

2011 IL App (2d) 100570-U
No. 2-10-0570
Order filed September 13, 2011

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kendall County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 05-CF-16
)	
THOMAS F. COX, JR.,)	Honorable
)	Martin D. Hill,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: The trial court properly dismissed defendant's postconviction petition alleging an actual-innocence claim based on newly discovered evidence: the evidence was not conclusive, as it consisted of a triple-hearsay assertion of a recantation, which assertion was itself recanted.

¶ 1 Defendant, Thomas F. Cox, Jr., was convicted of three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)). He filed a postconviction petition alleging that his trial and appellate counsel were ineffective, and also asserting a claim of actual innocence. The trial court summarily dismissed the petition and defendant appeals, contending that

the petition stated the gist of a claim of actual innocence based on newly discovered evidence. We affirm.

¶ 2 Defendant was convicted of three offenses against his stepdaughter, A.C. The trial court imposed three consecutive sentences of 18 years' imprisonment. On direct appeal, this court affirmed. *People v. Cox*, No. 2-06-0203 (2008) (unpublished order under Supreme Court Rule 23).

¶ 3 In 2009, defendant filed a postconviction petition. In it, he alleged several instances of ineffective assistance of trial counsel. He further alleged that appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness. Finally, defendant raised a claim of actual innocence based on the victim's alleged recantation.

¶ 4 Attached to the petition was the affidavit of defendant's mother, Mary Ann Lauk. She stated that on January 29, 2007, she accompanied the victim's mother, Roxanne Cox, to the office of Timothy Mahoney. Roxanne told Mahoney that her daughter had fabricated the allegations against defendant. Roxanne said that she still loved defendant and that A.C. was jealous of him.

¶ 5 A letter from Mahoney stated that his records revealed that he had an appointment scheduled with Mary Ann Lauk on January 29, 2007. However, he had no notes from the meeting and could not recall whether anyone else was with her.

¶ 6 A letter from public defender Donald Lorek stated that the office's chief investigator had interviewed Roxanne. She acknowledged telling Mahoney that A.C. had fabricated the allegations. However, she did so only because of pressure from defendant's family. She went on to say that A.C. had never recanted at any time. In defendant's own affidavit, he stated that he had spoken to his mother and that she denied pressuring Roxanne.

¶ 7 The trial court summarily dismissed the petition. Defendant timely appeals.

¶ 8 Defendant contends that his petition stated the gist of a meritorious claim of actual innocence, as Lauk's affidavit indicates that the victim recanted her testimony. The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) creates a three-stage process for the adjudication of postconviction petitions and permits a defendant to mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Erickson*, 183 Ill. 2d 213, 222 (1998). The summary dismissal of a postconviction petition presents a legal question that we review *de novo*. *People v. Ligon*, 239 Ill. 2d 94, 104 (2010).

¶ 9 The due process clause of the Illinois Constitution affords a postconviction petitioner the right to assert a freestanding claim of actual innocence based on newly discovered evidence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004); *People v. Washington*, 171 Ill. 2d 475, 489 (1996). The evidence in support of the claim must be newly discovered; material and not merely cumulative; and “‘of such conclusive character that it would probably change the result on retrial.’” *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009) (quoting *Morgan*, 212 Ill. 2d at 154).

¶ 10 Defendant urges that his mother's affidavit provides such conclusive evidence, but we disagree. There are at least three problems with this evidence, any of which is potentially fatal. First, recantation evidence is considered “‘very unreliable.’” *People v. Steidl*, 142 Ill. 2d 204, 254 (1991) (quoting *People v. Marquis*, 344 Ill. 261, 265 (1931)). Moreover, as the trial court noted, the alleged recantation does not even come from the victim herself. Rather, the evidence is triple hearsay, as defendant's mother reported that she heard the victim's mother say that the victim had recanted. See *People v. Cole*, 215 Ill. App. 3d 585, 587 (1991) (generally, newly discovered evidence consisting of hearsay does not warrant relief in a collateral attack on a conviction). Finally, the defense investigator who interviewed Roxanne reported that she made up the recantation story

under pressure from defendant's family and that, in reality, the victim's story would be the same today as it was at trial. Although defendant avers that his mother denied pressuring Roxanne, even if we accept this as true, it does not discount the possibility that some other member of defendant's family pressured Roxanne. (We note that Lorek's letter referred to defendant's "family," and not just his mother.) Thus, we are left with a triple hearsay assertion that the victim recanted, which is contradicted by defendant's own investigator. Such evidence is hardly "conclusive" such that it would likely change the result of the trial. Indeed, it is unlikely that the evidence would even be admissible.

¶ 11 On appeal, defendant does not assert that any of the other claims in his petition had merit. Thus, the trial court properly dismissed the petition.

¶ 12 The judgment of the circuit court of Kendall County is affirmed.

¶ 13 Affirmed.