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2012 IL App (3d) 110787-U

Order filed December 20, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois
	)	
v.	)	Appeal No. 3-11-0787
	)	Circuit No. 02-CF-1975
CORZELL J. COLE,	)	
	)	Honorable Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.  
Justice Holdridge concurred in the judgment.  
Justice O'Brien dissented.

**ORDER**

- ¶ 1 *Held:* The trial court did not err in dismissing defendant's postconviction petition at the second stage where defendant's alleged newly discovered evidence of actual innocence was not of such a conclusive character that it would probably change the result of the trial.
- ¶ 2 Defendant, Corzell Cole, appeals from the second-stage dismissal of his postconviction petition by the circuit court of Will County. Defendant claims he made a substantial showing of

actual innocence and, as such, his petition should have proceeded to an evidentiary hearing. We affirm.

¶ 3

### BACKGROUND

¶ 4 The record reveals that the State charged, tried and convicted defendant of first degree murder and attempted first degree murder on an accountability theory. The State's evidence at trial established that on November 1, 2002, defendant drove a car in which Travaris Guy was a passenger. Defendant pulled the car up next to a van, which was stopped at a traffic light at an intersection in Joliet. When defendant stopped the vehicle, his front bumper was just behind the front driver's-side window of the van. Four people were inside the van: David Woods, Sr.; his daughter, Sheena Woods; Sheena's cousin, David; and David's girlfriend, Constance.

¶ 5 Sheena recognized the occupants of defendant's car and identified them as defendant and Travaris Guy. She had known the two for several years. Sheena testified that her father, David Woods, Sr., opened his door and looked out to see who was in the car. As he opened the door, Travaris Guy began shooting. Sheena observed that her father had been shot and was bleeding from the mouth. When Sheena turned to get on the floor with him, she was also shot. After Guy had fired four shots into the van, defendant made a left turn at the intersection and sped off. Sheena's cousin David got into the driver's seat and drove the van toward the hospital. Sheena sustained a single gunshot wound to her back. Her father was dead on arrival at the hospital.

¶ 6 Creighton Brandt, a Colorado state police officer, testified at defendant's trial that he arrested defendant in Colorado Springs for possession of marijuana one week after the shooting.

Following his arrest, defendant gave several false names and a false birth date. At the police station, defendant overheard Brandt indicate his intent to send defendant's fingerprints to the FBI. Shortly thereafter, defendant became teary-eyed and revealed his actual identity.

Defendant further informed Officer Brandt that the police in Joliet were looking for him.

¶ 7 Defendant put no evidence on in his defense during his trial. Following closing arguments, a jury convicted defendant of first degree murder and attempted first degree murder. The court proceeded to sentence defendant to consecutive prison terms of 35 years for first degree murder and 15 years for attempted first degree murder.

¶ 8 On appeal, this court affirmed defendant's convictions and sentences. *People v. Cole*, No. 3-03-0915 (Dec. 14, 2006) (unpublished order under Supreme Court Rule 23) (*Cole I*). In finding that the evidence had been sufficient to establish defendant's guilt by accountability, we stated:

“Here, the [defendant] was driving the vehicle from which Travaris Guy fired the shots that killed David L. [Woods] and injured Sheena. [Defendant] specifically positioned his vehicle so that Guy would be able to shoot inside the van. [Defendant] kept the vehicle in that position until Guy had fired four shots into the van and struck two occupants. [Defendant] then drove away from the scene, fled to another city, and abandoned the vehicle. Thereafter, [defendant] fled the state and was found in Colorado

one week later, where he gave a false name to authorities.

[Defendant] never reported the shooting to police. This evidence was sufficient to find [defendant] guilty beyond a reasonable doubt of murder and attempted murder based on accountability.” *Cole I*, No. 3-03-0915, slip op. at 7 (Dec. 14, 2006) (unpublished order under Supreme Court Rule 23).

¶ 9 In September of 2007, defendant filed a *pro se* petition for postconviction relief. The petition alleged a claim of actual innocence based on allegedly newly discovered evidence; that being a sworn statement from the shooter, Travaris Guy. Specifically, the statement notes:

On November 1, 2002, defendant picked me up from my grandmother[’s] house on Water Street in Joliet, Illinois. Our destination was a hotel in Bolingbrook, Illinois. While on Interstate I-80 we turned off on Larkin Avenue in order to get gas and cigarettes. While at the gas station I placed a handgun on the floorboard of the vehicle. [Defendant] was on his way inside the gas station when this occurred. I then entered the gas station purchased a few snacks and returned to the car. [Defendant] was pumping the gas. When [defendant] entered the car he saw the gun that I had placed on the floor. We had a vague conversation about the gun and he stated that he did not want to drive on the

interstate with a gun in the car because he was scared of getting pulled over. [Defendant] was unaware that I was in possession of that gun when he picked me up from my grandmother's house. When he left the gas station we \*\*\* drove a few blocks and stopped at an intersection on Jefferson and Midland. We then looked to our right and saw a big black and grey van at the lights and \*\*\* could see that David Woods Sr. was the driver and David Woods Jr. was in the front seat passenger. David Woods Sr. was frowned up as if he was mad. I then told [defendant] to run the light, [defendant] stated, 'they were probably trying to scare us.' A few seconds later we saw the van jerk and then the doors opened. [Defendant] screamed and told me to get down. I ducked and at the same time noticed a silver gun in David Woods Sr.'s hand pointed directly at me. As I was continuing to duck down I lifted the gun with my left hand and fired a few shots in the direction of the van. At the same time [defendant] ran the light. This all happened very fast. Maybe two minutes. I never meant for anybody to get hurt. I only reacted the way I did because our lives were in danger that day."

¶ 10 Defendant's postconviction petition asserts that Guy's statement constituted newly

discovered evidence because Guy was unavailable at the time of defendant's trial due to the fact that he had yet to be apprehended. Guy was subsequently apprehended and tried after defendant had been sentenced. At his own trial, Guy testified that he shot at the van in self-defense. Guy was eventually convicted and sentenced to consecutive prison terms of 30 years for second degree murder of David Woods, Sr., and 30 years for attempted murder of Sheena Woods. On appeal, we affirmed Guy's convictions and sentences. *People v. Guy*, No. 3-05-0564 (June 13, 2007) (unpublished order under Supreme Court Rule 23). In *Guy*, this court found the evidence in the case was not closely balanced and stated:

"Guy admitted he and Corzell were in the intersection described by the State's witnesses. Guy asserted his version of the event could be corroborated through an examination of the van itself; however, photographs depicting the condition of the van, including photographs of the various holes in the exterior and interior, were provided at the trial. Trafton testified to the position of the holes and the location of the recovered bullets. Even were we to view Trafton's testimony regarding the ballistics as beyond the ken of his knowledge as a lay person, we note that Brian Mitchell, the forensic pathologist who performed the autopsy of Woods, also opined the trajectory of the bullet that killed Woods was upward, left-to-right and from the back of the body to the front, an angle

that suggested the vehicles were positioned as the three van occupants testified. Moreover, Guy admitted that he shot at Woods, did not deny that a bullet he fired resulted in the death of Woods; and, although Guy asserted Woods had a gun, no gun was ever recovered and there was no evidence of gunshot residue on Woods's hands." *Id.* at 11.

¶ 11 On November 19, 2007, the trial court entered a written order dismissing defendant's petition on the grounds that it was frivolous and patently without merit. The trial court found that Guy's statement did not offer any newly discovered evidence. Instead, the court held that the statement confirmed that defendant knew there was a gun in the car prior to the shooting. Defendant appealed the original dismissal of his postconviction petition.

¶ 12 On appeal, with one justice dissenting, this court reversed. *People v. Cole*, No. 3-08-0027 (Jan. 6, 2009) (unpublished order under Supreme Court Rule 23). On remand, defendant filed an amended postconviction petition, arguing the claim of actual innocence and adding the assertion that he was entitled to postconviction relief for ineffective assistance of counsel and due to a witness's perjury. The State filed a motion to dismiss the amended petition.

¶ 13 Following arguments pertaining to the State's motion, the trial court granted the State's motion to dismiss. The trial court found that the affidavit of Guy was submitted after he "had nothing to lose" as he had already been sentenced. The trial court characterized the affidavit as "not of such a convincing nature that it would have changed the outcome of defendant's trial."

¶ 14 This matter is defendant's appeal from the trial court's second-stage dismissal of his postconviction petition. Defendant appears to have abandoned all other claims of error in his amended petition save the newly discovered evidence of actual innocence based on Guy's testimony and affidavit.

¶ 15

#### ANALYSIS

¶ 16 The sole issue presented on appeal is whether the trial court erred in dismissing defendant's postconviction petition. We review *de novo* a trial court's decision to dismiss a petition at the second stage of postconviction proceedings. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 17 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a statutory remedy to criminal defendants who claim that substantial violations of their constitutional rights occurred at trial. *People v. Eddmonds*, 143 Ill. 2d 501, 510 (1991). The Act is not a substitute for an appeal, but rather is a collateral attack on a final judgment. *People v. Ruiz*, 132 Ill. 2d 1, 9 (1989). As such, where a petitioner has previously taken an appeal from 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. For this petitioner to be entitled to an evidentiary hearing, he must make "a substantial showing of a constitutional violation." *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 28; 725 ILCS 5/122-6 (West 2010). "Only upon a substantial

showing of a constitutional violation is a defendant entitled to a third-stage evidentiary hearing."

*People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 19.

¶ 18 Defendant claims in his postconviction petition that he was actually innocent of this crime. He does not dispute that he drove the car from which Guy fired the shots that killed David Woods and injured Sheena Woods. He does not dispute that he positioned the vehicle so that Guy would be able to shoot inside the van, immediately fled the scene after the shooting, subsequently fled the state to avoid prosecution and gave Colorado police officers numerous false names in further attempts to avoid prosecution. Defendant's amended petition acknowledges that prior to the shooting, he observed the gun in the car and he discussed the gun with Guy. His claim of actual innocence is solely based on the testimony of the shooter, Guy, in which the shooter claims to have acted in self-defense.

¶ 19 Our supreme court recently commented on a claim of actual innocence as analyzed through the postconviction spectrum. In *People v. Edwards*, 2012 IL 111711, the court stated:

"The elements of a claim of actual innocence are that the evidence in support of the claim must be 'newly discovered'; material and not merely cumulative; and of such conclusive character that it would probably change the result of retrial. [Citations.] We deem it appropriate to note here that the United States Supreme Court has emphasized that such 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.' [Citation.]

The Court added: 'Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.' " *Id.* at ¶ 32.

¶ 20 A jury convicted the *Edwards* defendant of first degree murder under a theory of accountability. *Id.* at ¶ 3. The appellate court affirmed his conviction on appeal (*People v. Edwards*, No. 1-00-2332 (2001) (unpublished order under Supreme Court Rule 23)) and also affirmed the first-stage dismissal of his original postconviction petition. *People v. Edwards*, No. 1-02-2563 (unpublished order under Supreme Court Rule 23). The *Edwards* defendant filed a subsequent postconviction petition, claiming actual innocence based upon, *inter alia*, newly discovered evidence; that being, an affidavit of the actual shooter, Eddie Coleman. *Edwards*, 2012 IL 111711, ¶ 10. Eddie's affidavit stated that he, Willie Richards and Little Mikey were the shooters and that petitioner "had nothing to do with this shooting." *Id.* Eddie explained he did not come forward earlier "because 'all I cared about was my freedom.'" *Id.*

¶ 21 Our supreme court noted in *Edwards* that the trial court's reasoning when denying leave to file the successive petition, that being petitioner's failure to satisfy the cause-and-prejudice test, was flawed. *Id.* at ¶ 31. The court reviewed instances in which the "procedural bar" to filing successive postconviction petitions is "relaxed." *Id.* at ¶¶ 4, 5. The first instance is when a petition can establish cause-and-prejudice for failure to raise the claim earlier. *Id.* The second

basis is when failure to relax the bar would result in a "miscarriage of justice." *Id.* "In order to demonstrate a miscarriage of justice to excuse application of the procedural bar, a petitioner must show actual innocence." *Id.* at ¶ 23.

¶ 22 Ultimately, the *Edwards* court answered the "question [of] whether petitioner set forth a colorable claim of actual innocence. In other words, did petitioner's request for leave of court and his supporting documentation raise the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence? Because we conclude that petitioner did not set forth such a claim, we do not believe a remand is necessary. Like the appellate court below, we believe petitioner's request for leave to file a successive petition based on actual innocence can be resolved as a matter of law and that further proceedings are unnecessary." *Id.* at ¶ 31.

¶ 23 Turning to Eddie's affidavit, the *Edwards* court noted:

"While petitioner obviously knew of Eddie at the time of trial, the evidence in Eddie's affidavit apparently was nevertheless 'unavailable at trial' [citation], and the evidence thus qualified as newly discovered. Eddie was a codefendant, with a fifth amendment right to avoid self-incrimination. No amount of diligence could have forced him to violate that right if he did not choose to do so. [Citation.]

However, even though Eddie's affidavit contains newly discovered evidence, the result is the same. In the affidavit's specific references to

petitioner, Eddie averred petitioner 'had nothing to do with this shooting,' he (Eddie) 'never saw or spoke with [petitioner] after the funeral,' petitioner was neither 'a part [of nor] took part in this crime,' and he (Eddie) did not 'share this information [about the shooting] with [petitioner] after the crime.' Though Eddie averred petitioner 'had nothing to do with this shooting' and was neither 'a part [of nor] took part in this crime,' Eddie critically does not assert that petitioner was not *present* when the shooting took place. As the appellate court correctly noted, Eddie's averment in his affidavit that he was the principal offender 'does little to exonerate defendant who \*\*\* was convicted of the murder under the theory of accountability.'

Thus, even though Eddie Coleman's affidavit could be considered new evidence, it does not raise the probability that, in the light of the new evidence, it is more likely than not that no reasonable juror would have convicted petitioner. This evidence is not 'of such conclusive character that it would probably change the result on retrial.' " (Emphasis in original.) *Id.* at ¶¶ 38-40.

¶ 24 Since Eddie's affidavit did not "assert a colorable claim of actual innocence as a matter of law," the *Edwards* court found "further postconviction proceedings were unnecessary." *Id.* at ¶ 41.

¶ 25 We acknowledge that *Edwards* involved denial of leave to file a successive

postconviction petition, which differs from this case as this is defendant's original petition. However, our task is similar to that of the *Edwards* court. Defendant acknowledges that to survive the State's motion to dismiss his petition must make a "substantial showing" of actual innocence. While defendant asserts he has met this burden, we find *Edwards* dispositive of the issue and hold defendant's claim that Guy's affidavit evinces a colorable actual innocence claim fails. As such, he has not made a substantial showing of a constitutional violation. Therefore, we hold the trial court correctly dismissed his petition.

¶ 26 In defendant's direct appeal, this court held the State adduced sufficient evidence at trial upon which a reasonable jury could conclude the State proved all the necessary elements of the crime beyond a reasonable doubt. *Cole*, No. 3-03-0915 (Dec. 14, 2006) (unpublished order under Supreme Court Rule 23). In *Cole*, we found:

"[T]he defendant was driving the vehicle from which Travaris Guy fired the shots that killed David L. and injured Sheena. The Defendant specifically positioned his vehicle so that Guy would be able to shoot inside the van. The defendant kept the vehicle in that position until Guy had fired four shots into the van and struck two occupants. The defendant then drove away from the scene, fled to another city, and abandoned the vehicle. Thereafter, the defendant fled the state and was found in Colorado one week later, where he gave a false name to authorities. The defendant never reported the

shooting to police. This evidence was sufficient to find the defendant guilty beyond a reasonable doubt of murder and attempted murder based on accountability." *Cole*, No. 3-03-0915, slip op. at 7 (Dec. 14, 2006) (unpublished order under Supreme Court Rule 23).

¶ 27 As stated by the *Edwards* court, to paint a colorable actual innocence claim, the newly discovered evidence must "raise the probability that, in light of the new evidence, it is more likely than not that no reasonable juror would have convicted the petitioner." *Edwards*, 2012 IL 111711, ¶ 40. To do this, the evidence must be "of such conclusive character that it would probably change the result on retrial." *Id.*

¶ 28 The fact that a convicted felon with nothing to lose comes forward to claim that he fired shots in self-defense does not make it more likely than not that no reasonable juror would have convicted petitioner in light of such a claim. We do not view the codefendant's self-serving claims as of such conclusive character that they would probably change the result on retrial. The trial court correctly noted that Guy's affidavit was secured after Guy had been convicted of decedent's murder. While Guy alleges these two innocent citizens merely came upon a van when the driver suddenly decided to open the door and point a gun at Guy, it does nothing to dispel the inference from all the other evidence that defendant positioned the vehicle for the purpose of assisting Guy in shooting into the van as this court found in defendant's direct appeal. Guy's affidavit acknowledges that defendant knew Guy had a gun in the car well before the two

came upon the van. It further indicates that defendant helped Guy flee the scene following the murder and attempted murder. Defendant has failed to identify any evidence that is of such conclusive character that it would probably change the result on retrial. Without such, defendant cannot make a colorable actual innocence claim entitling him to a third-stage evidentiary hearing.

¶ 29 Finally, we note the facts of this matter weigh even more heavily against further postconviction proceedings than did the facts of *Edwards*. Like the defendant herein, the *Edwards* defendant was also tried "under a theory of accountability." *Edwards*, 2012 IL 111711, ¶ 3. The *Edwards* defendant produced affidavits of the shooters, which claimed he had nothing to do with the shooting as well as affidavits from others claiming he was with them "before, during, and after the shooting took place." *Id.* at ¶ 12. Nevertheless, our supreme court found that the newly discovered evidence from the shooter that the *Edwards* defendant "had nothing to do with this shooting" did "not raise the probability that, in the light of the new evidence, it is more likely than not that no reasonable juror would have convicted petitioner. This evidence is not 'of such conclusive character that it would probably change the result of the retrial.'" *Id.* at ¶ 40. The *Edwards*' shooter remained silent as to whether or not the *Edwards*' defendant was at the scene of the crime: a fact that the supreme court specifically addressed. *Id.* at ¶ 39. ("Eddie critically does not assert that petitioner was not *present* when the shooting took place." (Emphasis in original.)). Guy, conversely, not only acknowledges defendant was at the scene of this crime but also that defendant knew he had a gun and helped him flee the scene following

this alleged act of self-defense. Guy's affidavit is far less exculpatory than the affidavit at issue in *Edwards*.

¶ 30

#### CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 32 Affirmed.

¶ 33 JUSTICE O'BRIEN, dissenting.

¶ 34 I respectfully dissent from the majority opinion. In making its ruling, the majority concludes that the petitioner's supporting documentation was not sufficient to raise the probability that it was more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence. In reaching that conclusion, the majority relies on the recent supreme court case of *People v. Edwards*, 2012 IL 111711 (2012), which affirmed the denial of Walter Edwards's successive postconviction petitions alleging actual innocence.

¶ 35 The majority acknowledges that *Edwards* differs from the present case because Edwards involved successive postconviction petitions, while this case involves the petitioner's original postconviction petition. More importantly, however, the cases, while factually similar in some respects, differ in some critical details. *Edwards* involved an affidavit from the actual shooter, who claimed that Edwards was not involved in the shooting. The affidavit did not refute the facts established at trial that Edwards was present at the shooting and was aware of the plan to avenge a friend's death. In this case, the shooter, Travaris Guy, was similarly unavailable at the time of the petitioner's trial, not only because of his Fifth Amendment privilege but because he

was also a fugitive from justice. Guy alleges in his affidavit that he acted in self-defense, which is consistent with his defense at his own trial. Since the petitioner was convicted of first degree murder and attempted first degree murder based upon accountability for Guy's actions, this raises a factual issue regarding the petitioner's intent. To survive a second stage dismissal, the petition must make a substantial showing of a constitutional violation. *People v. Hodges*, 234 Ill. 2d 1 (2009). The petitioner has done so in this case.

¶ 36 For these reasons, I respectfully dissent from the majority. I would reverse the decision of the trial court and remand for an evidentiary hearing.