

No. 1-12-2742

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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. 01 CR 5087
)	
TONIAC JACKSON,)	Honorable
)	Neera Lall Walsh,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court properly denied petitioner leave to file a successive postconviction petition because petitioner failed to put forth a viable claim of actual innocence.

¶ 2 Defendant Tonic Jackson appeals from the denial of his motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (the Act)(725 ILCS 5/122-1 *et seq.* (West 2008)). He contends that the trial court erred in denying his motion because he stated a colorable claim of actual innocence where a newly discovered recantation of a State's

witness proves that he did not see defendant participate in the shooting and was coerced to implicate defendant.

¶ 3 Defendant and codefendants Richard Hodges and David Jackson, who are not parties to this appeal, were charged with nine counts of first degree murder, six counts of attempted first degree murder, four counts of aggravated discharge of a firearm, and two counts of unlawful use of a weapon by a felon. The three cases were severed, but tried simultaneously. The court found defendant guilty of first degree murder, aggravated discharge of a firearm, and unlawful use of a weapon by a felon. The court sentenced defendant to 50 years' imprisonment for first degree murder, which included a 20-year enhancement for personally discharging a firearm during the commission of the murder. Defendant also received 10 years' imprisonment for the aggravated discharge of a firearm to be served consecutively to his murder sentence, and five years' imprisonment for the unlawful use of a weapon by a felon to be served concurrently with his aggravated discharge sentence.

¶ 4 According to the State's theory of the case, defendant was a participant in the murder of Christopher Pitts, which occurred at the Amoco gas station located at 1001 North Cicero in Chicago, at approximately 1 a.m. on January 20, 2001. The record shows that James Wilson gave a pretrial statement to Assistant State's Attorney (ASA) Lisa Hennelly stating that on the date of the incident, defendant got into an argument with Pitts at a gas station, then both defendant and codefendant Hodges chased and shot at Pitts. Wilson stated that defendant then ran back towards a Geo Tracker, put the gun back into his waistband and got into the passenger seat. Wilson also gave the same statement during his testimony before the grand jury, stating that he saw defendant shoot at Pitts.

¶ 5 At trial, Wilson admitted that he had previously given ASA Hennelly a statement that defendant took out a gun, chased the victim, and fired shots at him. However, he recanted his statement and denied that defendant shot the victim. Wilson also testified that no one had a gun that night, and that he was not sure who was actually shooting that night.

¶ 6 Chicago police officer John Haritos testified that he and his partner were driving their squad car near the corner of Cicero and Augusta during the early morning of January 20, 2001 when they heard gunshots. He looked over to the gas station, where he saw people running, including a black male running to a Geo Tracker. Officer Haritos turned on his lights and sirens as he began to follow the Tracker. He followed the vehicle until it pulled over, and saw defendant exit the passenger side and drop a gun. Defendant was then arrested.

¶ 7 Codefendant Hodges also testified during trial that he, defendant and Jackson drove to the gas station together, and that he and defendant shot at Pitts, but claimed that it was in self-defense.

¶ 8 At the close of defendant's bench trial, the court found defendant guilty of first degree murder, aggravated discharge of a firearm, and unlawful use of a weapon by a felon, and sentenced him to a total of 60 years in prison. The court stated in regards to Wilson's testimony:

"In this case it's obvious that James Wilson when he came to court and testified here was, as the defendant has artfully put it, not forthcoming. That's okay because he's testified previously and he has a previous statement that he gave. And in that statement and in that previous testimony he was clear and unambiguous *** about what [defendant] was doing ***."

¶ 9 This court affirmed that judgment on direct appeal over defendant's claims that the State failed to prove him guilty beyond a reasonable doubt of aggravated discharge of a firearm, that

the trial court improperly considered a witness' grand jury testimony in finding him guilty, and that the statute mandating the 20-year enhancement on his murder sentence was unconstitutional.

People v. Jackson, No. 1-03-3216 (2005) (unpublished order under Supreme Court Rule 23).

¶ 10 On July 22, 2005, defendant filed a *pro se* postconviction petition, alleging, *inter alia*, that he was denied his right to testify and that his trial counsel was ineffective for failing to allow him to do so. The trial court summarily dismissed defendant's postconviction petition, and this court affirmed that dismissal on appeal. *People v. Jackson*, No. 1-05-3985 (2007) (unpublished order under Supreme Court Rule 23).

¶ 11 On February 18, 2009, defendant filed a *pro se* motion for leave to file a successive postconviction petition in which he asserted a "free standing claim of actual innocence" pursuant to *People v. Washington*, 171 Ill.2d 475 (1990). Defendant attached to his motion an affidavit from Dontay Sanders stating that he witnessed the crime and did not see defendant shoot anyone, and an affidavit from David Jackson stating that defendant was on the ground when the shooting started and that he did not own or toss the murder weapon. Defendant also included his own affidavit stating that on the date of the incident, he did not have a gun, did not argue with, or shoot at, the victim, that he did not plan or agree to assist Hodges in the shooting, and that he recently discovered that Sanders had witnessed the incident. The trial court denied defendant's motion, noting that he had failed to satisfy the cause and prejudice test, and "made no showing that the absence of the claim now presented so infected the trial that his resulting conviction or sentence violated due process." Defendant appealed, and this court affirmed the trial court's dismissal.

¶ 12 On January 26, 2011, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). On April 27,

2011, the trial court dismissed his petition. This court granted the Office of the State Appellate Defendant's motion for leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987) and affirmed the dismissal. *People v. Jackson*, 2012 IL App (1st) 111649-U.

¶ 13 On April 18, 2012, defendant filed the instant motion to file a successive petition, attaching an affidavit from James Wilson to his petition and claiming actual innocence. Wilson detailed in the affidavit that he was forced to incorrectly identify defendant as one of the shooters during his handwritten statement and grand jury testimony. He also claimed that he was forced to give false testimony against defendant and Jackson and Hodges. Specifically, he claimed that ASA Hennelly told him that he would be arrested if he did not testify at the grand jury proceedings. On July 18, 2012, the trial court denied defendant leave to file his successive postconviction petition. The court found that Wilson's affidavit was not newly discovered evidence because the information was not material or of such a conclusive nature that it would change the result on retrial. Defendant filed the instant appeal.

¶ 14 The Post-Conviction Hearing Act (the Act)(725 ILCS 5/122-1 *et seq.* (West 2008)) provides a means whereby criminal defendants can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1(a) (West 2008); *People v. Harris*, 206 Ill. 2d 293, 299 (2002). The Act generally limits a defendant to the filing of but one postconviction petition, (*People v. Simmons*, 388 Ill. App. 3d 599, 605 (2009)) and expressly provides that any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived. 725 ILCS 5/122-3 (West 2006). Therefore, leave of court is a condition precedent to filing a successive postconviction petition. *Id.* at 605.

¶ 15 Pursuant to section 122-1(f) of the Act, leave of court may be granted only if a defendant demonstrates cause for his or her failure to bring the claim in an initial postconviction proceeding and prejudice results from that failure. 725 ILCS 5/122-1(f) (West 2010). However, our supreme court has recognized that a defendant need not establish cause and prejudice to be granted leave to file a successive petition if he or she can show a valid freestanding claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 330-31 (2009). To assert a claim of actual innocence based upon newly-discovered evidence, defendant must show that the evidence was: (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result on retrial. *Id.* at 333-34 (2009). A claim of actual innocence does not involve an analysis of whether the evidence at trial was sufficient to establish defendant's guilt beyond a reasonable doubt; the hallmark of such a claim means exoneration, or total vindication. *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999). We review the denial of defendant's motion for leave to file a successive postconviction petition *de novo*. *People v. Anderson*, 402 Ill. App. 3d 1017, 1028-29 (2010).

¶ 16 Defendant's claim of actual innocence based on newly discovered evidence fails. Our supreme court has held that a request for a new trial based on newly discovered evidence must satisfy two criteria, it must present evidence which was not available at the defendant's trial and which the defendant could not have discovered sooner through the exercise of due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002). Defendant concedes that Wilson explicitly recanted his statement identifying defendant as the shooter, but argues that Wilson's reasons as to *why* he gave the original false testimony should be considered newly discovered evidence. We disagree. Although Wilson did not testify that he was pressured by ASA Hennelly to falsely implicate defendant in the murder of Pitts, we do not find that his reasoning as to why he

recanted his statement amounts to newly discovered evidence. Regardless of the reason why Wilson gave the original statement, he attempted to recant this statement during his testimony at trial, and his recantation was ultimately rejected by the court. His affidavit merely amounts to a detailed rehashing of the same rejected recantation. Defendant also fails to demonstrate why he did not present this issue in his earlier petition and why it could not have been discovered prior to trial through due diligence. The information that he is claiming is newly discovered may have been discovered during trial had defense counsel simply asked Wilson why he was changing his testimony. This court has held that evidence is not newly discovered when it presents facts already known to defendant, even if the source of those facts may have been unknown, unavailable or uncooperative. *People v. Jarrett*, 399 Ill. App. 3d 517, 723 (2010). Therefore, while it was not clear why Wilson recanted the testimony during trial, his recantation was already known to defendant and was presented during trial. Thus, this information is simply cumulative evidence which does not add anything new to defendant's case regarding his actual innocence that was not already presented at trial. See *Ortiz*, 235 Ill. 2d at 235.

¶ 17 We also find that the evidence was not of such a conclusive character that it would probably change the result on retrial. *Ortiz*, 235 Ill. 2d at 333-34. First, there was overwhelming evidence of defendant's guilt at trial. During Wilson's pretrial statement to ASA Hennelly, he stated that defendant got into an argument with the victim at a gas station, and both defendant and codefendant Hodges chased and shot at the victim. He stated that defendant then ran back towards the Geo Tracker, put the gun back into his waistband and got into the passenger seat. The State presented testimony from Officer Haritos which essentially corroborated Wilson's story. Haritos stated that on the night of Pitt's murder, he heard gunshots near the gas station where Pitts was murdered and as he approached he saw people running, including a black male

running to a Geo Tracker. He followed the vehicle until it pulled over, and he saw defendant exit the passenger side and drop a gun. Additionally, codefendant Hodges testified that he, defendant, and Jackson drove to the gas station where he and defendant shot at Pitts. Therefore, Wilson's testimony was not the only evidence which implicated defendant as the shooter and his recantation does not totally vindicate defendant. See *Savory*, 309 Ill. App. 3d at 415. Second, the court ultimately found that Wilson's testimony was inconsistent and "not forthcoming."

Therefore, it is not clear how his claims of coercion by the prosecution might have affected the outcome of defendant's trial as the court essentially labeled him an incredible witness. We find that Wilson's affidavit does not exonerate defendant or otherwise present evidence of his actual innocence. See *Id.* Because defendant fails to demonstrate that the rule prohibiting successive petitions should be relaxed, his petition was properly denied.

¶ 18 For the foregoing reasons, we affirm the judgment of the Circuit court of Cook County.

¶ 19 Affirmed.