

No. 1-14-1192

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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. 98 CR 30731
)	
MATTHEW CARMICHAEL,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court properly denied defendant leave to file a successive postconviction petition where defendant failed to raise a colorable claim of actual innocence.

¶ 2 Following a jury trial, defendant Matthew Carmichael was convicted of first-degree murder, attempted first-degree murder, and aggravated discharge of a firearm. The trial court sentenced Carmichael to concurrent terms of 35 years' imprisonment for the murder and 30 years' imprisonment for the attempted murder. On direct appeal, this court granted defense counsel's motion for leave to withdraw pursuant to *People v. Anders*, 386 U.S. 738 (1967), and

affirmed the judgment of the trial court. *People v. Carmichael*, No. 1-01-2564 (2003) (unpublished order under Supreme Court Rule 23). We also affirmed the circuit court's dismissal of Carmichael's subsequent *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), which alleged ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct. *People v. Carmichael*, No. 1-05-0097 (2006) (unpublished order under Supreme Court Rule 23). Carmichael then filed a motion for leave to file a successive postconviction petition, which the circuit court denied. Carmichael appeals, contending that his petition stated a colorable claim of actual innocence based on the newly discovered affidavits of two witnesses. But because the affidavits Carmichael submits do not support a claim of actual innocence, we affirm.

¶ 3 Carmichael was charged with first-degree murder of Alvonzo Williams, attempted first-degree murder of Edward McCree and Sparkie Ashford, and aggravated discharge of a firearm, arising from a shooting that occurred in Chicago on November 10, 1998. We restate only the trial evidence pertinent to the current appeal.

¶ 4 In the early morning hours of November 10, 1998, Carmichael and Keith Sawyer met Damian Rodgers and rode with Rodgers in his car. As they drove, Rodgers and Carmichael, both members of the Gangster Disciples, spoke about another gang member, Eddie Bass, who had been shot and killed exactly one year earlier while sitting with Carmichael in his car. Rodgers and Carmichael discussed retaliating by shooting "Rick" and "Prince Money," who were Bass's suspected killers and members of the Mickey Cobras gang. Carmichael directed Rodgers to a house, retrieved a nine-millimeter gun, and returned to the car. Rodgers already had a gun with him.

¶ 5 As they drove looking for, Rick and Prince Money, the trio encountered a group in a Suburban at 118th and Peoria and stopped to talk with the driver. Carmichael asked the driver to take him home and got in the Suburban, but "jumped" out two or three minutes later and went to the front of the vehicle. He said, "[w]ho [*sic*] that," or "what's that," and fired six or seven shots. Rodgers did not hear anyone else shooting or see anyone else with a gun. He did not see anyone down the street and did not know what Carmichael was shooting at. One of the shots fired by Carmichael killed Williams.

¶ 6 Following his arrest, Carmichael gave a statement to police. After recounting the above events, Carmichael told police as he was talking to someone in the Suburban, he saw three people emerging from a gangway down the block. He could not see who they were, but thought they were Rick and "Money." In his initial statement, Carmichael told police that he, Sawyer and Rodgers all had guns and all three fired at the group. Carmichael later asked to change his statement and admitted he was the only one who fired a gun. He originally told police that "everyone was shooting" because he was angry and scared, and "did not want to be the only person to go to jail." Carmichael never mentioned in his statement that he was in fear for his life or felt the need to defend himself.

¶ 7 Carmichael elected to testify and related that as he stood in the street, he saw "three guys coming through the gangway stooping low." It was dark and raining, and Carmichael could not tell who the people were or whether Rick was among them. Carmichael testified that it "[j]ust came in my mind I thought it was Rick," but acknowledged having no idea whether he was present. Carmichael twice yelled "[w]ho is that?" When no one responded, he shot "five or seven times," trying to hit all three people.

¶ 8 Carmichael denied that Williams had done anything to make him afraid, but thought that the three people he shot at had killed Bass and were coming to kill him. According to Carmichael, he was thinking about Bass when he fired the gun, was scared, and had acted to defend himself.

¶ 9 The trial court instructed the jury as to first and second-degree murder but did not give a self-defense instruction. Among other offenses, the jury found Carmichael guilty of the first-degree murder of Williams.

¶ 10 Following affirmance of his conviction on direct appeal and dismissal of his initial postconviction petition, Carmichael filed a motion for leave to file a successive postconviction petition, which alleged actual innocence and cause and prejudice based on the newly discovered affidavits of two witnesses, Richard Campbell (aka "Rick") and Antonio Williams.¹

¶ 11 Campbell's affidavit stated that he was at 117th and Peoria at 1:30 a.m. on November 10, 1998, and saw a car and a Suburban with the lights on in the middle of the street. He recognized a few people he was "having a conflict with," including Carmichael. Campbell walked from the gangway "stooping low," intending to harm "defendant and others." Campbell believed that Carmichael recognized him because he said "something like 'who is that?'"

¶ 12 As Campbell attempted to "carry out [his] intentions," "three guys" came through the next gangway. Campbell "pulled back" so the men could not see him, and heard them yell out "y'all not real gangstas [*sic*]." Campbell heard gunshots and ran. He was never contacted before Carmichael's trial to give a statement, but attested that he would not have cooperated or testified due to his "lifestyle." In 2012, Campbell met Carmichael in prison, explained what he had seen and done on the night of the incident, and agreed to provide an affidavit.

¹ We use Antonio's first name to distinguish him from the victim.

¶ 13 Antonio's affidavit stated that he and his girlfriend were listening to music in a parked car near 117th and Peoria in the early morning hours of November 10, 1998. Antonio saw three people come through a gangway on the opposite side of the street, and paid "close attention" to them because of the number of shootings in the neighborhood. He recognized two of the men—Williams and Ashford. Williams carried a "silver looking object in his hand." Antonio rolled his window down "to get a good look at them" because it was raining heavily, and heard someone down the street yell "who is that." Williams raised the object he was holding, and Antonio saw it was a gun. Williams pointed the gun towards the group of people and yelled, " 'ya'll ain't real gangsters.' " Antonio heard gunshots from the direction of the group at the end of the block, and ducked down with his girlfriend until the shooting stopped.

¶ 14 The next day, Antonio learned that Williams had been killed. He visited Ashford and told him what he had seen, and Ashford asked him if he had spoken to the police or anyone else. Antonio said he had not, but understood Ashford's comment to be a threat. Antonio later moved away from the area. In October 2012, he met Carmichael's brother, Abraham Carmichael, who told him that Carmichael had been "locked up" for Williams' murder. Antonio told Abraham what he had seen on the morning of the shooting. Antonio eventually provided an affidavit. Carmichael's petition also included affidavits from himself and Abraham, which described their discussions with Campbell and Antonio.

¶ 15 On February 28, 2014, the circuit court denied defendant leave to file his successive postconviction petition. In a written order, the court stated that both Campbell and Antonio's affidavits were "newly discovered" and "material and noncumulative," but it was not probable that either affidavit would change the result at trial. Campbell's affidavit did not corroborate Carmichael's self-defense claim, as in his trial testimony, Carmichael denied knowing whether

Campbell was present during the shooting and Campbell's "subjective claim" that he intended to harm defendant "was not manifested in any way." Antonio's affidavit likewise did not corroborate Carmichael's self-defense claim, as no witness at trial, including those who were with Williams when the shots were fired, testified that Williams had a gun and "the only gun recovered was the nine-millimeter semiautomatic handgun *** which petitioner had fired."² Additionally, the court noted that Carmichael's claim of self-defense was "clearly rebutted" by evidence that he was the initial aggressor and was never in imminent danger or threatened with unlawful force. Thus, the court denied Carmichael leave to file his successive postconviction petition.

¶ 16 On appeal, Carmichael contends that the trial court erred by denying him leave to file a successive postconviction petition where Campbell and Antonio's affidavits supported his claim of actual innocence. Carmichael argues that Campbell's attestation that he was at the scene of the shooting and intended to harm Carmichael, along with Antonio's attestation that Williams pointed a gun in Carmichael's direction, corroborate his "otherwise unsupported" claim that he believed deadly force was justified at the time of the shooting. According to Carmichael, the affidavits place the trial testimony in a "new light" by rebutting the notion that Williams had not done anything to put Carmichael in fear for his life and establishing that Campbell acted in a threatening manner. Had Campbell and Antonio's evidence been available at trial, Carmichael submits that counsel could have argued a theory of self-defense, in addition to second-degree murder, and possibly, he would not have been found guilty of first-degree murder.

² Both parties' briefs note, correctly, that the trial evidence showed the gun produced at trial had not fired the recovered cartridges or bullet. The evidence did show, however, that all of the recovered .9mm cartridges, including one found in Carmichael's pocket, had been fired from the same gun.

¶ 17 The Act permits a defendant to challenge a conviction based on alleged violations of his constitutional rights that were not, and could not have been, adjudicated previously on direct appeal. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. English*, 2013 IL 112890, ¶ 22. The Act provides that “[o]nly one petition may be filed by a petitioner *** without leave of the court.” 725 ILCS 5/122-1(f) (West 2012). But a petitioner may be granted leave to file a successive postconviction petition if the petition establishes cause and prejudice or states a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶¶ 22-23. Here Carmichael submits that his motion for leave to file a successive postconviction petition stated a colorable claim of actual innocence. While our supreme court has not yet articulated the appropriate standard of review for actual innocence claims (*id.* ¶ 30), Carmichael's claim fails under either an abuse of discretion standard or *de novo* review.

¶ 18 Where a defendant raises a claim of actual innocence, "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." *Id.* ¶ 24. A colorable claim of actual innocence is one that raises the probability that it is more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence. *People v. Sanders*, 2016 IL 118123, ¶ 24. To establish a claim of actual innocence, the evidence in support of the claim must be (1) newly discovered, meaning that it was discovered after trial and could not have been discovered earlier through the exercise of due diligence; (2) material and noncumulative, meaning that it is relevant and probative of the defendant's innocence and adds to what the jury heard; and (3) of such a conclusive character that when considered with the trial evidence it would probably lead to a different result. *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 19 Notably, "[a] claim of actual innocence is not a challenge to whether the defendant was proved guilty beyond a reasonable doubt, but rather an assertion of total vindication or exoneration." *People v. House*, 2015 IL App (1st) 110580, ¶ 41 (citing *People v. Barnslater*, 373 Ill. App. 3d 512, 520 (2007)). In *Barnslater*, the defendant was convicted of aggravated criminal sexual assault based on the assault being committed during an aggravated kidnaping. *Barnslater*, 373 Ill. App. 3d at 519. The defendant filed a postconviction petition alleging actual innocence in view of an affidavit from the victim, which suggested that defendant had not kidnaped her. *Id.* We found that the affidavit did not establish defendant's actual innocence, which "requires that a defendant be free of liability not only for the crime of conviction, but also of any related offenses." *Id.* at 520-21 (citing *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999)). As the allegations contained in the defendant's petition, taken as true, did not vindicate the defendant for lesser included offenses of aggravated criminal sexual assault, the newly discovered evidence did not show that the defendant was actually innocent. *Id.* at 526-27.

¶ 20 Here, we find the trial court did not err in denying Carmichael leave to file his successive postconviction petition. First, viewed in conjunction with Carmichael's trial testimony, Campbell and Antonio's affidavits do not support a finding of actual innocence based on a theory of self-defense. To establish the affirmative defense of self-defense, Carmichael was required to show, *inter alia*, that he was not the initial aggressor and that he reasonably believed a danger existed that required the use of force. *People v. Lee*, 213 Ill. 2d 218, 225 (2004). At trial, Carmichael testified that he did not know whether Campbell was present at the scene of the shooting and did

not see Williams do anything that made him afraid.³ Thus, neither Campbell's attestation that he was present and intended to harm Carmichael, nor Antonio's attestation that Williams pointed a gun at Carmichael, has any bearing on whether Carmichael was the initial aggressor or whether he reasonably believed in the need for self-defense. See *People v. Jarrett*, 399 Ill. App. 3d 715, 724 (2010) (postconviction petition failed to state claim of actual innocence where the facts, taken as true, did not rebut trial testimony that defendant was initial aggressor); see also *People v. Garcia*, 90 Ill. App. 2d 396, 401 (1967) (self-defense not established where defendant testified that "at the moment he fired, he did not know who was behind him, what, if anything, the person approaching him had in his hands and that he did not know at whom he was shooting").

¶ 21 Second, the affidavits do not support a finding of actual innocence based on a theory of second-degree murder. As a panel of the Fifth Division of this court recently noted in *People v. Wingate*, 2015 IL App (5th) 130189, ¶ 34, under *Barnslater*, newly discovered testimony that "could potentially reduce the defendant's liability from first-degree murder to second-degree murder *** would not support a claim of actual innocence." Thus, even if Campbell and Antonio's affidavits suggested that Carmichael shot Williams due to an unreasonable belief in the need for self-defense, Carmichael would still be liable for the second-degree murder of Williams, and therefore, not actually innocent of a related offense against the victim. *Barnslater*, 373 Ill. App. 3d at 521. Carmichael argues that *Barnslater* was wrongly decided and that our supreme court has not adopted total exoneration as a requirement in postconviction claims for actual innocence, but we note our agreement with *Barnslater's* reasoning and see no reason to

³ The State correctly notes that if we attribute the facts stated in Campbell's and Antonio's affidavits to Carmichael *i.e.*, that Carmichael was aware the Campbell was at the scene and that Williams was pointing a gun in his direction, those facts could not be considered "newly discovered" as Carmichael would necessarily have been aware of them at his trial.

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depart from its holding. As Campbell and Antonio's affidavits do not support a finding of actual innocence, the circuit court did not err in denying Carmichael leave to file his successive postconviction petition.

¶ 22 Affirmed.