2018 IL App (1st) 160725-U
Nos. 1-16-0725 & 1-16-1268 (cons.)
Order filed December 11, 2018

Second 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. 99 CR 3579
	)	
GEORGE FERNANDEZ,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's denial of defendant's motion for leave to file a second successive postconviction petition over his contention that he presented a colorable claim of actual innocence.

¶ 2 In this consolidated appeal, defendant George Fernandez contends that the circuit court erred in denying him leave to file a second successive postconviction petition as he presented a colorable claim of actual innocence. Fernandez's actual innocence claim is neither supported by newly discovered evidence nor is the character of this evidence so conclusive that it would probably change the result on retrial, so we affirm.

¶ 3 Background

¶ 4 In 2001, a jury found Fernandez guilty of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(3) (West 1998)), and sentenced him to 18 years' imprisonment. The evidence at trial established that Jesus Lopez, while driving his 1991 red Ford Thunderbird in a heavy snowfall, stopped his car in the middle of North Spaulding Avenue. As he stood near his car, Fernandez drove up behind him, and approached Lopez. Fernandez placed a gun to Lopez's chest and, in Spanish, demanded money. After Lopez complied, Fernandez demanded Lopez's car. Lopez stepped aside, and Fernandez drove away in the Ford Thunderbird with license plate number J28135. Lopez viewed Fernandez, unobstructed, for between three to five minutes. Fernandez only spoke to Lopez in Spanish.

¶ 5 The next day, Chicago police officer Pamela Davis saw a red Ford Thunderbird make a right turn without obeying a stop sign. Davis activated her emergency lights and attempted to curb the Ford, which sped up and drove erratically. Davis continued to follow. Davis radioed for assistance, and, in the interest of public safety, turned off her emergency lights. Shortly after, the Ford stopped and Davis drove up behind it. She input the Ford's license plate number—J28135—into her onboard computer and again activated her emergency lights. The driver, whom Davis identified as Fernandez, walked toward Davis. As Fernandez approached, he began to run northbound. Davis issued a flash message and saw a squad car driven by Officer Golon, pursuing Fernandez. Golon arrested Fernandez in a yard on a dead-end street after Fernandez became stuck in the snow. Lopez viewed a lineup at the police station and identified Fernandez as the gunman who took his money and car.

¶ 6 Fernandez's mother testified that Fernandez did not speak Spanish.

¶ 7 The jury found Fernandez guilty of aggravated vehicular hijacking. He received a sentence of 18 years' imprisonment.

¶ 8 On direct appeal, Fernandez argued that his trial counsel was ineffective for failing to file a timely motion to reconsider sentence. We affirmed. *People v. Fernandez*, No. 1-01-1810 (2002) (unpublished order under Supreme Court Rule 23).

¶ 9 Fernandez filed, and the trial court denied, a petition for post-judgment relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002)).

¶ 10 Fernandez then filed a *pro se* petition under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2014)), alleging 22 different constitutional violations. Counsel was appointed to represent Fernandez and, on May 4, 2014, appointed counsel filed a supplemental petition. The amended petition argued that Fernandez's trial counsel was ineffective for failing to: (1) present cumulative testimony to show he did not speak Spanish; (2) allow Fernandez an adequate opportunity to display his facial tattoos to the jury; and (3) object to the issuance of Illinois Pattern Jury Instruction 3.15. The amended petition also argued that Fernandez's appellate counsel was ineffective for failing to raise these issues on appeal. The trial court dismissed the petition. This court affirmed the circuit court's decision. See *People v. Fernandez*, No. 1-04-2864 (2005) (unpublished order under Supreme Court Rule 23).

¶ 11 In January 2006, Fernandez filed a motion for leave to file a successive postconviction petition, arguing that he was actually innocent of the crime based on newly discovered evidence that he did not speak Spanish. Again, the trial court denied Fernandez's motion. Again, we affirmed. *People v. Fernandez*, No. 1-06-0929 (2009) (unpublished order under Supreme Court Rule 23).

¶ 12 Fernandez filed a federal petition for writ of *habeas corpus* that was denied by the federal district court. *Fernandez v. Pfister*, No. 07 C 2843 (2014).

¶ 13 On December 18, 2015, Fernandez *pro se* filed a 529-page document that he labeled as his "3rd petition for post-conviction relief under 735 ILCS 5/122-1 *et seq.*; 2nd petition for post-judgment relief under 735 ILCS 5/2-1401; 2nd motion for a new trial; 2nd motion for judgment notwithstanding the verdict; motion to reopen trial." Fernandez argued that he had newly discovered evidence in the form of a sworn affidavit from Robert Timms, that someone named Luiz Perez had admitted to committing the offense of which Fernandez was convicted. In support of his petition, Fernandez attached 59 "exhibits," one of which is 374 pages long.

¶ 14 Fernandez also filed multiple motions for leave to "supplement" his second successive postconviction petition. The trial court denied Fernandez "leave to file successive *pro se* post-conviction petitions." Fernandez filed a notice of appeal (No. 1-16-0725) from the order, which had been entered on January 26, 2016.

¶ 15 A couple months later, the trial court again denied Fernandez's motion for leave to file his second successive postconviction petition and second section 2-1401 petition. Fernandez filed a notice of appeal (No. 1-16-1268) from that order, which had been entered on March 21, 2016.

¶ 16 This court granted Fernandez's motion to consolidate his appeals.

¶ 17 On August 24, 2018, this court granted the State Appellate Defender's motion to withdraw as appellate counsel. We granted Fernandez's motion to proceed *pro se* and allowed him to file a reply brief. We denied Fernandez's motion to strike the briefs already on file. Because Fernandez has not filed a reply brief, we will proceed with the briefs already on file.

¶ 18 Analysis

¶ 19 Fernandez contends that the trial court erred in denying him leave to file his second successive petition because his petition raised a colorable claim of actual innocence based on Robert Timms' affidavit. According to Timms, Luiz Perez admitted to him on January 6, 1999, that he and his brother were the actual culprits of the crime of which Fernandez was convicted.

¶ 20 The Act provides a procedural mechanism for a defendant to assert a substantial denial of his or her constitutional rights in the original trial or sentencing. 725 ILCS 5/122–1 (West 2014); *People v. Allen*, 2015 IL 113135, ¶ 20. Where a defendant previously appealed a judgment of conviction, "the ensuing judgment of the reviewing court will bar, under the doctrine of *res judicata*, postconviction review of all issues actually decided by the reviewing court, and any other claims that could have been presented to the reviewing court will be deemed waived." *People v. Edwards*, 2012 IL 111711, ¶ 21.

¶ 21 Generally, the Act contemplates the filing of only one petition for postconviction relief. 725 ILCS 5/122–1(f) (West 2014). As outlined in the Act, a court may grant leave to file a successive petition "only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2014).

¶ 22 In addition to the cause-and-prejudice test codified in the Act, our supreme court has recognized that the bar to successive petitions should be relaxed where it is necessary to prevent a fundamental miscarriage of justice. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). But, for this exception to apply, the petitioner must demonstrate actual innocence. See

Pitsonbarger, 205 Ill. 2d at 459 ("To demonstrate *** a miscarriage of justice, a petitioner must show actual innocence ***."); see also *People v. Ortiz*, 235 Ill. 2d 319, 329–30 (2009).

¶ 23 Fernandez's proposed successive postconviction petition raises a claim of actual innocence. To succeed, a petitioner must present evidence that is (1) newly discovered, (2) material and noncumulative, and (3) of a conclusive character that would probably change the result on retrial. *People v. Jones*, 2017 IL App (1st) 123371, ¶ 43. These claims "must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).

¶ 24 "An actual innocence claim does not merely challenge the strength of the State's case against the defendant." *People v. Evans*, 2017 IL App (1st) 143268, ¶ 30. That is, the sufficiency of the State's evidence is not at issue in a postconviction proceeding. *Id.* Rather, "the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' " *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (citing *People v. Savory*, 309 Ill. App. 3d 408, 414–15 (1999)). We review *de novo* the denial of a motion for leave to file a successive postconviction petition. See *People v. Warren*, 2016 IL App (1st) 090884–C, ¶¶ 74–75.

¶ 25 Fernandez's actual innocence claim fails because it is not supported by newly discovered evidence nor is the evidence presented in support of his claim of a conclusive character that would probably change the result on retrial.

¶ 26 First, 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. *Ortiz*, 235 Ill. 2d at 334; *Collier* 387 Ill. App. 3d at 637 (Evidence

is "not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable or uncooperative").

¶ 27 According to Timms' affidavit, Fernandez had always been aware that Perez was the perpetrator of the crime of which he was convicted. Timms averred that Fernandez did not "break the code of silence" and incriminate anyone else when he was arrested. Instead, according to Timms, Fernandez "waited 7 years before implicating Luis Perez and his brother so that they could not be charged." Timms also states that, on January 6, 1999, Perez told him he was hiding until he knew whether Fernandez had implicated him, suggesting that Perez believed that Fernandez knew Perez was the perpetrator. Based on Timms' affidavit, Fernandez knew the identity of the perpetrator when he was arrested and chose not to reveal that information. Because Fernandez knew of the information included in Timms' affidavit at the time of his trial, it cannot be considered "newly discovered." See *People v. Jones*, 399 Ill. App. 3d 341, 364 (2010) (and cases cited) ("An unbroken line of precedent holds that evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of those facts may have been unknown, unavailable or uncooperative.").

¶ 28 Second, even if we assume that the affidavit of Timms to be newly discovered, material, and noncumulative, its character does not meet the test set out in *People v. Edwards*, 2012 IL 111711, for a colorable claim of actual innocence— it " [must] raise the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence [.]" *Edwards*, 2012 IL 111711, ¶ 31. Put another way, the new evidence presented in support of the 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. *People v. Coleman*, 2013 IL 113307, ¶ 97. Fernandez's evidence cannot meet this burden.

¶ 29 In his affidavit, Timms states that, on January 6, 1999, he saw Luis Perez near the housing project on 31st Street. Each time a police squad car would drive past, Perez would run back into "the projects." When Timms asked Perez why he was running, Perez replied that Fernandez had been arrested for a carjacking that he and his brother had committed. Perez stated that he had to hide from the police because he was afraid that Fernandez would implicate him.

¶ 30 The evidence at trial, however, overwhelmingly pointed to Fernandez as the perpetrator. The day after the carjacking, Officer Davis saw Fernandez driving Lopez's car. When Davis attempted to curb Fernandez for a traffic violation, he kept driving at a high rate of speed. Davis pursued. Eventually, Fernandez fled on foot. Assisting officers gave chase and apprehended Fernandez. Lopez then identified Fernandez from a lineup as the perpetrator. Lopez testified that he viewed Fernandez, unobstructed, for between three to five minutes. See *People v. Starks*, 2014 IL App (1st) 121169, ¶ 48 ("It is well established that a single witness's identification is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification."). Given this evidence, Timms' affidavit does not undermine our confidence in the factual correctness of the guilty verdict or raise the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. See *People v. Mabrey*, 2016 IL App (1st) 141359, ¶¶ 30-31.

¶ 31 Affirmed.