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2013 IL App (3d) 130386-U

Order filed October 25, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

<i>In re</i> J.B.,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
A Minor)	Rock Island County, Illinois
)	
(The People of the State of Illinois,)	
)	
Petitioner-Appellee,)	Appeal No. 3-13-0386
)	Circuit No. 12-JD-33
v.)	
)	
J.B.,)	
)	Honorable Raymond J. Conklin,
Respondent-Appellant).)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* Respondent failed to show the State secured respondent's adjudication of delinquency through the knowing use of a witness's perjured or false testimony. Adjudication of delinquency affirmed.
- ¶ 2 The State initiated delinquency proceedings against the minor-respondent, J.B., claiming that he committed the offense of residential burglary (720 ILCS 5/19-3(a) (West 2012)) by entering, without authority, the dwelling of Richard Becker with the intent to commit a theft

therein. Following an adjudicatory hearing, the circuit court of Rock Island County adjudicated the minor delinquent and sentenced him to an indeterminate term of commitment not to exceed his 21 birthday. Respondent filed a motion to reconsider his sentence, which the trial court denied. Respondent appeals, claiming he was denied due process when the State knowingly allowed perjured or false testimony to go un rebutted.

¶ 3

BACKGROUND

¶ 4 This matter began when, on January 23, 2013, the State filed a petition for detention of the minor and a petition to revoke the minor's probation. These petitions alleged that on July 27, 2012, the trial court adjudicated the minor delinquent for the offense of theft and sentenced him to 12 months' probation. The State further alleged that conditions of his probation included: refraining from committing any actions in violation of criminal statutes; residing with his father; attending school; and cooperating with recommended mental health treatment. The State alleged the minor to be in violation of these conditions in that he moved out of his father's residence, attended less than four days of school from July to November of 2012, and violated the law by using cannabis on multiple occasions.

¶ 5 The petition to revoke proceeded to a hearing during which the State informed the court that it anticipated filing a petition alleging that the minor committed the offense at issue here: residential burglary. J.B.'s counsel, a public defender, then stated that his office would likely seek to withdraw from representing J.B., as it already represented another minor allegedly involved in this residential burglary on both this and other matters. The second minor is identified as C.C. Eventually, the circuit court allowed the public defender's office to withdraw from representing J.B. and appointed new counsel to represent him.

¶ 6 Five days after that hearing, the State filed its petition alleging that on November 20, 2012, the minor, while acting in concert with another minor, knowingly and without authority, entered into the dwelling of Richard Becker with the intent to commit a theft therein. The court called the case for an adjudicatory hearing at which Richard Becker testified.

¶ 7 Becker stated that someone broke into his trailer in East Moline, Illinois. He was home until about 1:30 p.m. on the afternoon of Tuesday, November 20, 2012, at which time he left to go to work. He returned that night around 10:30 p.m. to discover that one of the two doors to his trailer had been damaged and was open. His neighbor informed him that his dog had been running loose during the time he was away. He described the damage to his door and itemized the possessions that were removed from his trailer, which included a television, speakers, video games, three different game systems and controllers.

¶ 8 The only other witness to testify was the minor, C.C. He stated that he was 15-years-old on the date of the break-in to Becker's trailer. He had been friends with J.B. for a couple weeks. Both minors lived in the same trailer park as Becker. On November 20, 2012, he met J.B. at trailer number 96. The two left that trailer at 7 p.m. and walked to Becker's trailer, where C.C. used a knife to pry open the backdoor to the point where he could unlock it. He and J.B. then entered the trailer several times and took electronics out of it. C.C. was aware of the electronics in the trailer as he is friends with the victim's son.

¶ 9 C.C. continued his testimony, noting that the boys took the electronics back to the trailer at lot 96, where J.B. made a call to one of his cousins in an attempt to find someone who would buy the stolen goods. Someone C.C. did not know then appeared and paid \$200 for the electronics. J.B. used the money to purchase cannabis. C.C. claimed not to have received any of

the \$200 but he did smoke some of the cannabis.

¶ 10 On cross-examination, C.C. acknowledged discussing the crime with detectives from the East Moline police department. Respondent's attorney asked C.C. if he was "charged in connection with this?" He responded, "I don't really know." Counsel continued, asking, "You don't know if you were arrested or not?" C.C. replied, "No, I wasn't arrested." He described going to the police station over the incident and his mom driving him home therefrom. Respondent's counsel then asked, again, "You never been charged here in court?" This time, C.C. simply stated, "No."

¶ 11 Respondent's counsel's last question asked C.C., "Did the detective make any sort of representation to you down at the police department that, something like this, you help him out you help yourself, something like that?" C.C. replied, "Yeah" at which time respondent's counsel noted he had no further questions.

¶ 12 During closing arguments, J.B.'s attorney recapped the testimony of the only two witnesses who testified. Respondent's counsel took no issue with Becker's testimony, then argued that the court should view C.C.'s testimony with significant skepticism. Counsel claimed the "fact that he wasn't charged I think is highly significant," and also reviewed the discrepancies between C.C.'s testimony at the hearing and statements given to the police department. Counsel discussed C.C.'s alleged "motivation" to "make something up" about the incident.

¶ 13 Ultimately, the trial court adjudicated J.B. delinquent for committing the crime of residential burglary of Richard Becker's trailer. The court conducted a sentencing hearing, after which it sentenced J.B. to an indeterminate term of commitment not to exceed his 21 birthday. Respondent filed a motion to reconsider sentence with the trial court denied. This appeal

followed.

¶ 14

ANALYSIS

¶ 15 Respondent's sole claim on appeal is that his due process rights were violated by "the false testimony of C.C. denying that he had been arrested or charged in connection with the residential burglary offense, thereby denying J.B. the ability to inquire as to what, if any, benefit C.C. had been offered in exchange for his critical testimony in this case."

¶ 16 It is well "established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. [Citations.] The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. People of the State of Illinois*, 360 U.S. 264, 269 (1959). "A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). The same principles apply "even if the testimony concerns only the credibility of the witness." *People v. Junior*, 349 Ill. App. 3d 286, 290 (2004) (citing *Olinger*, 176 Ill. 2d at 345). Fundamental fairness requires that a jury be truthfully informed about all matters going to the credibility of a witness and his motives for testifying known by the prosecutor or an agent of the prosecutor. *People v. Jimerson*, 166 Ill. 2d 211, 223 (1995). We review this case *de novo*. See *United States v. Saunders*, 166 F. 3d 907 (1999).

¶ 17 Respondent cites to *People v Junior*, 349 Ill. App. 3d 286, and *People v. Nino*, 279 Ill. App. 3d 1027 (1996), to support his contention that C.C.'s allegedly false testimony should result in reversal of the adjudication of his delinquency. In *Junior*, a witness, who was assisted in the crime for which the defendant had been charged, testified at defendant's trial in December of

2001 that no promises or agreements were reached with the State in exchange for his testimony. *Junior*, 349 Ill. App. 3d at 292. A review of the witness's own criminal case revealed, however, that some five months prior, in July of 2001, the State informed the court that it agreed to seek concurrent sentences for the witness/codefendant in exchange for his testimony. *Id.* Given these facts, the *Junior* court found that allowing the witness's testimony to stand without correcting it violated the *Junior* defendant's right to due process. *Id.* At 293.

¶ 18 In *Nino*, a split panel of this court found that the State "clearly presented [the witness] to the jury in a misleading light." *Nino*, 279 Ill. App. 3d at 1037. While the *Nino* court did not hold that this, in and of itself, amounted to reversible error, or violated the defendant's constitutional right to due process, a majority of the court did find the cumulative impact of this "manipulation," when coupled with other errors, required reversal. *Id.* at 1041.

¶ 19 In *Nino*, one of the State's witnesses had charges of residential burglary and arson pending against him at the time he testified. *Id.* at 1035. On cross-examination, the witness stated he had no deal in place with the State in exchange for his testimony, and he had no idea why his case had been continued three times and currently set for trial for a date after his testimony. *Id.* The majority of the *Nino* court stated that the State presented the witness "to the jury as a witness with no felony convictions, who was voluntarily testifying regarding the tragic death of his grandmother. In fact, [the witness] was a witness with a strong motivation to please the State in order to avoid a long sentence in the penitentiary." *Id.* at 1036.

¶ 20 The majority noted that the State admitted during the posttrial hearing that it deliberately manipulated the timing of the witness's pending cases so that he would have no felony convictions at the time he testified. *Id.* As such, the majority found the State presented the

witness's testimony in a "misleading light, and his credibility before the jury was not impeached." *Id.* at 1037. Justice Holdridge dissented in part, however, noting that he did "not believe the People's handling of [the witness's] testimony should be considered as grounds for reversal." *Id.* at 1041 (Holdridge, J., concurring in part, dissenting in part).

¶ 21 The partial dissent noted that it was well settled that for the defendant to be granted a new trial in such instances, "the defendant must prove that the People knowingly used perjured testimony." *Id.* (citing *People v. Brown*, 169 Ill. 2d 94, 105-06 (1974)).

¶ 22 Respondent herein claims his case is analogous to *Junior* and *Nino* as the record indicates C.C. perjured himself by offering false and misleading testimony. Respondent suggests that C.C. unequivocally testified that he was neither charged nor arrested for the residential burglary, and the record on appeal in this matter reveals otherwise. Therefore, respondent posits that the State knew C.C.'s testimony was false or misleading, yet allowed it to remain without contradiction. Not only do we find respondent's characterization of C.C.'s testimony inaccurate, but we find the record does not reveal that C.C. was ever charged or arrested in connection with this burglary.

¶ 23 As noted above, respondent's counsel twice asked C.C. on cross-examination whether he had been "charged in connection with this?" His initial response was, "I don't really know." Thereafter, counsel asked a number of questions about whether C.C. had been arrested in this matter to which he replied that he went to the police department voluntarily after which his mother drove him back to school. Counsel then, again, approached the subject of charges, stating, "You never been charged here in court?" to which C.C. stated, "No."

¶ 24 C.C.'s initial equivocation indicating that he really did not know if he had been charged in this matter or not make his final statement that he had not been charged anything but definitive.

Certainly, C.C.'s testimony on the subject is not as absolute as the adult witness's statement in *Junior*, who testified that he had no deal with the State when, in fact, the witness agreed to testify in exchange for the State's recommendation that he could serve his sentences concurrently instead of consecutively. Moreover, the record on appeal before us does not definitively show that C.C. was, in fact, charged with this residential burglary.

¶ 25 To factually support his contention to the contrary, respondent identifies comments made by his original public defender on January 23, 2013, five days before the residential burglary petition was filed in this matter. At a hearing to revoke respondent's probation stemming from the theft charge, the following exchange took place:

"RESPONDENT'S COUNSEL: I would advise the court that prior to the next pre-trial, we anticipate that there will probably be a residential burglary or burglary charge. We discovered after we prepared the paperwork this morning that we recently received a referral request and I believe our office has filed on a codefendant on that particular offense.

THE COURT: Who is the codefendant?

THE STATE: C.C.

THE COURT: Do you represent C.C.?

RESPONDENT'S COUNSEL: Yes.

THE STATE: The PD does represent him as well from previous times, as well as this charge.

THE COURT: Well, let me ask you -- let me just throw it out, would it be advisable -- I mean, I can set it for status like on the 8th, would

it be advisable to just -- is that what you want to do?

RESPONDENT'S COUNSEL: Yes, your honor, I think that we want to keep the shortest possible date in case the State doesn't file that.

THE COURT: Oh, I see.

RESPONDENT'S COUNSEL: If the State files that, then on the 8th we'll be in a position to advise the court which of the cases we need to get out of."

¶ 26 The State then acknowledged that no charges had been filed at that time against either C.C. or this respondent. Clearly, as of January 23, 2013, C.C. had not been charged with the residential burglary.

¶ 27 Respondent also cites to a minute order in the record for February 15, 2013, claiming it evinces "the public defender's assertion that it was representing [C.C.] and co-defendant in this case." The order in question states:

"State by ASA Cartwright; minor present in custody and by atty Kleinau; mother and stepfather present; Juvenile Court Services present. Due to conflict atty Kleinau makes oral motion to withdraw which is allowed -- atty N. Nieman is appointed to represent the minor. Case continued to 2/27/13 at 11:15 am. Minor is released to the custody of his mother and placed on a curfew."

¶ 28 Despite respondent's assertions, this minute order does not state that the public defender was representing C.C. as a codefendant for this residential burglary. It merely states he informed the court that he has a conflict.

¶ 29 Respondent seemingly acknowledges that the record lacks any conclusive evidence indicating that C.C. was, in fact, arrested or charged in conjunction with this residential burglary. Respondent notes, "the record in the case at bar provides more than just hopeful speculation that C.C.'s testimony under cross-examination was either mistaken, or knowingly false, and that the State was in a position to straighten out the falsehood." While that may be true, the hurdle respondent needs to clear in order to obtain a reversal of this adjudication, based upon the use of false testimony, is not "more than just hopeful speculation." To obtain the relief respondent seeks, he must show "the State's knowing use of perjured testimony" and a "reasonable likelihood that the false testimony could have affected the [trier of fact's] verdict." *Olinger*, 176 Ill. 2d at 345. We need not address the "reasonable likelihood" prong of that equation, as we find respondent has failed to show that the State knowingly used perjured testimony to obtain an adjudication of delinquency in this matter. The record before us simply does not establish that C.C. was, in fact, charged in this residential burglary. Without such evidence, it is impossible to conclude that he perjured himself when stating he "did not know" if he had been charged with in this matter, or when stating he had not been charged for this residential burglary.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 32 Affirmed.