2016 IL App (3d) 130622-U

Order filed April 5, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
	)	La Salle County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0622
v.	)	Circuit No. 84-CF-74
	)	
RONALD BARROW,	)	Honorable
	)	Cynthia M. Raccuglia,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order terminating section 116-3 proceedings was improper where the trial court had not fully ruled on defendant's request for ballistics testing.

¶ 2 Defendant, Ronald Barrow, appeals from the trial court's order granting the State's motion to close proceedings under section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2008)). Defendant contends the order closing proceedings was premature because the State had not completed all forensic testing requested by defendant prior to the court's order entered on April 17, 2009.

¶ 3 FACTS

¶ 4 Following a 1985 jury trial, defendant was found guilty of the offense of murder (Ill. Rev. Stat. 1983, ch. 38, ¶ 9-1(a)(1)) and received the death penalty. Additionally, defendant was found guilty of armed robbery (Ill. Rev. Stat. 1983, ch. 38, ¶ 18-2(a)), residential burglary (Ill. Rev. Stat. 1983, ch. 38, ¶ 19-3), and burglary (Ill. Rev. Stat. 1983, ch. 38, ¶ 19-1). The trial court sentenced defendant to 30 years' imprisonment for armed robbery and 15 years for residential burglary. Our supreme court affirmed defendant's convictions and sentences. *People v. Barrow*, 133 Ill. 2d 226 (1989). Defendant's death sentence was later commuted to a term of natural life imprisonment in 2003.

¶ 5 In September 2008, defendant filed a motion for forensic testing (2008 motion for forensic testing) pursuant to section 116-3 of the Code (725 ILCS 5/116-3 (West 2008)). In that motion, defendant requested DNA testing on a number of pieces of evidence introduced at his trial, as well as testing of certain fingerprints and a shoeprint found at the scene of the crime. Further, defendant requested certain ballistics testing as follows:

> "Defendant requests forensic testing of the ballistic evidence collected during the investigation of [the victim's] murder, including, but not limited to the projectile that killed the victim and presented at trial as State's Exhibit #131, and all evidence relating to Laboratory Case No. J84-468, Exhibit 19, 'one Smith & Wesson model 65-1, 357 Magnum caliber revolver, examined by State witness Robert Hunton, who testified that said gun 'could have' been the murder weapon, based upon information provided in discovery."

¶ 6 In its written response to defendant's 2008 motion for forensic testing, the State conceded to a test of the DNA found on defendant's shoe, but objected to all other DNA testing. In that

written response, the State also conceded or agreed that the requested ballistics testing on the spent projectile and the fingerprint testing would be appropriate for the court to order. The State did not concede or expressly object to defendant's request for ballistics testing on the .357 revolver.

¶ 7 During the subsequent 2009 hearing on defendant's 2008 motion for forensic testing, the State reiterated these written concessions and maintained its objection to the requested testing of the shoeprint. During the 2009 hearing, the prosecutor also addressed the issue related to evidence associated with the .357 revolver by stating as follows:

> "Getting now I guess to the issue of what is being contested, there is an issue of a gun that [defendant] informs me was taken in conjunction with another crime in the general area around the general time of this particular murder that he believes was test fired and compared against the slug that was found in this case. I don't know if that's true or not. I'm informed that the individual who performed that testing still is employed by the Illinois State Police Crime Lab and I will be in contact with him just to see what the circumstances of that were.
>
> We have some test fire projectiles that appear to be in evidence, but it is unclear to me where those necessarily came from or what significance they have. So I think we have agreed to table that issue to give me a chance to look into it more and see precisely what is there. I am not contesting it. I am not admitting to it. I just think we need to look into it a bit more so I can address that issue."

The court suggested that the State should file an affidavit after looking into whether the evidence involving the .357 revolver associated with another crime in the mideighties or any test fired projectiles from that revolver remained in the State's possession in 2009.

¶ 8 In a written order dated April 17, 2009, the trial court did not address the ballistics testing issues related to the .357 revolver but granted, in part, defendant's 2008 motion for forensic testing. The court's written order stated as follows:

> "1. All evidence currently in existence in this case shall be preserved pursuant to 725 ILCS 5/116-4.
>
> 2. State shall conduct further testing on fingerprint evidence, ballistic evidence, and drop of blood from the shoe, as conceded in the record, in accordance with the rules of AFIS [Automated Fingerprint Identification System], IBIS [Integrated Ballistic Identification System], and CODIS. No testing will begin until the State is notified of the defendant's intention regarding independent expert representative. New buccal sample to be collected from defendant. State again makes no concession as to the suitability of these items for further testing.
>
> 3. State shall examine evidence vault and investigate file again for the existence of hair and fiber evidence, and provide affidavit to the court regarding existence of same.
>
> 4. Additional testing on victim's clothing and the seat cushion shall not be conducted at this time, subject to reconsideration by the court.
>
> 5. Additional testing on defendant's shoes shall not be conducted at this time, subject to reconsideration by the court."

¶ 9 After multiple continuances affording defendant additional time to prepare a *pro se* motion to reconsider the court's April 17, 2009 order, on October 19, 2009, defendant filed

motions to reconsider the court's 2009 order[1] together with a separate motion to obtain forensic records and a motion for report of proceedings. In the motion to obtain forensic records, defendant requested the court to compel the State to produce any reports or files relating to "Laboratory # J84-468; Agency # 84-2-451; and Bureau Of Technical Field Services # I-84-178, produced by any State agent[.]"

¶ 10 On January 22, 2010, the parties were present in court for the hearing on defendant's motions to reconsider the court's order dated April 17, 2009. Before the motion hearing began, the trial court reminded and ordered the State to procure an affidavit from the laboratory indicating whether ballistics testing of the spent projectile, found near the victim's body, could take place because the murder weapon, a firearm, had not been recovered by the State during the investigation.

¶ 11 Thereafter, the court received arguments on defendant's motions to reconsider the court's order dated April 17, 2009. The court entered a written order dated January 22, 2010, that stated "Motion to reconsider re: DNA on victim's clothing and seat cushion and footwear evidence comparison is denied. This holding is final and appealable." The written order granted defendant's motion to obtain forensic records as well as his motion for report of proceedings. Finally, the order stated: "State to provide affidavit regarding hair, fiber, & firearm evidence."

¶ 12 Defendant filed a notice of appeal on January 22, 2010, challenging the trial court's order dated April 17, 2009, compelling the State to provide some, but not all, of the forensic tests requested by defendant. On September 7, 2011, this court issued a decision in *People v. Barrow*, 2011 IL App (3d) 100086, ¶ 17, which upheld the trial court's order dated April 17, 2009.

[1]Defendant filed one motion to reconsider the court's denial of expanded DNA testing and a separate motion to reconsider the court's denial of shoeprint testing.

Specifically, this court rejected defendant's argument that the trial court had erred by denying his request for shoeprint testing. *Id*. ¶¶ 33-38.

¶ 13 While defendant's 2011 appeal concerning the court's denial of some forensic testing subject to defendant's 2008 request was pending, the trial court continued to monitor the State's compliance concerning the forensic tests that *had* been ordered by the court on April 17, 2009. Over the course of the next three years, defendant repeatedly referenced the .357 revolver identified in his original 2008 motion for forensic testing, and continued to seek shoeprint testing. The State, meanwhile, continued to orally assure the court, based on conversations with unnamed laboratory personnel, that the ordered ballistics testing on the spent projectile found at the scene of the crime could not be completed.

¶ 14 On August 21, 2012, defendant filed a "Motion to Compel the State to Proceduce [*sic*] as Previously Ordered and Materials of Record" (2012 motion to compel). In paragraph 10 of that motion, defendant requested that

> "the State be compelled to produce Trial Exhibit #131 (Projectile) in possession of Robert Hunton and the Illinois State Police Crime Laboratory *** and the .357 projectile marked 'test shot 23 TS' which Robert Hunton tested and is in possession of La Salle County Sheriff Department according to David Guinnee's Attachment 'A'."

Defendant attached to his 2012 motion to compel an affidavit from Detective David Guinnee of the La Salle County sheriff's department, dated April 20, 2010. In the affidavit, Guinnee attested he had searched the evidence locker and circuit clerk's vault, and attached a "complete list of all exhibits in this case." Defendant also attached this list to his 2012 motion to compel. The

attached list referred to a piece of evidence described as "test shot 23 TS" found in an unlabeled box.

¶ 15 Also attached as exhibits to defendant's 2012 motion to compel were two laboratory reports from the Joliet forensic science laboratory dated April 5 and April 9, 2012. The first report indicated that a "[s]tain collected from back heal area of left shoe" was submitted for testing. Although the blood was identified as originating from a human being, no DNA was detected. The second report indicated that four[2] latent lifts were submitted for testing. One of those prints was found to be suitable for processing, but "[a]n AFIS search did not reveal any identifications."

¶ 16 On September 21, 2012, at the hearing on defendant's 2012 motion to compel, defendant argued the list provided by Guinnee was incomplete, and that he should be allowed to question Guinnee under oath regarding the affidavit. The court agreed, stating: "Any affidavits given to you, you have a right to question that witness in person on what is in the affidavit." In a written order issued on September 21, 2012, the court ordered: "Request in paragraph 10 as to actual location of ballistic evidence is reserved pending further proffer of the State."

¶ 17 The record contains a document, filed by the State on March 4, 2013, entitled "Supplemental Information Furnished to Defendant Pursuant to Illinois Supreme Court Rule 412." In that document, the State averred that a report authored by Robert Hunton and dated February 22, 2013, had been tendered to defendant. The actual report was not attached to the document filed by the State on March 4, 2013.

[2]Although the State apparently submitted three exhibits for testing, one of those exhibits contained two fingerprints.

¶ 18 On March 19, 2013, the State filed a motion (2013 motion to close) requesting that the trial court "order that the Defendant's request for forensic testing [had] been satisfied in the above cause."[3] In the 2013 motion to close, the State averred it had "submitted a number of different exhibits for testing at the Illinois State Police Crime Lab. Those included a ballistics identification using IBIS, a fingerprint comparison, and an analysis of some exhibits for possible DNA for use in further testing." The State noted the results of those tests had been tendered to defendant. The State concluded "no further issues exist[ed] to justify [defendant's] appearance in court." The State's 2013 motion to close included an attached notice of filing and proof of service upon defendant, also dated March 19, 2013. The State did not attach any laboratory reports or test results as exhibits to its 2013 motion to close that is the subject of this appeal.

¶ 19 In response to the State's 2013 motion to close, defendant filed a "Motion for Leave to Submit Written Status, Request for Continuance and Schedule for Filing of Motions," dated May 3, 2013 (2013 motion for leave to submit written status). In the 2013 motion for leave to submit written status, defendant asserted that "The State [had] supplied the Laboratory Report *** which was only one of the two ballistic tests requested [in 2008]." In his formal response to the State's 2013 motion to close, filed on June 20, 2013, defendant urged that "the ballistic test that was not done" was among the issues still to be litigated. Defendant also filed a motion for testing of shoeprint evidence (2013 motion for shoeprint testing).

¶ 20 In addition, on June 20, 2013, defendant filed a motion to strike the State's 2013 motion to close. In that motion to strike, defendant alleged he not been served by the State with a copy of the motion, nor had he received actual notice of the State's 2013 motion to close.

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[3]Though the State simply labeled this filing "Motion," we will continue to refer to it as a motion to close.

¶ 21 On August 22, 2013, the trial court conducted a hearing on defendant's 2013 motion to strike and the State's 2013 motion to close. At the hearing, defendant began by addressing his argument that the State had failed to serve its 2013 motion to close upon him. The court interrupted defendant, stating: "I'm going to deny that. It's pretty clear that you have had notice and received copies."

¶ 22 Turning to the merits of the State's 2013 motion to close, the State argued that all forensic testing ordered by the trial court in 2009 had been completed, including ballistics testing on a single spent projectile. On this basis, the State argued, all proceedings under section 116-3 had been completed. Defendant countered that numerous issues remained to be litigated. Specifically, defendant pointed out that "There was two projectiles ordered to be tested. *** They finally did test one of them. There's still one ballistic that still needs to be tested[.]" Defendant also argued the trial court still had not ruled on his 2013 motion for shoeprint testing.

¶ 23 After denying defendant's 2013 motion to strike, the court granted the State's 2013 motion to close. The court explained it was ruling "that we have completed everything that is potentially possible." The trial court's written order (order closing proceedings) stated: "State's motion is granted. The Court rules that the Defendant has exhausted his remedies under 725 ILCS 5/116-3. No further court dates." Defendant appeals from that order.

¶ 24 ANALYSIS

¶ 25 Defendant, proceeding *pro se*, raises several issues on appeal. First, defendant argues that the trial court's order closing proceedings was erroneous because his 2008 motion for forensic testing has not been fully resolved. Specifically, defendant contends that testing was not completed on the test shot from the .357 revolver. In support of his contention of error, defendant claims due to judicial bias, the trial court prematurely foreclosed further forensic

testing and granted the State's 2013 motion to close. Defendant also challenges the denial of his 2013 motion to strike the State's 2013 motion to close, the court's failure to allow his 2013 motion for shoeprint testing, and the constitutionality of section 116-3 itself.

¶ 26 The State maintains that all forensic testing ordered by the trial court in 2009 was completed. Moreover, the State contends that any issues related to the 2013 motion for shoeprint testing must be resolved against defendant based on *res judicata*. Finally, the State contends section 116-3 is constitutional.

¶ 27 I. Order Closing Forensic Proceedings

¶ 28 Proceedings under section 116-3 of the Code are not complete until ordered testing has been finished, and the results are tendered to defendant. See *Price v. Pierce*, 617 F.3d 947, 950-52 (7th Cir. 2010) (conducting in-depth analysis of section 116-3). Section 116-3 is essentially a discovery tool which allows defendant to develop newly discovered evidence to present to the trial court in a postconviction petition. *Id*. at 952; *People v. Savory*, 197 Ill. 2d 203, 210 (2001). The case law recognizes that section 116-3 does not provide a specific process in the event that the defense and State cannot agree that all court-ordered forensic testing has been completed. See *Pierce*, 617 F.3d at 950. When the defense and State cannot agree, we recognize the court must have the discretion to consider a motion to clarify the status, progression, or completion of previously ordered forensic testing for purposes of creating an accurate court record for further review when necessary.

¶ 29 In order to address whether the trial court properly concluded the State had complied with all forensic testing ordered by the court on April 17, 2009, we begin by revisiting the trial court's ruling on that date. On April 17, 2009, the court ordered the "State shall conduct further testing

on fingerprint evidence, ballistic evidence, and drop of blood from the shoe, as conceded in the record[.]"

¶ 30 During the 2009 hearing on defendant's 2008 motion for forensic testing, the State agreed to conduct ballistics testing on one spent projectile found at the scene of the crime. However, the State was uncertain about whether defendant was correct in asserting another test projectile might exist that was fired from a .357 revolver seized as evidence in an unrelated crime that occurred around the same time defendant was accused of this murder—nearly 30 years prior to the 2009 hearing.

¶ 31 Regarding the issue of whether the other projectile might remain in the State's possession in an unrelated case, the prosecutor explained to the court that he "need[ed] to look into it a bit more so [he could] address that issue." Consequently, the court orally directed the State to file an affidavit after looking into whether the State had retained the test projectile for the unrelated .357 revolver. Again, when the court addressed its 2009 decision on forensic testing on January 22, 2010, the court signed a written order directing the State to provide an affidavit regarding firearm evidence.

¶ 32 In spite of the court's written order dated January 22, 2010, the State did not submit an affidavit until April 20, 2010. On that date, the State tendered an affidavit to defendant which had been prepared by Guinnee. Guinnee's 2010 affidavit *verified* "test shot 23 TS," was still in the State's possession in 2010, decades after the murder. When defendant received Guinnee's affidavit in 2010, his appeal remained pending in this court. Our decision in the previous appeal was issued in March of 2012.

¶ 33 On August 21, 2012, defendant filed a 2012 motion to compel at issue in this appeal. In paragraph 10 of that motion, defendant requested that

> "the State be compelled to produce Trial Exhibit #131 (Projectile) in possession of Robert Hunton and the Illinois State Police Crime Laboratory *** and the .357 projectile marked 'test shot 23 TS' which Robert Hunton tested and is in possession of La Salle County Sheriff Department according to David Guinnee's Attachment 'A'."

Defendant attached to his 2012 motion to compel an affidavit from Guinnee dated April 20, 2010, for the court's consideration.

¶ 34 On September 21, 2012, the court considered defendant's 2012 motion to compel but was unable to rule on the request set out in paragraph 10 pertaining to the test shot. The court agreed with defendant's position by stating: "Any affidavits given to you, you have a right to question that witness in person on what is in the affidavit." In a written order issued on September 21, 2012, the court ordered: "Request in paragraph 10 as to actual location of ballistic evidence is reserved pending further proffer of the State." The court's order did not rule on paragraph 10 and that issue was "reserved pending further proffer of the State."

¶ 35 Contrary to the court's directive the State did not submit a proffer to the court concerning whether a comparison of the projectile found at the scene of this murder could be made to the projectile test fired from a weapon recovered in another case from the same time period. Instead, the State filed the 2013 motion to close which precipitated this appeal.

¶ 36 Based on this record, we agree the court's 2013 order closing proceedings was premature. Defendant's 2012 request to compel testing on the .357 projectile has not yet been ruled upon. Accordingly, we reverse the trial court's order closing proceedings and remand for resolution of defendant's request for ballistics testing.

¶ 37 While we reverse the trial court's order closing proceedings, we are unpersuaded that the court's ruling resulted from judicial bias. From this record, it appears the trial court fairly considered the merits of defendant's various motions filed over the course of several years. Indeed, the trial court often ruled in defendant's favor on issues involving further forensic testing. It appears the State simply dropped the ball and, due to the State's error and the passage of time, the court mistakenly believed, in good faith, all ordered testing had been completed. Therefore, we reject defendant's argument that judicial bias contributed to the court's ruling and conclude the trial court exercised its duties with a judicious patience and utmost professionalism.

¶ 38 Finally, we emphasize that we are not remanding for forensic testing on the .357 projectile marked "test shot 23 TS." We are merely remanding so that the trial court may issue a ruling on defendant's request for comparative forensic testing on the .357 projectile marked "test shot 23 TS." Moreover, because we grant defendant's requested relief in the form of reversal of the trial court's order closing proceedings, we need not address defendant's arguments that the closure was the product of prosecutorial misconduct, or that the State's 2013 motion to close was never properly served upon him.

¶ 39 II. Shoeprint Testing

¶ 40 Defendant also argues the trial court erred in failing to grant his pending 2013 motion for shoeprint testing. The State submits this issue must be resolved against defendant based on *res judicata* arising out of this court's decision in *Barrow*, 2011 IL App (3d) 100086. Defendant responds to the State's argument by claiming our previous decision, which ruled against defendant on the issue of shoeprint testing, is void for lack of jurisdiction because there were unresolved motions in the trial court when he filed his original notice of appeal on January 22,

2010. Thus, defendant argues this court did not have authority to exert our jurisdiction as a court of review.

¶ 41 Defendant's contention is plainly rebutted by the record. In the period of time after the trial court issued its April 17, 2009, order granting in part and denying in part defendant's 2008 motion for forensic testing, this defendant filed four additional other motions on October 19, 2009. Two motions requested the court reconsider its order denying certain DNA testing and to reconsider its order denying shoeprint testing. The other two motions separately requested forensic records and a report of proceedings. On January 22, 2010, the trial court issued a written order explicitly ruling upon each of those four motions by granting the latter two motions and denying the other motions. *Supra* ¶ 11.

¶ 42 We conclude there were not any unresolved motions at the time of defendant's 2011 notice of appeal that would have rendered defendant's notice of appeal ineffective. Moreover, we note that this court, in defendant's 2011 appeal, necessarily concluded that it had jurisdiction to decide the case. See *Barrow*, 2011 IL App (3d) 100086; *e.g.*, *People v. Walker*, 395 Ill. App. 3d 860, 863 (2009) (reviewing court has duty to *sua sponte* consider its own jurisdiction). Consequently, this court properly exercised jurisdiction to consider defendant's 2011 appeal and our decision in that case is not void. Accordingly, defendant's claims relating to the forensic testing of shoeprints must be resolved against him based on the doctrine of *res judicata*.

¶ 43 III. Constitutionality of Section 116-3

¶ 44 Defendant next contends that section 116-3 is unconstitutional. He maintains the statute is both unconstitutionally vague and unconstitutional as it applies to him. The extent of defendant's argument for unconstitutionality, however, is a bare recitation of the standard for such arguments. See *People v. Pembrock*, 62 Ill. 2d 317, 322 (1976) ("A statute is

unconstitutionally vague if the terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts."). Defendant fails to cite or discuss any case law which might support, either directly or by analogy, his vagueness argument. He provides no discussion of his as-applied challenge, other than the allegation itself.

¶ 45 This court is entitled to have issues clearly defined, with citations to authority and cohesive argument supporting those issues. *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 297 (2010). A reviewing court "is not a repository into which an appellant may foist the burden of argument and research [citation]; it is neither the function nor the obligation of this court to act as an advocate or search the record for error." *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993). Accordingly, we find defendant has forfeited his arguments by failing to develop them or cite any authority to support them. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); see also *Fryzel v. Miller*, 2014 IL App (1st) 120597, ¶ 26 ("A party's status as a *pro se* litigant does not relieve him of his obligation to comply with the appellate practice rules.").

¶ 46 CONCLUSION

¶ 47 The judgment of the circuit court of La Salle County is reversed and remanded with directions.

¶ 48 Reversed and remanded with directions.