

2018 IL App (2d) 160679-U  
No. 2-16-0679  
Order filed December 13, 2018

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Winnebago County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CF-838
	)	
KARLONDO T. DUBOISE,	)	Honorable
	)	Rosemary Collins,
Defendant-Appellant.	)	Judge, Presiding.

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

**ORDER**

¶ 1 *Held:* The trial court properly denied the defendant leave to file a successive postconviction petition where the affidavit supporting the request did not contain newly discovered evidence and where it would not change the result of the defendant's trial.

¶ 2 Defendant, Karlondo T. Duboise, appeals an order denying him leave to file a successive postconviction petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In *People v. Duboise*, 2013 IL App (2d) 111012-U (*Duboise I*) and *People v. Duboise*, 2016 IL App (2d) 140783-U (*Duboise II*), we recounted in detail the facts underlying

defendant's 2011 convictions of attempt first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)) and being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008)) and his aggregate sentence of 45 years in the Illinois Department of Corrections. Here, we will state only those facts necessary to the disposition of this appeal. Additional facts will also be stated as necessary in the analysis section of this Order.

¶ 5 On March 17, 2009, defendant was the passenger in a Dodge Magnum being driven by Andrei Byrd as they arrived at Byrd's ex-girlfriend's house in Rockford, Illinois. Felix Harmon, the ex-girlfriend's current husband, approached the driver's side and began fighting with Byrd. Harmon testified at trial that defendant shot him while he (Harmon) and Byrd were tussling inside the car. Then, according to Harmon, Byrd drove him to another location where Byrd and defendant beat him.

¶ 6 On May 2, 2014, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)), alleging that his appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness for failing to interview or call certain witnesses. Defendant attached affidavits of witnesses who stated that Byrd had told them that defendant was not involved in shooting Harmon. The trial court dismissed the postconviction petition as frivolous and patently without merit in part because defendant did not include an affidavit from Byrd. We affirmed in *Duboise II*, noting that defendant gave no explanation for why he could not have obtained Byrd's affidavit. *Duboise II*, 140783-U, ¶ 51.

¶ 7 On December 22, 2015, defendant filed a *pro se* motion for leave to file a successive postconviction petition pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2014)). He attached Byrd's "affidavit" in which Byrd stated that Harmon had the gun and that it

discharged while he and Harmon were fighting inside the car. Byrd further stated that defendant was outside of the car when the gun discharged and that he then drove defendant to a safer environment. Byrd did not state that he was unwilling to furnish an affidavit in support of defendant's first petition or that defendant had sought such an affidavit from him. Also, Byrd did not state that he would be available to testify to the matters contained in his affidavit. We note that Byrd's "affidavit" was not dated and that the notary failed to verify that Byrd signed the document under oath in front of her on the date that she signed it. On July 20, 2016, the trial court entered a written order denying defendant leave to file a successive petition. In its oral and written rulings, the court stated that defendant was relitigating claims that he had raised in the past. Defendant filed a timely notice of appeal.

¶ 8

## II. ANALYSIS

¶ 9 We first address defendant's motion for leave to file his reply brief *instanter*. According to the motion, the reply brief was due on November 6, 2018. The motion was not filed until November 15, 2018, nine days after the brief was due, and the only reason given for the delay was counsel's "volume and urgency of other appellate matters." Pursuant to Local Rule 103(b), a motion for extension of time must be filed at least 10 days prior to the date to be extended if the motion is served by mail. Here, according to the proof of service, counsel served defendant by mail, although opposing counsel was served electronically. We deem the motion untimely and the reason given for the delay unacceptable. Nevertheless, in this instance, we elect to grant the motion because of defendant's claim of actual innocence. However, counsel is on notice that in the future, the failure to comply with supreme court and local rules will not be so lightly overlooked.

¶ 10 Turning to the merits, defendant contends that Byrd's affidavit is newly discovered evidence of his actual innocence. The Act contemplates the filing of only one petition without leave of court. 725 ILCS 5/122-1(f) (West 2016). Any claim that was not presented in an original petition is waived. 725 ILCS 5/122-3 (West 2016). Evidence of actual innocence must be (1) newly discovered, (2) not discoverable earlier through the exercise of due diligence, (3) material and not merely cumulative, and (4) of such a character that it would probably change the result on retrial. *People v. Sanders*, 2016 IL 118123, ¶ 24. Leave of court should be granted where the petitioner's 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. *People v. Edwards*, 2012 IL 111711, ¶ 24. Leave to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation supporting it, that the claims fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings. *People v. Jones*, 2017 IL App (1st) 123371, ¶ 45. While decisions granting or denying leave of court generally are reviewed for abuse of discretion, the trial court's determination that a petitioner has failed as a matter of law to assert a colorable claim of actual innocence suggests *de novo* review. *Jones*, 2017 IL App (1st) 123371, ¶ 45. In *Edwards*, our supreme court did not resolve which standard of review applies (*Edwards*, 2012 IL 111711, ¶ 30), and we need not so determine, as defendant's claim of actual innocence fails under either standard of review. For the following reasons, we determine that Byrd's affidavit is insufficient to justify further proceedings.

¶ 11 Byrd's affidavit suffers from a number of deficiencies. Affidavits and exhibits accompanying a postconviction petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations. *People v.*

*Delton*, 227 Ill. 2d 247, 254 (2008). Nowhere did Byrd state that he is available to testify to the matters contained in the affidavit. Nor did Byrd state that he refused to furnish an affidavit in support of defendant's postconviction petition or that he was ever asked to do so. We also note that Byrd's affidavit was not dated. We have no idea when, in relation to defendant's postconviction petition, this affidavit was supplied. It is possible that defendant obtained it in time to attach it to his postconviction petition but failed to do so. The document contains a notary's stamp, but, tellingly, the notary did not verify that Byrd appeared before her under oath on the date that she signed the document. We do not hold that the lack of proper notarization defeats defendant's claim of actual innocence, but it bears on the lack of clarity as to when defendant might have obtained the affidavit.

¶ 12 In that vein, defendant does not address in his brief why Byrd's affidavit was not included in support of his postconviction petition. Defendant argues that because Byrd was also arrested for the attempt murder of Harmon, he could not have been forced to testify at defendant's trial, but defendant does not argue that Byrd could have invoked his fifth amendment privilege when defendant filed his postconviction petition. Consequently, defendant has not shown that Byrd's evidence was newly discovered or that he used due diligence to obtain it. Furthermore, shooting Harmon was only half the story. After Harmon was shot, defendant was in the car with Byrd when they drove to another location where two witnesses saw two men beating Harmon. According to the witnesses, the beating took place outside of Byrd's Dodge Magnum, and the witnesses saw the two men leave the scene in the Magnum.

¶ 13 Leave of court to file a successive petition should be granted only when the petitioner's supporting documentation raises the probability that no reasonable juror would have convicted him in light of the new evidence. *Edwards*, 2012 IL 111711, ¶ 24. Harmon testified that, after he

was shot, someone inside the car said, “Let’s drive him to the cornfield and kill him,” and that at another location both Byrd and defendant leaned him against the back passenger-side tire, jumped on him, kicked him, and hit him. *Duboise II*, 140783-U, ¶ 7. According to Harmon, defendant yelled “You are going to die tonight.” *Duboise II*, 140783-U, ¶ 7. As we noted in *Duboise II*, whether Byrd was the shooter did not matter under the State’s alternative theory that defendant was accountable for Byrd’s actions. *Duboise II*, 2016 IL App (2d) 140783-U, ¶ 44. Byrd’s affidavit would not arguably change the result on retrial, as his statement that he drove defendant from the scene of the shooting to a safer environment is contradicted by the evidence that he and defendant drove to a location where they both beat Harmon. Also, at trial, no witness testified that Harmon was armed. At most, Byrd’s affidavit merely contradicts the trial testimony rather than establishing defendant’s innocence. See *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008) (affidavits that address considerations of credibility go to reasonable doubt, not actual innocence). Accordingly, we hold that the trial court properly denied defendant’s motion for leave to file a successive postconviction petition.

¶ 14

### III. CONCLUSION

¶ 15 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County.

¶ 16 Affirmed.