2018 IL App (2d) 150800-U
No. 2-15-0800
Order filed March 2, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTOINE T. CHEST, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Stephenson County. No. 07-CF-0363 Honorable James M. Hauser, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's successive postconviction petition.

¶ 2 In April 2009, following a jury trial, defendant, Antoine T. Chest, was convicted of two counts of attempted first-degree murder (720 ILCS 5/8-4(a), 5/9-1(a)(1) (West 2006)) and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2006)). On direct appeal, we affirmed. *People v. Chest*, 2-09-1031 (2011) (*Chest I*) (unpublished order under Supreme Court Rule 23). Defendant's initial petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)) was summarily dismissed and, on appeal, we

affirmed. *People v. Chest*, 2013 IL App (2d) 120687-U (*Chest II*). Presently, defendant appeals the second-stage dismissal of his successive petition under the Act, which raises a claim of actual innocence. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Detailed facts regarding the trial evidence leading to defendant's conviction may be found in prior orders. However, for purposes of this appeal, we note that victims Damon Shipp and Demetrius Price were shot at around 2 p.m. on December 21, 2007, after being approached by two males, allegedly defendant and a co-defendant (whose trial was severed from defendant's). After the shooting, defendant and his co-defendant fled in a vehicle with two unidentified men; that vehicle ultimately crashed and, after a chase, defendant was apprehended.

¶ 5 Defendant argued at trial and on direct appeal that it was not proved beyond a reasonable doubt that he was the shooter. However, at trial, evidence was received that gunshot residue lifts taken from the backs of defendant's hands two hours after his arrest led the state police crime lab to conclude that he: (1) had discharged a firearm; (2) was in the vicinity of a discharged firearm; or (3) came in contact with gunshot residue *within six hours prior to taking the lifts*. Lifts taken from his co-defendant's hands did *not* test positive for the presence of gunshot residue. Further, a DNA expert testified that defendant also could not be excluded from having contributed to a mix of two human DNA profiles obtained from the gun. His co-defendant, however, was excluded. Finally, defendant could not be excluded from having contributed to a mix of DNA found on a sweatshirt and glove that were discovered in a garage near where, after the crime, defendant was seen.

¶ 6 In addition, evidence was received that, on December 20, 2007, *i.e.*, one day prior to the shooting that formed the basis of the trial charges, shots were fired from a black PT Cruiser's

window at one of the same victims. Investigation of the scene recovered 9 millimeter and .45-caliber shell casings. It was later determined that the casings recovered at the scene of the December 20, 2007, shooting and the casings recovered at the scene of the December 21, 2007, shooting were fired from the same weapon; specifically, they were all fired from a Tech-9 Cobra 9 millimeter semi-automatic. The evidence reflected that a black PT Cruiser with bullet holes in its body and back window was parked at defendant's girlfriend's house; defendant's girlfriend's father testified that he assumed that defendant had parked it in the driveway. The PT Cruiser was searched, and a 9-millimeter shell casing was found on the front passenger seat.

¶ 7 Finally, as noted in *Chest I*, when initially asked who had shot them, Shipp and Price did not answer or said they did not know. Officer Matthew Summers spoke to both victims together and told them that defendant and his co-defendant were being held in custody and would be released if not identified as the assailants. Shipp stated that he did not see who shot him, but he nodded at Price to indicate that Price could speak to Summers. Price then told Summers that defendant and his co-defendant were both involved in the shooting. The next day, after viewing another photo array, Price identified defendant. At trial, however, both Shipp and Price testified that they did not see who shot at them and did not know who was responsible. Further, Price testified that he knew defendant well enough that, if defendant had been shooting at him, he would have been able to identify him; he never saw defendant in a PT Cruiser. Price did not sign the photo lineups.

¶ 8 In his initial postconviction petition, defendant raised four claims, including actual innocence. Specifically, in addition to his own affidavit claiming innocence, defendant attached an affidavit from his co-defendant attesting that the co-defendant had pleaded guilty to the attempted-murder charges and that, on December 21, 2007, he was not with defendant nor did he

see defendant in the area of the shooting. In *Chest II*, we rejected defendant's actual-innocence claim, noting that, if believed, the co-defendant's affidavit was not completely exculpatory, as it stated only that he pleaded guilty to attempted murder charges; it did not explicitly state that *he* personally shot the victims. *Chest*, 2013 IL App (2d) 120687-U, ¶ 30. The distinction was critical, we noted, because unlike defendant, the co-defendant did not test positive for the presence of gunshot residue and his DNA profile was excluded from the two profiles found on the gun. *Id.* Further, we noted that, in contrast to the co-defendant's affidavit, the evidence at trial belied any assertion that defendant was not present. *Id.* at ¶ 31. Specifically, the evidence reflected that both men who approached the victims were armed and wearing black, hooded coats or sweatshirts. The men fled past a bank building, and then a black car pulled out; the car drove at a high rate of speed until it lost control and ran into a snow bank. The four occupants, wearing dark, hooded sweatshirts, fled; one officer drove in the direction of where two passengers fled and saw defendant, wearing a black t-shirt (again, it was winter), emerge from a driveway near Beaver and Avon Streets and run away. After being chased, defendant eventually surrendered. In the garage on Beaver and Avon Streets, police found a bundle of clothes, including a black, hooded sweatshirt, from which defendant's DNA could not be excluded. *Id.* Further, according to officer Brian Kuntzleman, after falsely telling defendant that he had been videotaped driving the black car, defendant admitted that he had done so. *Chest*, No. 2-09-1031, slip order at 3 (2011).

¶ 9 In June 2014, defendant filed a section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)), which the State moved to dismiss. Defendant then filed an "amended petition for relief from judgment or, in the alternative, successive petition for postconviction relief," as well as a motion for leave to file the successive postconviction petition.

A public defender amended the postconviction petition, and the State moved to dismiss it. In the petition, defendant raises another actual-innocence claim. In addition to his own affidavit, defendant attaches affidavits from victims Shipp and Price, as well as from Eugene Riley and Aja Harrell.

¶ 10 Shipp's affidavit attests that he has consistently claimed not to know the identity of the person who shot him. Shipp states that he was afraid to identify the shooter because "he was the chief of a retaliating drug gang." Shipp attests that his "conscious [*sic*] and building courage" enabled him to now identify Joey Palmer as the person who shot him.

¶ 11 Price attests that he repeatedly told police that he did not know who shot at him, but the police told him that defendant and his co-defendant were in custody and that he should identify them or they would be released. "I kept telling the police I didn't know who shot at us but they wouldn't stop questioning me and eventually I was pressured because someone called my phone threatening my life. I was scared and ready to leave so I falsely told the police [defendant] was involved." Price further attested that he had known defendant for a long time and would have known if he was the shooter. Price decided to come forward because, if he were innocent of a crime, he would hope that someone would tell the truth for him.

¶ 12 Riley attested that, around December 21, 2007, he knew a "vicious leader of a drug gang," Darnell "Don" Harris, who offered Riley $2,000 to warn two black men that, if they informed police who shot at them on December 20, and December 21, 2007, Harris would have them killed. Riley attested that he warned the two men and was assured on the phone that they would instead falsely accuse defendant of the shooting.

¶ 13 Harrell attested that she is defendant's girlfriend and mother to his daughters. Harrell stated that, the night prior to the shooting in question, defendant was with her the entire evening.

¶ 14 In his affidavit, defendant asserts that he did not shoot Price and Shipp and that he was not present at the scene. He attests that he recently discovered evidence that "notorious drug boss" Harris was responsible for the shooting and that he framed defendant. The evidence, defendant asserts, was previously unavailable to him and supports his actual-innocence claim.

¶ 15 The trial court noted that it was unclear whether defendant was ever granted leave to file the successive postconviction petition (the case was transferred from one courtroom to another). Nevertheless, as the public defender had represented defendant on the petition, and as the State had filed a responsive pleading thereto, the court decided to address the petition's merits. The court dismissed the petition and rejected defendant's actual-innocence claim, noting that, after reviewing the evidence from trial and this court's prior two orders, the postconviction evidence submitted by defendant was not so conclusive that it would probably change the result upon retrial. Further, the court noted that Harrell's affidavit, which purports to establish an alibi for defendant for the December 20, 2007, shooting, contradicts defendant's ineffective-assistance claim raised in his initial postconviction petition, which included defendant's assertion that the gunshot residue found on his hands could have been explained and resulted from his involvement in the December 20, 2007, shooting. See, *e.g.*, *Chest*, 2013 IL App (2d) 120687-U, ¶ 8. Defendant appeals.

¶ 16 II. ANALYSIS

¶ 17 Defendant argues that the trial court erred in dismissing his successive postconviction petition asserting an actual-innocence claim and that the petition should be remanded for a third-stage evidentiary hearing.

¶ 18 The Act provides a method by which criminal defendants can assert that their convictions and sentences were the result of a substantial denial of their rights under the United States

Constitution, the Illinois Constitution, or both. See 725 ILCS 5/122-1 *et seq*. (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Postconviction proceedings contain three distinct stages. *Hodges*, 234 Ill. 2d at 10. At the second-stage, as here, the petition must, taken as true and liberally construed, make a substantial showing of a constitutional violation to advance to a third-stage evidentiary hearing. See, *e.g.*, *People v. Ward*, 187 Ill. 2d 249, 255 (1999). We review *de novo* the trial court's decision to dismiss the petition without an evidentiary hearing. *Id.*

¶ 19 "A defendant is allowed to assert a claim of actual innocence in a successive petition because a wrongful conviction of an innocent person violates due process." *People v. Williams*, 392 Ill. App. 3d 359, 367 (2009) (*citing People v. Morgan*, 212 Ill. 2d 148, 154 (2004)). To assert a claim of actual innocence based upon newly-discovered evidence, a defendant must show that the evidence was: (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the trial result. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). Actual-innocence 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.' *** 'Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.' " *People v. Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). The actual-innocence claim and supporting documentation "must set forth a colorable claim of actual innocence, *i.e.*, they must raise the probability that it is more likely than not that no reasonable juror would have convicted [the defendant] in the light of the new evidence." *Id*. at ¶ 33.

¶ 20 Here, as below, the State does not disagree with defendant's assertion that the affidavits satisfy the first two requirements for an actual-innocence claim, *i.e.*, that they are newly discovered and non-cumulative. Instead, the State focuses its argument on the third requirement, arguing that the affidavits do not constitute compelling evidence of actual innocence and they are not of such conclusive character that they would probably change the result upon retrial. Assuming, *arguendo*, that the first two requirements are, indeed, satisfied, we agree that defendant's claim fails to satisfy the third requirement.

¶ 21 For purposes of an actual-innocence claim, "conclusive" means that the new evidence, when considered along with the trial evidence, would probably lead to a different result. *People v. Coleman*, 2013 IL 113307, ¶ 96. Here, we cannot say that, if presented with the new evidence along with the trial evidence, a jury would "probably" acquit defendant. We acknowledge that the new evidence, viewed in isolation and at first blush, appears exonerating. Indeed, Shipp and Price did not identify defendant as the shooter at trial, they now explain why they initially implicated him, and they identify the shooter as Palmer. Riley's affidavit lends support to Shipp and Price's testimony that their lives were threatened, but it notably does not identify the two black men whom he called.

¶ 22 Even assuming that the two men that Riley called were Shipp and Price, there remain other issues with the new evidence, when viewed in concert with the trial evidence. For example, defendant's current affidavit claims he was not present at the scene of the shooting. As we noted in *Chest II*, and as summarized previously, the evidence at trial belied any assertion that defendant was not present. Further, and in our view, critically, gunshot residue lifts taken from the backs of defendant's hands two hours after his arrest led the state police crime lab to conclude that he: (1) had discharged a firearm; (2) was in the vicinity of a discharged firearm; or

(3) came in contact with gunshot residue *within six hours prior to taking the lifts*. Presently, defendant argues that, between the time of his arrest and the residue test, his hands touched many items, such as police officers' hands, the squad car, and items in the booking room and, perhaps, gunshot residue was on those items and got onto his hands. However, in his initial postconviction petition, defendant asserted that the residue could have been explained, as he was involved in the December 20, 2007, shooting, the night before the shooting at issue here. Specifically, in his notarized affidavit attached to his initial postconviction petition, defendant attested:

> "I informed trial counsel that I had been involved in a shooting on the evening of December 20, 2007, in Freeport, Illinois, while driving my cousin[']s Chrysler PT Cruiser and said incident would explain the gunshot residue test administered on me by the State. This explanation would refute and belie the State[']s assertions at trial that I was involved in the December 21st offense."

¶ 23 Harrell presently contradicts defendant's initial position (that he was involved in the December 20, 2007 shooting), as she attests that defendant was *not* involved in the December 20, 2007, shooting and was with her all night. Further, the trial evidence contradicts defendant's initial position, as it showed that defendant came in contact with the residue within *six hours prior to taking the lifts*. Even if the lifts were taken *immediately* upon apprehending defendant, the December 20, 2007, shooting occurred outside of the six-hour timeframe. As such, defendant's shifting positions on where the residue came from contradict, or at least do not offer support for, the alleged compelling new evidence of innocence.

¶ 24 Further, the affidavits, which state that Palmer, whom we infer is somehow connected to drug leader Harris (we must infer, because the affidavits do not state), committed the shooting,

do nothing to account for the trial evidence reflecting that the casings recovered at the scene of the December 20, 2007, shooting and the casings recovered at the scene of the December 21, 2007, shooting were fired *from the same weapon*; specifically, they were all fired from a Tech-9 Cobra 9 millimeter semi-automatic. The evidence reflected that a black PT Cruiser with bullet holes in its body and back window was parked at defendant's girlfriend's house; defendant's girlfriend's father testified that he assumed that defendant had parked it in the driveway. The PT Cruiser was searched, and a 9-millimeter shell casing was found on the front passenger seat. Defendant could not be excluded from having contributed to a mix of two human DNA profiles obtained from the gun. And, as noted, defendant's prior notarized affidavit attested that he was involved in the December 20, 2007, shooting in his cousin's PT Cruiser. Therefore, when viewed together, the new evidence does not account for the foregoing evidence concerning the gun and vehicles, nor how that evidence could be connected to anyone other than defendant.

¶ 25 Defendant argues that there were weaknesses in much of the aforementioned evidence. Nevertheless, the question again is whether the new evidence, when considered along with the trial evidence, would probably lead to a different result. *Coleman*, 2013 IL 113307, ¶ 96. When the evidence is viewed in its totality, the new evidence does not reflect conclusive evidence of defendant's actual innocence. We conclude the trial court properly dismissed the successive postconviction petition.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of Stephenson County.

¶ 28 Affirmed.