IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSE A. MORETA,	§	
	§	
Defendant Below,	§	No. 26, 2024
Appellant,	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	
STATE OF DELAWARE,	§	Cr. ID No. 1603013733 (N)
	§	
Appellee.	§	

Submitted: April 24, 2024
Decided: May 24, 2024

Before **VALIHURA**, **TRAYNOR**, and **LEGROW**, Justices.

ORDER

After consideration of the appellant's opening brief, the State's motion to affirm, and the record on appeal, it appears to the Court that:

(1) The appellant, Jose A. Moreta, appeals from the Superior Court's order denying his second motion for postconviction relief. The State has filed a motion to affirm the Superior Court's judgment on the ground that it is manifest on the face of Moreta's opening brief that the appeal is without merit. We agree and affirm.

(2) After a seven-day trial in 2018, a Superior Court jury found Moreta guilty of murder, attempted murder, and other offenses. This Court affirmed on direct appeal in April 2019.[1] Moreta, with the assistance of counsel, filed a timely

[1] *Moreta v. State*, 2019 WL 1752616 (Del. Apr. 16, 2019).

motion for postconviction relief. The Superior Court denied the motion, and this Court affirmed.[2]

(3) On June 16, 2023, Moreta filed a letter asserting that he had evidence, previously withheld from him, that showed his innocence. The court determined that Moreta was seeking postconviction relief under Rule 61 of the Superior Court Rules of Criminal Procedure and, after receiving additional filings from Moreta and a response from the State, denied the motion. The Superior Court held that Moreta's motion was procedurally barred because it was successive[3] and filed more than one year after the judgment of conviction became final.[4] The court further concluded that Moreta had not overcome the procedural bars by sufficiently pleading the existence of new evidence that creates a strong inference that Moreta is actually innocent of the crimes of which he was convicted. [5]

(4) On appeal, Moreta asserts that he has three items of new evidence that satisfy the actual innocence exception to the procedural bars: (i) an unnotarized

[2] *Moreta v. State*, 2023 WL 3115966 (Del. Apr. 26, 2023).
[3] DEL. SUPER. CT. R. CRIM. PROC. 61(i)(2).
[4] *Id.* R. 61(i)(1).
[5] *See id.* R. 61(d)(2) (providing that a second or subsequent motion for postconviction relief "shall be summarily dismissed, unless the movant was convicted after a trial and the motion" pleads with particularity either "that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted" or "a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies to the movant's case and renders the conviction . . . invalid"); *see also id.* R. 61(i) (establishing procedural bars to postconviction relief and exceptions thereto).
[5] *Id.* R. 61(i)(5).

"affidavit" purportedly signed by Moreta's accomplice,[6] Joshua Gonzalez, in 2017, stating that Moreta did not tell Gonzalez to shoot; (ii) data on Moreta's cell phone that could have been used to show that a phrase that Gonzalez posted on Facebook after the shooting[7] referred to song lyrics and not the murder; and (iii) purported inconsistencies between the testimony of certain witnesses at Moreta's 2018 trial and those witnesses' testimony at Gonzalez's 2017 trial. None of those items constitutes new evidence of Moreta's actual innocence.

(5) Under Superior Court Criminal Rule 61(d)(2)(i), a defendant may avoid summary dismissal of a successive motion for postconviction relief by pleading with particularity that "new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted."[8] "Satisfying the actual innocence test is, by design, a heavy burden, and

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[6] *See Moreta*, 2023 WL 3115966, at *1 ("Gonzalez, with Moreta by his side, fired eight shots down North Connell Street in the direction of DeLeon and Serrano, wounding DeLeon and killing Serrano. . . . Although the evidence did not support a finding that Moreta had personally shot DeLeon or Serrano, the State argued that Moreta was guilty as an accomplice because Gonzalez acted at Moreta's bidding."). Gonzalez was tried separately from Moreta and was convicted of murder and other charges. *Moreta*, 2019 WL 1752616, at *1 n.2.

[7] *See Moreta*, 2019 WL 1752616, at *1 ("Two days after the incident, Gonzalez posted on Facebook: '[f]uckin wit tha gang you'll end up ina box M.O.E.T. You know what we pop anything drop when tha bullets fly by in da hood man you better watch a lot 100 # AllBegan # MoneyGateMixTape # FreeC # FreeP.'"); *see also id.* at *1 n.3 ("The State did not attempt to interpret much of the post. Instead, the State focused on the use of similar hashtags and 'M.O.E.T.' to connect Gonzalez and Moreta. '# FreeP' allegedly referred to Moreta, who was incarcerated at the time of the post.").

[8] DEL. SUPER. CT. R. CRIM. PROC. 61(d)(2)(i); *see also id.* R. 61(i)(5) (providing that the bars to successive and untimely motions for postconviction relief "shall not apply either to a claim that the court lacked jurisdiction or to a claim that satisfies the pleading requirements of subparagraphs 2(i) or (2)(ii) of subdivision (d) of this rule").

such meritorious claims are exceedingly rare."[9] To satisfy this test, "a defendant must present additional evidence that was not available at trial and would not have been despite the defendant's exercise of due diligence, thus making it 'new.'"[10] More specifically, a defendant must show that the "new evidence (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial and could not have been discovered before by the exercise of due diligence; and (3) is not merely cumulative or impeaching."[11]

(6) The affidavit, cell phone data, and testimonial inconsistencies do not satisfy that test. As the Superior Court observed, the affidavit bears characteristics that make its authenticity uncertain. Even accepting the affidavit at face value, however, Moreta has not shown that he discovered the affidavit, which is dated June 15, 2017, after his 2018 trial or that he could not have discovered it before his trial or initial postconviction proceedings. Similarly, Moreta does not explain why he would not have known before trial or during the first postconviction proceedings that his own cell phone contained song lyrics that corresponded to the words in the Facebook post. Moreover, the record reflects that the State provided the defense with extraction reports from Moreta's cell phones during pretrial discovery. Finally, as to the purported inconsistencies in witnesses' testimony at Moreta's trial and

[9] *Purnell v. State*, 254 A.3d 1053, 1100 (Del. 2021).
[10] *Id.*
[11] *Id.*

Gonzalez's trial, Moreta did not present this issue to the Superior Court in the first instance,[12] and we cannot discern how testimony provided during public trials in 2017 and 2018 could possibly be new evidence.

NOW, THEREFORE, IT IS ORDERED that the motion to affirm is GRANTED, and the judgment of the Superior Court be AFFIRMED.

BY THE COURT:

/s/ Gary F. Traynor
Justice

[12] *See* DEL. SUPR. CT. R. 8 ("Only questions fairly presented to the trial court may be presented for review . . . .").