2015 IL App (1st) 122098-U

FIFTH DIVISION
March 31, 2015

No. 1-12-2098

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 87 CR 8638 (02)
	)	
FRANCISCO NANEZ,	)	Honorable
	)	Mary M. Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Reyes concurred in the judgment.

ORDER

¶1 *Held*: The trial court's order granting the State's motion to dismiss this defendant's postconviction petition is vacated and the matter is remanded with directions for further second-stage proceedings.

¶2 After a simultaneous trial before separate juries, defendant and Arthur Almendarez were convicted of the first degree murder of two persons and aggravated arson. John Galvan was tried separately and was convicted of the same crimes. Each were sentenced to natural life in prison without the possibility of parole. Their convictions were all affirmed on direct appeal. *People v. Almendarez*, 266 Ill. App. 3d 639 (1994); *People v. Galvan*, 244 Ill. App. 3d 298 (1993) (Galvan

1). Galvan and Almendarez subsequently filed postconviction petitions pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/112-1 *et seq.* (West 2000)). In each of those matters, the trial court dismissed the postconviction petitions during second-stage proceedings. However, in each case this court reversed the dismissal and remanded the matter for a third-stage evidentiary hearing. *People v. Galvan*, 2012 IL App (1st) 100305-U (Galvan 2). This court is informed pursuant to our order that those matters remain pending and are scheduled for hearing in the near future.[1] Now we are once again called upon to review the dismissal of the postconviction petition of one of the three defendant's convicted with regard to this terrible crime, this last defendant, Nanez.[2]

¶3 The facts of this crime and the evidence produced at the trials have already been set forth in detail in this court's previous decision and orders and will not be repeated here except to the extent necessary. See *Almendarez*, 266 Ill. App. 3d at 641-42; *Galvan*, 244 Ill. App. 3d 298 at 300-01; *Galvan*, 2012 IL App (1st) 1003052, ¶ 2-13. In brief, however, on September 21, 1986, the Martinez home on 24th Place in Chicago, Illinois, was firebombed. The fire resulted in the deaths of brothers Julio and Guadalupe Martinez. Ultimately, the three defendants, Galvan, Almendarez and this defendant were arrested and convicted as described above.

¶4 At trial, the only evidence offered against this defendant was his own inculpatory statements. Specifically, offered into evidence were his statements made to Chicago Police Detective Vic Switski and later to an Assistant State's Attorney (ASA). Additionally, the State offered this defendant's third-party confession through the written statement of Michael Almendarez, defendant Almendarez's brother. Michael Almendarez had signed a written

[1] The lengthy procedural histories of the Almendarez and Galvan postconviction proceedings were set forth in detail in *Galvan* and *Almendarez* and will not be duplicated here.

[2] This defendant filed a *pro se* petition and then later filed a supplemental petition. As we have not found the need to differentiate between the two they will be referred to jointly as "the petition."

statement during the investigation of this crime in which he stated that Galvan and Nanez told him they started this fire. At trial, however, he denied the truth of the statement and claimed he made it because the police coerced him. The written statement was offered as substantive evidence pursuant to section 115-10.1 of the Code of Criminal Procedure (Ill. Rev. Stat.1989, ch. 38, par. 115-10.1). On appeal, however, the State conceded and this court agreed that the admission of this statement was error as it did not satisfy the personal knowledge requirement of section 115-10.1. This error, however, was determined to be harmless. *Almendarez,* 266 Ill. App. 3d at 646-647. The only admissible evidence against this defendant that remains, therefore, are the statements he made to Detective Switski and the ASA.

¶5 In this postconviction petition, this defendant claims that he was denied effective assistance of counsel. First, he claims his counsel was ineffective when his counsel persuaded this defendant to withdraw his motion to suppress his statements. This, he claims, was substandard performance as he had informed his counsel that he was coerced by Detective Switski to make his statements and that he was intoxicated at the time he was interviewed. He further alleges that his counsel failed to investigate a pattern of abuse by Detective Switski.

¶6 The second allegation of ineffective assistance of counsel involves the failure of counsel to investigate and present evidence that someone else was responsible for this crime. This defendant alleges that, unbeknownst to him, defense counsel was in possession of police reports that contained witness statements that Lisa Velez had stated her intention to burn down the Martinez home one week before the fire. The State does not contest that this information existed at the time of trial. Specifically, a report dated September 24, 1986, reflected that Jane Borys told the police that Velez had threatened to have the victim's house burned down. That same report contained an interview with Blanca Martinez in which she reported that she was having trouble

with Velez and that when Leticia Figueroa was arrested for child abuse it was suspected that she (Blanca) had called the police. She and her daughter overheard Velez say, "I'm going to start breaking windows and start killing somebody." The next day they noticed a window in the apartment building was broken out and Velez came by and told them that she broke the window. Again the same day Velez was overheard by them saying "well too bad for them, I'm going to kill the King (meaning Jorge Martinez) in that house." A report dated February 19, 1987, indicated that Blanca Martinez, the murder victims' sister, had stated that Velez threatened to kill her and break her windows because Blanca had called the Department of Children and Family Services on Velez's friend. A February 20, 1987, report stated that Jose Santos and Jane Borys reported overhearing Velez and her friends threaten to retaliate against the Martinez family. According to Borys, one week before the fire she was standing in front of the victims' home with Lisa Velez and Leticia Figueroa. Figueroa was upset because Blanca Martinez had called the police and had her and her sister arrested for assault. Lisa Velez suggested that she tell her boyfriend Jesse Alva of the problem with Martinez and that Alva would be glad to avenge Figueroa since Martinez's brother, Jorge, was a member of a rival gang. During that conversation Velez and Figueroa decided on setting the house on fire. A February 22, 1987, report reflected that Leticia Figueroa reported that Velez told Blanca that she was going to set her house afire because one of Blanca's brothers was responsible of the murder of Velez's brother. Lastly, in this regard, this defendant attached the affidavit of Jane Borys, dated November 23, 1996, in which she attested that approximately one week before the fire, she had a conversation with Jose Santos, as well as Lisa Velez and her boyfriend Jessie Alva. During this conversation, Velez expressed her hatred for Blanca Martinez and her desire to "get even" with Blanca and her brother George. According to Borys, Velez indicated "times that would be

appropriate to burn" down the Martinez home. Velez further stated that "she would not burn the building, located at 2603 West 24th Place, down until I (Borys) had moved out because I was pregnant." Borys further averred that “Lisa Velez was speaking to Jessie Alva in regards to a good time to burn the building, located at 2603 West 24th Place down." No evidence was adduced at this defendant’s trial with regard to any of these threats.

¶7 This defendant also attached his own affidavit in which he attested that at the time of his trial he had no knowledge of these threats, that his counsel never discussed them with him, and that the first time he learned of them was when he was incarcerated with Galvan in 2006. As a result, this defendant took the position before the trial court that his failure to pursue this claim prior to the date of the filing of his *pro se* petition, March 8, 2007, was not due to his culpable negligence. He offered no excuse for his tardiness with regard to his claim that counsel was ineffective with regard to his allegation that his statement was the result of coercion and intoxication.

¶8 In granting the State’s motion to dismiss, the trial court held that this defendant’s claims were untimely. It also held that as to the ineffectiveness/coercion claim the allegations of abuse were too generalized and not specifically related to this case. As to the ineffectiveness/Velez threats claim, the trial court ruled that as these threats would not have been admissible at trial and thus there was no substantial showing of a constitutional violation in that regard. Lastly, the trial court found that although the ineffectiveness claims were peppered with language asserting "factual innocence", this defendant had not made a free-standing claim of actual innocence.

¶9 On appeal, this defendant essentially takes the position that as he is similarly situated as Galvan and Almendarez, his case should be sent back to the circuit court to join their third-stage evidentiary hearing. The State takes the position that this defendant is not similarly situated in a

procedural sense and that the trial court correctly granted their motion to dismiss. Initially, we find it clear that this defendant is not so similarly situated to Almendarez and Galvan that his matter should be remanded to the circuit court without a discussion of the merits of the appeal. The appeals of the other two defendants centered on the question of whether a successor judge properly vacated the orders of a predecessor judge. No such issue arises here. We thus turn to the merits.

¶10 Section 122-1(c) of the Act establishes a statute of limitations for filing postconviction petitions. See 725 ILCS 5/122-1(c) (West 2006). If a postconviction petition is not filed within the limitations period, the Act requires the petitioner to allege facts showing the delay was not due to his or her culpable negligence. 725 ILCS 5/122–1(c) (West 2006). At the second stage of proceedings under the Act, the circuit court must determine whether the allegations in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the petition makes such a showing, it should be advanced to the third stage of proceedings where an evidentiary hearing can be held on the allegations in the petition. *Id*. Resolution of factual disputes and determinations as to the credibility of witnesses cannot be made upon the State's motion to dismiss at the second stage of proceedings but instead can be made following a third-stage evidentiary hearing. *Id*. at 380-81.

¶11 The Due Process Clause of the Illinois Constitution affords postconviction petitioners the right to assert a free-standing claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Where a defendant sets forth a claim of actual innocence based on newly discovered evidence, the usual time limitations for filing a postconviction petition do not apply. 725 ILCS 5/122-1(c) (West 2006); *Ortiz*, 235 Ill. 2d at 330.

Moreover, the Act generally contemplates the filing of only one postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). However, fundamental fairness allows the filing of a successive petition where the petition complies with the cause-and-prejudice test. *Id*. at 459. Where a defendant sets forth a claim of actual innocence, the defendant is excused from showing cause and prejudice. *Ortiz*, 235 Ill. 2d at 330.

¶12 A defendant asserting a claim of actual innocence must show that the supporting evidence is new because it was not available at the time of trial, material and not merely cumulative and "of such conclusive character that it would probably change the result on retrial." *Id*. at 333. Procedurally, actual innocence claims should be resolved as any other claim brought under the Act. *Id*. A free-standing claim of innocence means that the newly discovered evidence being relied upon " 'is not being used to supplement an assertion of a constitutional violation with respect to [the] trial.' " *People v. Hobley*, 182 Ill. 2d 404, 444 (1998) (quoting *People v. Washington*, 171 Ill. 2d 475, 479 (1996)).

¶13 With regard to the Velez threats and the allegation of ineffective assistance in regard thereto, the State takes the position that the threats are hearsay and further do not fall under the declaration against penal interest exception to the hearsay rule. In support of that position, the State cites several cases for the proposition that declarations of a third party, not made under oath, that he or she committed the crime are generally not admissible. See *People v. Newell*, 135 Ill. App. 3d 417, 426-27 (1985); *People v. Lettrich*, 413 Ill. 172, 178 (1952); *People v. McCallister*, 193 Ill. 2d 63, 100 (2000).

¶14 We find the cases cited by the State to be inapposite to the facts of this case. By focusing on the declaration against penal interest exception to the hearsay rule, the State has conflated statements of third parties confessing to past criminal acts with statements of third parties of the

intent to commit a criminal act in the future. Statements of intent to commit an act in the future are addressed under the state of mind exception to the hearsay rule. In its ruling, the trial court recognized this by stating:

> "Nonetheless, our supreme court has held that a hearsay statement may be admissible if it expresses the declarant's state of mind at the time of the utterance, such as his intent, plan, motive, or design. *People v. Lawler*, 142 Ill. 2d 548, 557 (1991). 'Statements that indicate the declarant's state of mind are admissible as exceptions to the hearsay rule when (1) the declarant is unavailable to testify; (2) there is a reasonable probability that the proferred hearsay statements are truthful; and (3) the statements are relevant to a material issue in the case.' *People v. Caffey*, 205 Ill. 2d 52, 91 (2001)."

The trial court then noted that there was nothing to indicate that Velez would have been unavailable to testify and thus these statements would have been inadmissible. This along with the fact that Velez denied to the police that she made these statements, according to the trial court, defeated the ineffective assistance of counsel claim regarding these threats.

¶15 At this juncture, we are faced with an interesting scenario not addressed by the parties. At the time of the defendant's trial, it is correct that the state of mind exception to the hearsay rule had been held to require the unavailability of the declarant. Therefore, it is probably correct that these threats would not have been admissible. Further, performance of trial counsel must be judged by the state of the law at the time of trial. *People v. Bailey*, 232 Ill. 2d 285, 299 (2009).

¶16 However, that is not the state of the law in Illinois today. With the enactment of the Illinois Rules of Evidence, the unavailability of the declarant is no longer required under the state of mind exception to the hearsay rule. Illinois Rule of Evidence 803(3) (eff. Jan.1, 2011) states:

> "HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ***
>
> (3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including: ***." Ill. R. Evid. 803(3) (eff. Jan. 1, 2011).

In Justice DiVito's recent guide to the Illinois Rules of Evidence, he commented:

> "Note that, though the Illinois rule is substantively identical to its federal counterpart, the placement of it as an 803 rule (where the availability of the declarant as a witness is immaterial) represents a substantive change. That is so because Illinois decisions had required the unavailability of the out-of-court declarant in order to trigger the rule's application, which would have required its placement as an 804 rule. Note, too, that this codification alters the requirement in previous cases that there be a reasonable probability that the statement was truthful." Gino L. DiVito, The Illinois Rules of Evidence: A Color-Coded Guide, Article 8, Rule 803, Author's Commentary at 141 (January 12, 2015).

¶17 Admissible statements by someone other than this defendant of the intent to commit the very unique crime of arson during the relevant time period could be strong evidence of actual innocence, especially in light of the fact that the only evidence against this defendant was his own statements. No physical evidence or eyewitness testimony tied this defendant to this crime, and he contends his statements were not voluntary.

¶18 It is true that this defendant did not make a free-standing claim of actual innocence but rather raised the Velez threats in regard to his claim of ineffective assistance of counsel.

However, based on the above analysis regarding the state of the law at the time of trial, that claim is not viable.

¶19 Interestingly, the State in its brief admits that the defendant is not without recourse as he could independently file a successive postconviction petition alleging actual innocence. We however, do not believe that in light of the procedural posture of this matter, that this defendant should be compelled to do so. As both of defendant's co-defendants are awaiting their third-stage hearing and as this matter has already been litigated for several years, we find that in the interest of judicial economy and otherwise in the interest of justice, the better course of action is to vacate the dismissal of this postconviction petition and remand to the circuit court with directions to allow this defendant to amend his petition to abandon his ineffectiveness claim with regard to the Velez threats and to allege a free-standing claim of actual innocence. We find this to be appropriate especially in light of the fact that if this defendant filed a successive postconviction petition alleging actual innocence, he would not be subject to the Act's statute of limitations nor required to pass the usual cause and prejudice test imposed on successive petitions. See *Ortiz*, 235 Ill. 2d at 329.

¶20 As noted, the trial court found that the claim of ineffectiveness/coercion was too generalized and not specifically related to this case. In light of our above ruling, we do not find the need to address that issue in detail. As noted above, this defendant has made little effort to excuse his tardiness with regard to this claim of ineffective assistance of counsel concerning the allegations of coercion. His attempt consists solely of the allegation that he has recently learned of subsequent cases involving Detective Switski, adding no specificity in that regard. As pled, the trial court correctly decided this was insufficient to withstand the motion to dismiss. We further note, however, that Almandarez and Velez were allowed to conduct extensive discovery

with regard to allegations of coercion by the detectives involved in this case and that prior to the dismissal of their petitions and in anticipation of an evidentiary hearing, they listed ten potential live witnesses. Upon remand, this defendant may elect to amend his petition to contend that his constitutional rights were violated by the use of his involuntary statements and that he now has newly discovered evidence to substantiate his claim. While we note that we rejected the State's contention that the evidence supporting Almendarez and Galvan's claims of a pattern and practice of abuse were not newly discovered, we leave it to the trial court to determine that issue in this matter as we will not speculate as to the arguments this defendant will make in that regard.

¶21 In sum, we vacate the dismissal of this defendant’s petition and remand to the circuit court with directions to allow him to amend it by abandoning his ineffective assistance of counsel claim regarding the Velez threats and to allege a free-standing claim of actual innocence and to otherwise amend his petition. The trial court will then proceed with further second-stage proceedings.

¶22 Vacated and remanded with directions