

No. 1- 12-2452

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. 00 CR 19274
)	
RICHARD SHARP,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Denial of defendant's *pro se* request for leave to file a successive post-conviction affirmed over defendant's unsupported claim of actual innocence.
- ¶ 2 Defendant Richard Sharp appeals from an order of the circuit court denying him leave to

file a second, successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends that he presented a colorable claim of actual innocence based on two exculpatory, albeit unnotarized, affidavits, including one from his codefendant.

¶ 3 This court previously affirmed defendant's 2002 jury conviction for first degree murder based on accountability and sentence of 28 years' imprisonment. *People v. Sharp*, No. 1-02-3730 (2004) (unpublished order under Supreme Court Rule 23). That conviction arose from a gang related incident on June 21, 2000, in the area of 111th Street and Vernon Avenue in Chicago, in which defendant was the driver of a vehicle carrying codefendants, Eric English and Steve Shempert,¹ who fired gunshots at opposing gang members, killing Andrew Jackson.

¶ 4 This court affirmed the dismissal of defendant's initial *pro se* post-conviction petition in 2005, after granting appointed counsel leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Sharp*, No. 1-05-3690 (2007) (unpublished order under Supreme Court Rule 23). In 2007, defendant filed a *pro se* motion for leave to file a successive post-conviction petition, which the circuit court denied, and there is no indication that defendant appealed that decision.

¶ 5 In 2012, defendant filed the *pro se* motion for leave to file the successive post-conviction petition at bar. Defendant's motion was based on actual innocence, and in support, he attached to his petition two unnotarized affidavits, one from Shempert and one from Andre Tyson. These affidavits were signed beneath a paragraph that declared, under penalty of perjury, that

¹ Shempert was sentenced to 27 years' imprisonment and English was sentenced to 21 years' imprisonment for first degree murder. They are not parties to this appeal.

everything contained herein is true and accurate to the best of their knowledge and belief.

¶ 6 Shempert stated in his affidavit that at 10:30 p.m. on June 21, 2000, he was standing with Coleman, English, Twan and Bubbles when defendant drove up. Coleman walked up to defendant, and talked to him briefly, then told Shempert and English to walk with him, Twan and Bubbles. Twan gave Shempert and English guns, and Coleman told them they were going to shoot at the "unplugs." Shempert told him he was not going to do it, and Coleman told him if he did not do it he was "done." Coleman then told them not to tell defendant because if he found out what they were about to do, he would not go. Shempert wanted to tell defendant, but did not do so because he was afraid of Coleman. English told defendant to drive to 111th Street and Vernon Avenue, and once there, English immediately started shooting out of the window at some people, and Shempert did as well. Defendant started panicking and yelling, and English told him to shut up and drive. When defendant refused, English pointed a gun at defendant and threatened to kill him if he did not drive away. Defendant drove away at gunpoint to the location where he met Coleman earlier. Coleman told defendant to get the car off the street, and that if he told anybody, he would take it out on defendant's mother. Shempert stated that since the incident he has matured a lot, learned to live righteously and justly, and his conscience can no longer accept the fact that an innocent man is imprisoned for something he had nothing to do with and no knowledge of at the time.

¶ 7 Tyson stated in his affidavit that he was standing at the corner of 112th Street and Vernon Avenue when he heard five gunshots. About 10 seconds later, he saw defendant pull up in a car with two men, one of whom was pointing a gun at defendant and arguing with him. Tyson ran down the block to see what happened, and was told by one of the "older brothers" not to say

anything, so he went home.

¶ 8 The circuit court denied defendant leave to file another successive post-conviction petition, finding that he had not sufficiently supported his allegation of actual innocence based on newly discovered evidence. The court noted that neither attached affidavit was notarized, and that affidavits filed pursuant to the Act must be notarized to be valid. As a consequence, the court found that the affidavits had no legal effect. The court further found that the attached affidavits did not offer such conclusive evidence that they would change the result of defendant's trial, in that the evidence was not new, but, rather, cumulative of the testimony presented at trial, and that defendant failed to satisfy the cause and prejudice test.

¶ 9 On appeal, defendant maintains that he presented a colorable claim of actual innocence based on the affidavits of Shempert and Tyson. The State initially responds that defendant failed to satisfy the requirements of section 122-2 of the Act where the affidavits he provided are not notarized, and that this failure is fatal to his petition. Defendant replies that the lack of notarization should not be used as a basis to deny him leave from filing his successive petition, and that, in the alternative, the signed statements qualified as "other evidence" in support of his allegations.

¶ 10 Under section 122-1 of the Act, defendant may file only one post-conviction petition without leave of court. 725 ILCS 5/122-1(f) (West 2012). Leave of court may be granted only if defendant demonstrates cause for his failure to bring the claim in his initial petition and prejudice resulting from that failure or by presenting a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶31.

¶ 11 Defendant's burden of obtaining leave to file a successive petition, whether on the cause

and prejudice or actual innocence basis, requires that he submit sufficient documentation for the court to make its determination. *People v. Wideman*, 2013 IL App (1st) 102273, ¶13. Section 122-2 of the Act requires that defendant provide affidavits, records, or other evidence to support his allegations or explain the absence of same. 725 ILCS 5/122-2 (West 2012).

¶ 12 The purpose of section 122-2 of the Act is to show that defendant's allegations can be objectively and independently corroborated. *Wideman*, 2013 IL App (1st) 102273, ¶16, citing *People v. Henderson*, 2011 IL App (1st) 090923, ¶21. Documents filed in support of the allegations in a post-conviction petition which purport to be affidavits must be properly executed lest they be in violation of section 122-2 of the Act. *Wideman*, 2013 IL App (1st) 102273, ¶16. If the affidavits do not comply with the evidentiary requirements of section 122-2 of the Act, then the petition must comply with the pleading requirements of section 122-2 by *at least* providing an explanation as to why the affidavits were unobtainable. (Emphasis in original.) *Wideman*, 2013 IL App (1st) 102273, ¶16, citing *People v. Collins*, 202 Ill. 2d 59, 66-68 (2002). A violation of the evidentiary requirements of section 122-2 as well as the pleading requirements is fatal to a defendant's post-conviction petition. *Collins*, 202 Ill. 2d at 68-69.

¶ 13 Here, defendant sought to file another successive post-conviction petition, and, in support, attached purported affidavits from his codefendant Shempert and another person, Tyson. Neither affidavit was notarized, and defendant failed to provide any explanation as to why either Shempert and Tyson could not obtain notarization to verify their own signed affidavits. With either, defendant has provided no basis for the circuit court to consider, and his complete disregard for the requirements of section 122-2 of the Act cannot be excused. *Wideman*, 2013 IL App (1st) 102273, ¶18. Accordingly, we find no error by the circuit court in denying defendant

leave to file this *pro se* successive post-conviction petition. *Wideman*, 2013 IL App (1s) 102273, ¶18.

¶ 14 In reaching that conclusion, we observe that defendant has cited numerous cases in which this court, and other Districts have found that an unnotarized section 122-2 affidavit is not fatal to a petition. However, each of those cases involved the dismissal of an initial post-conviction petition, where as here, defendant is seeking leave to file a successive post-conviction petition and a different standard applies. *Edwards*, 2012 IL 111711, ¶29 (successive petitions are not to be treated as an original petition under the Act).

¶ 15 In that regard, we further observe that this court has upheld the dismissal of an initial post-conviction petition where notarization of the purported section 122-2 affidavits was lacking. *People v. Brown*, 2014 IL App (1st) 122549, ¶¶54-55. However, in *Brown*, cited by defendant in support of his argument, this court found that *People v. Parker*, 2012 IL App (1st) 101809, ¶¶76-77, was wrongly decided in that it held that an unnotarized section 122-2 affidavit was not fatal to a post-conviction petition based on *People v. Henderson*, 2011 IL App (1st) 090923, ¶36, because *Henderson* addressed whether a *section 122-1 verification affidavit* was required to be notarized (emphasis added), which is not at issue here.

¶ 16 Defendant, nonetheless, cites cases involving section 122-1 verification affidavits in support of his contention that his section 122-2 supporting affidavits need not be notarized. The supreme court has held that the lack of a notarized verification affidavit may be objected to by the State at the second stage of proceedings, but may not solely be the basis for dismissal at the first stage. *People v. Hommerson*, 2014 IL 115638, ¶11 (and cases cited therein). However, the supreme court has also recognized that the purposes of the affidavit requirements for sections

122-1 and 122-2 are wholly distinct, and to equate the two would render the affidavit requirements under section 122-2 meaningless. *Wideman*, 2013 IL App (1st) 102273, ¶16, citing *Collins*, 202 Ill. 2d at 67. As noted above, the purpose of the section 122-2 affidavit requirement is to show that defendant's allegations can be objectively and independently corroborated, in contrast to the purpose of the section 122-1 verification affidavit requirement, which is to confirm that defendant's allegations are brought truthfully and in good faith. *People v. Henderson*, 2011 IL App (1st) 090923, ¶21.

¶ 17 In this case, which involved a second successive post-conviction petition, defendant completely failed to comply with supporting affidavit requirements of section 122-2. The affidavits are not notarized, nor is there any explanation as to why they are not. Under these circumstances, defendant's failure to comply with the requirement of section 122-2 cannot be excused (*Wideman*, 2013 IL App (1st) 102273, ¶18), and we find no error by the circuit court in denying him leave to file a second successive post-conviction petition.

¶ 18 Defendant, nonetheless, contends that his purported affidavits satisfied the other evidence requirement of section 122-2 of the Act. We disagree. The signed, unnotarized statements are a nullity (*Wideman*, 2013 IL App (1st) 102273, ¶15), with no legal effect (*People v. Niezgoda*, 337 Ill. App. 3d 593, 596 (2003)), and do not comply with section 122-2 of the Act (*People v. Gardner*, 2013 IL App (2d) 110598, ¶17). Further, the self verifications in the affidavits pursuant to section 1-109 of the Illinois Code of Civil Procedure (735 ILCS 5/1-109 (West 2012)), did not render them sufficient to comply with section 122-2 of the Act. *Wideman*, 2013 IL App (1st) 102273, ¶¶9, 18.

¶ 19 In light of the foregoing, we affirm the order of the circuit court denying defendant leave

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to file his second *pro se* successive post-conviction petition.

¶ 20 Affirmed.