2012 IL App (1st) 092138-U

FIFTH DIVISION
May 25, 2012

No. 1-09-2138

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 97 CR 9609
	)	
DESHAWN COLLINS,	)	Honorable
	)	John J. Fleming,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's post-conviction petition stated an arguably meritorious claim of actual innocence, and thus should not have been summarily dismissed, where the exculpatory affidavits of two codefendants were material and non-cumulative, and where the affidavits could arguably affect the outcome where the sole trial evidence against defendant was his own confession that was arguably not corroborated.

¶ 2 Following a 1998 jury trial, defendant DeShawn Collins was convicted of first degree murder and home invasion and sentenced to concurrent prison terms of 60 and 30 years. We affirmed on direct appeal. *People v. Collins*, No. 1-98-4851 (2000)(unpublished order under

Supreme Court Rule 23). Defendant appeals from the summary dismissal of his *pro se* post-conviction petition, contending that he stated arguably meritorious claims of (1) newly-discovered evidence of actual innocence and (2) ineffective assistance of trial and direct appeal counsel for not challenging a discovery violation by the State.

¶ 3 Defendant and codefendants Stanford Reed and Walter Blackman were charged with first degree murder, home invasion, and attempted armed robbery for allegedly breaking into the home of Walter McCullins, demanding money from him at gunpoint, and then shooting him to death on or about March 5, 1997.

¶ 4 During discovery, the State listed Assistant State's Attorney (ASA) Sandra Blake as a potential trial witness. Defendant demanded that the State disclose any witnesses intended to be called in rebuttal "and a specific statement as to the substance of the testimony such witnesses will give at the trial." There is no indication on this record that the State tendered such a statement regarding ASA Blake.

¶ 5 Defendant and codefendants were tried simultaneously, defendant and Reed by juries and Blackman by the court. At trial, police officer Laurie Sabatini testified that, at about 11 a.m. on the day in question, she saw four men exit a car and run behind McCullins' apartment building. She then heard 10-12 shots before the four men ran from the building, with one of them limping and holding his right knee, and fled in the car with Blackman driving. Officer Sabatini then went to McCullins' apartment, where she found him in the kitchen near the apartment door with several gunshot wounds. She also found several bags of cannabis and money in the adjacent living room. Officer Sabatini identified Blackman as the driver in a lineup and at trial.

¶ 6 Evidence was presented that Reed was hospitalized later the same day with a gunshot injury to his leg and that gunshot residue was found on his left hand. The autopsy found that McCullins had six gunshot wounds, and two .45 caliber bullets were recovered from his body.

There were bullet holes in the kitchen and living room of McCullins' apartment. Thirteen shell casings – one .38 caliber, five .45 caliber, and seven 9-millimeter – were found at the scene, and forensic testing found that all the 9-millimeter casings came from one gun and all the .45 caliber casings and bullets came from a single gun.

¶ 7 Defendant was arrested based on statements by Reed to the police, and when he was confronted with Reed's written statement, defendant gave a statement admitting to being one of the four men involved in the instant offenses. In his statement, defendant described the guns the four men had at the scene: defendant had a .38 caliber, Blackman a .45 caliber, Reed a .25 caliber, and the fourth offender (who defendant knew only by a nickname) had a 9-millimeter.

¶ 8 Doris Wilson testified for the defense that defendant was sleeping on the floor of her apartment, about a mile from the scene, at the time of the shooting. Specifically, when she left for work at about noon, defendant was still asleep. On cross-examination, Wilson admitted speaking with a female ASA but denied telling her that she saw a bundle on the living room floor when she left; that is, that she did not see defendant's face or speak with him. Wilson testified that defendant had not been sleeping with a blanket over him and she could see his face. ASA Sandra Blake testified in rebuttal that Wilson had told her that, while defendant slept in Wilson's apartment on the night before the shooting, she did not see or speak to him that morning. However, ASA Blake did not record or otherwise memorialize Wilson's statement. Defense counsel did not object to Wilson's cross-examination regarding her statement to ASA Blake nor to ASA Blake's testimony to the statement.

¶ 9 On this evidence, the jury found defendant guilty as charged. Codefendant Reed was found guilty as charged and codefendant Blackman was found not guilty. Defendant's unsuccessful post-trial motion did not claim a failure to disclose ASA Blake's rebuttal testimony. Defendant was sentenced upon the murder and home invasion convictions as stated above.

¶ 10 On direct appeal, defendant challenged improper remarks by the State during closing arguments. Specifically, an ASA had argued that "no one would have known about [the firearms evidence] except for this defendant." when in fact the police were aware through forensic testing of the type of weapons used in the instant offenses. We found this statement to be erroneous but not reversible because the error was cured by the jury instructions and was harmless in that defendant would have been convicted on the trial evidence regardless of the erroneous remarks.

¶ 11 Defendant filed the instant *pro se* post-conviction petition in November 2008. He raised a claim of newly-discovered evidence of actual innocence: affidavits from codefendants Reed and Blackman to the effect that defendant did not participate in the instant offenses and from Laron Barnes corroborating Wilson's alibi testimony. He also raised claims of ineffective assistance of counsel for not filing a motion to suppress his statement and for not challenging a discovery violation by the State; specifically, the failure to tender Wilson's alibi statement that defendant was asleep in her apartment at the time of the shooting. Attached to the petition was the 2008 affidavit of Laron Barnes averring that he was with defendant at Wilson's apartment on "the morning of" the shooting, without further specificity about when he arrived at or left Wilson's home. Also attached was Blackman's 2008 affidavit stating that defendant was not in his car on the day in question and did not participate in the McCullins shooting. Reed's 2007 affidavit was attached, in which he averred that defendant did not participate in the instant offenses, that Micheal Adams and Krotaphis Thompson participated alongside Blackman and Reed, and that Reed gave a statement implicating defendant because he had been told that defendant had just implicated him.

¶ 12 On February 11, 2009, the court summarily dismissed the petition. Regarding the actual innocence claim, the court found that the trial evidence of defendant's guilt was "substantial." As

to the claim that the State failed to disclose Wilson's statement to ASA Blake, the court noted that there no written or recorded statement for the State to tender. This appeal followed.

¶ 13 On appeal, defendant contends that his petition stated an arguably meritorious claim of actual innocence, based upon the exonerating affidavits of codefendants Reed and Blackman.

¶ 14 Under section 122-2.1 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2.1 (West 2010)), the circuit court may examine the trial record and any action by this court in evaluating a post-conviction petition within 90 days of its filing, and must summarily dismiss the petition if it is frivolous or patently without merit. A *pro se* petition is frivolous or patently without merit only if it has no arguable basis in law or fact; that is, if based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as one that is fantastic or delusional. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). The summary dismissal of a post-conviction petition is reviewed *de novo*. *Id*.

¶ 15 A defendant has the right to assert in a post-conviction petition a freestanding claim of actual innocence based on newly-discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Evidence is newly discovered if it has been discovered since the trial and the defendant could not have discovered it sooner through due diligence. *Ortiz*, 235 Ill. 2d at 334. The evidence in support of the claim must also be material rather than merely cumulative, and of such conclusive character that it would probably change the result on retrial. *Ortiz*, 235 Ill. 2d at 333.

¶ 16 Here, we must conclude that defendant's petition stated an actual innocence claim of arguable merit. The affidavits of codefendants Reed and Blackman are material and non-cumulative. While the State correctly points out that Blackman does not expressly aver that he participated in the McCullins shooting and was acquitted thereof, Reed was convicted of the instant offenses and admitted in his affidavit his involvement alongside Blackman. Reed's key averment, that he implicated defendant upon being told by police detectives that defendant had

implicated him, is not a fanciful – that is, fantastic or delusional – allegation meriting summary dismissal. The fact that officers were ordered to arrest defendant only after Reed gave a written statement implicating him is not inherently contradictory to the proposition that Reed was prompted or induced to implicate defendant by an assertion that defendant had implicated him.

¶ 17 As our supreme court stated in *Ortiz*:

> "This case is similar to *Molstad*, in which the defendant filed a motion for new trial and submitted the affidavits of his five codefendants, all of whom alleged that the defendant was not present during the attack on the victim. [Citation.] At trial, the State offered one eyewitness who testified that defendant was present during the crime. None of the codefendants testified because of the risk of self-incrimination. We affirmed the appellate court's decision to vacate defendant's conviction and remanded for a new trial on the basis of the newly discovered evidence. We held that the evidence was not cumulative because it went to 'an ultimate issue in the case: Who was present at the time of the attack *** ?' [Citation.] Although the defendant offered alibi testimony at trial, the introduction of the five codefendants' statements at the posttrial stage raised additional questions concerning the trial court's verdict." *Ortiz*, 235 Ill. 2d at 336, quoting *People v. Molstad*, 101 Ill. 2d 128, 132, 135 (1984).

¶ 18 As to the requirement that the codefendant affidavits would be likely to change the result, we note that this petition was summarily dismissed so that the issue before us is whether defendant has presented an arguable claim. While the evidence against defendant was certainly

sufficient to affirm his conviction on direct appeal, it is not overwhelming. Only defendant's own confession implicated him at trial, and it is certainly arguable that his statement is not substantially corroborated insofar as the corroborating information therein could have been provided by the police detectives who assisted in its preparation. Our supreme court noted in *Ortiz* that, where the newly-discovered evidence directly contradicts the trial evidence, as the Reed and Blackman affidavits do here, " 'this does not mean that [defendant] is innocent, merely that all of the facts and surrounding circumstances, including the testimony of [defendant's witnesses], should be scrutinized more closely to determine the guilt or innocence of [defendant].' " *Ortiz*, 235 Ill. 2d at 337, quoting *Molstad*, 101 Ill. 2d at 136.

¶ 19 Because we are remanding this petition for further proceedings under the Act, we need not address defendant's contention that his petition stated an arguably meritorious claim of ineffective assistance by trial and direct appeal counsel for not challenging a discovery violation by the State; to wit, the failure to disclose ASA Blake's rebuttal testimony that Wilson gave a prior statement inconsistent with her alibi testimony. See *People v. Hodges*, 234 Ill. 2d 1, 22 n. 8 (2009)(Act does not permit partial summary dismissal).

¶ 20 Accordingly, we vacate the summary dismissal of defendant’s post-conviction petition and remand for further proceedings pursuant to sections 122-4 through 122-6 of the Act. 725 ILCS 5/122-4 to -6 (West 2010).

¶ 21 Vacated and remanded.