2019 IL App (1st) 162509-U

No. 1-16-2509

Order filed September 12, 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. 00 CR 17550
	)	
GASI PITTER,	)	Honorable
	)	Arthur F. Hill Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Denial of defendant's motion for leave to file a successive postconviction petition is affirmed where the petition failed to show actual innocence based on a newly discovered affidavit stating defendant did not actively participate in a shooting.

¶ 2 Defendant Gasi Pitter appeals from the denial of his *pro se* motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, defendant argues that the circuit court erred in denying his motion for leave where he established a colorable claim of actual innocence by providing the affidavit of

a witness who averred that defendant was not standing with the person who shot the victims. We affirm.

¶ 3 Defendant and co-defendant Linsford Gill were charged in the same indictment with four counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2000)), two counts of felony murder while committing aggravated discharge of a firearm (720 ILCS 5/9-1(a)(3) (West 2000); 720 ILCS 5/24-1.2 (West Supp. 1999)), two counts of attempted first degree murder (720 ILCS 5/8-4(a) (West Supp. 1999); 720 ILCS 5/9-1(a)(1) (West 2000)), and three counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West Supp. 1999)), arising from an incident in Chicago on June 17, 2000. As to defendant, the State nol-prossed two first degree murder counts and one felony murder count, which were based on the personal discharge of a firearm. The State additionally nol-prossed two counts of attempted first degree murder and two counts of aggravated discharge of a firearm, and proceeded on the remaining counts. Defendant and Gill were tried in separate but simultaneous jury trials.[1]

¶ 4 At trial, Frederick Funes testified that on June 17, 2000, at about 10:30 p.m., his friend Jamal Moore drove him to meet another friend named Kevin. They reached the corner of Estes Avenue and Glenwood Avenue and saw defendant, Gill, Tamara Adams, and Donna Michelle Clark standing outside. Funes recognized defendant and Gill from "around the neighborhood." Funes and Moore pulled around the block and switched seats so Funes could drive. They then returned to Estes and Glenwood, and saw Adams and Clark, but not defendant and Gill. Funes pulled up to ask if Adams and Clark had seen Kevin, and Moore looked out the window and began speaking to one of the women. Funes then heard gunshots from behind the right side of the

[1] The jury found Gill guilty of first degree murder based on the personal discharge of a firearm. He is not a party to this appeal.

van and drove away. He looked in the rearview mirror and saw defendant discharge a firearm. Funes swerved to dodge the bullets, looked in the side mirror, and saw Gill run up to defendant and also discharge a firearm. Then, Funes made a right turn, and Moore "fell in [Funes's] lap."

¶ 5 Funes saw that Moore "had a hole in his head," and drove until he saw another friend, who led him to a hospital. Funes spoke with police and went to the police station. The next day, he returned to the hospital to find Moore "laid out with a bandage over his head" on "[s]ome type of life support machine." Moore was then taken off life support and died. On June 19, 2000, Funes went to the police station, and identified defendant and Gill in a physical lineup. Funes confirmed that a photograph depicted the van with a bullet hole in the back window.

¶ 6 On cross-examination, Funes testified that defendant was wearing a dark sweater with long sleeves when he shot at the van. He also testified that he told officers that "the shooter" had "shorter" hair, which he described as "nappy" with "short little twisty things."

¶ 7 Adams testified that she and Clark were with defendant, Gill, and a person named Cosmo on Estes. Clark's six-year-old daughter, Mariah, sat nearby in defendant's girlfriend's vehicle. Funes and Moore parked a maroon van in front of the group. Moore spoke with Clark, but Funes, defendant, and Gill stared at each other. Then, Funes and Moore drove away and, after about half a minute, returned and slowed down. Defendant and Gill looked at each other, ran past a nearby viaduct, and returned. Funes and Moore then turned left, and Adams heard gunshots. Adams "wasn't really paying attention to [defendant]," but saw Gill shooting a firearm. Defendant ordered Mariah to exit the vehicle and entered the driver's side. Gill entered the passenger side, and they drove away. Adams later went to a police station and identified defendant and Gill in a

lineup. She told the police that Gill was "the shooter," and defendant was "[j]ust getting in the car and leaving."

¶ 8 On cross-examination, Adams confirmed that she never saw Moore driving the van, and that Cosmo had "short, tiny" dredlocks "[l]ike little twigs." She denied seeing defendant with a firearm. She also stated that when Gill began shooting his firearm, she was "not sure what [defendant] was doing" because she was "on the ground," and the "next thing [she] knew," defendant was next to her. On redirect examination, Adams confirmed that she saw Gill start shooting, and before she was on the ground, "the last thing [she] saw was [defendant and Gill] together." Adams did not look up while she was on the ground, but she saw defendant at his girlfriend's vehicle when the gunshots had stopped.

¶ 9 Clark testified that she was with her daughter Mariah, Adams, Cosmo, Gill, and defendant on Estes and Glenwood, standing near defendant's girlfriend's vehicle. Mariah entered the passenger side of the vehicle, and Adams stood towards the vehicle's trunk and spoke with Cosmo, Gill, and defendant. After 10 or 15 minutes, a van approached with Funes driving and Moore in the passenger's side. Defendant and Gill "said something to the effect [of] 'let's get it' or 'let's do it,' " and ran towards a viaduct in the direction of defendant's brother's house. After a few minutes, the van reappeared, turned the corner on Estes, and slowed down. Clark and Moore looked at each other, and the van slowly drove away. Then, Clark heard gunshots from the direction of the viaduct, and saw defendant run past her towards the van. She saw Gill holding a firearm and walking toward the van, and lost sight of defendant, who had run further down the street and closer to the van. Clark heard a second set of gunshots from defendant's direction, and saw defendant and Gill run towards defendant's vehicle from different directions.

Clark removed Mariah from the vehicle, and defendant and Gill entered the vehicle and drove away.

¶ 10 Chicago police forensic investigator Leonard Stocker testified that he photographed the scene of the shooting with his partner, Officer Joseph Dunnigan, and found five fired cartridge cases discharged by a semi-automatic weapon. He then went to the hospital Moore was at, and saw a maroon van with bullet damage in the window of the rear right door. Stocker and Dunnigan photographed the van's interior and exterior, and found blood near the front passenger seat, on the floor, and on the sliding door window. Afterwards, they inventoried the fired cartridge cases at the police station.

¶ 11 Cook County assistant medical examiner Dr. Adrienne Segovia testified that Moore died from a gunshot wound to back of his head. The State entered stipulations that the five inventoried cartridge cases were fired by the same firearm and were the same caliber as a bullet recovered from Moore's body. The State also entered the inventoried cartridge cases, Moore's autopsy report, and photographs of the crime scene, maroon van, Moore's autopsy, and the lineups from which Adams identified defendant and Gill.

¶ 12 The defense entered a stipulation that if called to testify, Officer K. Meerbrey[2] would state that on the day of the shooting, Funes told him that one of the offenders running towards the van had "short dreads" and shot at the rear of the van with a firearm.

¶ 13 After the defense rested, the State moved to nol-pros the remaining aggravated discharge of a firearm count, and defendant moved to dismiss the remaining felony murder count. The trial court granted both motions, leaving two charges of first degree murder. The jury was instructed

[2] The full first name of Officer Meerbrey does not appear in the transcript of the trial proceedings.

on a theory of accountability, and found defendant guilty of first degree murder. The court sentenced defendant to 40 years' imprisonment.

¶ 14 On direct appeal, defendant argued that the State failed to prove him guilty of first degree murder beyond a reasonable doubt because the witnesses were not credible or consistent. We affirmed. *People v. Pitter*, 1-02-2363 (2003) (unpublished order under Supreme Court Rule 23).

¶ 15 On November 29, 2004, defendant filed a *pro se* postconviction petition alleging, *inter alia*, that (1) counsel on direct appeal was ineffective for failing to raise an ineffective assistance claim against trial counsel, who failed to "present a defense," call certain witnesses, and investigate the case; (2) the jury's verdict was against the manifest weight of the evidence; and (3) the trial court wrongfully instructed the jury on accountability when the indictment did not charge him with accountability. On February 23, 2005, the circuit court entered an order summarily dismissing defendant's petition. Defendant appealed from the summary dismissal, and we affirmed. *People v. Pitter*, 1-05-1056 (2007) (unpublished order under Supreme Court Rule 23).

¶ 16 On March 1, 2016, defendant filed the instant *pro se* motion for leave to file a successive postconviction petition, alleging, *inter alia*, that trial counsel was ineffective and that he was actually innocent. In connection with his ineffective assistance claim, defendant attached his own affidavit averring, in relevant part, that he told counsel that he was at the scene of the shooting but did not participate. As to his actual innocence claim, defendant alleged that while in prison in February 2016, he met Nicolas Akerele, who told defendant that he witnessed the shooting and that defendant was not one of the two shooters. Akerele also told defendant that "he was young and did not want to get involved," so he "left the scene." Defendant also provided Akerele's

affidavit, which stated that Akerele "vividly remember[s]" seeing the shooting "after dark" on a "summer night around June of 2000." Akerele claimed that at the intersection of Estes and Glenwood, he heard gunshots and saw two men, one of whom had "short dreads," shoot at a "dark color[ed] van" that was driving "towards the lake." The men then entered a "light color[ed] car" and drove away. According to Akerele, neither of the two men were defendant, and he "never came forward that night because of fear *** for [his] life." Akerele stated, "I don't know who these people were and honestly, I had my family to think about."

¶ 17 On June 26, 2016, the circuit court entered an order denying defendant's motion for leave. The circuit court found, in relevant part, that while Akerele's statement constituted newly discovered, non-cumulative evidence, it was not conclusive. The circuit court reasoned that defendant failed to establish that Akerele witnessed the same shooting for which defendant was convicted, as Akerele did not allege the specific date and time of the incident.

¶ 18 On appeal, defendant argues that the circuit court erred in denying his motion for leave to file a successive postconviction petition because Akerele's affidavit was newly discovered, non-cumulative, and would probably change the result on retrial. The State responds that Akerele's affidavit was not newly discovered because it did not concern facts that defendant could not have known at or prior to his trial. Moreover, the State asserts that the affidavit is non-conclusive because it only implicates the strength of the State's case, and that it is cumulative and adds nothing to the evidence presented at trial.

¶ 19 The Act 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 2016)), a petitioner must seek leave of court to file more than one petition. "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2016). We will relax this procedural bar, however, where there was a "fundamental miscarriage of justice," as when the petitioner has shown "actual innocence." (Internal quotation marks omitted.) *People v. Edwards*, 2012 IL 111711, ¶ 23.

¶ 20 Under the due process clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 2), postconviction petitioners have the right to assert "a freestanding claim of actual innocence based on newly discovered evidence." *People v. Ortiz*, 235 Ill. 2d 319, 331 (2009). An actual innocence claim must show total vindication or exoneration, as "sufficiency of the State's evidence is not a proper issue for a postconviction proceeding." *People v. Evans*, 2017 IL App (1st) 143268, ¶ 30. To show 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.

¶ 21 "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Id.* "[E]vidence is not newly discovered when it presents facts already known to a petitioner at or prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative." (Internal quotation marks omitted.) *People v. Miranda*, 2018 IL App (1st) 170218, ¶ 25. "Newly discovered evidence cannot be used to relitigate the sufficiency of the evidence adduced at trial." *People v. Flowers*, 2015 IL App (1st) 113259, ¶ 33. "Material evidence is relevant and probative of the defendant's innocence

[citation], but evidence is considered cumulative when it adds nothing to what was already before the jury [citation].” *People v. Jones*, 2017 IL App (1st) 123371, ¶ 43.

¶ 22 Evidence is conclusive when, considered along with the trial evidence, it “would probably lead to a different result.” *Coleman*, 2013 IL 113307, ¶ 96. The Supreme Court has emphasized “claims of actual innocence 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.’ ” *Jones*, 2017 IL App (1st) 123371, ¶ 44 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). “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.

¶ 23 A trial court should deny a petitioner’s motion for leave to file a successive petition based on actual innocence “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. 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 has not specified which standard applies, we find defendant’s actual innocence claim fails under both standards. *Id.*

¶ 24 Section 9-1 of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(a)(1), (2) (West 2000)) provides:

> “A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: (1) he either intends to

> kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another ***."

¶ 25 Defendant's motion for leave posits that he is actually innocent of first degree murder because, according to Akerele's affidavit, he was not one of the individuals shooting at the van that Funes drove. However, the State nol-prossed the first degree murder counts alleging defendant personally discharged a firearm, and the jury was instructed as to accountability. To establish a person's accountability for the conduct of another under section 5-2 of the Code (720 ILCS 5/5-2(c) (West 2000)), the State must prove that: "(1) defendant solicited, ordered, abetted, agreed or attempted to aid another in the planning or commission of the crime; (2) defendant's participation took place before or during the commission of the crime; and (3) the defendant had the concurrent intent to promote or facilitate the commission of the crime." *People v. Garrett*, 401 Ill. App. 3d 238, 243 (2010). An accomplice's intent to promote or facilitate a crime is established where "the defendant shared the criminal intent of the principal," or where "there was a common criminal design." *People v. Hugo G.*, 322 Ill. App. 3d 727, 737 (2001). "Accountability is not in and of itself a crime, but rather a method through which a criminal conviction may be reached." *People v. Stanciel*, 153 Ill. 2d 218, 233 (1992). "[A]ctive participation has never been a requirement for the imposition of criminal guilt under an accountability theory." *People v. Taylor*, 164 Ill. 2d 131, 140 (1995). Accordingly, to find defendant guilty of first degree murder, the jury did not need to find that defendant was one of the shooters.

¶ 26 At trial, Funes testified that Moore drove him in a van to the intersection of Estes and Glenwood, when he saw defendant, Gill, Adams, and Clark. The two drove away, switched

seats, and when they returned to the intersection, they only saw Adams and Clark. Funes heard gunshots, looked in his rearview mirrors twice, and saw both defendant and Gill shooting at the van. Adams also testified that defendant was present at the scene, and while she did not see him using a firearm, she saw him leave with Gill and return before the gunshots occurred. Clark stated that when Funes and Moore drove toward the group on Estes, defendant and Gill "said something to the effect [of] 'let's get it' or 'let's do it,' " went towards defendant's brother's house, and returned. Clark stated she heard gunshots in the direction of defendant's brother's house and where defendant was standing. Thus, while only Funes saw defendant firing a weapon, the evidence consistently showed that defendant was present at the intersection, left and returned to the scene together with Gill, and was nearby while Gill fired at the van. This evidence, together with Clark's testimony that defendant and Gill stated " 'let's get it' or 'let's do it,' " supported defendant's guilt under an accountability theory. *Garrett*, 401 Ill. App. 3d at 243.

¶ 27 While Akerele's affidavit claimed that defendant was not one of the two people shooting at the van, Akerele did not allege that defendant was not present during the offense, and defendant averred that he was present in his successive postconviction petition. Akerele also alleged that he heard gunshots before stating that he saw the shooting occur, suggesting he did not see the entirety of the incident. Therefore, Akerele's statement does not necessarily contradict the testimony that was presented at trial, which established defendant's guilt under an accountability theory even if defendant was not one of the shooters. *Taylor*, 164 Ill. 2d at 140. Akerele also provided little detail as to the date and time of the offense, whether he was able to clearly view the entire crime scene, and how far away he was from the scene. *Jones*, 2017 IL

App (1st) 123371, ¶¶ 49-51 (stating an eyewitness's affidavit in support of an actual innocence claim was not conclusive where the eyewitness did not claim the defendant was absent from the crime scene and did not provide any details regarding his view of the incident). In asserting that defendant was not one of the people shooting at the van, Akerele's statement essentially challenges the sufficiency of the evidence at trial, and does not totally vindicate or exonerate defendant. *Evans*, 2017 IL App (1st) 143268, ¶ 30. Because this statement is not conclusive, defendant has not presented "a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶ 24. Accordingly, the court properly denied his *pro se* motion for leave to file a successive postconviction petition.

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

¶ 29 Affirmed.