2012 IL App (2d) 110539-U
No. 2-11-0539
Order filed September 18, 2012



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Winnebago County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 97-CF-1081 |
| MARVIN WILLIAMS, | ) | Honorable Joseph G. McGraw, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

**ORDER**

*Held*: The trial court properly denied defendant's petition for Y-STR DNA testing under section 116-3, as the testing would not produce evidence materially relevant: defendant sought to establish that blood on a shoe did not come from a victim, but testing had already established that it did, and the testing he sought could not have identified another person whose blood was on the shoe, which identity would not likely have helped defendant.

¶ 1 Defendant, Marvin Williams, appeals a judgment denying his motions for leave to file a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West

2010)) and for scientific testing of evidence under section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2010)). We affirm.

¶ 2 I. BACKGROUND

¶ 3 On May 26, 1998, a jury found defendant guilty of two counts of first-degree murder (720 ILCS 5/9-1(a)(3) (West 1996)) in connection with the shooting deaths of Justin Levingston and Adrienne Austin at a house in Rockford at about 2 a.m. on March 18, 1997. The full trial evidence is set out in our opinion on defendant's direct appeal. See *People v. Williams*, 313 Ill. App. 3d 849 (2000). We note the following here.

¶ 4 Two witnesses, LeMual Conley and Antonio Trammell, testified that they, defendant, and Emmett Wright drove together to the house, entered by force, and terrorized the occupants, who included Levingston, Austin, four-year-old Luckia Austin, and Lovenia Hinton. Conley testified that he had known defendant for about two years before the crime; on the previous evening, the four men had agreed to drive to the house to steal marijuana. When they entered, defendant had a gun. Conley grabbed Hinton and told her not to look, and defendant and Wright took another woman who was downstairs to the second floor. Conley heard one shot, then another. Soon afterward, there were two more shots. Going upstairs, Conley saw Levingston lying in the stairwell and defendant standing alone in a bedroom. Conley went downstairs, heard two more shots from upstairs, and saw defendant come downstairs. Defendant wanted to shoot a woman who was downstairs, but Conley talked him out of it. The four intruders left. Conley dropped defendant off at the home of Angela Williams, defendant's sister. *Id*. at 853-54.

¶ 5 Trammell testified consistently with Conley about the events preceding the break-in. He also testified that, inside the house, defendant and Wright went upstairs; defendant asked where the

"'shit'" was; Trammell heard a shot and a man in pain; defendant repeated his question and Trammell heard another shot; defendant repeated his question and a woman said that she did not know; and another shot rang out. *Id*. at 855. Next, Trammell saw Levingston lying wounded in the stairwell. Defendant said, " 'Oh, you faking' "; and Trammell heard another shot. *Id*. Eventually, the men left. *Id*.

¶ 6 Hinton testified that, after the intruders kicked in the door and entered, one of them pointed a gun in her face, told her to look at the floor, and asked her where Levingston was. She pointed upstairs. Two intruders went upstairs. Hinton heard two gunshots in quick succession, then a third gunshot. Hinton heard the intruders leave, one of them speaking twice. Afterward, she saw that Levingston was lying, dead, on the stair landing and Adrienne Austin was gravely wounded upstairs. In June 1997, Hinton went to the courthouse and heard defendant speak. She immediately recognized his voice as that of the man who had spoken twice on exiting the house. *Id*. at 852-53.

¶ 7 Mike Triplett, a Rockford police officer, testified that, on March 20, 1997, he entered Angela Williams's home and arrested defendant. At the police station, defendant was wearing the same shoes as when he was arrested. *Id*. at 856. These shoes were introduced into evidence as People's exhibit No. 86. Human bloodstains were on them. DNA tests were run on two of the stains, People's exhibit Nos. 36-A and 36-B. The results were consistent with Levingston's DNA profile. No. 36-B was also consistent with one or more additional contributors, but not with defendant or the other intruders. Martinez Mineau testified that, on March 18, 1997, Trammell told Mineau about the shootings. Trammell described what he and "Red" had done upstairs, with Trammell shooting Levingston and "Red" yelling at the woman in the bedroom. *Id*. at 856-57.

¶ 8 Defendant relied on alibi, testifying that, after leaving Angela Williams's home at about 10 p.m., four hours before the break-in, he stayed at Tamara Miller's home until about 11:30 a.m., then returned to Angela Williams's home. *Id*. at 857-58. According to defendant, at the time, his sister was dating Conley but also seeing a man nicknamed "Red." *Id*. at 858. "Red's" name, occupation, and friends were all unknown to defendant. On March 18, 1997, shortly after hearing about the murders, defendant met "Red" in a parking lot. At "Red's" request, defendant lent him the tennis shoes that he had been wearing and took "Red's" shoes in return. Defendant testified that he was not wearing shoes at the time of his arrest but put on "Red's" shoes, which were size 13. Defendant claimed that he wore size-14 shoes. He admitted having told the police that he had spent the entire night, before his arrest, at Angela Williams's home. He also admitted that, after being arrested and having the shoes seized, he did not tell the police that the shoes really belonged to "Red." *Id*. In rebuttal, an officer who interviewed defendant on March 20, 1997, testified that, at first, defendant said that he had spent the whole night at his sister's home; then said that he had gone to Miller's house at midnight; and, after being told that Miller denied this, then said that he had been at his sister's home all night. *Id*. at 858-59.

¶ 9 Defendant appealed his convictions, contending that the trial court erred in admitting Hinton's voice-identification testimony; that the court erred in admitting testimony from Conley, his codefendant, allegedly implying that Conley had been threatened while in jail; and that improper comments in the State's closing argument denied him a fair trial. On May 23, 2000, this court affirmed the judgment. In discussing whether defendant had forfeited his second issue, we noted:

> "Here, we do not find the evidence *** closely balanced. Conley and Trammell testified as to the defendant's presence and conduct during the commission of the crime. Their

> testimony was substantially corroborated by Hinton's version of what happened that night *and by the blood found on the defendant's shoes*, which matched the blood of one of the victims. Additionally, Hinton identified the defendant's voice as the voice of the man she had heard coming downstairs and asking who else was in the house." (Emphasis added.) *Id*. at 861-62.

¶ 10 On April 9, 2001, defendant filed a petition for relief under the Act, raising various claims. The trial court dismissed the petition summarily. This court affirmed. *People v. Williams*, No. 2-01-0868 (2003) (unpublished order under Supreme Court Rule 23).

¶ 11 On November 8, 2010, defendant filed two documents in the trial court. The first was entitled, "Motion for Leave to File a Successive Petition for Post-Conviction Relief." The motion recognized that, under section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)), a defendant wishing to file a successive petition under the Act must either (1) show both cause for his failure to bring his claim in his original petition, and prejudice, *i.e.*, that the error not raised in the original petition so infected the trial that the resulting conviction or sentence violated due process; or (2) raise a claim of actual innocence. See *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). Defendant asserted that he had met this test for the claim that he now sought to raise—that DNA testing would advance his claim of actual innocence. Defendant's motion alleged that the testing had not been available at the time of his trial.

¶ 12 The second document was entitled "Successive Petition for Post-Conviction Relief and Motion for Forensic DNA Testing not Available at Trial in Support of a Claim of Innocence" (proposed petition). The proposed petition stated that it was brought under both the Act and section 116-3 of the Code, which reads:

"(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 *** forensic DNA testing *** 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 the 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 *** 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." 725 ILCS 5/116-3 (West 2010).

¶ 13 The proposed petition alleged that identity was the central issue in defendant's case; that none of the materials collected from defendant had been subject to the testing now requested; and that "Material (Shoes) belonging to [defendant's] co-defendant were tested and later attributed by mistake as [*sic*] defendant/Petitioner's shoes."

¶ 14 The proposed petition alleged further that defendant could not have availed himself of the "DNA Testing Procedures of [section 116-3] which became effective in 1998, as trial counsel failed to obtain independent testing 'because' [*sic*] counsel claimed they could not find anyone 'local' to conduct such tests." It then alleged that the shoes that had been tested and introduced into evidence were size 8 or 9 and had actually belonged to "alleged co-defendant" [*sic*] but were mistakenly identified as defendant's, although defendant actually wore "size-13" shoes.

¶ 15 In a separate section, the proposed petition set out the following factual allegations. When defendant, Conley, Trammell, and Wright were arrested, some of their clothing was taken as evidence. At a grand jury proceeding of May 7, 1997, Angela Williams, a witness, was shown a pair of shoes and was asked who owned them; she said that they looked like defendant's shoes but "look[ed] small to be his." These were the shoes that had been forensically tested. At a pretrial hearing, Aaron Small, a forensic scientist, testified that he had performed DNA analysis on a shoe recovered from Conley and a shoe allegedly recovered from defendant and had found that each one had a stain matching Levingston's DNA profile. The proposed petition alleged that the samples that had been tested could not have been cut from the size-13 shoes that defendant had actually worn.

¶ 16 Paragraph 32 of the proposed petition read:

> "These Blood Stains [*sic*] were significant in [defendant's] conviction, and in 1997, DNA testing was not Statutorily [*sic*] provided for, and in the specific contexts of this case,

> it is upon information and belief, that court[-]appointed trial counsel sought leave of court to conduct independent DNA testing, but failed to do so because counsel claimed he could not find anyone locally to conduct the tests, Thus [*sic*], making such tests unavailable at the time of trial, and there is a reasonable likelihood, That [*sic*] DNA test [*sic*] will confirm that the only blood on the (Size 13½) shoes held in evidence [*sic*] belongs solely to [defendant], because the evidence will show that on (March 20, 1997) [*sic*] during [defendant's] arrest in an unrelated Armed Robbery Case (Case Number 97-CF-635) [defendant] had received a cut on his left Elbow [*sic*], which was bandaged up because [defendant] had been hit by a female friend (Teresa Nolan), a spot of blood did in fact drop on [defendant's] shoes after being hit with a Water Glass [*sic*] by (Teresa Nolan) [*sic*] *** and, after being cut on the elbow, [defendant] took a towel and Dawn Dishwashing Soap/Detergent and proceeded to clean the blood spot off the shoe. Which could be confirmed by further testing."

Repeating the mistaken-shoes theory, the proposed petition stated that defendant was ready to submit to "a comparison of the DNA allegedly found on the shoes."

¶ 17 The trial court denied defendant leave to file a successive postconviction petition. The court stated that defendant was "rehashing claims previously ruled on"; that he was "not entitled to the DNA testing" he sought; and that he had failed to satisfy either prong of section 122-1(f)'s cause-and-prejudice test. Defendant moved to reconsider. He argued that the DNA tests had been performed on shoes that had not belonged to him. He also requested that the court "conduct a [*sic*] evidentiary hearing to determine whether [defendant's] size 13 shoes were in fact tested."

¶ 18 In a supplement to his motion to reconsider, defendant asked the court to construe his pleadings liberally as both a motion to file a successive postconviction petition and a motion for scientific testing under section 116-3. Also, for the first time, defendant alleged as follows:

> "Aaron Small, A [*sic*] Forensic Scientist with the State Police Conducted [*sic*] a DNA analysis, using the Polymerase Chain Reaction (PCR) method on Exhibit[s] 36-A and 36-B. On 36-B Small testified that there was an ADDITIONAL CONTRIBUTOR *** which he testified as being a Mixture which was one in 390 blacks, one in 9,000 Caucasions [*sic*], and one in 2,400 Hispanics. His test of the Mixture was 2.16 nanagrams [*sic*] *** of substance. [Defendant requests] that this Honorable Court grant the following DNA Test on the Mixture using-'SHORT TANDEM REPEATS TEST' STR HAS THE SCIENTIFIC POTENTIAL TO CREATE A NEW DNA PROFILE FROM A SMALLER SAMPLE."

The trial court denied the motion to reconsider. Defendant timely appealed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant contends that he made a sufficient showing to entitle him to DNA testing of evidence. Unlike in the proposed petition itself, defendant does not now assert that he is entitled to the testing of the "size-13" shoes that he claims were his. Instead, defendant reiterates the claim that he first raised in the addendum to his motion to reconsider: that he is entitled to a specific test, Y-STR analysis, on the bloodstains that were introduced into evidence, People's exhibit Nos. 36-A and 36-B, which came from the shoes, People's exhibit No. 86.

¶ 21 A ruling on a section 116-3 motion is reviewed *de novo*. *People v. Price*, 345 Ill. App. 3d 129, 133 (2003). Evidence that is materially relevant to a defendant's claim of actual innocence is that which tends to significantly advance that claim. *People v. Savory*, 197 Ill. 2d 203, 213 (2001).

The defendant need not establish that a favorable result would lead to his complete exoneration. *Id*. To decide whether the defendant has shown material relevance, a court considers the evidence introduced at trial and assesses the evidence that the defendant seeks to have tested. *Id*.

¶ 22 We note initially that defendant has forfeited the sole basis on which he seeks a reversal of the judgment. In the proposed petition, defendant sought the testing of the shoes that he asserted were really his: the pair that he testified he had lent "Red" shortly after the murders. Paragraph 32 of the proposed petition makes that clear—to the extent that anything in the proposed petition can be considered "clear"—as do the other portions of the proposed petition that we have summarized. The proposed petition did not request the testing of People's exhibit No. 86, the shoes that State witnesses had testified defendant had been wearing at the time of his arrest, or the retesting of People's exhibit Nos. 36-A and 36-B, the bloodstains that had been found on one of those shoes. Further, the proposed petition never mentioned or requested Y-STR analysis, although it did state, without citing any source, that trial counsel did not seek the "DNA testing procedures" that "became effective in 1998" because counsel could not find anyone " 'local' " to perform "such tests."

¶ 23 Under these circumstances, we need not consider whether defendant made a *prima facie* case for Y-STR testing of People's exhibit Nos. 36-A and 36-B. It is well settled that a defendant forfeits for appellate review any claim for relief that he first raised in a motion to reconsider the judgment. *Bank of America, N.A. v. Ebro Foods, Inc.*, 409 Ill. App. 3d 704, 709 (2011); *Caywood v. Gossett*, 382 Ill. App. 3d 124, 134 (2008). Only after the trial court dismissed his original motion for section 116-3 testing did defendant move either for the testing of People's exhibit Nos. 36-A and 36-B or for the use of Y-STR analysis. His claim is therefore forfeited.

¶ 24 Forfeiture aside, we hold that the dismissal of the proposed petition was proper because defendant did not demonstrate that the Y-STR testing of People's exhibit Nos. 36-A and 36-B would be materially relevant to his claim of actual innocence. In his motion to reconsider, defendant did not articulate how Y-STR testing of the stains would advance that claim. On appeal, his material-relevance argument consists of the terse statement, "[i]f the blood found on a shoe purportedly worn by the defendant did not come from either of the victims, corroboration of the testimony of Conley and Trammell would have been compromised, and the defendant's alibi more worthy of belief." This reasoning fails.

¶ 25 The main problem with defendant's argument is that it is simply counterfactual. The evidence proved, and defendant has not disputed, that the blood on the shoe *did* come from one of the victims—Levingston. Small's testimony established that one bloodstain, People's exhibit No. 36-A, came from Levingston and that the other stain, People's exhibit No. 36-B, came from Levingston and one or more other people, although defendant and his confederates were excluded. Thus, defendant's entire argument requires us to disbelieve the results of the DNA tests that were actually conducted. There is no reason to do so; our opinion affirming defendant's convictions noted that the DNA test results were significant evidence of defendant's guilt.

¶ 26 To the extent that defendant's actual-innocence claim makes any sense, it must hinge on the "mixture" of blood found in People's exhibit No. 36-B. Defendant's motion to reconsider did not focus on People's exhibit No. 36-A, the first stain. He conceded that the blood found there came from Levingston. The apparent thrust of defendant's argument was that, although Levingston's blood was also found in People's exhibit No. 36-B, the identity of the other contributor(s) had not been established, and Y-STR testing could do so. Even assuming that this is true (as we shall

explain, it is not true), we cannot see how resolving the mystery of the second stain would help defendant. Establishing the identity of the other person(s) whose blood got onto the shoe would more likely strengthen the case against defendant by showing that the shoe contained the blood of a second innocent person who had been present.

¶ 27 We might speculate (although defendant never has) that retesting People's exhibit No. 36-B would establish that the mysterious "Red," and not defendant, was actually the fourth intruder-perpetrator. (Mineau's testimony did arguably provide some support for this theory.) However, the record leaves the gravest doubt of whether "Red" even existed: in his testimony, defendant could not tell the jury anything about "Red," other than that he and defendant had swapped tennis shoes a few hours after the murders. Nobody called "Red" as a witness or tested his DNA. There is no reason to think that DNA testing of any kind would connect People's exhibit No. 36-B to "Red," because there is no reason to think that "Red's" identity could ever be established—even if he really did exist.

¶ 28 Moreover, there is no reason to think that the form of testing that defendant belatedly sought would even establish the identity of the person(s) other than Levingston who contributed to People's exhibit No. 36-B. Y-STR DNA testing, which examines "a class of polymorphisms in DNA called 'short-tandem repeats' " in Y (male) chromosomes (*People v. Barker*, 403 Ill. App. 3d 515, 527 (2010)) is not capable of providing such certainty. As *Barker* explained:

> "Y-STR testing cannot establish who the singular contributor [to] a crime scene source is, as the male chromosome traits may be found across people within a population as well as within a family. *** The main value of the test is that it has the power to include an individual as a possible contributor [to] a crime scene, or to conclusively exclude him from the pool of possible suspects. [Citation.] However, *** a match between a suspect and

evidence only means that the individual in question could have contributed to the forensic stain ***." *Id*. at 528.

At most, the requested test could show that *some* identified person *might* have left blood on the shoe. How that would undermine the trial evidence or strengthen defendant's alibi defense is something that defendant has never explained.

¶ 29 Finally, we must consider the strength of the evidence at defendant's trial. See *Savory*, 197 Ill. 2d at 213. Even discounting the DNA evidence, the case was not closely balanced; two acquaintances of defendant testified in detail that he was involved in the break-in and the murders, and defendant raised an alibi defense that was undermined by his inconsistent and essentially uncorroborated accounts of his whereabouts at the time of the murders. Defendant's explanation of how Levingston's blood got onto his shoes apparently did not persuade the jury, and he has now abandoned that theory. Against all of this, defendant can only speculate, Micawber-like, that, with more testing, "something will turn up."[1]

¶ 30 In sum, defendant's request for Y-STR analysis of the bloodstain in People's exhibit No. 36-B is not only forfeited but also meritless. There is no reason to believe that the requested test would materially advance defendant's claim of actual innocence.

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 30 Affirmed.

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[1]After Wilkins Micawber, an incurable optimist in the novel *David Copperfield* (1850) by Charles Dickens.