

THIRD DIVISION  
January 19, 2011

No. 1-09-2260

**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
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 19827
	)	
ARTIS JACKSON,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE Steele delivered the judgment of the court.  
Presiding Justice Quinn and Justice Murphy concurred in the judgment.

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**O R D E R**

*HELD:* Where the defense failed to exercise diligence in securing police records, denial of defendant's mid-trial motion for continuance to obtain the records was not an abuse of discretion; and motion for new trial was properly denied where the police records would not have changed the outcome of the trial.

Following a bench trial, defendant Artis Jackson was found guilty of burglary and sentenced to a prison term of six years. On appeal, defendant contends the trial court erred in denying

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his request for a continuance to obtain police documents and in denying his posttrial motion based on those documents which he claimed supported an alibi defense. We affirm.

Defendant was charged by indictment with one count each of residential burglary, criminal damage to property, and possession of burglary tools. Defendant's bench trial began on January 13, 2009, with the testimony of Gino Betts. On August 24, 2007, Betts was the owner of a four-unit, two-story brick building at 5800-5802 South Aberdeen in Chicago. Summoned to the building by a tenant, he discovered that both doors and doorjamb into the basement were damaged. Inside, there was water on the floor, copper pipes running from outside to the water heater were missing, and the water meter was also missing. Betts did not know defendant and never gave him permission to make modifications to the property.

The trial was continued to March 10, 2009, when Chicago Police Officer Miguel Del Toro and his partner, Officer Marilyn Soto, testified that on August 24, 2007, at about 2:20 a.m., as they were working Beat 793, they heard a police dispatch and in response went to 5800 South Aberdeen in their marked squad car. They arrived at about 2:24 a.m. Officers Newsome and Koll, who were working Beat 712 and had been assigned to the call, arrived at the scene just as Del Toro and Soto were getting out of their marked police car. Del Toro and Soto spoke to a tenant and went

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to the rear of the building where they saw defendant walking out the basement door with pipes in his hand. Del Toro also saw wire cutters and a wrench next to the doorway, told defendant to put down the pipes, and placed defendant under arrest. Officer Soto escorted defendant to the police car and Del Toro entered the basement, where he saw standing water around the water heater and observed that pipes were missing from the water heater and in the ceiling.

During cross-examination of Officer Del Toro, defense counsel played selections from an audio recording represented to be conversations between the police dispatcher and police units responding to the burglary. Del Toro was asked whether he heard Soto say to the police dispatcher on the tape that "we're heading over to 712 job." Del Toro replied, "I thought she said that we're going in with one from 712's job." He testified that "going in with one" usually means "we have an arrest."

The audiotape was also played for Officer Soto, after which she remembered saying to the dispatcher, "We're going in with one from 712's job." She meant that they "would be doing the transporting of the person that had been apprehended on 712's job."

Officer Jonathan Newsome was also available to testify on the second day of trial and was called as a defense witness. On August 24, 2007, he was working Beat 712 and his partner was

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Officer Gerald Koll. They responded to a call of burglary in progress at the Aberdeen location and arrived after Officers Soto and Del Toro. Newsome and Koll stayed in front of the building and Del Toro and Soto went to the back. Newsome heard a commotion and he and Koll went around back where they saw Soto escorting defendant to the front of the building. Newsome helped Soto escort defendant to Beat 793's car. Newsome did not recall seeing anybody walking on the street before he got to 5802 Aberdeen. He did not stop anybody and did not recall running a name check on anybody in the vicinity of the scene.

The trial was continued to April 16, 2009, at which time defense counsel filed "Defendant's Motion to Continue Trial." The motion stated that the defense theory of case was that the incident was initially assigned to Beat 712 at 2:19 a.m., that 712 responded at 2:21 a.m. and did not find defendant or any other suspect, that Beat 712 then cruised the area and found defendant walking on the street. The Beat 712 officers stopped him, conducted a name check, and allowed him to leave. Later, officers from Beat 793 also came upon defendant, still walking on the street. Beat 793 also conducted a name check and, after it came back "clear," they decided to detain him because his name had appeared in a recent *Sun-Times* newspaper article stating that he had filed suit against the city, claiming "he was framed by a crew of crooked Chicago cops." Appended to the motion were the

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newspaper article, a "Chicago Police Department Event Query" and two pages of LEADS responses. The motion also stated that name check records were not included in the LEADS responses and that defendant had issued a subpoena to the police department for "the appropriate records." A copy of the subpoena was also attached, requesting "[r]ecords of any LEADS inquiries made on 24 Aug 2007 between 02:00 and 04:00 concerning Artis Jackson, DOB 26 August 1964, IR # 690159."

In presenting the motion to the court, defense counsel represented that the motion and subpoena were prompted three days earlier. "I \*\*\* became aware that there were some records that I didn't have which if I did have I believe would support the defense theory of the case. I delivered a subpoena to the police department on Monday afternoon \*\*\*." Defense counsel represented the LEADS records would show that two LEADS name checks were performed on the morning in question: one at around 2:22 by Beat 712 who let him go, and one by Beat 793 "where they had nothing in the name tag that said he could be held but his name sounded familiar," that they knew about the newspaper article and spoke to defendant about it. "Without the LEADS record we would not put on our defense." The court denied defendant's motion to continue the trial.

Defendant then called Officer Gerald Koll, who testified that on the date in question he was working Beat 712 with Officer

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Newsome. They responded to a burglary in progress at 5802 South Aberdeen. His beat (712) arrived there simultaneously with Beat 793. He saw Officers Soto and Del Toro who were taking an individual in custody. There also might have been another car at the scene. Koll did not believe he conducted any name checks on 08-24-07 on the scene. Koll did not hear on August 24, 2007, that the man in custody had recently sued a Chicago police officer. He did hear about it months later,

Defendant renewed his request to continue the trial to obtain the subpoenaed LEADS records; his motion was denied. Defense rested. After closing arguments, the court found that as to Count I, the State had proven only burglary, not residential burglary. The court found defendant guilty on Count 2, criminal damage to property, which would merge with Count 1, and not guilty on Count 3, possession of burglary tools.

On May 21, 2009, defense counsel filed "Defendant's Motion for Judgment of Acquittal or, in the Alternative, for a New Trial." The motion alleged, *inter alia*, that the trial court erred when, on the last day of trial, it denied the defense request for a continuance until such time as the police department complied with the subpoena of records of any LEADS name check inquiries between 2 and 4 a.m. on August 24, 2007. On that same court date, the court presented defense counsel with the subpoenaed LEADS records, and counsel asked that the

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posttrial motion be put over so he could have time to evaluate the LEADS material.

The case continued to June 19, 2009, at which time defendant filed a posttrial motion supplement, attached to which were police records and an affidavit of defendant which stated: "I did not testify in my own behalf at trial because I had been advised by my attorney that, without corroboration, my testimony that I had been stopped for a name check, released, and then arrested by officers Deltoro [sic] and Soto while I was walking on the street, and that the arresting officers made comments about my having recently filed a lawsuit against the City of Chicago, would not be believed."

Defense counsel argues that the LEADS documents showed: an officer named Lewandowski ran a name check on defendant at 2:32 a.m.; there was no indication Lewandowski was at the scene, as he was not named in police reports; therefore, Lewandowski must have been somewhere else and, therefore, defendant was somewhere else at 2:32 a.m. The defense argued this raised reasonable doubt that defendant was at the scene of the burglary when the four police witnesses testified he was. The trial court denied the motion and noted that it believed the testimony of the police officers who stated defendant was arrested at the scene at 2:24 a.m., and that the first name check was run on defendant eight

minutes later. Subsequently, the trial court sentenced defendant to six years in prison.

On appeal, defendant first contends the trial court abused its discretion when it denied his midtrial motion for a continuance to obtain police documents.

After trial has begun, the trial court may grant "a reasonably brief continuance \*\*\* to either side in the interests of justice." 735 ILCS 5/114-4(f) (West 2008). Once trial has started, whether to grant a continuance is within the sound discretion of the trial court. *People v. Ward*, 154 Ill. 2d 272, 304 (1992). The failure to grant a continuance will be reversed on review only when it is shown that the trial court abused its discretion and the refusal prejudiced the defendant. *Ward*, 154 Ill. 2d at 304.

In the instant case, trial began on January 13, 2009, and was continued to March 10. Trial was continued again to April 16, at which time defense counsel presented a written motion to the court to continue the trial until the Chicago Police Department responded to a defense subpoena issued just three days earlier. The subpoena asked the police to produce records of any LEADS inquiries made concerning defendant on the date of the burglary between 2 a.m. and 4 a.m. In presenting the motion, defense counsel stated that three days earlier, he became aware that there were records of LEADS name checks that he did not have

which would support the defense theory, namely, that defendant was in another location when police responded to the burglary-in-progress call, he was stopped on the street by officers from Beat 712 who ran a name check and then let him go, that Beat 793 later stopped him, also ran a name check, and arrested defendant after recalling his name from a *Sun-Times* news article two days earlier. In denying defendant's motion for a continuance, the trial court noted it was "just sort of speculation" that there was a second LEADS inquiry to support the defense theory, that the name "Jackson" was a common name in Chicago and it was "a little bit of a stretch" to believe that just because a name appears in print, it achieves cognizable notoriety. The court also observed that trial had commenced on January 13, 2009, was continued to March 10, and continued again to April 16. The court found it "odd" that defense counsel had decided just three days before the third day of trial on April 16 that the LEADS documents were critical to the defense, and that it was speculative the LEADS documents even existed.

We find that the trial court did not abuse its discretion in denying the motion for continuance where there was no showing the defense had exercised diligence in obtaining the sought-after documents in a timely fashion and the very existence of the documentation sought was speculative.

The documentation sought by defense counsel in the eleventh hour was procurable reasonably in advance of trial by the exercise of due diligence. The case was assigned to the trial courtroom in October 2007 and the discovery process began later that month. On April 16, 2008, defense counsel filed "Defendant's Motion for Additional Discovery," requesting (1) a Chicago Police Department "Event Query" report relating to "Event #0723601489" and (2) "Any records showing requests for information made by Chicago police officers concerning the identity of the defendant made between midnight and 2:30 a.m. on August 24, 2007." The documentation defense counsel sought one year later on April 16, 2009, the last day of trial, merely extended the time of the name checks performed from 2:30 a.m. to 4 a.m. Neither the motion for continuance, which was not supported by affidavit, nor defense counsel's argument on the motion gave any reason why the name check documentation was not or could not have been sought prior to trial.

Moreover, up to the time of the continuance request, no trial evidence had been adduced in support of the alibi defense that defendant was arrested at a location other than the burglary site. Before defendant requested the continuance, two police officers from Beat 793, Del Toro and Soto, previously had testified they saw defendant emerge from the burglarized basement and arrested him shortly after they arrived on the scene at 2:24

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a.m. Both officers were subject to cross-examination; neither was asked whether he or she had performed a name check on anyone stopped on the street or whether he or she had seen the *Sun-Times* article about defendant's lawsuit.

Appended to the written motion for continuance were exhibits which included a two-page "Event Query" with respect to the burglary investigation and a two-page LEADS response indicating that at 3:26 a.m. on the date of the burglary call, a name check for defendant was performed. That documentation, which apparently had been tendered to the defense in response to its discovery request one year earlier, does not indicate where or by whom the name check was requested and does not corroborate defendant's theory of the case that he was arrested on a public street and not at the burglarized premises. Significantly, defendant does not argue on appeal that it should have been obvious to the court that the requested LEADS records were vital to the defense. On the contrary, defendant concedes: "The trial judge did not, of course, know when he denied defendant's request for a continuance that the records defendant sought would establish defendant's innocence." This is an appropriate concession, as nothing presented in the written motion or in argument indicated that the defendant's request for additional police records was anything more than a speculative fishing expedition.

Relying on *People v. Walker*, 232 Ill. 2d 113 (2009), defendant asserts that the trial court abused its discretion in denying the motion in that the court failed to consider the relevant factors in denying the continuance. There, the supreme court stated that among the factors a trial court should consider included: the movant's diligence, the defendant's right to a speedy, fair and impartial trial, and the interests of justice. Other relevant factors included, *inter alia*, the history of the case, the complexity of the matter, the seriousness of the charges, docket management, judicial economy, and inconvenience to the parties and witnesses. *Walker*, 232 Ill. 2d at 125-26. The only relevant factor defendant claims the trial court ignored was the fact the trial had been continued twice before. The record shows, however, that the trial court did not ignore that fact, but commented on the previous continuances in the trial. Those continuances were by agreement when no other trial witnesses were available on the first or second day of trial. On the third day of trial, however, when counsel moved for a continuance, a police officer whose presence had been requested by defendant was available to testify.

Given the lack of diligence in attempting to acquire the documentation sought by the defense, the lengthy amount of time (18 months) available for discovery, the fact the records sought were readily available a year earlier with the exercise of due

diligence, the protracted delay of three months devoted to the trial of the case, and the fact that no evidence received in the first two days of trial supported the defense theory of the case or the necessity to the presentation of that defense of further delaying the trial to acquire the records, the trial court did not abuse its discretion in denying defendant's motion for a continuance of the trial.

Defendant's second argument on appeal is that the trial court erred in denying his motion for a new trial when presented with "credible evidence" of his "factual innocence." Defendant describes the police department LEADS records as "newly discovered evidence" which required that he be granted a new trial.

The basic purpose of a posttrial motion is to afford the trial court the opportunity to reexamine its earlier rulings. *People v. Young*, 248 Ill. App. 3d 491, 505 (1993). A motion for a new trial that alleges newly discovered evidence must be accompanied by the defendant's affidavit showing his lack of prior knowledge of this evidence and his diligence in obtaining it. Also, the defendant must attach additional affidavits of the witnesses who would testify concerning the new evidence on retrial, unless the lack of such affidavits are sufficiently explained. *People v. Gray*, 96 Ill. App. 3d 757, 762 (1981).

Here, as in *Gray*, defendant's posttrial motion made no allegation that the evidence was discovered subsequent to his trial or that it could not have been discovered prior to trial by the exercise of due diligence. Consequently, the trial court properly denied his motion without conducting a hearing.

Defendant contends, however, that the posttrial LEADS records proved his innocence because the first of the name checks was requested by Officer Lewandowski at 2:32 a.m. and, since Officer Lewandowski was not at the crime scene, it follows that defendant was also not at the crime scene at 2:32 a.m.

Defendant's argument is flawed by unsupported conclusions and by the unimpeached eyewitness testimony of four State witnesses. While Lewandowski apparently was not one of the beat officers reporting from the scene, his actual location when he requested the name check was never shown, nor is there any support for defendant's speculation that he had to have been with Lewandowski when the name check was requested.

On the contrary, the posttrial LEADS records undercut defendant's claim of innocence. His theory, which was never supported by any trial evidence, is that he was innocently walking down the street (the defense never suggested where defendant was) when he was stopped by Beat 712 (Koll and Newsome) who requested a name check and then released him, and that at a later time he was still innocently walking down the street when

Beat 793 (Soto and Del Toro) stopped him, did a name check, remembered defendant's name from a previous *Sun-Times* news article, and arrested him at a location other than the site of the crime. The LEADS records show, however, that no name check was requested by Beat 793. The second and third name checks were requested by Koll and Newsome of Beat 712, and defendant does not deny that it was the officers of Beat 793 who arrested him.

We reject defendant's contention that his posttrial motions raised evidence of his actual innocence. No evidence heard at trial supported defendant's theory that the police arrested him at another location. No trial evidence showed any of the four police officers knew on the day of the burglary about the *Sun-Times* article. No evidence, including the posttrial LEADS documentation, established that defendant was anywhere other than at the crime scene when he was arrested.

In denying defendant's supplement to his motion for a new trial, the trial court accurately described this case as one of credibility. The court found that the four officers, who identified defendant as the individual apprehended at the scene of the crime, testified credibly. Their testimony was not impeached by any evidence adduced during or after trial. We will not substitute our judgment for that of the trier of fact as to the credibility of the witnesses. *People v. Castillo*, 372 Ill. App. 3d 11, 20 (2007).

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The "newly discovered" evidence was at most speculative and, in light of the trial court's factual findings based on the credibility of the testifying police officers, there is no indication it would have changed the result of the trial.

For all of the above reasons, the judgment of the trial court is affirmed.

Affirmed.