

No. 1-12-3237

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
Respondent-Appellee,)	Cook County.
)	
v.)	No. 01 CR 16022
)	
ALEX NEGRON,)	Honorable
)	Clayton J. Crane,
Petitioner-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's judgment denying defendant leave to file a successive petition for post-conviction relief is affirmed as defendant failed to present a colorable claim of actual innocence where the supporting affidavit merely impeached the testimony of two eyewitnesses.

¶ 2 Defendant Alex Negron filed a successive post-conviction petition and attached the affidavit of Jaime Rodriguez to his petition. The petition argued that the affidavit of Rodriguez

was newly discovered evidence that presented a colorable claim of actual innocence. Although the trial court agreed that the affidavit was newly discovered evidence, the trial court ultimately denied defendant's petition for leave to file his successive post-conviction petition because the evidence contained in the affidavit merely impeached the trial testimony of two eyewitnesses to a shooting and did not present material evidence of such a conclusive nature that it would probably change the result on retrial. Defendant now appeals the trial court's ruling denying him leave to file his successive post-conviction petition. For the reasons that follow, we affirm the trial court's order.

¶ 3 BACKGROUND

¶ 4 Defendant and codefendant, Yohn Zapada, were arrested in June 2001 and charged with the murder of Omar Brown. The court subsequently granted defendant's petition to sever. The men were tried simultaneously, defendant by a jury and Zapada by the court. Defendant was found guilty and sentenced to 60 years in prison, 30 years for murder plus a 30-year enhancement for personally discharging the weapon that caused Brown's death. Following an appeal and resentencing, defendant's sentence was reduced to a term of 48 years, which included a 20-year enhancement for discharging the weapon that caused Brown's death.

¶ 5 The evidence at defendant's trial established, through testimony of witnesses Conan Little and Rafael Vega, that after Zapada shot Brown, defendant shot Brown two or three times as Brown lay face-up on the ground. Little identified defendant as the second shooter in a line-up at the police station as well as in court. Vega identified defendant in police photos, in a police line-up, and in court. On cross examination, Vega admitted that he initially signed a statement stating that it was Zapada who shot Brown while Brown was on the ground; however, Vega

explained that at the time he signed that statement he did not know defendant and Zapada's names and mixed them up.

¶ 6 Less than five hours after the shooting, police recovered a gun and shell casings from defendant's hotel room that were submitted to the State Police Crime Lab. Police also recovered the bullets from Brown's body and submitted those to the lab as well. The parties stipulated that an expert in the field of firearms identification, if called to testify, would testify that the bullets that were recovered from Brown's body were from the gun recovered from defendant's hotel room. A medical examiner testified that the victim died as a result of multiple gunshot wounds including one to the left side of the back, one to the lateral left chest, and two shots to the back of the head, and that the gunshot wounds to the back of the head and the back were not consistent with the victim being shot while laying face-up on the ground. Based on this evidence, the jury found defendant guilty of murder.

¶ 7 Defendant filed an initial *pro se* petition for post-conviction relief contending, among other claims, that he was not proven guilty beyond a reasonable doubt because he did not shoot Brown, the eyewitnesses lied, and the testimony of the medical examiner did not indicate that someone stood over the victim and shot him. Attached to the petition was defendant's affidavit in which he averred that he ran away when he heard gunshots and that it was "Danny" who had a gun.¹ Also attached to the petition were the *pro se* post-conviction petition and affidavit of codefendant. Codefendant averred that after Brown tried to run him over, he and Brown began fighting. Defendant and Danny were also present. Brown choked codefendant and Vega hit him on the back until he fell to the ground. As Danny helped codefendant up, codefendant saw Brown coming toward him again. He grabbed Danny's gun and fired twice to scare Brown. When codefendant realized that he had shot Brown he became very scared, gave the gun back to

¹ The record does not reveal Danny's surname.

Danny, and ran away. As he ran, he heard more shots being fired, so he looked back and saw Danny chasing Brown while firing a gun. Codefendant also averred that he would testify under oath that he did not see defendant with a gun during the incident. The trial court dismissed defendant's petition for post-conviction relief. On appeal, we affirmed the dismissal of defendant's petition for post-conviction relief finding that while the codefendant's affidavit was newly discovered evidence, the claim of actual innocence based on the codefendant's affidavit was not of such a conclusive character that it would likely change the result of trial. A petition for leave to appeal our ruling was denied.

¶ 8 On October 24, 2011, defendant mailed in for filing a motion for leave to file a successive post-conviction petition, which is the petition at issue here. In the motion, defendant alleged that he was raising a claim of actual innocence, which did not require proof of cause and prejudice pursuant to *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002), along with claims of ineffective assistance of counsel, official misconduct, perjury, and insufficiency of the evidence. He also alleged that the basis of the claims was the prosecutorial concealment of exculpatory evidence, specifically that of the identity of an eyewitness, Jaime Rodriguez, whose affidavit was also attached to the petition.

¶ 9 In this appeal, defendant only asserts that he has presented a colorable claim of actual innocence based on the affidavit of Rodriguez and has not argued the other issues raised in the *pro se* successive post-conviction petition. Therefore, of relevance to this appeal, the affidavit of Rodriguez makes the following averments under oath:

“1.) On May 18, 2011, I told Alex Negron that I was present on the night of June 17, 2001 when a fight [*sic*] occurred on the 2900 block west of Shakespeare. I had tried to come forward about the

incident but the police told [me] that if I said anything that they would charge me with murder.

2.) I was [*sic*] present when the shots took place and I swear that [*sic*] Alex Negron did not shoot Omar Brown.

3.) If asked to do so I am competent to testify regarding the matter set forth herein.”

Defendant further alleged in his motion that Rodriguez's affidavit, when considered with all the evidence submitted during the proceedings, established his actual innocence.

¶ 10 On September 21, 2012, the trial court denied defendant's request for leave to file his successive post-conviction petition. With respect to defendant's actual innocence claim, the trial court found that although the affidavit of Rodriguez was newly discovered evidence, the affidavit "did not present material evidence of such a conclusive character as would probably change the result on retrial" as the affidavit "merely call[ed] into question the version of events presented by Little and Vega." In denying defendant's successive petition, the trial court noted that the affidavit still placed defendant at the scene of the shooting, that the gun that was used to kill Brown was found in defendant's hotel room, and that neither Little nor Vega had recanted their testimony that they saw defendant shoot Brown. Defendant now appeals the trial court's ruling arguing that because defendant presented a colorable claim of actual innocence based on the affidavit of Rodriguez, the trial court erred in denying defendant leave to file his successive post-conviction petition. For the reasons that follow, we affirm the trial court's ruling.

¶ 11 ANALYSIS

¶ 12 A post-conviction proceeding is a collateral proceeding rather than an appeal of the underlying judgment and allows review of constitutional issues that were not, and could not have

been, adjudicated on direct appeal. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). “Thus, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived.”

Pitsonbarger, 205 Ill. 2d at 456. Consistent with these principles, the Post-Conviction Hearing Act generally contemplates the filing of only one post-conviction petition. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). The Act expressly provides that “[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.” 725 ILCS 5/122–3 (West 2006).

¶ 13 Nevertheless, there are two bases upon which the bar against successive proceedings will be relaxed. *People v. Edwards*, 2012 IL 111711, at ¶ 22. The first basis for relaxing the bar is when a petitioner can establish “cause and prejudice” for the failure to raise the claim earlier. *Id.* The second basis by which the bar to successive post-conviction proceedings may be relaxed is what is known as the “fundamental miscarriage of justice” exception. *Id.* at ¶ 23. In order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a petitioner must show actual innocence. *Id.* Although this exception was not codified by the legislature, this court has reaffirmed its use in relaxing the bar against successive post-conviction proceedings. See *Ortiz*, 235 Ill. 2d 319 (acknowledging that leave of court to file a successive post-conviction petition may be based on actual innocence alone).

¶ 14 Petitioners seeking to institute a successive post-conviction proceeding must first obtain “leave of court.” *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Petitioner not only has the burden to obtain leave of court, but also “must submit enough in the way of documentation to allow a circuit court to make that determination.” *Id.* at 161. When seeking leave to file a successive post-conviction petition on the basis of actual innocence, our supreme court has held

that leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, at ¶ 24. Stated differently, leave of court should be granted when the petitioner's supporting documentation raises the probability that “it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” *Id.* A trial court's denial of leave to file a successive post-conviction petition is reviewed *de novo*. *People v. Edgeston*, 396 Ill. App. 3d 514, 518 (2009).

¶ 15 The elements of a claim of actual innocence are that the evidence in support of the claim must be “newly discovered” material that is not merely cumulative and of such conclusive character that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, at ¶ 32; *Ortiz*, 235 Ill. 2d at 333. 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. Further, evidence is considered cumulative when it “adds nothing to what was already before the jury.” *Id.* at 335. Here, however, we find that the trial court's ruling must be affirmed based on the third element, which requires that evidence in support of a claim of actual innocence be “of such conclusive character that it would probably change the result on retrial.” *Ortiz*, 235 Ill. 2d at 333.

¶ 16 Preliminarily, we note that defendant has made clear that the “primary focus” of his successive post-conviction petition is the affidavit of Rodriguez, rather than the affidavit of the codefendant, Zapada. See Appellant Reply Br., at 2-3. While we would find that the Zapada affidavit was not newly discovered evidence given that it was presented in the original post-conviction petition, see *People v. Snow*, 2012 IL App (4th) 110415 (evidence available at a prior

posttrial proceeding is not newly discovered evidence); see also *People v. English*, 403 Ill. App. 3d 121, 133 (2010) (finding the evidence was not newly discovered evidence where the evidence was available at trial and when the initial post-conviction petition was filed), there is no need to address this issue any further given defendant's assurances that his successive post-conviction petition was filed based on the alleged newly discovered evidence contained in the Rodriguez affidavit. As such, we review the Rodriguez affidavit in the context of all the evidence presented throughout the course of this litigation below.

¶ 17 The trial court properly denied defendant's successive post-conviction petition because defendant failed to establish the third prong of an actual innocence claim. Even though the affidavit of Rodriguez appeared to be newly discovered evidence on its face, the affidavit, even when viewed in light of all the evidence, was not “of such conclusive character that it would probably change the result on retrial.” *Ortiz*, 235 Ill. 2d at 333. The evidence presented at trial showed that the gun that was used to shoot and kill Brown was found in defendant's hotel room less than five hours following the shooting. The evidence presented at trial also showed that two eyewitnesses saw defendant shoot Brown multiple times after he had been shot by the codefendant. These witnesses identified defendant as the shooter both shortly after the shooting and in court, and neither one of these eyewitnesses have recanted their testimony. As such, the affidavit of Rodriguez, which states that he was present on the night of the shooting and did not see defendant shoot Brown, merely calls into question the testimony of the State's two eyewitnesses, which is insufficient to grant leave to file a successive post-conviction petition. 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) (where evidence merely impeaches or contradicts trial testimony, it is not typically of such conclusive character as to

justify post-conviction relief.); *People v. Chew*, 160 Ill. App. 3d 1082, 1086 (1987) ("evidence which merely impeaches a witness does not afford a basis for granting a new trial.").

Conversely, such evidence does not rise to the level of evidence that "would probably change the result on retrial." *Ortiz*, 235 Ill. 2d at 333. Therefore, we find that the trial court did not err when it denied defendant's motion for leave to file his successive post-conviction petition.

¶ 18 CONCLUSION

¶ 19 For the above reasons, we affirm the trial court's ruling denying defendant leave to file his successive post-conviction petition.

¶ 20 Affirmed.