

NOTICE
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2017 IL App (5th) 150056-U

NO. 5-15-0056

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Madison County.
)	
v.)	No. 04-CF-1047
)	
JESSIE J. LOGAN,)	Honorable
)	Richard L. Tognarelli,
Defendant-Appellant.)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Presiding Justice Moore and Justice Barberis concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's denial of leave to file a successive postconviction petition is affirmed where the defendant failed to set forth a colorable claim of actual innocence, and the defendant's appellate counsel is granted leave to withdraw on the ground that this appeal lacks merit.

¶ 2 The defendant, Jessie J. Logan, appeals from a judgment denying his motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The motion for leave was based upon a claim of actual innocence. The defendant's appointed counsel on appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit and has filed a motion to withdraw on that basis. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The

defendant has filed a response to OSAD's motion to withdraw. This court has examined OSAD's motion, the defendant's response, and the entire record on appeal. This court has concluded that the circuit court did not err in denying the defendant leave to file a successive postconviction petition, for the defendant failed to set forth a colorable claim of actual innocence. Any argument to the contrary would lack arguable merit. Accordingly, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 3

BACKGROUND

¶ 4

Trial and Direct Appeal

¶ 5 The defendant was charged with first-degree murder (strong probability of death or great bodily harm) (720 ILCS 5/9-1(a)(2) (West 2002)) in connection with the shooting death of Felicia McCray. In October 2004, the cause proceeded to trial by jury. The State's witnesses included Ulysses C. Johnson (Ulysses), Rhenda Johnson (Rhenda), Jimmeka Johnson (Jimmeka), and Lillian Johnson (Lillian). All four were eyewitnesses to the shooting of McCray.

¶ 6

Ulysses testified that she and her six children resided in a house in Venice, Illinois. At the time of the shooting, a sister of McCray also resided there, and the defendant lived there part-time. In the wee hours of a morning in mid-April 2004, McCray entered Ulysses's house through a second-story window, in order to speak with McCray's sister. The defendant confronted McCray, chastised her for entering the house through a window, and ordered her to depart at once. According to Ulysses, the defendant obtained the handgun that Ulysses kept at the house. Ulysses described a fraught scene in which

McCray and the defendant were only a few inches from one another at one moment and an arm's length apart at another moment. The defendant said to McCray, " 'I should have been killing you.' " He pointed a handgun directly at McCray, who told the defendant to " 'go ahead and shoot.' " A moment later, "the gun went off." Ulysses declined to opine on whether the defendant intended to shoot McCray. Ulysses further testified that she regularly visited the defendant in jail as he awaited his murder trial and that she hoped to marry him.

¶ 7 Rhenda, Jimmeka, and Lillian were three of Ulysses's children. Rhenda testified that at the moment the gun fired, the defendant was standing and was pointing the gun at McCray, while McCray, with her hands raised and empty, was walking toward the defendant and telling him to shoot her. Jimmeka estimated that the defendant was standing five feet from McCray when he shot her. At the time, McCray's hands were raised and empty, and McCray was telling the defendant to "please shoot" her. Lillian testified that during the confrontation, the defendant and McCray repeatedly pushed one another. Then, the defendant pointed a gun at McCray and shot her. According to Lillian, the defendant seemed surprised that he had shot her. Shortly afterward, the defendant was shaking, and he stated that he shot McCray accidentally.

¶ 8 The State's witnesses also included a firearms examiner for the Illinois State Police, Division of Forensic Services, who testified about the gun with which the defendant shot McCray. He testified that the gun, a revolver, would not fire unless someone pulled the trigger and held it back. When the gun was in "single-action mode," 4 to 4½ pounds of pressure were needed to fire it; in double-action mode, 13 to 13½

pounds of pressure were needed. According to the firearms examiner, the gun was far from a "hair trigger" in either mode.

¶ 9 The defendant testified on his own behalf. According to the defendant, he and McCray repeatedly pushed one another at Ulysses's residence, as he insisted that McCray leave the house and as McCray insisted on remaining. At this time, the defendant was holding a gun in one hand, hoping to scare off McCray. "[W]hen [the defendant] pushed [McCray] the last time, that's when the gun went off." The defendant testified that he thought he had his finger on the gun's trigger at that time. However, he did not intend to shoot McCray, he did not purposely pull the trigger, he was surprised when the gun fired, and he did not know how the gun fired. Shortly after the shooting, the defendant departed from Ulysses's residence.

¶ 10 During cross-examination by the State, the defendant confirmed that he took the gun with him when he left Ulysses's house after the shooting, and that he went to his sister-in-law's house, where he left the gun. The defendant also acknowledged that after he was arrested, he initially told police interrogators that he was not at Ulysses's house at the time of the shooting. When the State asked the defendant, "You were lying because you knew you were guilty of murder, right?", the defendant answered, "Yeah." Also during cross-examination, the defendant stated that he saw a knife in McCray's possession and he obtained the gun in response, but he acknowledged never mentioning a knife during his direct testimony.

¶ 11 During the State's rebuttal, the defendant's two police interrogators testified that during their three-hour interview, the defendant stated at one point, " I'm guilty of

murder.' " At other points, though, the defendant insisted that the shooting was accidental.

¶ 12 The parties stipulated to the admission of the autopsy report authored by forensic pathologist Dr. Raj Nanduri.

¶ 13 At the defendant's request, the judge instructed the jury on involuntary manslaughter, in addition to the charged offense of first-degree murder (strong probability of death or great bodily harm). The jury found the defendant guilty as charged. The circuit court sentenced the defendant to imprisonment for 21 years.

¶ 14 The defendant perfected an appeal from the judgment of conviction. However, in January 2007, this court dismissed the direct appeal on the defendant's motion.

¶ 15 *The Defendant's Earlier Collateral Attacks on the Conviction*

¶ 16 In May 2006, while the direct appeal was still pending in this court, the defendant filed in the circuit court a *pro se* petition for postconviction relief. In that petition, the defendant claimed that trial counsel had provided constitutionally ineffective assistance (1) by failing to provide the defendant with pertinent information concerning a plea offer by the State, and (2) by failing to call forensic pathologist Dr. Raj Nanduri as a witness at trial. The circuit court appointed a special public defender as postconviction counsel. The State filed an answer.

¶ 17 In March 2008, the circuit court held an evidentiary hearing on the May 2006 postconviction petition. The evidence consisted of testimony from the defendant and from his trial attorney. The trial attorney explained why he stipulated to the forensic pathologist's autopsy report and why he did not call the pathologist as a witness at trial.

The attorney stated that the stipulation prevented the jury from seeing autopsy photographs, and testimony from the pathologist would not have been helpful in advancing the defendant's theory of the case. The defendant admitted that he had not spoken with the forensic pathologist, but he expressed a belief that she could offer some testimony to establish that the shooting was accidental. After hearing this evidence, the circuit court denied the postconviction petition, finding that the defendant had failed to make a substantial showing that he had been deprived of his constitutional right to the effective assistance of trial counsel. The defendant filed a notice of appeal from the denial of his (first) postconviction petition. This court affirmed. *People v. Logan*, No. 5-08-0211 (May 21, 2009) (unpublished order pursuant to Supreme Court Rule 23).

¶ 18 In June 2010, the defendant filed a *pro se* motion for leave to file a second petition for postconviction relief. The defendant alleged that restricted access to a prison law library had prevented him from raising all meritorious issues in his first postconviction petition. He prayed that the circuit court would enter an order granting him leave to file a second postconviction petition within six months after entry of the order. (The defendant did not describe any particular issue he wished to raise.) In August 2010, the circuit court entered an order denying the defendant's motion for leave to file a second postconviction petition, on the ground that the defendant had failed to satisfy the cause-and-prejudice test elucidated in *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002). In October 2010, the defendant filed a motion to reconsider and submitted a second petition for postconviction relief. The circuit court entered an order striking the second petition for postconviction relief, due to the court's previously denying leave to file a second postconviction petition.

The defendant filed a notice of appeal, but in February 2011, this court dismissed the appeal for lack of appellate jurisdiction.

¶ 19 *The Defendant's Current Collateral Attack on the Conviction*

¶ 20 On November 14, 2014, the defendant filed a motion for leave to file a successive petition for postconviction relief, along with a proposed petition. This motion and this proposed petition are the subject of the instant appeal. In the motion, the defendant asserted that he was actually innocent of the crime of which he was convicted.

¶ 21 In the proposed successive petition, the defendant presented three claims: (1) his attorney in the first postconviction proceeding deprived him of reasonable assistance, due process, and equal protection when the attorney either failed or refused to contact and interview three known eyewitnesses—Ulysses Johnson-Doss, Jimmeka Johnson, and Lillian Johnson—each of whom would have corroborated the defendant's trial testimony that he shot Felicia McCray unintentionally; (2) his attorney in the first postconviction proceeding deprived him of a reasonable level of assistance when the attorney failed to pursue the defendant's claim that trial counsel had provided ineffective assistance by failing to interview eyewitnesses Ulysses Johnson-Doss, Jimmeka Johnson, and Lillian Johnson; and (3) he was deprived of due process, equal protection, and a reasonable level of assistance when postconviction counsel failed to present a claim that trial counsel was constitutionally ineffective for failing to call the forensic pathologist as a witness or to present to the jury the autopsy report.

¶ 22 Attached to the proposed successive petition was an affidavit from "Ulysses C. Doss," wherein she stated that she was an eyewitness to the shooting, that she repeatedly

phoned the office of the defendant's trial attorney due to her desire to testify at the defendant's trial, but the attorney never responded. According to Ulysses, Felicia McCray broke into the house in which Ulysses and the defendant were residing. The defendant, while holding a gun, tried to push McCray out of a room. The defendant and McCray were mere inches from one another when the gun "accidentally" fired. Ulysses's affidavit was dated February 19, 2012. Also attached to the proposed successive petition was a criminal history of McCray and an affidavit from the defendant, wherein he complained about his attorney in his first postconviction proceeding. (There was no affidavit from the forensic pathologist.)

¶ 23 On December 23, 2014, the circuit court entered an order denying the defendant's motion for leave to file a successive postconviction petition. The court concluded that the defendant could not set forth a colorable claim of actual innocence. In addition, the court concluded that the defendant's claims of unreasonable assistance by counsel in the first postconviction proceeding were without merit. The defendant filed a notice of appeal from the denial order. The court appointed OSAD to represent the defendant on appeal.

¶ 24 ANALYSIS

¶ 25 This appeal is from a judgment denying leave to file a successive postconviction petition based upon a claim of actual innocence. The circuit court concluded that the defendant had failed to set forth a colorable claim of actual innocence. Thus, this court is faced with a purely legal question. Purely legal questions are generally reviewed under a

de novo standard. *People v. Edwards*, 2012 IL 111711, ¶ 30. Therefore, this court will apply the *de novo* standard of review.

¶ 26 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354 (2010). A defendant institutes a postconviction proceeding by filing a petition in the circuit court. 725 ILCS 5/122-1(b) (West 2012).

¶ 27 A defendant is not entitled to all the postconviction proceedings he wants. He is not free to file an unlimited number of postconviction petitions. Indeed, the Act contemplates the filing of only one postconviction petition. *People v. Davis*, 2014 IL 115595, ¶ 14. Successive postconviction actions are disfavored. *People v. Edwards*, 2012 IL 111711, ¶ 29. Section 122-1(f) of the Act makes clear that a defendant may file only one postconviction petition, unless he obtains leave of court to file a successive petition. 725 ILCS 5/122-1(f) (West 2012). A defendant's motion for leave to file a successive postconviction petition must be accompanied by documentation sufficient to allow the circuit court to determine whether leave should be granted. *Edwards*, 2012 IL 111711, ¶ 24. A defendant will be granted leave to file a successive postconviction petition when he either (A) establishes both "cause" for his failure to bring a claim in his initial postconviction petition and "prejudice" resulting from that failure (725 ILCS 5/122-1(f) (West 2012); *People v. Smith*, 2014 IL 115946, ¶ 34; *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002)), or (B) demonstrates a "fundamental miscarriage of justice"

by showing that he is actually innocent of the crime of which he was convicted (*Pitsonbarger*, 205 Ill. 2d at 459).

¶ 28 Here, the defendant did not attempt to satisfy the cause-and-prejudice test. In his motion for leave to file a successive postconviction petition, the defendant stated that he was setting forth a claim of actual innocence.

¶ 29 Where a defendant relies on actual innocence in order to obtain leave to file a successive petition, he must support the actual-innocence claim with evidence that is "newly discovered; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial." (Internal quotation marks omitted.) *Edwards*, 2012 IL 111711, ¶ 32. Newly-discovered evidence is evidence that was unavailable to the defendant at trial and could not have been discovered earlier through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002). A court should deny leave "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." *Edwards*, 2012 IL 111711, ¶ 24. Conversely, leave should be granted when "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." (Internal quotation marks omitted.) *Id.*

¶ 30 Here, the defendant clearly failed to set forth a colorable claim of actual innocence. In other words, none of the claims presented in the proposed successive petition was supported by any newly-discovered or exonerating evidence.

¶ 31 Each of the three claims presented in the defendant's proposed successive petition alleged unreasonable assistance by counsel during the defendant's first postconviction

proceeding in 2006-08. Because there is no constitutional right to the assistance of counsel in a postconviction proceeding, such claims do not provide a basis for relief under the Act. See, e.g., *People v. Flores*, 153 Ill. 2d 264, 280 (1992). Nevertheless, this court will examine the complete contents of the proposed successive petition, and the accompanying documentation, in order to determine whether a colorable claim of actual innocence was set forth.

¶ 32 The first two claims presented in the proposed successive petition stemmed from trial counsel's alleged failure to contact and interview Ulysses, Jimmeka, and Lillian. The defendant asserted that Ulysses, Jimmeka, and Lillian would have provided trial testimony corroborating his own testimony that the shooting of McCray was accidental. These two claims are strange, since Ulysses, Jimmeka, and Lillian did in fact testify at the defendant's trial (albeit for the State), and their detailed testimonies definitely did not create an impression that the shooting was accidental. Their testimonies were far more helpful to the prosecution, which argued that the defendant purposefully squeezed the trigger of the gun he was pointing at McCray.

¶ 33 In support of the first two claims presented in his proposed successive petition, the defendant provided an affidavit from "Ulysses C. Doss," to whom the defendant referred as "Ulysses Johnson-Doss" in his proposed successive petition. By all appearances, "Ulysses C. Doss" or "Ulysses Johnson-Doss" is the Ulysses C. Johnson who testified at the defendant's October 2004 trial. Oddly, Ulysses wrote in her affidavit that she tried without success to contact the defendant's trial attorney, in a failed bid to testify for the defendant at his trial. However, as previously noted, Ulysses did in fact testify at the

defendant's trial, as a witness for the State. It is nonsensical to suggest that Ulysses did not testify at the trial.

¶ 34 As for the substance of Ulysses's affidavit, it was not very different from her trial testimony. The main difference was that the affidavit included an expression of Ulysses's opinion that the shooting was accidental. At trial, Ulysses did not opine on whether the shooting was accidental; she merely described the facts and circumstances of the shooting. Whether the shooting was accidental was the key disputed issue at trial, and an issue for the jury to determine based on the evidence. It is unlikely that the jury would have made a different determination based merely on Ulysses's expression of her opinion that the shooting was accidental, especially in light of the great weight of the State's evidence and the dubiousness of the defendant's own testimony, summarized *supra*. At any rate, Ulysses's affidavit did not include any newly-discovered evidence that would exonerate the defendant. The defendant did not provide any such evidence to support the first two claims in his proposed successive petition.

¶ 35 The third (and final) claim presented in the defendant's proposed successive petition stemmed from trial counsel's alleged failure to call the forensic pathologist as a witness or to present to the jury the autopsy report. This claim was essentially a rehash of a claim the defendant presented in his first postconviction proceeding, discussed *supra*, and therefore the claim is *res judicata*. Furthermore, this claim was not supported by any newly-discovered or exonerating evidence, without which an actual-innocence claim cannot succeed.

¶ 36

CONCLUSION

¶ 37 The defendant sought leave to file a successive postconviction petition based upon a claim of actual innocence. However, he plainly failed to state a colorable claim of actual innocence. On that basis, the circuit court properly entered a judgment denying leave. Any argument to the contrary would lack arguable merit. Therefore, OSAD is granted leave to withdraw as the defendant's attorney in this appeal, and the judgment of the circuit court is affirmed.

¶ 38 Motion granted; judgment affirmed.