2013 IL App (1st) 112530-U

SECOND DIVISION
November 12, 2013

No. 1-11-2530

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. 97 CR 9559
	)	
TAMAR WATKINS,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's dismissal of defendant's section 2-1401 petition was affirmed where the petition was not timely filed and the recantation affidavit of an occurrence witness did not support defendant's claim that the witness perjured himself at trial. The mittimus was corrected to reflect only one count of first degree murder where there was only one decedent.

¶ 2 Defendant Tamar Watkins appeals from the circuit court's order dismissing his petition filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010). On appeal, defendant contends the circuit court erred in dismissing his petition which contained an affidavit of an important occurrence witness recanting his trial testimony. Defendant also requests that we correct the mittimus to reflect his conviction for only one count of first degree murder. We affirm the dismissal of defendant's petition and order correction of

the mittimus.

¶ 3 Defendant was indicted for the murder of Erick Powell, attempted first degree murder of Sherodd Shenault, and aggravated discharge of a firearm. The testimony at defendant's 1998 bench trial included the following. Sherodd Shenault testified that he was currently in custody for a parole violation. On April 18, 1996, at about 2:15 a.m., he and Erick Powell were standing on the corner of Huron and Lavergne in Chicago. Both men were members of the Cicero Insane Vice Lords gang and had just finished selling drugs. Shenault saw a black man approaching them and asked Powell who it was. The man was dressed in black pants, a black sweatshirt with a black hoodie, and black shoes. When the man was 2½ feet away from Powell and Shenault, he pulled out a 9 millimeter semi-automatic pistol. When Shenault saw the gun, he started running east on Huron. After about 30 seconds, Shenault heard four gunshots and after a pause he heard more shots. Shenault went around the block and returned to the scene. He saw Powell lying on the ground, dead; he had been shot multiple times. Shenault observed two bullet holes in his own jacket. A crowd had gathered, including members of the Cicero Insane Vice Lords. Shenault did not recall whether Ike King was there. Days after the shooting, Shenault spoke with Ike King on more than one occasion about the incident. At some time in 1996, Shenault went to the police station at Grand and Central and gave the police his coat with the bullet holes in it. The police told him it would be inventoried. The coat was not produced at defendant's trial.

¶ 4 On January 28, 1997, Shenault went to a police station where he picked out defendant's photo from a five-photo array. On March 17, 1997, Shenault returned to the same police station and identified defendant in a lineup. At trial, Shenault identified defendant as the gunman and as the man he identified in the photo array and the lineup. Shenault had never seen defendant before the night of the shooting but previously had heard his name. Shenault admitted that when he testified before a grand jury on February 7, 1997, he was shown a photo of defendant and testified he knew the man by the name of Spoony.

¶ 5 Charles Berry testified that he was a convicted felon and currently in custody for possession with intent to deliver. He was a member of the Disciples gang on the early morning of April 18, 1996. At about 2:15 a.m. he was on the porch of a residence about five houses from the intersection of Lavergne and Huron. He looked toward the intersection and saw three black men standing at the corner. One of the men ran east on Huron. A second man put a gun to the head of the third man and shot him. After the third man fell to the ground, the gunman stood over him and kept shooting him until the gun clicked as if it were out of bullets. That was the only direction in which the gunman shot. Berry did not see the gunman's face. The gunman, who was wearing black clothes including a black hoodie jacket, ran south on Lavergne to the alley and then ran east.

¶ 6 Ike King testified at trial that he had been arrested four days earlier for delivery of a controlled substance, had previous felony convictions, and currently was on parole from the Department of Corrections. In April 1996, both King and Erick Powell held the rank of three star universal in the Cicero Insane Vice Lords. King was still a member of the gang. The Cicero Insane Vice Lords and the Traveling Vice Lords were rival factions, contesting control over "drug turf." The Cicero Insane Vice Lords had control over the sale of drugs in the area of Lavergne and Huron. In January 1996, the Traveling Vice Lords began selling drugs nearby, in the area of Superior and Lavergne. Between January and April 1996, King went to Superior and Lavergne where he had "a few" conversations with defendant. King asked defendant what the Traveling Vice Lords were doing there. Defendant replied that they could sell drugs if they wanted to there. In one conversation in April, defendant wanted to know from whom he had to get permission to sell drugs in that area and told King he wanted to meet with Powell. On April 18, at about 2 a.m., King was in a car on Lavergne, coming up to Erie Street, when he heard shooting coming from nearby. King saw a black man, dressed all in black, run across the street in front of King's car. King saw the man run into the alley and get into the passenger side of a

red car. The red car drove out of the alley, turned left onto Leclair, right onto Ohio, and stopped at a red traffic light at Laramie. King drove his car to the traffic light, pulled up next to the passenger side of the red car, and saw that the passenger in the red car was defendant, whom he knew as Spoony. King drove to the area of Lavergne and Huron, where he saw Powell lying on the ground. In December 1996, a police detective went to King's home and showed him several photos. King identified the photo of defendant as the person he saw running in the vicinity of the shooting. On March 7, 1997, King attended a lineup and identified Spoony, the defendant, as the person he saw running from Huron and Lavergne on the early morning when Powell was shot.

¶ 7 Officer Terry Hoover testified that on March 7, 1997, he and his partners went to an apartment building at 38 North Central in Chicago. One of Hoover's partners, Officer Kearns, had received a telephone tip that a murder suspect named Tamar Watkins, alias Spoony, was in Apartment 205 at that address. Hoover and two other officers went to the apartment door while Kearns stationed himself outside beneath a window. After Hoover knocked and announced his office, defendant attempted to escape through the window but was apprehended by Kearns.

¶ 8 Detective Mark Pawelski testified that on December 19, 1996, he showed a photo array to Ike King. King picked out the photo of defendant, whom he knew as Spoony, as the man who he saw running from the area of Lavergne and Huron on April 18, 1996, after King heard shots being fired. On January 28, 1997, Pawelski also showed a photo array to Shenault, who identified the photo of defendant as the man who shot Powell. On March 7, 1997, Pawelski and another detective interviewed defendant at the police station. After defendant was advised of the *Miranda* warnings, he stated he knew nothing of the shooting of Powell, had never been in the area of 4957 West Huron, and was not a member of any Chicago street gang. Later that evening, defendant was placed in a lineup and was identified by Ike King. The officers had another conversation with defendant, who admitted he was a member of the Traveling Vice Lords street gang and had been in the West Huron area but not since February 1996. Defendant admitted that

he had an altercation with Ike King before the shooting of Powell. Pawelski told defendant he had been identified as being in the West Huron area at the time of the shooting and was seen inside a red or maroon vehicle. Defendant replied that he had a friend with a vehicle matching that description and that King may have seen him (defendant) in that car in the area on the night of the shooting, but he did not shoot the man. On March 17, 1997, Pawelski conducted another lineup viewed by Shenault, who identified defendant as the man he saw shoot Powell.

¶ 9 The parties stipulated that the medical examiner who conducted the autopsy of Erick Powell observed 14 gunshot wounds to Powell's body, including five wounds to his head.

¶ 10 The defense rested without presenting evidence.

¶ 11 The circuit court found defendant not guilty on count 3, attempted murder of Sherodd Shenault, and on count 4, aggravated discharge of a firearm by knowingly discharging a firearm in the direction of Shenault, based on the testimony of Charles Berry that the shooter did not fire in the direction of the fleeing Shenault. The court found defendant guilty on counts 1 and 2 charging him with the first degree murder of Erick Powell. The court noted that Shenault's testimony was corroborated by the neutral testimony of Berry and the testimony of Ike King and that defendant's own statements to the police admitted he was "on the scene" and in a car similar to the one described by King.

¶ 12 The two assistant Public Defenders who represented defendant at trial filed a motion for new trial. They withdrew when defendant secured new counsel, who filed a supplemental posttrial motion alleging ineffectiveness of trial counsel. Following a contested hearing on the supplemental posttrial motion, in which both defendant and his lead trial counsel testified, the court denied the motion. On March 3, 1999, the circuit court sentenced defendant to 30 years in prison. This court affirmed the judgment on direct appeal. *People v. Watkins*, No. 1-99-1405 (2000) (unpublished order under Supreme Court Rule 23).

¶ 13 Subsequently, defendant filed a *pro se* petition under the Post-Conviction Hearing Act

(Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). The petition alleged that he was denied the effective assistance of trial counsel, and that his posttrial and direct appeal counsel were also ineffective. The petition also raised a freestanding claim of innocence and a claim that the State did not disclose the extent of favorable treatment accorded to State trial witnesses. The circuit court dismissed the petition after the 90-day period for initial review. We remanded the case for a second-stage proceedings under the Act. *People v. Watkins*, No. 1-02-2425 (2003) (unpublished order under Supreme Court Rule 23).

¶ 14 Upon remand, the circuit court appointed counsel for defendant. On January 18, 2011, defendant's postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984). No amendment was made to the *pro se* petition, but counsel was given leave to file a section 2-1401 petition for postjudgment relief which was filed on January 18, 2011. Attached to the petition was an affidavit by Ike King recanting a portion of his trial testimony. The petition alleged that King's affidavit admitted he had committed perjury at defendant's trial, though the perjury "was unknown to the State."

¶ 15 King's affidavit, dated July 26, 2007, and appended to the section 2-1401 petition, stated the following. As Powell was King's best friend, he was very upset when Powell was killed and wanted to do something to help Powell's family. When Powell was shot, King was driving nearby and heard gunshots. He saw the shooter, who was dressed in black, enter a red car. When the red car stopped for a traffic light, King positioned his own vehicle and looked into the car to see if he could recognize the shooter. He thought at the time that the person in the passenger seat "could possibly be 'Spoony' [defendant], but I really was not sure." King returned to the scene of the shooting and saw Shenault, who told King the shooter was "Spoony." King later learned that "Spoony" was the nickname for defendant. "When I testified at trial I thought it was 'Spoony' in the passenger seat because Sherrod [*sic*] was so sure 'Spoony' was the shooter after I got back to the block." The affidavit continued: "Years later, when members of different gangs started

talking with each other, the word on the street was that 'Spoony' did not shoot Erick Powell but instead another gang member, whose nickname was 'Nose,' and who resembled 'Spoony' did the shooting." King did not know the identity of the person nicknamed "Nose."

¶ 16 The State filed motions to dismiss both the *pro se* postconviction petition and the section 2-1401 petition. The circuit court granted the State's motions to dismiss both petitions.

¶ 17 On appeal, defendant contends that the portion of the circuit court's order which dismissed his section 2-1401 petition was error and that the cause must be remanded for an evidentiary hearing because Ike King's 2007 recantation showed his 1998 trial testimony to be based on perjury, entitling defendant to relief from the trial judgment.

¶ 18 Section 2-1401 of the Code provides that relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition. 735 ILCS 5/2-1401 (West 2010); *People v. Johnson*, 352 Ill. App. 3d 442, 444 (2004). In criminal proceedings, a petition filed pursuant to Section 2-1401 seeks to correct all errors of fact occurring in the prosecution of a case that were unknown to the petitioner and the court at the time of trial which, if then known, would have prevented the judgment being entered. *Johnson*, 352 Ill. App. 3d at 444; *People v. Pinkonsly*, 207 Ill. 2d 555, 566 (2003). "To obtain relief under section 2-1401, the defendant 'must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.' " *Pinkonsly*, 207 Ill. 2d at 565, citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). The section 2-1401 petition must be filed "not later than 2 years after the entry of the order or judgment" from which relief is sought. 735 ILCS 5/2-1401(c) (West 2010). Thus, to obtain section 2-1401 relief, the defendant must show both a meritorious defense to the charges against him and due diligence in presenting it. *Pinkonsly*, 207 Ill. 2d at 565. However, section 2-1401 has an exception to its limitations period for delays attributable to

disability, duress, or fraudulent concealment. *Pinkonsly*, 207 Ill. 2d at 564. "Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of two years." 735 ILCS 5/2-1401(c) (West 2010). Absent an evidentiary hearing on a petition brought pursuant to section 2-1401, we review the circuit court's denial of the petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 13 (2007). We may affirm the court's judgment on any basis supported by the record. *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008).

¶ 19 The final judgment on defendant's conviction was entered on March 3, 1999, and the section 2-1401 petition was filed on January 18, 2011. The State argues that defendant's petition was untimely because it was filed more than nine years beyond the two-year filing limit. Defendant contends that King's affidavit was an admission that he perjured himself at trial and the petition was not untimely because King fraudulently concealed his perjury, with the result that no amount of diligence could have produced the affidavit sooner. However, Ike King's affidavit was executed on July 26, 2007. To obtain relief under section 2-1401, the defendant must show both a meritorious defense to the charges against him and due diligence in presenting it. *Pinkonsly*, 207 Ill. 2d at 565. As defendant did not file his section 2-1401 petition until 3½ years after King executed his affidavit, defendant's petition was untimely filed when he failed to demonstrate due diligence in presenting his claim.

¶ 20 Defendant's claims of King's perjury at trial and his fraudulent concealment of the perjury also fail. While King's affidavit did recant that portion of his trial testimony relating to the identity of the passenger in the red car, his recantation did not amount to perjury. The term "perjury" generally denotes "[t]he act or an instance of a person's deliberately making material false or misleading statements while under oath." Black's Law Dictionary 1160 (7th ed. 1999). A person commits the crime of perjury "when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement,

material to the issue or point in question, which he does not believe to be true." 720 ILCS 5/32-2 (West 1998). King's affidavit averred that after the passage of time subsequent to the trial, he had serious doubts that the person he saw in the red car was "Spoony" (defendant). However, at the time he looked into the car and observed the shooter, he thought that person might be defendant, and this thought was confirmed by Shenault telling him a short time later that the shooter was indeed defendant. King's affidavit stated, "When I testified at trial *I thought it was 'Spoony' in the passenger seat* because Sherrod [*sic*] was so sure 'Spoony' was the shooter after I got back to the block." [Emphasis added.] Subsequent to the trial, "word on the street" from members of different gangs caused King to doubt his trial identification of defendant. While King's identification of defendant at trial may or may not have been mistaken, nothing in his affidavit indicated that King believed his testimony was false at the time he testified under oath at trial or that he fraudulently concealed his subsequent doubt as to the accuracy of his trial testimony.

¶ 21 Defendant asserts that, to survive a motion to dismiss his petition, all he was required to show was that King's admission in his affidavit, that he came to believe he was mistaken about his identification of defendant in the red car, *could* have prevented judgment against him. Defendant misstates the appropriate standard. A meritorious section 2-1401 claim involves factual errors at the petitioner's trial which were unknown to him and court at that time, but *would* have prevented the judgment rendered had they been known. *Pinkonsly*, 207 Ill. 2d at 566.

¶ 22 Generally, a witness's recantation of prior testimony is viewed as inherently unreliable, and a court should not grant a new trial on that basis except in extraordinary circumstances. *People v. Jones*, 20112 IL App (1st) 093180, ¶ 63. Here, King's recantation was insufficient to show that, without his identification testimony at trial, the outcome of the trial *would* have been different. King was merely an occurrence witness, whereas Shenault testified at trial that he saw defendant shoot Powell at a distance of 2½ feet and later identified him in a photo array and a

police lineup. Defendant claims Shenault was "severely impeached" because he testified he later found two bullet holes in his own jacket, whereas Charles Berry testified that the shooter fired his weapon only at the deceased. However, Shenault never testified that defendant shot at him as he ran away; he testified only that when he returned to the scene of the shooting after Powell was killed, he noticed what he believed were two bullet holes in his jacket. Although Berry could not identify defendant as the shooter, Berry's testimony corroborated Shenault's version of the incident and the description of the black clothing worn by the shooter. That portion of King's testimony which he did not later recant corroborated the description of the shooter's black clothing given by Shenault and Berry. Defendant's attempted flight from the police when they came to his home to arrest him gave rise to an inference of defendant's consciousness of guilt. *People v. Hart*, 214 Ill. 2d 490, 519 (2005). After initially denying any knowledge of the shooting of Powell, defendant later admitted to police that he was in the area of the shooting at the time of the offense, and King may have seen him there in the vehicle described by King. Given this evidence of defendant's guilt, his section 2-1401 petition failed to show that King's recantation, if known by defendant and the court at the time of trial, would have prevented the entry of judgment against him. Consequently, the circuit court properly denied defendant's petition.

¶ 23 Finally, both defendant and the State agree that the mittimus should be corrected to reflect only one conviction for first degree murder because there was only one decedent. *People v. Roman*, 2013 IL App (1st) 102853, ¶ 27, citing *People v. King*, 66 Ill. 2d 551, 566 (1977). Pursuant to our authority set forth in Supreme Court Rule 615(b)(1), we vacate defendant's conviction for first degree murder under count 2 and correct the mittimus to reflect judgment only on count 1. Accordingly, this court directs the circuit court clerk to amend the mittimus to reflect that defendant was convicted of only one count of first degree murder.

¶ 24 The circuit court's order dismissing defendant's postconviction petition and his section 2-

1401 petition is affirmed and the mittimus is modified to reflect that defendant was convicted of only one count of first degree murder.

¶ 25 Affirmed; mittimus modified.