2019 IL App (1st) 160510-U

No. 1-16-0510

Order filed April 11, 2019

Fourth 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. 08 CR 5529
	)	
RAPHAEL LEVI,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant leave to file a successive postconviction petition where defendant failed to raise a colorable claim of actual innocence based on newly discovered evidence from an eyewitness.

¶ 2 Defendant Raphael Levi appeals from the denial of his *pro se* motion for leave to file a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He argues he should be permitted leave to file a successive postconviction petition

because he adequately set forth an actual innocence claim based on newly discovered evidence. For the following reasons, we affirm.

¶ 3 Following a 2009 jury trial, defendant was convicted of first degree murder of Terrance Jackson and sentenced to 60 years' imprisonment, which included a 25-year enhancement for personally discharging a firearm. We set forth the facts of the case in defendant's direct appeal (*People v. Levi*, 2012 IL App (1st) 100379-U (unpublished order under Supreme Court Rule 23)), and we recite them here to the extent necessary to our disposition.

¶ 4 At trial, the State's theory of the case was that a disagreement between defendant and Jackson escalated and resulted in defendant shooting Jackson. The defense theory was that defendant was asleep at his girlfriend's residence at the time of the shooting.

¶ 5 Jackson's wife, Joyce Jackson, testified she did not know defendant but had seen him "in the neighborhood." She knew defendant's nickname was "Nudie Man" and identified him in court. Three days before the shooting, on August 6, 2007, at around 6 p.m., Jackson was in his car picking Joyce up from his aunt's residence on the 9200 block of South University Avenue. Joyce received a call from Jackson, who was waiting in his car, telling her to "hurry up because Nudie Man and his brother are going to get him with a bat." As Joyce walked to Jackson's car, she observed Nudie Man holding a bat in his hands and standing with two other men across the street. On August 9, 2007, at around 6:45 a.m., Jackson's aunt informed Joyce that Jackson had been shot.

¶ 6 On cross-examination, Joyce testified she spoke with Detective Eileen Heffernan the day after Jackson was shot. She told Heffernan about the August 6, 2007 incident. However, she acknowledged that she did not call the police on that date because "nothing happened."

¶ 7 Curtis Moore testified that he lived on the 9200 block of South University across the street from Jackson's aunt. He owned a construction business and Jackson worked for him. Moore knew defendant as Nudie Man from the neighborhood and identified him in court.

¶ 8 On August 9, 2007, around 7 a.m., Moore instructed Jackson to park in the alley at the back of his residence before they drove to a job together. As Moore went to meet Jackson in the alley, he heard three gunshots. Moore immediately called Jackson, who stated, "Man, this n*** just shot me." When Moore asked who shot him, Jackson responded, "Nudie Man." Moore called 911 and told them that Jackson was driving to the hospital. The police arrived shortly thereafter and Moore spoke first with a plainclothes officer and later with two detectives. Moore was aware that defendant and Jackson knew each other and were "[n]ot too friendly that week."

¶ 9 On cross-examination, Moore acknowledged he could not recall whether he told a detective that Jackson named Nudie Man as his shooter. However, he clarified that he knew he told the police about his conversation with Jackson on the date of the shooting because they "went down the street" in search of the person Moore named as the shooter. Moore emphasized that he told the police several times that Jackson said, "Man, this n*** just shot me." He also told Detective Heffernan on the date of the shooting that he spoke with Jackson on the phone and gave her the details of the conversation, including that Nudie Man was the shooter. Moore did not tell Heffernan again that Jackson named Nudie Man as the shooter because "it was clear the first time."

¶ 10 Jeffrey Bloomingberg, Jackson's cousin, testified that on the day in question, he and Jackson were working for Moore. Bloomingberg and Jackson were in Jackson's white truck that morning. They drove to Moore's house between 7 and 7:30 a.m. Jackson spoke with Moore on

the phone and then parked in the alley in the back of the residence. While sitting in the alley, Jackson pointed out a "beat up," "burgundy" car that drove past and said he was fighting with the driver. Bloomingberg did not see the driver, and did not know whom Jackson was talking about.

¶ 11 As the two men sat in the car, a man walked into the alley holding a silver "small automatic" gun. He walked from the passenger side of the car to the driver's side, where Jackson was seated. Bloomingberg did not know the man, but it was daylight and he got a "good look" at him. Bloomingberg identified defendant in court as the person holding the gun.

¶ 12 After approaching the driver's side of the car, defendant and Jackson began discussing a disagreement between the two of them, indicating that they knew each other. Bloomingberg did not know what the men were talking about, but defendant reacted angrily. Defendant then asked Jackson whether he had money, and Jackson responded that he had $7. Defendant said that Jackson had more than $7 and Jackson took his wallet out to show defendant its contents. Bloomingberg was seated in the passenger seat for the entire conversation and was looking at defendant, hoping he would not shoot the gun. After arguing about the money, defendant "looked at [Jackson] real strangely and he shot." The first bullet missed Jackson, but defendant fired two more shots and hit Jackson in the chest. Defendant pointed his gun at Bloomingberg and retreated back into the alley.

¶ 13 Jackson subsequently called Moore and told him he had been shot. Jackson gave Moore the shooter's "street name," but Bloomingberg could not recall the nickname at the time of trial. Jackson thereafter started driving out of the alley. At 92nd Street and University, Bloomingberg switched to the driver's seat and drove Jackson to the hospital.

¶ 14 Bloomingberg spoke with police officers and told them that Jackson had named the shooter during the phone call with Moore. After speaking with the officers, Bloomingberg identified defendant as the shooter in a photographic array at approximately 9:45 a.m. on the day of the shooting. In the photograph, defendant had braided hair, but Bloomingberg clarified he did not have braids in his hair when he shot Jackson. Despite the discrepancy in hairstyles, Bloomingberg identified defendant's photo because he recognized his face. In February 2008, while Bloomingberg was in jail on a narcotics charge, he viewed a physical lineup and identified defendant as the shooter "right away." Bloomingberg acknowledged he had a prior drug conviction.

¶ 15 On cross-examination, Bloomingberg reiterated both that Jackson called Moore after he was shot, and Bloomingberg told the detectives that Jackson named his shooter during the phone call to Moore. Bloomingberg acknowledged that he was on probation at the time of the shooting and in jail when he identified defendant in a physical lineup.

¶ 16 Crystal Taylor testified she was friends with Ebony Buckley, who had a child with defendant. Taylor knew defendant as Nudie Man and identified him in court. In February 2008, Taylor was at Buckley's residence. Buckley and defendant got into a fight and Taylor overheard Buckley say that defendant was wanted for murder. Defendant subsequently told Taylor that he "shot the dude" and Buckley threatened to turn him into the police whenever she was mad at him. When Taylor asked defendant more about the murder, defendant said he "got into it" with a "dude" and was not "gonna let the dude kill him" so he shot and killed him first. Defendant also stated he was on the news and "America's Most Wanted." He told Taylor that he planned on

turning himself in but his mother was dying, and he was "waiting for somebody to sign a notarized letter."

¶ 17 At the end of February 2008, defendant called Taylor and asked her to meet him at a hotel on 79th Street and Normal Avenue. Taylor declined, called the police, and gave them defendant's whereabouts. Taylor acknowledged she did not call the police on the day she found out defendant shot someone.

¶ 18 Chicago police detective Eileen Heffernan testified that on the morning of the shooting, she went to the alley where the shooting occurred and then to the hospital, where she learned Jackson had died. She spoke with witnesses at the hospital and learned that Jackson had been shot inside his car, which was parked at the hospital. Heffernan also spoke with officers at the hospital before returning to the alley where the shooting occurred. By that time, she had information about a possible suspect whose nickname was Nudie Man. She later learned Nudie Man was defendant and put out an investigative alert with defendant's name and description.

¶ 19 While attempting to locate defendant, Heffernan learned he lived at an address in Dolton, approximately a 15 minute drive from the alley where Jackson was shot. She also learned Talania Williams, defendant's girlfriend, lived at the Dolton residence. Heffernan spoke with Williams on August 10, 2007, and ascertained that she had kicked defendant out of the house on the day of the shooting. The police were unable to locate defendant until February 2008, when they received a call from Buckley and Taylor. Following that phone call, defendant was arrested at a hotel on 79th Street. Bloomingberg subsequently made an "immediate identification" of defendant as Jackson's shooter in a physical lineup.

¶ 20 On cross-examination, Heffernan testified that when she spoke with Moore on the day of the shooting, he did not tell her that Jackson named Nudie Man as the shooter. Joyce informed her of an incident three days prior to the shooting where three men were coming toward her and Jackson with a bat, but she did not name Nudie Man as one of the men.

¶ 21 On redirect, Heffernan testified the suspect in Jackson's shooting was immediately identified after the shooting. The State then asked the following question:

> "[ASSISTANT STATE'S ATTORNEY]: When you talked to [Joyce], she did tell you that her husband said hurry up while in the car as the three men with bats approached that Nudie Man was out to get him?
>
> [WITNESS]: Yes."

¶ 22 The medical examiner testified that Jackson died from a gunshot wound to the chest.

¶ 23 Talania Williams, defendant's girlfriend, testified for the defense that defendant was living with her in Dolton in August 2007. He had a key to her apartment. On the day of the shooting, she saw defendant sleeping between 3 and 4:30 a.m. when she woke up. Williams woke up again around 8 a.m. and saw defendant sleeping. At some point that day, Williams woke defendant up and told him to leave her house "because it was rumored that he had killed someone." She acknowledged that she was asleep at 7 a.m. and did not know where defendant was at that time.

¶ 24 Rosie Swanigan, Williams' neighbor, testified for the defense that when she left for work between 8 and 8:30 a.m. on the morning of the shooting, she observed defendant's car, which was maroon and "really raggedy." She did not see defendant.

¶ 25 The State called Heffernan in rebuttal. Heffernan testified that in October 2007, Williams told her she woke up in her apartment between 4 and 5 a.m. and saw defendant, and woke again later between 9:30 and 10 a.m. Williams never said that she woke up at 8 a.m.

¶ 26 The jury found defendant guilty of first degree murder in which he personally discharged a firearm. The court sentenced defendant to a total of 60 years' imprisonment, including a 25-year firearm enhancement. We affirmed on direct appeal. *Levi*, 2012 IL App (1st) 100379-U (unpublished order under Supreme Court Rule 23).

¶ 27 On August 15, 2013, defendant filed an initial *pro se* postconviction petition, raising claims regarding hearsay testimony admitted at trial, jury instructions, the firearm enhancement included in his sentence, and numerous claims of ineffective assistance of trial and appellate counsel. On November 1, 2013, the trial court summarily dismissed defendant's petition. Defendant did not appeal the dismissal.

¶ 28 On April 3, 2015, defendant mailed a *pro se* motion for leave to file a successive postconviction petition and a motion for discovery. In his petition, defendant asserted, *inter alia*, a claim of actual innocence based on newly discovered evidence. He alleged that Caleb Charlston, an eyewitness to Jackson's murder, came forward and claimed someone other than defendant shot Jackson. Defendant claimed he could not raise this issue earlier because he was not at the scene of the crime and did not know who witnessed the crime.

¶ 29 In support of his petition, defendant attached a notarized affidavit from Charlston dated February 24, 2015.[1] Charlston averred that, at around 7 or 7:30 a.m. on August 9, 2007, he was leaving his girlfriend's residence on the 9200 block of South University Avenue and witnessed

[1] The first part of the affidavit uses the spelling "Charlston," but the signature on the affidavit is spelled "Charleston."

Mark Cooper fire a gun at two men in a white pickup truck in the alley. Charlston feared for his life and ran to the front of the residence. He did not come forward sooner because he feared gang retaliation.

¶ 30 In his own affidavit, defendant averred that he was actually innocent and could not have discovered the eyewitness evidence sooner because he did not know Charlston and had "no way of knowing" that Charlston witnessed the crime until he contacted defendant in 2015. He further averred that he "wore long braids" at the time of the shooting and was unfairly arrested because his wife lied to police.

¶ 31 On December 17, 2015, the court denied defendant leave to file a successive postconviction petition and his motion for discovery. With respect to defendant's actual innocence claim, the court found that, even assuming the evidence in Charlston's affidavit was newly discovered and not cumulative, it was not material nor "so conclusive that it would overcome the evidence presented at trial." Specifically, the court noted that, while the testimony inculpates Mark Cooper, it does not exculpate defendant. This appeal follows.

¶ 32 On appeal, defendant contends he should have been permitted leave to file a successive postconviction petition because he set forth a colorable claim of actual innocence based on newly discovered evidence. Specifically, he asserts Charlston's purported testimony demonstrated Mark Cooper, not defendant, shot Jackson, and that evidence "adds to the alibi evidence presented at trial" and would probably change the result on retrial.

¶ 33 The Act provides a means for criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). However, the Act generally contemplates the filing of only one petition. *People v. Ortiz*, 235 Ill.

2d 319, 328 (2009). Prior to filing a successive petition, a defendant must first obtain "leave of court." See 725 ILCS 5/122-1(f) (West 2014); *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010).

¶ 34 In order to file a successive petition, a defendant must satisfy the cause and prejudice test or the "fundamental miscarriage of justice" exception, set forth as a claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶¶ 22-23; 725 ILCS 5/122-1(f) (West 2014). Where, as here, the defendant seeks to relax the bar against successive postconviction petitions on the basis of actual innocence, the court should deny such leave only when 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." *Edwards*, 2012 IL 111711, ¶ 24. In other words, leave of court should be granted only where the supporting documentation raises the probability that " 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' " *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). We review the trial court's denial of leave to file a successive petition *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13.

¶ 35 Postconviction petitions may assert freestanding claims of actual innocence based on newly discovered evidence under the due process clause of the Illinois Constitution. *Ortiz*, 235 Ill. 2d at 333. To succeed on a claim of actual innocence, a petitioner must present evidence that is (1) newly discovered, (2) material and noncumulative, and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96 (citing *People v. Washington*, 171 Ill. 2d 475, 489 (1996)).

¶ 36 Here, we find the trial court properly denied defendant leave to file a successive petition. In *Edwards*, our supreme court noted that the United States Supreme Court has emphasized that

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.' " *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup*, 513 U.S. at 324). We initially note that Charlston's affidavit does not amount to *reliable* new evidence. Although in his affidavit Charlston claims he did not come forward sooner due to fear of gang retaliation, it does not explain what prompted him to come forward eight years after the shooting or how he, an allegedly independent witness, got into contact with defendant or knew to get into contact with defendant, an apparent stranger. Given these circumstances, we cannot say that Charlston's affidavit provides reliable evidence from a trustworthy witness.

¶ 37 More importantly, however, ignoring the reliability of the affidavit and assuming the purported testimony was newly discovered and noncumulative, the evidence is not so conclusive that it would probably change the result on retrial. The evidence at trial established defendant, also known as Nudie Man, and Jackson had an ongoing dispute at the time of the shooting. Defendant walked up to Jackson's vehicle, argued with him, and then shot him several times. Bloomingberg did not know defendant, but got a "good look" at the shooter because it was daylight and the shooter stood at the car arguing with Jackson. He identified defendant from a photo array less than three hours after the shooting, and again in a physical lineup after defendant was arrested. Moore testified that Jackson identified defendant as the shooter immediately after he was shot. Taylor testified that defendant admitted to shooting someone, although admittedly, he did not name Jackson specifically. The witnesses called in defendant's defense did little to support an alibi defense because they could not testify where defendant was at 7 a.m., the time of the shooting.

¶ 38 Nevertheless, despite this evidence, defendant claims Heffernan's testimony impeached Moore and Joyce, thereby undermining the State's evidence and proving Charlston's affidavit would change the result on retrial. We disagree. While Heffernan denied that Moore told her about Jackson naming Nudie Man as the shooter, Moore testified repeatedly that he told police that Jackson identified Nudie Man as the shooter, and stated he knew that he told them because officers immediately went looking for the named shooter. Bloomingberg corroborated Moore's testimony on this point. He testified that he heard Jackson give the shooter's "street name" to Moore during their phone call. Heffernan's testimony regarding whether Joyce named Nudie Man as one of the men carrying a bat in the days leading up to the shooting is unclear. On cross-examination, Heffernan testified Joyce did not name Nudie Man, and on redirect, she agreed with the State that Joyce told her Jackson told her to "hurry up" because "Nudie Man was out to get him." Despite these ambiguities, we do not find any impeachment significant enough that the addition of Charlston's purported testimony would probably change the result on retrial.

¶ 39 Defendant also makes much of the fact that the State presented only one eyewitness, Bloomingberg, and that his identification was unreliable because he had a criminal history. We are likewise unpersuaded by these contentions. Although Bloomingberg was the only eyewitness, he was in the vehicle during the shooting, "got a good look" at defendant and identified him in a photo array shortly thereafter, noting that he recognized defendant's face, despite a difference in hairstyles. Bloomingberg again identified defendant in a physical lineup after defendant was arrested in February 2008. It is well settled that the positive and credible testimony of even a single witness is sufficient to conviction. *People v. Gray*, 2017 IL 120958, ¶ 36. Further, as detailed above, his identification was not the only evidence against defendant.

¶ 40 We additionally point out that in this court, defendant contends at varying times that Charlston's purported testimony "challenges" the State's identification evidence, "adds to the alibi evidence," exonerates him, and "would establish reasonable doubt" that he shot Jackson. We reiterate that the standard is whether the evidence is so conclusive that it would "probably lead to a different result." *Coleman*, 2013 IL 113307, ¶ 96 (citing *Ortiz*, 235 Ill. 2d at 336). Even if Charlston's purported testimony would bolster defendant's alibi defense, in light of the evidence against defendant, it falls short of the total exoneration required to support a claim of actual innocence. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40 (noting the hallmark of actual innocence is " 'total vindication' or 'exoneration' ") (quoting *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008)). Charlston's purported testimony that Mark Cooper was shooting into a white truck at the relevant time conflicts with Bloomingberg's identification of defendant as the shooter, but fails to exonerate defendant in light of all of the evidence against him. As mentioned, this evidence consisted of, in part, Moore's testimony that Jackson actually named defendant, albeit using his nickname, as the shooter. Thus, it does not 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, ¶ 24 (quoting *Schlup*, 513 U.S. at 327).

¶ 41 In light of the foregoing, we affirm the trial court's denial of defendant's motion for leave to file a successive postconviction petition.

¶ 42 Affirmed.