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2016 IL App (3d) 150033-U

Order filed January 26, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0033
JOSHUA K. LARSON,)	Circuit No. 06-CF-5
Defendant-Appellant.)	Honorable Walter D. Braud, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant invited error when he argued cause and prejudice to support his motion for leave to file a successive postconviction petition asserting an actual innocence claim. Even absent invited error, the defendant's motion and supporting documentation failed to set forth a colorable claim of actual innocence.

¶ 2 After an unsuccessful direct appeal (*People v. Larson*, No. 3-07-0183 (2009) (unpublished order under Supreme Court Rule 23)) and an unsuccessful appeal from the second stage dismissal of his postconviction petition (*People v. Larson*, 2011 IL App (3d) 100972-U), the defendant filed a motion for leave to file a successive postconviction petition. In the motion,

the defendant challenged his first-degree murder conviction based on newly discovered evidence. The circuit court *sua sponte* denied the defendant leave to file the successive petition and he appeals.

¶ 3

FACTS

¶ 4

The details surrounding the defendant's conviction and sentence are fully described in the defendant's direct appeal. *Larson*, No. 3-07-0183. Therefore, we summarize only those facts relevant to the instant appeal.

¶ 5

Police arrested and charged the defendant with two counts of first degree murder for the stabbing death of Lemon Horton. Count I alleged that the defendant intentionally caused the victim's death by striking him on the head and cutting his throat (720 ILCS 5/9-1(a)(1) (West 2006)). Count II alleged that the defendant struck the victim on the head and cut his throat knowing that those acts created the substantial probability of death (720 ILCS 5/9-1(a)(2) (West 2006)). The following evidence was adduced at trial.

¶ 6

A firefighter discovered the victim's severely burned body inside the victim's burning home. An autopsy revealed four lacerations on the back of the victim's head caused by blunt force trauma resulting in skull fractures. However, the doctor performing the autopsy opined that the victim died from bleeding caused by a knife wound to his neck.

¶ 7

On the day of the homicide, K.K., a minor at the time, visited the defendant at his home. K.S. and E.S., the defendant's cousins were also present, along with K.S.'s girlfriend R.B. K.K. and the defendant discussed robbing someone the defendant knew. Eventually, K.K. and the defendant left the defendant's house and proceeded to the victim's home to rob him. K.S., E.S., and R.B. stayed behind. The defendant took a metal pipe and a kitchen knife along with him. K.K. was unarmed.

¶ 8 At first, the defendant told K.K. to run into the victim's home and attack him. After K.K. refused, the defendant instructed him to knock on the victim's door and ask to use the phone. While K.K. distracted the victim, the defendant planned to run inside the victim's house, rob him, then run away. K.K. agreed to this suggestion, approached the front door and asked the victim to use the phone. The victim allowed K.K. inside and let him use the phone. While K.K. pretended to use the phone, he heard a noise sounding like someone being hit in another room. K.K. looked into the living room and saw the victim lying on the floor with the defendant standing over him holding the metal pipe. K.K. then ran back to the defendant's house, the defendant following shortly thereafter carrying a lockbox.

¶ 9 When the defendant returned, K.S. observed blood on the defendant's neck and hands. The defendant struggled opening the lockbox, so K.S. helped pry it open. While they attempted to pry the lockbox open, the defendant told K.S. that he was going back to "get rid of the body." The defendant left alone.

¶ 10 Meanwhile, K.S. and the others called R.B.'s mother and asked for a ride home. The defendant returned before R.B.'s mother arrived. K.S. observed blood on the defendant's overalls and both arms when he returned. E.S. also observed blood on the defendant's face and shirt.

¶ 11 A few minutes later, R.B.'s mother arrived and drove the group to K.S. and E.S.'s house. The defendant occupied the front passenger seat of the vehicle and K.K. sat in the backseat. After the car ride, K.S. and K.K. told K.S.'s mother what the defendant had done to the victim. The next day, K.S.'s mother called the police who arrested the defendant. K.K. was not charged with an offense arising from the homicide, but did testify against the defendant at his trial.

¶ 12 In a recorded phone call made by the defendant to his mother while he was in prison, the defendant told her that he instructed K.K. to go into the house and use the phone. The defendant

also told her that he ran into the victim's house, grabbed a suitcase, and then ran away. He claimed he had no idea what happened after he left.

¶ 13 Evidence admitted at trial included the victim's suitcase, a metal pipe, a pair of K.K.'s shoes, and the victim's lockbox. Investigators recovered the victim's suitcase and the metal pipe from a ravine near the defendant's home. The victim's lockbox was recovered inside the defendant's home. In addition, investigators discovered check stubs and banking slips in the victim's name inside the victim's suitcase. Those too were admitted into evidence at trial.

¶ 14 Eileen Taylor, a forensic scientist with the Illinois State Police, processed the lockbox for latent fingerprints. Her examination of the lockbox revealed a latent palmprint matching the defendant. Taylor also examined the check stubs and banking slips and did find one suitable print for comparison. Taylor compared the latent print on the check stubs and banking slips to the defendant's, as well as K.K.'s prints but the print did not match either individual.

¶ 15 Another forensic scientist, Jennie Hah, processed blood stains in the vehicle the defendant and K.K. occupied following the homicide. Her examination indicated blood on the shoulder harness of the front passenger seat occupied by the defendant after the homicide. The same harness was admitted into evidence at trial. She also found blood on K.K.'s right shoe. Forensic scientist, Debra Minton, confirmed that the blood indicated on the shoulder harness and K.K.'s right shoe matched the victim's profile.

¶ 16 Ultimately, the jury found the defendant not guilty of count I (intentionally causing the victim's death) and guilty of count II (knowing that his acts created the substantial probability of death). The circuit court sentenced the defendant to 60 years' imprisonment. Following his unsuccessful appeal and postconviction petition, the defendant filed a motion for leave to file a successive postconviction petition. That motion is the subject of the instant appeal.

¶ 17 In the motion, the defendant alleged he "was denied the 14th Amendment Due Process of Law, pursuant to Brady V. Maryland, when the States Attorney failed to disclose *** that the States Key witness, [K.K.] has an Uncle, Gene [K.], who was and is a Rock Island County Police Detective." Under the heading "Cause," the defendant claimed that he did not learn that K.K.'s uncle was a "Rock Island County Police Detective" until he "saw the [Quad Cities Law Enforcement Officers Memorial] web page print out" after his trial. A printout of the described webpage is attached to the motion and identifies Gene K. as a "Rock Island Police Detective" and lists his telephone number. The accompanying affidavit of Samantha Green avers that she called the telephone number listed on the webpage printout and spoke with Gene's wife. His wife informed Green that K.K. is Gene's nephew.

¶ 18 Because of this relationship, the defendant argued he "suffered substantial prejudice" because he "could have used this information to argue to the Jury why [K.K.] was treated significantly different then the defendant by the Rock Island County Law Enforcement Community and that the Rock Island County Law Enforcement Community Shifted the evidence away from [K.K.] onto the defendant because of the law enforcement influence of [K.K.'s] Uncle."

¶ 19 For his second ground for relief, the defendant claimed the State denied him "14th amendment due Process of Law Pursuant to Brady V. Maryland, when [it] withheld several critical forensic reports that prevented [the defendant] from discrediting the states forensic evidence presented at the trial."

¶ 20 Under the heading "Cause," the defendant claimed that the State failed to disclose several critical forensic reports regarding evidence used at his trial. The defendant obtained those reports following his trial through a Freedom of Information Act request. The defendant

attached the withheld reports to his motion and marked those documents group exhibit B. Group exhibit B included: three Illinois State Police laboratory reports, notes detailing the forensic examination of the lockbox, and four Illinois State Police forensic services telephone conversation records.

¶ 21 First, the defendant claimed the withheld reports demonstrated that the State mishandled a pair of his shoes which he claimed "deprived [him] of the opportunity to expose: (1) the improper chain of custody maintained over [the defendant's] gym shoes: (2) the gym shoes was unaccounted for, for four months: (3) no blood was indicated on the photographs of [the defendant's] shoes like they were indicated on the photographs of [K.K.'s] gym shoes."

¶ 22 Next, the defendant claimed that the withheld reports demonstrated that the State tampered with the lockbox investigators found in his home. The defendant argued that after the first forensic examination failed to reveal any fingerprints on the lockbox, the prosecutor called the forensic crime lab and ordered the forensic technician to fabricate the defendant's prints on the lockbox. In support, the defendant cited to a forensic lab technician's notes detailing her examination of the lockbox, as well as the transcripts of conversations between the prosecutor and a forensic technician.

¶ 23 Further, the defendant alleged the withheld reports showed that the State never tested the metal pipe or suitcase recovered near his home for latent prints. To support this allegation, the defendant cited to a forensic laboratory report and the transcript from a telephone conversation between the forensics lab and the Rock Island police department. The defendant argued that the State never tested the metal pipe because "if [K.K.'s] prints were found on them it would have seriously undermined his credibility as the State's key witness."

¶ 24 In addition, the defendant claimed that the withheld reports indicated that K.K.'s fingerprints were found on the check stubs and banking slips recovered from inside the victim's suitcase. The defendant based his conclusion on an Illinois State Police forensic division latent print worksheet, which he argued shows that the lab tested the check stubs and banking slips and found K.K.'s fingerprints.

¶ 25 Lastly, the defendant argued that the withheld reports showed that the investigators never tested blood discovered in the backseat of the vehicle occupied by K.K. following the homicide. The defendant acknowledged that the victim's blood had been found where he sat in the vehicle, but argued that blood was also found near K.K.'s seat. According to the defendant, the police did not test the blood found where K.K. sat because if the blood had been tested and matched the victim, it would implicate K.K. and not the defendant.

¶ 26 In summarizing his arguments, the defendant concluded that "[h]ad the jury known that the state refused or failed to test evidence so that their key witness, [K.K.], would not be incriminated, and that his fingerprints were found on the victim's personal paper that were found inside the suitcase, the jury may not have believed [K.K.'s] trial testimony and exonerated [the defendant]."

¶ 27 By written order, the circuit court *sua sponte* denied the defendant's motion. The order noted the untimeliness of the defendant's successive postconviction petition, but acknowledged it could still consider the petition "if the Defendant is making a claim of actual innocence." The court went on to explain that the defendant must satisfy cause and prejudice before the court could grant the defendant leave to file his successive postconviction petition. In analyzing the claims under the cause and prejudice test, the circuit court found:

"Most of Defendant's claims are trial matters that were fully presented in the jury trial and later sorted out on appeal and in the first petition for post-conviction relief. The only new claim is the one made about [K.K.] The Defendant claims that he was prejudiced because he didn't know that this witness was the nephew of a detective for the City Rock Island. Defendant somehow seems to think that if the jury knew that the witness had a police detective for an uncle, and nothing more, they would think he was framed. This was an East Moline case and the City of Rock Island, including its detectives, had nothing to do with it. The Defendant's assertion is absurd. The Defendant says that the nephew was the real culprit. He explains that the nephew lied in court when he blamed the murder on him. Of course, the Defendant has forgotten about the blood seen on his person as he left a trail of blood from the place of the murder. There were witnesses who saw him in that condition, and so testified. Though the Defendant did not testify, he was represented by one of the best defense attorneys in the state. His attorney made great efforts to shed light on the possibility that teenager [K.K.] was the murderer.

While Defendant claims that he recently learned that [K.K.], the witness, is a nephew Rock Island City Detective [Gene], it is likely that he never heard of Detective [Gene], because he didn't have anything to do with the investigation. In any case, it is the Defendant's burden to make a connection. Clearly, he has not been able to do so. The Defendant is totally unable to show cause or prejudice and the petition for leave to file a successive post-conviction petition is denied."

¶ 29 On appeal, the defendant contends the circuit court erred when it denied his motion for leave to file a successive postconviction petition because it erroneously applied the cause and prejudice test to his claims. Specifically, the defendant argues that a defendant alleging actual innocence in a successive postconviction petition is excused from satisfying the cause and prejudice test.

¶ 30 At the outset, we note that while the defendant is correct that an individual is excused from alleging cause and prejudice when asserting a free standing actual innocence claim, the defendant invited the circuit court's cause and prejudice analysis in the instant case. Under the doctrine of invited error, a defendant may not request to proceed in one manner and later contend on appeal that the course of action was in error. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). In the defendant's motion he specifically argued his claims under the cause and prejudice test. In fact, the defendant used the headings cause and prejudice in his motion. At no point in the motion did the defendant argue that his claim of actual innocence excused him from alleging cause and prejudice. The defendant cannot present his argument to the circuit court under the cause and prejudice test, have the circuit court apply that test, then claim on appeal that the circuit court should have applied a different test when considering his motion. *Id.* On this basis alone, we affirm the circuit court's judgment. See *People v. Smith*, 2013 IL App (4th) 110220, ¶ 21 (a reviewing court "may affirm on any basis supported by the record if the judgment is correct").

¶ 31 Even if we were to ignore the defendant's clear invitation for error, we find the defendant failed to meet his burden in requesting leave to file a successive postconviction petition. Unlike the first stage postconviction gist standard, a defendant requesting leave to file a successive petition in which he asserts a free standing claim of actual innocence must set forth a colorable

claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶ 31. That is, the defendant must set forth allegations based on newly discovered evidence that is material, noncumulative, and of such conclusive character that it would probably change the result on retrial. *Id.* ¶ 32. To support those allegations, the defendant must present sufficient documentation to raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Id.* ¶ 31.

¶ 32 Of the several grounds for relief alleged in his motion, the defendant only argues two on appeal. In short, the defendant first alleges that the State's failure to disclose K.K.'s uncle's status as a law enforcement officer denied him the opportunity to expose the potential bias of the State's key witness. Second, the defendant alleges the State withheld critical forensic reports which denied him the opportunity to discredit the State's expert witnesses. We discuss each ground in turn.

¶ 33 As to the defendant's first ground for relief, he claims K.K.'s uncle used his status as a law enforcement employee to influence the homicide investigation in a way that would implicate the defendant and protect K.K. from prosecution. However, the defendant fails to offer any affirmative evidence to support his conclusory allegation that K.K.'s uncle had any impact on the homicide investigation. *Id.* At best, the defendant's supporting evidence establishes that K.K.'s uncle worked for a law enforcement agency wholly independent of the agency that actually investigated the homicide. Absent any affirmative evidence to support his conclusory allegation, the defendant cannot raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of this evidence. *Id.* ¶ 32.

¶ 34 Moreover, we reject the defendant's claim that this evidence is newly discovered. In particular, we note that the defendant made this allegation in his first postconviction petition

where he claimed "[K.K.] also has an family member who is a Officer in the Rock Island Police force." Thus, the defendant cannot set forth a colorable claim of actual innocence under his first ground for relief. *Id.*

¶ 35 Next, we consider the defendant's second ground for relief, which he bases on the withheld forensic reports. To summarize, the defendant argues the reports establish that the State mishandled physical evidence presented at trial and refused to test other physical evidence because testing the evidence would have incriminated K.K. and exonerated the defendant. The pieces of physical evidence the defendant challenges are: (1) a pair of the defendant's shoes; (2) blood collected from the area of the vehicle K.K. occupied shortly after the homicide; (3) the lockbox; (4) a metal pipe; (5) a suitcase; and (6) the check stubs and banking slips in the victim's name. We discuss each piece of evidence in turn.

¶ 36 First, we summarily dispose of the defendant's allegation regarding the purported mishandling of his shoes. Specifically, the defendant claims that the proper chain of custody had not been established for his shoes unlike K.K.'s shoes. Defendant also contends his shoes did not indicate the presence of blood, but at trial a forensic technician testified that blood had been present on the shoes. The defendant does not cite to any of the withheld reports to support this conclusory allegation. In fact, the defendant fails to offer any newly discovered evidence to support this allegation. Therefore, the defendant's claim on this matter fails. See *People v. Harris*, 206 Ill. 2d 293, 301 (2002) (defining newly discovered evidence as "evidence that was unavailable at trial and could not have been discovered sooner through due diligence.").

¶ 37 Second, the defendant claims that investigators never tested blood found near the area of the vehicle K.K. occupied shortly after the homicide because if it matched the victim's blood "it would implicate K.K. and not [the defendant]". We note the defendant was aware at trial that the

vehicle indicated blood near K.K.'s seat and could have questioned the State's witnesses regarding the forensic testing. *Id.* More significantly, actual innocence means total vindication or exoneration. See *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008) (noting the actual innocence definition). The presence of the victim's blood near K.K.'s seat would not exonerate the defendant. As the defendant acknowledges, investigators discovered the victim's blood on the harness of the seat the defendant occupied following the homicide. Taken as true, the defendant's allegation at most implicates K.K., but cannot support his claim of actual innocence.

¶ 38 Third, the defendant asserts the prosecutor ordered the forensics lab to fabricate his palmprint on the lockbox after an initial examination failed to reveal any latent prints. This claim fails because the defendant fails to offer any affirmative evidence to support his conclusory allegation. In fact, the supporting evidence the defendant cites contradicts his claim. As the defendant acknowledges, the forensics lab would not examine physical evidence for latent prints when it is found, as it was here, inside the suspect's residence, unless there was an obvious latent print in blood. On May 4, 2006, the DNA examiner opened the lockbox but did not examine it for blood because the latent print examiner had not yet examined the evidence to inform her of where she could test for blood. Then, on May 10, 2006, the DNA technician spoke with the latent print technician who "did not observe any Qble LP's in any Qble area where [the DNA technician] would test for blood." Thus, in line with the forensics lab's policy, the latent print technician limited her initial examination of the lockbox to those areas where the DNA technician would test for blood.

¶ 39 Subsequently, on May 18, 2006, the prosecutor called the forensics lab and told the latent print technician that he "wants to find [the defendant's] prints on the box to show he handled it, even though it was in his house" and "Cari Berry OK'd the printing of the box. Will look for [the

defendant]." The latent print examiner made a note of the conversation indicating the prosecutor "[understood the forensic lab's] limited resources [and] voiced his frustration." The record confirms the prosecutor did not instruct the lab to fabricate the defendant's prints but merely asked for the lockbox to be fully examined for fingerprints. Moreover, this request is in line with the forensics lab's policy of not fully examining physical evidence found inside a suspect's residence for his latent prints. Because the lockbox did not indicate blood, the latent print technician would not perform a full examination. Thus, the prosecutor needed to ask the forensic technicians to fully examine the lockbox for the defendant's latent prints.

¶ 40 Fourth, the defendant alleges the forensic technicians never examined the metal pipe for fingerprints "because if [K.K.'s] prints were found on them it would have seriously undermined his credibility as the State's key witness." To begin with, the defendant fails to offer any affirmative evidence to support his conclusory allegation that the forensic technicians refused to test the metal pipe because the presence of K.K.'s fingerprints on the metal pipe would have undermined K.K.'s credibility at trial. Further, the forensic technician examining the physical evidence in this case testified at trial and stated that she only examined the lockbox, the check and banking slips, and the victim's coffee table for latent prints. Thus, the defendant was aware at trial that the forensic technicians never examined the metal pipe. This fact is not newly discovered. Even assuming, however, the metal pipe had K.K.'s fingerprints, this fact at best establishes K.K. acted as an accomplice but cannot exonerate the defendant. *Id.*

¶ 41 Similarly, we find insufficient the defendant's fifth claim that investigators never tested the suitcase found near the defendant's home for fingerprints because if an examination revealed K.K.'s prints, his credibility would have been undermined at trial. Like the defendant's claim regarding the metal pipe, the defendant fails to support his conclusory allegation with any

affirmative evidence establishing the prosecution intentionally refused to test the suitcase in an effort to maintain K.K.'s credibility as a witness.

¶ 42 Finally, the defendant claims actual innocence because the forensics lab discovered K.K.'s fingerprints on the victim's check stubs and banking slips. The record establishes that the print on the check stubs and banking slips did not match either the defendant or K.K. We call attention to the forensic technician's testimony that she did discover a latent print on the documents, but the print did not match either the defendant or K.K. The defendant fails to offer any affirmative evidence rebutting that testimony. Moreover, even assuming K.K.'s fingerprints were on those documents, this revelation would in no way exonerate the defendant. *Id.*

¶ 43 CONCLUSION

¶ 44 The judgment of the circuit court of Rock Island County is affirmed.

¶ 45 Affirmed.