2018 IL App (3d) 150672-U

Order filed March 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0672 Circuit No. 06-CF-891
CARZELL E. SCOTT,	)	Honorable Carla Alessio Policandriotes, Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Carter and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not err in dismissing defendant's postconviction petition at the second stage of proceedings where that petition failed to make a substantial showing of a constitutional violation or of actual innocence.

¶ 2 A jury found defendant, Carzell E. Scott, guilty of home invasion following a trial held in 2007. After we affirmed that conviction on direct appeal, defendant filed a postconviction petition that counsel in his direct appeal had been ineffective for failing to raise an issue related to the jury instructions delivered at trial. At the second stage of proceedings, defendant added a

claim of actual innocence, based on an affidavit submitted by an individual claiming to have been at the scene of the crime. The circuit court dismissed the petition at the second stage. Defendant argues that this dismissal was in error because his petition made substantial showings of a constitutional violation and of his actual innocence. We affirm.

¶ 3 FACTS

¶ 4 On April 17, 2006, the State charged defendant with home invasion (720 ILCS 5/12-11(a)(3) (West 2006)). The indictment alleged that defendant entered the dwelling of Nathaniel Mayfield and threatened the imminent use of force by pointing a firearm at Mayfield. Defendant's jury trial commenced on January 30, 2007.

¶ 5 Alicia Woods testified that she was with her boyfriend, Mayfield, at his apartment on the morning of April 15, 2006. Mayfield's was the front apartment located at 702 Richards Street. Around 9 a.m., a man came to the door asking for "the light-skinned girl." Woods went outside where the man told her that he was looking for a girl that sold clothes. Woods assumed the man had the wrong apartment, and directed him to an apartment behind Mayfield's.

¶ 6 Woods testified that the man did not make any indications that he would be leaving. At that point, a white car drove up next to the apartment, about 15 feet from where she was standing. Woods recognized the car and its driver, as she had seen both on occasion by the back apartment. The man then grabbed her arm and forced her inside the apartment. The man pointed a handgun at Woods. When Mayfield came to the front room of the apartment, the man pushed Woods to the floor, and asked where the money was, pointing the handgun at him as well. Mayfield gave the man his wallet. The man then made Woods and Mayfield lay on the floor in the bedroom while he took money from the dresser. Woods identified defendant as the intruder.

¶ 7 When the man left, Woods called the police. She estimated that the police arrived three minutes later. Woods gave a description of the intruder, as well as the white car that had parked in front of the apartment. She described the intruder as wearing a baseball hat and hooded sweatshirt, and had silver teeth or a silver grill. Later that day, Woods was shown a number of photographs at the police station. From those photographs, Woods indentified defendant as the person who entered the apartment with a handgun. From a separate array of photographs, she identified the driver of the white car as Kerwin Doss.

¶ 8 Mayfield provided testimony substantially similar to that of Woods. Mayfield also identified defendant in court as the intruder, testifying that he was "100 percent certain" in that identification. Mayfield testified that defendant was wearing a black hooded sweatshirt and a baseball hat and had silver teeth. When defendant left the apartment, Mayfield looked out the window and saw a white car speeding down the street. Mayfield was also shown a photo array by police later that day, but was unable to identify any of the photographs as that of the intruder.

¶ 9 On cross-examination, Mayfield agreed that he had previously testified that he had told the police the intruder was wearing a t-shirt.[1] Mayfield was also shown a photo array months later at the State's Attorney's office. He testified that he was in an office with Assistant State's Attorney Mike Knick when he was shown the photographs. Knick later testified that Mayfield initially chose a photograph and said "this might be him." Woods, who was in the office as well, asked Mayfield if he was sure. Mayfield then selected the photograph of defendant and declared "this probably is him."

¶ 10 David Sova of the Joliet Police Department testified that he was dispatched to a home invasion at approximately 9 a.m. on April 15, 2006. He arrived at the apartment within minutes.

[1]Woods and Mayfield had each testified at a hearing on defendant's motion to suppress Mayfield's identification of defendant.

He met Woods on the front porch, describing her as excited and distraught. Sova radioed Woods's description of the suspects and the white car to dispatch.

¶ 11 Police discovered that the white car was registered to a Melissa Nisbet. Kevin Soland and Jim Klancher of the Joliet Police Department went to Nisbet's apartment. Each officer testified that they saw the white car in question, with defendant and Doss having just exited it. Defendant and Doss began to walk toward the apartment building. Soland testified that the men matched the description that had been relayed over the radio. Soland yelled for the men to stop, but they looked at him and continued into the apartment building. When the men looked at him, Soland noticed defendant's silver teeth. Klancher also testified that he observed defendant to have silver teeth. Klancher and Soland went to Nisbet's apartment, where they eventually took defendant into custody.

¶ 12 Nisbet testified that she lived with Doss. Doss and defendant took her car on the morning of April 15, 2006, and did not return to the apartment until 12:30 or 12:45 that afternoon. She testified that defendant was wearing a gold or silver grill in his mouth at the time. Nisbet knew that Doss owned a handgun. He kept it in the closet at their apartment. She knew that Doss took the handgun when he and defendant took her car that morning, because the handgun was no longer in the apartment after they left. After they returned, Nisbet suspected that Doss hid the handgun in either the couch or a chair. Nisbet allowed the police to search her apartment, as well as her car.

¶ 13 In Nisbet's car police found a black baseball hat with white lettering and a black sweatshirt. Those items were labeled at trial as People's exhibit Nos. 7 and 8, respectively. Officers later found a black handgun hidden in the couch in Nisbet's apartment. The handgun was labeled People's exhibit No. 6 at trial.

¶ 14 Woods testified that People's exhibit No. 6 resembled the weapon wielded by the intruder. Mayfield testified that he recognized People's exhibit No. 6 as the same weapon pointed at him by the intruder. Similarly, each testified that People's exhibit Nos. 7 and 8 were similar to the items of clothing worn by the intruder. Nisbet recognized People's exhibit No. 6 as the handgun owned by Doss. She also identified People's exhibit No. 7 as a hat that defendant wore almost every day. She identified People's exhibit No. 8 as a sweatshirt similar to one she had seen both defendant and Doss wear in the past.

¶ 15 Detective Carlos Matlock of the Joliet Police Department met with Woods and Mayfield on April 15, 2006. Woods identified defendant as the intruder that pointed a handgun at her and Mayfield. She identified Doss as the driver of the white car. Mayfield could not pick out the intruder from the photo array Matlock showed him. Matlock recalled Mayfield asking if any of the men in the photographs had silver teeth, a fact which was not apparent from any of the photographs themselves.

¶ 16 Matlock later interviewed defendant at the police station. Defendant initially denied being at 702 Richards Street that day. After Matlock informed defendant that someone had identified him, defendant stated that he was at the apartment to visit a man who lived there. Doss drove him to the apartment in the white car. Defendant told Matlock that he did not know the name of the person who lived at the apartment, but was hoping that the person would sell some CDs for defendant. The person who lived at the apartment owed defendant $25 or $30. After initially denying that he entered the apartment, defendant told Matlock "a light-skinned female" invited him in. After he retrieved the money he was owed, defendant left the apartment and entered Doss's car.

¶ 17 Matlock expressed incredulity at defendant's story. Defendant admitted he had been untruthful, then vowed to tell Matlock the truth. Next, defendant told Matlock that he and Doss had been at Doss's mother's home. Doss's mother lived in an apartment behind the victims' apartment. Doss told him there was some money in the victims' apartment and that defendant should go get it. Doss told defendant he should get the money because the victims would recognize Doss. Defendant knocked on the door, and, when a woman answered the door, he entered the apartment. He took money off of a dresser. He denied having a handgun or ordering the occupants of the apartment to lie on the floor.

¶ 18 Defendant told Matlock that after the incident, he and Doss returned to Nisbet's apartment. While he was in the bathroom, he overheard Nisbet and Doss discussing hiding a handgun in the couch. Matlock returned to Nisbet's apartment with other officers, where they recovered from Nisbet's couch the handgun that would be marked as People's exhibit No. 6. Defendant refused to have his statement recorded, either by video, audio, or writing.

¶ 19 Detective Dave Jackson, who was with Matlock during the questioning of defendant, observed that defendant had silver teeth. Correctional officer Vincent Perrillo testified that he inventoried defendant's belongings upon his intake. Among the items he inventoried was "[s]ome metal removable teeth."

¶ 20 Doss testified for the defense. He was in custody relating to the events in question and had two prior felony convictions for possession of a stolen motor vehicle. Doss testified that he was at the home of a woman named Jennifer on the morning of April 15, 2006. He left Jennifer's house around 9 a.m., driving a white car that belonged to Nisbet. He was using the car to sell drugs. Sometime thereafter, Doss received a phone call from an individual named Molly, whom he described as "like a mother to" him. He did not know her last name. Molly asked defendant to

come to her home at 702 Richards Street. Doss testified that he pulled into the driveway, Molly entered the car, and he sold her some drugs.

¶ 21 While Doss was selling drugs to Molly, he saw a woman he knew by the name "Alise" standing on her porch with a man he only knew by the name "Black." Alise lived at the same address but in a different apartment. Doss recognized Alise because he had sold her drugs 20 to 30 times in the last month. He did not know her last name. After Molly exited his car, defendant pulled out of the driveway, then stopped in front of Alise's apartment so he could roll a blunt. Doss testified:

> "As I'm rolling the blunt I heard a screen door slam, and I looked to my right and saw Black running down the stairs. He jumped in my car with a gun in his hand told me to go, so I pulled off."

Doss dropped Black off soon thereafter, then resumed selling drugs. He then went to pick up defendant, his cousin, from the home of Tanya Reddick. He picked up defendant between 11 and 11:30 a.m. Doss and defendant sold more drugs, stopped at McDonald's, then proceeded to Nisbet's apartment.

¶ 22 Doss testified that defendant's teeth are white, and he did not have any silver or gold implants. Doss described the handgun found in the apartment as the "house gun," and testified that he always kept it in the couch. He identified People's exhibit No. 8 as his black hooded sweatshirt, and testified that no one other than him had ever worn it. He identified People's exhibit No. 7 as defendant's hat.

¶ 23 Reddick testified that defendant helped her out around the house while she was ill. She cared about defendant. Reddick testified that defendant "practically lived" at her house. She

testified that defendant was at her house the night of April 14, 2006, spent the night, and did not leave until around 11:20 the next morning. She never saw silver in his teeth.

¶ 24 Following the close of evidence and closing arguments, the circuit court delivered instructions to the jury. Over defendant's objection, the court delivered Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter IPI Criminal 4th), advising the jury that

> "[w]hen a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case."

¶ 25 The jury found defendant guilty. The court sentenced defendant to a term of 41 years' imprisonment, including a 15-year firearm enhancement.

¶ 26 On direct appeal, defendant did not raise any issues relating to jury instructions. This court affirmed his conviction. *People v. Scott*, No. 3-07-0313 (2009) (unpublished order under Illinois Supreme Court Rule 23).

¶ 27 Defendant filed a *pro se* postconviction petition on February 14, 2011. In the petition, defendant argued that appellate counsel had been ineffective for failing to argue that the circuit court erred in delivering IPI Criminal 4th No. 3.17. Though the circuit court summarily dismissed the petition, this court reversed and remanded for second-stage proceedings on the grounds that "there is a valid argument that the court may have erred in using IPI Criminal No. 3.17." *People v. Scott*, 2012 IL App (3d) 110306-U, ¶ 12.

¶ 28 On remand, appointed postconviction counsel filed an amended petition, which is the subject of the present appeal. The amended petition restated the instruction-based ineffectiveness argument and added an additional claim of actual innocence.

¶ 29 Defendant's claim of actual innocence was based upon an affidavit sworn by Sherman Hearns on April 25, 2011. In the affidavit, Hearns averred that he was a "long time associate" of Mayfield, and that he was with Mayfield and Woods in the apartment on the morning of April 15, 2006. According to Hearns, Woods called Doss that morning asking to purchase drugs. As she waited for Doss to arrive, Woods saw another drug dealer, a person that Hearns only knew as "Black." After a conversation between Woods and Black became heated, Black entered the apartment, and Hearns overheard him threaten to shoot Woods and Mayfield. After Black left the apartment, Hearns saw him enter Doss's white car.

¶ 30 The circuit court dismissed defendant's amended petition in its entirety.

¶ 31 ANALYSIS

¶ 32 On appeal, defendant contends that his amended petition made substantial showings of ineffective assistance of counsel and of actual innocence. He argues that this court should remand the matter for a third-stage evidentiary hearing on each of those claims.

¶ 33 A postconviction petition will be dismissed at the second stage of proceedings "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At this stage, a petitioner's factual allegations are taken as true unless they are affirmatively rebutted by the record. *People v. Domagala*, 2013 IL 113688, ¶ 35. Thus, the "substantial showing" standard is a measure of the legal sufficiency of the allegations; inquiring whether the allegations in the petition, if proven true at an evidentiary hearing, would entitle the petitioner to

relief. *Id.* We review the second-stage dismissal of a postconviction petition *de novo*. *Hall*, 217 Ill. 2d at 334.

¶ 34 I. Ineffective Assistance of Appellate Counsel

¶ 35 Defendant first argues in his amended petition that appellate counsel was ineffective for failing to raise a contention of error related to the court's delivery of IPI Criminal 4th No. 3.17. He argues that the instruction (see *supra* ¶ 24) explicitly only applies where a witness testifies that he was involved in the commission of a crime with defendant, and that Doss gave no such testimony in the present case. Defendant asserts that because the issue would have been meritorious if raised on appeal, appellate counsel was ineffective for failing to do so.

¶ 36 To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The same standard applies where it is the performance of appellate counsel that is challenged. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). In order to survive second-stage proceedings, a defendant must make a substantial showing of deficient performance and prejudice. See *Domagala*, 2013 IL 113688, ¶ 42.

¶ 37 Defendant has failed to make a substantial showing that the result of his direct appeal would have been different had counsel raised the jury instruction issue. Even assuming, *arguendo*, that the circuit court erred in giving IPI Criminal 4th No. 3.17, prevailing on that point alone would not alter the outcome of defendant's direct appeal. Appellate counsel would still be tasked with surviving a harmless error analysis. See, *e.g.*, *People v. Battle*, 393 Ill. App. 3d 302, 306-07 (2009) (issues relating to jury instructions reviewed for harmless error). "Error arising from the tendering of jury instructions is deemed harmless only if the submission of proper

instructions to the jury would not have yielded a different result." *People v. Shaw*, 186 Ill. 2d 301, 323 (1998).

¶ 38 In the present case, the result of defendant's trial would not have been different had the court not instructed the jury to consider Doss's testimony with caution. Initially, we note that Doss was defendant's cousin, an avowed drug dealer, and had two prior felony convictions. The jury would have been considering his testimony with some caution even before the court delivered the instruction in question.

¶ 39 More importantly, the evidence against defendant was so overwhelming that it cannot be reasonably said that a single different instruction would have yielded a different result. Woods, by all accounts a credible witness, identified defendant in court as the intruder. She also selected his photograph from an array just hours after the incident. Woods also identified Doss as the driver of the white getaway car. Later that day, police officers found Doss and defendant having just exited from that car. Further, Woods told officers that the intruder had a silver grill over his teeth and testified as such at trial. Mayfield, while he was not able to make an identification from the photo array, did testify that the intruder had silver teeth. Numerous police officers and Nisbet testified that defendant had silver teeth. In fact, a set of removable silver teeth was among defendant's personal belongings when he entered the jail.

¶ 40 Additionally, police recovered a baseball hat and a sweatshirt from the white car, and a handgun from the apartment where Doss and defendant were eventually found. In fact, it was defendant who told police where they would find that handgun. Both Woods and Mayfield identified that hat and sweatshirt as those worn by the intruder. Both Woods and Mayfield identified the handgun as the same or similar to the one wielded by the intruder. Nisbet identified the hat as one defendant wore almost every day. Finally, after being arrested, defendant told

Matlock a series of apparently false stories before admitting that he had actually entered Mayfield's apartment in order to obtain money.

¶ 41 Against this mountain of evidence, defendant presented testimony from two interested witnesses: defendant's cousin and a woman who cared about defendant and who relied upon him for help. Both presented a version of events that actually conflicted with those that defendant finally settled upon when talking to Matlock. Both also denied that defendant had silver teeth, despite the numerous witnesses who had testified otherwise.

¶ 42 Defendant insists that the jury's verdict depended solely on the credibility of the witnesses at trial, and the evidence was thus closely balanced. Defendant derives his argument from *People v. Sebby*, 2017 IL 119445, ¶ 63, in which our supreme court reiterated: " 'Given these opposing versions of events, and the fact that no extrinsic evidence was presented to corroborate or contradict either version, the trial court's finding of guilty necessarily involved the court's assessment of the credibility of the two officers against that of defendant.' " *Id*. (quoting *People v. Naylor*, 229 Ill. 2d 584, 607 (2008)).

¶ 43 Defendant's statement of facts might support the notion that defendant's trial was a mere credibility contest. That statement of facts, however, makes no mention of the handgun found in the apartment with defendant—the same handgun that the victims identified as being the handgun used in the home invasion. Defendant's statement of facts also makes no reference to the sweatshirt and hat found in the getaway car—items which were worn by defendant and which the victims also identified as being worn by the intruder. Indeed, defendant's statement of facts makes absolutely no mention of the silver teeth, observed on defendant by at least five individual witnesses, while both victims testified that the intruder had silver teeth. In arguing that

there was no extrinsic evidence tying defendant to the crime, defendant simply chooses to ignore a vast amount of extrinsic evidence.

¶ 44 Because the evidence against defendant was so overwhelming, and because Doss's testimony was already stained by numerous hallmarks of incredibility, the circuit court's delivery of IPI Criminal 4th No. 3.17, if erroneous, could have had no impact on the ultimate result of the trial. In turn, any such error would have been found harmless beyond a reasonable doubt on appeal. Accordingly, defendant failed to make a substantial showing of prejudice in his amended postconviction petition.

¶ 45 II. Actual Innocence

¶ 46 Defendant next contends that when Hearns's affidavit is taken as true, it creates a substantial showing of actual innocence.

¶ 47 Freestanding claims of actual innocence based on newly discovered evidence made in postconviction proceedings are subject to the same three-stage procedure as any other postconviction claim. See *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). The evidence put forth by a defendant in support of his actual innocence claim must be: "newly discovered; material and not merely cumulative; and 'of such conclusive character that it would probably change the result on retrial.' " *Id.* (quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)).

¶ 48 Initially, Hearns's proposed testimony is largely cumulative of that provided by Doss at defendant's original trial. It portrays a sequence of events in which the mysterious "Black" actually committed the home invasion then entered Doss's car afterward. Like Doss's testimony, it provides no explanation as to why Woods identified defendant as the intruder.

¶ 49 Even assuming, again for the sake of argument, that Hearns's proposed testimony can be considered noncumulative, it is not of such a conclusive character that it would probably change

the result on retrial. As discussed above, the evidence against defendant was overwhelming. Hearns's proposed testimony, like Doss's testimony, actually conflicts with the version of events defendant himself relayed to Matlock.

¶ 50 Moreover, if presented at retrial, Hearns would suffer from the same credibility issues as Doss. At defendant's invitation, we take judicial notice of Hearns's information provided by the Illinois Department of Corrections' website. The website shows that if Hearns were to testify at a new trial, the State would impeach that testimony with his felony convictions for burglary, theft, and obstruction of justice.[2] A jury would likely reject Hearns's testimony in the same way the jury rejected Doss's testimony. In short, Hearns's affidavit is far from conclusive, and does not come close to creating a probability that the result would be different if defendant was retried.

¶ 51 Defendant failed to make a substantial showing of actual innocence in his amended petition, just as he failed to make a substantial showing of ineffective assistance of appellate counsel. Accordingly, we affirm the circuit court's second-stage dismissal of defendant's amended petition.

¶ 52 CONCLUSION

¶ 53 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 54 Affirmed.

[2]We agree with defendant that the assertions in Hearns's affidavit must be taken as true and that no credibility determinations should be made at this stage. However, we are not assessing the credibility of Hearns's affidavit here; instead, we are assessing his prospective credibility at a potential retrial of defendant.