2019 IL App (1st) 162054-U

Nos. 1-16-2054 & 1-16-2123 (consolidated)

Order filed June 12, 2019

Third 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. 98 CR 22730
	)	
SHAUN PROFIT,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Denial of defendant's motion for leave to file a second successive postconviction petition is affirmed where the petition failed to show actual innocence based on newly discovered evidence, since defendant's affidavit alleged that prior to trial, defendant knew the facts underlying the allegedly new evidence.

¶ 2 Defendant Shaun Profit appeals from the denial of his *pro se* motion for leave to file a second successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS

5/122-1 *et seq.* (West 2014)).[1] On appeal, defendant argues he was entitled to file a successive postconviction petition based on newly discovered evidence showing his actual innocence, namely, an affidavit from a State witness's boyfriend alleging the witness admitted to falsely testifying against defendant. We affirm.

¶ 3 Defendant, Simione Dunn,[2] and Katrina Dent were charged in the same indictment with attempt first degree murder (720 ILCS 5/8-4 (West 1998); 720 ILCS 5/9-1 (West Supp. 1997)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 1996)), armed violence (720 ILCS 5/33A-2 (West 1998); 720 ILCS 5/12-4(a) (West Supp. 1997)), home invasion (720 ILCS 5/12-11(a)(1), (2) (West 1996)), armed robbery (720 ILCS 5/18-2 (West 1998)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 1996)), and aggravated battery (720 ILCS 5/12-4(a) (West Supp. 1997)), arising from an incident in Forest Park on July 24, 1998. Defendant and Dunn were tried simultaneously in severed proceedings. We set forth only the evidence from defendant's bench trial that is relevant to the issue on appeal.

¶ 4 Pursuant to a plea bargain, Dent testified that on July 24, 1998, she and defendant were "just friends." On that day, she, a man named Doeman, Dunn, and defendant drove to Leon Forrester's apartment on the 500 block of Des Plaines Avenue in Forest Park to purchase cannabis. Dent approached Forrester's apartment door with Dunn, who showed her a gun. Forrester let Dent and Dunn into the apartment and sat in a chair. Dunn then got up to use the bathroom located behind Forrester, exited the bathroom wearing latex gloves, and shot Forrester.

[1] Defendant filed two motions for leave to file a late notice of appeal following the circuit court's order denying leave to file his second successive postconviction petition (appeal numbers 1-16-2054 and 1-16-2123). We allowed both motions and consolidated the cases for review.

[2] While Simione Dunn's last name is spelled "Dunne" elsewhere in the record, the parties do not dispute that Simione Dunn and Simione Dunne are the same person.

Dent screamed and ran to the front door. When she opened the door, she saw defendant wearing latex gloves and carrying a green bag. Dent returned to the car, defendant and Dunn joined her, and Doeman drove them away. On July 28, 1998, two detectives and a police officer went to Dent's home, and she received a phone call from defendant. Dent invited defendant over, and defendant was arrested when he arrived.

¶ 5 Forrester testified that Dent arrived at his apartment with Dunn, who had a "firearm." Forrester sat down in the living room, and Dunn got up and used the bathroom. Then, Forrester heard Dunn leave the bathroom and was shot in the head. While on the floor, Forrester saw Dunn "pull down shoeboxes" from a closet and "take everything." Another man entered the apartment, stepped over Forrester, went to the bathroom, and shot Forrester in the neck. Dunn addressed the second person by name, and Forrester was then shot a third time in the shoulder. At the hospital, a detective showed Forrester a series of photographs, and Forrester identified Dunn as the first man in the apartment who shot him in the head. Forrester could not recall telling the police he heard one man in the apartment say another man's name.

¶ 6 The State entered evidence showing that Forrester had bullet holes in his neck, right upper arm, and right thumb, and had a bullet lodged in his right maxillary sinus above his upper cheek.

¶ 7 Forest Park police officer Cheryl Baker testified that on July 28, 1998, she and an investigator went with Dent to her apartment and saw Dent receive a phone call. Defendant arrived at the apartment and was arrested.

¶ 8 Defendant testified that he did not go to Forrester's apartment with Dent on July 24, 1998, and that he did not know Forrester. According to defendant, the police arrested him when

he was visiting the apartment of Dent, his girlfriend. Defendant also testified that on July 17, 1998, he was at a beauty shop with Dunn, Dent, and a man named Anthony Scott. There, Dunn told defendant "he had been intimate with" Dent and "had to physically remove [Dent] out of the shop." While Dent was removed from the shop, she said she would "get even," and stated, "I am going to get you, [Dunn]."

¶ 9 The trial court found defendant "guilty as charged." The court noted that it had problems with the testimony and demeanor of Dent, who was a "knowing *** participant in a criminal enterprise." Nonetheless, the court found that other evidence, including Forrester's testimony, "fit together" with Dent's testimony. Specifically, Dent indicated that three individuals, including Dunn and defendant, "went with her to the apartment" and "conducted a criminal enterprise including shooting and robbing the victim ***." The trial court noted that "Forrester indicates a similar story of what occurred," and that he had sufficient time to observe and accurately identify Dunn. The court stated that in order for it to believe otherwise, there would have to be "a conspiracy between Dent and the police and all these other people," in which case Forrester would have also identified defendant for the police. The court sentenced defendant to consecutive prison terms of 18 years for attempt first degree murder and 18 years for armed robbery, and merged the other counts.

¶ 10 On direct appeal, defendant argued that the State failed to prove him guilty beyond a reasonable doubt, and that his consecutive sentences were unconstitutional. *People v. Profit*, No. 1-00-0353 (2001) (unpublished order under Supreme Court Rule 23). We affirmed. *Id.*

¶ 11 In 2002, defendant filed a postconviction petition, alleging that the State failed to prove beyond a reasonable doubt a fact that resulted in a greater penalty, and claiming that the State

used "perjured testimony" against him. The circuit court summarily dismissed defendant's petition, finding there were no constitutional issues of merit that could not have been or were not raised before the appellate court. Defendant appealed from the circuit court's denial. We granted appellate counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed. *People v. Profit*, No. 1-02-3154 (2003) (unpublished order under Supreme Court Rule 23).

¶ 12 On November 6, 2003, defendant filed a motion for leave to file a successive postconviction petition. The circuit court allowed defendant leave to file the petition, advanced it to the second stage, and appointed counsel for defendant. In July 2007, defendant filed a *pro se* "amended petition," alleging, among other things, that trial counsel was ineffective for not objecting when his trial was conducted simultaneously with Dunn's severed trial, that he received a sentence enhancement not included in his indictment, and that the evidence against him was insufficient. The State filed a motion to strike this *pro se* pleading, which the court granted.

¶ 13 In October 2007, defendant filed a *pro se* "supplemental" postconviction petition, alleging, *inter alia*, that the State failed to disclose the plea bargain it made with Dent, that he would not have waived his right to a jury trial had he known of the deal, and that trial counsel was ineffective for not objecting to the State's use of Dent's inconsistent testimony. The State filed a motion to dismiss defendant's successive *pro se* petition, which the circuit court granted. Defendant appealed from the court's ruling, arguing his postconviction counsel acted unreasonably by not adopting his various *pro se* pleadings and amending them. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 1. We affirmed. *Id.* at ¶ 34.

¶ 14 On December 8, 2015, defendant brought a motion for leave to file a second successive postconviction petition. Defendant alleged, in relevant part, that he is actually innocent based on newly discovered evidence, namely, the affidavit of Dent's boyfriend, Tony Williams. Williams's affidavit, which defendant attached to the motion, is dated July 3, 2014, and states:

> "2. *** I, Tony Williams, and Katrina Dent, [h]ave a child together.
>
> ***
>
> 4. *** Katrina Dent, told me that the Forest Park, Illinois investigative detectives and Cook County State's attorney threaten[ed] to charge her with Home Invasion, Armed Robbery, Attempt First Degree Murder and take away her child, if she didn't testify against Shaun Profit.
>
> 5. I just recently found out that Shaun Profit was the guy Katrina Dent lied on at his trial.
>
> 6. If in any event, I'm ever summoned to substantiate any of these allegations, my testimonies will be exactly as mentioned in this affidavit."

Defendant asserted in his motion that this affidavit "did not exist at the time [he] filed his initial [postconviction] petition," and that he did not receive it until 2014.

¶ 15 Defendant additionally attached his own affidavit, which states that on July 28, 1998, he was placed inside a holding cell at a police station. There, Dent cried and called out defendant's name, and she told defendant that detectives were "threatening to lock me up and take away my child" if she did not "lie on" him. Dent apologized to defendant and stated, "I hope you can understand why I'm doing this." Defendant's affidavit also alleges he informed trial counsel of

this interaction, and trial counsel said there was "not much she could do because this information was not in the discovery."

¶ 16 On April 22, 2016, the circuit court entered an order denying defendant leave to file the successive petition. The court found that Williams's affidavit was inadmissible hearsay, and that defendant's own affidavit showed he "was aware of this potential evidence." The court also found that defendant had "not demonstrated that this alleged evidence is so conclusive that it would probably change the result on retrial."

¶ 17 On appeal, defendant argues that he set forth a colorable claim of actual innocence and was entitled to file a successive postconviction petition. According to defendant, Williams's affidavit constituted newly discovered, material, and non-cumulative evidence, which showed that Dent had admitted to a "disinterested party" that she falsely implicated defendant under threats from the police and prosecutors. In response, the State argues that defendant's affidavit acknowledges he knew Dent was purportedly lying when he was first arrested. The State also contends that Williams's affidavit would not bring a new result on retrial because it contains inadmissible hearsay.

¶ 18 The Act (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a procedure for persons under criminal sentence to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Under section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2014)), "[o]nly one petition may be filed by a petitioner under this Article without leave of the court." Further, "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2014). The bar against

successive postconviction proceedings will be relaxed, however, where there was a "fundamental miscarriage of justice," an exception that applies where the petitioner has shown "actual innocence." (Internal quotation marks omitted.) *People v. Edwards*, 2012 IL 111711, ¶ 23.

¶ 19 "[T]he due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *People v. Ortiz*, 235 Ill. 2d 319, 331 (2009). "[A]ctual innocence" means "total vindication" or "exoneration," and it does not involve an inquiry of whether the "defendant has been proved guilty beyond a reasonable doubt." (Internal quotation marks omitted.) *People v. Calhoun*, 2016 IL App (1st) 141021, ¶ 30. To establish actual innocence, the petitioner "must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 20 Evidence is new where it was "discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Id.* (citing *People v. Burrows*, 172 Ill. 2d 169, 180 (1996)). "[E]vidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, even if the source of these facts may have been unknown, unavailable, or uncooperative." (Internal quotation marks omitted.) *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (2010) (citing *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008)). "Material means the evidence is relevant and probative of the petitioner's innocence," and "conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result." *Coleman*, 2013 IL 113307, ¶ 96. "An actual innocence claim is extraordinarily difficult to meet [citation], and [c]ourts rarely grant postconviction petitions based on claims of

actual innocence." (Internal quotation marks omitted.) *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 23.

¶ 21 Where a petitioner moves for leave to file a successive petition based on actual innocence, the motion "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." *Edwards*, 2012 IL 111711, ¶ 24. As the Illinois Supreme Court has noted, this rule "suggests a *de novo* review," although generally "decisions granting or denying 'leave of court' are reviewed for an abuse of discretion." *Id.* ¶ 30. While the supreme court did not specify the applicable standard, we find defendant's actual innocence claim fails under either standard. *Id.*

¶ 22 As an initial matter, we note that defendant disputes the trial court's finding that Williams's affidavit contains inadmissible hearsay. Defendant asserts that the affidavit is admissible under the exception laid out in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and applied in *People v. Tenney*, 205 Ill. 2d 411 (2002). Under this exception, "where hearsay testimony bears persuasive assurances of trustworthiness and is critical to the accused's defense, its exclusion deprives the defendant of a fair trial in accord with due process," and the testimony "may be admissible under the statement-against-penal-interest exception to the hearsay rule." *Id.* at 434. We have previously held that this exception requires a consideration of the extrajudicial statement's trustworthiness, and that, in postconviction proceedings, "[t]rustworthiness and reliability determinations may be made only at a third-stage evidentiary hearing." *People v. Warren*, 2016 IL App (1st) 090884-C, ¶¶ 95-96. Regardless of the admissibility of Williams's

affidavit, however, the affidavits attached to defendant's motion for leave show that there was no newly discovered evidence to support an actual innocence claim.

¶ 23 Defendant attached the affidavit of Williams, who alleged that Dent told Williams she "lied on" defendant at trial. Defendant alleged in a separate affidavit, however, that Dent told him detectives were "threatening her to lie on" defendant as early as July 28, 1998. Defendant's trial did not begin until more than a year later, on August 24, 1999. Regardless of whether defendant knew then of any "disinterested" sources showing that Dent "lied on" him, Williams's affidavit does not constitute newly discovered evidence, since it concerns facts that defendant claims to have known prior to trial. See *Jarrett*, 399 Ill. App. 3d at 718, 724 (finding the affidavits of alleged witnesses corroborating the defendant's self-defense theory were not newly discovered evidence, where defendant acknowledged in his petition that, prior to trial, he knew the facts supporting his self-defense theory).

¶ 24 Defendant claims that while he knew Dent had testified falsely at trial, he did not know at the time of trial that "Dent admitted her dishonesty to a disinterested party." Yet, as stated, whether evidence is newly discovered turns on whether defendant knew the underlying facts, not whether the source of those facts was known or available. *Id.* at 723. While Williams's statements may not have been available at trial, he alleges that he knew the facts that Williams's affidavit sets forth. Defendant also relies on *Coleman* and *People v. Molstad*, 101 Ill. 2d 128 (1984), to support his position that Williams's affidavit constitutes newly discovered evidence. Yet in *Coleman* and *Molstad*, the petitioner presented newly available testimony from multiple witnesses, who contradicted the testimony of, and outnumbered, the State's witnesses. *Coleman*, 2013 IL 113307, ¶ 113-14; *Molstad*, 101 Ill. 2d at 134-36. Additionally, in those cases, the

defendants raised an alibi defense at trial (*Molstad*, 101 Ill. 2d at 135), or in a petition, introduced evidence challenging whether he was at the scene (*Coleman*, 2013 IL 113307, ¶ 103). Here, defendant only presented the affidavit of one new witness alleging that one of the State's multiple witnesses lied at trial. Therefore, defendant has not provided newly discovered evidence showing his actual innocence.

¶ 25 Moreover, the facts in Williams's affidavit would not be material to defendant's innocence, and they would not be conclusive, since they would not "probably lead to a different result." *Coleman*, 2013 IL 113307, ¶ 96. As stated, a claim of "actual innocence" must assert defendant's "total vindication" or "exoneration." (Internal quotation marks omitted.) *Calhoun*, 2016 IL App (1st) 141021, ¶ 30. Defendant's successive petition does not show his actual innocence, but rather, only attacks the credibility of one witness. *Collier*, 387 Ill. App. 3d 630, 637 (2008) (finding the affidavits offered to establish the defendant's actual innocence "at best" only impeached or contradicted trial testimony and, therefore, only "address[ed] considerations of credibility that go to reasonable doubt, not actual innocence"). As the trial court expressly stated, its finding was based on all of the evidence, including the testimony of Forrester, which "fit together" with Dent's testimony. Because defendant has failed to present conclusive, newly discovered evidence, "it is clear *** [he] cannot set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶ 24. Accordingly, we affirm the circuit court's denial of defendant's motion for leave to file a second successive postconviction petition.

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 27 Affirmed.