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IN THE
COURT OF APPEALS OF INDIANA

LAFAYETTE CALDWELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-1003-PC-156
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
The Honorable Kathleen A. Sullivan, Magistrate
Cause No. 45G01-9210-CF-251

SEPTEMBER 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant Lafayette Caldwell, Jr., seeks review of the post-conviction court's denial of his successive petition for post-conviction relief. We affirm.

ISSUES

Caldwell raises one issue, which we restate as whether the post-conviction court erred by denying his successive petition.

FACTS

The underlying facts taken from this Court's opinion on direct appeal are as follows:

> On the afternoon of September 18, 1992, Nathan Riley and Jimmy Lane went to meet Michael Jones in an apartment in Gary, Indiana. Riley planned to meet Jones at the apartment so that he could pay Jones $1,000, which he owed to Jones. Jones was also expecting Caldwell to arrive at the apartment to collect a $1,200 gambling debt.
>
> Upon Riley and Lane's arrival at the apartment, Jones was alone. Jones, Riley, and Lane proceeded to the living room, where Riley and Lane sat on the couch. Jones stood by the window and watched for Caldwell to arrive. Approximately 20 to 30 minutes later, Caldwell arrived at the apartment accompanied by James Lofton and Jermaine Byers. Caldwell and Jones went into a bedroom to talk. Lofton and Byers remained in the living room with Riley and Lane. While in the bedroom, Jones gave Caldwell the $1000, which Jones had received from Riley. Caldwell then leaned out the doorway of the bedroom, whispered to Lofton, and nodded his head. Lofton immediately pulled out a .9mm handgun and ordered Riley and Lane to lie on the floor. Byers also pulled out a handgun. Caldwell returned to the bedroom.
>
> Riley and Lane lay face down on the floor next to the couch. Byers took $200 to $300 from Riley's pockets. Jones looked out of the bedroom doorway and saw Riley and Lane lying on the floor and Lofton and Byers holding guns on them. Jones then fled from the apartment. Lofton shot at Jones while he fled. Caldwell emerged in the doorway with a gun in his hand. Riley and Lane were then shot. Riley was shot in the head, neck, left shoulder, and chest. Lane was shot in the chest, back, and hip. Caldwell, Byers, and Lofton then fled the scene.

> After the shooting had stopped, Lane got up from the floor and jumped out of the window, which was two stories above the ground. Riley crawled to the phone, called the police, and then crawled out into the hallway to wait for help. Both Riley and Lane survived the shooting. Subsequently, Lane identified Caldwell and Byers from photographic lineups. Riley was able to identify Caldwell, Byers, and Lofton as involved in the shooting after viewing three separate photographic lineups.
>
> On October 13, 1992, Caldwell, Byers, and Lofton were charged with two counts of attempted murder and one count of robbery. After a jury trial, the three men were found guilty on all counts. Caldwell was sentenced accordingly.

Caldwell v. State, Cause No. 45A05-9407-CR-241, slip op. at 2-3 (Ind. Ct. App. Aug. 12, 1996). Caldwell appealed, and this Court affirmed the trial court's judgment. *See id.*

Next, Caldwell filed a petition for post-conviction relief. The post-conviction court denied Caldwell's petition, and he did not appeal.

Subsequently, Caldwell asked this Court for leave to file a successive petition for post-conviction relief. This Court granted Caldwell's request, and Caldwell filed his successive petition with the post-conviction court. The post-conviction court held an evidentiary hearing ("the SPCR hearing"). After the SPCR hearing, the post-conviction court issued findings of fact and conclusions of law denying Caldwell's successive petition. Caldwell now appeals.

DISCUSSION AND DECISION

Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Walker v. State*, 903 N.E.2d 1022, 1024 (Ind. Ct. App. 2009), *transfer denied*. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Id.* A petitioner who has been denied post-conviction

relief appeals from a negative judgment, and he or she must convince the appellate court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *McCary v. State*, 761 N.E.2d 389, 391 (Ind. 2002), *reh'g denied*.

The post-conviction court made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conclusion that a mistake has been made." *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008) (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*).

Lafayette contends he is entitled to post-conviction relief because newly discovered evidence establishes that he is entitled to a new trial. As we discuss in more detail below, one of the victims of the robbery and shootings has recanted part of his original trial testimony. New evidence will mandate a new trial only when a 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 trial. *Carter v. State*, 738 N.E.2d 665, 671 (Ind. 2000). The basis for newly discovered evidence should be received with great

caution and the alleged new evidence carefully scrutinized. *Reed v. State*, 508 N.E.2d 4, 6 (Ind. 1987).

In its findings of fact and conclusions of law denying Caldwell's successive petition, the post-conviction court concluded that Caldwell's new evidence did not meet all nine requirements for relief because the new evidence is merely impeaching, is not worthy of credit, and would probably not produce a different result at trial. We address the post-conviction court's conclusion that the new evidence would probably not produce a different result at trial. When reviewing a claim that newly discovered evidence will probably produce a different result on retrial, the post-conviction court is to consider the weight that a reasonable trier of fact would give the newly discovered evidence and evaluate the probable effect of this evidence in light of all the facts and circumstances of the original trial. *Atherton v. State*, 714 N.E.2d 1116, 1121 (Ind. Ct. App. 1999), *reh'g denied*.

At the SPCR hearing, Nathan Riley repudiated his statement at Caldwell's original trial that he saw Caldwell with a gun during the robbery and shootings. Riley testified at the SPCR hearing that he never saw Caldwell holding a gun, and his prior statements that Caldwell had a gun were false. Riley stated that when he testified at Caldwell's original trial he was in a "revengeful" state of mind. Tr. p. 55.

Nevertheless, at the SPCR hearing Riley reaffirmed other aspects of his prior testimony that tend to show that Caldwell participated in the robbery and shootings even if Caldwell did not wield a gun. Riley conceded that his prior testimony remained true in the following respects: (1) Caldwell arrived at Jones' apartment with Lofton and Byers;

(2) at the apartment Caldwell went into a bedroom with Jones, came out the bedroom after a while, and whispered to one of the gunmen immediately before Lofton and Byers pulled out guns and ordered Riley and Lane to lie down; and (3) Caldwell left the apartment with Lofton and Byers after the shootings. Furthermore, Riley testified at the SPCR hearing that he was unable to say that Caldwell was not involved in the robbery and shootings.

In addition, other evidence implicates Caldwell in the robbery and shootings. The other victims, Michael Jones and Jimmy Lane, both testified at Caldwell's original trial. Jones testified that he went into a bedroom to talk with Caldwell, and then Caldwell left the bedroom as if to tell someone something before Lofton and Byers pulled out guns. Lane similarly testified that Caldwell came out of a bedroom and whispered to one of the gunmen before they pulled out guns. Lane further testified that Caldwell was still in the apartment when the first shot was fired.

Based upon this evidence, the trial court properly concluded that Riley's new testimony would probably not produce a different result at trial. *See Reed*, 508 N.E.2d at 6 (ruling that a co-conspirator's new testimony, in which he recanted past testimony, was not likely to produce a different result at trial in light of other evidence).

Having determined that the trial court properly concluded that Caldwell's newly discovered evidence would probably not produce a different result at trial, we need not address the remaining elements of the test for newly discovered evidence because Caldwell was obligated to prove all nine.

Caldwell contends that the trial court improperly added a tenth element to the standard for newly discovered evidence, which he characterizes as requiring Caldwell to prove that Riley was under threat of prosecution for perjury when Riley recanted his trial testimony. We disagree. In its findings of fact and conclusions of law, the trial court noted that Riley was not under threat of prosecution for perjury, but the trial court noted that fact for the purpose of distinguishing a Court of Appeals decision from the current case, not for the purpose of adding a new element to the standard for newly discovered evidence.

Caldwell has failed to demonstrate that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.

CONCLUSION

For these reasons, we affirm the judgment of the post-conviction court.

Affirmed.

BRADFORD, J., and BROWN, J., concur.