2011 IL App (2d) 100280-U
No. 2—10—0280
Order filed August 26, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 00—CF—2166
DeANDRE L. ROBINSON,	)	Honorable Victoria A. Rossetti,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: Defendant's actual-innocence claim, based on newly discovered evidence, was insufficient to warrant leave to file a successive postconviction petition: the evidence was not conclusive, especially in light of the strong evidence of guilt.

¶ 1 Defendant, DeAndre L. Robinson, appeals an order denying him permission to file a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1 *et seq.* (West 2004)). On appeal, defendant contends that the trial court erred in (1) applying the "cause and prejudice" test of section 122—1(f) of the Act (725 ILCS 5/122—1(f) (West 2004)) to his claim of

actual innocence; and (2) deciding the credibility of the affidavit that was filed in support of the proposed petition. We affirm.

¶ 2 In 2000, defendant was charged with the first-degree murder (720 ILCS 5/9—1(a)(2) (West 2000)) of James McClain, the passenger in a U-Haul truck driven by LaQuion McBride. At defendant's jury trial, the evidence was essentially undisputed that, shortly before the fatal incident, defendant and McBride angrily exchanged words at a tavern; that McBride drove to the parking lot of a McDonald's restaurant and defendant followed in his car; that defendant exited his car, approached the parked truck and angrily confronted McBride; that he pointed a .357 Magnum revolver through the open driver's-side window of the truck; that the gun soon discharged, striking McClain in the chest and fatally wounding him; and that defendant then walked away and drove off. Defendant contended that the gun went off accidentally as he and McBride struggled over it, so that he was guilty only of involuntary manslaughter. The jury disagreed, finding defendant guilty of murder. The trial court sentenced him to 36 years' imprisonment.

¶ 3 Defendant appealed, contending in part that the evidence did not prove him guilty beyond a reasonable doubt of first-degree murder. Defendant noted that, although McBride testified at trial that he never touched defendant's gun, he admittedly wrote out a statement, a few hours after the shooting, in which he said that he had pushed the gun away just before it fired. Also, the parties stipulated that a police officer would testify that, a few minutes after the shooting, McBride told him the same thing. Defendant argued that McBride's statements corroborated defendant's testimony that the gun discharged accidentally as McBride grabbed at it.

¶ 4 We rejected defendant's reasonable-doubt argument. In addition to noting that the jury had been free to credit McBride's trial testimony over his prior statements, we observed that it was undisputed that defendant had approached the truck, pointed the gun through the window, and

angrily confronted McBride—all of which strongly supported finding that he had willfully pulled the trigger, knowing that he would cause death or great bodily harm (see 720 ILCS 5/9—1(a)(2) (West 2000)). *People v. Robinson*, No. 2—00—1474 (2002), slip order at 10 (unpublished order under Supreme Court Rule 23). Further, we stated, the accident theory was "refute[d]" by the testimony of Robert Wilson, a firearms examiner with a police crime laboratory, that defendant's gun had an internal safety and required 12¾ pounds of pressure to pull the trigger. *Id.* at 10-11.

¶ 5 On December 3, 2002, defendant filed a *pro se* petition under the Act. As pertinent here, he claimed that newly discovered evidence, an affidavit by Shakar Stone, supported his claim of involuntary manslaughter. In his affidavit, Stone stated that, at the time of the shooting, he was standing three or four parking spaces away from McBride's truck; that he saw defendant point a gun at McBride and heard defendant address McBride angrily; that he saw McBride reach out and grab the gun with both hands; that a struggle ensued in which defendant's head and upper chest were drawn inside the truck; and that, after about 30 seconds, the gun fired and defendant stumbled back. The trial court dismissed the petition summarily, noting that Stone's account of a lengthy struggle in which defendant was pulled inside the truck contradicted defendant's own trial testimony.

¶ 6 On appeal, we affirmed. *People v. Robinson*, No. 2—03—0159 (2004) (unpublished order under Supreme Court Rule 23). We explained that a claim of actual innocence, based on newly discovered evidence, requires that the evidence be so conclusive that it would probably change the result on retrial. *Id.* at 2 (citing *People v. Washington*, 171 Ill. 2d 475, 489 (1996)). We held that Stone's affidavit failed this test. First, it was not clear that the evidence was truly new. *Id.* at 2-3. Second, Stone's testimony would not likely affect the result on retrial, in part because his account of a lengthy fight between defendant and McBride went "well beyond" defendant's account of a "quick tussle" over the gun. *Id.* at 4.

¶ 7 On January 27, 2005, defendant moved for leave to file a successive postconviction petition. He alleged that his proposed petition satisfied section 122—1(f) of the Act, which reads:

> "Only one petition may be filed by a petitioner *** without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause 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 (2) 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 2004).

¶ 8 Defendant's proposed petition raised a claim of actual innocence based on newly discovered evidence. This time the source of the evidence was Charles Smith, who claimed to have been an eyewitness to the shooting. Defendant contended that he had been unable to obtain Smith's evidence by the time of his trial, having discovered Smith only in 2004 while they were inmates at the same prison. In an affidavit, Smith stated as follows. While he was parked near the entrance of the McDonald's parking lot, he saw the U-Haul truck pull in and park nearby. Defendant exited his car, walked up to the truck, and pointed a gun at the driver. After hearing some words exchanged, Smith saw the driver grab the gun, apparently with both hands. Defendant and the driver started to struggle over the gun; within seconds, Smith saw a bright flash inside the truck. Defendant entered his car and drove off. Smith drove off but returned minutes later. The police had arrived. Smith told a detective that he wanted to talk about the shooting, but the detective refused to listen.

¶ 9 The trial court entered an order that was identical to the one that summarily dismissed defendant's first postconviction petition. On appeal, we reversed and remanded. *People v. Robinson*, No. 2—05—0557 (2007), slip order at 2-3 (unpublished order under Supreme Court Rule 23). After the trial court again ruled against him, defendant appealed. For reasons that we need not explain here, we vacated the judgment and again remanded the cause. *People v. Robinson*, No. 2—07—1210 (2009) (unpublished order under Supreme Court Rule 23).

¶ 10 On remand, the trial court explicitly denied defendant leave to file the proposed petition, stating that he had not satisfied the prejudice prong of the cause-and-prejudice test, as Smith's testimony would probably not lead to a different result on retrial. Defendant timely appealed.

¶ 11 On appeal, defendant argues that the judgment must be reversed because (1) the trial court erroneously applied section 122—1(f)'s cause-and-prejudice test to the claim of actual innocence; and (2) the trial court improperly weighed the evidence. On our *de novo* review (*People v. Thompson*, 383 Ill. App. 3d 924, 929 (2008)), we disagree.

¶ 12 Defendant is correct that the trial court erred in its apparent assumption that section 122—1(f)'s cause-and-prejudice test applied to his claim of actual innocence. See *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). However, whether the trial court erred in this regard, or in its alleged weighing of the evidence, is ultimately irrelevant. We review the trial court's judgment, not its reasoning; thus, we may affirm on any basis called for by the record, regardless of whether the trial court's reasoning was correct. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010). Therefore, we turn to the actual issue: whether defendant's claim of actual innocence was sufficient to entitle him to file his proposed successive postconviction petition. We hold that it was not.

¶ 13 As noted, a successive postconviction petition asserting a claim of actual innocence based on newly discovered evidence will be allowed only if the evidence at issue is newly discovered;

material and not merely cumulative; and so conclusive that it would probably change the result on retrial. *Ortiz*, 235 Ill. 2d at 333. Smith's proposed evidence does not pass this test, as it is not so conclusive that it would probably change the result on retrial. As we noted in affirming defendant's conviction, the evidence of defendant's intent was extremely strong. It was essentially undisputed that defendant, who had earlier exchanged angry words with McBride, approached McBride's truck, pointed his gun through the open driver's window at McBride, and threatened McBride in some manner. Also undisputed was that defendant soon after fired his gun, fatally injuring McClain.

¶ 14 To avoid a conviction of first-degree murder, defendant advanced the theory that the gun went off accidentally as he and McBride struggled over it. The jury rejected this theory. In affirming, we noted not only that McBride's testimony contradicted the accident theory, but that the theory had been "refuted" by Wilson's expert testimony that the gun could not have discharged as defendant claimed. *Robinson*, No. 2—00—1474, slip order at 10-11. Later, in affirming the dismissal of defendant's first postconviction petition, we observed that Stone's proposed eyewitness testimony was not so conclusive that it likely would have caused a different result on retrial.

¶ 15 Smith's proposed testimony, while perhaps more consistent with defendant's theory of the case than was Stone's, likewise falls far short of what would be needed to support defendant's claim of actual innocence. Smith's testimony would not contradict the evidence that defendant had a grudge against McBride and pointed the gun at McBride. Smith's testimony would at most contradict McBride on the issue of whether there was a struggle for the gun before it went off; it would not require a jury to reject McBride's testimony that there was no struggle. Moreover, even had there been a struggle for the gun, that would hardly show that defendant fired the gun *as a result of that struggle* and not in spite of it. Finally, and most tellingly, Smith's testimony would not cast

any doubt on Wilson's expert testimony that, owing to the internal safety and the amount of pressure needed to fire defendant's gun, the gun could not have gone off accidentally as defendant claimed.

¶ 16 For all of these reasons, defendant's proposed successive petition failed the actual-innocence test, and the trial court properly refused to allow defendant to file it. Therefore, the judgment of the circuit court of Lake County is affirmed.

¶ 17 Affirmed.