

No. 1-11-2528

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 93 CR 27560
)	
ARNEL ROBINSON,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

Presiding Justice Connors delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

- ¶ 1 **Held:** Court did not err in dismissing post-conviction petition after evidentiary hearing where it was not manifestly erroneous for the court to conclude that the facially exculpatory evidence of a new witness was not newly-discovered, reasonably discoverable by trial counsel, or likely to change the outcome at trial.
- ¶ 2 Following a bench trial, defendant Arnel Robinson was convicted of first degree murder and attempted armed robbery and sentenced to consecutive prison terms of 55 and 10 years. We affirmed on direct appeal. *People v. Robinson*, No. 1-97-0663 (1998)(unpublished order under Supreme Court Rule 23). Defendant now appeals from an order of the circuit court dismissing his post-conviction petition following an evidentiary hearing. He contends that he established a

reasonable probability that the testimony of his newly-discovered witness would change the outcome of a new trial.

¶ 3 Defendant and codefendant Antonio Segoviano¹ were charged with first degree murder of Martin Alvarez and attempted armed robbery of Alvarez and Onesimo Beltran on or about November 9, 1993, in that they demanded money from Alvarez and Beltran while armed with a gun and shot Alvarez to death.

¶ 4 At trial, Onesimo Beltran testified that, at about 4:30 p.m. on the day in question, he and Alvarez parked their truck in an alley near a currency exchange where Alvarez intended to purchase a vehicle sticker. While Alvarez did so, Beltran waited outside. After about five minutes, he heard two gunshots from behind the truck. When he looked in that direction, he saw Alvarez walking down the alley towards the truck and also saw six or seven people in the alley. After Alvarez re-entered the truck and they drove away, Beltran realized that Alvarez was badly wounded and bleeding. An ambulance was called, but Alvarez died of his injuries.

¶ 5 Mario Rodriguez testified that, shortly after 4 p.m. on the day in question, he was with defendant, codefendant, and a man he knew as Jay Jay or Jerome at a pair of payphones near the currency exchange. Defendant and Rodriguez were friends; while defendant was a member of the Gangster Disciples and Rodriguez, codefendant and Jerome were members of the Satan Disciples, those gangs were not hostile to each other. As Jerome used the payphone, defendant showed Rodriguez a gun in his waistband and told him that he had it for protection. Defendant and codefendant walked a few feet away, but Rodriguez could hear codefendant ask defendant if he wanted to make some money. Defendant agreed, lifted his shirt, and adjusted the gun in his waistband. Codefendant said he would "find somebody" at the currency exchange; while he

¹Codefendant was convicted in a separate jury trial, and we affirmed on direct appeal. *People v. Segoviano*, No. 1-95-4286 (2001) (unpublished order under Supreme Court Rule 23).

walked there, defendant went into the nearby alley, out of Rodriguez's view. A few minutes later, codefendant followed Alvarez out of the currency exchange and into the alley, also out of Rodriguez's view. When Rodriguez heard defendant shout "give me your money" twice, he walked over to the alley, where he saw defendant pointing a gun at Alvarez's head and codefendant standing next to the truck. Rodriguez panicked and walked away; as he did so, he heard two gunshots from the alley. Rodriguez admitted that he had recently been convicted of burglary but had not been sentenced therefor as of defendant's trial.

¶ 6 James Stillwell testified that he was drinking with Rafael Martinez at his home on the morning in question, then selling drugs on a nearby streetcorner for the Satan Disciples for several hours. As he went back to Martinez's home, he walked along the alley in question. He heard a gunshot and saw defendant with a gun in hand and a man in front of defendant with his back to defendant. Defendant fired a second shot, and Stillwell fled. He knew defendant, having met him the night before, and was aware that he was a member of the Gangster Disciples. About 15 minutes later, defendant came to Martinez's home and admitted to Martinez in Stillwell's presence to having killed Alvarez because "supposedly the guy had \$500 on him, but he didn't." Defendant also showed Stillwell his gun and asked Stillwell to dispose of the shells, but he refused. Stillwell admitted to prior convictions for theft and "auto theft," to being a member of the Satan Disciples, and to having three beers that day but denied drinking more or using drugs.

¶ 7 The medical examiner testified through stipulation to the effect that Alvarez died from a single gunshot wound to the back. Defendant presented no witnesses or evidence.

¶ 8 On this evidence, the court found defendant guilty of first degree murder and the attempted armed robbery of Alvarez but not guilty of the attempted armed robbery of Beltran. Following the denial of defendant's post-trial motion, the court sentenced him to consecutive prison terms of 55 and 10 years.

¶ 9 On direct appeal, defendant sole contention of error was insufficiency of the evidence.

¶ 10 Defendant filed a *pro se* post-conviction petition in February 2000 raising various claims of ineffective assistance by trial and appellate counsel.² He alleged that he was near the currency exchange on the afternoon in question "working his regular corner selling crack cocaine," that it would have been a violation of gang rules to leave his assigned location for any reason including committing robbery as alleged, and that the State witnesses were members of a different gang than defendant's, which "they felt was attempting to take over their territory." He alleged that he was using one of the payphones at the time of the shooting, that five witnesses could corroborate this, and that he provided trial counsel the names of these persons. The petition named three of the persons: Nadine Lopez, Christine Lopez, and "Nadine's niece De-De." He also alleged that codefendant "and a friend of the victim who was in the area when the shots were fired" (presumably Beltran) would have testified that defendant could not have shot Alvarez. The petition was supported by defendant's affidavit.

¶ 11 Appointed counsel filed a supplemental petition in 2001 arguing that defendant's consecutive sentences violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¶ 12 The State moved to dismiss the petition as supplemented, arguing in relevant part that the petition was untimely filed in February 2000 and was not supported by affidavits from his suggested witnesses. Defendant responded that he filed his petition in November 1998 so that it was timely. The circuit court dismissed the petition as untimely filed in July 2003. However, on appeal we reversed and remanded for further proceedings. *People v. Robinson*, No. 1-03-2292 (2004)(unpublished order under Supreme Court Rule 23).

²The petition bears February 2000 filing stamps but a notarization date in November 1998. Defendant sent a letter in 1999 to the circuit court inquiring of the status of a post-conviction petition he filed in November 1998, but the court replied that there was no petition or record of the filing of a petition in defendant's case file nor in the records of the State's Attorney.

¶ 13 Counsel filed a supplemental petition in 2007 raising various claims including ineffective assistance of trial counsel for, in relevant part, not investigating Nadine or Christine Lopez, nor Denise Zinzer, who "together place [defendant] on the phone before, during, and after the shooting." Attached to the petition was the affidavit of Denise Zinzer, stating that she was on the front porch of the home of her aunt Nadine with her children, Nadine, and her cousin Christine when she saw defendant using the payphone while codefendant and Rodriguez followed a man out of the currency exchange. Defendant was still on the payphone when codefendant pulled an object from his waistband and Zinzer heard a shot; she immediately ran inside the Lopez home with her children. Zinzer averred various subsequent threats from the families of codefendant and Rodriguez, and explained that she was now coming forward because those "who intimidated me have moved out of the neighborhood."

¶ 14 Counsel later, in October 2008, filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Feb. 6, 2013) averring that he concluded, after consulting with defendant and reviewing the record, that various supplemental petitions and discovery motions had been necessary to properly raise defendant's claims. In relevant part, he averred that he had taken Zinzer's statement and had a video recording thereof. He admitted that Nadine Lopez "does not want to get involved," which he surmised was out of fear of gang retaliation against herself and daughter Christine, but argued that "it may still be necessary to call both of the Lopezes as a witness at the evidentiary hearing because both will, at a minimum, corroborate the fact that Denise Zinzer was across the street from the scene of the crime" and thus rebut any argument by the State that Zinzer was not at the scene. Defendant supported this surmise, elsewhere in his filings, with an affidavit from Robert Hague to the effect that, when he mentioned defendant as he ate with the Lopezes, Christine said that she knew defendant was innocent "because she saw the whole thing," whereupon "Nadine looked at Christine to try to get her to shut up." Hague also averred that,

when he asked Christine why "she never said anything before," Christine attributed her silence to Mario Rodriguez, and Nadine again "looked at Christine to try to get her to shut up."

¶ 15 The State moved to dismiss the petition as supplemented. Regarding exculpatory evidence from the Lopeses and Zinzer, the State noted that neither Lopez provided an affidavit and argued that Zinzer's affidavit did not constitute evidence new to defendant, reasonably discoverable by trial counsel, or likely to have changed the outcome at trial.

¶ 16 In December 2007, the court denied the motion to dismiss and ordered an evidentiary hearing. The State moved for reconsideration, and in August 2008 the court dismissed one of defendant's claims not before this court on appeal while ordering that an evidentiary hearing would proceed on his ineffectiveness claim "for failing to investigate and call Nadine Lopez, Christine Lopez, and Denise Zinzer as witnesses" at trial, and deferring a ruling on the related "claim of actual innocence based on the affidavit from Denise Zinzer." Defendant's motion to reconsider the partial dismissal was denied in July 2009.

¶ 17 At the 2010 evidentiary hearing, Denise Zinzer testified that she has four children and that Nadine Lopez is her aunt and Christine Lopez her cousin. At about 4:30 p.m. on the day in question, she was on the porch of Nadine's home with her children and the Lopeses when she saw defendant using a payphone across the street while codefendant and Rodriguez were standing by a nearby currency exchange. She had been on the porch for about 10 minutes, and she had seen defendant approach the payphone and codefendant and Rodriguez arrive later. She first testified that she made no eye contact with defendant, codefendant, or Rodriguez, but then clarified that she "acknowledged" defendant and he acknowledged her so that it was "fair to say that he saw [Zinzer] on the porch as [she] saw him on the phone." She saw nobody else she knew by the payphones or currency exchange, and could not recall seeing anyone else there at all. When a man came out of the currency exchange and went into a nearby alley, codefendant and

Rodriguez followed him into the alley. While Zinzer still saw defendant on the payphone, she heard gunshots. Zinzer ran inside with her children upon the first shot, and saw defendant drop the phone and run away.

¶ 18 On the day of the shooting, a police detective came to the Lopez home and spoke with Zinzer as well as the Lopezes. Zinzer gave the detective the same account as herein, but did not go to the police station or contact the State's Attorney upon learning that defendant (and codefendant and Rodriguez) had been arrested. About two months after the shooting, codefendant's cousin "beat up" and threatened Zinzer. Codefendant's brother and Rodriguez's sister also threatened Zinzer. She did not report the beating or intimidation to police. While Zinzer knew defendant and his mother, brother, and sister since the early 1980s and considered herself a friend of the family, "[n]o one ever really came to me about court up until, I'd say, like 2005. *** They asked if I was going to come *** to court. But I was never contacted by anyone until recently." In particular, "the first time I ever talked about the case was, when I felt safe to talk about it, was in 2006" with post-conviction counsel. Zinzer then, on advice of post-conviction counsel, refused to speak with investigators from the State's Attorney, and particularly refused to speak with two female investigators.

¶ 19 Defendant's trial counsel Robert Strunck testified that, as an Assistant Public Defender assigned to the homicide task force, he would "on every case" send investigators to interview witnesses mentioned in the State's discovery disclosures. However, he could not recall seeing the names of the Lopezes or Zinzer when he reviewed the discovery in this case. He discussed the facts of the case, and the strengths and weaknesses of the State's case, with defendant but could not recall defendant mentioning Zinzer as a potential witness. Strunck had a transcript of codefendant's trial and would have used anything therein that he would have seen as helpful to defendant. He planned to argue at trial that the State couldn't prove defendant guilty beyond a

reasonable doubt, in particular because the State's witnesses had prior convictions and were members of a different gang than defendant – Satan Disciples and Gangster Disciples respectively – so that they "weren't exactly the most upstanding citizens in the community." While he did not follow Rodriguez's case due to his own case load, Strunck was aware of his conviction for burglary and used it as impeachment. He was certain that, after defendant was convicted but before he was sentenced, defendant did not mention any additional witnesses that he believed should have been called at trial. Had defendant done so, Strunck would have sent investigators to find them and then spoken with them himself before deciding whether the new witnesses were credible.

¶ 20 Nadine Juarez, formerly Lopez, testified that she was home at about 4:30 p.m. on the day in question, and particularly in her kitchen, when she heard gunshots. After confirming that her children were safe, she went outside and saw defendant, codefendant, and Rodriguez walking away. Zinzer was not at her home at any time that day, either before or after the shooting. On cross-examination, Nadine admitted that she did not attend an earlier hearing despite receiving a subpoena from post-conviction counsel, but explained that "I'm a cancer patient" with "a notice from my doctor stating that I was under treatment and unable to come to court." She attended court for the instant testimony because her chemotherapy was completed and her physician approved her attendance. Nadine would not let her daughter Christine "hang with" Zinzer, though they were cousins, because Zinzer is "so into the drugs" and because Zinzer's mother (Nadine's "baby sister") is raising Zinzer's children.

¶ 21 Nadine was interviewed by post-conviction counsel and his investigator Christopher Young but denied telling them that she saw, before the shooting, defendant on the payphone and codefendant and Rodriguez by the currency exchange. She also denied telling them that Zinzer came running in after the shots screaming that someone had been shot, or that Zinzer frequently

came to her home for dinner. She told post-conviction counsel to "stop putting words in my mouth" because he had phrased his questions as "isn't it a fact that this and this and this" while "I kept telling you 'no, it's not.'" Post-conviction counsel did not request, and she did not provide, an affidavit. Nadine denied that she "don't want to get involved in this case because [she's] afraid of harm to [her] family."

¶ 22 Joanne Ryan, investigator for the State's Attorney, testified that she was not assigned to any investigations in this case in 2006, and only one investigation in this case in 2008 to find Rodriguez's trial counsel. Ryan also reviewed the records of the investigation bureau and found no assignments in this case in 2006 nor any assignment to any of the female investigators to attempt to interview Zinzer.

¶ 23 Christopher Young, investigator for the Public Defender, testified that he was present for Nadine's interview in May 2006 in which she stated that she saw defendant near a payphone, was in her kitchen when she heard gunshots, and Zinzer came inside screaming that shots had been fired. Nadine never told counsel or Young to "stop putting words in my mouth." Young recalled Nadine signing an affidavit for counsel.

¶ 24 Post-conviction counsel informed the court that "there is no affidavit from Nadine."

¶ 25 Christine or Christina Lopez testified that she was not home with Nadine on the day in question until the evening, though she could not recall where she was, and she did not see defendant using the payphone in question. Zinzer asked her to lie, by saying that she (Christine) saw defendant on the payphone, because Zinzer said that she was being harassed. She told post-conviction counsel in two interviews in 2009 and 2010 that Zinzer was not at or near the Lopez home on the day of the shooting. She denied telling post-conviction counsel in the 2010 interview, in the presence of investigator Harold Winston, that Zinzer was in fact present that day. However, she admitted telling them that she had said that Zinzer was there because Zinzer

asked her to lie. Christine's mother Nadine is a friend of codefendant's mother, and Christine considered herself a friend of codefendant while a mere acquaintance of defendant.

¶ 26 Zinzer testified in rebuttal that she never asked Christine to lie for her. In the spring of 1994, Zinzer discussed the case with Nadine and an investigator Nadine brought with her. The investigator provided a card from the State's Attorney, and while he gave his name at the time, she could not recall it. Zinzer admitted that she did not mention this meeting with the investigator when post-conviction counsel interviewed her on various occasions.

¶ 27 On August 11, 2011, the circuit court dismissed defendant's petition. In relevant part, the court found that Zinzer's testimony was not newly-discovered because defendant did not apprise trial counsel that Zinzer had seen him on the payphone at the time of the shooting, and it was unlikely to change the outcome of the trial because "Zinzer is simply not a credible witness." As to the latter, the court considered it "difficult to believe" that she could be a friend of defendant's family for years and yet not mention what she had seen even after defendant was convicted, that she did not report the alleged intimidation by codefendant's family, and that her "testimony regarding when she first came forward with this information is contradictory." The court also found that the Lopezes's accounts contradicted Zinzer's account. This appeal timely followed.

¶ 28 On appeal, defendant contends that the circuit court erred in dismissing his petition following an evidentiary hearing, and in particular that he established a reasonable probability that Zinzer's testimony would change the outcome in a new trial.

¶ 29 Under the Post Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.* (West 2010), a petition may be summarily dismissed within 90 days of filing if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition not summarily dismissed must be "docketed for further consideration" (725 ILCS 5/122-2.1(b) (West 2010)), and the "State shall answer or move to dismiss" the petition. 725 ILCS 5/122-5 (West 2010). If the petition is not dismissed,

the "court may receive proof by affidavits, depositions, oral testimony, or other evidence" to determine whether and what relief is appropriate. 725 ILCS 5/122-6 (West 2010). Where an evidentiary hearing was held involving fact-finding and credibility determinations, or the post-conviction judge "has some special expertise or familiarity with [the] defendant's trial or sentencing and that familiarity has some bearing upon disposition of the" petition, we reverse the resulting decision of the circuit court only if it is manifestly erroneous. *People v. English*, 2013 IL 112890, ¶ 23. Otherwise, our review is *de novo*. *Id.* Manifest error is an error that is clearly evident, plain, and indisputable. *People v. Brown*, 2013 IL App (1st) 091009, ¶ 53, citing *People v. Johnson*, 206 Ill. 2d 348, 360 (2002).

¶ 30 In general, for a successful claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient – that is, objectively unreasonable under prevailing professional norms – and that said performance prejudiced him; that is, that there is a reasonable probability that the result of the proceeding would have been different absent the alleged error. *People v. Domagala*, 2013 IL 113688, ¶ 36.

¶ 31 Newly-discovered evidence warrants retrial only when it is (1) so conclusive that it will probably change the result on retrial, (2) material and not merely cumulative, and (3) discovered since trial and of such nature that the defendant exercising due diligence could not have discovered it earlier. *Brown*, ¶ 50, citing *People v. Orange*, 195 Ill. 2d 437, 450–51 (2001).

¶ 32 Here, Zinzer gave facially exculpatory testimony: that defendant was using the payphone when the shots rang out, and that she saw codefendant and Rodriguez follow the victim from the currency exchange into the alley before the shots. However, it is reasonable to conclude from Zinzer's testimony that defendant was aware of her presence at the scene, and from trial counsel Strunck's testimony that defendant did not mention Zinzer to him. Defendant's initial *pro se* petition referring to the Lopezes and "Nadine's niece De-De" as potential exculpatory witnesses

tends to corroborate his personal awareness of this evidence, even as Strunck's testimony contradicts defendant's assertion that he informed Strunck of these witnesses. Thus, it was not manifestly erroneous for the court to conclude that trial counsel was not ineffective for not investigating and calling Zinzer at trial. Similarly, it was not manifestly erroneous for the court to conclude that a key element of newly-discovered evidence – that *defendant* was unaware of it before trial – was fatally absent.

¶ 33 It was also not manifestly erroneous for the court to find Zinzer an incredible witness so that her testimony was unlikely to change the outcome at trial, which is fatal to both ineffective-assistance and newly-discovered-evidence claims. Nadine testified clearly that Zinzer was not at her home on the afternoon in question, so that she could not have witnessed defendant on the payphone. The evidence presented to impeach Nadine's testimony, from Young and Christine as well as Zinzer herself in rebuttal, was itself contradictory and inconclusive.

¶ 34 In sum, the court's dismissal of defendant's petition as supplemented, following an evidentiary hearing, was not manifestly erroneous. Accordingly, the judgment of the circuit court is affirmed.

¶ 35 Affirmed.