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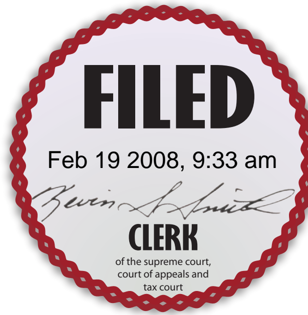

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT F. FUTRELL,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 49A02-0703-PC-202

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 3
The Honorable William T. Robinette, Judge Pro Tem
Cause No. 49G03-0202-PC-50985

February 19, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Robert Futrell (Futrell), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUE

Futrell raises three issues on appeal, which we combine and restate as the following single issue: Whether the post-conviction court erred in denying him a new trial based upon newly discovered evidence.

FACTS AND PROCEDURAL HISTORY

We take the following facts from our opinion in Futrell's direct appeal:

> Gary Wheat went to Maggie Baker's home. They conversed about a missing television set for a few minutes. Baker left the room and called someone on her cell phone. A few minutes later someone knocked on the door, which Baker opened and then stood behind. Futrell, John McDaniel, and two other men entered the room. McDaniel shot Wheat in the leg. Wheat played dead while someone took approximately $340 to $360 in cash out of his pants pocket. Futrell shot Wheat two more times in the leg as he left.

Futrell v. State, No. 49A02-0209-CR-727, slip op. at 2 (Ind. Ct. App. June 19, 2003). On June 25, 2002, a jury found Futrell guilty of robbery, as a Class A felony, Ind. Code § 35-42-5-1; aggravated battery, a Class B felony, I.C. § 35-42-2-1.5; carrying a handgun without a license, as a Class C felony, I.C. § 35-47-2-23; and carrying a handgun without a license, as a Class A misdemeanor, I.C. § 35-47-2-23. The jury also found Futrell to be a habitual offender. The trial court imposed a sentence of forty years. On appeal, Futrell challenged

the sufficiency of the evidence supporting his robbery conviction. On June 19, 2003, we affirmed his conviction in a memorandum decision. *See Futrell*, No. 49A02-0209-CR-727.

In March 2004, Futrell began filing post-conviction papers, and on November 9, 2005, he filed his second Amended Petition for Post-Conviction Relief (Petition), which is the subject of this appeal. On April 24, 2006, Futrell filed an affidavit sworn by Gary Wheat, one of the victims in the case, seeking to secure a subpoena for Wheat to testify at a post-conviction evidentiary hearing. Wheat's affidavit stated, in pertinent part:

> 4. I Gary Wheat testified to a Robbery that took place at 1026 Jefferson on 1-24-02[.] [I]t was my understanding that two of the defendants had also shot me. I found out that it was not true at all.
>
> 5. I was scared that I would've become a suspect instead of a victim[.] I also apologize under a sworn statement that if I could've changed my testimony I would have and I Gary Wheat apologize to all involved and I hope this sworn statement helps.
>
> 6. Once again under oath I'm sorry and apologize and sorry for my role in this case.

(Appellant's App. pp. 124-25). On April 28, 2006, the post-conviction court stamped "DENIED" on Wheat's affidavit.

The post-conviction court held evidentiary hearings on July 11 and August 8, 2006. On December 14, 2006, the post-conviction court issued its Findings of Fact and Conclusions of Law Denying Post-Conviction Relief. On January 17, 2007, Futrell filed a Motion to Correct Error. The post-conviction court summarily denied the motion the same day.

Futrell now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Futrell argues that the post-conviction court erred in denying him a new trial based upon Wheat's affidavit. Under the rules of post-conviction relief, the petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Johnson v. State*, 832 N.E.2d 985, 991 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*. To succeed on appeal from the denial of relief, the post-conviction petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite to the one reached by the post-conviction court. *Johnson*, 832 N.E.2d at 991.

Our supreme court has established that new evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial. *Taylor v. State*, 840 N.E.2d 324, 329-30 (Ind. 2006). We must analyze these nine factors with care, as "the basis for newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized." *Id*. at 330 (quoting *Reed v. State*, 508 N.E.2d 4, 6 (Ind. 1987)). The burden of showing that all nine requirements are met rests with the petitioner for post-conviction relief. *Id*.

Wheat's affidavit fails to meet at least two of the criteria. First, a statement by Wheat that he lied at trial would be used merely to impeach his testimony. *See id.* Second, Futrell has not persuaded us that the new evidence would probably produce a different result at a new trial. In his affidavit, Wheat stated, "[I]t was my understanding that two of the defendants had also shot me. I found out that it was not true at all." (Appellant's App. p. 124). He continued, "I also apologize under a sworn statement that if I could've changed my testimony I would have[.]" (Appellant's App. p. 125). However, there is no indication in what regard Wheat would have changed his testimony and therefore no reason to believe that a new trial would produce a different result.

Moreover, even if Wheat were to testify that Futrell did not shoot him, Futrell would still be liable as an accomplice. "[T]here is no distinction between the criminal responsibility of a principal and that of an accomplice. Thus, one may be charged as a principal yet convicted as an accomplice." *McQueen v. State*, 711 N.E.2d 503, 506 (Ind. 1999) (citations omitted). The post-conviction court noted this general principle in its Findings of Fact and Conclusions of Law Denying Post-Conviction Relief when it stated, "[T]he doctrine of accomplice liability renders it moot who the actual shooter was as long as [Futrell] participated, which the evidence clearly demonstrated he did." (Appellant's App. p. 170).

Because Futrell failed to establish all nine requirements mandating a new trial based upon newly-discovered evidence, the post-conviction court did not err in denying Futrell's request for a new trial.[1]

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err in denying Futrell's petition for post-conviction relief.

Affirmed.

KIRSCH, J., and MAY, J., concur.

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[1] The two other "issues" Futrell raises are without merit. He first notes that the appointed public defender withdrew from this case before Futrell obtained Wheat's affidavit and asks that we remand the case to the post-conviction court to give the State Public Defender's Office an opportunity to re-evaluate his claims in light of the affidavit. However, presentation of the affidavit by an attorney would make it no less deficient as a basis for a new trial, so remand for this purpose is unnecessary.

Secondly, Futrell urges: "This [c]ourt, in the interest of judicial economy and of considerable savings to the tax paying public, should suggest to the Department of Correction that changes be made to [its] law library policies and directives." (Appellant's Br. p. 15). However, Futrell neither provides us with the language of any allegedly-problematic policy or directive nor explains how any specific policy or directive hampered his preparations in this case. Furthermore, "[c]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Cohn v. Strawhorn*, 721 N.E.2d 342, 346 (Ind. Ct. App. 1999), *trans. denied* (citing *Turner v. Safley*, 482 U.S. 78, 85-86, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)). "Thus, courts will afford substantial deference to the professional expertise of correction officials with respect to the day-to-day operation of prisons and the adoption and execution of prison policies." *Id.*