

No. 1-13-2967

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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. 93 CR 22846
)	
DAVID STAPLES,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE JAMES FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held:* Where the fingerprint evidence advanced by defendant in support of his claim of actual innocence is not of such conclusive character that it would probably change the result on retrial, the trial court did not err in denying leave to file a successive postconviction petition.

¶ 2 Defendant David Staples appeals from the denial of his motion for leave to file a successive petition for postconviction relief. On appeal, defendant contends that the trial court

erred in denying leave where newly discovered fingerprint evidence attached to his petition clearly undermines confidence in the jury's verdict finding him guilty of first degree murder and attempted first degree murder. For the reasons that follow, we affirm.

¶ 3 Following a 1995 jury trial, defendant was convicted of first degree murder and attempted first degree murder and sentenced to consecutive terms of 47 and 15 years in prison, respectively. On direct appeal, defendant challenged the sufficiency of the evidence and, alternatively, contended that he was denied a fair trial by the admission of "other crimes" evidence that he was involved in a shooting at the time of his arrest, two days after the offenses at issue. We affirmed defendant's conviction and sentence. *People v. Staples*, No. 1-95-3199 (1997) (unpublished order under Supreme Court Rule 23). In the course of doing so, we set forth the underlying facts of the case. Those facts will be repeated here to some extent due to the nature of defendant's postconviction claims.

¶ 4 At trial, the surviving victim, Jamel Armstrong, testified that on the afternoon of August 25, 1993, he and the murder victim, Jeremiah Jones, were sitting on the doorstep of Jones' apartment building on 53rd Street, just past Maryland Avenue in Chicago. Two men walked by, saying, "What's up brother?" and Armstrong and Jones replied, "What's up?" Armstrong described one of the men as light-skinned and thin with a ponytail, and the other as dark-skinned and heavysset. The two strangers walked four steps further, then turned around and began approaching Armstrong and Jones, who, fearing danger, ran westbound on 53rd Street. Armstrong heard the men laughing and then heard a gunshot, causing him to flee into the next alley. Jones continued running on 53rd Street and rounded the corner at Maryland Avenue. In the

alley, Armstrong heard another gunshot coming from the area of 53rd and Maryland. He continued to flee down the alley, but then discovered he had been shot in the foot. He asked a bystander to summon the police, and then hid until he heard his mother calling him. Armstrong subsequently viewed a lineup, which included defendant, but was unable to identify either of the men involved in the shooting.

¶ 5 Robin Collins, Armstrong's mother, testified that at the time of the shooting she was being driven home from work by her husband, Frederick Lewis. A third person, Trent Taylor, was in the car with them. They approached Collins' building, where Collins saw Armstrong and Jones sitting on the steps. Lewis turned the car around to park directly across the street. Collins then saw her son, Armstrong, run in front of the car and into an alley, and also heard a gunshot. She heard laughter and thought it was all a game until she saw a man shoot a gun at Jones, who was 15 to 20 feet away and fleeing. When Jones fell to the ground, Collins got out of the car to look for her son. She eventually found him in an alley, shot in the foot. Collins also testified that two days later, on August 27, 1993, at approximately 11 p.m., she was at home when she heard gunshots. She and her husband, Lewis, went "toward Cottage Grove," where she saw Lewis go up to a "body" that was lying on the ground and then saw Lewis speak to the police. Collins viewed a lineup about a month later, which included defendant, but was unable to identify anyone.

¶ 6 Frederick Lewis testified that on August 25, 1993, he had driven home and, after he turned the car around on 53rd Street, heard a shot and saw his stepson, Armstrong, run in front of his car and into an alley. From a distance of about 25 to 30 feet, Lewis saw a man, who was

standing in the middle of the street, aim a gun at Jeremiah Jones, who was fleeing, and shoot him. Jones then fell to the ground. In court, Lewis identified defendant as the shooter. He further testified that defendant and another man, with his hair combed back into a ponytail, walked to a van and drove away. Lewis further stated that Collins had gotten out of the car to find her son, and that the remaining passenger, Trent Taylor, then got out of the car, examined Jones, and returned to the car to report that Jones was dead. Thereafter, Lewis and Taylor began to pursue the van. When they saw a police car, they flagged it down and Taylor got out to talk to the police. Lewis then proceeded to again follow the van until he was able to obtain its license plate number. He wrote the number down and returned to the shooting site, where he saw Jones lying between two cars. At that time, he gave the license plate number to the police on the scene. Lewis also stated that on August 25 it was sunny and clear, and he had no trouble seeing what occurred.

¶ 7 Lewis further testified that two days later, on August 27, 1993, at approximately 10:30 p.m., he was at home when he heard gunshots. He went to investigate and, one-half block from his house, saw a crowd gathered. When he approached, he saw a gun on the grass and recognized it as the one used by defendant to shoot Jeremiah Jones on August 25. He then saw defendant lying on the ground. Lewis informed the police of his identifications, telling the police, among other things, that he recognized the gun, which was large and silver with a black handle, as the one defendant had used to shoot Jones two days earlier. He also identified that gun in court as the murder weapon. Lewis further stated that he had been convicted of residential burglary in 1988 and served a probationary term, with six months in jail, for that offense.

¶ 8 On cross-examination, Lewis testified that he had never viewed a lineup. He also stated that he described the two men to the police as between 19 and 25 years of age; one was light-skinned with a ponytail, and the other, the shooter, was dark-skinned. He further stated that he gave the police other unspecified descriptive details, but admitted that he did not describe the two men's height and weight.

¶ 9 Chicago police officer Elvin Boone testified that on August 27, 1993, he responded to a report of shots being fired and found defendant, who had been shot, crawling on the ground. Frederick Lewis then approached and told Officer Boone that the injured man looked like the person who had shot his son two days earlier and that the gun defendant had used at that time was silver with a big black handle. Officer Boone took Lewis closer to defendant, and Lewis positively identified him as the man who shot his son. Boone then took Lewis over to a gun, 30 feet away, and Lewis said it looked exactly like the one used in the earlier shooting. Boone identified the gun at trial, which was a .357 magnum revolver.

¶ 10 Chicago police officer John Moravac, who guarded the gun at the scene where defendant had been shot, also testified that Lewis identified defendant as the man who had shot his son and identified the gun as the weapon used in that shooting. Officer Moravac also testified, however, that the gun was only three feet away from where defendant was lying.

¶ 11 Chicago police forensic investigator Frank DeMarco testified that he recovered six spent .357 cartridges from the gun found near defendant. Richard Chenow, a firearms expert employed by the Chicago police department, testified that the bullet recovered from the body of the murder victim, Jeremiah Jones, was a .38 caliber. However, upon examination of the lands and grooves

left on this bullet, Chenow determined that it could have been fired by either a .38 caliber gun or by a .357 magnum revolver such as the one found near defendant on August 27 and identified by Frederick Lewis as the murder weapon used in the August 25 shooting incident.

¶ 12 The parties stipulated that if called, Dr. Barry Lifschultz of the Cook County Medical Examiner's Office would testify that the murder victim, Jeremiah Jones, died as a result of a gunshot wound to the left side of his neck.

¶ 13 There was also testimony that the van used in the August 25 shooting, which was stolen the day before that shooting, was recovered on August 26. It had been burned and only four fingerprints were recovered, all from the windows inside the van. None of the fingerprints on the windows matched those of defendant. No fingerprints were recovered from the steering wheel, the dashboard, or the seats of the van.

¶ 14 During the State's case-in-chief, the trial court received a note from a juror asking whether Frederick Lewis could be re-called to testify as to the angle at which he saw defendant and as to whether he was wearing corrective lenses at the time of the shooting; whether any threats had been made against Jamel Armstrong relating to positively identifying the gunman; and whether it would be possible to view photographs that were presented in court. The trial court spoke with the juror and the attorneys outside the presence of the other jurors, confirmed that the juror had not spoken with any of the other jurors about her concerns, and informed her that it was the prerogative of the State and the defense to present evidence "the way they see fit."

¶ 15 The jury found defendant guilty of the first degree murder of Jeremiah Jones and the attempted first degree murder of Jamel Armstrong. The trial court imposed consecutive terms of 47 and 15 years in prison, respectively.

¶ 16 On direct appeal, we rejected defendant's challenge to the sufficiency of the evidence, finding that a rational trier of fact could reasonably have convicted defendant based on Frederick Lewis's "strong, unequivocal" eyewitness identification, the corroborating physical description of the shooter provided by Armstrong, and the corroboration provided by the fact that the weapon found near defendant two days after the crime had characteristics establishing that it could have fired the bullet that was recovered from the murder victim's body. We also rejected defendant's contention that he was denied a fair trial by the admission of "other crimes" evidence that he was involved in a shooting two days after the offenses at issue. *People v. Staples*, No. 1-95-3199 (1997) (unpublished order under Supreme Court Rule 23).

¶ 17 In 1998, defendant filed a *pro se* postconviction petition alleging, among other things, that his trial counsel was ineffective because she failed to make any attempt to interview alibi witnesses for whom defendant had provided names and addresses. The witnesses defendant identified were his wife, who he alleged would have testified that on the day at issue, defendant was with her at a motel in Harvey all day while their car keys were lost; the "proprietor" of Mike's Locksmith, who he alleged would have testified that defendant was at the motel from about 3:30 p.m. to 4:30 p.m., while he made a key for the car; and two named employees of the motel, who he alleged would have testified that they saw defendant at the motel. The trial court summarily dismissed the petition. On appeal, this court granted the motion of the Cook County

Public Defender to withdraw and affirmed the judgment of the circuit court. In doing so, we noted that defendant had not provided affidavits from the witnesses who allegedly saw him at the motel at about the time of the shooting, and that therefore, his allegations were unsupported.

People v. Staples, No. 1-98-2063 (1999) (modified order upon denial of rehearing; unpublished order under Supreme Court Rule 23).

¶ 18 In 2001, defendant filed a second *pro se* postconviction petition. In this petition, defendant, *inter alia*, re-alleged that trial counsel was ineffective for failing to investigate alibi witnesses including his wife and the locksmith. According to defendant, his brother had contacted the locksmith, who said he would not sign an affidavit or get involved unless he was directed to do so by a court. Defendant attached an affidavit from his brother, attesting to these facts. The trial court dismissed the petition as frivolous and patently without merit. On appeal, this court granted counsel's motion to withdraw and affirmed. *People v. Staples*, No. 1-01-3376 (2002) (unpublished order under Supreme Court Rule 23).

¶ 19 In 2004, 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 2004)), asserting that his consecutive sentences were unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The trial court dismissed the petition and we affirmed the dismissal. *People v. Staples*, No. 1-04-3415 (2006) (unpublished order under Supreme Court Rule 23).

¶ 20 In 2005, defendant filed a *pro se* "Motion for Fingerprint Testing Not Available at Time of Trial Pursuant to 725 ILCS 5/116-3." In the motion, defendant alleged he had "just learned" that a man named Thomas Young was standing with the victims at the time of the shooting,

participated in the shooting, and was in the van as it drove from the scene. Accordingly, defendant requested that Thomas Young's fingerprints be compared to the latent prints found in the van. Defendant attached to the motion an affidavit executed by Enrique Gervais, who averred that on the day of the shooting, he saw Thomas Young driving a white van past 5469 Ingleside. The trial court recharacterized the motion as a postconviction petition and summarily dismissed it without notifying defendant of the recharacterization or giving him an opportunity to amend the pleading. On appeal, this court vacated the trial court's order and remanded the case for further proceedings in compliance with *People v. Pearson*, 216 Ill. 2d 58 (2005). *People v. Staples*, No. 1-05-2285 (2007) (unpublished order under Supreme Court Rule 23).

¶ 21 On remand, the trial court interpreted this court's order as finding the recharacterization improper and denied defendant's motion on the merits. Defendant appealed, contending that the trial court failed to comply with this court's mandate to comply with the admonishment requirements set forth in *Pearson*. We agreed, vacated the circuit court's order, and remanded with directions to provide defendant with the appropriate *Pearson* warning regarding successive postconviction petitions and an opportunity to withdraw or amend his *pro se* pleading. *People v. Staples*, No. 1-07-2571 (2009) (unpublished order under Supreme Court Rule 23).

¶ 22 On September 19, 2007, defendant filed a third *pro se* postconviction petition. In the petition, defendant alleged that (1) he was denied due process by the trial court's summary dismissal of his first and second postconviction petitions; (2) he was denied the right to a fair trial by the State's knowing use of the perjured testimony of Frederick Lewis; (3) he was denied due process by the State's use of gang testimony in violation of a pretrial motion *in limine*; (4) he

was denied the right to a fair trial where the State withheld exculpatory evidence that Thomas Young was with the victims at the time of the shooting, departed from the scene in the van before the police arrived, and later viewed a lineup that included defendant; (5) he was denied the right to a fair trial where trial counsel failed to contact, interview, or otherwise call alibi witnesses he informed her about, namely his wife, her cousin, and a locksmith; (6) he was denied due process by trial counsel's ineffectiveness; and (7) the trial court erred in giving jury instructions on first degree murder and aggravated battery. Defendant attached several affidavits to his petition, including one executed by his brother, in which he averred that a representative from the locksmith service told him he recalled going to the motel in Harvey but "would only get involved if directed by the court"; one from his wife, in which she averred that she and defendant spent the entire day in question at the motel and that no one from the Public Defender's office interviewed her; and one from Enrique Gervais, who averred that on the day of the shooting, he saw Thomas Young driving a white van past 5469 Ingleside. The trial court denied defendant leave to file his successive petition, finding that he had failed to satisfy the cause and prejudice test.

¶ 23 On September 29, 2009, defendant withdrew his motion for fingerprint testing without prejudice. On December 9, 2011, he filed a new *pro se* "Motion for Fingerprint or Forensic Testing Not Available at Trial Regarding Actual Innocence Pursuant to 725 ILCS 5/116-3," which was granted. Resulting fingerprint testing completed on August 10, 2012, revealed that no fingerprints recovered from the van matched defendant, but that one print from an interior

window matched Kevin Collier, and another print from an interior window matched Lenell Young.

¶ 24 On October 30, 2012, defendant filed a *pro se* motion for leave to file a successive postconviction petition, contending that the fingerprint identification of Kevin Collier and Lenell Young supported his claim of actual innocence. Defendant argued that the fingerprint evidence was not available to him until after August 10, 2012, and asserted that had the jury known about Kevin Collier's and Lenell Young's fingerprints in the van, it would have altered the outcome of the trial.

¶ 25 The trial court denied leave to file, finding that although the fingerprint evidence was not cumulative of the evidence introduced at trial, defendant had not met his burden of demonstrating that it was newly discovered or that it was of such a conclusive nature that it would probably have changed the result at trial.

¶ 26 Defendant filed a *pro se* motion to reconsider, asserting that he had exercised due diligence in discovering the identity of the individuals whose fingerprints were recovered from the van, and that this evidence of identity was in fact newly discovered. Defendant further argued that the evidence, especially the evidence identifying the fingerprints of Lenell Young, was exonerating because a person identified as Thomas Young had been present at the scene of the crime, and because the van at issue was recovered in close proximity to Thomas Young's address. According to defendant, both of these circumstances implicated "Young" as the shooter who fled the scene in the van. Defendant attached a copy of a police report to his motion,

reflecting that Thomas Young of 7401 S. Sangamon viewed a lineup but did not identify defendant, and that the van was abandoned and recovered at 7017 S. Sangamon.

¶ 27 The trial court denied defendant's motion to reconsider. In doing so, the trial court found that the evidence identifying Kevin Collier's and Lenell Young's fingerprints in the van was not newly discovered because fingerprint testing was available and had been done prior to trial, and defendant had failed to present evidence that the identity of those two individuals could not have been discovered sooner through due diligence. The trial court further found that even if the fingerprint analysis constituted newly discovered evidence, it was not of such a conclusive nature that it would have changed the result on retrial. Noting that defendant had tried to link Lenell Young to Thomas Young, the court found that defendant had presented no evidence that the two were connected, were relatives, or were the same individual; had not explained why Thomas Young was never before identified by any witnesses on the scene; and entirely failed to explain the significance of the fingerprint analysis evidence.

¶ 28 Defendant appealed.

¶ 29 On appeal, defendant contends that the trial court erred in denying him leave to file a successive postconviction petition where the newly discovered fingerprint evidence attached to his petition clearly undermines confidence in the jury's verdict. Defendant maintains that he set forth a colorable claim of actual innocence based on newly discovered evidence where (1) evidence that the fingerprints recovered from inside the van matched Kevin Collier and Lenell Young was not available until August 2012, well after his 1995 trial and his 2005 initial request for fingerprint testing; (2) this new evidence was not cumulative to what was presented at trial;

and (3) the new fingerprint evidence casts doubt on the factual correctness of the jury's verdict, particularly in light of other evidence that had come to light since trial, *i.e.*, alibi evidence provided by defendant's wife and brother and a police report indicating that Thomas Young was an eyewitness to the shooting but had failed to identify defendant in a lineup. Defendant argues that the State did not present a compelling case against him, that he has now presented the identities of the two individuals who were "likely responsible" for the shooting, and that had the fingerprint evidence been available at trial, defense counsel could have argued to the jury that this was a case of mistaken identity and that Kevin Collier and Lenell Young were the true culprits. Noting that at least one juror "had doubts about [his] involvement," he concludes that if the jurors had known Kevin Collier and Lenell Young "were in the van used by the two assailants as they fled," in conjunction with all of the other evidence presented in previous postconviction petitions, there is a reasonable probability that they would not have convicted him.

¶ 30 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) contemplates the filing of only one postconviction proceeding. *People v. Edwards*, 2012 IL 111711, ¶ 22. However, our supreme court has provided two bases upon which the bar against successive proceedings may be relaxed. *Id.* The first basis is when a defendant establishes "cause and prejudice" for failing to raise the claim earlier. *Id.* The second is the "fundamental miscarriage of justice" exception, under which the defendant must show actual innocence. *Id.* ¶ 23. When a defendant claims actual innocence, the question is whether his petition and supporting documentation set forth a colorable claim; that is, whether they raise the probability

that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Id.* ¶¶ 24, 31, 33. The evidence supporting the claim of actual innocence must be (1) newly discovered; (2) material and not merely cumulative; and (3) of such conclusive character that it would probably change the result on retrial. *Id.* ¶ 32. The conclusiveness of the evidence is the most important element of an actual innocence claim. *People v. Sanders*, 2016 IL 118123, ¶ 47. We review the denial of leave to file a successive petition claiming actual innocence *de novo*. *People v. Jones*, 2016 IL App (1st) 123371, ¶ 71 (citing *Edwards*, 2012 IL 111711, ¶ 30).

¶ 31 In the instant case, the evidence identifying the fingerprints in the van as belonging to Kevin Collier and Lenell Young does not exonerate defendant. Accordingly, we need not determine whether that fingerprint evidence was newly discovered or whether it was material and not merely cumulative. *Sanders*, 2016 IL 118123, ¶ 47.

¶ 32 As noted above, in order to succeed on a postconviction claim of actual innocence, the evidence supporting that claim must be so conclusive that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32. Evidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt. *People v. Green*, 2012 IL App (4th) 101034, ¶ 36; *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40. Here, the evidence advanced by defendant merely shows that Kevin Collier's and Lenell Young's fingerprints were recovered from the inner surface of the van's windows. However, nothing indicates when these men left their fingerprints there. Evidence was presented at trial that the van had been stolen the day before the shooting and that by the time the police recovered it, it had been burned. It is

entirely possible that Kevin Collier and Lenell Young had, at some point in time, used the van for some purpose, innocent or nefarious, other than driving it from the scene of the shooting.

¶ 33 More important, it had already been determined before trial that defendant had not left fingerprints in the van. Although the jury heard that evidence, it nevertheless found defendant guilty. That defendant did not leave fingerprints in the van does not mean he could not have been in the van as it drove from the scene, much less that he could not have been the victims' shooter. Knowing the identities of two people who did leave fingerprints in the van does not change this fact. The fingerprint evidence would not contradict the State's evidence of defendant's guilt, and therefore, does not qualify as exonerating evidence that supports a claim of actual innocence. See *Green*, 2012 IL App (4th) 101034, ¶ 36.

¶ 34 The fingerprint evidence identifying Kevin Collier and Lenell Young as two people who, at some point in time, touched the windows of the van that was used by the shooter and his accomplice to flee from the scene does not exonerate defendant. Even if the fingerprint evidence could be considered new and noncumulative, it does not raise the probability that if it had been presented at trial, it is more likely than not that no reasonable juror would have convicted defendant. See *Edwards*, 2012 IL 111711, ¶ 40. Because the fingerprint evidence is not of such conclusive character that it would probably change the result on retrial, defendant has failed to assert a colorable claim of actual innocence. See *id.* ¶¶ 40-41. Accordingly, the trial court did not err in denying defendant leave to file his successive postconviction petition.

¶ 35 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 36 Affirmed.