2019 IL App (1st) 161728-U

No. 1-16-1728

Order filed March 7, 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. 06 CR 6358
	)	
JOSEPH MONTGOMERY,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The denial of the defendant's request for leave to file a successive postconviction petition is affirmed where the defendant did not present a freestanding claim of actual innocence and the affidavits presented would not have changed the result on retrial.

¶ 2 Defendant Joseph Montgomery appeals from the circuit court's order denying him leave to file a successive petition under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) relating to his conviction for first degree murder in the 2005 shooting death

of Monty Grant. On appeal, defendant contends his successive petition presented a claim of actual innocence based on the affidavits of two individuals who attested they observed someone other than defendant shoot the victim. We affirm.

¶ 3 Defendant elected a jury trial. Lucille Loggers testified that about a month before the shooting, she accepted a ride from Grant. Grant, Curtis James and another male she knew as Moo-Moo were in the car. After one stop to drop off Moo-Moo and another stop to drop off either James or Grant (she was not sure which), Loggers was in the vehicle with the remaining male (either James or Grant), who touched her and told her to take her clothes off. Loggers refused and exited the vehicle.

¶ 4 On October 29, 2005, Loggers was visiting a female friend at the Stateway Gardens housing complex on South Federal Street in Chicago. Loggers observed James and Grant arrive at the building. There, she heard James and Grant ask about marijuana. Loggers told her friends those were the two males who tried to assault her. After James and Grant fled from the Stateway Gardens building and Loggers pursued them, she returned to the building and told defendant they "tried to do something to me or whatever."

¶ 5 Loggers entered a vehicle with Jarrod Johnson and defendant, and defendant drove them to 37th Street. Defendant and Johnson exited the vehicle. Loggers did not observe what happened but heard "some shots." Defendant and Johnson returned to the vehicle. Loggers did not observe defendant with a gun. On cross-examination, Loggers said that when defendant exited the vehicle, others were standing "right around," including the boys who had chased James and Grant earlier.

¶ 6 A few days later, Loggers went to Grand Rapids, Michigan. She returned to Chicago after hearing that in February 2006, defendant had been arrested. On April 9, 2006, Loggers went to the police station; however, she denied telling a detective she observed defendant shoot Grant.

¶ 7 Chicago police detective Anthony Powell testified that, on April 9, 2006, Loggers told him that on the night Grant was killed, defendant approached her and asked her what happened. Loggers told him, and defendant told her to enter the vehicle. Defendant drove to an alley on 37th Street near Wabash. Loggers heard a shot, turned and observed defendant shoot someone. Johnson was struggling with another person. Loggers did not tell him a crowd had gathered when the shooting occurred or that she heard the shot come from a crowd down the street.

¶ 8 Powell also asked Loggers where she went after the shooting. Loggers said a woman named Deneen took her to a motel room where defendant was staying. Deneen left and returned a few times without offering to take Loggers home. Loggers was taken home at some point in January.

¶ 9 Assistant State's Attorney Tom Driscoll testified that he spoke to Loggers on April 9, 2006. Loggers recounted that she told defendant on the night of the shooting that she observed two boys who had tried to assault her. Johnson and James started fighting. She heard three or four shots after which defendant returned to the vehicle. A couple of days after the shooting, Loggers' friend Deneen and a girlfriend of defendant told Loggers that she needed to "go somewhere for a while." They drove her to a motel where defendant arrived three days later. Deneen and defendant's girlfriend brought food to Loggers and took her shopping. After Loggers stayed at the motel for about two and a half months, defendant drove Loggers home.

¶ 10 James testified he, Grant and defendant knew each other from growing up at Stateway Gardens. Between 11 p.m. and midnight on October 29, 2005, James and Grant went to that location in search of marijuana. James observed Loggers in the lobby but did not know her name. Loggers told some other people present to "get" James and Grant, and three or four people chased them out of the building.

¶ 11 James and Grant ran away and returned to James's truck to find its windows were smashed. As James and Grant stood near the truck, defendant drove up to them. Loggers sat in the passenger seat and Johnson was in the back seat. James knew Johnson. Defendant and Johnson exited the vehicle. Johnson grabbed James around his upper arms and held him while defendant shot Grant. James heard a "click" and then heard three shots.

¶ 12 James testified Loggers did not exit the vehicle, and Grant did not speak before being shot by defendant. Defendant and Johnson left. James did not observe anyone else with a gun. James identified defendant and Johnson in a police photo array that night and identified Loggers the next day.

¶ 13 Johnson testified he had known defendant since childhood. On the night of the shooting, he observed Loggers in defendant's vehicle. Johnson asked defendant to drive him to a restaurant at 39th and Wallace. Defendant pulled into an alley near 37th Street and stopped the vehicle, and defendant and Johnson exited the vehicle. Loggers remained in the vehicle.

¶ 14 James was standing nearby; Johnson had also known James since childhood. James was standing with Grant, who Johnson did not know. Johnson was speaking to James and hugging James when he heard four or five shots. Johnson looked at defendant, who was pointing a gun at

Grant. Defendant told Johnson to enter the vehicle. In the vehicle, defendant told Johnson and Loggers he "didn't want to hear [anything] else about that" or he would shoot them.

¶ 15 Michael Bennett testified he met defendant in 2005 through Michael Gordon, a mutual friend. In November 2005, Bennett observed defendant at a steakhouse, and defendant said he had killed Grant because he tried to sexually assault Loggers. Also in November 2005, Bennett waited outside with another man while Gordon went into a hotel where defendant and Loggers had met. After about 45 minutes, Gordon returned with a gun that he told Bennett to discard. Bennett took the gun home. When Bennett was arrested in December 2005 for criminal trespass to a vehicle, he told police he had a gun from Grant's murder, and the gun was retrieved from Bennett's home.

¶ 16 An assistant Cook County medical examiner testified Grant was shot three times in the back and once in the chest. Two bullets were recovered from Grant's body. The State police firearms examiner testified one of the recovered bullets came from the weapon recovered from Bennett's home.

¶ 17 In the defense case, a stipulation was presented that a Chicago police detective would testify that on October 31, 2005, he questioned James about a female named Lucille. James told the detective he vaguely remembered the incident; he said that a month earlier, he had picked up a girl in Stateway Gardens and drove her around. When James told her he wanted to go home, the girl was upset and exited the vehicle.

¶ 18 The defense called Michael Gordon, who testified that he knew defendant and Johnson. A few days after October 29, 2005, Johnson called Gordon and told him to come by and pick something up. When Gordon arrived, Johnson handed him a .357 revolver and told him to get rid

of it. Gordon gave the weapon to Bennett. Gordon denied telling a detective that defendant told him to get rid of the weapon.

¶ 19 In the State's rebuttal case, Powell testified he interviewed Gordon on February 14, 2006, and Gordon told him defendant ordered him to get rid of the gun and later asked if he had. Gordon said defendant was "on the run" and that defendant's sister gave Gordon money to deliver to defendant.

¶ 20 The jury found defendant guilty of first degree murder and found that he had personally discharged a firearm that proximately caused death. Defendant filed a motion for a new trial, asserting, *inter alia*, that the testimony of Johnson, Bennett and Gordon was not credible. When the parties appeared in court for a hearing on that motion, defense counsel stated he had received a letter from Don Campbell, who was Johnson's cellmate at the Lawrence Correctional Center. In the letter, Campbell stated Johnson had confessed to him that he testified falsely at defendant's trial. Johnson also told Campbell he did not observe defendant shoot the victim but testified as such under a threat from prosecutors. Attached to the letter was a signed and notarized affidavit of Johnson stating that he spoke to Campbell.

¶ 21 A hearing was held at which Johnson testified. He acknowledged signing the affidavit but said his trial testimony was true and his remarks to Campbell did not involve this case. The trial court denied defendant's motion for a new trial, stating that, even if Johnson recanted his trial testimony, that disavowal "would not have made a difference *** on the ultimate issue of guilt." The court denied the defense's request to have Campbell brought in to testify.

¶ 22 The trial court sentenced defendant to 75 years in prison. That term included a 25-year firearm enhancement.

¶ 23 On direct appeal, defendant argued: (1) the trial court's questioning of potential jurors did not comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007); (2) the court erred in denying his request for a continuance on the first day of trial; (3) there was prosecutorial misconduct during closing argument based on the prosecutor's reference to statements that were not admitted as substantive evidence of defendant's guilt; and (4) defendant's sentence was excessive. This court affirmed defendant's conviction and sentence. *People v. Montgomery*, No. 1-08-3623 (2010) (unpublished order under Supreme Court Rule 23).

¶ 24 In 2011, defendant filed his initial petition under the Act, raising several claims of ineffectiveness of his trial and appellate counsel. In addition, defendant asserted he could present newly discovered evidence of his actual innocence based on Campbell's account that Johnson confessed he shot the victim; he argued that Campbell's affidavit attesting as such had been lost in the prison mail. He also attached an affidavit of his mother, Sandra Montgomery, in which she attested to the mail issue and the substance of Campbell's story. Defendant also claimed the State used the perjured testimony of James and Johnson to convict him.

¶ 25 The circuit court summarily dismissed defendant's initial postconviction petition, stating, *inter alia*, that defendant had not raised an actual innocence claim based on newly discovered evidence. In addition, the court found that defendant already raised the issue of Johnson's purported statements to Campbell in his posttrial motion and had provided no affidavit from Campbell. On appeal, this court affirmed the summary dismissal of defendant's initial postconviction petition. *People v. Montgomery*, 2014 IL App (1st) 120584-U, ¶ 14.

¶ 26 In 2015, defendant filed a motion for leave to file a successive postconviction petition, along with the petition itself. In that petition, defendant asserted a claim of actual innocence

based on the February 2015 affidavits of Correail Nash and Nathaniel McCray, who each claimed they witnessed the shooting and that Johnson, not defendant, shot Grant.

¶ 27 In Nash's signed and notarized affidavit, he attested he spoke to defendant in January 2014 while serving a 32-year sentence at Menard Correctional Center (Menard). Nash averred that at about 11:30 p.m. on October 29, 2005, he observed defendant driving a maroon-colored vehicle near 37th and State, where defendant and Johnson exited the vehicle. Nash knew Johnson. According to Nash, defendant and Johnson approached James and Grant near an alley; Johnson grabbed Grant and placed him in a bear hug. Nash said he observed Johnson pull out a gun and fire several shots at Grant. Nash ran away because he did not want to "get involved" and did not speak to police or an attorney about what he observed. Nash attested he met defendant in 2014 while at the Menard prison and told defendant he had witnessed the shooting.

¶ 28 McCray attested in a signed and notarized affidavit that he met defendant while incarcerated at Menard. McCray attested that between 11:30 and midnight on October 29, 2005, he was near the Stateway Gardens complex and observed defendant drive up in a maroon-colored Chrysler. Johnson and defendant exited the vehicle and walked toward James and Grant. After Johnson "played around with Grant" and grabbed him, Johnson shot Grant two or three times. McCray left because he did not want to be questioned by police, stating there was a "stop snitching code in the neighborhood" and he had previously been in "trouble with the police." McCray attested that he learned in 2007 that defendant had been convicted of Grant's murder and that Johnson "got out" because he testified against defendant. McCray averred that defendant "did not even have a gun that evening" and said he offered that account when he encountered defendant at Menard in November 2014.

¶ 29 Defendant also attached his own signed and notarized affidavit averring his innocence. Defendant averred he and Johnson confronted James and Grant about Loggers' claim that she was assaulted. Defendant asserted that Johnson "began to tussle with one of them" and Johnson then "pulled out a gun and fired at Grant several times, causing him to fall down." Defendant said he did not know that Johnson had a gun. Defendant averred he did not have a gun that night and did not shoot anyone. He attested that at Menard in November 2014, Nash and McCray told him they witnessed the shooting and observed Johnson shoot the victim.

¶ 30 Also in his successive petition, defendant asserted the State convicted him by using the perjured testimony of James and Johnson. He maintained the affidavits of Nash and McCray established that James and Johnson gave untruthful accounts at trial.

¶ 31 In an October 14, 2015, written order, the circuit court denied defendant leave to file his successive petition, finding he had not sufficiently stated an actual innocence claim. The circuit court also concluded that defendant's claim based on the accounts of Nash and McCray did not represent a freestanding claim of actual innocence because defendant also relied on those affidavits to support his claim that the State presented false testimony from James and Johnson.

¶ 32 Defendant moved for reconsideration of the circuit court's ruling, and the circuit court denied that motion. Defendant now appeals.

¶ 33 On appeal, defendant contends his successive petition raises a colorable claim of actual innocence because the affidavits of Nash and McCray indicating that someone else shot the victim are: newly discovered evidence; material and not cumulative; and of such conclusive character that they would probably change the result on retrial. He argues the actual innocence

standard does not require him to show that he is, in fact, innocent of the crime but rather only that the new evidence would change the result if it was presented at a trial.

¶ 34 The Act provides a statutory remedy to criminal defendants who claim that a substantial violation of their constitutional rights occurred at their trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. To this end, the Act generally contemplates the filing of only one postconviction petition and provides that "[a]ny claim of [a] substantial denial of constitutional rights not raised in the original or amended petition is waived." *People v. Ortiz*, 235 Ill. 2d 319, 328-29 (2009); 725 ILCS 5/122-3 (West 2014).

¶ 35 To file a successive postconviction petition, a defendant must first obtain leave of court, and further proceedings on the petition do not take place until leave is granted. 725 ILCS 5/122-1(f) (West 2014); *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010). Where a successive petition is based on a claim of actual innocence, the circuit court should deny leave to file the petition only where it is clear from a review of the petition and the supporting documentation provided that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. *People v. Sanders*, 2016 IL 118123, ¶ 24. Leave of court to file a successive petition should be granted where the petition and documentation raise 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. This court reviews the denial of leave to file a successive petition *de novo*. *People v. Eddmonds*, 2015 IL App (1st) 130832, ¶ 24.

¶ 36 When bringing a successive postconviction petition, a petitioner faces "immense procedural default hurdles" because a second petition filed under the Act "plague[s] the finality of criminal litigation." *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). Accordingly, successive

petitions are allowed only under the precept of fundamental fairness or if the defendant can establish cause and prejudice for not raising the issue in an earlier proceeding. *People v. Nicholas*, 2013 IL App (1st) 103202, ¶ 32. Fundamental fairness is implicated when a defendant sets forth a claim of actual innocence based on newly discovered evidence which could not have been presented earlier. *Ortiz*, 235 Ill. 2d at 332. Thus, a defendant filing a successive petition may assert a freestanding claim of actual innocence based on newly discovered evidence. *Ortiz*, 235 Ill. 2d at 332. A freestanding actual-innocence claim is independent of any claims of constitutional error at trial and focuses solely on a defendant's factual innocence in light of new evidence. *People v. Coleman*, 2013 IL 113307, ¶ 83. Such a claim is cognizable under the Act because the wrongful conviction of an innocent person violates due process under the Illinois Constitution. *People v. Starks*, 2012 IL App (2d) 110324, ¶ 31 (citing *People v. Washington*, 171 Ill. 2d 475, 489 (1996)).

¶ 37 The State contends at the outset that, as the circuit court expressly found in its order, defendant has not raised a "freestanding" claim of actual innocence. The State asserts that in addition to using the Nash and McCray affidavits to maintain he is actually innocent of the crime because Johnson was the gunman, defendant also relied on the affidavits to support his claim that he was convicted based on Johnson's perjured testimony.

¶ 38 Defendant responds that his actual innocence claim based on those affidavits represents a "freestanding" claim because he has not also raised his perjured testimony claim in this appeal. We agree with the State.

¶ 39 The record shows that both claims were included in defendant's successive petition and that both of those claims refer to the affidavits of Nash and McCray. See *People v. Brown*, 371

Ill. App. 3d 972, 984 (2007) (a claim is not freestanding if its evidentiary support is also used to support a separate claim). Moreover, an allegation that the State convicted a defendant using perjured testimony does not demonstrate the defendant's actual innocence but is instead directed at the sufficiency of the State's evidence at trial. *Washington*, 171 Ill. 2d at 495 (McMorrow, J., specially concurring). The fact that, in this appeal, defendant has not pursued his claim that the State presented perjured testimony at trial is of little import to our determination that defendant's actual innocence claim is not freestanding. Stated differently, where defendant raised both claims in his petition, defendant's choice of what issue or issues to raise on appeal from the denial of leave to file the successive petition does not transform the nature of the contentions themselves. Accordingly, because defendant's claim of actual innocence is not freestanding, the circuit court did not err in denying him leave to file his successive petition.

¶ 40 That said, even assuming *arguendo* that defendant has presented a freestanding claim of actual innocence, we conclude the affidavits of Nash and McCray, when considered with the evidence presented at trial, would not have changed the result on retrial. To present a claim of actual innocence, the evidence in support must be: (1) newly discovered; (2) not discoverable earlier through the exercise of due diligence; (3) material and not merely cumulative; and (4) whether the evidence is of such conclusive character that it would probably change the result on retrial. *Coleman*, 2013 IL 113307, ¶ 96.

¶ 41 On appeal, the parties mainly dispute the fourth and most important element of such a claim. To meet that test and require further proceedings, the new evidence presented in support of the defendant's actual innocence claim must place the trial evidence in a different light and undermine the court's confidence in the factual correctness of the guilty verdict. *Coleman*, 2013

IL 113307, ¶ 97. Actual innocence involves the defendant's exoneration of the charged offense, not the sufficiency of the evidence or whether the defendant was proved guilty beyond a reasonable doubt. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (the hallmark of an actual innocence claim is the defendant's total vindication of the crime in question). The evidence in question must "raise the probability that it is more likely than not that no reasonable juror would have convicted [the defendant] in light of the new evidence." *Edwards*, 2012 IL 111711, ¶ 33.

¶ 42 In light of the evidence presented at trial, we cannot say the affidavits of Nash and McCray raise the probability that it is more likely than not that no reasonable juror would have convicted defendant. To summarize the relevant trial testimony, James, who had known defendant for many years, testified that defendant shot Grant while Johnson was holding onto James. Johnson, who was with defendant just before the shooting, testified he was speaking to James and hugging him when he heard several shots and observed defendant pointing the gun at Grant. Although Loggers testified at trial that she was in the vehicle when a shooting occurred but did not observe defendant with a gun, she was impeached with her prior statement to Detective Powell that she did observe defendant shoot someone. Later, Loggers and defendant hid out at a motel for several months. Bennett testified that when he observed defendant at a steakhouse, defendant confessed to killing Grant, and Bennett hid the weapon in November 2005 at the behest of Gordon, a mutual friend of Bennett and defendant. One of the two bullets recovered from the victim's body came from that weapon.

¶ 43 Both Nash and McCray averred in their affidavits that they witnessed the shooting and that Johnson was the person who shot Grant. That testimony would be considered along with the accounts of the State witnesses that defendant was the shooter and told Bennett he shot the

victim, including Loggers' impeached testimony. While defendant argues the accounts of Nash and McCray would be considered alongside those of the witnesses at trial, those would merely represent conflicting accounts to be weighed by the trier of fact. We cannot say that the affidavits of two people that defendant met while in prison would have changed the guilty verdict in this case.

¶ 44 Accordingly, the circuit court's order denying defendant leave to file a successive postconviction petition is affirmed.

¶ 45 Affirmed.