2011 IL App (1st) 100309-U

FOURTH DIVISION
November 23, 2011

No. 1-10-0309

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 98 CR 19106
	)	
DONZELL LOWE,	)	Honorable
	)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

O R D E R

¶ 1 *Held*: Third-stage denial of post-conviction petition affirmed where circuit court's finding that a trial witness' recantation was equivocal and insufficient to establish defendant's actual innocence was not manifestly erroneous.

¶ 2 Defendant Donzell Lowe appeals from the denial of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) following a third-stage evidentiary hearing. He contends that the circuit court erred in denying his petition because the evidence established his actual innocence.

¶ 3 The record shows, in relevant part, that following a 2000 bench trial, defendant was found guilty of the first degree murder of Gerchaton Young and the attempted first degree murder of Reggie Rupert. He was convicted on evidence[1] showing that on June 21, 1998, Quintina Young drove her sister, Gerchaton, to the house of their cousin, Kamara Evans, at 5846 South Hermitage Avenue. She pulled over to the curb on the driver's side when they arrived, and Kamara began to talk with Quintina through the driver's side window of the car while kneeling down near the curb. Reggie Rupert conversed with Gerchaton as he leaned inside the passenger's side window. Soon thereafter, a burgundy colored vehicle carrying four passengers turned the corner onto the street and shots were fired from it. Gerchaton was struck in the head and died two days later; Rupert was shot in the right hand and right hip and sustained multiple injuries.

¶ 4 Both Rupert and Louis Buford testified at trial that defendant and Cion Rice were in the car from which the shots were fired. Buford, who was standing across the street at the time of the shooting, testified that defendant, a member of the "Blackstone Rangers" gang, was in the front passenger seat of the car, that Rice was in the back, and that he saw shots fired from the front seat area. He could not identify the shooter, however, because he started to run. Rupert, who was out on bond on the date of the shooting after being charged with the murder of defendant's brother, testified that he saw defendant firing a gun from the driver's side of the car, and Rice firing a gun from the passenger's side. The court ultimately sentenced defendant to concurrent, respective terms of 50 and 10 years' imprisonment on his first degree murder and attempted first degree murder convictions, and this court affirmed that judgment on direct

[1] The essential facts have been taken from this court's order in *People v. Lowe*, No. 1-00-3787 (2003) (unpublished order under Supreme Court Rule 23).

appeal. *People v. Lowe*, No. 1-00-3787 (2003) (unpublished order under Supreme Court Rule 23).

¶ 5 On August 12, 2003, defendant filed a *pro se* petition for post-conviction relief alleging that he was denied a fair trial and effective assistance of counsel. In support, he claimed, *inter alia*, that Shannon Parks would testify that "defendant was home playing video game'z [*sic*] until 12:00 and that defendant was still imobile [*sic*] and using crutches," and that Keyon Pointdexter would testify that "he was at defendant [*sic*] home playing video game's until 12:00 pm. and that defendant was on crutches." Defendant also claimed that Lawana Smith would testify that "defendant was not on scence [*sic*] of crime and that their was no shooting from an [*sic*] car, and shooter was walking." Defendant did not provide any supporting affidavits from these witnesses to corroborate their proposed testimony. The circuit court, nonetheless, docketed his petition on October 1, 2003, and appointed the public defender to represent him.

¶ 6 Private counsel subsequently entered an appearance on behalf of defendant, and on June 12, 2008, counsel filed a supplemental petition for post-conviction relief alleging, *inter alia*, actual innocence based on newly discovered evidence, *i.e.*, an affidavit from Rupert in which he averred that defendant was not one of the shooters. In that affidavit, which was attached to the petition and dated February 7, 2007, Rupert stated that "Cion Rice was firing the shots," that he "did not see Donzell Lowe firing any shots," and that "Donzell Lowe did not shoot me, Gerchaton, or anyone, because he was not a person firing the shots."

¶ 7 On November 23, 2009, the court held an evidentiary hearing on Rupert's affidavit[2] during which Rupert testified, in relevant part, that on June 21, 1998, he observed Cion Rice firing a gun in his outstretched arm out of the rear driver's side window of a maroon Bonneville.

[2] The court also granted defendant an evidentiary hearing with respect to an affidavit supporting his claim of ineffective assistance of counsel. However, defendant does not challenge the court's findings on that affidavit in this appeal.

He also thought that he had seen someone firing shots from the front passenger seat of the car, but was "[n]ot really" able to recognize that individual. Counsel subsequently elicited the following testimony:

"Q. Mr. Rupert, did you see Donzell Lowe [defendant] at any point on the evening you were shot, June 21st, 1998?

A. I can't positively say I seen him.

Q. What do you mean you can't positively say that you saw him?

A. I can only assume, but I didn't -- I'm not saying I didn't, but –

* * *

Q. Mr. Rupert, let me ask you, what do you mean by I can only assume?

A. Well, I really didn't see him like how I seen Cion, but I did see somebody in the driver's seat, but I can't positively identify Donzell as being the person in the driver's -- in the passenger seat."

¶ 8 Rupert then testified that he identified defendant as a shooter at trial based on "what I seen, and also what I had heard," which was that defendant was "one of the shooters." He also identified defendant as a shooter "[b]ecause I thought he probably would have done it because we was -- we was charged with murder against his brother," and he had heard a rumor before the shooting that "they had went to church. They were celebrating his [defendant's brother's] life, and they was praying that they killed somebody later on that day." Rupert further testified that he was upset and wanted to blame defendant after the shooting.

¶ 9 On cross-examination, Rupert stated that when he heard shots fired, he turned around and looked directly at the car as it passed him, and was close enough to reach out and grab the driver. The State subsequently pursued the following line of questioning:

"Q. Now correct me if I am wrong, a minute ago didn't you just testify that you can't say that you saw Donzell Lowe but you can't say that you didn't see him either?

A. Yes, sir.

* * *

Q. So Donzell may have been in that car shooting and he may not have been in that car shooting?

A. Yeah.

Q. So he may have a shooter [*sic*], he may not have been a shooter?

A. Yeah.

Q. He may have been in the car, he may not have been in the car?

A. Yeah."

Rupert acknowledged that he identified defendant and Rice as the shooters to police within 10 to 15 minutes of the shooting, and stated that he was positive at the time that defendant was in the car and had shot at him. A few months after defendant's trial, however, he changed his mind and believed that defendant was not one of the shooters.

¶ 10 On redirect, counsel inquired, "And why is it that you do or do not know whether or not he [defendant] was a shooter," and Rupert responded, "I didn't see him." Rupert testified that his affidavit was prepared by an attorney representing defendant, but that he reviewed it and found its contents to be accurate. He also testified that he began doubting his identification of defendant as the shooter after the trial.

¶ 11 On January 14, 2010, the court denied defendant's post-conviction petition, finding, *inter alia*, that Rupert's testimony "can best be described as equivocal, both in his direct and cross-

examination and not of such a convincing nature as would warrant the relief sought by the Petitioner here." This appeal follows.

¶ 12 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Proceedings are initiated by the filing of a petition verified by affidavit in the circuit court in which the conviction took place (725 ILCS 5/122-1(b) (West 2010)), and ultimately may consist of up to three distinct stages (*People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006)). At the third stage of proceedings, defendant is entitled to an evidentiary hearing wherein he may present evidence in support of his petition. *Pendleton*, 223 Ill. 2d at 472-73.

¶ 13 When the circuit court conducts a third-stage evidentiary hearing involving fact-finding and credibility determinations, we will not reverse the court's decision unless it is manifestly erroneous (*Pendleton*, 223 Ill. 2d at 473), *i.e.*, error that is clearly evident, plain, and indisputable (*People v. Morgan*, 212 Ill. 2d 148, 155 (2004)). However, if no such determinations are necessary, *i.e.*, no new evidence is presented and the issues raised are pure questions of law, our review is *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 14 As an initial matter, the parties disagree as to which standard of review should be applied in this appeal. Defendant maintains that our review should be *de novo*, claiming that the issues of whether Rupert's testimony was equivocal, and whether that testimony was sufficient to overturn defendant's conviction, are "not subject to credibility determinations." The State responds that new evidence of a witness' recantation testimony is subject to the manifestly erroneous standard, citing *Morgan*.

¶ 15 In *Morgan*, 212 Ill. 2d at 152, defendant filed a post-conviction petition alleging that the only living eyewitness from his trial had recanted his testimony and provided a supporting

affidavit from that witness. The circuit court denied his petition following an evidentiary hearing. *Morgan*, 212 Ill. 2d at 152. The supreme court subsequently affirmed that dismissal applying the manifestly erroneous standard of review, noting that "in every case of this kind," it is the responsibility of the trial court to assess the credibility of the recantation testimony after observing the demeanor of the witness. *Morgan*, 212 Ill. 2d at 165. This case, likewise, required that the trial court assess the credibility of a recanting witness at an evidentiary hearing, and, thus, in accordance with *Morgan*, we apply the manifestly erroneous standard of review to the issue of whether defendant's petition was properly denied.

¶ 16 Defendant contends that he established his actual innocence based on newly discovered evidence where Rupert recanted his prior identification of him as the shooter. He claims that Rupert's evidentiary hearing testimony established that he had perjured himself at trial because that testimony explains his prior inconsistent statements. The State responds that defendant's testimony at the evidentiary hearing did not amount to a recantation of his trial testimony or perjury, but rather, was mere impeachment.

¶ 17 To succeed on a claim of actual innocence, defendant must present evidence that was not available at trial and could not have been discovered sooner through diligence, that is material and noncumulative, and that is of such conclusive character that it would probably change the result on retrial. *Morgan*, 212 Ill. 2d at 154. A claim of actual innocence is not a challenge to whether defendant was proved guilty beyond a reasonable doubt, but rather, an assertion of total vindication or exoneration. *People v. Barnslater*, 373 Ill. App. 3d 512, 520 (2007).

¶ 18 In this case, the evidence presented by defendant to establish his claim of actual innocence is Rupert's recantation of his earlier identification of him as one of the shooters. Our supreme court has noted, however, that recantation testimony is inherently unreliable and will

not result in a new trial except in extraordinary circumstances. *People v. Steidl*, 177 Ill. 2d 239, 260 (1997).

¶ 19 The record in this case shows that when the shooting occurred, Rupert was standing in the street, then turned and looked directly at the car from which the shots were being fired that was within an arm's reach of him. He positively identified defendant as one of the shooters to police 10 to 15 minutes afterwards, and did so again at trial. His identification was corroborated by Louis Buford, who testified that he saw defendant in the front passenger seat of the car as well as shots fired from the front seat area. A few months after trial, Rupert began doubting his identification of defendant as the shooter, and more than six years after trial, he signed an affidavit recanting his prior identification. At the hearing on that affidavit, however, Rupert testified that he was "not really" able to recognize the individual firing shots from the front passenger's seat, but also was "not saying I didn't" see defendant. Similarly, on cross-examination, he acknowledged that he could not say that he did see defendant, but also could not say that he did not see him either. He then finally testified on redirect, "I didn't see him."

¶ 20 The record thus shows that Rupert made a positive identification of defendant as the shooter both right after the shooting and at trial which was corroborated by the testimony of another witness, and he only began doubting that identification months later. Even then, Rupert did not actually recant his identification until years later, and when questioned about it at the evidentiary hearing held thereon, he clearly equivocated as to whether or not he observed defendant as one of the shooters. Under these circumstances, we cannot say that Rupert's recantation was sufficiently compelling such that the decision of the trial court to favor his trial testimony over the recantation was manifestly erroneous. *Morgan*, 212 Ill. 2d at 161.

¶ 21 Defendant nonetheless maintains that Rupert's recantation was sufficient to warrant the reversal of his conviction and a new trial, citing *People v. Burrows*, 172 Ill. 2d 169 (1996) and

Steidl. We disagree. Defendant fails to recognize that in *Burrows*, 172 Ill. 2d at 181, the supreme court affirmed the trial court's decision to grant defendant a new trial under the deferential manifest weight standard which only permits reversal where the opposite conclusion is clearly evident (*People v. Deleon*, 227 Ill. 2d 322, 332 (2008)). Here, likewise, we defer to the trial court's determination unless there is clear error, and, as noted above, we find none. Furthermore, we find that *Steidl*, 177 Ill. 2d at 260-61 is inapposite, as in that case the supreme court found that defendant was merely entitled to an evidentiary hearing on a trial witness' recantation, and, in the case at bar, defendant has already received such a hearing.

¶ 22 We also find no merit to defendant's claim that Rupert's testimony at the evidentiary hearing establishes that he committed perjury at trial. Defendant has already pointed out, on direct appeal, the many inconsistencies in Rupert's trial testimony, and this court nonetheless found "that the most essential of Rupert's statements remained consistent throughout, i.e., that defendant and Rice were both inside the shooter's car." *Lowe*, No. 1-00-3787 at 10-11. The fact that Rupert is now, years later, equivocating as to whether or not defendant was in the car is of no significance where his prior identification was corroborated by Buford at trial, and where defendant, himself, gave a statement to the assistant State's Attorney admitting that he was in it. Moreover, defendant did not allege or show that the State knowingly used false testimony to establish a constitutional violation. *People v. Brown*, 169 Ill. 2d 94, 106 (1995).

¶ 23 For these reasons, we find defendant's claims to be without merit, and conclude that the circuit court did not err in denying defendant's petition for post-conviction relief after an evidentiary hearing.

¶ 24 Affirmed.