

2017 IL App (1st) 121781-U

No. 1-12-1781

Order filed November 8, 2017

Third Division

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County,
)	
v.)	No. 96 CR 30301
)	
DERWIN WRIGHT,)	Honorable
)	Arthur F. Hill, Jr.,
Defendant-Appellant.)	Judge, presiding.

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

ORDER

¶ 1 *Held:* Circuit court did not err in denying defendant leave to file successive postconviction petition claiming newly-discovered evidence of actual innocence; evidence was not of such conclusive character as to probably change outcome.

¶ 2 Following a 1999 bench trial, defendant Derwin Wright was convicted of two counts of first degree murder, and one count each of home invasion and attempted first degree murder, and sentenced to natural life imprisonment for the murders and concurrent 30-year prison sentences for the other offenses. We affirmed on direct appeal. *People v. Wright*, No. 1-00-0929 (2001)

(unpublished order under Supreme Court Rule 23). We also affirmed the dismissal of his prior postconviction petition. *People v. Wright*, No. 1-11-2456 (2015)(unpublished order under Supreme Court Rule 23). Defendant now appeals from a 2012 order denying him leave to file a successive postconviction petition, contending that his petition raised a newly-discovered claim of actual innocence. We affirm.

¶ 3 Defendant, and codefendants Maurice Hardaway and Jermaine Daniels, were charged with first degree murder, attempted first degree murder, and home invasion. The indictment alleged that, on or about October 21, 1996, they fatally shot Ronald Goodwin and James Scott, and shot Arlene Owens in the head, in the course of invading the home of Jordan Yancy knowing that there were one or more persons therein. Defendant's bench trial was held simultaneously with the jury trials of codefendants.

¶ 4 At the November 1999 trial, Doris McCarty testified that defendant, accompanied by codefendants, asked her to knock on Yancy's apartment-building door after 1 a.m. on the day in question. McCarty, an admitted drug addict, recognized defendants as she had bought drugs from them. When nobody answered after McCarty knocked once, defendant pointed a gun at her and demanded that she try again or he would kill her. She knocked and yelled for Yancy to let her in. When Yancy opened the door for McCarty, defendants rushed into the apartment building, taking Yancy with them. McCarty stayed outside. A short time later, she heard multiple gunshots from Yancy's second-floor apartment, so she fled the scene.

¶ 5 McCarty identified all three defendants for the police within two weeks of the shooting. In particular, she identified defendant in a photographic array and a lineup within a week of the shooting. She was threatened because she was a witness in this case, and she was relocated at State expense in 1996 and 1999. McCarthy's criminal history, including four felony theft

convictions and her admitted use of aliases to confuse the police, was examined in detail at trial. In particular, she violated probation in 1998 and received a six-year prison sentence, but in February 1999 had her sentence reduced to three years. However, she denied having any deal with the State in exchange for her testimony in this case.

¶ 6 Jordan Yancy testified that, when McCarty came to his apartment building, Owens, Goodwin, and Scott were in his second-floor apartment. When Yancy opened his building's door for his friend McCarty, someone thrust a gun in his eye, several people forced him upstairs, and he was ordered to face the wall in a washroom. Yancy heard someone say "shoot him in the head" or the like, followed by several gunshots, followed in turn by the sound of people fleeing the building. In his apartment, Yancy found Goodwin, Scott, and Owens with gunshot wounds, with only Owens still moving.

¶ 7 Arlene Owens testified that she was with Yancy, Goodwin and Scott in Yancy's apartment when she heard McCarty yell to Yancy. Yancy went downstairs to let McCarty in. A few minutes later, three men entered Yancy's apartment; two of them had guns. Owens knew defendant as a neighborhood drug dealer and recognized him as one of the armed men, but did not know the other two men. Goodwin told the men that he did not have their money, and one of the men – not defendant – shot Goodwin. The same man shot Owens in the head and then shot Scott. Owens was in the hospital about a week later when she identified defendant, from a photographic array, as one of the armed intruders. Owens admitted that she used cocaine in the morning several hours before the late-night shooting.

¶ 8 On cross-examination, Owens testified that she did not recall being interviewed by particular detectives on the day after the shooting. She recalled being interviewed and "looking at the photograph [of] defendant," and she was not sedated at the time, but she could not recall

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the detectives' names or particular questions. Owens did not come to court on November 15, 1999, a few days before trial, despite a subpoena, because "I was very scared" and "very afraid to come" to court. She denied knowing that a bench warrant had been issued for her arrest.

¶ 9 The detective who showed Owens the photographic array from which she identified defendant testified that Owens was coherent and responsive, and that other detectives had visited Owens before he did. The parties stipulated that Owens was told by telephone on November 20 that a warrant would be issued for her arrest if she did not attend court.

¶ 10 The trial court found defendant guilty on this evidence, noting that both McCarty and Owens linked him to the home invasion and shootings. The court noted that they both knew defendant beforehand and thus were recognizing a known person during the incident rather than making an identification of a stranger known only from the incident.

¶ 11 On direct appeal, defendant claimed a speedy-trial violation and ineffective assistance of counsel. We affirmed. *Wright*, No. 1-00-0929.

¶ 12 In 2003, the circuit court summarily dismissed defendant's postconviction petition alleging that his natural life sentences were unconstitutional.

¶ 13 In 2007, defendant filed an unsuccessful petition for relief from judgment claiming that he had recently learned that McCarty had received a reduced sentence in exchange for her trial testimony – that is, the 1999 sentence reduction of her 1998 violation of probation – and that the State had failed to disclose its deal with McCarty.

¶ 14 In 2008, defendant filed a successive postconviction petition reiterating his claim of an undisclosed State deal with McCarty whereby her six-year sentence was reduced to three years. We affirmed the circuit court's 2011 dismissal of the successive petition. *Wright*, No. 1-11-2456. We found that "the theory that there was an implicit deal between McCarty and the State was

apparent as early as trial, where McCarty revealed that her sentence had been reduced by half only 10 months before [and] that she was relocated at the State's expense two times between the 1996 offenses and the 1999 trial." *Id.*, ¶ 36. We found that "defendant has failed to establish the alleged deal was a material factor in his conviction" because "[i]f the State made an implicit deal with McCarty, then the trial court *knew* about this implicit deal" (emphasis in original) and

"had to know that the parties had some sort of implicit understanding, even if it was not a typical plea deal governed by Rule 402 (eff. July 1, 2012). Moreover, again, McCarty's trial testimony made clear that she ultimately benefitted from cooperating with authorities. Yet, even this information did not dissuade the trial court from finding McCarty credible in her identification of defendant as the perpetrator of the crime. Nor did McCarty's multiple convictions, aliases, drug addiction, or two-time relocations by the State." *Id.*, ¶ 39.

We noted that McCarty cooperated with the police, including identifying defendant, days after the shooting and before her alleged plea deal. *Id.*, ¶ 40. Also, Owens corroborated McCarty's identification, and Yancy and Owens corroborated McCarty's account of the incident. *Id.*, ¶ 42.

¶ 15 Defendant filed the instant motion for leave to file a successive postconviction petition in January 2012. He alleged that Owens was recanting her trial testimony and thus that he had a newly-discovered claim of actual innocence. In her attached September 2011 affidavit, Owens averred that "my testimony given at the trial of [defendant] was not true. Ever since I had testified, my conscience has been bothering me that an innocent person had been convicted of the crime he did not commit." She averred that "[i]n October of 1996, I was in the company [of Goodwin and Scott] at [Yancy's] house using drugs. At that time three men ran into the house and started arguing with [Goodwin] over drugs and money. At some point these three men pulled

out guns and started shooting at us. I got shot in the head and I [fell] unconscious.” She averred that she told the police repeatedly that she could not identify the intruders. She averred that a detective came to her a week after the shooting while she was in the hospital, told her “that they caught the guys who shot me,” showed her a photograph, and told her that it depicted one of the intruders. She averred that after repeated police interviews, she “told them what they wanted to hear.” She averred that she did not go to court “because I didn’t remember anything” but then came to court when the warrant was issued and “testified to what the State’s Attorney needed me to say.” “I truly don’t remember anything what happen[ed] to this present day.” She made her affidavit “of my own accord” and was not bribed or threatened into doing so.

¶ 16 On May 15, 2012, the circuit court denied defendant leave to file a successive petition. The court found that Owens’s affidavit was newly-discovered, as defendant could not have presented it before Owens provided it. The court also found it non-cumulative, in that her averment that she cannot recall any events from the day of the shooting is evidence that was not presented at trial. However, the court found Owens’s affidavit to not be of such conclusive character as to probably change the outcome of the case. Because she cannot recall the events of the day in question, and because McCarty also implicated defendant, Owens’s affidavit cannot support a conclusion that defendant did not participate in the offenses, the court found.

¶ 17 On appeal, defendant contends that the circuit court erred in denying him leave to file a successive postconviction petition that raised a newly-discovered claim of actual innocence.

¶ 18 Generally, a defendant may file only one post-conviction petition without leave of the court, which may be granted if the defendant shows an objective cause for not previously raising the claims of the proposed petition and prejudice from not raising them. 725 ILCS 5/122-1(f) (West 2012). Another basis for granting leave to file a successive petition is that the proposed

petition raises a newly-discovered claim of actual innocence. *People v. Sanders*, 2016 IL 118123, ¶ 24. Well-pled factual allegations in a post-conviction petition and supporting documentation must be taken as true unless positively rebutted by the record. *Id.*, ¶ 42. Our review of the denial of leave to file a successive petition is *de novo*. *Id.*, ¶ 31.

¶ 19 In order to succeed on a claim of actual innocence, a defendant must present new, material, non-cumulative evidence that is so conclusive it would probably change the result on retrial. *Id.*, ¶ 24. Evidence is new if it was discovered after trial and could not have been discovered earlier through the exercise of due diligence, material if it is relevant and probative of the defendant's innocence, and non-cumulative if it adds to the evidence heard at trial. *Id.*, ¶¶ 24, 47; *People v. Coleman*, 2013 IL 113307, ¶ 96. Conclusiveness is the most important element of an actual innocence claim. *Sanders*, ¶ 47. A defendant's new evidence must be so conclusive that it is more likely than not that no reasonable trier of fact would find him guilty beyond a reasonable doubt. *Id.* The new, material, and noncumulative evidence must place the trial evidence in a different light and undermine the court's confidence in the factual correctness of the guilty verdict. *Coleman*, ¶ 97. Actual innocence is a claim of vindication or exoneration, not insufficiency of the evidence or mere impeachment of witnesses. *Id.*; *People v. Evans*, 2017 IL App (1st) 143268, ¶ 30. A witness's recantation of his prior testimony is generally viewed as unreliable and does not merit a new trial except in extraordinary circumstances. *Sanders*, ¶ 33.

¶ 20 Here, we agree with the circuit court that Owens's affidavit is not of such conclusive character as to probably change the outcome of this case. Accepting *arguendo* that Owens cannot recall the events of the day of the shooting, and that she would no longer implicate defendant in any testimony, she did not aver that defendant was not one of the three men who entered Yancy's apartment. We must accept as true Owens's actual averments, as well-pled factual allegations,

but need not accept defendant's inference that "[i]nherent in the averment that [he] was innocent is that [he] was not one of the three" intruders. It is also inferable from Owens's averments – she was using drugs before the incident and cannot recall the events of the day, and yet implicated defendant before and during trial – that she believes or presumes him innocent. Owens's affidavit is thus impeaching rather than exonerating.

¶ 21 Defendant was implicated in the offenses herein by the trial testimony of McCarty as well as Owens. While McCarty did not witness defendant in Yancy's apartment during the shootings, her testimony placed defendant as an active armed participant in forcibly entering Yancy's apartment building with the group that (as is reasonably inferable from Yancy's testimony) shot Goodwin, Scott, and Owens. McCarty's testimony is not negated merely because Owens would no longer corroborate it. We are not obligated to infer, as defendant argues, that McCarty's pretrial identifications of defendant – who she knew before the incident and directly interacted with during the incident – are impeached by Owens's averment that a detective showed Owens "a picture" and told her that it depicted one of the intruders.

¶ 22 Accordingly, the judgment of the circuit court is affirmed.

¶ 23 Affirmed.