidence that could potentially exonerate the defendant. *People v. Anderson*, 401 Ill. App. 3d 134, 140-41 (2010),(citing *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008)); see also *Edwards*, 2012 IL 111711, ¶ 24.

¶ 33 The hallmark of actual innocence means total vindication or exoneration, not merely presenting a reasonable doubt. *Anderson*, 401 Ill. App. 3d at 141; *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36. Here, defendant has failed to do either. Most importantly, we conclude the affidavits presented by defendant do not constitute evidence that could potentially exonerate him.

¶ 34 Because defendant's petition did not present new evidence that raised the probability that it was more likely than not that no reasonable juror would have convicted him in the light of the new evidence, his petition and the affidavits failed to set forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 24. Accordingly, the circuit court did not err in denying leave to file his successive petition.

¶ 35 For the reasons stated, we affirm the judgment of the circuit court.

¶ 36 Affirmed.