

No. 1-10-2926

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	No. 00 CR 2651
)	
JERRELL DENSON,)	The Honorable
)	Stanley J. Sacks,
Petitioner-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err by denying defendant postconviction relief after an evidentiary hearing, where the newly discovered evidence was not of such a conclusive character that it would change the result on retrial. In addition, postconviction counsel was not ineffective because defendant was afforded a reasonable level of assistance. Affirmed.

¶ 2 Defendant Jerrell Denson appeals from the circuit court's order denying him relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) following an evidentiary hearing. Defendant contends that the circuit court's judgement was manifestly

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erroneous because the evidentiary hearing revealed newly discovered evidence of defendant's actual innocence that would likely change the result on retrial. Defendant alternatively contends that this court should remand the case for another evidentiary hearing due to postconviction counsel's unreasonable failure to present the testimony of a corroborating witness. We affirm.

¶ 3 THE UNDERLYING TRIAL

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. On November 1, 1999, at approximately 10:00 p.m., Rory Longs was shot and killed. In addition, Longs' Chevrolet Caprice was stolen and torched. In 1999, defendant and accomplice, Isaiah White, were charged with first degree murder and aggravated vehicular hijacking in relation to Longs.

¶ 5 At their joint jury trial, Cardell Campbell testified that on the evening of the incident, he was selling drugs at the corner of 60th and Carpenter streets, when he saw his cousin, Tenisha Peay, arrive in a vehicle with Longs at their grandmother's house. Peay went inside the house, while Longs remained in his vehicle. Cardell then observed codefendant driving a black Lumina down 59th and Carpenter with defendant in the passenger seat. Defendant and codefendant drove around the block, waited in an alley for a short time and then backed up alongside Longs' vehicle. According to Cardell, codefendant exited the Lumina with a gun in hand, approached the passenger-side window of Longs' vehicle, and shot Longs. Defendant then exited the Lumina, pushed Longs out of his vehicle, and drove away in it. Codefendant followed in the Lumina. Cardell went to his grandmother's front door and told Peay that Longs had been shot, but he fled the scene because he did not want to be involved. Valerie Campbell, Cardell's

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mother, corroborated that her son was not in their family home at the time of the murder.

¶ 6 Sharon Spann testified that at approximately 1 a.m. on November 2, 1999, she called the police because she saw a car that was missing wheels and rims burning in a vacant lot next to her home. Police responded to the call and found Long's vehicle in the vacant lot. The parties stipulated that on August 12, 1999, Long had purchased Toyo tires and "assassin rims."

¶ 7 Randy Durr testified that sometime after Halloween of 1999, he heard that defendant and codefendant were selling "assassin rims" that were on a black Lumina. Shortly thereafter, Durr paid codefendant \$650 for the rims. Robert Green, testified that he went to Durr's house, removed the rims from the Lumina and installed them on Durr's vehicle. Two days later, police stopped Durr in his vehicle and began looking for defendant and codefendant. In addition, Detective Valdez testified that two fingerprints from the rims recovered from Durr's vehicle were linked to codefendant .

¶ 8 In an effort to impeach Cardell, the defense provided the testimony of Colin Smith, an investigator with the Cook County Public Defender. Smith testified that on September 1, 2000, he and defense counsel visited Cardell and read him the police report he generated, as well as his grand jury testimony. According to Smith, Cardell reported that his account of the shooting was the result of police coercion. Cardell then signed a statement written by defense counsel in which he denied witnessing the events described in the grand jury transcript. This evidence was contradicted on rebuttal when Cardell testified, in turn, that the two men had claimed to be from the States Attorney's Office and that he had signed the statement without reading it because he could not read.

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¶ 9 The defense also presented the following witnesses. Defendant's grandfather, the Reverend Willie Moffett, and Debria Williams, defendant's mother, both testified that Cardell told them he did not witness the shooting and did not provide this information to the State. Reverend Moffett and his wife, Gertrude, also testified that on that day in question, defendant had been at their home from about 10:00 p.m. to 10:30 p.m. Gertrude testified that defendant left around 10:30 p.m., reportedly to see his girlfriend, in the Lumina with codefendant.

¶ 10 Wakendra Pegues, defendant's girlfriend, testified that on the night in question she was working as a manager at a Subway shop located at 9838 S. Western Avenue. Defendant arrived at 10:45 p.m., while codefendant waited in the car. Pegues clocked out at 11:01 p.m and set the alarm at 11:05 p.m., per company policy. On cross examination, however, she admitted she was scheduled for a 9-to-5 shift and had punched out at 9:01 p.m. In rebuttal, the State presented the testimony of Frank Cueller, the store owner, who testified that Pegues was not a store manager and there was no requirement that the shop's alarm be set at a particular time each night.

¶ 11 The jury found defendant guilty of first degree murder and aggravated vehicular hijacking. On October 30, 2001, defendant filed an amended motion for a new trial that alleged he had obtained newly discovered exculpatory evidence from Marteesse Parker, who gave a videotaped statement to defendant's attorney. Parker stated that Julius Burdine, also known as "Ju-Ju," told Parker that defendant was not involved in Longs' murder. Both Parker and Burdine were allegedly friends with defendant and present throughout his trial. Burdine reported that he conspired along with Cardell, codefendant, and an individual named Frank Black to murder Longs. Parker, however, later recanted his videotaped statement, claiming that he had lied about

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Burdine's exculpatory statements because he wanted defendant to escape incarceration. Parker was subsequently charged with obstruction of justice and invoked his fifth amendment right by refusing to testify at defendant's hearing for a new trial. In addition, Burdine could not be located at the time of the hearing. Thus, the trial court granted the State's motion to disregard the newly discovered evidence and denied defendant's motion for a new trial.

¶ 12 The trial court subsequently sentenced defendant to 33 years' imprisonment, which he is now serving. This court affirmed the judgment on direct appeal, rejecting defendant's claims that defense counsel was ineffective, the State misstated evidence, and defendant's sentence was excessive. *People v. Denson*, No. 1-02-0492 (2003) (unpublished order under Supreme Court Rule 23).

¶ 13 POSTCONVICTION PETITION

¶ 14 On December 14, 2009, with the aid of private counsel, defendant filed a petition pursuant to the Act, supported by affidavits, alleging his actual innocence on the basis of the eyewitness testimony of Cortez Jones. In his affidavit, Jones stated that he was at the scene of the murder and saw a man he knew as "Ju-Ju," acting alone, shoot Longs. In another affidavit, Antonio Campbell stated his brother Cardell was in a different location when the murder occurred, and was physically incapable of witnessing the murder as he testified to at trial. In his own affidavit, defendant swore that he was innocent.

¶ 15 At the third-stage evidentiary hearing, held July 29, 2010, Jones, who was defendant's sole witness, testified that he currently resides in prison for first degree murder and signed the affidavit defendant filed to show actual innocence. Jones testified that at approximately 10:30

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p.m. on November 1, 1999, he witnessed "Ju-Ju," an individual he knew from the neighborhood, talking to an unknown individual through the passenger-side window of a reddish-orange two-door Chevrolet, which Jones thought belonged to his friend Raymond. Jones did not know "Ju-Ju's" legal name. Jones further testified that he then saw "Ju-Ju" fire a shot into the passenger-side window, run around to the driver's side, pull the victim out of the vehicle and drive away. Jones explained that he saw the events unfold from his friend Boss Hog's front porch directly across the street. After the incident, Jones and his friend Charles, who was waiting in a vehicle in front of Boss Hog's house, drove away because they did not want to get involved. Jones was afraid to talk to the police because he thought "Ju-Ju" would shoot or kill him.

¶ 16 Jones testified next that he learned defendant had been convicted of the shooting when he made a collect call to Boss Hog from prison on January 3, 2008. Jones explained that he called Boss Hog because he needed some money for the prison commissary to celebrate his birthday, but had not contacted Boss Hogg since his imprisonment.

¶ 17 Jones, who had never before met defendant, then sought him out in prison. After another prisoner with the nickname "Black Boy" pointed defendant out at a church service, Jones informed defendant of the matter and promised to verify what he witnessed in writing. Jones agreed to testify on defendant's behalf, because the wrong person had been convicted.

¶ 18 Following closing arguments, the circuit court ruled, without objection, that it would not consider Antonio Campbell's affidavit because he did not testify at the postconviction hearing. On September 3, 2010, the circuit court denied defendant's petition rejecting his claim of actual innocence because Jones' testimony was not of such a conclusive character that it would change

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the result on retrial. The circuit court noted that Jones testimony was "not credible" and "totally inconsistent with the evidence in the case," mainly because "the evidence is clear that there were two offenders in this case, not just one." Defendant now appeals.

¶ 19

ACTUAL INNOCENCE

¶ 20 On appeal, defendant contends that the circuit court committed manifest error by denying defendant's petition where the evidentiary hearing revealed newly discovered evidence of defendant's actual innocence that would likely change the result on retrial. During the third stage of proceedings under the Act, the defendant carries the burden of presenting a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Where fact finding and credibility determinations are involved, the circuit court's decision will be upheld unless it is manifestly erroneous. *Id.* At an evidentiary hearing, the circuit court serves as fact finder, and thus, it is the court's function to determine the credibility of witnesses, decide the weight to be given to their testimony, and resolve any evidentiary conflicts. *People v. Dopson*, 2011 IL App (4th) 100014 ¶ 19. A reviewing court may not substitute its judgement for that of the trier of fact unless an error was clearly plain, evident and indisputable. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). In order for a claim of actual innocence to justify a new trial, it must be supported by evidence that is (1) newly discovered, (2) material and noncumulative, and (3) of such conclusive character that it would probably change the result on retrial. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010). The new evidence need not establish the defendant's actual innocence; rather a new trial is warranted if all of the facts and surrounding circumstances, including the new evidence, warrant a closer scrutiny to determine the innocence or guilt of the

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defendant. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1033 (2011).

¶ 21 Relying on *Ortiz*, defendant contends that Jones' testimony is of such a conclusive character that it would change the result on retrial. We find plaintiff's reliance on *Ortiz* misplaced. In *Ortiz*, the supreme court reversed the appellate court's judgment granting defendant a new trial because the newly discovered evidence clearly contradicted the recanted testimony of the two prosecution witnesses. *Ortiz*, 235 Ill. 2d 319 at 337. In addition, the supreme court noted that "at retrial, the evidence of defendant's innocence would be stronger when weighed against the recanted statements of the State's witnesses," as well as the absence of physical evidence linking the defendant to the murder. *Id.* In contrast, here, the State's main witness, Cardell, did not recant his testimony, and additional evidence at trial linked defendant to the murder. Notwithstanding evidence attacking Cardell's credibility, the jury did not find such evidence rendered Cardell's testimony incredible. Moreover, the circuit court found Jones' testimony to be incredible and "totally inconsistent with the evidence in the case." Incredible testimony would neither strengthen the defense nor weaken the State's case. Based on the record in its entirety, we cannot say that the circuit court's conclusions were in error.

¶ 22 The circuit court determined that Jones was an incredible witness based on both his testimony and "demeanor." The circuit court noted in its oral ruling that it was improbable that "out of the clear blue [and] ten years later" the murder of Longs just by happenstance came up in a conversation between Jones and Boss Hog, with whom Jones had not spoken since his incarceration eight years prior. Additionally, the court found it odd that Jones did not know "Ju-Ju's" legal name and had never met defendant, but nevertheless, was able to say that defendant

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and "Ju-Ju" were not the same individual. In addition, the circuit court found it troubling that Jones' testimony was "totally inconsistent with the evidence in the case," which the court found to be "credible evidence."

¶ 23 At trial, the evidence presented showed that there were two offenders. The evidence demonstrated that not only did defendant and codefendant murder Longs, but also that they stole his vehicle and sold his rims within a couple days of the incident. In addition, codefendant's fingerprints were found on one of the rims. The circuit court believed that the trial evidence clearly proved there were two offenders, while Jones' testimony only accounted for one. This new evidence inexplicably left codefendant out of the mix completely, which was inconsistent with the physical evidence at trial. Thus, the circuit court found Jones' testimony to be "absolutely outrageously incredible." In addition, defendant incorrectly states that the task of determining Jones' credibility was for the jury. At a postconviction evidentiary hearing, the judge determines the witnesses' credibility, the weight given to their testimony and draws reasonable inferences from the evidence. *People v. English*, 403 Ill. App. 3d 121, 135 (2010). If the circuit court finds the witness' testimony so incredible that it will not change the result on retrial, then the court is within its purview to dismiss the petition. *Ortiz*, 235 Ill. 2d at 337.

¶ 24 Based on the above, the record amply supports the circuit court's determinations that the evidence was not of such a conclusive nature that it would probably change the result on retrial. Accordingly, the court's finding that defendant had not meet his burden of showing his actual innocence claim was not manifestly erroneous. In light of our determination, we need not consider whether Jones' testimony was newly discovered, material and noncumulative.

¶ 25

POSTCONVICTION COUNSEL

¶ 26 Defendant next contends that postconviction counsel was ineffective for failing to call Parker to testify at the evidentiary hearing. The right to counsel in a postconviction proceeding is statutory, not constitutional. *People v. Davis*, 382 Ill. App. 3d 701, 709 (2008). Under the Act, a defendant is entitled to a reasonable level of assistance, but is not assured of receiving the same level of assistance constitutionally guaranteed to criminal defendants at trial. *People v. Kegel*, 392 Ill. App. 3d 538, 541 (2009). Under the Act, postconviction counsel must fulfill specific duties as imposed by Illinois Supreme Court Rule 651(c). Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Specifically, counsel must (1) consult with the petitioner either by mail or in person to ascertain the contentions of deprivation of constitutional rights; (2) examine the record of the trial proceedings; and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007).

¶ 27 Here, the record shows that postconviction counsel fulfilled all of his legally mandated duties. In addition, the record suggests that it was a reasonable strategic decision not to call Parker to testify at the evidentiary hearing. Shortly after trial, Parker made a video statement to defense counsel alleging Julius Burdine, also known as "Ju-Ju," made an admission to Parker that Burdine conspired to kill Longs, along with codefendant, Cardell and Black. Burdine allegedly also told Parker that defendant was not involved. Parker later recanted his statement, however, asserting that he had lied to help defendant escape incarceration. Subsequently, the State charged Parker with obstruction of justice, and Parker refused to testify at defendant's post trial hearing.

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¶ 28 Clearly, based on Parker's behavior in the matter thus far, there was no way for postconviction counsel to ascertain the content of Parker's testimony at the evidentiary hearing or how it would be interpreted by the circuit court. No matter which way he would have testified, it's safe to say a judge would be hard pressed to find him credible. For instance, Parker may have testified that Burdine did not clear defendant of involvement, which would be unfavorable testimony. In turn, if Parker did deny defendant's involvement in the murder he could be perceived as incredible because he formerly recanted the same assertion. In addition, even if Parker testified favorably for defendant and the circuit court did not find his former recantation rendered his testimony incredible, the court may still have found Parker's testimony incredible because his arguably favorable account that four individuals were responsible for the murder was contradicted by trial evidence that two individuals were responsible and also by Jones' testimony that only one individual was responsible. Overall, the record supports the notion that postconviction counsel made a strategic decision in not calling Parker to testify and defendant was afforded a reasonable level of assistance. Therefore, based on the foregoing, we conclude postconviction counsel was not insufficient and a new evidentiary hearing is not warranted.

¶ 29 CONCLUSION

¶ 30 Accordingly, we affirm the judgment of the circuit court.

¶ 31 Affirmed.