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SECOND DIVISION
July 23, 2013

No. 1-11-2098
2013 IL App (1st) 112038-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 91 CR 28295
	)	
MICHAEL WILLIAMS,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

ORDER

Held: Denial of successive postconviction petition following evidentiary hearing was not against the manifest weight of the evidence where new DNA tests were cumulative to evidence at original trial and did not demonstrate defendant's actual innocence of the crimes he was convicted of.

¶ 1 In 1994, defendant Michael Williams was convicted of the murder of Gail Conyers, the attempted murder of Delroy Reese, and the armed robbery of both of them, but he was acquitted of criminal sexual assault against Conyers. Thirteen years later, DNA tests conclusively excluded defendant as a contributor for DNA evidence found on Conyers. Defendant filed a

successive postconviction petition, contending that the new DNA tests were evidence of his actual innocence and warranted a new trial. Following an evidentiary hearing, the circuit court denied defendant's petition. We affirm.

¶ 2 I. BACKGROUND

¶ 3 After finishing work on Halloween night in 1991, Reese went to visit Conyers, who was his girlfriend. Later that evening, they were joined by his nephew Delking Tremble and defendant. Reese asked Tremble and defendant to go to the store for liquor and cigarettes, and while they were gone Reese and Conyers engaged in sexual intercourse.

¶ 4 Upon defendant and Tremble's return, the four began drinking. Sometime later, Tremble asked to borrow some money from Reese. He refused, but when Conyers asked Reese for some money, he gave her about $30 or $35 and put the remainder of his cash, about $80, into his front pocket. Reese then went to a back bedroom and took a nap.

¶ 5 After Reese departed, defendant and Conyers left the apartment and bought some cocaine. When they returned, defendant asked Tremble to help him rob Reese. Tremble agreed, and the three went into the bedroom where Reese was sleeping. Tremble held Reese down while Conyers reached into his front pocket to retrieve the money. Reese woke up and began to struggle, and the money and other items fell out of his pocket. At some point during the struggle, defendant grabbed a nearby baseball bat and began striking Reese in the head with it. Tremble lost his grip on Reese, who tried to escape into the living room. Reese begged defendant to stop hitting him, but defendant continued to beat him. Defendant chased Reese out of the apartment, where he eventually collapsed in the street.

¶ 6 Defendant returned to the bedroom, but the money from Reese's pocket was gone. Defendant confronted Conyers about the missing money and then began beating her in the head

with the bat. According to Tremble, defendant pulled down Conyers' pants and found the money. Defendant then struck Conyers again and proceeded to sexually assault her. After dragging Conyers' body to a front room, defendant left with Tremble.

¶ 7 Conyers died of her wounds, but Reese survived. He was found by a passing police officer at about 3:30 a.m., and an examination at the hospital revealed severe facial and skull fractures. Reese suffered some neurological damage, but two days after the attack he was able identify defendant and Tremble as the men who attacked him. Reese identified both men by name and picked them out of photo arrays. Detectives quickly arrested Tremble. He initially denied involvement, but eventually confessed that both he and defendant had participated in the crime. Tremble was charged with the crimes, but later pleaded guilty in exchange for a 30-year sentence and his testimony against defendant.

¶ 8 The case against defendant turned almost exclusively on the testimony of Reese and Tremble, who both testified at trial. The prosecution also presented the results of tests on biological evidence from the scene, including a rape kit from Conyers and a used condom. Unlike the witness testimony, however, this evidence was relatively inconclusive. DNA analysis was in its infancy in 1991, so the forensic analysis of the biological evidence was limited to blood typing. The State's forensic expert testified that both Conyers and Tremble have type O blood, but that defendant is type B. Although there was a great deal of type O blood found at the scene, investigators did not find any type B blood. The typing results on the semen found on the condom were likewise inconclusive. Most importantly, however, the typing on the vaginal swab from Conyers was type O, not type B, which excluded defendant as a contributor.

¶ 9 Because the only direct evidence against defendant for Conyers' rape and murder was Tremble's testimony, the defense strategy centered on pointing out the inconsistencies between

his testimony and the physical evidence, as well as his obvious motive to testify against defendant in exchange for a favorable plea deal. Defendant elected not to testify in his own defense, but the defense presented Anthony Stein, who testified that he had been in a holding cell with defendant and Tremble in March 1994. According to Stein, Tremble spontaneously declared that defendant had nothing to do with the crime and that Tremble had acted on his own. The defense also called one of the detectives, who testified that Tremble's hands had been bruised and swollen when he was interviewed shortly after the crime.

¶ 10 Not long after the jury retired to deliberate, the jury sent out a note, which said:

> "Dear Judge Urso, we have two members of the jury that have indicated that they are not sure the defendant was even at the scene of the crime, in fact they feel that there was absolutely no evidence that truly put him at the scene of the crime. They also feel that the witnesses were not accurate or consistent in their testimonies. Where do we go from here?"

After consulting with the parties, the trial court told the jury to keep deliberating.

¶ 11 About two hours later, the jury announced that it had reached a verdict. The jury found defendant guilty of Conyers' murder and the attempted murder of Reese, as well as armed robbery of both of them. However, the jury decided to find defendant not guilty of aggravated sexual assault against Conyers.

¶ 12 After the trial, defendant filed a motion for a new trial. At the hearing on the motion, defendant presented the testimony of a new witness, Ben Howell. Howell testified that he owned the building in which defendant and Tremble lived, and that on the night of the murder, Tremble had come in about 11:00 p.m. Tremble was very agitated and "came in very confused, and he was hollering, talking about he killed the bitch, something like that." He also allegedly stated, "I

didn't mean to kill the bitch." Howell assumed that Tremble was intoxicated and did not inquire further. Howell also explained that he had been hospitalized and had only learned of the trial four days before the hearing on the motion for a new trial. As it turned out, however, Howell had been known to the defense before trial and was a relative of defendant's. The trial court denied the motion, finding that Howell's testimony was not newly discovered evidence and would in any event not have affected the outcome of the trial.

¶ 13 Defendant was eventually sentenced to life in prison. We affirmed defendant's conviction on direct appeal. See *People v. Williams*, No. 1-95-0309 (May 19, 1997) (unpublished order under Supreme Court Rule 23). Defendant then filed two postconviction petitions. The first was filed in 2001 and was dismissed. The second, which alleged a confrontation clause violation regarding some hearsay statements regarding Reese's identification of defendant, was filed in 2005, following the U.S. Supreme Court's ruling in *Crawford v. Washington*. That petition was also dismissed.

¶ 14 In 2007, defendant filed a motion requesting forensic testing that was not available at trial. DNA analysis had advanced significantly since the time of defendant's trial, and defendant sought to have the blood and semen found at the scene analyzed. The circuit court denied the motion as to the blood evidence in the apartment, but granted it as to the vaginal and anal swabs taken from Conyers. (The court also denied defendant's request to test other evidence from the scene, but defendant does not challenge that order.) When the sample from the vaginal swab was tested, the results positively excluded defendant as a contributor. The results also indicated the presence of material from one or two unknown subjects other than Reese, Tremble, or defendant. Based on this evidence, defendant sought leave to file a successive postconviction petition

alleging actual innocence. The circuit court granted leave, and defendant filed his petition on August 25, 2009.

¶ 15 About nine months later, while the petition was still pending at the second stage of proceedings, defendant's postconviction counsel informed the court that he was in possession of three affidavits that had been obtained by defendant. The affidavits were from men who had been incarcerated with Tremble, and each affidavit purported to show that Tremble had testified falsely against defendant in order to avoid the death penalty. Two of the affidavits dated from 1997 and 2001, but the third was dated March 2010. Postconviction counsel asked the court for leave to supplement or amend the postconviction petition, but the State objected. The State argued that the affidavits were not related to the newly discovered DNA evidence, and it would therefore be improper to allow defendant to "bootstrap" these new claims into his postconviction petition. The court denied the motion to amend.

¶ 16 At the evidentiary hearing on defendant's postconviction petition, the trial court heard the testimony of two defense experts who had tested the samples obtained from vaginal and anal swabs of Conyers. The expert who tested the anal swab testified that the DNA in the sample was a mixture from two people, one of whom was Conyers and one who appeared to be Reese. The expert testified that the sample did not match either Tremble or defendant. The other expert tested the vaginal swab using a type of analysis that only identifies male DNA. The expert found that the sperm portion of the sample could potentially have come from Reese but could not have come from either Tremble or Williams. The nonsperm portion of the sample was somewhat inconclusive but did not affirmatively match Reese, Tremble, or defendant. A third, mixed portion of the sample was similarly inconclusive. That portion included two potentially

overlapping samples (*i.e.*, that may or may not be from the same person), but neither sample matched defendant, Reese, or Tremble.

¶ 17 After hearing the evidence, the circuit court denied the petition. In its written order, the circuit court found that the DNA evidence was not of such a conclusive nature that it would have changed the result of the original trial. At most, the trial court found, the results merely indicated that Conyers had sexual intercourse with both Reese and a man other than defendant at some point in the 72 hours preceding her death.

¶ 18 II. ANALYSIS

¶ 19 Defendant's primary argument on appeal is that the circuit court's decision to deny the petition was against the manifest weight of the evidence. Defendant contends that the circuit court failed to consider the DNA evidence in light of all of the evidence in the record, which in defendant's view is rife with inconsistencies.

¶ 20 Generally, the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2010)) limits postconviction proceedings to only one petition. See *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). Successive petitions are allowed only when "fundamental fairness so requires," which a defendant may establish only by showing "good cause for failing to raise the claimed error in a prior proceeding and that actual prejudice resulted from the error." *Id.* A claim of actual innocence based on newly discovered evidence is sufficient to satisfy the cause-and-prejudice requirement. See *id.* at 154.

¶ 21 Defendant contends that the DNA evidence in this case constitutes newly discovered evidence of his actual innocence and therefore warrants a new trial. In order to obtain relief under this theory, however, "it must be evidence that was not available at defendant's original trial and that the defendant could not have discovered sooner through diligence. The evidence

must also be material and noncumulative. In addition, it must be of such conclusive character that it would probably change the result on retrial." *Id.* We will reverse the denial of a postconviction petition after a third-stage evidentiary hearing only when the circuit court's decision is "manifestly erroneous," that is, when there is an "error which is clearly evident, plain, and indisputable." (Internal quotation marks omitted.) *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 22 As defendant points out in his brief, his conviction rested almost exclusively on the questionable testimony of Tremble. There was no physical evidence linking defendant to the scene of the crime, and the only other witness to place him there was Reese, who suffered devastating head injuries and neurological damage during the attack. Tremble, however, was granted a favorable plea deal in exchange for his testimony and admitted to being involved in the crime. Most importantly, Tremble testified quite clearly that defendant sexually assaulted Conyers prior to killing her. In defendant's view, the new DNA evidence conclusively excludes defendant as a contributor for the samples that were recovered from Conyers body, which demonstrates that he could not possibly have sexually assaulted her as Tremble claimed. With Tremble's credibility on that point destroyed by the contrary DNA evidence, defendant contends that it is likely that he would be acquitted on retrial.

¶ 23 But there are two significant problems with defendant's position. First, the results of the new DNA analysis of the evidence are very similar to the results of the blood typing that was presented at trial. In the original trial, expert witnesses testified that defendant was excluded as a contributor for the semen found in Conyers' vagina. That sample was determined to be type O, but defendant was type B. Although the two tests are different, the results are the same:

defendant is excluded as a contributor. This means that new evidence related to the vaginal swab is cumulative to what was presented with trial.

¶ 24 Defendant argues that even if the results on the vaginal swab are cumulative, the results on the anal swab are not because the original results were inconclusive but the new results exclude defendant as a contributor. This is not exactly what the experts concluded at the evidentiary hearing, but even if we agreed with defendant on this point for the sake of argument there is a second, larger problem with the new evidence. In order to warrant a retrial, the new evidence must reasonably likely to change the result on retrial. Recall that although the jury convicted defendant of Conyers' murder, Reese's attempted murder, and the robbery, the jury also acquitted defendant of the sexual assault. Given that the only evidence that defendant committed the sexual assault was Tremble's testimony on the subject, the fact that the jury acquitted defendant of the sexual assault necessarily means that the jury did not accept Tremble's testimony about the assault. Defendant's primary reason for requesting a retrial is that the new DNA evidence conclusively contradicts Tremble's testimony about the sexual assault, but the record is clear that the jury did not believe Tremble in the first place. If the jury did not believe Tremble's account of the sexual assault in the original trial yet still convicted defendant of the murder, attempted murder, and robbery, then the new DNA evidence disproving that account cannot be "of such conclusive character that it would probably change the result on retrial." *Morgan*, 212 Ill. 2d at 153. Under these circumstances, we cannot say that the circuit court's decision to deny the petition was manifestly erroneous.

¶ 25 Defendant's secondary argument on appeal is that his postconviction counsel's performance was unreasonable. Defendant contends that postconviction counsel failed to read

the entire record of proceedings, and as a result failed to present key facts from the record to the circuit court during the hearing on the petition.

¶ 26 There is no constitutional right to counsel during postconviction proceedings, and petitioners are therefore only entitled to the level of assistance specified in the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). See *People v. Turner*, 187 Ill. 2d 406, 410 (1999). The Act provides only for a "reasonable" level of assistance. See *People v. Flores*, 153 Ill. 2d 264, 276 (1992). Postconviction counsel must perform the duties specified in Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012), which include "consult[ing] with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, *** examin[ing] the record of the proceedings at the trial, and *** ma[king] any amendments to the petitions filed pro se that are necessary for an adequate presentation of petitioner's contentions."

¶ 27 Defendant contends that his postconviction counsel failed to read the entire record of proceedings, but the only evidence for this contention is that counsel did not argue certain points during the evidentiary hearing on the petition. Defendant contends that counsel should have presented Ben Howell's testimony from the posttrial motion hearing, a statement from the original trial judge that indicated defendant walked with a cane,[1] and the alleged confrontation clause violation that was presented in defendant's 2005 postconviction petition.

¶ 28 As the State points out in its brief, however, the record contains postconviction counsel's Rule 651(c) affidavit, in which he attests that he did, in fact, read the report of proceedings from the trial. Defendant argues that this statement implies that counsel failed to read the report of

[1] Defendant contends that this physical infirmity indicates that he would have been unable to overpower Reese, who was by all accounts much larger than defendant. But the only reference in the record to defendant's use of a cane comes from a comment by the trial judge during sentencing, and there is no indication in the record that defendant required a cane at the time of the crimes.

proceedings from the *posttrial* motion hearing, but this is merely speculation on defendant's part. Given the familiarity with the entire record that postconviction counsel displayed during not only the evidentiary hearing on the petition but in all the postconviction proceedings, the more likely explanation is that counsel did read those portions of the record but decided that they had no bearing on defendant's claim that the new DNA analysis was evidence of his actual innocence. Indeed, the DNA analysis was the sole basis for defendant's actual innocence claim, so counsel was not even required to review portions of the record that did not relate to that claim. See *People v. Davis*, 156 Ill. 2d 149, 164 (1993) ("Rule 651(c) does not require, for substantial compliance, that appointed post-conviction counsel examine the entirety of a petitioner's trial proceedings. *** [A]ppointed counsel is required to examine as much of the transcript of proceedings as is necessary to adequately present and support those constitutional claims raised by the petitioner."). Therefore even if counsel failed to examine the portions of the record relating to Howell's testimony, defendant's potential physical infirmity, and the 2005 postconviction petition, it was not unreasonable to do so.

¶ 29 Defendant's final contention on appeal is that the circuit court abused its discretion when it denied defendant leave to amend his petition to include the three affidavits. The Act grants the circuit court discretion over amendments to postconviction petitions (see 725 ILCS 5/122-5 (West 2010)), and leave to amend should generally be freely given. See *People v. Scullark*, 325 Ill. App. 3d 876, 880 (2001).

¶ 30 In this situation, however, there are several factors present that indicate the circuit court was well within its discretion in denying the defense motion to amend or supplement the petition. First, at the time defendant sought to amend the petition, the petition had already been pending for over nine months. At no point prior to this time did defendant mention the affidavits or seek

leave to include them in his petition. Second, the affidavits themselves have no relation to the new DNA analysis that was at issue in the petition. Instead, the affidavits relate to alleged admissions by Tremble that he falsely implicated defendant in the crimes. Third, even if the affidavits could be considered separate proof of defendant's actual innocence, there is no indication that they were newly discovered evidence. Two of the affidavits were nearly ten years old by the time they were presented to the circuit court, and the third was based on events that occurred in 2009, over three months before defendant filed his postconviction petition. Despite the age of the affidavits, defendant gave the court no explanation for his failure to either include these affidavits in his petition or bring them to the court's attention earlier than May 2010. Under these circumstances, the circuit court did not abuse its discretion by denying defendant's motion to amend or supplement the petition.

¶ 31 III. CONCLUSION

¶ 32 The circuit court's decision to deny defendant's postconviction petition was not manifestly erroneous. Postconviction counsel did not perform unreasonably, and the circuit court did not abuse its discretion by denying defendant leave to amend or supplement his petition.

¶ 33 Affirmed.