2015 IL App (1st) 130531-U

FIRST DIVISION
MARCH 30, 2015

No. 1-13-0531

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. 90 CR 7524
	)	
JEROME ANDERSON,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's motion for DNA database comparison testing was properly denied where such testing would not significantly advance his claim of innocence or produce evidence materially relevant to that claim. *Sua sponte* dismissal of defendant's section 2-1401 petition was proper even though defendant failed to properly serve the petition on the State.

¶ 2 Defendant Jerome Anderson, who had been convicted of two counts of attempted first degree murder and one count of aggravated battery, appeals from the dismissal of his *pro se* motion for DNA database comparison and his *pro se* petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant

contends that where comparison DNA testing of blood collected a block from the scene of the crime has the potential to produce new, noncumulative evidence to significantly advance his claim of actual innocence, this court should reverse the denial of his request for testing. Defendant further contends that the trial court erred in *sua sponte* dismissing his section 2-1401 petition because the petition was never properly served on the State and the State neither waived service nor appeared in court to answer the petition.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the events of March 2, 1990. That evening, a man shot at two police officers, hitting one in the chest and leg. As the officers returned fire, the man fled toward the southwest. Shortly thereafter, an evidence technician collected swabs of two spots of fresh blood about a block southeast of the scene of the shooting. The next morning, defendant was arrested at his fianceé's home based on a photograph identification by one of the officers. Defendant had no visible gunshot wounds.

¶ 5 Prior to trial, polymerase chain reaction DNA testing conducted on the blood found near the scene excluded defendant as the donor. The day before trial, defense counsel moved to submit the DNA results at trial. The trial court denied the motion, ruling that the results were not "relevant enough" to cause the delay required to conduct a *Frye* hearing, since the State was not intending to present evidence that the blood came from defendant and the defense could still present evidence that defendant had not been shot on the date of his arrest.

¶ 6 At trial, Chicago police officer Johnny Patterson testified that about 8:40 p.m. on the day in question, he and his partner, Officer Richard Mitchell, were on patrol in the area of a south side Chicago Housing Authority (CHA) high rise located at 3919 South Federal. As they passed

the building, Officer Patterson saw a group of men standing in the breezeway, passing objects back and forth to each other. The officers parked their car a block away. As they walked back toward the building, Officer Patterson saw a man he did not know standing in front of the building in an area that was well lit by streetlights. Officer Patterson testified that the man was black and clean shaven, had a light complexion, was about 6' to 6'1" tall, weighed between 150 and 160 pounds, and was in his early 20s. When the officers were about four to five feet from the man, Officer Patterson said, "Police officers." The man, whom Officer Patterson identified in court as defendant, fled toward the southwest. When defendant was about 15 to 20 feet away, he turned, pulled a silver object from the front of his pants, and fired four to six shots. Officer Patterson was hit in the chest and the left leg. As he fell, he pulled his own gun and fired about four shots at defendant. Officer Mitchell also fired two to four shots at defendant, who continued running southbound. Officer Patterson lost sight of defendant and did not know whether defendant was hit.

¶ 7 Chicago police officer Richard Mitchell testified that about 8:40 p.m. on the day in question, he was on patrol with Officer Patterson when he noticed a group of men near the elevator of a CHA building. Suspecting that drug transactions were occurring, he and Officer Patterson parked their car a block away and walked back to the building. According to Officer Mitchell, the area was well-lit with street lights. Officer Mitchell saw a man standing at the mouth of a breezeway of the building. He described the man as black, light skinned, about 6' or 6'1" tall, and between 180 and 200 pounds. In court, he identified defendant as the man in the breezeway. Officer Mitchell testified that when he was about five feet from defendant, Officer Patterson announced his office. Officer Mitchell, who was looking toward the group of men near

the elevator, heard some shooting. He turned and saw Officer Patterson "going down." Officer Mitchell pulled his gun and fired three or four shots at defendant, who was about 10 or 15 feet away and running. He saw "fire" coming from defendant's gun and heard more shots. Defendant was aiming at Officer Mitchell, who felt a bullet pass close to his ear. When defendant ran off in a southwesterly direction, Officer Mitchell attended to Officer Patterson, who had been shot, and called for assistance. Officer Mitchell did not know whether defendant had been hit.

¶ 8 Officer Mitchell testified that after his partner was taken away in an ambulance, he went to the police station and spoke with detectives. There, Officer Mitchell McCollough showed him six to eight pictures. From those photographs, Officer Mitchell identified defendant as the shooter. The next day, Officer Mitchell identified defendant in a lineup.

¶ 9 On cross-examination, Officer Mitchell acknowledged that in a report he prepared the night of the shooting, he marked the lighting conditions as "poor artificial." He also stated that the shooter was between 16 and 20 years old and was clean-shaven, but when shown a photograph taken at the time of defendant's arrest the day after the shooting, he agreed that defendant "had facial hair."

¶ 10 Chicago police officer Mitchell McCollough testified that on the night in question, he responded to a radio call that an officer had been shot. At the scene, he spoke with Officer Patterson, who gave a description of the shooter. Officer McCollough then went to the station and gathered pictures of six men who fit the description given by Officer Patterson and who were known to frequent the area. He showed the stack of pictures to Officer Mitchell, who identified defendant as the shooter.

¶ 11 Chicago police officer Tim McKeough testified that on the night of the shooting, he gathered evidence from the scene, including a metal fragment from the breezeway area of the CHA building. He also took swabs of two spots of blood that were found on the street in front of a firehouse at 4005 South Dearborn. The parties stipulated that if called as a witness, a member of the firearms division of the Chicago police department crime lab would have testified that the metal fragment recovered by Officer McKeough was a .38 caliber bullet.

¶ 12 Chicago police officer John Hart testified that on the morning following the shooting, he and several other officers went to defendant's girlfriend's house. Officer Hart went to the rear of the house while another officer approached the front door. As he was standing at the rear of the house, Officer Hart heard a window open. He looked up to the second floor and saw defendant "coming out head first out of the window and hit the ground pretty hard with his head." Officer Hart arrested defendant. He did not see any gunshot wounds on defendant's body. Inside the house, Officer Hart recovered a .22 caliber rifle, a box of .380-C automatic bullets, 10 loose .380 bullets, a box of .45 caliber bullets, and nine .38 special bullets. Chicago police officer Hardy White testified that he recovered a loaded .45 caliber gun and a clip containing six live .45 caliber rounds.

¶ 13 Defendant testified that on the day in question, he was 6'1" tall, weighed 210 pounds, and had facial hair. He stated that he had never been to the CHA building where the shooting took place, did not have any friends who hung out there, and did not shoot Officers Patterson and Mitchell. He testified that on the day he was arrested, he had been in bed when his fianceé went to answer a knock at the door. When he heard "some forcible entry" and men with loud voices

running up the stairs, he panicked and fled through the bedroom window. Defendant stated that he did not know the rifle was in the house, but that the "other guns" were there for protection.

¶ 14 In rebuttal, Officer McCullough testified that he had seen defendant at the CHA building in question at least three times during 1989 and early 1990. He also stated that prior to the shooting, he drove by the CHA building and saw a light-skinned man, but could not say whether that man was defendant.

¶ 15 The jury found defendant guilty of two counts of attempted first degree murder and one count of aggravated battery. The trial court entered judgment on the verdict and sentenced defendant to consecutive terms of 40 years in prison for the attempted murder of Officer Patterson and 10 years in prison for the attempted murder of Officer Mitchell.

¶ 16 This court affirmed defendant's conviction and sentence on direct appeal. *People v. Anderson*, No. 1-92-2095 (1995) (unpublished order under Supreme Court Rule 23). Subsequently, we also affirmed the dismissal of his initial and successive postconviction petitions. *People v. Anderson*, Nos. 1-01-3399 (2004), 1-05-1039 (2007) (unpublished orders under Supreme Court Rule 23).

¶ 17 In September 2012, defendant filed a *pro se* "Motion for DNA Database Search," in which he alleged he was mistakenly identified as the shooter and requested that the blood sample collected near the scene of the shooting be compared against the Illinois State Police DNA database, as such testing would "likely result in a DNA match of the actual offender." In November 2012, defendant filed a *pro se* petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), asserting that his term of Mandatory Supervised Release (MSR) was void and unconstitutional because it was imposed by the Illinois

Department of Corrections (IDOC) without having been ordered by the trial court. The proof of service attached to the section 2-1401 petition listed the name of the State's Attorney, but not the address, and indicated that defendant placed the documents in the institutional mail at the correctional center where he was incarcerated.

¶ 18 The trial court dismissed both *pro se* motions in a single written order. Regarding the DNA motion, the trial court determined that such evidence would be irrelevant because no connection had ever been made between the blood stains and the offender who attempted to murder the victims. The trial court *sua sponte* dismissed the section 2-1401 petition, finding that the term of MSR was neither void nor unconstitutional.

¶ 19 On appeal, defendant first contends that where comparison DNA testing of the blood collected a block from the scene has the potential to produce new, noncumulative evidence to significantly advance his claim of actual innocence, this court should reverse the denial of his request for database comparison analysis. Defendant asserts that he has established a *prima facie* case for DNA testing and comparison analysis because identity was an issue at trial and the blood sample was subject to a chain of custody sufficient to establish that it had not been substituted, tampered with, or altered in any material respect. He argues that the comparison analysis he is requesting has gained general acceptance in the scientific community and that such testing carries a possibility for complete exoneration or, at least, the possibility to cast the evidence presented at trial – in particular, the "weak" identifications made by the officers – in a substantially different light. Defendant postulates that discovering the identity of the person whose blood was recovered "could very quickly show that he, not [defendant], was the shooter, whether based on an acknowledgment of that fact by the individual himself or by the officers, or

through discovery that this individual, unlike [defendant], had some reason for shooting at the officers," or "could uncover that the individual who left this blood was treated for gunshot wounds near the time of these events or had scars which would allow an inference of the same," or could reveal a person who "could have injured himself in his quick flight, or [had] been injured in one of countless other ways immediately before, during, or after the shooting."

¶ 20 Under section 116-3 of the Code of Criminal Procedure of 1963, a defendant requesting posttrial DNA testing is required to demonstrate that the requested technology was not available at the time of trial, that identity was the central issue at trial, and that the evidence to be tested has been subject to a secure chain of custody. 725 ILCS 5/116-3(a), (b) (West 2012). If those *prima facie* requirements are met, the defendant is entitled to DNA testing only if the result of such testing has the scientific potential to produce new, noncumulative evidence that is materially relevant to the assertion of actual innocence. 725 ILCS 5/116-3(c)(1) (West 2012). The DNA test results need not completely exonerate the defendant. 725 ILCS 5/116-3(c)(1) (West 2012). However, DNA evidence that plays a minor role and is a collateral issue is not considered materially relevant because it does not significantly advance a claim of actual innocence. *People v. Savory*, 197 Ill. 2d 203, 213 (2001); *People v. Gecht*, 386 Ill. App. 3d 578, 581-82 (2008). Whether DNA testing will provide materially relevant evidence "requires a consideration of the evidence introduced at trial, as well as an assessment of the evidence defendant is seeking to test." *Savory*, 197 Ill. 2d at 214. A ruling denying DNA testing pursuant to section 116-3 is reviewed *de novo*. *Gecht*, 386 Ill. App. 3d at 581.

¶ 21 In the instant case, we need not determine whether defendant has made a *prima facie* case for posttrial DNA testing. This is because the evidence he seeks to have tested is not materially

relevant to his claim of innocence. Defendant was convicted based on identifications made by the two police officers he shot at, who were within five feet of him immediately prior to the shooting. Other evidence indicative of guilt was defendant's headfirst flight out a second-story window when the police arrived at his fianceé's home the morning after the shooting, as well as his possession of various kinds of weapons and ammunition. Even though defense counsel was precluded from presenting DNA evidence that defendant was not the source of the recovered blood, defense counsel nevertheless established that the blood could not have been defendant's by procuring testimony from an arresting officer that defendant had no gunshot wounds on his body at the time of his arrest. Thus, we fail to see how the spots of blood found on the street about a block from the scene of the shooting could be a factor in defendant's conviction. Nothing in the record suggests that the blood had anything to do with the case or defendant's conviction.

¶ 22 The theory defendant now proposes – that DNA comparison analysis of the blood may result in a match of someone in the database, and that this person will either confess to the shooting or will be identifiable by the officers, by his motive, or by 25-year-old scars – is highly speculative. Even assuming that DNA comparison analysis will reveal a match, knowing whose blood was found a block southeast of the crime scene is of no value. First, both Officer Patterson and Officer Mitchell testified that the shooter fled southwest, not southeast, so it is unlikely that the blood came from the shooter. Second, neither officer knew if the shooter had been hit by a bullet, so nothing in the record indicates that the shooter was bleeding. Third, and most important, the person who bled in front of the firehouse could have done so for any number of reasons. As emphasized by the State in rebuttal closing, "Maybe somebody was playing

basketball and got injured. Maybe somebody was in a fight. Maybe somebody was fixing their car in the parking lot and injured their hand. Maybe a fireman was injured coming in and out of the firehouse, or maybe somebody was going to the firehouse for first aid." Given the officers' testimony that they did not know if the shooter had been hit and that the shooter ran in a different direction, any of these explanations for the presence of the blood is as likely as the one offered by defendant.

¶ 23 In this case, DNA comparison testing would not produce new, noncumulative evidence materially relevant to defendant's assertion of actual innocence. After considering the evidence introduced at trial and assessing the evidence defendant is seeking to test, we conclude that even if DNA comparison testing were to reveal a match in the database, such results standing alone, would not advance defendant's claim of actual innocence. See *Savory*, 197 Ill. 2d at 214-15; *Gecht*, 386 Ill. App. 3d at 584. Accordingly, the trial court did not err in denying defendant's request.

¶ 24 Defendant's second contention on appeal is that the trial court erred in *sua sponte* dismissing his section 2-1401 petition – in which he claimed his term of MSR was void and unconstitutional because it was imposed by the IDOC without having been ordered by the trial court – because the petition was never properly served on the State and the State neither waived service nor appeared in court to answer the petition. Defendant observes that the proof of service attached to his petition listed the name of the State's Attorney, but not an address, and indicated that he had placed the petition in the institutional mail at the correctional center where he was imprisoned. He further notes that there is no indication in the record that the State ever received notice of his petition, as the State filed no responsive pleading and was not present when the

petition was discussed in open court. Defendant asserts that given these circumstances, we should either remand the matter for further proceedings or modify the judgment to reflect dismissal without prejudice.

¶ 25 The State responds that defendant lacks standing to challenge lack of notice to a party other than himself, and that he should not be permitted to reap appellate benefits as a result of his own admitted error below. Our review is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 13 (2007).

¶ 26 Section 2-1401 establishes a comprehensive procedure for allowing the vacatur of final judgments more than 30 days after their entry. *Vincent*, 226 Ill. 2d 1, 7 (2007). Once a section 2-1401 petition has been filed, the opposing party has 30 days to answer or otherwise plead in response to the petition. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985) provides that service of a section 2-1401 petition must comply with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which in turn mandates service either by summons, prepaid certified or registered mail, or publication. The purpose is to notify a party of pending litigation in order to secure his presence. *People v. Ocon*, 2014 IL App (1st) 120912, ¶ 23. In construing the sufficiency of the notice, courts do not focus on whether the notice is formally and technically correct but, rather, whether the object and intent of the law were substantially attained. *Id.*

¶ 27 In the instant case, defendant mailed his section 2-1401 petition to the circuit court clerk on November 1, 2012. The clerk filed the petition on November 16, 2012. More than 30 days later, on December 21, 2012, the trial court *sua sponte* dismissed the petition with prejudice. The State was not present in court when the dismissal was announced. However, a transcript of a

court call on December 6, 2012, reflects that an assistant State's Attorney was present when the trial court stated, "Jerome Anderson, Order of court, December 21st."

¶ 28 As explained in *Laugharn*, the primary purpose of the 30-day waiting period is to afford the State sufficient time to respond to a petitioner's claims before a trial court may *sua sponte* consider the petition. *Laugharn*, 233 Ill. 2d at 323. That is, the State must be allowed time to make its position known. *People v. Alexander*, 2014 IL App (4th) 130132, ¶ 46.

> "However, the 30-day period does not provide a sword for a petitioner to wield once a court—as in this case—does not find in his favor, especially given that, under defendant's interpretation, the basis of his claim on appeal is his *failure* to comply with Rule 105. If we were to accept defendant's rationale, a prisoner who uses regular mail to effect service upon the State will—upon appeal—be rewarded with a second bite of the apple if the court denies his petition on the merits. Indeed, no practical reason would exist to comply with the provisions of Rule 105 because to do so would foreclose that avenue of review, which effectively empowers a prisoner to persist in filing frivolous claims." (Emphasis in original.) *Id.*

¶ 29 Here, defendant seeks to benefit from his failure to follow the filing requirements of Rule 105, claiming that the trial court erred by dismissing his petition because he improperly served the State via regular mail. In these circumstances, we follow the well-reasoned opinion in *People v. Alexander* and decline to reward defendant for his own failure to comply with Rule 105. See

Alexander, 2014 IL App (4th) 130132, ¶ 47.[1] As in *Alexander*, in the instant appeal, the State does not contest the deficient service and thus the underlying petition is without merit. See *People v. McChriston*, 2014 IL 115310, ¶¶ 16, 29-31 (even when not specifically mentioned by the trial court, MSR is automatically included in a sentence and does not violate separation of powers or due process), *cert. denied*, *McChriston v. Illinois*, No. 13-9871 (U.S. Oct. 6, 2014). Accordingly, we find no reason to remand the case so that defendant can properly serve the State or so that the State can waive service. Such a remand would likely result in the State responding that the petition is frivolous, and the trial court would then repeat its dismissal of the petition. See *Alexander*, 2014 IL App (4th) 130132, ¶ 50. We agree with the *Alexander* court that such a remand would be a waste of judicial resources, contrary to our supreme court's favor of the efficient expenditure of judicial resources. *Id*. at ¶ 51. We decline defendant's invitation to engage in this speculative, useless exercise. Accordingly, defendant's contention fails.

¶ 30 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 31 Affirmed.

[1] The *Alexander* court expressly declined to follow a contrary decision in *People v. Carter*, 2014 IL App (1st) 122613, *appeal granted*, No. 117709 (Sept. 24, 2014).