2013 IL App (1st) 111146-U

FIFTH DIVISION
May 3, 2013

No. 1-11-1146

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 27365
	)	
JOSEPH RUSH,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant did not state a claim of actual innocence, we affirm the summary dismissal of his post-conviction petition; where defendant was entitled to additional days of presentence custody credit, we amend the mittimus.

¶ 2 Defendant Joseph Rush appeals the trial court's order summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2010). On appeal, defendant contends that his petition set forth an arguable claim of actual innocence. He also correctly asserts that the mittimus should be amended to reflect 3,650 days of presentence custody credit. We affirm as modified.

¶ 3 This case arises from the murder of 56-year-old Zdzislaw Szczerba, also known as Jimmy, who was attacked and beaten at Marquette Park in Chicago on September 21, 1997. The victim died two days later from his injuries. Following a 2000 jury trial, this court, on appeal, reversed defendant's felony murder conviction and remanded for a new trial after finding that the trial court improperly allowed a psychiatrist to testify in the presence of the jury concerning the competency of Ginger Altman, who was an eyewitness to the crimes. *People v. Rush*, No. 1-00-3864 (2003) (unpublished order under Supreme Court Rule 23).

¶ 4 At the second jury trial on remand, Mary Swek, the victim's sister, and Henry Swek, the victim's nephew and Mary's son, testified. At about midnight on September 21, 1997, Mary received a call from the victim who asked her to come to his house. When she arrived, Mary hardly recognized the victim because his face was so bruised and swollen. He was wet with blood and had cuts on the back of his head. Mary drove the victim to the hospital, and Henry met her there. Henry observed that the victim had swollen eyes, abrasions on his face, and a large bump on the back of his head. Henry spoke with the victim before he went into surgery. The victim never regained consciousness after the surgery, and he died the morning of September 23, 1997. A detective called Henry later that morning and they discussed what the victim told him. Henry met detectives later that day in Marquette Park, where he found some of the victim's personal items. Mary later identified three fishing poles that were recovered by police from defendant's dining room as having belonged to the victim.

¶ 5 Police Sergeant John Nowakowski testified that he and his partner, Detective Nesling, went to Marquette Park to investigate the crime after receiving a physical description of the offender, including a tattoo on his arm that spelled "Joe." They stopped defendant because he matched the description of the offender. Defendant identified himself and showed the officers a tattoo on his arm that spelled "Joe." After being arrested and advised of his *Miranda* rights,

defendant told Nowakowski that on the evening of September 21, he was in a fight with an "old guy" and that he was with his girlfriend Ginger Altman.

¶ 6 Sam Black, a former assistant State's Attorney, testified that defendant told him that he and Altman went fishing in Marquette Park on September 21, and that he and the victim were drinking beer and vodka. The victim gave defendant money to buy more alcohol, and when he returned to the park, the victim pushed him into the water twice. Defendant then struck the victim twice in the head, and took the victim's fishing poles to defendant's house. Police later recovered three fishing poles from the dining room of defendant's house. Black further testified that he took Altman's handwritten statement, and she provided that defendant hit and kicked the victim multiple times.

¶ 7 The State published Altman's testimony that she provided at defendant's first trial, because she had died. Altman testified that on the evening of September 21, 1997, she met defendant, who was her boyfriend, at Marquette Park. When she arrived, defendant was sitting with an older white man who introduced himself to Altman. The two men were fishing and drinking beer when the older man gave defendant money to purchase vodka. Defendant bought the vodka, returned to the park, and the two men shared the alcohol. Later, the older man pulled defendant into the water and held his head under the water for a few seconds. Defendant slapped and kicked the older man, who fell to his knees, and took his watch and $3. Altman admitted that she provided a statement to Black, which was consistent with Black's testimony, and acknowledged that she told the grand jury that defendant took fishing poles from the victim's car trunk. She also told the grand jury that she visited defendant in jail on October 7, 1997, when he told her that he slapped, kicked, and punched the man. At the close of her testimony, Altman indicated that she was taking the medications Haldol and Depakote, and that she was taking these medications when she provided her statement to Black.

¶ 8 The jury found defendant guilty of first degree murder, and he was subsequently sentenced to 42 years' imprisonment. We affirmed that judgment on appeal. *People v. Rush*, 401 Ill. App. 3d 1 (2010).

¶ 9 On December 28, 2010, defendant filed a *pro se* post-conviction petition, alleging, in pertinent part, that he was actually innocent of the offense. In support, defendant attached an affidavit from Dante Deddo, who attested that "Freddy" and "John," two men who Deddo knew from church, confessed to beating the victim after defendant was at Marquette Park with the victim. The circuit court summarily dismissed defendant's petition, finding that his actual innocence claim was unsupported by the evidence, not newly discovered, and merely a reasonable doubt argument.

¶ 10 On appeal, defendant contends that his post-conviction petition stated an arguable claim of actual innocence. He specifically maintains that Deddo's affidavit constituted newly discovered, material, and non-cumulative evidence likely to change the result on retrial. An appeal from a first-stage dismissal, as in this case, is reviewed *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 11 At the first stage of a post-conviction proceeding, the circuit court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 10. A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Hodges*, 234 Ill. 2d at 11-12; see also *People v. Tate,* 2012 IL 112214, ¶ 9 ("the threshold for survival [is] low"). Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an indisputably

meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17.

¶ 12 The Act allows a defendant to assert a claim of actual innocence based on newly discovered evidence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Our supreme court considered a claim of actual innocence as analyzed in a post-conviction proceeding:

> "The elements of a claim of actual innocence are that the evidence in support of the claim must be 'newly discovered'; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial. [Citations.] We deem it appropriate to note here that the United States Supreme Court has emphasized that such claims must be supported 'with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented a trial.' [Citation]." *People v. Edwards*, 2012 IL 111711, ¶ 32.

The need for support of an actual innocence claim accords with our supreme court's holding that a post-conviction petition under the Act must include affidavits, records, or other evidence supporting the petition's allegation. *People v. Coleman*, 183 Ill. 2d 366, 379 (1998).

¶ 13 Here, the State contends, and we agree, that the affidavit of Deddo is not sufficient to support defendant's claim of innocence because it contains only hearsay statements. Hearsay affidavits are generally insufficient. *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003); see also *People v. Cole*, 215 Ill. App. 3d 585, 587 (1991) (a petition supported by an affidavit based only on hearsay or mere conclusions is insufficient to warrant relief under section 2-1401). Deddo's affidavit describes purportedly inculpatory statements by two men identified only as

Freddy and John, who claimed to have also beaten the victim after defendant left the scene. Deddo was not a witness to the crimes and did not even aver that he would testify. Deddo's hearsay statements do not and cannot support defendant's claim of actual innocence.

¶ 14 Defendant's reliance on *People v. Sparks*, 393 Ill. App. 3d 878 (2009), and *People v. Cihlar*, 111 Ill. 2d 212 (1986) is misplaced. In *Sparks*, the defendant relied on an affidavit of an occurrence witness to the incident to support his actual innocence claim based on self-defense, but, in the present case, defendant relies on the hearsay presented by the affiant who was not even present at the crime scene. In *Cihlar*, the newly discovered evidence involved the testimony of several witnesses that attacked the reliability of the victim's identification of the defendant as her assailant. The victim's testimony in *Cihlar*, which was uncontradicted at trial, was the only evidence linking the defendant to the crime. *Cihlar*, 111 Ill. 2d at 217-18. Here, by contrast, several witnesses, along with defendant's own statements, linked him to the murder. Deddo's affidavit, which averred that two other men beat the victim after defendant left Marquette Park, does not prove that defendant was not at least one of the victim's assailants.

¶ 15 Furthermore, actual innocence is the equivalent of total vindication or exoneration. *People v. Anderson*, 402 Ill. App. 3d 1017, 1037 (2010). Accordingly, the newly discovered evidence must be of such conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 16 Here Deddo's affidavit cannot be said to be of such conclusive character that it would probably change the result on retrial because it is inadmissible hearsay, Deddo never attested that he would testify, and the result would probably not change in a third trial. The 56-year-old victim died from head injuries sustained by blunt trauma. Sergeant Nowakowski testified that after defendant was arrested, defendant told him that on the date in question he was in a fight in the park with an "old guy," and that Altman was with him. Altman testified that as defendant and

the older white man walked toward the older man's car, defendant slapped and kicked the older man who fell to his knees. In her written statement to Assistant State's Attorney Black, she said that defendant hit and kicked the victim multiple times. Black testified that defendant told him he went fishing with the victim in Marquette Park on September 21, and that he struck the victim twice in the head. Black further testified defendant told him that he took the victim's fishing poles and brought them back to his house. The State admitted into evidence three fishing poles recovered from defendant's home, which the victim's sister identified as belonging to the victim. Based on the above facts, we find Deddo's affidavit insufficient to overcome the significant trial evidence showing that defendant committed first degree murder.

¶ 17 Defendant also contends, and the State correctly agrees, that he is entitled to 3,650 days of presentence custody credit. The record shows that defendant was arrested on September 23, 1997. Following his jury trial on remand he was sentenced to 42 years' imprisonment for first degree murder on September 21, 2007. The mittimus incorrectly awards defendant 3,638 days of presentence custody credit.

¶ 18 A reviewing court may correct the mittimus at any time. *People v. Quintana*, 332 Ill. App. 3d 96, 110 (2002). The right to receive *per diem* credit is mandatory, and normal waiver rules do not apply. *People v. Williams*, 328 Ill. App. 3d 879, 887 (2002). A defendant is statutorily entitled to credit for all time "spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2010); *People v. Latona*, 184 Ill. 2d 260, 270 (1998). A defendant held in custody for any part of a day should be given credit against his sentence for that day. *People v. Smith*, 258 Ill. App. 3d 261, 267 (1994). However, a defendant is not entitled to presentence custody credit for the date of sentencing. *People v. Williams*, 239 Ill. 2d 503, 510 (2011). Therefore, we award defendant presentence custody credit from September 23, 1997, through September 20, 2007, which amounts to 3,650 days.

¶ 19 For the foregoing reasons, we amend the mittimus to award 3,650 days of presentence custody credit and affirm the judgment of the trial court in all other respects.

¶ 20 Affirmed as modified.