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2016 IL App (3d) 140224-U

Order filed June 14, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois.
)	
v.)	Appeal No. 3-14-0224
)	Circuit No. 03-CF-1847
)	
REGIS J. WOODS,)	
)	Honorable Robert P. Livas,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* The trial court erred in dismissing defendant's postconviction petition without an evidentiary hearing. Defendant made a substantial showing of prosecutorial misconduct.
- ¶ 2 Defendant, Regis J. Woods, appeals the second-stage dismissal of his postconviction petition. On appeal, defendant argues he made a substantial showing: (1) of actual innocence; (2) that the State violated his right to due process when it induced and knowingly presented false

testimony; and (3) that his attorney provided ineffective assistance of counsel. We affirm in part and reverse in part.

¶ 3

FACTS

¶ 4

Following a May 10, 2003, incident, the State charged defendant with first degree murder (720 ILCS 5/9-1(a)(2) (West 2002)), attempt first degree murder (720 ILCS 5/8-4(a); 720 ILCS 5/9-1(a)(1) (West 2002)), and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2002)).

¶ 5

At defendant's bench trial, State witness Charles Howard testified he had been at a bar called Don's with his friend CoSandra Moland. Howard observed defendant at the bar, whom he knew from the neighborhood as "Little Fred." Howard and Moland left the bar in the early morning hours. After arriving at Howard's mother's house, Howard parked his car in the driveway, and Moland parked on the street in front of the house, which was located in the 500 block of Washington Street in Joliet. They both went inside the house for a few minutes, as Moland needed to use the bathroom, and then they came back outside. Howard and Moland had a brief conversation and, after a few minutes, Moland got in her car to leave. Howard turned around and began to walk back to the house. While Howard was still outside, Moland honked her car's horn. Howard turned around and walked back to Moland's car. Moland, sitting in the driver's seat, leaned over to roll down the passenger's side window. Howard then observed another car pull up behind Moland's car and stop.

¶ 6

A man got out of the rear passenger's side of the car and walked toward Howard. Howard said "what up" to the man, and the man began to fire a gun at Howard. Howard ran across the street to get away from the shooter. He turned around and observed defendant get out of the same car and walk toward Moland's car on the driver's side. Defendant aimed a gun at

Moland's car. Howard turned and continued running, but he stumbled and fell. He rolled on the ground and came to rest in a position facing away from Moland's car.

¶ 7 One of the shooters ran up to him and fired his gun once. Howard felt gunpowder residue from the shot hit his face and head. He lay still, and then he heard three rapid gunshots and glass breaking. These sounds came from the direction of Moland's car. He stated that the shots fired at him sounded like a revolver, and the shots that broke the glass sounded as if they came from an automatic weapon. He also heard someone say "Fred, get that nigger, and get her, too." Howard continued to lie still until he heard the sound of cars driving away. He then got up and ran to the passenger door of Moland's car. After realizing that Moland had been shot, Howard dialed 911 at 3:35 a.m. Howard informed the dispatcher that Fred Woods had shot him and Moland. He was unable to identify the other shooter. Moland died of multiple gunshot wounds.

¶ 8 When police officers arrived at the scene, Howard told them that Fred Woods, who was wearing a black hoody and a black do-rag, had shot Moland. He described the second shooter as wearing "all black"—a black jacket with white stripes down the side and a black hat that covered his nose and forehead. Howard was taken to the hospital for treatment of his wound. There, the officers showed him a photographic array. Howard identified a picture of defendant as the man who shot Moland, but he stated that he was too tired to be sure. He later chose the same picture of defendant out of the same photographic array, and identified defendant as the shooter.

¶ 9 Steven Smith testified that, while he was conducting a narcotics transaction at 7 Miller Street at approximately 3:30 a.m., he observed defendant's cousin, David Woods, driving a burgundy car. The car parked across the street at 8 Miller Street. Smith then heard a gunshot, followed by at least two more shots, and he looked in the direction of the 500 block of Washington Street. Through the trees that partially blocked his view, he observed sparks. On

the walk back to his car after completing his transaction, Smith was surprised by the sudden appearance of defendant, who was brandishing a gun.

¶ 10 Smith first talked to the police about the homicide in November 2003, while he was incarcerated on three pending armed robbery charges. Smith denied that he had approached detectives about Moland's murder. He claimed that a detective brought up the subject of Moland's murder while talking to him about something else.

¶ 11 After Smith testified, defense counsel asked the trial judge to visit the scene—not in an attempt to recreate any of the events of the evening (which the judge had earlier declined to do), but just to view it. Doing so, counsel stated, was “absolutely crucial” to understanding Smith's testimony. It would also help the court determine the distances involved. The judge stated he would consider the request, but he would need time to think about it. He remarked that if he were to visit the scene, all parties would have to be present. The judge never visited the scene.

¶ 12 Cavelle Jackson, defendant's girlfriend, testified that defendant arrived at her house at approximately 2:30 a.m. on May 10. She awoke at 3 a.m. to feed her baby. She observed that defendant was asleep in bed. She stated that defendant's cellular phone rang several times. Defendant woke up once to answer his phone, and had a brief conversation before falling back asleep.

¶ 13 Cellular phone records, later introduced into evidence by stipulation of the parties, showed that defendant's cellular phone placed and received numerous calls between 1 and 4 a.m. on May 10. In particular, between the hours of 2:30 and 4 a.m., defendant's phone received 20 calls of one to two minutes duration, and placed 14 outgoing calls of a similar duration.

¶ 14 Following presentation of the evidence, the trial court found defendant guilty of all charges. The court sentenced defendant to 46 years' imprisonment for first degree murder, a

consecutive 9 years' imprisonment for attempt first degree murder, and a concurrent 9 years' imprisonment for aggravated discharge of a firearm. Following the denial of his posttrial motions, defendant appealed his sentence and conviction to this court. *People v. Woods*, No. 3-04-0851 (2006) (unpublished order under Supreme Court Rule 23). Defendant's only issue on direct appeal was that the trial court erred in allowing the State to impeach its own witness by the use of prior inconsistent statements. This court affirmed, finding that defendant had waived the issue and the evidence was not closely balanced. Defendant thereafter filed a *pro se* petition for postconviction relief, which the trial court summarily dismissed. This court affirmed. Defendant appealed, and the Illinois Supreme Court, in its supervisory authority, directed this court to vacate its judgment and reconsider in light of *People v. Hodges*, 234 Ill. 2d 1 (2009). This court reconsidered its previous decision, and remanded defendant's petition for second-stage postconviction proceedings.

¶ 15 In May 2013, defendant, through court-appointed counsel, filed an amended postconviction petition and included supporting affidavits. In the petition, defendant alleged, *inter alia*: (1) that Augusta Spearman, an inmate at Menard Correctional Center, had information showing that defendant did not commit the crime; (2) that Howard had been coerced by prosecutors to testify falsely against defendant; and (3) that trial counsel was ineffective for failing to obtain a ruling on the defense motion to have the trial judge visit the crime scene and for failing to conduct an appropriate investigation, *i.e.*, to discover information from Patricia Sharp, a resident of the area where the crime occurred.

¶ 16 Spearman submitted the following affidavit, which we recite verbatim:

“I Augusta Speorman [*sic*] Jr., being dulying [*sic*] sworn
upon my oath depose and give the following statement on behalf of

Regis Woods. A guy I met here at the Menard Correctional Center who is from Joliet, IL. As I am too. As we started conversating [sic] about the neighborhood I learned of the offense that he was incarcerated for, and I became aware of that/the incident he was being imprisoned for I actually witnessed the shooting that took place.

When I related the story to Regis Wood that I had witnessed it, it was apparent that we were talking about the same incident.

I now give this sworn statement for the first time ever, that I witnessed the shooting that occurred back in May of 2003, in the area of Washington and Miller on the east-side of Joliet, IL.

I was going to buy some weed at 3:30, or 4:00 A.M. in the morning; and I saw clearly a man wearing a red jersey, dark pants, at lease [sic] 6'2" and around a 198 lbs, shooting at someone. I am also 100% sure from being face to face with Regis Woods that he was not the person in height nor size that I saw shooting in the general area of Washington and Miller street [sic] where I was heading to cop some weed in May 2003.

I August Speorman [sic] Jr. signs this affidavit of my own free will, and moral duty to testify to the truth I've witness with my own eye's [sic] May 2003, without any promise of personal gains

or threats to my health or well being. Anything further I sayeth not.”

¶ 17

Charles Howard, the State’s key witness, submitted an affidavit that read as follows:

“This affidavit is given by me, Charles T. Howard, in regards to the case of Regis Woods. On the night in question, I informed the detective that I could not be 100% sure of the identification of either shooter. I told them that earlier in the evening, Jemell Barefield had told me that he had a problem with Fred Woods—who was at the same club that we were at (Don’s). That was my reason for assuming that it might have been that Fred Woods (Regis Woods). Prior to then, I had only heard of ‘Fred’ Woods. I had told both the state attorney and the detectives that I did not want to testify and say that it was Regis Woods for sure, because I was not completely sure. I was told that my parole would be violated and I would be sent to jail for contempt and perjury. At first, I just did not show up for the court dates, but then I got arrested so I testified like they wanted me to. The statement above is given freely without any threat or promises by me.”

¶ 18

Patricia Sharp, a resident of the area, also submitted an affidavit after the Will County public defender’s office contacted her in 2013. In the affidavit, Sharp averred that she had lived at 8 Miller for approximately 33 years and was extremely familiar with the area where the shooting occurred. She stated that there had been no substantial changes in the landscape of the area, and “a cursory viewing of the aforementioned area would indicate that, regardless of the

conditions or any conceivable variations (such as time of day, time of year, etc.), it would have been impossible for anyone (regardless of the acuity of their senses) to have seen anything going on in front of 512 Washington while standing at or near 7 Miller.” Sharp also stated that she knew Moland and remembered the night she was murdered. On the night of the murder, Sharp was returning home from Harrah’s Casino. When Sharp pulled into her driveway, there was no one outside in the area of 7 Miller. Sharp immediately entered her house, and as soon as she did so, she heard gunshots coming from the area of 512 Washington. No one associated with the defense ever talked with her regarding the murder.

¶ 19 The State filed a motion to dismiss, which the trial court granted.

¶ 20 This appeal followed.

¶ 21 ANALYSIS

¶ 22 On appeal, defendant argues the trial court erred in dismissing his postconviction petition without conducting an evidentiary hearing. He specifically argues he made a substantial showing in his amended postconviction petition that: (1) he was actually innocent of the offenses for which he was convicted; (2) testimony of the State’s key witness who positively identified him at trial as one of the offenders was false and induced by police and prosecutorial misconduct; and (3) his trial attorneys were ineffective in failing to locate, present, or ask the trial court to consider evidence that could have affected the outcome of his case.

¶ 23 The Post-Conviction Hearing Act (Act) provides a three-stage review process for a criminal defendant to challenge the validity of his conviction based upon a constitutional violation. 725 ILCS 5/122-1 *et seq.* (West 2014). In the present case, the trial court dismissed defendant’s postconviction petition at the second stage of review. During the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *People*

v. Pendleton, 223 Ill. 2d 458, 473 (2006). All well-pleaded facts that are not positively rebutted by the record are to be taken as true. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). Second-stage inquiry does not require the court to engage in any fact-finding or credibility determinations, as such determinations will be made at the evidentiary stage of the proceedings. *Id.* The sole issue for the court to determine at the second stage is whether the petition being attacked is proper as a matter of law. *Id.* “In other words, the ‘substantial showing’ of a constitutional violation that must be made at the second stage [citation] is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief.” (Emphasis in original.) *People v. Domagala*, 2013 IL 113688, ¶ 35. We review the second-stage dismissal of a postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 389.

¶ 24

A. Actual Innocence

¶ 25

Defendant first argues the trial court erred in dismissing his postconviction petition at the second stage because he made a substantial showing of actual innocence. A defendant makes a substantial showing of actual innocence sufficient to advance his cause to an evidentiary hearing when he presents evidence that: (1) is newly discovered; (2) could not have been discovered sooner through the exercise of due diligence; (3) is material and not cumulative; and (4) would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009); *People v. Molstad*, 101 Ill. 2d 128, 134-36 (1984).

¶ 26

In his affidavit, Spearman alleged that, after speaking with defendant, “it was apparent” that he had witnessed the shooting for which defendant was incarcerated. Spearman stated that, while purchasing drugs at 3:30 or 4 a.m., he clearly saw the shooter, who was wearing a red jersey and was at least 6’2” and weighed approximately 198 pounds. Spearman averred that he

was “100% sure” based on his familiarity with defendant’s face that defendant was not the person “in height nor size” that he witnessed commit the shooting in May of 2003 in the area of Washington and Miller in Joliet.

¶ 27 The State responds that Spearman’s allegations are insufficient to support a claim of actual innocence; Spearman’s affidavit does not identify whether the intended victim was male or female, whether the intended victim was on foot or in a car, or even whether anyone had actually been shot. Further, although there were two shooters involved in Moland’s murder, the State claims Spearman’s affidavit makes no mention of seeing a second shooter or even that he heard shots coming from two locations. Thus, according to the State, Spearman’s affidavit does not advance defendant’s claim of actual innocence, as it does not even show that Spearman witnessed the murder that formed the basis of defendant’s conviction.

¶ 28 In addition, the State argues, because Spearman did not assert that he would be willing to testify, his affidavit is facially insufficient, as it fails to identify the “availability of the alleged evidence.” See *People v. Jones*, 399 Ill. App. 3d 341, 366 (2010) (finding an affidavit flawed where it did not contain a statement that the individual would actually testify to the facts alleged in his affidavit).

¶ 29 Initially, we disagree that Spearman’s affidavit did not indicate his willingness to testify on defendant’s behalf. Spearman indicated he was signing the affidavit of his own free will and with a “moral duty to testify to the truth I’ve witnessed with my own eye[s] May 2003, without any promise of personal gains or threats to my health or well being.” Construed liberally, we find these words sufficient to show Spearman’s availability and willingness to testify on defendant’s behalf. See *People v. Smith*, 2015 IL App (1st) 140494, ¶ 24 (finding that a witness indicated his availability by stating in his affidavit that he wanted to help the defendant, taking

knowingly presented false testimony, a defendant presents a constitutional question within the purview of the Act. *People v. Clinton*, 2016 IL App (3d) 130737, ¶ 25; see also *People v. Brown*, 169 Ill. 2d 94, 103 (1995) (“[A] criminal conviction obtained through the knowing use of false testimony constitutes a violation of due process.”).

¶ 34 Here, the State attempts to recharacterize defendant’s due process claim as an actual innocence claim and asserts that Howard’s allegations could have been discovered earlier through the exercise of due diligence. However, it is clear, both from defendant’s amended postconviction petition and his brief on appeal, that defendant’s claim alleges a violation of his constitutional right to due process based on prosecutorial misconduct. As stated above, such a claim requires only a showing that the State knowingly presented false testimony. See *Brown*, 169 Ill. 2d at 106.

¶ 35 The State next argues the trial judge in this case was justified in dismissing this claim without an evidentiary hearing because he was the judge who presided over the original trial. See *People v. Hernandez*, 298 Ill. App. 3d 36, 40 (1980) (“When questions of perjury and the credibility of a witness’ posttrial recantation are raised, the trial court is justified in dismissing without an evidentiary hearing when he or she was the judge who presided over defendant’s trial.”). However, *Hernandez* was decided prior to the Illinois Supreme Court’s decision in *Coleman*, and wrongly applies an abuse of discretion standard in assessing whether a trial court may properly dismissed a petition without an evidentiary hearing. As the court made clear in *Coleman*, the appropriate standard of review upon second-stage dismissal is *de novo* and all credibility determinations are to be made at the evidentiary hearing stage of proceedings. *Coleman*, 183 Ill. 2d at 385, 389.

¶ 36 Taking Howard’s current allegations as true, as we must at this stage, we believe defendant presented sufficient evidence to show that the State induced Howard to testify falsely, in violation of his right to due process. In his affidavit, Howard stated that he was not 100% sure defendant was the shooter; he had just assumed so because a friend had told him that he had a problem with defendant earlier that evening. When Howard told the State’s Attorney and the detectives involved in the case that he did not want to testify against defendant because of his unsureness, he was told that his parole would be violated and he would be sent to jail for contempt or perjury. When Howard did not show up for court, the police arrested him. For these reasons, Howard decided to testify “like they wanted [him] to.”

¶ 37 A review of the facts of *Coleman* supports our determination that the trial court erred in dismissing defendant’s claim without conducting an evidentiary hearing. In *Coleman*, the defendant had been convicted of two murders that took place in a drug house. 183 Ill. 2d at 370. State witness Aldene Lockett testified at the defendant’s trial that she viewed a physical lineup, which included the defendant, and that he fit the description of the man she saw leaving the house at the time of the murders. *Id.* at 371.

¶ 38 In a postconviction petition, defendant included an affidavit from Lockett, wherein she averred that she saw the gunman’s face as he was leaving the drug house and remembered recognizing him as someone from the neighborhood. *Id.* at 377. She further stated that she had told the police during the lineup that the defendant was not dark enough to be the man who came out of the drug house. *Id.* She also told them she did not remember ever seeing him in the neighborhood. *Id.* Lockett claimed the prosecutor called her every few days to try to convince her that the defendant was the right person and to make sure her story did not change. *Id.*

¶ 39 The trial court denied the defendant’s petition without an evidentiary hearing. *Id.* at 378. In response to the defendant’s argument that he was entitled to an evidentiary hearing because Lockett’s affidavit showed that the State had knowingly presented false testimony and withheld exculpatory information, the State argued that the information contained in Lockett’s affidavit was nothing more than a witness recantation, which had historically been deemed unreliable. *Id.* at 390. For that reason, the State argued, no evidentiary hearing was necessary. *Id.*

¶ 40 In rejecting this argument, the Illinois Supreme Court noted that each of the cases the State relied upon for the proposition that recantations are unreliable involved situations where the trial court conducted a hearing at which it had assessed the credibility of the recanting witness’s new testimony. *Id.* By contrast, the court noted, because the defendant’s petition had been dismissed at the second stage, any determination of the credibility of the recanting witness’s new testimony was premature. *Id.* The court reasoned,

“By seeking to dismiss the post-conviction petition, the State assumed the truth of the factually supported allegations contained in that petition, at least for purposes of the motion. Therefore, the State, as the movant, has eliminated all factual issues from the inquiry. For this reason, the State cannot now on appeal seek affirmance of the dismissal order by arguing that Lockett’s recantation is incredible or untrustworthy. Had the State wished to test Lockett’s credibility, the State should have *answered* the petition, rather than seeking to dismiss it, for the latter action raises solely the question of the sufficiency of the pleadings, as a matter of law, and admits the pleadings solely for purposes of deciding

the legal question. As we have discussed earlier in this opinion, the Act contemplates that factual and credibility determinations will be made at the evidentiary stage of the post-conviction proceeding, and not at the dismissal stage.” (Emphasis in original.) *Id.* at 390-91.

¶ 41 Based on the foregoing, we conclude the trial court erred in dismissing this portion of defendant’s postconviction petition at the second stage. In so holding, we recognize that Howard’s trial testimony was corroborated by his 911 call, his identification of defendant to the police on scene, and the physical evidence. However, the issue is not whether defendant would have been convicted without Howard’s testimony but, rather, whether there was misconduct on the part of the State. Defendant is entitled to an evidentiary hearing.

¶ 42 C. Ineffective Assistance of Counsel

¶ 43 Finally, defendant argues his trial counsel provided ineffective assistance by failing to investigate and present evidence that could have affected the outcome of his case. Specifically, defendant argues counsel should have obtained a ruling on its earlier request for the trial judge to visit the scene, and should have located Patricia Sharp, a witness who lived in the area.

¶ 44 To be entitled to an evidentiary hearing on an allegation of ineffective assistance of counsel, a defendant must make a substantial showing that: (1) his counsel’s performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for the deficient performance, the outcome of the trial would have been different. *Coleman*, 183 Ill. 2d at 397. In addition, if a claim can be disposed of for lack of sufficient prejudice, we need not consider the reasonableness of counsel’s performance. *Id.* at 397-98.

¶ 45 Here, both of defendant's arguments concerning counsel's alleged ineffective assistance would have served only to rebut the testimony of State witness Steven Smith. Smith testified that, while conducting a narcotics transaction in the area, he heard gunshots and saw sparks through the trees in the direction of Washington Street. Smith further testified he saw defendant immediately thereafter brandishing a gun. According to defendant, however, the visit to the scene would have shown the impossibility of Smith having seen the shooting from his location, and Sharp's testimony would have shown that no one was in the location Smith stated he was in at the time of the shooting. Nevertheless, even without Smith's testimony, which the trial court noted was inherently suspect, we find that the evidence presented was more than sufficient to support the court's finding of guilt.

¶ 46 As noted on direct appeal, the evidence in defendant's case was not closely balanced. Even setting Howard's trial testimony aside for moment (assuming it was coerced by the State), Howard identified defendant as the shooter in his 911 call, to the police upon their arrival on scene, and twice in a photo lineup. In addition, defendant's cellular phone records directly discredited his alibi—that he was asleep at his girlfriend's house at the time of the shooting. For these reasons, defendant cannot meet the prejudice prong of *Strickland*, and the trial court properly dismissed his ineffective assistance of counsel claim at the second stage of postconviction proceedings.

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, we reverse the judgment of the circuit court of Will County and remand for an evidentiary hearing on defendant's claim of prosecutorial misconduct. In doing so, we affirm the court's second-stage dismissal of defendant's actual innocence and ineffective assistance of counsel claims.

¶ 49 Affirmed in part and reversed in part. Remanded with directions.