

2019 IL App (1st) 162209-U

No. 1-16-2209

Order filed May 31, 2019

Sixth Division

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).

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. 07 CR 522
)	
FREDERICK PIGRAM,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

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

¶ 2 Defendant Frederick Pigram appeals from the denial of his *pro se* motion for leave to file a successive postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). He claims that he should be permitted leave to file a successive

petition because he presented a colorable claim of actual innocence based on newly discovered evidence. We affirm.

¶ 3 On June 30, 2006, Raydale Davenport was shot to death outside of an apartment building on the 1900 block of West Washington Street. On November 30, 2006, defendant was arrested and charged with two counts of first degree murder. At trial, the jury heard testimony from the police officers who investigated the shooting and three eyewitnesses who identified defendant as the shooter. Defendant was found guilty of first degree murder and sentenced to 50 years' imprisonment. We affirmed his conviction and sentence on direct appeal. *People v. Pigram*, No. 1-09-1144 (2011) (unpublished order under Illinois Supreme Court Rule 23).

¶ 4 Because defendant presents a claim of actual innocence based on an affidavit from an individual claiming to be the actual shooter, we recount in detail the evidence presented at his jury trial.

¶ 5 Rico Hargrove, who was sixteen years old at the time of these events, testified that about 11:00 a.m. on June 30, 2006, he left his aunt's apartment with his cousin, Davenport, who was also known as Snuggle. They exited the back of the apartment building and stopped to talk to Derrick Smith (who was deceased by the time of trial), Terrence Bridges, and Rico's younger brother, Ricardo Hargrove.¹ They all then began walking toward a nearby apartment building for a community breakfast. Rico and Davenport were walking ahead of the other three men, and they stopped on the stairs leading into the back of the apartment building to talk with a friend named Reggie. As they were talking, the building door opened, and Rico saw defendant, whom he had known his whole life and knew by the nickname Fling. According to Rico, defendant said "I

¹ Because Rico and Ricardo share the same last name we refer to them by their first names.

heard you was looking for me” to Davenport and revealed a firearm in his waistband, which Rico described as chrome. Davenport responded “if you pull a gun on me, you are going to have to use it.” Rico then saw defendant remove the firearm from his waistband and shoot at Davenport. Davenport tried to run, but he fell down the stairs and landed on the ground. Defendant shot several times and then fled back into the building. Rico stated that when defendant began shooting, Reggie ran back into the building. He also stated that no one else was shooting other than defendant. Rico stayed with Davenport until an ambulance and the police came. He later talked to the police about what happened and identified defendant as the shooter. Rico testified that the shooting was about a family dispute between defendant and Davenport.

¶ 6 The parties stipulated that, if called, Officer Krofel² would testify that Rico told him on the day of the shooting that defendant was mad because Davenport did not want to be in the Four Corner Hustlers, a gang in which defendant was involved.

¶ 7 Terrence Bridges testified that Davenport was his older brother. At the time of these events, Bridges was seventeen years old. He acknowledged that on June 29, 2006, he pled guilty to aggravated battery to a police officer and possession of a controlled substance. About 11:00 a.m. on June 30, 2006, Bridges left his apartment and went to look for Davenport. His grandmother told him that Davenport had just left and walked to another apartment building to get breakfast. Bridges was with Ricardo Hargrove and Derrick Smith. As Bridges exited his apartment building through the back door and walked through the area between the buildings, he saw Davenport standing on the back porch of a nearby building talking to Rico and Reggie. Bridges was about 30 feet away when he saw defendant emerge from the back door of the

² Officer Krofel’s first name does not appear in the record.

building and say to Davenport: “What was that *** you was saying[?]” Defendant then pulled out a “chromish gray” gun with a black handle. Davenport said “you got it out, you might as well gone use it now[.]” Defendant started shooting at Davenport, who fell backwards. He stated that Reggie ran away from the building when defendant started shooting. Bridges testified that he heard about ten or eleven shots and he did not observe anyone else shooting or anyone else with a gun. Defendant then fled back into the building through the same door he came out of. When the ambulance and police arrived on the scene, he spoke with the police and told them that defendant shot Davenport. Bridges also testified that at the time there was an ongoing dispute between his family and defendant’s family.

¶ 8 Ricardo Hargrove testified that about 11:00 a.m. on June 30, 2006, he went to the area between two apartment buildings where he met Bridges and Smith. Davenport and Rico then walked by to go to the community breakfast and the trio decided to join them. Davenport and Rico walked ahead of Ricardo, Bridges, and Smith. When Davenport and Rico reached the steps to enter the back of the building, Ricardo saw defendant standing in the doorway and firing his gun at Davenport. Davenport turned to leave but fell to the ground next to the steps. Defendant then fled back into the building. Ricardo stated that he had known defendant his whole life. He also stated that he did not see Reggie talking with Rico and Davenport. He further testified that he was currently incarcerated for a parole violation but that the State’s Attorney’s office had not offered him anything regarding those criminal cases in exchange for his testimony in this case.

¶ 9 Chicago police officer Ricardo Colon testified that on June 30, 2006, he and his partner, Officer Houlihan,³ were patrolling near the apartment buildings in question and heard gunshots.

³ Officer Houlihan’s first name does not appear in the record.

They approached the area on foot and observed a person lying on the ground behind one of the buildings. Colon went into the building through the back door to see if he could find the shooter or any witnesses. He could not find anybody in the building, so he went back outside to wait for the ambulance to arrive.

¶ 10 Chicago police officer Zbigniew Niewdach testified that he was a forensic investigator assigned to the crime scene. There, Niewdach recovered four cartridge cases and one fired bullet. He testified that the cartridge cases were consistent with coming from a semiautomatic handgun, but he could not tell whether they came from the same gun. A gun was not recovered for comparison.

¶ 11 The parties stipulated that Dr. Claire Cunliffe, an expert in forensic pathology, would testify that Davenport died as a result of multiple gunshot wounds.

¶ 12 Chicago police detective Kelly Gary testified that on June 30, 2006, she was assigned to investigate the shooting. That day, she was working with her partner, Detective Pat Golden. They canvassed the building which the shooter had fled through but did not find any eyewitnesses to the shooting. They went to defendant's apartment, where his girlfriend and his child resided, but he was not there. Detective Gary then interviewed Bridges and Rico. They identified defendant from a photograph provided by the police. Detective Gary stated that before issuing an investigative alert on a name given by a witness, the police verify the identification of that person. On July 8, 2006, she interviewed Ricardo and Smith and an arrest warrant was issued for defendant. On November 30, 2006, defendant was taken into custody for the murder of Davenport.

¶ 13 The jury found defendant guilty of both counts of first degree murder. The court merged the counts and sentenced him to 50 years' imprisonment, which included a firearm enhancement of 25 years. Defendant's posttrial motions were denied.

¶ 14 Defendant timely filed a direct appeal, arguing that: (1) the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012); (2) the trial court made statements to the jury that prevented them from being candid about their potential biases; (3) his trial counsel was deficient for eliciting evidence that he was a gang member; (4) the State made inflammatory comments during its rebuttal closing argument; and (5) he was entitled to an additional two days of sentence credit for time served. This court affirmed his conviction and directed the mittimus to be corrected to reflect the accurate amount of presentencing credit. *Pigram*, No. 1-09-1144.

¶ 15 On February 3, 2012, defendant filed a postconviction petition under the Act, which raised several claims of ineffective assistance of trial and appellate counsel. The trial court summarily dismissed his petition on April 27, 2012, finding it to be frivolous and patently without merit under the Act. On appeal, this court affirmed that order, after granting appointed counsel's motion for leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Pigram*, 2013 IL App (1st) 121784-U.

¶ 16 On December 28, 2015, defendant filed a *pro se* motion for leave to file a successive postconviction petition, accompanied by an affidavit from Tony Gentry. In the motion, defendant argued that he is actually innocent of the crime for which he was convicted based on Gentry's affidavit. He claimed that the affidavit constitutes newly discovered evidence that is so conclusive as to change the result on retrial.

¶ 17 In Gentry’s affidavit, dated November 13, 2015, Gentry averred that his reckless actions caused Davenport’s death on June 30, 2006. He averred that it started the previous night when Davenport told “Hustlers from the building that no one [was] allowed to work (sell drugs) in the buildings but him and the peoples but him and the people [who] participated in the war against the B-Ds.” This led to arguments and fighting. Then, someone shot several times into the air. Gunfire was exchanged throughout the night between the apartment buildings. The next morning, Gentry was on the back stairs of the apartment building when Rico and Davenport exited the back door and began to shoot at him. Gentry shot back, and they fled. Gentry ran after them and continued shooting, as did they. Gentry then left the area. Sometime later, he heard that Davenport died and that someone else was accused of his murder. He was later incarcerated for a different offense. He finally averred that defendant was “just a victim of circumstance” and that he was willing to testify in court to the contents of the affidavit.

¶ 18 On June 29, 2016, the trial court denied defendant leave to file the successive petition, concluding that he failed to establish that this newly discovered evidence was so conclusive as to change the result on retrial.

¶ 19 Defendant now appeals that ruling, claiming 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. He argues that the affidavit shows that he was not involved in the murder of Davenport and that Gentry was the actual shooter.

¶ 20 The Act permits a defendant to collaterally attack a conviction by asserting it resulted from a “substantial denial” of his constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2016). However, the Act does not contemplate the filing of successive postconviction petitions. *People*

v. Edwards, 2012 IL 111711, ¶ 22. As such, “[s]uccessive petitions are disfavored under the Act[.]” and a defendant must first obtain leave of the court under one of two exceptions. *People v. Jones*, 2017 IL App (1st) 123371, ¶¶ 41, 45. In order to file a successive petition, the defendant’s petition must satisfy the cause-and-prejudice test or it must state a colorable claim of actual innocence. *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 19. The latter claim is permitted because “a wrongful conviction of an innocent person violates due process.” *People v. Williams*, 392 Ill. App. 3d 359, 367 (2009). In this case, defendant claims he is actually innocent.

¶ 21 When a defendant raises a claim of actual innocence “leave of court should be granted when the petitioner’s supporting documentation raises the probability that ‘it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.’ ” *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). To this end, “all well-pleaded facts that are not positively rebutted by the trial record are taken as true.” *People v. Harper*, 2013 IL App (1st) 102181, ¶ 38. We review a trial court’s ruling on a motion for leave to file a successive postconviction petition *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13.

¶ 22 The requirements for establishing a claim of actual innocence are as follows:

“[T]he defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. [*People v. Washington*, 171 Ill. 2d 475, 489 (1996)]. New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. See [*People v. Burrows*, 172 Ill. 2d 169, 180 (1996)]. Material means the evidence is relevant and probative of the petitioner’s innocence. *People v. Smith*, 177 Ill. 2d 53, 82-83 (1997). Noncumulative means the evidence adds to what the jury heard. [*People v. Molstad*, 101

Ill. 2d 128, 135 (1984)]. And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. [*People v. Ortiz*, 235 Ill. 2d 319, 336-37 (2009)].” *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 23 Here, defendant claims that he has presented a colorable claim of actual innocence based on the newly discovered account of Gentry, who states that he shot at Davenport on the day of Davenport’s death. Defendant argues that Gentry’s affidavit is newly discovered and material evidence that exculpates him and would likely change the result on retrial.

¶ 24 We agree, and the State does not argue to the contrary, that Gentry’s affidavit is newly discovered, noncumulative, and material evidence. First, Gentry’s affidavit is newly discovered because defendant had no way of knowing that Gentry had a different account of the events, which alleged he was the actual shooter. See *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 37. Based on the contents of the affidavit, the only person who would have known about Gentry would be Rico and he testified that defendant was the shooter and did not mention the presence of Gentry. Second, the affidavit is not cumulative because there was not any evidence presented at trial suggesting that someone other than defendant shot Davenport. See *Ortiz*, 235 Ill. 2d at 335 (stating that evidence is cumulative where it “adds nothing to what was already before the jury”). Finally, the evidence is material because it goes to a central issue before the jury, which in this case is whether defendant was the individual who shot and killed Davenport. See *People v. Adams*, 2013 IL App (1st) 111081, ¶ 35; *People v. Smith*, 2015 IL App (1st) 140494, ¶ 20. Gentry’s affidavit states that he shot at Davenport and that defendant was just a “victim of circumstance,” and such evidence is certainly material as it calls into question who actually killed Davenport.

¶ 25 However, in light of the evidence presented at trial, we do not find that Gentry’s affidavit constitutes conclusive evidence that would probably lead to a different result on retrial. See *People v. Sanders*, 2016 IL 118123, ¶ 47 (stating that “the conclusiveness of the new evidence is the most important element of an actual innocence claim”). “An actual innocence claim does not merely challenge the strength of the State’s case against the defendant.” *People v. Evans*, 2017 IL App (1st) 143268, ¶ 30. The new evidence must support total vindication or exoneration, not merely a reasonable doubt of the defendant’s innocence. *Adams*, 2013 IL App (1st) 111081, ¶ 36; see also *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008) (“[T]he hallmark of ‘actual innocence’ means ‘total vindication,’ or ‘exoneration.’ ”).

¶ 26 Gentry swore in his affidavit that Davenport started shooting at him and he fired back but did not know until sometime later that Davenport died. This purported testimony would merely conflict with the credible eyewitness testimony of Rico, Ricardo, and Bridges—all of whom positively identified defendant as the shooter. See *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 30. Gentry’s affidavit is also not conclusive. Although he says that he confess[es] to Davenport’s murder committed “through my reckless actions”, he does not actually say that he shot Davenport. Thus, his affidavit does not completely exonerate defendant because there remains the possibility that defendant killed Davenport. See *People v. Williams*, 2016 IL App (1st) 133459, ¶ 57 (finding that “the evidence contained in the affidavit merely affect[ed] the issue of the sufficiency of the evidence and therefore [did] not totally vindicate defendant”). Further, Gentry’s affidavit claimed that on the night before the shooting, there was a shootout between the buildings. That statement is rebutted by the record as the forensic investigator testified that he found only four cartridge casings and one bullet in the area of the shooting. See

Sanders, 2016 IL 118123, ¶ 48 (stating that the factual allegations contained in a petition “must be taken as true unless they are positively rebutted by the record”). For these reasons, we do not consider Gentry’s affidavit to be conclusive in nature and character.

¶ 27 Additionally, as this court stated on defendant’s direct appeal, evidence of defendant’s guilt at trial was overwhelming. *Pigram*, No. 1-09-1144 at 9. Our courts have repeatedly stated that the positive and credible testimony of one eyewitness is sufficient for conviction. *People v. Gray*, 2017 IL 120958, ¶ 36. In this case, there was eyewitness testimony from not just one but three individuals who identified defendant as the shooter. Two of the witnesses testified that they were familiar with defendant and had known him their whole life. Moreover, the three witnesses’ accounts of the shooting contained strikingly similar details, such as the words exchanged between Davenport and defendant just prior to the shooting, the circumstances of how they all came to be in the area, and the direction defendant fled following the shooting. See *People v. Harris*, 206 Ill. 2d 293, 302 (finding the trial evidence, which included eyewitness testimony, overwhelming and the actual innocence evidence not of such conclusive character as to change the result on retrial). Although, as defendant points out, there were contradictions among their accounts, as this court stated on appeal, they were minor. See *Pigram*, No. 1-09-1144 at 9.

¶ 28 When considered along with the trial evidence, Gentry’s affidavit that he and Davenport were shooting at one another 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). Therefore, we conclude that defendant has failed to present a colorable claim of actual innocence based on Gentry’s affidavit and the trial court did not err in denying defendant leave to file a successive postconviction petition.

No. 1-16-2209

¶ 29 We affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.