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2016 IL App (3d) 140200-U

Order filed May 3, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-14-0200
v.)	Circuit No. 94-CF-5040
)	
GREGORY SHAW,)	The Honorable
)	Robert P. Livas,
Defendant-Appellant.)	Judge, Presiding.
)	

JUSTICE LYTTON delivered the judgment of the court.
Justice Holdridge concurred.
Justice Wright dissented.

ORDER

¶ 1 *Held:* Trial court properly (1) considered State’s objection to defendant’s motion for leave to file successive postconviction petition, and (2) denied defendant’s motion for leave to file successive postconviction petition alleging actual innocence where affidavit from codefendant failed to allege facts sufficient to exonerate defendant of murder by accountability.

¶ 2 Defendant Gregory Shaw was convicted of armed robbery, felony murder and first degree murder. The trial court sentenced him to death. The supreme court reversed defendant’s

convictions for armed robbery and felony murder and remanded for resentencing. On remand, the trial court sentenced defendant to life imprisonment. After his initial *pro se* postconviction petition was dismissed and the dismissal was affirmed by this court, defendant filed a motion for leave to file a successive postconviction petition alleging actual innocence. The State filed a written objection to defendant's motion. After considering the objection, the trial court denied defendant's motion. On appeal, defendant argues that the court erred in (1) considering the State's objection to his motion for leave to file a successive postconviction petition, and (2) denying his motion for leave to file a successive postconviction petition. We affirm.

¶ 3

FACTS

¶ 4

Defendant and Elton Williams were charged with armed robbery, felony murder and first degree murder. Defendant and Williams were tried together with separate juries. Prior to trial, Williams pled guilty to armed robbery.

¶ 5

The evidence at trial showed that Williams robbed William Chaney in the parking lot of the Arbor Club apartment complex shortly after midnight on September 28, 1994. Before the robbery, Chaney noticed a white car parked nearby with its motor running. After the robbery, Chaney called the police and described Williams and the white vehicle he saw. Chaney never saw defendant.

¶ 6

Minutes after Chaney called the police, officers saw a vehicle that matched the description Chaney gave them leaving the Arbor Club apartment complex. Defendant was the driver of the vehicle. Police officer Timothy Simenson pulled over defendant. Two other officers, Tom Evanoff and Ralph Smith, arrived on the scene. The officers parked their squad cars behind the white vehicle defendant had been driving.

¶ 7 Simenson directed defendant to go to the back of the white car. Defendant walked to the back of the car and sat on the trunk deck without being ordered by the officers to do so. In the meantime, Simenson examined the interior of the car. After that, Simenson said he intended to open the trunk and told defendant to get off of it. Defendant slid off but stayed near the back of the white car. Simenson told defendant to go to his patrol car. Defendant placed his hands on the front hood of Simenson's car and bent forward at the waist. None of the officers told defendant to do that. Smith found defendant's actions "unusual" and told defendant to stand up.

¶ 8 As Simenson was opening the trunk of the white car, Williams emerged and shot Simenson twice, killing him. Williams tried to run but was stopped when Evanoff and Smith shot him. When the shooting stopped, Smith saw defendant "spread-eagled" on the hood of Simenson's car. Smith did not know when defendant had moved into that position. Defendant never told any of the officers that anyone was in the trunk of the white car.

¶ 9 The jury convicted defendant of armed robbery, felony murder and first degree murder based on accountability. The jury sentenced him to death. On appeal, the supreme court reversed defendant's armed robbery and felony murder convictions because of insufficient evidence that defendant aided and abetted Williams before or during the armed robbery. *People v. Shaw*, 186 Ill. 2d 301, 323-25 (1998). However, the court affirmed defendant's first degree murder conviction finding that the evidence against defendant was "convincing." *Id.* at 327, 331.

¶ 10 Because of its reversal of defendant's armed robbery and felony murder convictions, the supreme court remanded the case to the trial court for resentencing. *Id.* On remand, the trial court sentenced defendant to natural life in prison.

¶ 11 Defendant filed a *pro se* postconviction petition alleging that his trial and appellate counsel were ineffective. The trial court dismissed the petition, and we affirmed the dismissal on

appeal. *People v. Shaw*, No. 3-06-0204 (Sept. 29, 2008) (unpublished order under Supreme Court Rule 23).

¶ 12 Thereafter, defendant filed a motion for leave to file a successive postconviction petition. The petition alleged a claim of actual innocence. Attached thereto was an affidavit from Williams that stated:

- “1. I, Elton Williams, being first duly sworn under oath, do hereby swear as follows:
2. On the night of September 28, 1994, I committed a robbery in Crest Hill, Illinois[;]
3. During the robbery, Gregory Shaw was nowhere to be seen and took no active part[;]
4. Gregory Shaw had no prior knowledge of the robbery or that anyone would be shot on the night of September 28, 1994[;]
5. I, Elton Williams, shot and killed Sgt. Timothy Simenson[;]
6. The weapon used in both the robbery and shooting was mine[; and]
7. Before any shots were fired, Gregory Shaw had already surrendered himself to law enforcement officers.”

Defendant’s motion alleged that Williams’ affidavit was “newly discovered” and “completely exonerating.”

¶ 13 The State filed a written objection to defendant’s motion. After considering defendant’s motion and the State’s objection, the trial court denied defendant’s motion for leave to file a successive postconviction petition.

¶ 14 ANALYSIS

¶ 15

¶ 16 Defendant first argues that the trial court erred in considering the State’s objection to his motion for leave to file a successive postconviction petition. He contends that the State is not allowed to respond to a defendant’s motion for leave to file a successive postconviction petition. This issue is a question of law that we review *de novo*. See *People v. Welch*, 392 Ill. App. 3d 948, 955 (2009).

¶ 17 The Postconviction Hearing Act “generally contemplates the filing of only one postconviction petition.” *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). “[S]uccessive postconviction actions are disfavored by Illinois courts.” *People v. Edwards*, 2012 IL 111711, ¶ 29. A successive postconviction petition may only be filed if leave of court is granted. 725 ILCS 5/122-1(f) (West 2012).

¶ 18 During the first stage of initial postconviction proceedings, the court must consider a defendant’s postconviction petition without any input from the State. *People v. Gaultney*, 174 Ill. 2d 410, 419-20 (1996). However, this rule does not apply to successive postconviction petitions. *People v. Collier*, 387 Ill. App. 3d 630, 639 (2008). No supreme court decision or legislative enactment prevents the State from providing its input on a defendant’s motion for leave to file a successive postconviction petition. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶¶ 33-35; *Welch*, 392 Ill. App. 3d 948, 955.

¶ 19 Allowing the State to provide input when a defendant files a motion for leave to file a successive postconviction petition “is consistent with the general principle that only one postconviction petition may be filed without leave of court.” *Crenshaw*, 2015 IL App (4th) 131035, ¶ 33. It also furthers the State’s interest in the finality of criminal litigation. *Id.* “The

State’s input can offer assistance to the trial court in making its decision whether to grant leave – assistance that may prove helpful given the issues raised and the passage of time.” *Id.*

¶ 20 Since neither the supreme court nor legislature has said otherwise, the State is allowed to provide input on a defendant’s motion for leave to file a successive postconviction petition. See *id.* ¶ 35. The trial court did not err in considering the State’s objection to defendant’s motion seeking leave to file a successive postconviction petition. See *id.*; *Welch*, 392 Ill. App. 3d at 955.

¶ 21 II

¶ 22 Defendant also argues that the trial court erred in denying his motion for leave to file a successive postconviction petition because he set forth a colorable claim of actual innocence. We review *de novo* a trial court’s denial of a defendant’s motion for leave to file a successive postconviction petition. See *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 23 A defendant may file a successive postconviction petition that sets forth a claim of actual innocence. *People v. Ortiz*, 235 Ill.2d 319, 329-30 (2009). Evidence supporting a claim of actual innocence must be (1) newly discovered, (2) material, (3) noncumulative, and (4) of such conclusive character as would probably change the result on retrial. *Id.* at 333.

¶ 24 A defendant seeking leave of court to file a successive postconviction petition “not only has the burden to obtain leave of court, but also ‘must submit enough in the way of documentation to allow a circuit court to make that determination.’ ” *Id.* ¶ 24 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010)). When a defendant files a motion for leave to file a successive postconviction petition based on actual innocence, “leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence.” *Id.*

¶ 25 No amount of diligence can force someone to violate his fifth amendment right to avoid self-incrimination if he chooses not to do so. *Edwards*, 2012 IL 111711, ¶ 38. Thus, an affidavit authored by a codefendant averring that he acted alone and with no assistance from the defendant qualifies as newly discovered evidence. See *id.*

¶ 26 In order for evidence of actual innocence to be so conclusive that it would probably change the result on retrial, it must support total vindication or exoneration, not merely present a reasonable doubt. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36. When a defendant is convicted of murder under a theory of accountability, an affidavit from a codefendant stating that the defendant “had nothing to do with the shooting” or “did not assist in the shooting” does not exonerate the defendant and support a claim of actual innocence. See *Edwards*, 2012 IL 111711, ¶ 39; *Anderson*, 401 Ill. App. 3d at 141.

¶ 27 Here, in support of his successive petition alleging actual innocence, defendant provided an affidavit from Williams, his codefendant, stating that defendant “had no prior knowledge of the robbery or that anyone would be shot on the night of September 28, 1994.” While Williams’ affidavit constitutes newly discovered evidence (*Edwards*, 2012 IL 111711, ¶ 38), the facts contained within it are not of such a conclusive character that they would change the result on retrial. *Adams*, 2013 IL App (1st) 111081, ¶ 36. The affidavit merely states that defendant “had no prior knowledge *** that anyone would be shot.” The affidavit does not state that defendant did not know Williams had a weapon when he hid in the trunk of the car or that defendant did not know that Williams might shoot someone if he was discovered in the trunk. To the contrary, defendant’s acts of bending forward and placing his hands on the hood of Simenson’s patrol car and later lying “spread-eagled” on that car suggest that defendant knew that Williams would shoot his weapon upon being discovered by police.

¶ 28 In this case, defendant was driving a vehicle knowing that an armed man was hiding in the trunk. When defendant was pulled over, he did not alert the police to Williams' presence and did not warn police about Williams and his weapon before they opened the trunk. Williams' affidavit does not exonerate defendant. Defendant could be found guilty of first degree murder by accountability even if he did not know for certain that someone would be shot on the night of September 28, 2014. The trial court properly denied defendant's motion for leave to file a supplemental postconviction petition.

¶ 29 CONCLUSION

¶ 30 The judgment of the circuit court of Will County is affirmed.

¶ 31 Affirmed.

¶ 32 JUSTICE WRIGHT, dissenting.

¶ 33 I agree with the majority that the trial court may properly allow the State's request to file a written objection to a defendant's motion for leave to file a successive postconviction petition. However, in this case, I believe the trial court erred by failing to set a schedule allowing defendant an opportunity to similarly file a written response to the State's written objection before the court's ruling. Respectfully, I would remand the matter to the trial court to provide defendant with an opportunity to file a response to the State's objection. On this basis, I respectfully dissent.