2019 IL App (1st) 162511-U

Nos. 1-16-2511 & 1-17-2154 (CONSOLIDATED)

Order filed August 30, 2019

Fifth 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 10291
	)	
LARRY WILLIAMSON,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Where two affidavits attached to defendant's first and second successive *pro se* postconviction petitions meet the requirements for a claim of actual innocence based on newly discovered evidence, we reverse the trial court's denials of leave to file the petitions and remand for further postconviction proceedings.

¶ 2 In this consolidated appeal, defendant Larry Williamson appeals from the trial court's denial of leave to file: (1) a successive *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) (appeal No. 1-16-2511), and (2) a

second successive *pro se* postconviction petition (appeal No. 1-17-22154). Defendant contends that he stated colorable claims of actual innocence based on newly discovered evidence in the form of eyewitness affidavits. For the following reasons, we reverse and remand for further postconviction proceedings.

¶ 3 Following a 2007 jury trial, defendant was convicted of first degree murder for the shooting death of Dimitri Wilson and sentenced to 48 years' imprisonment. We affirmed on direct appeal and corrected his mittimus to reflect the proper conviction. *People v. Williamson*, No. 1-08-0238 (2009) (unpublished order under Supreme Court Rule 23). In doing so, we set forth the facts of the case. Because defendant is claiming actual innocence, we again recite the facts in detail.

¶ 4 At trial, Herman Fordman testified that on the evening of June 6, 2005, he rode his bicycle to the liquor store on 75th Street and Colfax Avenue. Many people were out on the street. At around 8:30 p.m., he observed a verbal altercation between two unknown individuals and subsequently heard three gunshots as he rode away. Fordman did not see the shooting. He continued to his grandmother's house and was arrested the following day on a drug charge. At the police station, Fordman identified defendant and Wilson in a photographic array as the individuals involved in the altercation, but did not know either of them. He did not see defendant with a gun and did not see him shoot Wilson. He was released without being charged for the drug offense after identifying defendant.

¶ 5 Fordman acknowledged signing a written statement taken by Assistant State's Attorney (ASA) James Murphy in January 2006. His statement contained the following. Fordman knew defendant and Wilson "from the neighborhood," but did not know them by name. He observed

the two men arguing as he left the liquor store and looked back because he believed they might fight. As Fordman looked back, he saw Wilson put his hands up in front of his face and heard gunshots. Although he did not see a gun, Fordman saw flashes from gunshots from where defendant stood. In his statement, Fordman acknowledged giving the statement freely and voluntarily and that no threats or promises were made to him in exchange for his statement.

¶ 6 At trial, Fordman acknowledged signing each page of his statement, initialing corrections, and signing photographs of Wilson and defendant. He denied that he read the statement prior to signing it and that no threats or promises were made in exchange for it. Fordman also denied giving the ASA the information contained within the statement. He acknowledged that at the time of trial he was serving a four-year sentence for a drug offense.

¶ 7 ASA Murphy testified that Fordman gave an oral statement relating to the shooting in January 2006 and subsequently agreed to have his statement memorialized in writing. Murphy asked Fordman questions and summarized his answers. He testified to the contents of Fordman's statement. Fordman reviewed the photographs and statement before signing each page. He further agreed that no threats or promises were made in exchange for his statement and that it was made freely and voluntarily.

¶ 8 Donald Epps testified that he had known both defendant and Wilson for more than 10 years. On the night of the shooting, Epps was standing in the doorway of a liquor store on 75th and Colfax when he observed Wilson drive up in his Cadillac. Defendant was standing with a group of people, and Wilson said something as he approached them. Epps then heard gunshots and saw Wilson on the ground. When Epps heard the shots, he ran and did not see anything else.

He acknowledged that, on the night of the shooting, he had been drinking alcohol and smoking marijuana. He was across the street from the shooting and had no vision in his left eye.

¶ 9 Epps testified that he was arrested on a drug charge on December 18, 2005 and was interviewed by ASA Kim Ward. He signed a written statement, in which he acknowledged that he had been arrested for a drug offense, but his statement was freely and voluntarily given and no threats or promises were made in exchange for it. Epps also testified before the grand jury. Both his statement and grand jury testimony showed Epps observed Wilson drive up in his Cadillac, approach defendant, and ask if he wanted to "box," or fist fight. Wilson then turned as defendant shot him approximately six times. Wilson started running, but fell and attempted to crawl back to his car. Defendant got into a van and drove away with his girlfriend.

¶ 10 Epps acknowledged that he identified defendant as the shooter from a photograph and signed the photograph, which had been attached to his statement. Although Epps identified the written statement and acknowledged that his signature appeared on each page, he testified that the substance of his statement was untrue. He additionally testified that ASA Ward promised to "drop" the drug charge against him if he signed a statement against defendant but ultimately the charge was not dismissed. Epps had also been convicted of a separate drug offense and sentenced to four years' imprisonment.

¶ 11 Jennifer Jackson testified that defendant was her former boyfriend and her child's father. The two broke up prior to the shooting, but saw each other when defendant visited their child. On the day of the shooting, Jackson was at 75th and Colfax at around 4:30 p.m. with her daughters, her brother, and two of her cousins. While Jackson and her family left a store, they heard gunshots, and she ran home with her children. She did not see defendant near the shooting

and did not know who fired the shots. Jackson was home at 8:30 p.m. and denied that the shooting took place in the evening.

¶ 12 On April 1, 2006, the police requested that Jackson come to the station to pick up defendant's belongings and an officer picked her up at 11 p.m. that night. Jackson was pregnant at the time. She was at the police station for about five hours and was periodically questioned about the shooting. Jackson did not know Wilson before the police showed her his picture during their questioning. She initially told the police she did not witness the shooting, but acknowledged that she eventually signed a statement and testified before the grand jury that defendant was involved.

¶ 13 ASA Michael Clarke took Jackson's written statement. In it, she stated that she was on 75th and Colfax on the day of the shooting and saw defendant standing outside of the post office. She saw a man, whom she later learned was Wilson, walk to his car and motion like he was getting something. Jackson could not see what he retrieved, but he had one hand at his waist. As Wilson and defendant spoke to each other, Jackson turned away and heard five or six gunshots coming from the area where the men were standing. Jackson did not see who shot the gun, but she saw Wilson on the ground. She did not see anything in Wilson's hand while he was on the ground. Following the shooting, Jackson spoke with defendant, who stated he wished it had never happened and that Wilson was not out there that day. Defendant additionally stated he knew he would have had to face Wilson one day but wished it was not a situation where Wilson's life had been taken. During the conversation, defendant had been upset and crying. He stated his life was over because of what he had done to Wilson. Attached to Jackson's statement were photographs of Wilson and herself taken on the day she signed the statement.

¶ 14 Before the grand jury, Jackson's testimony regarding the shooting was substantially similar to that in her statement. She added that she was near the scene of the shooting in the evening of June 6, 2005, and saw Wilson, who was "the one who [defendant] had gotten into it," retrieve something from his car and approach defendant. She observed that "there was some type of fight going on between [defendant] and [Wilson]." Following the shooting, Jackson walked home because detectives had arrived at the scene. During her grand jury testimony, Jackson identified her handwritten statement and the attached photograph of Wilson. She acknowledged that she was able to make corrections to the statement and had reviewed and signed each page of the statement. She denied being under the influence of alcohol or drugs both when she gave her statement and at the time of her grand jury testimony. She additionally acknowledged that she was not threatened or promised anything in exchange for her statement or grand jury testimony. Jackson testified that ASA Clarke had treated her "[l]ike a regular person."

¶ 15 At trial, Jackson testified that she made up the story implicating defendant in the shooting so that she would be permitted to leave the police station. She acknowledged being sober at the time she gave her statement and telling ASA Clarke that she was sober. While Jackson acknowledged that Wilson's photograph was attached to her statement and that she had identified him as the victim, she denied seeing or signing the attached photograph of herself.

¶ 16 Regarding her grand jury testimony, Jackson acknowledged she was under oath and answered questions from ASA Diana Garcia-Camilo. Garcia-Camilo interviewed Jackson before she testified, and she informed the ASA that police detectives threatened her prior to giving her statement. Jackson largely could not recall her grand jury testimony.

¶ 17 Jackson testified her statement and grand jury testimony were untrue, and the police accused her of lying when she told them she did not witness the shooting. The police threatened to charge her as an accessory to murder, take away her children, and force her to give birth in jail if she did not sign a statement inculpating defendant. Jackson then made up the story in her statement to avoid being charged and recounted the same story before the grand jury. In the three days between Jackson signing her statement and testifying before the grand jury, the police came to her house on multiple occasions and threatened to cut off her public aid and call the Department of Children and Family Services if she failed to testify. When Jackson informed ASA Clarke and ASA Garcia-Camilo that she had been threatened by the police, the ASAs told her that the comments were not threats.

¶ 18 ASA Clarke testified that he took Jackson's oral statement about the shooting on April 2, 2006. Jackson was calm and cooperative and agreed to have her statement memorialized in writing. She repeated what she said during her oral statement, and Clarke wrote it down. Clarke then read the statement back to Jackson and gave her the opportunity to make changes. Jackson stated it was accurate and signed the bottom of each page and the photograph taken of her. Jackson told Clarke she had been treated "fine" by police and no one threatened her or told her what to say during her statement. He denied that Jackson alleged the detectives threatened her.

¶ 19 ASA Garcia-Camilo testified she interviewed Jackson for 40 minutes prior to her testifying before the grand jury. Jackson had been cooperative. Garcia-Camilo recounted Jackson's grand jury testimony and identified a transcript of the proceedings, which she stated contained the entirety of Jackson's testimony. During the grand jury proceedings, Jackson had identified a copy of her statement. Garcia-Camilo denied that Jackson informed her that she had

been threatened by police. She further denied that Jackson testified to the grand jury that she had been threatened by police.

¶ 20 Fordman's, Epps', and Jackson's written statements and the transcript of Jackson's grand jury testimony were admitted as substantive evidence pursuant to section 115-10.1 of the Illinois Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.1 (West 2004)).

¶ 21 Dr. Eupil Choi from the Cook County Medical Examiner's Office testified he conducted the autopsy and concluded Wilson died of multiple gunshot wounds.

¶ 22 Defendant testified that he was with a group of people, including a friend called "Moan," on the corner of 75th and Colfax around the time of the shooting. He observed that two men were arguing and "squared off" as if they were going to "box." After hearing gunshots, defendant fled the scene with the other individuals standing on the corner. He did not see who had been shot. Defendant acknowledged that he owned a van at the time and that he knew Epps. He denied knowing Wilson and did not see Epps or Jackson near the scene. Defendant acknowledged he continued to talk to Jackson, whom he trusted and in whom he confided.

¶ 23 The jury found defendant guilty of first degree murder and found he personally discharged the firearm that proximately caused Wilson's death. The court sentenced defendant to 48 years' imprisonment.

¶ 24 We affirmed on direct appeal and corrected his mittimus to reflect the proper conviction. *Williamson*, No. 1-08-0238 (2009) (unpublished order under Supreme Court Rule 23). We also affirmed the second-stage dismissal of his initial postconviction petition. *People v. Williamson*, 2015 IL App (1st) 130932-U.

¶ 25 On May 3, 2016, defendant filed a *pro se* "successive petition for post-conviction relief," alleging actual innocence based on newly discovered evidence from two witnesses, Michael Berry and Jeffrey Fields, who each averred defendant was not the shooter.

¶ 26 In support of his petition, defendant attached affidavits from Berry and Fields. Berry averred that his nickname was "Moan." At the time of the shooting, he was in a restaurant on 75th and Colfax. He observed defendant standing on the corner with a crowd of people. Berry walked over to defendant, who was talking to a group of women. While they talked, Berry heard shots coming from the crowd and saw people running and ducking. Berry, defendant, and another man ran to 74th Street and Colfax. Berry did not know the shooter but would be able to identify him. He did not speak to police or a lawyer about what he witnessed because he "was basically out of the neighborhood" and moved to Joliet. Berry did not know defendant had been charged with the murder until he saw defendant in prison. He was willing to testify to the contents of his affidavit.

¶ 27 Fields averred he was on his bike on 75th and Colfax at the time of the shooting. He knew defendant and observed him in a crowd of people on the other side of the street. Fields noticed two men arguing before one of the men pulled out a gun and shot the other. People started running and Fields rode away on his bike. Fields did not know the shooter, but would be able to identify him. He described the shooter as a "light skin, slim black guy with a white shirt on." Defendant did not have a gun or shoot anyone that night. No one spoke to Fields about what he witnessed, and he did not come forward because he was afraid of the police. Fields was willing to testify to what he witnessed because he did not want defendant "locked up for something he did not do."

¶ 28 On July 27, 2016, the court denied defendant leave to file a successive petition, finding he failed to both demonstrate a claim of actual innocence and satisfy the cause and prejudice test. Defendant timely appealed. The appeal was assigned appeal No. 1-16-2511.

¶ 29 While that appeal was pending, on June 18, 2017, defendant mailed a *pro se* motion for leave to file a second successive postconviction petition, alleging actual innocence based on newly discovered evidence from Spencer Jackson.[1] Defendant attached an affidavit from Spencer, who averred he was exiting a corner store on 75th and Colfax at around 8:30 p.m. on the day of the shooting. A "light skin, slim black guy" approached him. The man was approximately 5'8, had a "low hair cut," and had a tattoo under his right eye. He asked whether Spencer was selling marijuana and then stated he was looking for Wilson. The man stated Wilson sold him weed earlier in the day, which was laced with "P.C.P.," and he wanted his money back. The man then noticed Wilson parked on 75th and approached him. Wilson and the man began arguing, and the man pulled out a gun and shot Wilson. Spencer subsequently fled and did not know that defendant had been charged with murder until they "ran into" each other in prison. Spencer additionally did not come forward earlier because the shooter had seen his face. He was willing to testify now "[i]n an effort to keep an innocent man from spending the rest of his life in prison."

¶ 30 In his affidavit, defendant averred he was unaware Spencer witnessed the shooting until they "crossed paths" in prison, where Spencer "came forward on his own free will" and provided an affidavit. He contended that Spencer's affidavit "adds to" the evidence at trial and provides a motive for the unknown shooter. Defendant additionally argued that Spencer's affidavit was

[1] Because multiple individuals share the last name Jackson, we refer to Spencer Jackson by his first name.

inconsistent with the evidence at trial showing he was the shooter and would therefore change the result on retrial.

¶ 31 On June 27, 2017, the court denied defendant leave to file a successive petition. The court found defendant again failed to state a claim of actual innocence because Spencer's proposed testimony was not so conclusive that it would probably change the result on retrial. The court additionally imposed fees against defendant for frivolous filings pursuant to section 22-105 of the Code of Civil Procedure (735 ILCS 5/22-105 (West 2016)). Defendant timely appealed. The appeal was assigned appeal No. 1-17-2154. We allowed defendant's motion to consolidate appeals Nos. 1-16-2511 and 1-17-2154.

¶ 32 On appeal, defendant argues he should be granted leave to file his successive postconviction petitions because the affidavits from Berry, Fields, and Spencer constitute newly discovered evidence of his actual innocence.

¶ 33 The Act permits criminal defendants to challenge their convictions based on constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). However, generally only one petition is permitted under the Act. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009); 725 ILCS 5/122-3 (West 2016). To file a successive petition, a defendant must first obtain "leave of court." See 725 ILCS 5/122-1(f) (West 2016); *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). To obtain leave of court, the defendant must satisfy either 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. 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. Stated differently, the court should grant leave to file a successive petition based on actual innocence 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)).

¶ 34 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)). Newly discovered evidence is evidence that has been discovered since the trial, and that the defendant could not have discovered sooner through due diligence. *Ortiz*, 235 Ill. 2d at 334. Evidence is considered cumulative when it adds nothing to what was already before the jury. *Id.* at 335. The conclusiveness of the evidence is the most important element of an actual innocence claim. *People v. Sanders*, 2016 IL 118123, ¶ 47. Evidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 36. Where a witness's statement is both exonerating and contradicts prosecution witnesses, it can be capable of producing a different outcome on retrial. *Id.* (citing *Ortiz*, 235 Ill. 2d at 336-37). Newly discovered evidence does not have to be completely dispositive of an issue to be deemed likely to change the result upon retrial; rather, it need only be conclusive enough "to *probably* change the result upon retrial." (Emphasis in original.) *People v. Davis*, 2012 IL App (4th) 110305, ¶ 62.

¶ 35 When contemplating whether leave to file a successive petition should be granted, all well-pleaded facts are taken as true. *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 77. We review the trial court's denial of leave to file a successive petition *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13.

¶ 36 In this case, Berry's affidavit does not qualify as newly discovered evidence because Berry has been known to defendant since the shooting. At trial, defendant testified he was with his friend "Moan" on 75th and Colfax on the day of the shooting. In his affidavit, Berry averred he is known as "Moan," and further averred he walked up to defendant shortly before the shooting while defendant was speaking with some women. The shooting occurred while they were talking. Thus, defendant knew of Berry's potential testimony at the time of trial. See *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007) (evidence must have been discovered since trial to constitute newly discovered evidence).

¶ 37 However, both the Fields and Spencer affidavits are sufficient to support defendant's actual innocence claim based on newly discovered evidence. Fields' affidavit is newly discovered because he did not come forward until 2016 based on his fear of the police. According to his affidavit, he was at 75th and Colfax and observed defendant, whom he knew from the neighborhood, in a crowd of people. Two individuals unknown to Fields were arguing when one shot the other. The shooter was a light-skinned man wearing a white shirt. Fields rode away on his bicycle upon hearing the gunshots. No one approached Fields about his observations of the shooting.

¶ 38 Likewise, Spencer's affidavit constitutes newly discovered evidence where he did not come forward with what he observed earlier because: he was afraid, given that the shooter had

seen his face; and he was unaware that defendant had been charged with Wilson's murder. In his affidavit, Spencer averred that he spoke with an unknown "light skin, slim black guy" just before the shooting. The man stated he wanted his money back from an earlier drug transaction with Wilson, and Spencer watched as he approached and then shot Wilson. Given the testimony that there was a crowd of people at the scene of the shooting and that the presence of Fields and Spencer were apparently unknown to those at the scene, we find these affidavits qualify as newly discovered evidence.

¶ 39 Additionally, the evidence in these affidavits is material and noncumulative. Both the Fields and Spencer affidavits constitute material evidence because their potential testimony goes to the central issue of the identity of Wilson's shooter and each provided a first-person account of the shooting that directly contradicted the prior statements of Fordman, Epps, and Jackson. Moreover, Fields and Spencer each described the shooter and expressly stated he was not defendant. The description of the shooter as someone other than defendant and Spencer's account of the shooter's alleged motive are details that were not presented to the jury, and therefore were not cumulative. *Ortiz*, 235 Ill. 2d at 335.

¶ 40 Finally, Fields' and Spencer's affidavits are of such a conclusive character that, if presented, would probably change the result on retrial. As previously noted, the affidavits contradict the prior statements of all three of the State's eyewitnesses to the shooting. See *Adams*, 2013 IL App (1st) 111081, ¶ 36. They also comport with the theory of the defense at trial, which was that defendant was present on the scene in the crowd of people, but was not the shooter. Thus, this evidence of defendant's innocence would be stronger when weighed against Fordman's, Epps', and Jackson's prior statements. This is especially so where, as here, Fordman

and Jackson did not see who shot the gun. Because we find the Fields and Spencer affidavits constitute newly discovered evidence, we cannot say that 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. We therefore find defendant should have been permitted leave to file his successive petitions. Accordingly, we reverse the trial court's determinations in both appeals and remand for second-stage proceedings.

¶ 41 In reaching this conclusion, we express no opinion on the credibility of the affidavits, which is reserved for the third stage of postconviction proceedings. *Warren,* 2016 IL App (1st) 090884-C, ¶ 77 (credibility determinations may not be made until a third-stage evidentiary hearing of a successive postconviction proceeding).

¶ 42 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand for second-stage postconviction proceedings.

¶ 43 Reversed and remanded.