2018 IL App (1st) 160569-U

No. 1-16-0569

Order filed December 20, 2018

Fourth Division

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. 09 C6 61229
	)	
MARLAND EDWARDS,	)	Honorable
	)	Michele M. Pitman,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in dismissing defendant's postconviction petition claiming newly-discovered evidence of actual innocence, where the evidence at issue was not of such conclusive character as to likely change the outcome.

¶ 2 Following a jury trial, defendant Marland Edwards was convicted of armed robbery committed with a firearm and sentenced to 21 years' imprisonment. We affirmed on direct appeal. *People v. Edwards*, 2013 IL App (1st) 110565-U (unpublished order under Supreme

Court Rule 23). Defendant now appeals from the second-stage dismissal of his postconviction petition, contending that it stated a meritorious claim of actual innocence. We affirm.

¶ 3 The record on appeal does not include any of the original trial proceedings, either common-law record or transcripts. The record commences with our direct appeal order and otherwise consists of the proceedings upon defendant's postconviction petition. Our recitation of the trial evidence is therefore taken from our direct appeal order.

¶ 4 Defendant was convicted primarily upon the testimony of Anthony Nettles and Malon Dorsey regarding events on the afternoon of June 29, 2009. They testified that they were walking towards a store when defendant and another man approached them and defendant offered to sell them a gun. Defendant did not show them a gun at that time. They were returning from the store when defendant and his companion again approached them and defendant challenged them to fight. Nettles and Dorsey walked away but, a short time later, both saw defendant pass a pistol or handgun to the other man. Defendant then approached Nettles, challenged him to fight, knocked him to the ground, and told his companion to shoot Nettles. Instead, defendant's companion took Nettles's cellphone and wallet, and he and defendant fled. Kiara Johnson, who was with Nettles and Dorsey as they returned from the store, testified that defendant acted aggressively and, when the men began fighting, threatened to shoot anyone that moved, but she did not see a gun.

¶ 5 On direct appeal, defendant contended that his conviction should be reduced to robbery because the evidence was insufficient to convict him of armed robbery as the State failed to prove that the object used in the robbery was a firearm. He also contended that trial counsel was ineffective for arguing in opening statements a theory that the trial evidence did not support. We

affirmed. *Edwards*, 2013 IL App (1st) 110565-U (unpublished order under Supreme Court Rule 23).

¶ 6 Defendant filed his *pro se* postconviction petition in May 2014, claiming that he had newly-discovered evidence of his actual innocence: an affidavit by an eyewitness averring that, in defendant's words, "one of the fighters who lost the fight promise[d] the winner that he would falsely charge him with use of a gun and armed robbery." Defendant alleged that he was unaware at the time of trial of a bystander who saw that no robbery occurred, no gun was used, and defendant was threatened with false charges. Regarding diligence, he argued that trial counsel had not conducted an adequate investigation and, "although defendant was aware of" bystanders to the fight, he "was too busy fighting to be able to identify" or seek any witnesses. Defendant also argued in the petition that the same affidavit cast doubt upon the sufficiency of the trial evidence. Attached to the petition were 2014 affidavits by defendant and Alfredo Remigio, indicating that they were both in prison at Menard.

¶ 7 Remigio averred that, on the afternoon of June 29, 2009, he saw three men and two women together at a certain location, with one man facing the other men antagonistically. Remigio did not know any of them but anticipated a fight and stopped to watch. He noticed several people watching from nearby windows or as they passed in the street. There was "a brief fist fight and wrestling," and the "winner" of the fight was chased away by the other two men and two women "hollering that they would lie on him." Remigio did not see a gun during the incident, did not see anyone with a hand in anyone else's pocket, and did not hear anyone complain that anything had been taken, "but someone hollered they would lie." Remigio came forward because paralegal Eugene Horton "advertised a written and verbal notice of the crime."

Remigio went to Horton "with what I had witnessed," and Horton "recently introduced me to the alleged armed robber." Remigio averred that, if called, he would testify as aforesaid.

¶ 8 Defendant averred that he was actually innocent and did not show a gun, offer to sell a gun, rob anyone, or threaten to shoot anyone. He averred that he could not have discovered Remigio sooner with due diligence because he did not know Remigio and trial counsel had not conducted a "meaningful investigation."

¶ 9 The trial court docketed the petition for second-stage proceedings and appointed counsel for defendant in June 2014. In June 2015, postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. July 1, 2017), averring that she consulted with defendant to ascertain his claims of deprivation of constitutional rights, examined the record of proceedings for defendant's trial and sentencing, and made any amendments to the *pro se* petition necessary to adequately present defendant's claims.

¶ 10 Also in June 2015, counsel filed an amended postconviction petition to "augment" the *pro se* petition, asserting a freestanding claim of actual innocence based on affidavits by Remigio and Horton that were attached to the amended petition.

¶ 11 Remigio averred that he saw a fight on the afternoon of June 29, 2009, in a certain location. He noticed several bystanders – indeed, a "large crowd" – watching the fight. After the fight, the loser and his friends chased away the winner and another man, yelling that they would tell the police that the winner had "weapons." However, Remigio saw no weapons. Remigio learned of this case when he consulted Horton regarding his own case. In looking at Horton's cases as examples of his work, Remigio recognized the date, time, and location of the incident in defendant's case as the fight he had witnessed. Horton showed him a photograph, which he

recognized as the winner of the fight he saw. He told Horton about the fight, and that he did not see anyone take anything from anyone else during the incident. Remigio averred that he was willing to testify.

¶ 12 Horton averred that defendant consulted with him in 2014, he agreed to help defendant, and he posted a notice on the prison bulletin board and a newspaper advertisement. Remigio approached Horton and discussed defendant's case. Horton then prepared Remigio's affidavit based on his account.

¶ 13 The State filed a motion to dismiss the petition as amended, arguing that the claim of actual innocence was not based on newly-discovered evidence. The State noted that facts known to the defendant at the time of trial are not newly-discovered merely because the witness or other source of information was unknown or unavailable. The State conceded that Remigio was a newly-discovered witness and that his affidavits contained material evidence. It argued, however, that his evidence was not of such conclusive character as to change the outcome of the trial, as he did not aver that defendant was not present or that he was "actually innocent of anything."

¶ 14 Following arguments, the court granted the motion to dismiss. It found defendant was not presenting newly-discovered evidence and there was no probability that the outcome of trial would be changed by defendant's evidence.

¶ 15 On appeal, defendant contends that the dismissal of his petition as amended was erroneous because he stated a meritorious claim of actual innocence.

¶ 16 A postconviction petition may proceed through three stages. *People v. Dupree*, 2018 IL 122307, ¶ 28. If it is not summarily dismissed at the first stage after filing, it is, as here, docketed for second-stage proceedings, with counsel appointed for an indigent defendant who requests

counsel. 725 ILCS 5/122-4, 122-5 (West 2014); *Dupree*, 2018 IL 122307, ¶ 28. A petition may be dismissed at the second stage upon the State's motion if the petition does not make a substantial showing of a constitutional violation. *Dupree*, 2018 IL 122307, ¶ 28. If the petition is not dismissed, it proceeds to the third stage with an evidentiary hearing. *Id*.

¶ 17 At the second stage, all well-pled factual allegations in the petition are liberally construed in the defendant's favor and accepted as true unless refuted by the record. *Id.* ¶ 29; *People v. Sanders*, 2016 IL 118123, ¶¶ 31, 37. The issue in a motion to dismiss a postconviction petition is the legal sufficiency of the well-pled allegations of a constitutional violation – that is, whether those allegations would entitle the defendant to relief if proven at an evidentiary hearing – so the trial court should not engage in fact-finding or credibility determinations. *Dupree*, 2018 IL 122307, ¶ 29. We review *de novo* the second-stage dismissal of a postconviction petition. *Id.*

¶ 18 For a claim of actual innocence, a defendant must present evidence that is (1) newly discovered, (2) not discoverable earlier by exercising due diligence, (3) material and not merely cumulative, and (4) of such conclusive character that it would probably change the result on retrial. *Sanders*, 2016 IL 118123, ¶ 24. Evidence is new if it was discovered after trial and could not have been discovered earlier by exercising 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. *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 19 Conclusiveness is the most important element of an actual innocence claim. *Sanders*, 2016 IL 118123, ¶ 47. The new 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*, 2013 IL 113307, ¶ 97. Actual innocence is a claim of vindication or exoneration, not insufficiency of

the evidence or mere impeachment of witnesses. *Id.*; *People v. Shaw*, 2018 IL App (1st) 152994, ¶¶ 53, 70.

¶ 20 Here, we find that defendant's petition and supporting affidavits do not present a claim of newly-discovered evidence of actual innocence. Remigio's affidavits are material, as he averred to the effect that Nettles and his friends threatened to implicate defendant as being armed with a gun, and that he did not see a gun, or see or hear of any theft, during the fight he witnessed. While Remigio's affidavits do not identify defendant or anyone else by name, the date, time, and location of the fight he saw correspond to the incident testified to by Nettles and Dorsey. Further, Remigio averred that Horton showed him a photograph that he recognized as the winner in the fight who was threatened with a false accusation. Remigio averred that he did not know the participants in the fight, and Remigio and Horton averred to the circumstances of Horton learning Remigio's account, so the petition and affidavits support a conclusion that Remigio was not known to defendant at the time of trial.

¶ 21 However, we find that defendant's petition as amended does not present evidence of such conclusive character as to likely change the outcome of this case. Nettles and Dorsey testified at trial that defendant confronted them twice before giving his companion a gun and confronting Nettles a third time. They testified that defendant knocked Nettles to the ground and told his companion to shoot Nettles, but the companion took Nettles's cellphone and wallet instead before he and defendant fled. Kiara Johnson corroborated that defendant was aggressive and threatened to shoot someone, though she also testified that she did not see anyone display a gun.

¶ 22 Against this trial evidence, defendant's petition as amended presents two affidavits by Remigio, discovered when defendant, Remigio, and paralegal Horton were in the same prison

together. Remigio averred that he stopped in his travels to watch an imminent fight because "I have always enjoyed a good fist fight." Thus, by his own account, he did not see the events preceding the fight. His first affidavit described the incident as "a brief fist fight and wrestling," while his second affidavit gave no description of the fight at all but jumps from two men "facing each other ready to fight" to "[a]fter the actual fight." Remigio's averment that the fight included wrestling tends to belie his conclusory averments that he did not see anyone take anything and "no one *** stuck their hands in the others pockets to take anything." Remigio was also inconsistent about the key new element in his account: what was said to defendant as he ran away. He first averred that "both of the men and girls" were "hollering they would lie on him" and vaguely that "someone hollered they would lie." He later averred that "the loosers [*sic*] were screaming foul words and saying that they were going to tell the police he had weapons."

¶ 23 Johnson's testimony highlights a significant shortcoming of Remigio's affidavits as evidence allegedly conclusively exonerating defendant. While Remigio averred that he did not see a gun or weapon during the incident, Johnson testified at trial to similar effect. The jury already heard evidence similar to Remigio's affidavits on this point and convicted defendant of armed robbery. Moreover, Remigio avers that he began paying attention to a group of men (in his first affidavit) or two men (in his second affidavit) as they prepared to fight. His account thus does not contradict or refute the testimony of Nettles and Dorsey that they saw defendant pass a gun to his companion *before* defendant confronted Nettles the third time and knocked him to the ground. In other words, Remigio's averral that he did not see a gun does not impeach the State's trial evidence regarding a gun, much less exonerate defendant.

¶ 24 We conclude that Remigio's affidavits, taken alongside the existing trial evidence, are not of such conclusive character that they would probably change the result in a retrial. The dismissal of defendant's petition based on those affidavits was therefore not erroneous.

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

¶ 26 Affirmed.