

No. 1-14-1998

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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. 95 CR 25864
)	
JOSEPH WILSON,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm the judgment of the circuit court denying defendant leave to file his successive *pro se* postconviction petition because his claim of actual innocence was not supported by newly discovered evidence of such conclusive character that it would probably change the result on retrial.

¶ 2 Following a 1998 jury trial, defendant Joseph Wilson was convicted of first degree murder and attempted armed robbery and sentenced to concurrent, respective terms of natural life and 15 years' imprisonment. Defendant appeals from the circuit court's order denying him

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leave to file a 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 his petition presented a colorable claim of actual innocence based on the attached affidavit of Lester Griffin, who averred that defendant's gun discharged as defendant and the victim struggled over it. We affirm.

¶ 3 The evidence adduced at trial showed that in the early morning hours of August 21, 1995, defendant shot and killed William Burra during an armed robbery that occurred near the intersection of Cicero Avenue and LeMoyne Street. Defendant was arrested on the same date and, on the next day, provided an assistant state's attorney (ASA) and a detective with a 22-page, court-reported statement detailing his involvement in the shooting and robbery. Defendant's statement was published to the jury by ASA Stephanie Garrett.

¶ 4 In the statement, defendant related that in the early morning on the date in question he met a group of his friends, Lavandes Milton, Steve Harris, Robert Thompson and Pieto, at the corner of Cicero and LeMoyne. Defendant showed the group a loaded handgun that he brought from his home and then told Milton to put the gun in the bushes near LeMoyne. After Milton did so, the group remained in the area and continued talking. A short time later, defendant saw police pull a car over on the west side of Cicero. Defendant stated that there were three people inside the car: one black male in the front passenger seat, a white male in the driver's seat and a white female in the back seat. Defendant was familiar with the front passenger, Albert Anderson. After police left the scene, Anderson exited the car and approached one of defendant's friends. Defendant then spoke with Anderson about selling him the gun. During the course of the conversation, Anderson told defendant that the driver of the car, Burra, had a

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couple of hundred dollars in his pocket. Anderson went back to the car to talk with Burra about purchasing the gun from defendant.

¶ 5 When Anderson went back to the car, defendant spoke to his friends about a plan to rob Burra. The plan was to take Burra into an alley and pretend to sell drugs to him and then "stick him up" using the gun that was hidden in the bushes. At some point, Milton retrieved the gun from the bushes and defendant placed it in his pocket. Burra exited the car, spoke with defendant and his friends, and then walked with them into the alley. As he did so, Anderson called to him and Burra walked back to the car. When Burra entered the car, defendant placed the gun to his side to prevent him from driving away. Burra tried to start the car, but one of defendant's friends prevented him from doing so. Burra eventually started the car and, "as he was pulling off," defendant shot him in the side. In response to the question, when you say you shot him in the side what did you do with the gun, defendant stated "I pulled the trigger." Burra drove away and defendant ran home and hid the gun in a closet.

¶ 6 Alison Fausti, Burra's fiancé, testified that, in the early morning hours of the date in question, she, Burra and Anderson drove to the west side of Chicago to purchase drugs. Fausti acknowledged that several hours before doing so, she and Burra each "did a line" of cocaine. She also acknowledged that she had two prior felony convictions for possession of a controlled substance and that, at the time of the shooting, she had been using cocaine three times a week for about 10 years. Burra was the driver of the car, Anderson was in the front passenger seat, and Fausti was in the back seat. About 1:30 a.m., they were pulled over by police near the

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intersection of Cicero and LeMoyne. Fausti acknowledged that she told police her name was Sylvana because she was worried that there were warrants out for her arrest.

¶ 7 After the police left, Anderson exited the car and spoke with about five men, who were standing on LeMoyne. Anderson returned to the car and, shortly thereafter, Burra and him exited the car. Burra spoke with defendant and his friends, and then walked with them into an alley. About five minutes later, Burra exited the alley, followed by defendant and his friends. As Burra entered the car and started the engine, defendant and his friends reached in through the open driver's side window and attempted to remove the keys from the ignition. When Burra started the car, defendant placed a gun to his side while the other four men tried to hold him. As Burra started to pull away, defendant shot him once in the side. Burra drove a few blocks and then lost consciousness. About 30 minutes after the shooting, Fausti talked to responding officers. She acknowledged that she told the officers that her name was Sylvana and that she was married to Jack Manzella. On the following day, Fausti identified defendant from a lineup as the shooter. She also identified him in open court.

¶ 8 Doctor Mitra Kalelkar, assistant chief medical examiner at the Cook County Medical Examiner's Office, performed the autopsy of Burra's body and testified as an expert in forensic pathology. Doctor Kalelkar testified that a bullet entered the left side of Burra's abdomen and that there was stipling around the wound indicating close-range firing. Doctor Kalelkar testified that this was consistent with Burra having a gun placed at his side and being shot. Doctor Kalelkar concluded, to a reasonable degree of medical certainty, that the cause of Burra's death

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was a single gunshot wound to the left side of his abdomen and that the manner of death was homicide.

¶ 9 Defendant testified that he did not intend to kill Burra, and that the gun discharged while they struggled over it. Defendant stated that after Burra started the car he asked to see the gun. As defendant handed him the gun, Burra tried to grab it and drive away at the same time. When he did so, "[the gun] went off." Defendant acknowledged that he provided an ASA with a statement, but testified that he did so because the police told him that they would throw his case out if he gave them a motive.

¶ 10 The jury found defendant guilty of first degree murder and attempted armed robbery. Defendant appealed, and this court affirmed his convictions over defendant's contention that the court failed to adequately consider his rehabilitative potential and imposed an excessive sentence for first degree murder. *People v. Wilson*, No. 1-98-1898 (1999) (unpublished order under Supreme Court Rule 23).

¶ 11 On December 8, 2009, defendant filed a *pro se* postconviction petition, arguing that his trial counsel was ineffective for allowing the trial court to consider an improper factor at sentencing—defendant's pending murder charge in an unrelated case. Defendant also argued that he was denied his right to due process because his sentence was severely disproportionate to the sentences received by his codefendants. The circuit court granted the State's motion to dismiss the petition and we affirmed that order. *People v. Wilson*, 2013 IL App (1st) 110864-U.

¶ 12 On April 22, 2013, defendant sought leave to file a *pro se* successive postconviction petition that is the subject of this appeal. In this successive petition, defendant alleged that he

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was actually innocent of Burra's murder. In support of his actual innocence claim, defendant attached an affidavit from Lester Griffin. In the affidavit, dated March 12, 2013, Griffin averred that he was inside the car when Burra was shot. Griffin was seated in the back seat next to a "white woman [who] was asleep during the entire ride," Anderson was in the front passenger seat and a "white guy drove the car." After their car was pulled over by police, Anderson and Burra exited the car and each talked to a separate group of people. Burra returned to the car and sat in the driver's seat. As he did so, "a big guy" approached the driver's side of the car and asked him if he wanted to buy a gun. Burra asked to see the gun and defendant retrieved it from his pocket. Burra looked at the gun and then "tried to take it from [defendant], while trying to drive away." Griffin averred that during the struggle, the gun discharged. Burra let go of the gun and drove away. After Burra stopped the car at LeMoyne and Cicero, Griffin jumped out of the car because he was afraid.

¶ 13 Griffin averred that he was never questioned about the incident and that he did not know that Burra had died. Griffin also averred that he learned that defendant was imprisoned for the shooting on March 25, 2012, when defendant spoke at a prison church service and Griffin recognized him as "the big guy who had tried to sell the white guy the gun."

¶ 14 On May 16, 2014, the circuit court entered a written order denying defendant leave to file the successive postconviction petition. The court found that defendant failed to show that Griffin's affidavit constituted newly discovered evidence. In doing so, the court stated that defendant did not exercise due diligence in presenting this evidence sooner, given that Griffin's presence at the crime scene was information within defendant's own perception, yet he failed to

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explain why he did not mention Griffin prior to or during trial. The court also found that Griffin's affidavit was not of such a conclusive character that it would probably change the result on retrial where it was cumulative of the evidence presented at trial—that the gun discharged while defendant and Burra struggled over it.

¶ 15 On appeal, defendant contends that his petition presented a colorable claim of actual innocence based on Griffin's affidavit. He argues that Griffin's affidavit, taken as true, shows the gun went off accidentally during a struggle, as he testified to at trial.

¶ 16 The Act generally contemplates the filing of only one postconviction petition and provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or amended petition is waived." *People v. Ortiz*, 235 Ill. 2d 319, 328-29 (2009); 725 ILCS 5/122-3 (West 2012). This statutory bar to a successive postconviction petition will be relaxed when fundamental fairness requires. *Ortiz*, 235 Ill. 2d at 329. Fundamental fairness allows the filing of a successive petition where the petition complies with the cause and prejudice test. *Id.*

¶ 17 However, a successive postconviction petition that sets forth a claim of actual innocence is not subject to the general cause and prejudice test. *Ortiz*, 235 Ill. 2d at 330. Rather, when a successive postconviction petition based upon a claim of actual innocence is filed, "leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided *** that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶ 24. Stated differently, "leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is

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more likely than not that no reasonable juror would have convicted him in light of the new evidence.' " *Id.*, quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

¶ 18 The elements of a successful claim of actual innocence require that the evidence supporting the claim must be: (1) newly discovered; (2) material; (3) not merely cumulative; and (4) of such conclusive character that it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32, citing *Ortiz*, 235 Ill. 2d at 333. In *People v. Coleman*, 2013 IL 113307, ¶ 96, our supreme court clarified that "[n]ew means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. [Citation.]"

¶ 19 It is unclear whether an abuse of discretion or *de novo* standard of review applies to decisions granting or denying leave to file a successive petition raising a claim of actual innocence. See *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 59 (applying *de novo* standard of review); *People v. Edwards*, 2012 IL 111711, ¶ 30 (declining to decide whether an abuse of discretion or *de novo* standard of review applies to decisions granting or denying leave to file a successive petition raising a claim of actual innocence). However, applying either standard in this case, our conclusion is the same. See, e.g., *People v. Simon*, 2014 IL App (1st) 130567, ¶ 58.

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¶ 20 Here, defendant failed to plead a colorable claim of actual innocence because Griffin's affidavit is not newly discovered, material, non-cumulative, or of such a conclusive character that it would probably change the result on retrial. As in *Edwards*, the "newly discovered" evidence here "does not raise the probability that, in light of this new evidence, it is more likely than not that no reasonable juror would have convicted" defendant. *Edwards*, 2012 IL 111711, ¶ 40. In *Edwards*, the court expressly stated that the United States Supreme Court has emphasized that a defendant's claim of actual innocence should be supported by new reliable evidence, which could include trustworthy eyewitness accounts. *Id.* ¶ 32, citing *Schlup*, 513 U.S. at 324. Griffin's affidavit does not amount to new reliable evidence as contemplated by *Edwards*.

¶ 21 First, the affidavit does not constitute newly discovered evidence given that Griffin's presence inside the car was within defendant's perception and therefore could have been discovered earlier through the exercise of due diligence. See *People v. Jones*, 399 Ill. App. 3d 341, 364 (2007), and cases cited therein ("[a]n unbroken line of precedent holds that evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of those facts may have been unknown, unavailable or uncooperative").

¶ 22 In reaching this conclusion, we are not persuaded by defendant's argument that "the basic reason Griffin's affidavit is newly discovered is that no witness at trial, including [defendant], mentioned seeing a fourth occupant in the car and so no due diligence could have produced Griffin as a witness until now." Defendant's self-serving argument is belied by the record, which shows that there were only three people inside the car. Fausti testified that she was in the back seat, Anderson was in the front passenger seat and Burra was driving the car. Fausti's testimony

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was corroborated by defendant, who stated in his written statement and testified at trial that there were only three people in the car: one black male in the front passenger seat, a white male in the driver's seat and a white female in the back seat.

¶ 23 We are also not persuaded by defendant's reliance on *People v. Adams*, 2013 IL App (1st) 111081. In *Adams*, this court reversed the circuit court's order denying the defendant leave to file a successive postconviction petition after finding that he set forth a colorable claim of actual innocence based on newly discovered affidavits of three witnesses, two of whom passed by the scene of the crime and witnessed someone other than the defendant committing the murder. *Id.*, ¶ 33, 39. Here, unlike *Adams*, Griffin was not a passerby at the time of the shooting such that defendant would not have known about him or had any reason to seek him out. *Id.*, ¶ 33. Rather, as mentioned, Griffin's presence inside the car would have been within defendant's perception and readily available to him prior to and during trial.

¶ 24 Second, Griffin's affidavit, even assuming it is material in nature, is merely cumulative of the evidence presented at trial. At trial, defendant testified that the gun discharged as he and Burra struggled over it. In his affidavit, Griffin averred that Burra tried to grab the gun from defendant and that, "during the struggle for the gun, the gun discharged." As such, this evidence is cumulative because it does not add anything to what was previously before the jury. See *Ortiz*, 235 Ill. 2d at 335 (evidence is deemed cumulative if it does not add anything to what was previously before the jury).

¶ 25 Defendant nevertheless argues that Griffin's affidavit would have added to what the jury heard about the defense's theory of the case and served to corroborate his trial testimony that the

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gun accidentally discharged. Defendant also argues that Griffin's affidavit was not cumulative because it would have created new questions for the jury: (1) whether there was a fourth person in the car; and (2) whether Fausti was sleeping until the time of the shooting. See *Adams*, 2013 IL App (1st), ¶ 34 ("[e]vidence is not cumulative if it would create new questions in the mind of the trier of fact").

¶ 26 Defendant's arguments essentially challenge the sufficiency of the evidence to sustain his conviction. However, a claim of actual innocence is not intended to question the strength of the State's case, nor does it concern whether a defendant has been proved guilty beyond a reasonable doubt. *People v. Coleman*, 381 Ill. App. 3d 561, 568 (2008); *Barnslater*, 373 Ill. App. 3d at 520. Rather, this court has held that, to proceed to second-stage proceedings, a successive petition must be based on newly discovered evidence that could potentially exonerate the defendant. *People v. Anderson*, 401 Ill. App. 3d 134, 140-41 (2010), citing *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008); see also *Edwards*, 2012 IL 111711, ¶ 24. In doing so, we stressed that the hallmark of actual innocence means total vindication or exoneration, not merely presenting a reasonable doubt. *Anderson*, 401 Ill. App. 3d at 141; *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36. That said, unlike in *Ortiz* relied on by defendant in support of his argument, he has failed to do either in this case. See *Ortiz*, 235 Ill. 2d at 336 (evidence presented in support of the defendant's successive petition was not cumulative where the affidavit of an alleged eyewitness conflicted with the State's main witnesses on the central issue of who beat and killed the victim).

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¶ 27 Finally, and most importantly, Griffin's affidavit is not of such conclusive character that it would probably change the result on retrial given the evidence presented at trial which established that defendant shot Burra. The day after the shooting, defendant provided a detective and an ASA with a 22-page, court reported statement detailing how he shot Burra. In the statement, defendant related that on the date in question he brought a loaded handgun from his house and asked one of his friends to hide it in the bushes. After learning that Burra had money in his pocket, defendant explained how he and his friends planned to rob Burra and lured him into an alley. When Burra went back to his car, defendant placed a gun to his side to prevent him from driving away. Defendant's friends prevented Burra from starting the car. After Burra started the car and attempted to drive away, defendant shot him in the side. Defendant specifically stated that, when he shot him, he pulled the trigger of the gun. Fausti testified to the exact same sequence of events. The day after the shooting, she identified defendant from a lineup as the shooter. She also identified him in open court.

¶ 28 Defendant nevertheless argues that Fausti had "serious credibility problems" where she acknowledged using cocaine on the date in question, had two prior felony convictions and provided police with a fake name and date of birth shortly after the incident because she was worried about being arrested on outstanding warrants. Defendant maintains that, given Fausti's lack of credibility, had Griffin testified consistently with him, it would have likely tipped the scales in favor of reasonable doubt in the minds of the jurors.

¶ 29 Again, as mentioned, a claim of actual innocence is not intended to question the strength of the State's case, nor does it concern whether a defendant has been proved guilty beyond a

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reasonable doubt. *Coleman*, 381 Ill. App. 3d at 568; *Barnslater*, 373 Ill. App. 3d at 520; see also *Adams*, 2013 IL App 1st 111081, ¶ 36 ("[e]vidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt"); *Ortiz*, 235 Ill. 2d at 336-37 (a statement of a witness that is both exonerating and contradicts a State's witness, can be capable of producing a different result on retrial). Here, Griffin's affidavit is neither exonerating nor substantively contradictory to Fausti's testimony that defendant shot Burra. Although Griffin averred that defendant and Burra struggled over the gun, this evidence would serve to impeach Fausti's testimony not exonerate defendant. See *Ortiz*, 235 Ill. 2d at 336 (evidence that defendant was not present at the beating and shooting of the victim was deemed exonerating).

¶ 30 Because defendant did not present new evidence that raised the probability that it was more likely than not that no reasonable juror would have convicted him in the light of the new evidence he failed to allege a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 24. Accordingly, the circuit court did not err in denying leave to file his successive petition.

¶ 31 For the reasons stated, we affirm the judgment of the circuit court.

¶ 32 Affirmed.