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2012 IL App (3d) 110162-U

Order filed November 9, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 21st Judicial Circuit,
Plaintiff-Appellee,) Kankakee County, Illinois,
)
v.) Appeal No. 3-11-0162
) Circuit No. 96-CF-234
TAIWO GRANT,)
) Honorable
Defendant-Appellant.) Kathy Bradshaw-Elliott,
) Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant is not entitled to a new evidentiary hearing on his amended postconviction petition on the basis that a primary State's witness, who provided an affidavit recanting his trial testimony but could not be found at the time of the original evidentiary hearing, has since been located.
- ¶ 2 Following a jury trial, defendant, Taiwo Grant, was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 1992)) and sentenced to 50 years of imprisonment. On appeal, this court affirmed defendant's conviction and sentence. *People v. Grant*, No. 3-98-0263 (2000)

(unpublished order pursuant to Supreme Court Rule 23). Defendant filed a *pro se* postconviction petition (725 ILCS 5/122-1 (West 2010)), which was amended by appointed postconviction counsel (725 ILCS 5/122-2.1 (West 2010)). The amended petition argued that new evidence of the recantation of trial testimony by the only eyewitness, Cory Lee, established defendant's actual innocence. Following an evidentiary hearing, the circuit court denied defendant's amended postconviction. Defendant filed a motion to reconsider, which the circuit court also denied.

¶ 3 Defendant appealed, arguing that this case should be remanded for a new evidentiary so Lee, who was unavailable at the original evidentiary hearing and has since been located, can now testify for the postconviction petition judge to determine his credibility. We affirm.

¶ 4 **FACTS**

¶ 5 Defendant was charged with two counts of first degree murder based on allegations that he shot and killed Darroll McDaniels. Defendant's trial took place on January 13-16, 1998.

¶ 6 At trial, Detective Kenneth Lowman testified that he found McDaniels' body in the driver's seat of a car on the morning of July 14, 1993, with a gunshot wound to his head. Lowman found a gun sight on the front passenger seat. A gunsmith testified that the gun sight was from a .32- or .38-caliber gun.

¶ 7 McDaniels' girlfriend testified that she owned the car in which McDaniels' body was found and that McDaniels had borrowed it from her the day prior, on July 13, 1993. McDaniels' girlfriend further testified that McDaniels carried an older looking gun. McDaniels' sister testified that McDaniel carried a western-style, six-chamber gun with a long barrel and part of the handle missing.

¶ 8 Lee testified that he, defendant, and McDaniels were all friends, but defendant was upset

with McDaniels for giving a statement to police that implicated defendant in a fight with police at a bowling alley. Lee testified that he, defendant, and McDaniels left a party together the night before McDaniels' body was found and drove around in a gray car owned by McDaniels' girlfriend. McDaniels parked the car so the three men could smoke marijuana. Lee sat in the backseat. McDaniels pulled out a revolver with tape on the handle and set it down. Lee heard two gunshots and saw defendant with McDaniels' revolver in his hand. Defendant told Lee that he would shoot him if he said anything. Police found Lee's fingerprint in the car.

¶ 9 Phillip Marcolini testified that he had given police a statement indicating that the night before McDaniels' body was found he saw defendant, McDaniels, and Lee leaving a party together. Marcolini saw McDaniels with a long-barreled gun that had a missing sight and tape around the handle. Marcolini testified that defendant hated McDaniels and heard defendant say that he would "get" McDaniels for giving a statement to police implicating him in a fight that took place with police at a bowling alley.

¶ 10 John Snow, defendant's cellmate, testified that defendant told him that he shot and killed a man in the man's car with an old .38-caliber gun because the man had signed a statement against him regarding a fight with police at a bowling alley. Snow previously worked as a police informant and offered to work as an informant again in exchange for an early release. Snow was not promised anything for his testimony against defendant and did not receive an early release.

¶ 11 Sergeant Robin Passwater had also testified that the month after the murder he questioned defendant in an unrelated matter. Defendant told Passwater that on August 9, 1993 (a few weeks after the murder), he had been in possession of an old revolver with a taped handle and a missing front sight.

¶ 12 The jury found defendant guilty of first degree murder. Defendant was sentenced to 50 years of imprisonment. Defendant's conviction and sentence were affirmed on appeal.

¶ 13 On July 10, 2001, defendant filed a *pro se* postconviction petition, arguing that Lee had recanted his trial testimony and that, as Lee was the only eyewitness to the murder, defendant's actual innocence had been proven. Postconviction counsel was appointed to represent defendant, and counsel filed an amended petition adopting defendant's argument of actual innocence based on the newly discovered evidence of Lee's recantation. The amended petition included a recantation affidavit from Lee, in which Lee swore that he did not see defendant shoot McDaniels and did not know who murdered McDaniels. Lee indicated in the affidavit that he testified falsely because Passwater threatened that if Lee did not sign a statement implicating defendant then Lee would be charged with McDaniels' murder. Passwater showed Lee a statement, purportedly from defendant, in which defendant implicated Lee in McDaniels' murder. Lee indicated that the only reason he testified falsely against defendant was out of "fear that [he] would be charged for murder."

¶ 14 The State filed a motion to dismiss defendant's postconviction petition at the second stage of the proceedings. The trial judge denied the motion to dismiss, noting that she could not determine the credibility of Lee's recantation without an evidentiary hearing because she was not the judge at trial and had not previously had the opportunity to determine Lee's credibility.

¶ 15 At the time of the evidentiary hearing on January 7, 2011, Lee could not be located to testify. Following the evidentiary hearing, the circuit court denied defendant's postconviction petition. Defendant filed a motion to reconsider, which was denied. Defendant appealed.

¶ 16

ANALYSIS

¶ 17 On appeal, defendant argues that this case should be remanded for a new evidentiary hearing because Lee, who recanted his trial testimony in an affidavit and was unable to be located at the time of the original postconviction evidentiary hearing, has been located and is currently serving a prison sentence.

¶ 18 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a means by which a criminal defendant may collaterally attack his conviction or sentence based on a substantial violation of his constitutional rights during the proceedings that resulted in the conviction or sentence being challenged. The conviction of an innocent person violates the due process clause of the Illinois Constitution and, therefore, our supreme court has recognized the right of postconviction petitioners to assert a claim of actual innocence based on newly discovered evidence. *People v. Morgan*, 212 Ill. 2d 148 (2004). To obtain relief on a claim of actual innocence, the "newly discovered" evidence must be material and noncumulative evidence, which was unavailable at defendant's original trial and could not have been discovered sooner through diligence, that is of such conclusive character it would probably change the result on retrial. *Id.* at 154.

¶ 19 The Act divides the postconviction process into three separate stages of review. 725 ILCS 5/122-1 *et seq.* (West 2010). If the petition is not dismissed at the first or second stage, it proceeds to the third stage, wherein the court conducts an evidentiary hearing on the petition's claims. 725 ILCS 5/122-6 (West 2010). The standard of review for the denial of postconviction relief following an evidentiary hearing is whether the denial was manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458 (2006). Manifest error is error which is clearly evident, plain, and indisputable. *Morgan*, 212 Ill. 2d 148.

¶ 20 In this case, defendant's claim of actual innocence is based upon the "newly discovered" evidence of Lee's recantation of his trial testimony. Lee provided an affidavit indicating that he did not see defendant shoot McDaniels. We acknowledge that defendant is not seeking a new trial but a new evidentiary hearing for the purpose of the trial court determining Lee's credibility. However, even assuming that Lee's recantation statements were found to be credible, it is not "clearly evident, plain, and indisputable" that Lee's recantation would change the result of defendant's conviction on retrial.

¶ 21 First, Lee's recantation was not exculpatory and did not contradict other evidence at trial. In his recantation, Lee indicated that he did not see defendant shoot McDaniels and did not know who murdered him. Implicitly, if Lee does not know who shot McDaniels then he would not know if defendant shot McDaniels. This case is distinguishable from *People v. Hernandez*, 298 Ill. App. 3d 36 (1998), wherein the appellate court reversed the dismissal of defendant's postconviction petition because the credibility of the recantation affidavit, which exonerated the defendant, could not be determined by a judge who never heard the witness testify without an evidentiary hearing. Rather, this case is similar to *People v. Broughton*, 344 Ill. App. 3d 232 (2003), which distinguished *Hernandez* and held that an evidentiary hearing was unnecessary where the recantation, if true, did not exonerate defendant and other evidence at trial established defendant's guilt.

¶ 22 Here, Lee's recantation does not exonerate defendant, and other evidence at trial establishes defendant's guilt. Even if Lee's trial testimony were discounted and his recantation affidavit taken to be true, evidence of defendant's jailhouse confession to Snow supports defendant's conviction. The version of events relayed by Snow was corroborated by other

evidence, such as McDaniels leaving the party with Lee and defendant, and defendant's wanting to harm McDaniels for giving a statement to police implicating defendant in the fight with police at the bowling alley. The evidence at trial also indicated that McDaniels carried a gun, and defendant admitted to being in possession of a similar gun weeks after the McDaniels shooting. Consequently, an evidentiary hearing as to Lee's credibility is unnecessary.

¶ 23 Furthermore, recantation of testimony is regarded as inherently unreliable; therefore, a new trial will not be granted on the basis of recanted trial testimony except in extraordinary circumstances. *Morgan*, 212 Ill. 2d 148. In *People v. Burrows*, 172 Ill. 2d 169 (1996) our supreme court affirmed the award of a new trial based upon recantation testimony by a prime witness because the witness not only recanted her trial testimony but also made self-incriminating admissions, under oath, that placed the blame for the killing on herself and exonerated the defendant. In the case at hand, there are no such extraordinary circumstances.

¶ 24 Accordingly, we cannot say that trial court's denial of defendant's postconviction petition was erroneous or that a new evidentiary hearing is warranted.

¶ 25 **CONCLUSION**

¶ 26 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 27 Affirmed.