2013 IL App (1st) 120191-U

THIRD DIVISION
November 27, 2013

No. 1-12-0191

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. 86 CR 7570
	)	
FELIX STUCKEY,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Hyman and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Judicial notice of another record on appeal in a co-defendant's case documenting the destruction of a Vitullo evidence collection kit warranted where the underlying convictions in both appeals related to the same acts performed against the same victim. Appeal dismissed as moot because destruction of the Vitullo kit rendered it impossible to conduct DNA forensic testing of that kit.

¶ 2 Following a jury trial, defendant Felix Stuckey was convicted of aggravated criminal sexual assault, attempted murder and aggravated battery. The trial court imposed a 60-year sentence including an extended-term sentence based on exceptionally brutal and heinous

behavior indicative of wanton cruelty. On appeal, Stuckey contends that the trial court erred in denying his motion for forensic DNA testing on a Vitullo evidence collection kit (Vitullo kit) because he established that identity was at issue in the trial leading to his conviction during which he maintained his innocence and consent to sexual contact was not raised as a defense.[1] Stuckey also contends that the trial court erroneously denied his motion because he demonstrated that the Vitullo kit was subject to a chain of custody establishing that it was not substituted, tampered with, replaced or altered in any material aspect. For the reasons that follow, we dismiss Stuckey's appeal as moot.

¶ 3 BACKGROUND

¶ 4 A complete recitation of the facts leading to Stuckey's conviction is set forth in his direct appeal and we summarize below only the facts germane to the claim he raises in this appeal. *People v. Stuckey*, 231 Ill. App. 3d 550 (1992). Stuckey's conviction arose from events occurring on March 29-30, 1986, in Chicago, Illinois and against victim T.S., who was 14 years of age at the time of assault.

¶ 5 During Stuckey's trial, T.S. testified that she and James Stuckey, who is Stuckey's brother, were "looking for a place to prostitute" and she subsequently earned $120 from prostitution. From that amount, T.S. gave James $60 and she kept the remaining $60 placing it in her boot. Later that same night, she was approached on the street by Stuckey, James and Bruce Davis. T.S. testified that the three men forced her into a vehicle and they drove to Stuckey's house. Once there, James and Stuckey exited the vehicle, and T.S. engaged in sexual intercourse with Davis

[1] Stuckey maintains that he was not T.S.'s assailant, which is consistent with the trial strategy of not presenting consent as a defense to a charge of criminal sexual assault.

against her will. Later, James and Stuckey returned to the vehicle and they drove to a park where Stuckey pointed a gun at T.S. and ordered her to exit the vehicle. After T.S. complied, Stuckey forced her to remove her clothes and he, James and Davis sexually assaulted her. Stuckey and Davis then retrieved rope from the vehicle's trunk and tied one end of the rope around T.S.'s naked body and hands and the opposite end of the rope to the back of the vehicle. After T.S. was tied to the vehicle, Stuckey and Davis entered the vehicle, which drove forward dragging her along the pavement behind the vehicle. A few minutes later, the vehicle stopped, Davis exited the vehicle and he untied T.S. Davis returned to the vehicle, which drove away, and T.S. was left in the street.

¶ 6 In response to hearing dogs barking, a woman looked through the window of her back door and saw T.S. lying on the ground. The woman called the police and after arriving at the scene, the police found T.S., who told one of the officers that Stuckey raped her. T.S. was transported to one hospital and later transported to a different hospital. When she was at the second hospital, she was treated by the hospital's burn unit because the nature of her injuries were similar to third degree burns. She also sustained serious injuries to the side of her face and all over her body.

¶ 7 While at the hospital, T.S. identified Stuckey, James and Davis as her assailants from photographs shown to her by an assistant state's attorney. Also during her hospitalization, T.S. told a psychology intern that she did not know the identity of the individuals in the photographs previously shown to her. During her testimony at trial, T.S. admitted that she lied to the psychology intern and she did know the individuals in the photographs, who she identified as her

assailants.

¶ 8 Following jury deliberations, the jury found Stuckey guilty of aggravated criminal sexual assault, attempted murder and aggravated battery. The trial court sentenced Stuckey to an extended-term sentence of 60 years' imprisonment. Stuckey appealed, mainly asserting that he was not proved guilty beyond a reasonable doubt and that the trial court abused its discretion when it sentenced him to 60 years' incarceration because his adult criminal history was not included in his presentence investigation report. This court affirmed Stuckey's conviction, but remanded for a new sentencing hearing. *Id.* at 568. At the conclusion of the new sentencing hearing, Stuckey was again sentenced to 60 years' imprisonment and this court affirmed that sentence. *People v. Stuckey*, No. 1-94-1248 (1995) (unpublished order under Supreme Court Rule 23).

¶ 9 Stuckey filed a *pro se* post-conviction petition alleging that the imposed extended-term sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Concluding that *Apprendi* does not apply retroactively, this court affirmed the trial court's summary dismissal of the petition. *People v. Stuckey*, No. 1-02-2674 (2003) (unpublished order under Supreme Court Rule 23).

¶ 10 On January 18, 2011, Stuckey filed a *pro se* motion requesting forensic testing of the Vitullo kit samples collected from T.S. at the time of the assault. Stuckey asserted that the test results have the scientific potential to produce new, noncumulative evidence materially relevant to his assertion of actual innocence, even though the results may not exonerate him.

¶ 11 On March 9, 2011, the trial court denied Stuckey's *pro se* motion for forensic testing finding that he failed to make a *prima facie* showing that identity was an issue in his trial because

the victim identified him as one of her assailants on multiple occasions. This court allowed Stuckey to file a late notice of appeal.

¶ 12 ANALYSIS

¶ 13 Stuckey's sole issue on appeal is that the trial court erred in denying his motion for forensic testing of the Vitullo kit pursuant to section 116-3 of the Illinois Code of Criminal Procedure, 725 ILCS 5/116-3 (West 2010), which is the statutory provision setting forth the criteria that must be established to perform forensic DNA testing. Stuckey contends that the Vitullo kit is subject to forensic testing because the identity of T.S.'s assailants was an issue in the trial that resulted in his conviction. Stuckey also contends that the Vitullo kit has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced or altered in any material aspect and it was not subject to testing at the time of trial.

¶ 14 The State responds that Stuckey's request for forensic testing is moot because the Vitullo kit was destroyed in 1989 precluding the relief requested. More specifically, the State requests this court to take judicial notice of the proceedings relating to James's motion for forensic testing of the Vitullo kit where the State established that the kit had been destroyed. Stuckey counters that the destruction of the Vitullo kit has not been determined in his case and he does not wish to be bound by concessions made by an attorney in another proceeding who did not represent him.

¶ 15 Contrary to Stuckey's claim, the well-established doctrine of judicial notice permits us to review the record in James's appeal to dispose of the issue he raises on appeal. Illinois courts are at liberty to take judicial notice of other proceedings where a holding in one case involving

substantially the same parties is dispositive of the pending case. *Walsh v. Union Oil Co. of California*, 53 Ill. 2d 295, 299 (1973). Judicial notice applies to facts that are "readily verifiable from sources of indisputable accuracy," and courts are encouraged to invoke judicial notice when applicable because doing so is an important aid in the efficient disposition of litigation. *People v. Davis*, 65 Ill. 2d 157, 165 (1976). The doctrine also specifically extends to public records and other judicial proceedings. *People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010).

¶ 16 In this case, the doctrine of judicial notice is applicable because: (1) Stuckey's and James's convictions relate to the same events that occurred on March 29-30, 1986; (2) Stuckey and James assaulted the same victim; (3) Stuckey and James requested DNA forensic testing of the same Vitullo kit; and (4) the finding in James's case regarding the Vitullo kit's destruction is dispositive here. Accordingly, we have reviewed the record on appeal in *People v. James Stuckey*, 1-12-0863. See *Jimerson*, 404 Ill. App. 3d at 634 (judicial review of the record in co-defendant's appeal was undertaken to support a finding that the jury received the proper forms during deliberations and the defendant was not prejudiced by improper jury instructions.) Our review of the record in that appeal reveals that the State undertook an investigation to determine the existence of the Vitullo kit and any extracts from the DNA swabs within that kit. As a result of its investigation, the State learned from Lori Lewis, an employee at the Chicago Police Department who maintains the extracts for the department, that the Vitullo kit was destroyed in May of 1989 and no extracts were preserved. Lewis also represented that other extracts were destroyed in July of 1990. As support for this finding, the State tendered documentary evidence

to both the trial court and James, who was present for the hearing on his motion.[2] Based on the evidence presented and representations made, the trial court, James and his attorney acknowledged that the Vitullo kit had been destroyed. In fact, the trial court recognized that the Vitullo kit was actually destroyed prior to James's prosecution. Based on our judicial notice of the proceedings comprising the record in James's appeal, we, too, conclude that the Vitullo kit that Stuckey seeks to have tested has been destroyed and thus the relief he seeks in this appeal cannot be granted.

¶ 17 We are not persuaded by Stuckey's claims that he should not be bound by the representations and concessions made by James's attorney relating to the Vitullo kit's destruction and that he is entitled to a separate investigation to determine whether the Vitullo kit exists. We note that Stuckey refers to James as a co-defendant in his motion and also states that James's case involves the trial court record, crimes and charges that are similar to his case. Additionally, Stuckey in his motion for forensic testing relied on testimony from James's trial to establish that a Vitullo kit was, in fact, prepared while T.S. was in the hospital and that it was subject to a proper chain of custody. Stuckey also relied on the police report in James's case that listed as evidence the Vitullo kit that was prepared, picked up and taken to the crime lab. Collectively, these assertions made by Stuckey rebut his claim that a separate investigation regarding the existence of the Vitullo kit is warranted because he concedes that his case is related to James's case.

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[2] The document tendered by the State is absent from the record in James's appeal. However, it is evident from the transcripts of the February 9, 2012 hearing included in the record that the State tendered a document memorializing Lewis's representations that the Vitullo kit no longer existed.

Moreover, we reject Stuckey's inconsistent request for us to take judicial notice of James's case to establish the existence of a proper chain of custody relating to the Vitullo kit, but, yet, refrain from taking judicial notice of the kit's destruction that was also established in James's case. Accordingly, the trial court's factual finding of the Vitullo kit's destruction in James's case is directly relevant to the issue Stuckey raises on this appeal and the record reveals that the trial court's factual finding was not based on any ill-advised concessions made by James's attorney as Stuckey asserts, but on evidence presented to the trial court.

¶ 18 Lastly, we must determine whether Stuckey's appeal is rendered moot given the trial court's finding that the Vitullo kit was destroyed. The often employed test for mootness is to determine whether the issues raised in the trial court no longer exist because intervening events render it impossible for this court to grant relief to the complaining party. *In re Andrea F.*, 208 Ill. 2d 148, 156 (2003). A reviewing court may take judicial notice of events absent from the record disclosing that an actual controversy no longer exists, which renders the issue for review moot. *Id.*

¶ 19 In this case, the trial court denied Stuckey's motion for forensic testing on March 9, 2011. Shortly thereafter on May 26, 2011, the State informed the trial court in James's case that the Vitullo kit had been destroyed in May of 1989. Thus, discovery of the Vitullo kit's destruction is an intervening event rendering it impossible for this court to grant Stuckey's requested relief. Accordingly, Stuckey's appeal is dismissed as moot.

¶ 20 CONCLUSION

¶ 21 For the reasons stated, we dismiss Stuckey's appeal.

¶ 22 Appeal dismissed.