

2011 IL App (1st) 091724-U  
No. 1-09-1724

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 97 CR 5351
	)	
KAFELE PARKER,	)	Honorable Stanley J. Stacks,
	)	Judge Presiding.
Defendant-Appellant.	)	

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Justice Murphy delivered the judgment of the court.

Quinn, P.J., and Steele, J., concurred in the judgment.

**ORDER**

*HELD:* Where this court affirmed defendant's conviction on direct appeal finding evidence provided at trial sufficient to prove guilt beyond a reasonable doubt and affirmed the dismissal of his successive postconviction petitions, the trial court's denial of defendant's subsequent motion for fingerprint testing of shell casings found at the crime scene pursuant to 725 ILCS 5/116-3 was proper because the testing would not produce new, noncumulative evidence that was materially relevant to his claim.

¶ 1 Following a consolidated bench trial, defendant, Kafele Parker, and codefendant, Walter Cage, were found guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 1992)) and

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attempted murder (720 ILCS 5/8-4(a) (West 1992), 720 ILCS 5/9-1(a)(1) (West 1992)) in connection with the January 22, 1997, fatal shooting of Booker Flowers III, and shooting of Antoine Mims. Defendant was sentenced to consecutive sentences of 60 years' imprisonment for first degree murder and 30 years' imprisonment for the attempted murder conviction. Defendant filed a direct appeal, arguing that the evidence was insufficient to prove him guilty beyond a reasonable doubt and that the trial court erred in denying his request for a continuance to procure a mitigation witness during sentencing. This court affirmed his convictions and sentence. *People v. Parker*, 1-98-1586 and 1-98-3644 (2000) (unpublished order under Supreme Court Rule 23).

¶ 2 Defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)) (Act), claiming that he was denied effective assistance of trial counsel relating to counsel's alleged failure to investigate and present mitigation evidence. Defendant's petition was summarily dismissed and this court affirmed. *People v. Parker*, 1-01-1204 (2002) (unpublished order under Supreme Court Rule 23). Defendant filed a successive postconviction petition on May 10, 2004, alleging ineffective assistance of trial counsel for the failure to request forensic testing on the shell casings recovered from the crime scene. Defendant was denied leave to file the petition and this court affirmed that ruling. *People v. Parker*, 1-04-2444 (2005) (unpublished order under Supreme Court Rule 23).

¶ 3 Defendant filed the instant *pro se* motion for fingerprint testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963. 725 ILCS 5/116-3 (West 2008). The trial court denied defendant's motion in a written order, finding that, while identity was at issue at trial,

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three eyewitnesses identified defendant as one of the shooters and fingerprint testing of the shell casings would provide speculative, if any, evidence to exonerate defendant. On appeal, defendant argues his motion demonstrated that identity was the central issue in the case, a sufficient chain of custody of the shell casings was established, and the new testing available had the potential to uncover new, noncumulative evidence material to his claim of actual innocence. For the following reasons, we affirm the denial of defendant's motion.

¶ 4

#### I. BACKGROUND

¶ 5 The facts of this case are more fully recited in the Rule 23 order for defendant's direct appeal. *Parker*, slip op. at 1-8. We limit our discussion of the facts here to those pertinent to defendant's motion. As noted above, a consolidated bench trial was held at which the following evidence was presented.

¶ 6 On January 21, 1997, Booker Flowers III and Antoine Mims, both members of the Traveling Vice Lords street gang, were selling drugs at the northwest corner of the intersection of Kildare Avenue and West Madison Street in Chicago, Illinois. This intersection contained adjacent "drug spots" controlled by two "enemy" street gangs, the Gangster Disciples controlled the southern corners and the Traveling Vice Lords controlled the northern corners. Flowers and Mims were on their gang's controlled area on this morning when three members of the Gangster Disciples drove up and approached Flowers, telling him to not sell drugs on the corner, but to sell them in the alley. Flowers responded with laughter and the other gang members also laughed and then drove away.

¶ 7 In the morning of January 22, 1997, Flowers and Mims were standing at the northwest corner of this intersection again, along with fellow gang members Quentin McCaster, Wyatt

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Hayes, and others. A vehicle owned by a member of the Gangster Disciples pulled up to the southeast corner of the intersection and the vehicle occupants talked with members of that gang who were standing on the corner. The vehicle then was driven toward the northwest corner of the intersection.

¶ 8 Mims testified that defendant exited the rear driver's side door of the vehicle and ran toward the group of Traveling Vice Lords members. Defendant, dressed in a black leather jacket and a mask that covered the lower portion of his face, began shooting toward the group. Defendant shot Flowers, who immediately fell to the ground screaming. Codefendant also exited the vehicle and began shooting, hitting Mims twice in the chest and arm. Mims ran and was able to escape to his uncle's nearby store while defendant and codefendant stood over Flowers and shot him repeatedly.

¶ 9 An ambulance and police reported to Mims' uncle's store soon thereafter. Mims testified that he had known defendant for many years, but simply initially informed the police that members of the Gangster Disciples had shot him. At the hospital, Mims again spoke to a police officer and identified defendant as one of the shooters. On January 24, 1997, while still in the hospital, Mims identified defendant in a photo array and on January 26, 1997, he identified defendant in a lineup at the police station. On a later date, Mims returned to the police station and identified codefendant Cage in a lineup as the second shooter and identified a mask as the one worn by defendant.

¶ 10 Quentin McCaster testified consistently with Mims, stating that when the shooting started he ran way, looking back to see defendant and codefendant standing over Flowers and shooting repeatedly. He did not identify defendant as a shooter when interviewed by the police on the day

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of the shooting because he was “terrified.” Days later, he identified defendant and codefendant in separate lineups. He testified that he had known defendant for approximately three months prior to the shooting.

¶ 11 Kevin McCaster, Quentin’s brother, testified that he had been walking toward the group of Traveling Vice Lords when he observed defendant exit the rear driver-side of the vehicle and begin shooting at the group. Defendant was dressed in black and wearing a half-top mask. He saw defendant shoot Mims twice and repeatedly shoot Flowers. He further testified that he regularly saw defendant and codefendant together and knew he was a member of the Gangster Disciples because he saw him hanging out with members of that gang and handshaking with them.

¶ 12 Detective John Roberts of the Chicago police department testified that he was assigned to investigate the shooting and testified to the identifications made by Mims and Kevin McCaster. Detective David March testified that he placed defendant into custody on January 25, 1997, and transported him to the police station. When he was searched, a black ski mask was recovered from his jacket. Stipulated testimony established that Flowers suffered 12 gunshot wounds from two different firearms, a .380 caliber weapon and a 9-millimeter weapon.

¶ 13 Defendant presented the testimony of his wife and a hospital employee as alibi witnesses. Katina Johnson testified that at approximately 10:30 or 10:45 a.m. on January 22, 1997, defendant and codefendant walked with her to Bethany Hospital for her doctor’s appointment. The three remained at the hospital until after 1 p.m. Hospital employee Calvin Ridgell testified that he saw Johnson and a man who looked like defendant at the Hospital on January 22, 1997, at approximately 11:30 to 11:40 a.m. Ridgell testified to a check-in sheet from the hospital that

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indicated that Johnson checked into the hospital at 11:41 a.m.

¶ 14 Following arguments, the trial court found defendant and codefendant guilty of first degree murder and attempted first degree murder. On direct appeal, this court rejected defendant's arguments that the State failed present evidence sufficient to prove him guilty beyond a reasonable doubt and that the trial court erred in failing to grant a continuance during sentencing. *People v. Parker*, 1-98-1586 and 1-98-3644 (2000) (unpublished order under Supreme Court Rule 23).

¶ 15 On November 29, 2000, defendant filed a *pro se* postconviction petition, alleging that he was denied effective assistance of trial counsel relating to counsel's alleged failure to investigate and present mitigation evidence. The petition was summarily dismissed and this court affirmed the summary dismissal on appeal. *People v. Parker*, 1-01-1204 (2002) (unpublished order under Supreme Court Rule 23). Defendant sought leave to file a successive postconviction petition on May 10, 2004, alleging ineffective assistance of trial counsel for the failure to request forensic testing on the shell casings recovered from the crime scene. Defendant was denied leave and this court affirmed that ruling. *People v. Parker*, 1-04-2444 (2005) (unpublished order under Supreme Court Rule 23).

¶ 16 Defendant filed the instant *pro se* motion for fingerprint testing pursuant to section 116-3. 725 ILCS 5/116-3 (West 2008). The trial court denied defendant's motion in a written order. The court noted that defendant claimed in his motion that the requested testing was not available at the time of trial, but that he also had made a prior claim that counsel was ineffective for not requesting the same tests. The trial court also made a finding that, while identity was at issue at trial, three eyewitnesses identified defendant as one of the shooters and fingerprint testing of the

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shell casings would provide speculative, if any, evidence to exonerate defendant. Accordingly, the motion was denied. This appeal followed.

¶ 17

## II. ANALYSIS

¶ 18 Under section 116-3 of the Code of Criminal Procedure of 1963, a defendant may file a motion for fingerprint, Interballistic Identification System, or forensic testing not available or completed at trial where it has the potential to produce new, noncumulative materially relevant evidence to a defendant's actual innocence claim. 725 ILCS 5/116-3 (West 2008). Section 116-3 reads in full:

“(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint, Integrated Ballistic Identification System, or forensic DNA testing, including comparison analysis of genetic marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5-4-3 of the Unified Code of Corrections [730 ILCS 5/5-4-3], on evidence that was secured in relation to the trial which resulted in his or her conviction, and:

(1) was not subject to the testing which is now requested at the time of trial; or

(2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial

that provides a reasonable likelihood of more probative results. Reasonable notice of the motion shall be served upon the State.

(b) The defendant must present a prima facie case that:

(1) identity was the issue in the trial which resulted in his or her conviction; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant;

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community.

(d) If evidence previously tested pursuant to this Section reveals an unknown fingerprint from the crime scene that does not match the defendant or the victim, the order of the Court shall direct the prosecuting authority to request the Illinois State Police Bureau of Forensic Science to submit the unknown

fingerprint evidence into the FBI's Integrated Automated Fingerprint Identification System (AIFIS) for identification.” 725 ILCS 5/116-3 (West 2008).

¶ 19 Therefore, for a section 116-3 motion to succeed a defendant must show that identity was the central issue at trial, that the evidence was subject to a sufficiently secure chain of custody, and that the testing will “potentially produce new, noncumulative evidence that is materially relevant to the defendant’s actual-innocence claim.” *People v. Johnson*, 205 Ill. 2d 381, 393 (2002). In order to determine whether the new evidence is materially relevant, the trial court must consider not only the evidence presented at trial, but also the evidence the defendant seeks to test. Likewise, a reviewing court must review the record to assess the merits of the motion and review on appeal of a section 116-3 motion is *de novo*. *People v. Savory*, 309 Ill. App. 3d 408, 412 (1999).

¶ 20 Defendant asserts, and the State concedes, that he has shown that the fingerprint testing sought by defendant is generally accepted in the scientific community, that the shell casings were not tested for fingerprints at the time of trial, and that a sufficient chain of custody exists for the evidence. The State also concedes that identity was the issue at trial, but maintains that the evidence at trial proving defendant’s identity as the shooter was so overwhelming and any unrevealed evidence that the fingerprinting could uncover would be so speculative as to defendant’s case that the trial court properly determined it would not provide material evidence of defendant’s innocence.

¶ 21 Defendant argues that the trial court erred in relying in part on the allegation that the requested testing was not available at trial despite the fact he earlier had argued that counsel was ineffective for not requesting those same tests. Defendant notes that section 116-3 was amended

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in 2007 to remove the requirement that a defendant must allege that the technology was not available. While the trial court does note this failure, it bases its denial of the motion more on the finding that any evidence the testing would produce would provide, at best, speculative evidence that someone else loaded the weapon. With the testimony of three eyewitnesses at trial, the trial court found this evidence would not be non-cumulative evidence materially relevant to defendant's actual innocence claim.

¶ 22 Defendant maintains that this finding runs contrary to case law established by this court in *People v. Hockenberry*, 316 Ill. App. 3d 752 (2000) and *People v. Rokita*, 316 Ill. App. 3d 292 (2000). The defendant in *Hockenberry* sought DNA testing of vaginal swabs and stains from the victim and the victim's underwear and bed sheets. The victim had conceded that she had sexual intercourse with another person prior to the alleged offense and the State argued that evidence that the requested testing could provide would not be materially relevant. *Hockenberry*, 316 Ill. App. 3d at 757. The appellate court acknowledged this argument, but found that if testing established that the seminal fluid was from another person, it would nonetheless support the defendant's claim that he did not have sex with the victim and allowed the testing. *Id.* at 759.

¶ 23 In *Rokita*, while the victim identified the defendant, her ex-husband, as her attacker in an aggravated criminal sexual assault case, the defendant asserted that there was no sexual contact between them. The defendant was found guilty. Subsequently, the defendant moved for testing, arguing that DNA testing of seminal samples taken from the defendant and the victim should have been tested. The *Rokita* court, citing the dissent in *Savory*, rejected the idea that the evidence to be tested was not limited to that which would provide total vindication and found

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that the DNA testing could provide evidence relevant to the defendant's claim that no sexual contact occurred. *Rokita*, 316 Ill. App. 3d at 758-59.

¶ 24 Defendant argues that, like in *Hockenberry* and *Rokita*, evidence that someone else's fingerprints were on the shell casings would support his contention that he was not the shooter. Defendant points to testimony of the eyewitnesses that they were rival gang members with criminal histories. Defendant argues that the witnesses testified that they were either frightened, running away, "hysterical" or "dizzy" and that this necessarily diminishes the weight of their testimony. Furthermore, defendant was not specifically fingered as the shooter by the witnesses until days after the shooting. He argues that these factors and other inconsistencies of their testimony open doubt to the identifications made to the police and evidence that another person was involved would support his theory that he was not involved in the shooting.

¶ 25 We agree with the State that the trial court did not err in finding that any possible evidence from the requested testing would be, at best, speculative evidence that someone else handled the bullets of the firearm. As highlighted in *Savory*, this evidence would, at best, "only exclude one relatively minor item from the evidence of guilt marshaled against him by the State." *Savory*, 197 Ill. 2d at 215. The evidence in this case, even if other fingerprints were identified, would not overcome the testimony of the three eyewitnesses at trial. Three eyewitnesses who repeatedly identified defendant and were deemed credible at trial.

¶ 26 Unlike the situations in *Hockenberry* and *Rokita*, where testing of seminal and blood samples could demonstrate that the defendant did not have sexual contact, the best the evidence here could show was that someone else handled the bullets in defendant's gun. The corroborated eyewitness identifications would not be overcome by this outcome. As in *Savory*, this evidence

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would only exclude one relatively minor item of guilt and the trial court properly denied defendant's motion for additional testing.

¶ 27

### III. CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the trial court is affirmed

¶ 29 Affirmed.