

SIXTH DIVISION
September 12, 2014
Modified October 10, 2014

No. 1-12-0955

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. 99 CR 16466
)	
JOSE GARCIA,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

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

O R D E R

- ¶ 1 *Held:* We affirmed the circuit court's denial of defendant's *pro se* motion for leave to file a successive postconviction petition for relief where defendant failed to raise a colorable claim of actual innocence.
- ¶ 2 Defendant, Jose Garcia, appeals from an order of the circuit court which denied his *pro se* motion for leave to file a successive postconviction petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant argues his successive petition raised a colorable claim of actual innocence based upon newly-discovered evidence which corroborates defendant's assertion that he shot the victim in self-defense. We

affirm after finding the successive postconviction petition and newly-discovered evidence did not raise a colorable claim of actual innocence.

¶ 3 Following a jury trial, defendant was convicted of first-degree murder in the shooting death of Cesar Aguilar (victim), and was sentenced to 40 years in prison. On direct appeal, in *People v. Garcia*, No. 1-00-2136 (2002) (unpublished order pursuant to Supreme Court Rule 23), we summarized the evidence at trial, which included defendant's inculpatory statements to the police, as follows:

"At trial, Thomas Ramirez testified that at 10:30 p.m., on June 25, 1999, he and the victim, 18-year-old Cesar Aguilar, were sitting in front of Ramirez'[s] home at 1450 South 58th Court in Cicero, when defendant and codefendant Luis Diaz, approached them shouting, "King Love." Both [defendant and codefendant] carried guns and fired them at Ramirez and the victim. The victim, who was wheelchair-bound, shouted that neither of them were gang members, but defendant continued to approach and shoot his gun at the victim. Thomas ran into the house to call police. When he returned outside, the shooting had stopped and he found the victim bent over clutching his stomach.

Cicero police officers Vitalo and Fiodirosa were driving in the area when they heard about six gunshots. As they proceeded toward the area of the shooting, they observed [defendant and codefendant] running toward them with codefendant Diaz carrying a gun in his hand. The officers arrested [defendant and codefendant] and transported them to the police station where defendant made a statement admitting his involvement in the shooting. He stated that he fired a .38 caliber pistol toward the victim

because the victim was a member of the Latin Counts street gang who had intimidated his mother earlier that evening.

Assistant State's Attorney Tim Grace testified that after advising defendant of his *Miranda* rights, defendant told him that on the night of June 25, 1999, three members of the Latin [C]ounts came by his house and flashed gang signs at his mother who was trying to leave. Around 10:30 p.m., defendant and codefendant decided to shoot some of the gang members for intimidating defendant's mother. Defendant then visited 'Fernando' who gave him a .38 caliber pistol and a 9 millimeter pistol for codefendant. Defendant and codefendant then proceeded to an area near Ramirez'[s] home where they observed eight Latin Counts. When three of them walked to Ramirez'[s] home, defendant and codefendant ran up to them shouting, 'What's up N*****?' while firing their guns. Defendant believed that one of the gang members had a gun, so he continued to fire until he heard a clicking sound.

Scott Infantino testified he saw the shooting from the second floor of Ramirez'[s] home. He stated that Ramirez and the victim were in front of the house when someone shouted 'King love.' He hear the victim say, 'We ain't nothing,' and then he heard gunfire. When he looked outside, he saw a man in a white shirt and dark pants standing two feet from the house, aiming and firing a gun at the house. He then ran downstairs where he found the victim in a curled up position, holding his stomach. Minutes later police brought defendant back to the scene of the shooting where Infantino identified him as the shooter based upon his clothing, height and hairstyle.

* * *

Forensic pathologist Dr. Tae An testified that the victim died from a single gunshot wound to the left buttock which lacerated multiple internal organs.

Firearms expert Brian Mayland testified that the size of the single bullet recovered from the victim's body was .38 caliber." *Id.*

Additionally, the State introduced evidence that defendant tested positive for gunshot residue on his hands following his arrest. Defendant called his mother, Maria Cordozo, as a witness who testified that on June 25, 1999, members of the Latin Counts approached her and defendant and flashed gang signs.

¶ 4 On direct appeal, defendant argued his sentence was excessive when compared to that of codefendant, and that the trial court erred when it refused a defense request to recall certain witnesses. This court affirmed defendant's conviction and sentence. See *Id.* Defendant then filed a *pro se* postconviction petition for relief under the Act which was dismissed. We affirmed the dismissal. See *People v. Garcia*, No. 1-08-2806 (2010) (unpublished order under Supreme Court Rule 23).

¶ 5 In December 2011, defendant filed a *pro se* motion for leave to file a successive postconviction petition for relief. Defendant stated that he would be submitting newly-discovered evidence, *i.e.*, a sworn affidavit, which would substantiate his claim that he was actually innocent of the offense of first-degree murder. Before defendant submitted the newly discovered evidence, the circuit court, on January 6, 2012, denied defendant's motion for leave to file a successive postconviction petition for defendant's failure to satisfy the requirements of the cause and prejudice test.

¶ 6 Defendant, on March 9, 2012, more than sixty days later, filed a *pro se* motion for reconsideration of the denial of his motion for leave to file the successive postconviction petition. Defendant's argued that he was actually innocent of first-degree murder because he only intended to scare members of the gang which harassed his mother, and that he acted in self defense when he shot the victim. In support of his request for reconsideration, defendant then presented the January 2012, affidavit of Juan Gonzalez, and defendant's own affidavit. In his affidavit, Mr. Gonzalez averred that on the night of the shooting, he saw the victim outside at approximately 11 or 11:30 p.m. Mr. Gonzalez told the victim "to be careful" because it was late. The victim responded by saying that "he was ok," and showed Mr. Gonzalez a gun. Mr. Gonzalez then left the area, and later learned the victim had been shot.

¶ 7 In his affidavit, defendant stated that on the night of the shooting, he did not intend to shoot or kill anyone. Defendant stated he and his codefendant intended only to scare members of the Latin Counts street gang.

¶ 8 On March 16, 2012, the circuit court denied defendant's motion for reconsideration of the denial of his motion for leave to file a successive postconviction petition. Defendant filed a notice of appeal on April 14, 2010.

¶ 9 On May 13, 2013, the supreme court entered a supervisory order directing this court to treat defendant's notice of appeal as validly filed. Therefore, we will consider defendant's argument on appeal that the circuit court erred when it denied him leave to file his successive postconviction petition because it raised a colorable claim of actual innocence.

¶ 10 The Act contemplates the filing of a single postconviction petition. *People v. Holman*, 191 Ill. 2d 204, 210 (2000). Section 5/122-3 of the Act provides that any claim of a substantial

denial of constitutional rights not raised in an original or amended postconviction petition is waived. 725 ILCS 5/122-3 (West 2012). The bar against multiple petitions may be relaxed "when fundamental fairness so requires." *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002). "In order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a petitioner must show actual innocence." *People v. Edwards*, 2012 IL 111711, ¶ 23 (citing *Pitsonbarger*, 205 Ill.2d at 459)). Because successive petitions are disfavored under the Act, a defendant must first obtain leave of court to file one. *People v. Smith*, 2013 IL App (4th) 110220, ¶ 20.

¶ 11 When a defendant claims actual innocence, the question is whether his motion for leave to file a successive petition and supporting documentation set forth a colorable claim of actual innocence; that is, whether defendant raises 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. Adams*, 2013 IL App (1st) 111081, ¶ 30 (citing *Edwards*, 2012 IL 111711, ¶ 22). Defendant must support a successive petition based on actual innocence with new reliable evidence, such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial. *Id.* ¶ 32. The evidence in support of a claim of actual innocence must be newly discovered, material and not merely cumulative, and of such conclusive nature that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). When a defendant raises a claim of actual innocence in a successive petition, a court will deny leave to file only when it is clear, after review of the petition and its supporting documentation, that as a matter of law the petition does not make "a colorable claim of actual innocence." *Edwards*, 2012

IL 111711, ¶ 24. This court reviews the denial of leave to file a successive postconviction petition *de novo*. *Adams*, 2013 IL App (1st) 111081, ¶ 30.

¶ 12 Initially, defendant argues that the circuit court erred in applying the cause and prejudice test when it denied his motion for leave to file a successive postconviction petition. The bar against a successive petition may be relaxed when a petitioner establishes cause and prejudice for the failure to previously raise a claim under the Act. *Edwards*, 2012 IL 111711, ¶ 22. However, a claim of actual innocence is a separate basis upon which a successive petition may be allowed to be filed. *Id.* ¶ 23. Because defendant raised a claim of actual innocence, he was excused from satisfying the cause and prejudice test in order to obtain leave to file his successive postconviction petition. *Id.* ¶ 24. However, even if the circuit court erred in applying the cause and prejudice test here, this error alone does not require reversal because we review the circuit court's denial of leave to file a successive postconviction petition *de novo*. *Adams*, 2013 IL App (1st) 111081, ¶ 30.

¶ 13 Defendant argues the evidence contained in Mr. Gonzalez's affidavit was not available at trial, and that Mr. Gonzalez's statements confirm defendant's claim that he shot the victim in self defense, and would probably change the result at retrial. We disagree.

¶ 14 As discussed above, in order to succeed on an actual innocence claim, a defendant must first present new, material, noncumulative evidence. *People v. Coleman*, 2013 IL 113307, ¶ 96 (citing *People v. Washington*, 171 Ill. 2d 475, 489 (1996)). Our supreme court has defined newly discovered evidence as "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *Ortiz*, 235 Ill. 2d at 334. Evidence is considered cumulative when it "adds nothing to what was already before the jury."

Id. at 335. Finally, the evidence must be of such a conclusive character that it would probably change the result at retrial. *Id.* at 333.

¶ 15 Even if this court were to agree that Mr. Gonzalez's affidavit was newly discovered evidence, the statements contained in the affidavit were not of such a conclusive character, they would probably change the result on retrial.

¶ 16 The elements of the affirmative defense of self-defense are: "(1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable." *People v. Lee*, 213 Ill. 2d 218, 225 (2004); 720 ILCS 5/7-1(a) (West 2004).

¶ 17 Defendant has continually asserted that someone on the porch moved in such a way that he believed that a gun was being drawn. At trial Mr. Ramirez stated that neither he nor the victim had a gun. Mr. Gonzalez's affidavit states that he saw the victim with a gun before the shooting. But Mr. Gonzales also averred that he left the scene before the shooting. At most, Mr. Gonzalez's affidavit merely calls into question Mr. Ramirez's testimony that the victim was not armed. The evidence offered by Mr. Gonzalez would not probably change the result on retrial.

¶ 18 Defendant has never stated he actually saw anyone on the porch with a gun. There was no evidence that anyone on the porch fired a gun. The testimony of Mr. Ramirez and defendant's confession established that defendant and codefendant were the aggressors. Defendant and codefendant armed themselves to go to the neighborhood of a rival gang. Defendant and codefendant approached the porch where the victim sat in his wheelchair, with their guns drawn

and shouting, "King Love." Mr. Gonzalez's affidavit does not contradict this testimony of aggression on the part of defendant and does not substantiate any threat of force against defendant.

¶ 19 The statements contained in Mr. Gonzalez's affidavit were not of such a conclusive nature to corroborate a claim of self defense that the result would be different at a retrial. Defendant's motion for leave to file was not sufficient to grant leave to file a successive postconviction petition where the affidavit, at best, may have called into question Mr. Ramirez's testimony that the victim was not armed. See *Ortiz*, 235 Ill. 2d at 335 (impeachment of a prosecution witness is an insufficient basis for granting a new trial); *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008) (when evidence merely impeaches or contradicts trial testimony, it is not typically of such conclusive character as to justify postconviction relief).

¶ 20 We are unpersuaded by defendant's reliance on *People v. Sparks*, 393 Ill. App. 3d 878 (2009). The defendant in *Sparks* had been found guilty of first-degree murder. The defendant had asserted at trial that the victim was shot when the victim and a second person attempted to rob defendant. In an initial postconviction petition, the defendant raised a claim of actual innocence based upon the affidavit of an eyewitness which stated she had seen the victim and another man attempt to rob the defendant. On review of the trial court's summary dismissal, at the first stage of the postconviction proceeding, the appellate court found the defendant's *pro se* postconviction petition set forth a sufficient factual basis for a claim of actual innocence based upon newly-discovered evidence when the statements presented in the eyewitness's affidavit were neither fantastic, nor delusional and corroborated the defendant's self-defense claim. *Id.* at 884-85. Ultimately, the appellate court concluded, after considering the minimum requirements

placed upon a defendant at the first stage of postconviction proceedings, that the defendant's claim of actual innocence did not lack an arguable basis, either in law, or in fact. *Id.* at 886-87.

¶ 21 Here, unlike *Sparks*, defendant is not at the first stage of proceedings under the Act. Defendant's motion for leave to file a successive petition based on a claim of actual innocence is subject to a different, more substantial standard of review. See *Edwards*, 2012 IL 111711, ¶¶ 25-26 (rejecting a claim that a motion for leave to appeal successive postconviction petition should be analyzed under the same first-stage standard). We also note that, unlike the witness in *Sparks*, Mr. Gonzalez was not an eyewitness to the events surrounding the victim's death. Thus, Mr. Gonzalez's testimony could not corroborate defendant's version of the incident—that someone on the porch behaved as though he was drawing a gun.

¶ 22 We conclude defendant's successive postconviction petition for relief did not raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the evidence contained in Mr. Gonzalez's affidavit. *Edwards*, 2012 IL 111711, ¶¶ 24, 39-41. Accordingly, because defendant has failed to assert a colorable claim of actual innocence, the circuit court properly denied his *pro se* motion for leave to file a successive postconviction petition for relief. *Id.* ¶¶ 23-24.

¶ 23 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.