

No. 1-16-0453

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

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 08 CR 10621
)	
GREG COLEMAN,)	Honorable
)	Maura Slattery Boyle,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

- ¶ 1 *Held:* Denial of defendant's request for leave to file a successive postconviction petition is affirmed where the affidavit that defendant offered in support of his claim of actual innocence was not newly discovered evidence and would not have changed the result on retrial.
- ¶ 2 Defendant-appellant, Greg Coleman, appeals from the circuit court's order denying him leave to file a successive petition under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) relating to his convictions of the first degree murder of Marvel Berry and the armed robbery of Zedric Collins. On appeal, defendant contends his successive

petition presented a colorable claim of actual innocence as it was supported by an affidavit of an individual who asserted that someone, other than defendant, committed the murder. We affirm.

¶ 3 At a bench trial in 2010, Mr. Collins, who had known defendant since childhood, testified that, about 3 a.m. on October 27, 2007, he left the second floor apartment of Joyce Smith, located on South Dearborn Street in Chicago. Mr. Collins was about to exit the lobby of the building when defendant approached him, pointed a revolver at him, and told him not to move. Mr. Collins stood against a wall while defendant took \$70 in cash and a marijuana cigar from him. While this took place, Mr. Collins looked up and saw Ms. J. Smith standing at the top of the stairs. Mr. Berry then came into the lobby. Defendant pointed the gun at Mr. Berry and told him not to move. When Mr. Berry flinched, defendant shot him twice. Mr. Collins ran up to Ms. J. Smith's apartment, and heard another shot. Mr. Collins identified defendant in a photo array as the person who shot Mr. Berry.

¶ 4 Ms. J. Smith testified that she considered Mr. Collins to be her grandchild, and defendant was her granddaughter's half-brother. While standing outside her apartment, Ms. J. Smith saw an unidentified man pointing a black gun at Mr. Collins at the bottom of the stairs. When Ms. J. Smith returned to her apartment, she heard gunshots. In the days following the shooting, a detective came to her house and showed her a photo array where she identified defendant after the detective pointed him out to her.

¶ 5 Ms. J. Smith was impeached by a statement she made to police about one week after the shooting on November 5, 2007, where she identified defendant as the gunman. When asked at trial about that statement, she said she "might have said that because of the things I heard." Ms. J. Smith testified that she had incorrectly identified defendant and that the police told her to name him.

¶ 6 Harold Milon testified that he is Ms. J. Smith's grandson and that he knows Mr. Berry and defendant. At about 3 a.m. on October 27, 2007, Mr. Milon and Mr. Berry walked to Ms. J. Smith's apartment building. As Mr. Milon followed Mr. Berry into the building, he saw a person wearing a gray hoodie and holding a revolver. Mr. Milon heard the man in the gray hoodie speak and thought it was defendant, whom he had known since childhood. Mr. Milon also saw a person wearing a black hoodie. Mr. Milon ran to a nearby building on South State Street and told a group of people standing in front of that building that Mr. Berry was being robbed. Mr. Milon was impeached by his April 9, 2008, statement to police in which he positively identified defendant as the person who shot Mr. Berry.

¶ 7 The State presented evidence that Mr. Berry sustained two gunshot wounds. The bullets were recovered from Mr. Berry's body, and it was established the shots were fired from the same weapon.

¶ 8 The defense presented no evidence. The trial court found defendant guilty of the first degree murder of Mr. Berry and the armed robbery of Mr. Collins. Defendant's motion for a new trial, filed by counsel, was denied. Defendant, in a letter, had also claimed ineffectiveness of counsel.

¶ 9 Prior to sentencing, defendant raised a claim of ineffectiveness of trial counsel and, at his sentencing hearing, he again voiced this claim. Defendant was sentenced to 45 years for first degree murder and 21 years for armed robbery, with those terms to be served consecutively. After sentencing, the trial court accepted defendant's *pro se* motion as to ineffectiveness and continued the matter.

¶ 10 At the next court date, the trial court denied defendant's motion to reconsider sentence. The court then gave defendant an opportunity to present his *pro se* motion claiming

ineffectiveness of trial counsel, after which the court denied defendant's motion. On direct appeal, defendant argued the trial court did not conduct a proper inquiry into his ineffectiveness claims pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). This court rejected defendant's argument and affirmed his convictions and sentences in *People v. Coleman*, 2013 IL App (1st) 112197-U.

¶ 11 In May 2014, defendant filed his initial *pro se* postconviction petition which alleged that the evidence presented at trial was insufficient to prove his guilt. The circuit court summarily dismissed that petition in July 2014.

¶ 12 On August 26, 2014, defendant filed a *pro se* motion for reconsideration and, on August 27, 2014, he filed a *pro se* "amended petition for postconviction relief" in which he raised a claim of actual innocence. In the petition, defendant alleged that Lucretia Smith saw Mr. Berry being shot by Nicholas Brown and he submitted Ms. L. Smith's affidavit in support of this contention. In her affidavit, Ms. L. Smith averred that, at the time in question, she saw Mr. Berry "come stumbling out [of] the building and fell on the ground." Ms. L. Smith then saw a man wearing a hoodie run up and shoot Mr. Berry. She screamed and, when the shooter grabbed her and threatened her, she recognized him as Mr. Brown. A "couple years" after the shooting, she learned that defendant was in prison for Mr. Berry's murder; she then decided to "come forth and say who really did it." On October 8, 2014, the trial court denied defendant's motion for reconsideration.

¶ 13 In 2015, defendant filed a motion for leave to file a successive postconviction petition, along with the successive petition itself, which is the subject of this appeal. In defendant's successive petition, he raised a claim of actual innocence based on the affidavit of Kevin Walker.

¶ 14 In his affidavit dated September 25, 2015, Mr. Walker attested that he was a former Gangster Disciple gang member and was at the scene of the shooting at about 2:45 a.m. Mr. Walker was approaching the building when Mr. Brown, a member of the Mickey Cobras gang, started shooting. Mr. Brown shot Mr. Berry, and Mr. Berry fell. Mr. Brown ran up to Mr. Berry and shot him a second time. Mr. Walker and the Gangster Disciples believed that defendant sent Mr. Brown to the area to shoot at them. Mr. Walker stated that defendant was a “shot caller” for the Mickey Cobras, and that “they don’t move” unless told to by defendant. Mr. Walker attested that the Gangster Disciples agreed to implicate defendant in the shooting to get him “off the streets.” Mr. Walker said that, even though he saw Mr. Brown shoot the victim, he did not implicate Mr. Brown earlier because he feared retaliation and he did not tell the police because he thought he would be “in trouble for not contacting them earlier.” The trial court denied defendant leave to file the successive petition.

¶ 15 On appeal, defendant contends his successive petition raises a colorable claim of actual innocence. Defendant argues he has met the requirements for an actual innocence claim because Mr. Walker’s account of the shooting is newly discovered evidence, is not cumulative of other trial evidence, and is of such a conclusive character, that it would probably change the result on retrial.

¶ 16 The Act provides a statutory remedy to criminal defendants who claim that a substantial violation of their constitutional rights occurred at their trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. To this end, 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, 329-29 (2009); 725 ILCS 5/122-3 (West 2014). To file a successive petition, a defendant must first obtain leave of

court, and further proceedings on the petition do not take place until leave is granted. 725 ILCS 5/122-1(f) (West 2014); *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010).

¶ 17 Where, as here, a successive petition is based upon a claim of actual innocence, leave of court to file a successive postconviction petition should be denied by the circuit court 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. *People v. Sanders*, 2016 IL 118123, ¶ 24. Leave of court to file a successive petition should be granted where the petitioner's supporting documentation raises the probability that it is, more likely than not, that no reasonable juror would have convicted the petitioner in light of the newly discovered evidence. *Id.*

¶ 18 The elements of a successful claim of actual innocence require that the evidence presented by the defendant in support of 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. *People v. Coleman*, 2013 IL 113307, ¶ 96. In *Coleman*, our supreme court clarified that "newly discovered" means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence; "material" means the evidence is relevant and probative of the petitioner's innocence; "noncumulative" means the evidence adds to what the jury heard; and "conclusive" means the evidence, when considered along with the trial evidence, would probably lead to a different result. *Id.* This court reviews the denial of leave to file a successive postconviction petition *de novo*. *People v. Eddmonds*, 2015 IL App (1st) 130832, ¶ 14.

¶ 19 Here, defendant failed to plead a colorable claim of actual innocence because the contents of the affidavit of Mr. Walker cannot be considered newly discovered. At this stage, we are

required to consider as true the contents of the affidavit of Mr. Walker. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). That said, Mr. Walker attested that defendant did not commit the murder but, instead, was a “shot caller” for a rival gang and that he had sent Mr. Brown to the area to shoot the victim. Accepting this as true, it is axiomatic that defendant would have known of this evidence earlier, *i.e.*, that defendant would have been aware that the ordered shooting of Mr. Berry was carried out by someone else. See *Ortiz*, 235 Ill. 2d at 334 (2009) (to be “newly discovered,” the evidence offered in support of the claim of actual innocence must not have been available at the defendant’s trial or discoverable sooner through the exercise of due diligence); see also *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (2010); *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008) (evidence is not “newly discovered” where it presents facts that are already known to a defendant at trial or that were known by the defendant prior to trial, though the source of these facts may have been unknown, unavailable or uncooperative).

¶ 20 Moreover, aside from not being newly discovered, the affidavit of Mr. Walker is not of such conclusive character, that it would probably change the result on retrial. *Coleman*, 2013 IL 113307, ¶ 96. This consideration is the most important element of an actual innocence claim. *Edwards*, 2012 IL 111711, ¶ 40. To meet the requirement of being of such conclusive character as to change the result on retrial, the new evidence presented in support of a defendant’s claim must place the trial evidence in a different light and undermine the court’s confidence in the factual correctness of the guilty verdict. *Coleman*, 2013 IL 113307, ¶ 97. Actual innocence involves the defendant’s exoneration of the charged offense, not the sufficiency of the evidence, or whether the defendant was proved guilty beyond a reasonable doubt. *People v. House*, 2015 IL App (1st) 110580, ¶¶ 40, 46 (a defendant’s total vindication of the crime in question is the hallmark of an actual innocence claim).

¶ 21 After considering the affidavit of Mr. Walker with the evidence presented at trial, we find that it does not support a finding of defendant's actual innocence. Stated differently, the affidavit of Mr. Walker does not place the trial evidence in a different light such that it undermines our confidence in the factual correctness of the guilty verdict. The record shows that Mr. Collins, who had known defendant since childhood, testified that defendant shot Mr. Berry. Mr. Collins also identified defendant in a photo array as the person who shot Mr. Berry. In addition, although Ms. J. Smith and Mr. Milon testified at trial they were unsure of the shooter's identity, they were both impeached with their prior statements which identified defendant as the gunman. Therefore, the contents of the affidavit of Mr. Walker, which included averments that defendant was a "shot caller" for a gang and had directed the shooting, are not of such conclusive character, as to probably change the result on retrial. See *People v. Brown*, 2017 IL App (1st) 150132, ¶ 52 (new affidavit implicating another person did not meet this test because it was directly rebutted by trial witnesses who saw gunman and identified him as the defendant); *Collier*, 387 Ill. App. 3d at 637 (evidence that impeaches or contradicts trial testimony is not typically of such conclusive character to warrant postconviction relief).

¶ 22 Accordingly, the circuit court's order denying defendant leave to file a successive postconviction petition is affirmed.

¶ 23 Affirmed.