FOURTH DIVISION
June 4, 2015

No. 1-13-2949

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. 92 CR 5788
	)	
DANIEL GARCIA,	)	Honorable
	)	Rosemary Grant Higgins,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was not entitled to DNA testing of evidence not previously subjected to DNA testing, where this court held in an earlier post-conviction appeal that forensic evidence was immaterial in defendant's case, materiality is elemental to a forensic testing claim, and the circuit court properly relied on our earlier holding in denying relief.

¶ 2 Following a 1997 jury trial, defendant Daniel Garcia was convicted of first degree murder, aggravated kidnapping, and robbery and sentenced to concurrent prison terms of 80, 15, and 7 years respectively. We affirmed on direct appeal. *People v. Garcia*, No. 1-97-1049 (1998) (unpublished order under Supreme Court Rule 23). We also affirmed the 2008 dismissal upon

the State's motion of his 1999 post-conviction petition as supplemented[1] and the summary dismissal of his 2001 *pro se* post-conviction petition. *People v. Garcia*, 405 Ill. App. 3d 608 (2010); No. 1-01-2238 (2002)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the denial of his *pro se* petition for forensic testing under section 116-3 of the Code of Criminal Procedure (725 ILCS 5/116-3 (West 2012)) seeking the submission of certain evidence for DNA testing. He contends that the circuit court erred in denying his petition as he has shown all the elements of a section 116-3 claim. For the reasons stated below, we affirm.

¶ 3 Defendant and codefendant Benjamin Kirk were charged with first degree murder, aggravated kidnapping and robbery of Margaret Anderson on or about February 8, 1992. Codefendant had a simultaneous but severed bench trial.

¶ 4 The trial evidence was that the body of 78-year-old Margaret Anderson, beaten almost beyond recognition, was found on February 8, 1992, on a concrete ledge of an expressway underpass. No purse or identification was found near the body, but a set of keys near the body opened the doors to Anderson's home. Dentures, a tissue pack, and wrapped candy were found in Anderson's coat pockets, and also found at the scene were one of Anderson's boots, more tissue packs, a candy, and a drink bottle. Alvaro Delgado, a homeless man sheltering in the underpass, was taken to the police station (but released after questioning) as was Delgado's clothing including a jacket. Anderson's niece identified her and confirmed that she wore eyeglasses. Anderson's autopsy revealed that she suffered brain hemorrhages and a broken neck in addition to numerous injuries to her face, knees, and right thigh. Her injuries were consistent with being

[1] The petition had been summarily dismissed but we remanded for further proceedings. *People v. Garcia*, No. 1-00-0384 (2001).

dragged and struck in the face, and in particular her broken neck was consistent with her head being forcefully struck against a concrete ledge. Police canvassed the area on February 13 and spoke with Rosemary Cintron, a known prostitute and drug user, outside a neighborhood restaurant ("the restaurant") frequented by drug dealers, addicts, and prostitutes. Cintron accompanied the officers to the police station, where she gave a statement.

¶ 5 At trial, Cintron testified that she knew defendants, and admitted to being a drug user who supported herself by prostitution and selling drugs and had two convictions for drug possession. On February 7, 1992, she got "high" with defendants at a "crack house" and she stayed there through the day and into the night until she left with defendant in a cab. Near dawn, she left the cab at defendant's behest because he and codefendant "were going to score." Later that morning, she saw defendants running past her into the crack house without speaking to her. When they eventually exited, defendant showed her rocks of cocaine and a gold bracelet and told her that he had to sell the bracelet. When she next saw defendant a few days later, he explained that he and codefendant saw an elderly woman wearing eyeglasses walking along an underpass, codefendant grabbed her and beat her, and defendants took a gold bracelet from her while codefendant threw her glasses onto the expressway. Cintron later gave this account to police and identified defendants from police photographs. While she conceded that some of her grand jury testimony was not truthful, she was vague about what aspects were untrue, and she maintained that her account of defendant's statement was true.

¶ 6 Carmen Rivera testified that she shared an apartment with codefendant in February 1992 and admitted to using cocaine and participating in robberies with him. When codefendant left home on February 7, he had no cocaine nor money to buy any. When she saw him again at about

1 p.m. on the 8th, his face was swollen and his hands were scratched up. She saw him later that evening at home, when he had cocaine and was preparing it, and she noticed a bracelet under the stove. When she asked if it was "real," he replied that it was but they could not keep it as it was "hot." Codefendant and Rivera decided to sell the bracelet, and on the morning of February 9 they met with Nancy Kuntu-Nelson at the restaurant. Kuntu-Nelson testified that codefendant sold her a bracelet, and she thought she saw defendant outside the restaurant at that time though she had not mentioned that to the police. Kuntu-Nelson sold the bracelet to a jewelry shop on February 10, and the shop owner testified that he melted down the bracelet before the police came to him on February 15. Meanwhile, later on February 9, Rivera noticed in her home a small clear purse and an empty eyeglass case that she had not seen before; she later gave the purse to the police. When she tried to look under the stove for hidden drugs, codefendant stopped her. The owner of Rivera's apartment building testified that, when Rivera and codefendant vacated the residence in February 1992, she found and discarded various items left behind including an eyeglass case. She noticed something jammed under the stove and called police, who found it to be a wallet or case containing various documents bearing Anderson's name.

¶ 7 Defendant was arrested on February 14, 1992, and after being informed of his *Miranda* rights gave a statement to Assistant State's Attorney (ASA) Theodore Kmiec, who testified that he wrote the statement and read it aloud to defendant, who corrected and signed it. According to the statement, defendants were outside the restaurant at about 5 a.m. on February 8 when they decided to commit thefts. As they walked along a main street, they decided to steal the radio from a parked car. Codefendant stood lookout while defendant removed the radio, then they continued on until they saw an older woman wearing glasses and noticed that she was wearing

jewelry that appeared to be gold. Codefendant suggested stealing her purse, and defendant agreed. Codefendant confronted the woman while defendant stood behind her. The woman struggled when codefendant tried to grab her purse, so he punched her in the face. He then demanded her jewelry, but she refused to give it to him. Codefendant struck the woman again, twice, and defendant told her to surrender her jewelry to avoid being hit again. Defendant told codefendant to take her bracelet and stop hitting her, but codefendant replied that defendant should keep quiet and stand lookout. Codefendant grabbed the woman by the hair and dragged her up the incline of the underpass. Defendant fled the scene and returned to the restaurant because the passing traffic made him nervous. About an hour later, codefendant came to the restaurant and called defendant outside, where defendant saw a gold bracelet in codefendant's hand when he shook it. Defendant recognized it as the woman's bracelet but took it from codefendant, who warned him that he "did not see anything."

¶ 8 The parties stipulated to the testimony of serologist and microbiologist Pamela Fish of the State Police crime laboratory. Fish received and tested swabs from Anderson's body and concluded that they were negative for sperm or semen. She received and tested samples of a reddish-brown substance from the sidewalk and ledge of the underpass and concluded that they contained human blood insufficient to test for blood type. Lastly, Fish would testify that she tested Delgado's jacket for blood but the results were negative. The parties also stipulated to the effect that no useable fingerprints were found on the evidence from the scene.

¶ 9 Defendant testified, admitting to being an unemployed drug user who supported himself by theft. He denied involvement in the robbery or murder, and attributed Cintron's testimony to anger because he would not pay her for cocaine they shared. After his arrest, he repeatedly

denied knowing anything about Anderson's murder but detectives hit and kicked him and pulled his hair. An officer planted keys and an identification card in defendant's jacket but removed them when defendant noted that he had already been searched. In further interviewing, defendant was struck in the head four to seven times with a telephone book, causing him to fall and cut his arm, and was told that he would be struck each time he denied being involved. He ultimately gave a statement to end the beatings and go home, and he did not read the entire statement prior to signing it. The ASA who prepared the statement did not ask defendant what he knew about Anderson's murder, but defendant told him about his treatment by police. On cross-examination, defendant admitted that, in an earlier hearing, he misidentified photographs from his unrelated January 1992 arrest as depicting injuries he received following the instant arrest.

¶ 10 The detectives named by defendant as his assailants testified, denying that they or other officers mistreated defendant. A paramedic who saw defendant at his jail intake on February 15 testified that he had no bruises on his face and mentioned no injury to his arm.

¶ 11 On this evidence, the jury found defendant guilty of first degree murder, aggravated kidnapping, and robbery. The court similarly found codefendant guilty.

¶ 12 In his initial post-conviction petition as supplemented, defendant claimed that the State knowingly used perjured testimony – Fish's stipulated forensic testimony – and trial counsel was ineffective for failing to challenging Fish's findings where she was discredited in other collateral proceedings. On appeal from the petition's dismissal, we noted that we must accept the veracity of well-pled allegations but need not give credence to immaterial allegations, with defendant bearing the burden of showing materiality. We found ourselves:

> "unable to say that, but for Fish's input, defendant's trial would have ended differently. [Citation.] Even assuming the trial judge had concluded that Fish's findings were false, we fail to see how defendant was harmed by her stipulated testimony. None of the evidence adduced at trial tended to show defendant had direct physical contact with the victim. Defendant's own statement, which he claimed was the product of coercion and beaten out of him, clearly distanced himself from the victim. Moreover, there was nothing tending to indicate defendant bled or secreted in any form or fashion during the encounter with the victim." *Garcia*, 405 Ill. App. 3d at 616.

Because forensic evidence was not a significant part of the State's case against defendant, proof that he left no trace on Anderson or at the scene would not advance his case and Fish's allegedly perjured findings were immaterial.

¶ 13 We rejected the contention that trial counsel had been ineffective for stipulating to Fish's testimony rather than challenging it. Defendant's "defense to the fatal beating of Anderson was, essentially, 'I was not there, I did not do this.' " *Garcia*, 405 Ill. App. 3d at 618. The stipulated test results were inconclusive and therefore neither inculpatory nor particularly exculpatory. We found further testing was unnecessary, as it "could serve to provide additional inconclusive results or, even worse, undermine the defense by potentially implicating defendant." *Id*. Thus, it was a reasonable strategic decision to not challenge the forensic evidence but allow its admission. Moreover, defendant was not prejudiced by the admission of Fish's evidence because it was not inculpatory and did not impair his defense. We similarly rejected the claim that trial counsel was ineffective for not commissioning further forensic testing, reiterating that defendant's conviction was not based on forensic evidence and his trial strategy was to claim he

removed himself from the offense when codefendant continued striking Anderson. Because nothing in the existing evidence placed defendant at the scene, nothing would be added to his case by additional testing that presumably would show no forensic contribution by defendant. We held that defendant's claim lacked the materiality and conclusiveness required to produce a different result on retrial. In so holding, we relied on *People v. Savory*, 197 Ill. 2d 203 (2001), where our supreme court addressed materiality in the context of a section 116-3 petition.

¶ 14 We also rejected defendant's contention that post-conviction counsel did not fulfill the duties prescribed by Supreme Court Rule 651(c) (eff. Feb. 6, 2013), holding that counsel is not required to obtain or generate new evidence such as DNA testing. We acknowledged the State's argument that defendant could "choose to avail himself of" a section 116-3 petition but held that "this issue is not properly before us." *Garcia*, 405 Ill. App. 3d at 626.

¶ 15 Defendant filed the instant *pro se* petition for forensic testing in May 2013, alleging that the swabs from Anderson's body, the vials of blood, and the jacket had been tested but not for DNA, while other evidence (Anderson's and Delgado's clothing, the bottle, tissue-packs, candy, boot, and keys) was inventoried but not tested. He argued that identity was at issue in his trial and that testing revealing the presence of a person other than defendants would undermine the case against defendant. He argued that his case would be advanced even if only codefendant's DNA was found because if defendant "was there at all, even merely present, his DNA should have appeared on at least one of those pieces of evidence." He noted that the State had raised the prospect of a section 116-3 petition in appellate argument on his initial post-conviction petition.

¶ 16 On June 5, 2013, the court denied relief, finding that the petition raises "issues that were already resolved by the Appellate Court against the Defendant" and noting that defendant's

statement "distanced himself from the victim" and "there's nothing tending to indicate that the Defendant bled or secreted any form or fashion during the encounter with the victim so there's no DNA for testing." This appeal followed.

¶ 17 On appeal, defendant contends that the circuit court erred in denying his petition for forensic testing because he stated a case for DNA testing under section 116-3.

¶ 18 Section 116-3 provides that a defendant may make a motion in the circuit court for forensic DNA testing, "including comparison analysis of genetic marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5-4-3 of the Unified Code of Corrections, on evidence that was secured in relation to the trial" at which he was convicted, if the evidence was either not subject at the time of trial to the testing now requested, or it was previously tested but "can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results." 725 ILCS 5/116-3(a), citing 730 ILCS 5/5-4-3(f) (West 2012). The defendant must present a *prima facie* case that identity was the issue in his trial and that the evidence to be tested has been subject to a sufficient chain of custody. 725 ILCS 5/116-3(b) (West 2012). An allegation that the evidence to be tested had been in the continuous possession of the police or some other State agency is facially sufficient regarding the chain-of-custody requirement; a defendant cannot be expected to prove at the outset a proper chain of custody because the evidence at issue will typically have been in State possession. *People v. Bailey*, 386 Ill. App. 3d 68, 75 (2008).

¶ 19 The circuit court must also determine that "the result of the testing has the scientific potential to produce new, noncumulative evidence *** materially relevant to the defendant's assertion of actual innocence when the defendant's conviction was the result of a trial, even though the results may not completely exonerate the defendant." 725 ILCS 5/116-3(c) (West 2012). Evidence is materially relevant to a claim of actual innocence if it tends to significantly advance the claim even if it does not by itself exonerate the defendant. *People v. Stoecker*, 2014 IL 115756, ¶ 33, citing *Savory*, 197 Ill. 2d at 213-14. Whether evidence would be materially relevant requires an evaluation of the trial evidence and the evidence the defendant seeks to acquire through the testing. *Id*. We review *de novo* the disposition of a section 116-3 petition. *Stoecker*, 2014 IL 115756, ¶ 21.

¶ 20 Here, this court squarely considered, and found lacking, the materiality of forensic evidence in the context of defendant's first post-conviction petition. Defendant is seeking DNA testing of evidence earlier tested by Fish (Anderson's swabs, the blood samples, and the jacket) but also evidence not mentioned in Fish's stipulated trial testimony that was nonetheless recovered and inventoried. However, we previously found materiality unproven not just because the forensic evidence at trial did not implicate defendant but also because there was no evidence that defendant touched Anderson or that he was bleeding or otherwise secreting; that reasoning applies equally to the untested and previously-tested evidence. Notably, in finding materiality unproven, we relied on *Savory*, where our supreme court addressed materiality as a requirement of section 116-3. The circuit court denied the instant petition in reliance on our opinion, and as materiality is a required element of a section 116-3 claim, we cannot find error in that reliance or the resulting denial of the instant petition.

¶ 21 Defendant relies on our statement in our opinion that he could file a section 116-3 petition. However, we made that remark in a particular context. In disposing of defendant's contention that post-conviction counsel was ineffective for not seeking and presenting additional evidence such as DNA testing, we held that counsel was not required to do so by Rule 651(c) nor did defendant require the assistance of counsel to motion for DNA testing as he could file such a petition himself. Notably, we expressly refused to rule on the issue of a section 116-3 petition that at that point did not exist. The latter ruling – essentially, refraining from making a final or ultimate holding – does not negate our preceding holding of immateriality.

¶ 22 Accordingly, the judgment of the circuit court is affirmed.

¶ 23 Affirmed.