2018 IL App (2d) 121056-U
Nos. 12-1056 & 13-0132 cons.
Order filed April 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 06-CF-3223
ELIAS R. DIAZ,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's successive postconviction petition alleging actual innocence, because the petition did not meet the standard to justify further proceedings.

¶ 2 Defendant, Elias Diaz, appeals an order "summarily dismissing" his successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)), which he had not obtained leave of court to file. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 1996))

in connection with the shooting death of a young boy. The matter proceeded to a bench trial. The State presented evidence that on November 10, 1996, defendant drove Mark Downs and Ruben Davila to and from a residence in Aurora, Illinois, with the intent of shooting a rival gang member, Robert Saltijeral. Downs fired numerous gunshots into the home. As it turned out, Saltijeral no longer resided there, and the gunshots killed six-year-old Nico Contreras. Davila testified against defendant, detailing his own involvement in the shooting while also implicating Downs and defendant. Two other witnesses, Alejandro Solis and Billie Mireles, testified that defendant made inculpatory statements after the murder. Defendant testified on his own behalf and denied participating in the shooting. Downs did not testify at defendant's trial. The trial court found defendant guilty and sentenced him to 60 years' imprisonment. Downs was convicted of Contreras' murder in separate proceedings.

¶ 5 We affirmed defendant's conviction on direct appeal. *People v. Diaz*, No. 2-09-0199 (unpublished order under Supreme Court Rule 23). In *People v. Diaz*, 2014 IL App (2d) 110877-U, we affirmed the first-stage dismissal of defendant's original postconviction petition; we also affirmed an order denying defendant's second petition to vacate his conviction pursuant to section 2-1401 of the Code of Civil Procedure (see 735 ILCS 5/2-1401 (West 2016)). In *People v. Diaz*, 2017 IL App (2d) 150470-U (*Diaz III*), we affirmed orders denying defendant leave to file two different successive postconviction petitions.

¶ 6 Subsequent to our decision in *Diaz III*, defendant petitioned our supreme court to reinstate two of his earlier appeals (numbers 12-1056 and 13-0132), which had been dismissed by this court for failure to comply with certain orders during the course of briefing. Those appeals both related to yet another successive postconviction petition that defendant had submitted, without leave of court, in June 2012. On October 18, 2017, our supreme court

directed this court to reinstate appeals 12-1056 and 13-0132. We did so and consolidated the appeals for purposes of briefing and decision.[1]

¶ 7 We turn to the proposed successive postconviction petition that defendant submitted with the assistance of counsel on June 15, 2012. Once again, that is the petition at issue in the present consolidated appeals. Defendant advanced a claim of actual innocence. He supported his petition with two affidavits, the first of which was signed by Downs on September 29, 2011. Downs averred as follows:

> "About a day after the murder of Nico Contreras[,] Ruben Davila confided in me that he had shot up Robert Saltijerals [*sic*] home in retaliation for Robert Saltijeral and Jose Virgin shooting at him on Nov. 3rd[,] 1996 in front of Davila's home. At this time[,] me and Ruben Davila were friends and he would confide in me about things he had been involved in. Ruben Davila told me he had stopped at his kids mothers [*sic*] house and girlfriend named Jackie Stapleton in the early morning hours of November 9th[,] 1996. After throwing rocks at Jackies [*sic*] window and getting no response, Ruben Davila alone decided, he had told me[,] that he (Davila) was going to hit the Saltijeral home since it was just a street over on Aurora Ave. Davila stated to me that he wanted revenge

[1] In *Diaz III*, we addressed the following two consolidated appeals: numbers 15-0470 and 15-1170. After we reinstated appeals 12-1056 and 13-0132, defendant moved to have us take judicial notice of the e-record filed in appeal 15-0470 for purposes of briefing the reinstated appeals (12-1056 and 13-0132). We granted that motion. In his brief, defendant now asks us to additionally take judicial notice of the trial exhibits, which were part of the record in appeal 15-1170 and which are still in the possession of this court. We grant defendant's request to take judicial notice of the exhibits.

> for Saltijeral shooting at him. Davila told me he knew exactly where Robert Saltijeral slept at and the layout of the home. Davila told me he crept through the backyards towards the Saltijeral home alone straight towards the bedroom window where Robert Saltijeral slept. After coming upon the bedroom window, Ruben Davila said he lit the room up and ran to his rental car parked on Lincoln Ave[.] in front of Jackies [*sic*] home and escaped alone. Ruben Davila never mentioned anything about Elias Diaz being involved in this crime. I asked Ruben who he was with and he told me he was alone with his .380 he always carried. Through my lawyer[,] David Kliment[,] I learned Elias Diaz wanted me to be a witness. My public defender told me I would not be testifying for Elias Diaz because it wasn't in my best interest. I disagreed with my lawyer, but I was never interviewed by Elias Diaz [*sic*] attorney[,] Ms. Colton[,] or advised of a trial date to testify on or subpeoned [*sic*] by Elias Dias [*sic*] attorney to testify on Elias Diaz [*sic*] trial date."

¶ 8 Defendant also submitted his own affidavit in support of his petition. He averred that he asked his trial counsel to call Downs as a witness because he believed that Downs could contradict Davila's trial testimony. Defendant's attorney did not attempt to contact Downs or subpoena him to testify. Instead, defendant's attorney was informed that Downs would invoke his fifth amendment rights if he were called to testify. According to defendant, he did not know before September 2011 that Downs could have testified that Davila admitted one day after the murder to having committed the murder alone.

¶ 9 On August 20, 2012, the trial court "summarily dismissed" defendant's petition. The court reasoned that "Downs' affidavit constitutes hearsay which is insufficient to warrant post-conviction relief based on a claim of actual innocence." According to the court, Downs'

testimony regarding Davila's statements did not implicate the admission-against-penal-interest hearsay exception, as defendant failed to present evidence corroborating Davila's statement and the "alleged statement was not made spontaneously to Downs after the murder." Defendant's counsel filed a notice of appeal from that order on defendant's behalf, and the appeal was docketed in this court as No. 12-1056. Shortly thereafter, defendant filed a *pro se* motion asking the trial court to reconsider its August 20 order. The court denied that motion on October 1, 2012. Defendant filed a *pro se* notice of appeal from the October 1 order, and that appeal was docketed in this court as No. 13-0132.

¶ 10 II. ANALYSIS

¶ 11 "[T]he Act provides a statutory remedy to criminal defendants who claim that substantial violations of their constitutional rights occurred at trial." *People v. Edwards*, 2012 IL 111711, ¶ 21. This encompasses freestanding claims of innocence based on newly-discovered evidence. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). The Act contemplates a single postconviction proceeding (*Edwards*, 2012 IL 111711, ¶ 22), and a defendant ordinarily must obtain leave of court before filing a successive petition (725 ILCS 5/122-1(f) (West 2016)). Even in the absence of a motion seeking leave to file a successive petition, however, the trial court may rule on a proposed successive petition "when documents submitted by a petitioner supply an adequate basis to determine whether the petitioner has sufficiently alleged *** actual innocence." *People v. Sanders*, 2016 IL 118123, ¶ 25.

¶ 12 To prevail under a theory of actual innocence, a defendant must present evidence that is "newly discovered," which means that it was not available at the time of trial and could not have been discovered sooner through diligence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Such evidence must also be "material and noncumulative" and "of such conclusive character that it

would probably change the result on retrial." *Morgan*, 212 Ill. 2d at 154. A trial court should grant leave to file a successive postconviction petition "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 new evidence." *Sanders*, 2016 IL 118123, ¶ 24. We review *de novo* the decision to deny leave to file a successive petition. *People v. Warren*, 2016 IL App (1st) 090884-C, ¶¶ 74-75.

¶ 13 Defendant argues that his June 2012 successive petition set forth a colorable claim of actual innocence, "because Davila's statement to Downs was newly-discovered evidence that could be admitted at trial" as a statement against penal interest. Defendant further submits that Downs' affidavit was noncumulative and material, because "[n]o witnesses at [defendant's] trial testified that Davila committed the murder alone before escaping on foot." Moreover, defendant maintains, the credibility of some of the State's key witnesses at trial "was strained at best." Defendant thus asks us to reverse the order dismissing his successive petition and to remand the matter for second-stage postconviction proceedings.

¶ 14 Defendant's petition did not meet the standard to justify further proceedings. As an initial matter, it is by no means certain that Downs' testimony would be admissible at trial. Downs' testimony about what Davila told him after the shooting is hearsay. See Ill. R. Evid. 801(c) (eff. Oct. 15, 2015) (" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). To that end, "[a]n extrajudicial declaration, not under oath, by the declarant that he, and not the defendant on trial, committed the crime is inadmissible as hearsay, though the declaration is against the declarant's penal interest." *People v. Pecoraro*, 175 Ill. 2d 294, 306 (1997). Such statement may only be admitted after considering certain factors outlined in

Chambers v. Mississippi, 410 U.S. 284 (1973), a case with a holding that our supreme court has described as "narrow." *People v. Tenney*, 205 Ill. 2d 411, 435 (2002); see also Ill. R. Evid. 804(b)(3) (eff. Jan. 1, 2011).

¶ 15 Even were we to assume the admissibility of Downs' testimony regarding what Davila told him, this evidence is not "of such conclusive character that it would probably change the result on retrial." *Morgan*, 212 Ill. 2d at 154. As we noted in a prior appeal, the evidence against defendant was "overwhelming." *Diaz*, 2014 IL App (2d) 110877-U, ¶ 25. Downs' testimony might impeach Davila's trial testimony. However, two other witnesses, Solis and Mireles, testified that defendant made incriminating remarks to them on separate occasions after the murder, acknowledging his role as the driver. Defendant presented no new evidence in his successive postconviction petition calling the testimony of Solis or Mireles into doubt. Instead, on appeal, defendant merely rehashes his trial counsel's closing arguments that Solis and Mireles lacked credibility. Defendant has failed to present anything akin to the type of newly-discovered evidence that our supreme court has said may support a claim of actual innocence, such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence. See *Edwards*, 2012 IL 111711, ¶ 32.

¶ 16 After reviewing defendant's June 2012 successive postconviction petition, along with the supporting documentation, it is clear that defendant cannot set forth a colorable claim of actual innocence. Specifically, defendant has not raised the probability that it is more likely than not that no reasonable trier of fact would have convicted him in light of the new evidence. Accordingly, the trial court properly dismissed the petition. See *Sanders*, 2016 IL 118123, ¶ 24.

¶ 17 III. CONCLUSION

¶ 18 For the reasons stated, we affirm the judgment of the circuit court of Kane County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4–2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 19 Affirmed.