

No. 1-09-2790

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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. 94 CR 21169 |
| |) | |
| REGINALD KELLEY, |) | Honorable |
| |) | Mary Margaret Brosnahan, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Karnezis concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court appropriately denied defendant's postconviction motion for ballistics testing where testing results would not produce evidence material to his claim of actual innocence.

¶ 2 Defendant Reginald Kelley appeals the circuit court's denial of his motion pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2008)) for testing of ballistics evidence introduced at his 1996 trial. On appeal, defendant contends the circuit court erred in denying his motion where he set forth a *prima facie* case for ballistics testing in support of his claim of actual innocence. We affirm.

¶ 3 Following a 1996 bench trial, defendant was found guilty of multiple felonies, including the first-degree murder of a three-year-old boy and the attempted first-degree murder of the child's grandfather. Defendant was sentenced to consecutive prison terms of 80 years for first-degree murder and 20 years for attempted first-degree murder.

¶ 4 The trial testimony revealed that on July 25, 1994, at about 10:30 p.m., Ebony Collins was driving a white Chevy Caprice north on Yates Boulevard on Chicago's south side. Ebony's father, Ronnie Cole (Cole), sat in the front passenger seat, and Ebony's three-year-old son, Kevin Taylor, Jr. (K.T.), sat between them. In the back seat were Ebony's brother, Ronnie Collins (Ronnie), and Ebony's friend, Lashon Johnson (Lashon). When the car stopped for a red light at 75th Street, Ebony, Cole, and Ronnie noticed several people standing about 25 feet away on the northeast corner. Two of the boys walked across the street toward the Chevy. One boy wore dark clothing; the other boy, who was staring at the Chevy, wore red shorts and a white T-shirt with striped sleeves and his hair was in braids. At trial Ebony, Ronnie and Lashon identified defendant as the boy in red shorts, and both Ebony and Ronnie testified that they had seen defendant on several occasions prior to the shooting.

¶ 5 When the traffic light changed to green, Ebony began to drive through the intersection, and she and Ronnie saw defendant throw down some gang signs. Ebony heard someone say, "Ain't that the motherf***ing car?" As the car drove on, Ronnie and Lashon looked out the rear window and saw defendant fiddle with his shirt. Ronnie saw a black object tucked inside the shirt. Lashon testified that she saw defendant's right arm extend to a 90-degree angle and saw three flashes from his extended arm. He fired several gunshots, and the back windshield was shattered by bullets entering the car. Mr. Cole was shot twice in his left arm. K.T. was shot in the back of his head and died hours later in a hospital.

¶ 6 On July 29, 1994, a police officer escorted Ebony to a funeral home where she recognized defendant from the night of the shooting. Police officers detained defendant, who was placed under arrest after he was found to be in possession of a loaded .25-caliber semi-automatic handgun. Ebony, Ronnie, and Lashon subsequently identified defendant in police lineups.

¶ 7 Officer Ferrari, an evidence technician, testified that he recovered three 9-millimeter cartridge casings on the street and another three cartridge casings from the nearby driveway of an Amoco station at the intersection of Yates and 75th Street. From the floor of the Chevy behind the driver's seat, Ferrari recovered a fragment of a copper jacket from a fired bullet.

¶ 8 The parties stipulated that a forensic pathologist, Dr. Kirschner, performed an autopsy on K.T. and determined that the child died from severe cerebral injuries secondary to a gunshot wound to the head. Dr. Kirschner removed a partially deformed medium-caliber jacketed lead bullet from K.T.'s right frontal lobe. The bullet was maintained in the proper chain of custody and forwarded to the Chicago crime lab. The parties also stipulated that a forensic expert, Mr. Warner, would testify he subjected the bullet fragment to analysis, it was not suitable for comparison, and he would be unable to testify as to its specific caliber.

¶ 9 Assistant State's Attorney (ASA) Peter Faraci testified that he conducted a post-arrest interview of defendant concerning the shooting of K.T. and his grandfather. Defendant told Faraci that he was not sure where he was at the time of the shooting, but he was either at his aunt's house or "hanging out" with his friends in an alley. He also stated that two days before that shooting, his cousin, Brian Hill, a member of the Black P Stone street gang, had been shot and killed by Gangster Disciples. Defendant was also a Black P Stone, and he believed that the car used in the shooting of Brian Hill was a white or light-colored four-door Chevrolet.

¶ 10 Subsequently, defendant told ASA Catherine Hufford that on July 23 his cousin Brian had been fatally shot and that at the time of K.T.'s shooting death he was at the home of Brian's

parents at 6725 South Clyde. Hufford asked defendant whether he was worried that the gun found in his possession was used in the shooting. Defendant replied, "no, because I did not have no nine millimeter." Hufford asked him who had said it was a 9-millimeter gun. When defendant said she had told him, she stated she never mentioned what kind of weapon it was. Defendant responded, "I should have listened to my mother and kept my mouth shut. I don't want to talk to you any more."

¶ 11 Defendant presented an alibi defense through the testimony of Kash Tahmir (formerly known as Larry Hill) and his wife, Enewamah Tahmir. Their son, Brian Hill, a member of a street gang, was shot to death in a drive-by shooting early on the morning of July 24, 1994. They testified that defendant was with them inside their home at 6725 South Clyde from early July 24, shortly after Brian died, until July 27. As Tahmir and defendant's stepfather were close friends, Tahmir and his wife considered defendant as if he were their nephew and their son Brian's cousin. During that time defendant wore long dark pants and a striped shirt. Enewamah testified that defendant could not have left the house through the back door because that door could not be unlocked without a key and she had the key.

¶ 12 Melissa Williams, Brian Hill's girlfriend, was at the Tahmir home from about 5 a.m. on July 24 until July 28. Between 9:30 and 11 p.m. on July 25, defendant was with her and other young people in Brian's bedroom. Defendant was wearing black jeans and a white shirt with a collar and black stripes across the shirt. He wore those clothes until the following Thursday.

¶ 13 Angela Egeston was also was at the Tahmir home on July 25 from noon until 1:30 a.m. on July 26. During some of that time, she was on the back porch with defendant. One could simply unlock the back door and walk out.

¶ 14 In rebuttal, Norfil Diciolli, an investigator for the Cook County State's Attorney's Office, testified that on August 4, 1994, he went to 6725 South Clyde and interviewed Tahmir. Tahmir

stated that he had just had a telephone conversation with defendant's mother, who had called to ask him about helping her out to get some alibi witnesses for her son. Tahmir said she had been "a little upset with him" because he had not supplied a list of witnesses and told her he could not bother with it, that he was under stress because of the death of his own son. When Diciolli asked Tahmir specifically about defendant's whereabouts on the evening of July 25, 1994, between 10 and 11 p.m., Tahmir stated he could not remember.

¶ 15 In closing argument, the prosecutor emphasized the identification testimony of Lashon Johnson who saw defendant fire into the Chevy and two other witnesses who saw defendant at the crime scene, as well as the motive of gang retaliation for the killing of Brian Hill. The prosecutor briefly commented that defendant's statement to ASA Hufford indicated he knew the gun that killed K.T. was a 9-millimeter weapon.

¶ 16 The circuit court found defendant guilty of first-degree murder, attempted first-degree murder, and armed violence, and imposed an extended prison term of 80 years for the first-degree murder of K.T. and a consecutive 20-year prison term for the attempted first-degree murder of Ronnie Coles.

¶ 17 On direct appeal, defendant contended that the circuit court abused its discretion in sentencing him and also asserted that his trial counsel was ineffective, *inter alia*, for failing to investigate evidence concerning the caliber of the bullet removed from K.T.'s head during the postmortem examination and stipulating inappropriately to the ballistics evidence and corresponding medical examiner testimony. We affirmed the judgment of the circuit court after finding that "there is no evidence in the record that trial counsel failed to either interview Dr. Kirschner or investigate the evidence concerning the caliber of the bullet. Instead, defendant points this court to evidence of an autopsy report that is not contained in the record." *People v. Kelley*, 304 Ill. App. 3d 628, 636 (1999). We concluded the evidence did not support a holding

that defendant was denied effective assistance of counsel and that "a medical examiner is not qualified to testify as to ballistics testimony." *Id.*

¶ 18 Following unsuccessful attempts to gain relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 1998, 2002); see *People v. Kelley*, 331 Ill. App. 3d 253 (2002); *People v. Kelley*, No. 1-07-2152 (2009) (unpublished order under Supreme Court Rule 23)), on May 5, 2009, defendant filed a motion pursuant to section 116-3 of the Code for post-conviction ballistics testing of the shell casings found on the street and the bullet retrieved from the murder victim's skull against the Integrated Ballistics Identification System (IBIS) database. Alleging that "ballistics testimony was a central part of the State's case," the motion contended that IBIS testing (1) would show that recovered bullets did not match the shell casings found at the crime scene or corroborate defendant's alleged statement, and/or (2) may provide a link to evidence found at another crime scene after defendant's incarceration. On June 23, 2009, the circuit court denied the motion for ballistics testing without a hearing. Ruling that the motion failed to make a *prima facie* showing requisite for testing under the statute, the court's written order found that: the ballistics evidence was tested prior to trial and that the bullets and/or shells came from a 9-millimeter gun; the parties had stipulated at trial that the bullet fragments were not suitable for comparison and, therefore, it could not be determined which caliber weapon fired them; and there was abundant evidence supporting defendant's conviction. The court denied defendant's subsequent motion for reconsideration.

¶ 19 On appeal, defendant contends the circuit court erred in ruling that he had failed to set forth a *prima facie* case for ballistics testing and in finding that trial evidence showed the ballistics evidence came from a 9-millimeter weapon. Defendant also asserts the court erred in denying his motion for ballistics testing where he demonstrated that IBIS testing "has the

potential to reveal the identity of the true offender, disprove that the gun used in the offense was a [9-]millimeter, and render his alleged custodial statement immaterial."

¶ 20 Defendant's motion was founded on section 116-3 of the Code. The section was enacted in 1998, after defendant's 1996 trial, and outlined the process defendants must follow to obtain fingerprint or forensic DNA testing when actual innocence was at issue during trial. 725 ILCS 5/116-3 (West 1998). Section 116-3 was amended in 2007 to include Integrated Ballistic Identification System testing. See Pub. Act 95-688, § 5 (eff. Oct. 23, 2007). It permits a defendant to obtain forensic testing of physical evidence when such testing was not available at the time of the defendant's trial and when certain statutory requirements are met. *People v. Sanchez*, 363 Ill. App. 3d 470, 475 (2006). To present a *prima facie* case for forensic testing, a defendant must establish that identity was the central issue at his trial and that there was a sufficient chain of custody of the evidence to be tested. 725 ILCS 5/116-3(b) (West 2008); *People v. Shum*, 207 Ill. 2d 47, 66 (2003). The circuit court then must determine whether the requested testing will potentially produce new, noncumulative evidence that is materially relevant to the defendant's claim of actual innocence. *People v. Johnson*, 205 Ill. 2d 381, 393 (2002). Although the evidence need not vindicate defendant completely, it must tend to "significantly advance" his claim of actual innocence. *Johnson*, 205 Ill. 2d at 395, citing *People v. Savory*, 197 Ill. 2d 203, 213 (2001). We review *de novo* a circuit court's ruling on a motion pursuant to section 116-3. *People v. Brooks*, 221 Ill. 2d 381, 393 (2006); *People v. Barrow*, 2011 IL App (3d) 100086, ¶ 25.

¶ 21 Section 116-3 provides in relevant part:

"(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, 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.

***."

¶ 22 Defendant satisfied the initial requirement for filing his motion under subsection 116-3(a)(1), *i.e.*, that the ballistics evidence admitted at his 1996 trial was not subject to the requested IBIS testing, as the IBIS database was not available until 1999. See *People v. Pursley*, 407 Ill. App. 3d 526, 531, 532 n.3 (2011).

¶ 23 Defendant also contends, but the State disputes, that he presented a *prima facie* case for ballistics testing under subsection 116-3(b). Defendant's motion for ballistics testing accurately contended that identity was directly at issue. The motion also asserted that the ballistics "evidence was tested in this case and that evidence remains in the custody of the State ***." This averment is sufficient to establish chain of custody. *Sanchez*, 363 Ill. App. 3d at 478 (the defendant's motion, stating that the evidence to be tested had been in the continuous possession of law enforcement authorities, was sufficient to satisfy the chain-of-custody requirement). The record confirms that a sufficiently secure chain of custody was established with respect to the

ballistics evidence. The parties stipulated to the chain of custody of the partially deformed jacketed lead bullet that Dr. Kirschner recovered from K.T.'s head. Officer Ferrari recovered the six 9-millimeter shell casings from the site of the shooting. He also recovered a fragment of a copper jacket from the floor of the Chevy. At trial, Ferrari identified six shell casings and a copper jacket fragment as the ones he had recovered, and he testified that all were in substantially the same condition at trial as when he recovered them. All of those exhibits were admitted in evidence. We may assume that the trial exhibits, including the ballistics evidence, would have remained in the custody of the circuit court clerk after trial and would not be available to defendant. *Johnson*, 205 Ill. 2d at 394; see also *People v. Travis*, 329 Ill. App. 3d 280, 285 (2002). We conclude that defendant presented a *prima facie* case for IBIS testing of the ballistics evidence pursuant to subsection 116-3(b).

¶ 24 Defendant's claim fails, however, because he has failed to satisfy the first requirement under 116-3(c) of the statute. Under that subsection, the circuit court was required to allow the requested IBIS testing upon a showing that it had the scientific potential to produce new, noncumulative evidence materially relevant, even though not completely exonerating, to the defendant's claim of actual innocence. 725 ILCS 5/116-3(c)(1) (West 2008); *Pursley*, 407 Ill. App. 3d at 532. However, defendant's motion that IBIS ballistics testing would produce new, noncumulative evidence was based only on unfounded speculation that the IBIS system can determine the caliber of a deformed bullet or bullet fragment previously determined by a ballistics expert to be unsuitable for comparison and incapable of caliber identification.

¶ 25 An explanation of IBIS is necessary to understand whether the defendant satisfied subsection (c). See *Pursley*, 407 Ill. App. 3d at 533. Local Illinois law enforcement agencies and other agencies that partner with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) "use IBIS to acquire digital images of the markings recovered from crime scene and test evidence

and compare those images in a matter of hours against earlier entries into the IBIS system using electronic image comparison." *Id.* If a match emerges, firearms examiners compare the original evidence with a microscope to confirm the match, thus linking two different crime scenes. *Id.*

¶ 26 We agree with the State that an IBIS test on the bullet fragment does not have the potential to produce materially relevant evidence. Defendant refers to the IBIS system as "new technology" and asserts it would show that the bullet recovered from K.T.'s head does not match the 9-millimeter casings. Defendant overlooks the fact that the IBIS system is not a testing procedure for determining calibration. Its value lies in its extensive database. IBIS is not a new technology; it simply utilizes imaging to reproduce and store in its database a picture of what the ballistics evidence looked like after the shooting. Defendant cites no authority for his inference that IBIS can transform a bullet which defendant previously stipulated to be incapable of comparison into a bullet that can be compared with others in the IBIS data base. The deformed bullet from K.T.'s head was analyzed by the crime lab, found unsuitable for comparison, and its caliber could not be determined. The only IBIS "testing" that could be done with the bullet fragment from K.T.'s head would be to obtain an image of the fragment and attempt to determine whether it matches any other entry in the IBIS database. It cannot do what defendant's motion claimed, *i.e.*, to disprove that the gun used in the offense was a 9-millimeter weapon. Defendant has not demonstrated, or even claimed, that IBIS could determine the caliber of the partially deformed bullet which a ballistics expert had pronounced as unsuitable for comparison. Defendant's motion failed to demonstrate how IBIS could achieve its purpose of linking the bullet recovered in this case with evidence found at another crime scene. Nor has defendant demonstrated how IBIS could either show that the bullet did not match the shell casings found at the crime scene or disprove defendant's alleged statement to ASA Hufford.

¶ 27 With respect to the fragment of a jacket from a fired bullet that was found in the Chevy, no evidence was adduced at trial whether it was also analyzed at the crime lab and, if so, whether its caliber was or could be determined. However, such analysis was available. If the caliber of the jacket fragment could have been determined by crime lab analysis, there was no need for IBIS testing. If there were no identifiable caliber markings on the jacket fragment and its caliber could not have been determined, as in the case of the bullet fragment, there is no indication a comparison of its digital image with the IBIS database could be made.

¶ 28 Another basis for affirming the circuit court's denial of the motion for ballistics testing, even if it were successfully performed, is that the testing was not materially relevant to defendant's claim of actual innocence. His conviction was based primarily on the credibility of eyewitness testimony and did not rest to any significant degree on ballistics evidence or defendant's statement to ASA Hufford indicating he knew the caliber of the murder weapon. The prosecution presented three witnesses who testified they viewed defendant at the scene of the offense. Two of them, Ebony and Ronnie, previously had known defendant from that neighborhood. The third, Lashon Johnson, testified she saw defendant fire the shots that entered the Chevy and struck the victims, and she was impeached only on minor matters such as when she told police officers about details of the tragedy. Defendant's alibi witnesses contradicted each other on the key question of whether defendant was able to have left the Clyde Street house by the back door at the time of the shooting. While the six casings found at the crime scene were 9-millimeter casings, the weapon used was never recovered and the caliber of the fragments recovered from K.T.s head and Ebony's car could not be determined. Consequently, the State could not positively establish the caliber of the weapon used. The State made only a brief reference in closing argument to defendant's statement to ASA Hufford about a 9-millimeter weapon. Here, as in *Savory*, 197 Ill. 2d at 215, testimony about the physical evidence sought to

be tested "was only a minor part of its strong case against the defendant." We conclude here, as we did in *Savory*, that "a test result favorable to defendant would not significantly advance his claim of actual innocence, but would only exclude one relatively minor item from the evidence of guilt marshaled against him by the State." *Id.*

¶ 29 We are cognizant that the circuit court's findings may have been mistaken with respect to some identification testimony and the caliber of the recovered ballistics fragments. However, we review *de novo*, and we may affirm the circuit court's judgment on any basis contained in the record regardless of the circuit court's reasoning. *Beacham v. Walker*, 231 Ill. 2d 51, 61 (2008).

¶ 30 Defendant also contends that IBIS "testing may provide a link to another piece of evidence found at a crime scene committed after Kelley was incarcerated" and that such a result "drastically increases the likelihood" that the same person, someone other than defendant, used the same weapon to kill K.T. Defendant relies heavily on *Pursley*, where the alleged murder weapon, a Taurus 9-millimeter, was recovered from the defendant's apartment. Experts for the State and the defense compared two fired bullets recovered from the crime scene with test bullets fired from the Taurus. A State witness testified that all the bullets were fired from the same gun. The defendant's witness opined that while the crime scene bullets were probably fired from a Taurus gun, they were not fired from the specific gun recovered from the defendant's apartment. Pursley contended on appeal that "IBIS testing could reveal that ballistics evidence from the crime scene might match a weapon that was used in a crime *after* defendant was incarcerated, which could be exonerating evidence as the State heavily relied upon the ballistics evidence produced at trial." (Emphasis in original.) *Pursley*, 407 Ill. App. 3d at 529. This court observed: "Here, we consider what evidence could result from an IBIS search. The best outcome that defendant could obtain from IBIS testing is that the crime scene evidence could be 'matched' to the evidence of another crime that occurred after police confiscated defendant's Taurus gun, thus

implicating another possible weapon besides defendant's gun." *Id.* at 535. In reversing the denial of the defendant's motion for section 116-3 ballistics testing, we held that the defendant had met the requirements of the statute, since using the IBIS database to search for additional matches had the potential to produce new evidence to significantly advance his claim. *Id.* at 539. We also noted there that, unlike the instant case, the State relied upon the ballistics evidence (*id.* at 538) and much of the State's remaining evidence was circumstantial (*id.* at 539).

¶ 31 In the instant case, where the prosecution presented strong identification testimony, the weapon was never recovered. Defendant was arrested several days after the crimes, allowing ample time to dispose of the murder weapon. That the same weapon may have been used at a later time in the commission of a separate crime does not exonerate defendant. The case *sub judice* is very similar to that of *People v. Snow*, 2012 IL App (4th) 100415, where, as in the instant case, the murder weapon was not recovered. This court determined that defendant's claim, that IBIS testing could show that some unknown weapon used in another offense could identify the "true perpetrator" in his case, was wholly speculative. *Id.* at ¶ 72. Consequently, in affirming the denial of the defendant's motion for section 116-3 ballistics testing, this court concluded that "[a]ny new evidence would not disprove a gun used by defendant to shoot [the victim] was not the murder weapon." *Id.* Here, as in *Snow*, "any test result would not significantly advance defendant's claim of actual innocence." *Id.* Accordingly, we conclude the circuit court appropriately denied defendant's section 116-3 motion.

¶ 32 For the reasons stated above, we affirm the judgment of the circuit court.

¶ 33 Affirmed.