2017 IL App (1st) 152407-U
Order filed: September 22, 2017

FIFTH DIVISION

No. 1-15-2407

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. 11 CR 5293
	)	
ANTHONY WHITFIELD; VAN WHITFIELD; and	)	
TERRANCE POLK,	)	Honorable
	)	William G. Lacy,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred in the judgment.

ORDER

¶ 1 ***Held***: Circuit court's denial of defendants' motion for leave to file a second successive postconviction petition affirmed where defendants failed to raise a colorable claim of actual innocence.

¶ 2 Defendants Anthony Whitfield (Anthony), Terrance Polk (Terrance Polk), and Van Whitfield (Van) appeal from an order of the circuit court of Cook County denying them leave to file a second successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). Defendants argue that their petition raised a colorable claim of their actual innocence based on the attached affidavits of individuals who averred either that

defendants were not involved in the shooting, or were, otherwise, not present at the scene when the shooting occurred. For the reasons set forth below, we affirm.

¶ 3 This court has previously detailed the evidence presented at defendants' jury trial when it affirmed their convictions and sentences of natural life imprisonment on direct appeal in *People v. Whitfield*, No. 1-00-1303 (2002) (unpublished order under Supreme Court Rule 23). We will, therefore, limit our recitation of the evidence to that necessary to address defendants' arguments in this appeal.

¶ 4 Defendants, members of the Mickey Cobras gang, were convicted of the first-degree murder of Gerard Thomas (Gerard) and Brodie Trotter (Brodie), members of the rival Black Disciples gang, stemming from a 1997 shooting at a public housing complex in Chicago. Defendants' convictions largely resulted from the testimony of three residents of the housing complex: Kaneita Billups (Kaneita), Venus Smith (Venus), and Darlene Billups (Darlene).

¶ 5 The evidence presented at trial established that Kaneita and her friend Venus lived in the building at 4848 South State in Chicago. The Mickey Cobras and Black Disciples were vying for control of the building. Members of the Black Disciples, including Gerard and Brodie, as well as members of the Mickey Cobras were present in the building. Kaneita and Venus knew several members of the Mickey Cobras, including Anthony, Van, Terrance Polk, Christopher Whitfield (Christopher), Terrance Thomas (hereinafter referred to as Thomas, also known as "42"), and Lionel Blackwell (also known as "Big Well").

¶ 6 On August 11, 1997, following a confrontation between members of the two gangs, Kaneita and Venus heard Terrance Polk say: "we fixing to take it to the ground," before they heard a loud commotion in the lobby of the building. Standing on the porch, Kaneita and Venus saw Anthony, Van, and Thomas run down the stairs to the ground floor.

¶ 7 Kaneita testified that a crowd had formed outside the building and she saw Anthony and Terrance Polk running out of the building, holding guns. She saw Christopher and Terrance Polk fighting with a boy in an orange jacket, and heard Thomas say: "f**k him up," or "get him."

¶ 8 Kaneita heard a gunshot but did not know who had fired it. Thomas then said: "work it," or "work him" and everyone began shooting. She saw Thomas and Blackwell shoot their guns, and also saw Christopher holding a gun in his hands. Kaneita then saw Brodie walking toward the building, heard a gunshot, and saw him fall to the ground. Christopher and Terrance Polk stood over Brodie and said: "yeah, yeah, yeah," and "we got us one." Defendants then fled the scene in cars. Kaneita went downstairs and observed Gerard lying on the ground.

¶ 9 Venus also testified that she saw Christopher and Terrance Polk fighting with a boy. She heard a gunshot but did not see who had fired the shot. However, immediately after hearing the shot, she saw Christopher moving away from the building with something in his hand. Thomas retrieved a gun from a car and said: "work him" before pointing a gun at the building and firing a shot. Venus saw Blackwell and Christopher shooting. Anthony and Terrance Polk had guns, but Venus did not see them shoot. She observed Brodie walking and eating. He then fell. Christopher and Terrance Polk stood over his body, high-fived, and say: "we got us one." Defendants, Blackwell, Christopher, and Thomas then fled the scene in cars. Venus went downstairs and saw Gerard lying on the ground.

¶ 10 Darlene, Kaneita's mother, testified that she heard a commotion and, looking down from her apartment window, saw a group that included Anthony, Terrance Polk, and Van fighting. She further saw Terrance Polk and Christopher fighting with a boy wearing an orange shirt. Anthony, Van, Terrance Polk, Christopher, Blackwell, and Thomas were all holding guns. Thomas yelled: "get them," and fired his gun. Darlene then saw Blackwell and Van shoot, but did not see

Anthony or Terrance Polk fire their guns. Christopher and Terrance Polk walked to Brodie, stood over his body, and said: "yeah, we got one" before high-fiving. Anthony, Van, and Terrance Polk left the area in cars. Darlene then went downstairs and saw Gerard lying on the ground.

¶ 11 Defendants were found guilty of two counts of first degree murder and sentenced to natural life imprisonment. We affirmed defendants' convictions and sentences on direct appeal. *People v. Whitfield*, No. 1-00-1303 (2002) (unpublished order under Supreme Court Rule 23).

¶ 12 Defendants filed a petition for relief under the Act on May 17, 2001, alleging the State withheld the nature of several witnesses' relationships with members of a rival gang in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Following an evidentiary hearing, the circuit court denied defendants' petition. Defendants appealed, arguing their constitutional rights were violated, and that the circuit court incorrectly found no witness bias and further erred by prohibiting proposed expert witness testimony on the issue of witness bias. We affirmed the circuit court's denial of defendants' postconviction petition on May 2, 2011. *People v. Whitfield*, No. 1-08-1870 (2011) (unpublished order under Supreme Court Rule 23).

¶ 13 On September 25, 2012, defendants filed a motion for leave to file a successive postconviction petition, which asserted their actual innocence. In support, defendants attached several affidavits, including those of Christopher, Earl Galtney (Galtney), and Darryl Williams (Williams). On November 9, 2012, the circuit court denied leave to file a successive postconviction. Defendants did not appeal the denial.

¶ 14 On May 26, 2015, defendants filed a motion for leave to file a second successive postconviction petition. This petition, the subject of the instant appeal, alleged actual innocence as well as claims that trial counsel was ineffective for failing to seek out and present exculpatory witness testimony at trial. Defendants claim that the affidavits, which were submitted with the

petition, showed that they were not present at the shooting and that other individuals were responsible for the murder of Gerard and Brodie. The affidavits were made by defendants and by John Murray, Jr., Nakia Copeland (Copeland), Nikea Nutall (Nutall), and Rosetta Polk-Pugh (Rosetta), who is the mother of Terrance Polk. Again, as they did with the initial successive petition, defendants also included affidavits of Christopher, Williams, and Galtney. On appeal, however, defendants rely only upon the affidavits of Copeland, Nutall, Christopher, Williams, and Galtney.

¶ 15 In her affidavit, dated November 29, 2014, Copeland averred that, on August 11, 1997, she was present with Terrance Polk all day and night. She picked him up between 11:30 a.m. and noon from his mother's house. Copeland and Terrance Polk went shopping until approximately 4 p.m. Copeland and Terrance Polk "hung out" at Rosetta's house until 10 p.m. before going to a lounge where they drank and "[p]artied" until 2 a.m. They then returned to Rosetta's house to sleep and did not leave there until the next morning. Copeland denied that she and Terrance Polk went to the Robert Taylor Homes on the night of August 11 and 12, 1997. Copeland knew that Rosetta informed trial counsel that Terrance Polk and Copeland never went to the Robert Taylor Homes on the night of the shootings but trial counsel never contacted her.

¶ 16 In Nutall's affidavit, dated November 29, 2014, she averred that, on August 11, 1997, she was at 4848 South State Street at the Robert Taylor Homes where her friend "Yolanda" lived. Nutall and Yolanda heard the shooting and immediately went outside to see what had happened. Nutall told police detectives that Terrance Polk was not present at the time of the shooting. She later told Rosetta that she would testify. Rosetta told her that trial counsel would contact her, but he did not do so.

¶ 17 Christopher provided an affidavit which was substantially similar to his affidavit in support of defendants' first successive postconviction petition. In the affidavit submitted in support of the second successive postconviction petition, dated August 20, 2014, he averred that, on August 11, 1997, he was standing outside the building at 4848 South State Street at the Robert Taylor Homes. He and his friends "got into it" with members of the Black Disciples gang. A Black Disciple named "Travis" pulled out a gun and fired about four shots at Thomas and Christopher, who were both members of the Mickey Cobra gang. Brodie was struck by one of the bullets, but Christopher did not know who shot Gerard. Defendants were not present at the scene of the shooting. Christopher could not testify or provide an affidavit at the time of defendants' trial because he was being tried separately for the same offense and did not want to incriminate himself. Christopher concluded: "now that everything is over I am coming forth with the truth."

¶ 18 Williams also provided an affidavit containing facts substantially similar to his affidavit previously submitted in support of defendants' first successive postconviction petition. In his affidavit, dated May 28, 2014, Williams averred that, on August 11, 1997, he was standing outside the building at 4848 South State Street at the Robert Taylor Homes with friends. He and his fellow Black Disciples "had an altercation" with members of the Mickey Cobras gang. A Black Disciple named "Lil Travis" pulled out a gun and fired about four shots, hitting Brodie. Williams saw Blackwell and Thomas pull out guns and shoot at some Black Disciples. He later learned that Gerard was killed during this incident. Gerard "could have only been killed by the gunfire from [Blackwell's] or [Thomas's] guns." Defendants were not present at the scene when the shootings occurred. Williams was no longer a Black Disciple and, therefore, did not fear reprisals against him or his family from the gang.

¶ 19 Galtney provided two affidavits that are verbatim to his affidavits which were submitted in support of defendants' first successive postconviction petition. In the first affidavit, dated June 19, 2012, Galtney averred that, on August 11, 1997, he was present at the Robert Taylor Homes with friends. He and his fellow Black Disciples, "Travis" and "Lil Kenny," had "some words" with members of the Mickey Cobras. Lil Kenny and Blackwell, a Mickey Cobra, got into a fist fight near the building. Travis pulled out a gun and fired about five shots at "Chris" and Thomas. Galtney only saw Brodie fall. Blackwell and Thomas pulled out guns and fired, but everyone started to run. Defendants were not at the scene when the shooting occurred. Galtney would have come forward sooner, but he was a Black Disciple and he did not want anything to happen to him or his family. He was no longer a Black Disciple and did not live in that area.

¶ 20 In Galtney's second affidavit, also dated June 19, 2012, he averred that he wanted "to come forward after learning that a lie was created to help send 'Terrance Polk' to the penetentary [sic] for life." On August 10, 1997, Galtney's friends "Wayne" or "Hit Man" never had any guns or any altercations with Terrance Polk. Galtney never saw Terrance Polk that day and has not seen him in years. He did not know why Kaneica and Venus "created this story involving [him]."

¶ 21 On July 17, 2015, in a written order, the circuit court denied defendants leave to file their second successive postconviction petition. The court found, *inter alia*, that defendants failed to establish ineffective assistance of counsel because they could not establish prejudice. The court also found that defendants could not show actual innocence based on the affidavits of Galtney, Christopher, and Williams as they had submitted affidavits in support of defendants' first successive petition alleging actual innocence and, thus, the affidavits were barred from consideration by *res judicata*. With respect to Copeland's and Nutall's affidavits, the court determined that this evidence could not be used to simultaneously support a claim of actual

innocence and also supplement an assertion of ineffective assistance of counsel. Further, the court found these affidavits were not newly discovered or conclusive evidence to show defendants were innocent of the offenses.

¶ 22 The Act provides a procedural mechanism for a defendant to assert a substantial denial of his constitutional rights in the underlying proceedings giving rise to his conviction. 725 ILCS 5/122-1 (West 2014); *People v. Tate*, 2012 IL 112214, ¶ 8. Generally, the Act contemplates the filing of only one petition for postconviction relief. 725 ILCS 5/122-1(f) (West 2014). Where a defendant previously appealed a judgment of conviction, "the ensuing judgment of the reviewing court will bar, under the doctrine of *res judicata*, postconviction review of all issues actually decided by the reviewing court, and any other claims that could have been presented to the reviewing court will be deemed waived." *People v. Edwards*, 2012 IL 111711, ¶ 21. Moreover, claims asserting substantial denial of constitutional rights that were not raised in the original or amended postconviction petition are waived. 725 ILCS 5/122-3 (West 2014).

¶ 23 Before the claims in a successive petition can be considered, a petitioner must first obtain leave of court to file the successive petition. *People v. Sutherland*, 2013 IL App (1st) 113072, ¶ 16. A successive postconviction petition may be considered only when a defendant (1) establishes "cause and prejudice" for the failure to raise the claim sooner; or (2) makes a claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 329-30 (2009). Leave to file a successive postconviction petition will be denied where "it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *People v. Smith*, 2014 IL 115946, ¶ 35.

¶ 24 Defendants first argue that the second postconviction petition set forth a colorable claim of actual innocence based on the affidavits of Galtney, Copeland, Christopher, Williams, and Nutall.

¶ 25 "An actual innocence claim does not merely challenge the strength of the State's case against the defendant." *People v. Evans*, 2017 IL App (1st) 143268, ¶ 30. That is, the sufficiency of the evidence presented by the State is not at issue in a postconviction proceeding. *Id*. Instead, "the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' " *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (citing *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999)).

¶ 26 In raising a claim of actual innocence, a petitioner must present evidence that is (1) newly discovered; (2) material and noncumulative; and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. These claims "must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.' " *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). "To set forth a colorable claim of actual innocence in a successive petition, the defendant's 'request for leave of court and his 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.' " *People v. Jones*, 2017 IL App (1st) 123371, ¶ 127 (quoting *People v. Edwards*, 2012 IL 111711, ¶ 31).

¶ 27 We find defendants failed to establish a colorable claim of actual innocence in their second successive postconviction petition because the affidavits of Galtney, Christopher, and Williams offered in support cannot be considered newly discovered evidence. Defendants' first

successive postconviction petition alleging actual innocence was also supported by the affidavits of Christopher, Williams, and Galtney which contained the same substantive material and are nearly verbatim to the affidavits filed in support of defendants' second successive postconviction petition. As the circuit court already considered and rejected actual innocence in defendants' first successive postconviction petition based on these affidavits, they cannot be considered "newly discovered" such that we can consider them as part of an actual innocence claim in defendants' second successive postconviction petition. See *People v. Warren*, 2016 IL App 090884-C, ¶ 114 ("Typically, evidence of which the defendant was aware in earlier postconviction proceedings will not be considered newly discovered."); *People v. Snow*, 2012 IL App (4th) 110415 ("if the evidence was available at a prior posttrial proceeding, the evidence is also not newly discovered evidence").

¶ 28 The affidavits of Copeland and Nutall, provided in support of defendant's second successive postconviction petition, likewise fail to establish a colorable claim of actual innocence, as they do not present a free-standing claim of actual innocence and are not "newly discovered."

¶ 29 A free-standing claim of actual innocence refers to newly discovered evidence that is not " 'used to supplement an assertion of a constitutional violation with respect to [the] trial.' " *People v. Hobley*, 182 Ill. 2d 404, 443-44 (1998) (quoting *People v. Washington*, 171 Ill. 2d 475, 479 (1996)). Copeland's and Nutall's affidavits state not only that defendants were not involved in the shooting, but also that trial counsel was aware that Copeland and Nutall would testify to this effect but never contacted them. Thus, defendants' supported their actual innocence, as well as ineffective assistance of trial counsel for counsel's failure to contact Copeland and Nutall and

present their affidavits. Defendants, therefore, fail to present a free-standing claim of actual innocence. See *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007).

¶ 30 Even if the failure to present a free-standing claim of actual innocence did not bar consideration of these affidavits, the affidavits of Copeland and Nutall cannot be considered newly discovered evidence. To qualify, the evidence must have been unavailable at trial and could not have been discovered earlier through diligence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Evidence is not considered newly discovered "if it presents facts already known to the defendant, even if the source of those facts was unknown, unavailable or uncooperative." *People v. English*, 2014 IL App (1st) 102732-B, ¶ 49. Defendants appear to concede the affidavits are not newly discovered evidence, as they argue that it "is an uncontested fact that no defense was presented at trial despite the known existence of these witnesses." As defendants acknowledge Copeland and Nutall were "known" at trial, their affidavits averring to the events of August 11, 1997, cannot be considered newly discovered evidence. See *Morgan*, 212 Ill. 2d at 154 (to be considered "newly discovered" evidence, "it must be evidence that was not available at defendant's original trial and that the defendant could not have discovered sooner through diligence").

¶ 31 Additionally, the affidavits of Copeland and Nutall fail to recite facts which would lead to a conclusion they are "newly discovered." Turning to Copeland's affidavit, she averred, *inter alia*, that she was present with Terrance Polk all day and night on August 11, 1997. However, Copeland never averred that she was unable to testify, she simply stated that trial counsel never contacted her to do so. Also, she never explains why she provided her 2014 affidavit 15 years after defendants' 1999 trial. Finally, as Copeland averred she was with Terrance Polk on the date of the shooting, he would have necessarily known about her at the time of trial, and any facts she

now provides cannot be considered newly discovered. See *People v. Harris*, 206 Ill. 2d 293, 301 (2002) (finding affidavits of alibi witnesses were not newly discovered evidence because the defendant would have known of his alibi at the time of trial).

¶ 32 Nutall's affidavit also cannot be considered newly discovered evidence based on the facts contained therein. She averred that she told police detectives Terrance Polk was not involved in the shooting and told Rosetta she would testify at trial.[1] She further stated trial counsel never contacted her, despite Rosetta telling her he would. However, nowhere in her affidavit does she explain why her affidavit, dated November 29, 2014, was obtained 15 years after defendants' 1999 jury trial and after defendants had previously submitted two other postconviction petitions. Thus, based on these facts, defendants have not shown that Nutall's testimony was unavailable at trial and could have been discovered sooner through the exercise of diligence.

¶ 33 Having determined that the affidavits of Galtney, Copeland, Christopher, Williams and Nutall are not newly discovered it becomes unnecessary for us to determine whether the affidavits are "conclusive." See *Edwards*, 2012 IL 111711, ¶¶ 37-38 (ending its actual innocence analysis after determining certain witness affidavits were not newly discovered evidence). Defendants' claim of actual innocence fails.

¶ 34 Finally, defendants argue the court erred in dismissing their actual innocence claim because the witnesses at trial viewed the shooting from "some distance," were biased against them, and failed to mention crucial facts "which would have inculpated" them. Defendants continue: "It is more than probable that if the trier of fact would have heard the affiant testimony at trial and weighed it against the inconsistent [S]tate witnesses the conclusion would have been not guilty." However, this argument is not a claim of actual innocence, of complete vindication

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[1] We note that, on the State's answer to discovery, an individual name "Takia Netall" was listed as a potential witness.

(*Collier*, 387 Ill. App. 3d at 636) but, rather, it essentially challenges the sufficiency of the evidence to sustain the convictions. A claim of actual innocence does not challenge the strength of the State's evidence, or concern itself with whether a defendant was found guilty beyond a reasonable doubt. *Evans*, 2017 IL App (1st) 143268, ¶ 30; *People v. Barnslater*, 373 Ill. App. 3d 512, 520 (2007). We, therefore, reject defendants' characterization of their contention that weighing the affiants' testimony against that of the State's witnesses would have resulted in a not guilty verdict as a claim of actual innocence.

¶ 35 For the reasons set forth above, defendants, in their second successive postconviction petition, did not set forth a colorable claim of actual innocence and the circuit court properly denied them leave to file that petition. We, therefore, affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.