

No. 1-14-2390

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

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|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 02 CR 9808 |
| |) | |
| NICHOLAS VISINAIZ, |) | Honorable |
| |) | Clayton J. Crane, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Reyes 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 bench trial, defendant Nicholas Visinaiz was convicted of first-degree murder, aggravated unlawful use of a weapon, and unlawful use of a weapon by a felon, and sentenced to 50 years' imprisonment. This court upheld defendant's convictions and sentence on direct appeal. *People v. Visinaiz*, No. 1-06-2540 (2008) (unpublished order under Supreme Court

Rule 23). Thereafter, we granted the motion of the Office of the State Appellate Defender, pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), to withdraw as counsel on appeal from the dismissal of defendant's subsequent *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)), and affirmed the order of the circuit court. *People v. Visinaiz*, No. 1-10-0666 (unpublished order under Supreme Court Rule 23). Defendant then filed a motion for leave to file a successive postconviction petition, which the circuit court denied. Defendant appeals, contending that his petition stated a colorable claim of actual innocence based on the newly discovered affidavit of a witness. We affirm.

¶ 3 Defendant was charged with the first-degree murder of Ernesto Ayala, aggravated unlawful use of a weapon, and unlawful use of a weapon by a felon, arising from an incident that occurred in Chicago on March 29, 2002. We restate only the evidence pertinent to the current appeal.

¶ 4 At trial, Ray Finn testified that at approximately 4:35 p.m. on March 29, 2002, he was driving his truck on Oakley and saw a van approaching from half a block away, moving 5 to 10 miles per hour in the middle of the street. The driver appeared to be looking down. Finn stopped and sounded the horn, but the van collided with his truck. The passenger of the van, who Finn identified in court as defendant, shook the driver and exited the vehicle, screaming "he's dead, he's dead." Defendant removed all of his clothes and stood naked in the street with his hands in the air, screaming. Finn noticed a firearm near defendant's clothes and called the police.

¶ 5 Officer Alonzo testified that he responded to the scene of the shooting and found the driver of the van unresponsive, with blood on his forehead. Defendant sat in the back seat, wearing pants and socks. Alonzo asked him several times what happened, and he eventually shouted, "I shot him, I shot my cousin." Alonzo asked defendant where the firearm was located,

and defendant stated it was "in front." Alonzo arrested defendant and afterwards recovered a small, two-shot derringer on the street near his clothes. The derringer contained two spent rounds.

¶ 6 Officer Paulson and his partner administered a gunshot residue (GSR) test on defendant's hands at approximately 6:10 p.m.

¶ 7 Robert Berk, a trace evidence analyst, examined defendant's GSR kit. Berk stated that three types of particles must be present for a positive finding of GSR, but only one particle was found on defendant's right hand and none were found on his left hand. Additionally, the requisite particles were not identified on samples taken from defendant's jacket and shirt. According to Berk, the absence of GSR could be explained by the fact that the back end of a derringer is sealed and, therefore, deposits less gunshot residue than other types of firearms.

¶ 8 Dr. Kendall Crowns, an assistant medical examiner, performed an autopsy on Ayala's body. The autopsy revealed that Ayala received a gunshot wound above the right ear, and another gunshot wound slightly behind the right ear. According to Dr. Crowns, the presence of muzzle imprints on Ayala's skin and soot inside the wound tracks and skull indicated that both wounds were "contact wounds," meaning that the barrel of the firearm was "pressed tightly against the skin so that all the gases, the gunpowder and the bullets go right into the wound track." Dr. Crowns recovered four bullet fragments from Ayala's brain. He opined that the cause of death was multiple gunshot wounds to the head and that the manner of death was homicide. According to Dr. Crowns, Ayala's toxicology results were negative for alcohol, cocaine, opiates, and heroin, but testing was not performed for PCP or "speed."

¶ 9 Dorothy Sepanik, an evidence technician, testified that she received and inventoried a sealed bullet envelope from Dr. Crowns.

¶ 10 Kurt Murray, a forensic scientist, testified that he examined the four bullet fragments, two cartridge cases, and the derringer. He stated that the two cartridge cases were fired from the derringer, but the four bullet fragments were unsuitable for comparison to a test shot. He also stated that the derringer had a "heavy" trigger pull, requiring more than 18 pounds of pressure to fire the weapon. According to Murray, the firearm did not have to be cocked before it was fired.

¶ 11 Cynthia Engelkingprus, another forensic scientist, examined the derringer and the two spent cartridges but was unable to recover any latent fingerprints suitable for comparison.

¶ 12 Defendant testified that Ayala was a distant relative. They had known each other approximately 20 years, lived together, and attended night school together to obtain their GEDs. On the day of the shooting, Ayala drove defendant in the van to the house of Ayala's cousin, Frankie. Ayala exited the van and walked to a car where Frankie and two women were sitting. Defendant could not hear the conversation. Subsequently, both women entered the van and Ayala drove to two different ATM machines, where the women withdrew money. Ayala drove back to Frankie's house and one of the women went inside the house, then returned to the van. While Ayala drove, the woman produced a bottle of liquid PCP and dipped a cigarette in the drug. Defendant, Ayala, and both women smoked the cigarette. Afterwards, Ayala left the women at their car and drove to his grandmother's building with defendant Ayala went inside and defendant stayed in the van.

¶ 13 Fifteen to twenty minutes later, Ayala returned to the van and drove away. He cursed at defendant, pointed a firearm at him, and accused him of having sex with his girlfriend. Defendant raised his hands and told Ayala to lower the firearm, but Ayala said, "you're dead." Ayala looked toward the street and defendant partially stood up. He grabbed Ayala's hand that held the firearm and pushed. The firearm touched Ayala's head and fired twice. Ayala's finger

was on the trigger both times, but defendant did not know whether his own finger was on top of Ayala's finger. The van crashed and defendant fell to the floor. He picked up the firearm, put it in his pocket, and shook Ayala, who was unresponsive. Defendant exited the van and screamed for help. He noticed blood on himself and removed his clothes to see whether he had been shot. Then, he went into "shock." When a police officer arrived, defendant told him where to find the firearm and was handcuffed.

¶ 14 On cross-examination, defendant testified that he smoked \$40 worth of PCP twice a week until a few months before the shooting. He denied being under the influence of PCP at the time of the shooting because he "didn't smoke that much" in the van. He also denied that the van hit any parked cars while he struggled with Ayala over the firearm. He did not recall telling officers that "someone gave me some shit, I shot my cousin." He denied throwing a bottle of water while detectives interrogated him, but admitted to kicking the bottle. Additionally, he denied throwing a chair across the room or jerking on his handcuffs, and acknowledged hitting his head against the wall but denied "banging it hard." He denied yelling that he would "beat this case" or asking police officers to beat him.

¶ 15 In rebuttal, the State called Officer Buehler and Detective Climack. Officer Buehler testified that she arrived at the crime scene and heard defendant yell, "oh, my God, oh, my God, somebody gave me some shit, I shot my cousin." According to Buehler, defendant did not state that he pulled the trigger or that he feared for his life when Ayala drew the gun.

¶ 16 Detective Climack testified that a day after the shooting, he and his partner went to an interview room at the police station to discuss the case with defendant. They read defendant the *Miranda* rights and he yelled that he wanted a lawyer. Defendant threw a bottle of water across the room, threw a chair, and struck his head against the wall. He yelled that he would "beat the

case" by alleging that officers "beat him." He asked officers to kick him in the testicles, and twisted his wrists in his handcuffs in order to "injure himself." Climack denied that anybody kicked defendant, and stated that action was taken to protect him.

¶ 17 The trial court found defendant guilty of first-degree murder, aggravated unlawful use of a weapon, and unlawful use of a weapon by a felon. In its findings, the court stated that "based upon the physical evidence," including the location of the two gunshot wounds to Ayala's head, defendant's explanation of the shooting was "implausible." The court merged the counts and sentenced defendant to 50 years' imprisonment.

¶ 18 This court upheld defendant's conviction and sentence on direct appeal. *People v. Visinaiz*, No. 1-06-2540 (2008) (unpublished order under Supreme Court Rule 23). Thereafter, we granted the motion of the Office of the State Appellate Defender, pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), to withdraw as counsel on appeal from the dismissal of defendant's subsequent *pro se* petition under the Act (725 ILCS 5/122-1 *et seq.* (West 2014)), and affirmed the order of the circuit court. *People v. Visinaiz*, No. 1-10-0666 (unpublished order under Supreme Court Rule 23).

¶ 19 On September 4, 2013, defendant filed a motion for leave to file a successive postconviction petition, which alleged actual innocence based on the newly discovered affidavit of a witness, Edgar Phillips. Phillips' affidavit stated that at approximately 4:30 p.m. on March 29, 2002, he was walking southbound on Oakley, between 21st Place and Cermak, when he noticed a van driving slowly toward him. He recognized the driver, Ayala, from the neighborhood. Ayala pointed a "small handgun" at the passenger's face and head. Phillips could not see the passenger's "full face" and did not believe the passenger could see his face. The van passed Phillips, "pumped its brakes twice," and hit another vehicle. Phillips saw a man who he

thought was a "detective" running toward him, so he continued walking and stopped at a McDonald's restaurant. After eating, Phillips made some phone calls and was picked up by a friend. On returning to the neighborhood, he learned that someone had been shot on Oakley. He thought that Ayala had shot the passenger, but later learned that Ayala had been shot and killed.

¶ 20 Years later, Phillips visited his girlfriend's mother, Nancy, and learned that her fiancé, nicknamed "Drak," was imprisoned. Nancy stated that Drak was from Chicago and formerly belonged to the Cullerton Deuce street gang. Phillips knew that a Cullerton Deuce named Drak was imprisoned for shooting Ayala, who had belonged to the Satan Disciples street gang and used the nickname "Wacko." He mentioned this to Nancy, who visited her fiancé a few days later. Following the visit, she told Phillips that her fiancé was imprisoned for shooting " 'Wacko,' a Satan Disciple from Oakley." Phillips told Nancy "all that I witnessed and all that I knew," and explained that he could not previously testify because he was "young and in fear for my life." He prepared the affidavit with Nancy's help and stated that he would testify in court if necessary.

¶ 21 On January 24, 2014, the circuit court denied defendant leave to file his successive postconviction petition. In a written order, the same judge who presided at defendant's bench trial found that Phillips' affidavit was newly discovered and material, but also cumulative of the trial evidence because defendant had testified that "his life was in danger" and the trial court rejected his claim of self-defense. Additionally, the circuit court found that Phillips' affidavit was not so conclusive as to probably change the result at trial where other evidence established defendant's intent to kill, including the location of Ayala's contact wounds, the lack of damage to parked vehicles, and defendant's conduct and statements following the shooting. The circuit court concluded that Phillips' testimony "would not have changed the outcome at trial in the light of the substantial evidence that clearly established that [defendant] intended to kill the victim and

was not acting in self-defense." The circuit court denied defendant leave to file his successive postconviction petition. Subsequently, this court granted defendant leave to file a late notice of appeal.

¶ 22 On appeal, defendant contends that the circuit court erred by denying him leave to file a successive postconviction petition where Phillips' affidavit raised a colorable claim of actual innocence. Defendant argues that the affidavit is newly discovered, as Phillips made no prior statements about the case and defendant could not have known he was a witness. Additionally, defendant submits that the affidavit is material and noncumulative for adding "independent support" to his claim of self-defense, and establishes the elements of self-defense so conclusively as to probably change the result at trial. He further alleges that the affidavit casts a "different light" on the trial evidence, and suggests that Phillips' view of the van "pump[ing] its breaks" accounts for the fact that no parked vehicles were damaged during the struggle with Ayala. Characterizing the trial evidence as "sufficient to convict" but "far from overwhelming," defendant maintains that Phillips' affidavit undermines the verdict and, therefore, supports a viable postconviction claim.

¶ 23 The State contends that the circuit court properly denied defendant leave to file his successive postconviction petition where Phillips' affidavit did not support a claim of actual innocence. According to the State, Phillips' affidavit is not newly discovered because he attested that he had connections to the "neighborhood," did not expressly state that he never discussed the case, and might have been discovered through defendant's due diligence. Additionally, the State maintains that Phillips' affidavit was immaterial to the issues at trial and cumulative of defendant's own testimony, as it did not establish all the elements of a self-defense claim but only suggested that at some point prior to the shooting, Ayala pointed the firearm at defendant.

The State notes that the judge who presided at defendant's bench trial also considered and rejected his successive postconviction petition, finding, in both proceedings, that the physical evidence contradicted defendant's claim of self-defense. Moreover, because this court found on direct appeal that a rational trier of fact could determine from the physical evidence that defendant intended to kill Ayala and did not act in self-defense, the State argues that the issue of whether the physical evidence refuted defendant's self-defense theory is *res judicata* and cannot be raised as part of defendant's actual innocence claim. Additionally, the State submits that Phillips' affidavit fails to refute other evidence undermining defendant's self-defense theory, including the lack of damage to other vehicles, defendant's PCP use, his erratic behavior following the incident, and his inculpatory statements.

¶ 24 In reply, defendant maintains that he could not have known about the new evidence until Phillips came forward, and is not obligated to show what measures he took to locate unknown witnesses. Although Phillips did not see Ayala draw the firearm or witness the shooting, defendant argues that the affidavit still suggests that Ayala was the initial aggressor and renders a theory of self-defense more likely. As the State did not prove that the physical evidence was inconsistent with self-defense, defendant urges that Phillips' testimony could have led to a different result, notwithstanding that the judge who presided at defendant's trial also denied defendant leave to file his successive postconviction petition.

¶ 25 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 2014); *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 2014). However, 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. In the present appeal, defendant 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), defendant's claim fails under either an abuse of discretion standard or *de novo* review.

¶ 26 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. *Id.* ¶ 33. 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, meaning that it is "relevant and probative" of the defendant's innocence; (3) noncumulative, meaning that it "adds to what the jury heard"; and (4) 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.

¶ 27 Defendant argues that no reasonable juror would have convicted him in view of Phillips' affidavit, which, defendant maintains, supports his claim of self-defense. "The elements of self-defense are: (1) that unlawful force was threatened against a person; (2) that the person threatened was not the aggressor; (3) that the danger of harm was imminent; (4) that the use of force was necessary; (5) that the person threatened actually and subjectively believed a danger

existed that required the use of the force applied; and (6) the beliefs of the person threatened were objectively reasonable." *People v. Lee*, 213 Ill. 2d 218, 224-25 (2004); 720 ILCS 5/7-1 (West 2002). After a defendant raises the affirmative defense of self-defense, "the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, in addition to proving the elements of the charged offense." *Id.* at 224.

¶ 28 As an initial matter, we reject defendant's argument to the extent he attempts to use his postconviction claim of actual innocence as a vehicle for reinterpreting the evidence at trial. As our supreme court has explained, the purpose of postconviction proceedings "is not to readjudicate the guilt or innocence of a defendant, but rather to determine whether there has been a denial of his constitutional rights which has not already been adjudicated." *People v. Baze*, 43 Ill. 2d 298, 305 (1969). Consequently, it is "not within our province in reviewing a post-conviction hearing to reweigh the evidence." *Id.*; see also *People v. Collier*, 387 Ill. App. 3d 630, 638 (2008) (rejecting the defendant's attempt in a postconviction proceeding to use his claims of actual innocence to challenge the sufficiency of the evidence).

¶ 29 In this case, even if this court were to find Phillips' affidavit to be newly discovered, material, and noncumulative, his statements are not so conclusive regarding defendant's theory of self-defense as to cause a different result on retrial. Phillips attested that he saw Ayala driving the van while pointing a firearm at a passenger. At trial, defendant similarly stated that Ayala pointed a firearm at him. Defendant's self-defense claim, however, was also predicated on his testimony that he grabbed Ayala's hand, and, while Ayala's finger was on the trigger, the firearm touched Ayala's head and discharged twice. Phillips did not claim to see these events, and his affidavit in no way refutes the testimony of the medical examiner, who stated that muzzle imprints on Ayala's skin and soot inside the wound tracks and skull showed that the barrel of the

firearm was "pressed tightly against [Ayala's] skin" when the firearm discharged. Based on the physical evidence, including the location of Ayala's gunshot wounds, the trial court found defendant's explanation of the shooting to be "implausible." See *People v. Young*, 347 Ill. App. 3d 909, 920-21 (2004) ("it was within the jury's province to believe that, given the number and location of gunshot wounds the defendant inflicted, the defendant was not acting in self-defense"). Considering Phillips' affidavit along with the trial evidence, as we must, we cannot say his testimony would probably cause a different result on retrial. *Coleman*, 2013 IL 113307, ¶ 96. Therefore, defendant's actual innocence claim fails.

¶ 30 Contrary to defendant's position, our ruling in *People v. Sparks*, 393 Ill. App. 3d 878 (2009), does not require a different outcome here. In *Sparks*, the defendant was convicted of first-degree murder despite asserting at trial that he shot the victim when the victim and another person attempted to rob him. *Sparks*, 393 Ill. App. 3d at 879-80. In an initial postconviction petition, the defendant claimed actual innocence based upon the affidavit of an eyewitness who claimed to have seen the victim and another man attempt to rob the defendant. *Id.* at 884-85. The trial court summarily dismissed the defendant's petition. *Id.* at 882. We reversed, finding that the defendant's actual innocence claim met the minimum requirements for first-stage postconviction proceedings. *Id.* at 887.

¶ 31 The present case, unlike *Sparks*, involves a successive postconviction petition subject to a different, more substantial standard of review. *Edwards*, 2012 IL 111711, ¶ 29 (different standards apply for a first-stage postconviction petition and a successive postconviction petition, partly because "treating successive petitions the same as initial petitions[] *** ignores the well-settled rule that successive postconviction actions are disfavored by Illinois courts"); *People v. Simon*, 2014 IL App (1st) 130567, ¶ 63. Moreover, unlike the eyewitness in *Sparks*, Phillips

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claimed to have seen only part of the events surrounding Ayala's death. Consequently, Phillips' affidavit does not raise the probability that no reasonable juror would have convicted defendant, and the circuit court did not err in denying defendant leave to file his successive postconviction petition.

¶ 32 For all the foregoing reasons, we affirm the judgment of the circuit court.

¶ 33 Affirmed.