2014 IL App (1st) 123359-U

FIRST DIVISION
October 6, 2014

No. 1-12-3359

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. 96 CR 16902
	)	
LEEONCE RUCKMAN,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: Court did not err in dismissing *pro se* petition for relief from judgment, as it did not err in finding that defendant's new evidence of recantation was unlikely to change the outcome.

¶ 2 Following a jury trial, defendant Leeonce Ruckman was convicted of first degree murder and attempted first degree murder and sentenced to consecutive prison terms of 55 and 10 years. On direct appeal, we modified his sentences to run concurrently but otherwise affirmed. *People v.*

Ruckman, No. 1-98-3991 (2000)(unpublished order under Supreme Court Rule 23). We have also affirmed the summary or *sua sponte* dismissals of defendant's 2001 *pro se* post-conviction petition and 2006 *pro se* petition for relief from judgment. *People v. Ruckman*, No. 1-07-0321 (2007); No. 1-01-4362 (2003)(unpublished orders under Supreme Court Rule 23). Defendant now appeals from the September 2012 dismissal of his second *pro se* petition for relief from judgment. He contends that the dismissal of his petition is erroneous because it diligently raises a claim of actual innocence and because his newly discovered evidence is likely to change the outcome of a retrial.

¶ 3 The trial evidence was that, at about 10:45 a.m. on June 7, 1996, Oscar Gaeta, James Munoz, Darrell (or Darryl) Johnson, and James Szwed were leaving a gasoline station together when defendant asked Gaeta and Munoz if they were in the Latin Dragons street gang. They were, and Munoz replied "Dragon love, King killer," the latter referring to the Latin Kings gang. Defendant replied "LDK" (meaning Latin Dragon Killer) and drew a gun, pointed it at Gaeta and Munoz, and fired three or four shots. Gaeta was struck in the chest by the first shot, while Munoz took cover. As he fired, defendant said "LDK, how do you like this, would you like more?"

¶ 4 Munoz, Szwed, and Maria Stanil, who was at the gasoline station, testified that they saw these events and heard defendant's remarks. They identified defendant as the shooter from an array of six photographs on the day of the shooting and in a lineup the next day; each viewed the lineup separately. On cross-examination, none of the three recalled seeing anything unusual about the shooter's forearms or right hand; defendant had tattoos on his arms. Three .32 caliber spent shell casings were recovered at the scene of the shooting. The bullet removed from Gaeta's body was larger than a .25 and smaller than a .38 caliber bullet so that the medical examiner opined that it was consistent with a .32 caliber bullet though similar sizes could not be ruled out. When defendant was arrested, seven .32 caliber bullets were found in a bag in his pants pocket.

¶ 5 For the defense, Hector Carrizales, Rodrigo Rodriguez, and Rogelio Perez testified that defendant wore an elastic bandage on his right hand in June 1996 so that he was unable to play basketball. Perez also testified that he and his wife played pool with defendant that morning for several hours beginning at about 8 a.m.; defendant played pool with difficulty due to an injury that rendered him unable to close his right hand. However, Carrizales, Rodriguez, and Perez admitted that they and defendant were in the Latin Kings, Carrizales and Rodriguez testified that defendant's nickname was Wesso, and Perez admitted that another Latin Kings member known to himself and defendant had been killed a few days before the shooting at issue so that both of them were "upset." A physician testified that x-rays taken of defendant on June 25, 1996, showed that he had a fracture to his right hand that he sustained anywhere from a week to a year previously.

¶ 6 In rebuttal, Reyes Velasquez testified that a man who identified himself as Wesso played pool in his bar with a man and a woman from after 7 a.m. to about 9:30 a.m. on June 7, 1996, and had nothing visibly wrong with his right hand. While Velasquez earlier identified a photograph of defendant as Wesso, he could not identify anyone in court as Wesso or his male companion.

¶ 7 On direct appeal, defendant contended that the court erred by admitting the bullets found upon his arrest into evidence and by imposing consecutive sentences, while the State conducted improper cross-examination and closing argument. Defendant's 2001 post-conviction petition raised a speedy trial claim and related ineffective assistance claim for counsel not moving for dismissal, and claims that the jury was not adequately instructed on the presumption of innocence or apprised of the unreliability of identification evidence. On appeal therefrom, he added claims that the venire should have been examined on bias against street gangs and impartiality. His 2006 petition raised challenges to his term of mandatory supervised release.

¶ 8 In February 2012, defendant filed the instant *pro se* petition for relief from judgment. He alleged that Johnson had given perjured inculpatory testimony to the grand jury and Szwed had given perjured inculpatory testimony at trial, and that Johnson sent defendant an affidavit "since my trial" while Szwed sent his affidavit to defendant in August 2011. Attached to the petition was Szwed's August 2011 affidavit that he was present for the fatal shooting of Gaeta along with Munoz and Johnson but did not see who committed the shooting, so that he identified defendant as the shooter in a photographic array only because he knew him to be a member of the rival Latin Kings gang. Also attached was Johnson's 2002 affidavit to the same effect, adding that he had not testified at trial because he "couldn't positively say" defendant was the shooter. Both affidavits included an averment that nobody made threats or promises to the affiant to induce the affidavit.

¶ 9 The State moved to dismiss the petition in July 2012, arguing that it was untimely filed and that defendant had not alleged, nor did the record show, any grounds (legal disability, duress, or fraudulent concealment) to overcome that untimeliness.

¶ 10 In September 2012, with the State standing on its motion, the court granted the State's motion and dismissed defendant's petition. The court found that the petition was filed well outside the two-year limitation period but defendant presented evidence of fraudulent concealment in that Johnson and Szwed had initially given false information implicating defendant. However, defendant still had to show diligence in presenting his claim, and the fact that Johnson's affidavit was from 2002 showed a lack of diligence. Moreover, the court found, the new evidence of the Johnson and Szwed affidavits was unlikely to change the outcome at trial because there was "overwhelming" evidence of defendant's guilt even accepting the recantations, in the form of Munoz and Stanil's testimony and the bullets found in defendant's pocket of the same caliber as the

evidence from the crime. The court noted that Johnson had not testified at trial nor was his grand jury testimony used at trial. This appeal timely followed.

¶ 11 On appeal, defendant contends that his petition for relief from judgment should not have been dismissed because it diligently raises a claim of actual innocence and because his newly discovered evidence is likely to change the outcome of a retrial.

¶ 12 Section 2-1401 of the Code of Civil Procedure provides that "[r]elief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section." 735 ILCS 5/2-1401(a) (West 2012). To be entitled to relief under section 2-1401, a defendant must make specific factual allegations supporting (1) the existence of a meritorious defense or claim, (2) due diligence in presenting that defense or claim in the original proceeding, and (3) due diligence in filing the section 2-1401 petition. *People v. Dodds*, 2014 IL App (1st) 122268, ¶ 18, citing *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). A section 2-1401 "petition must be filed not later than 2 years after the entry of the order or judgment. 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 2 years." 735 ILCS 5/2-1401(c) (West 2012). To show fraudulent concealment, the defendant must make specific factual allegations demonstrating an affirmative attempt to prevent discovery of the alleged grounds for relief, and demonstrating his good faith and reasonable diligence in attempting to discover such matters before trial or within the limitation period. *Dodds*, 2014 IL App (1st) 122268, ¶ 19. We review *de novo* the dismissal without an evidentiary hearing of a section 2-1401 petition. *People v. Garza*, 2014 IL App (4th) 120882, ¶ 18, citing *Vincent*, 226 Ill. 2d at 18.

¶ 13 A petition presents a claim of actual innocence where there is evidence that is (1) newly discovered, (2) material and not merely cumulative, and (3) of such conclusive character that it

would probably change the result on retrial. *People v. Henderson*, 2014 IL App (2d) 121219, ¶ 24. Evidence is newly discovered if it was unavailable at trial and could not have been discovered sooner through due diligence. *Id*., ¶ 33.

¶ 14 Here, the circuit court could reasonably conclude that defendant had Johnson's affidavit long before he filed the instant petition: Johnson's affidavit was from 2002, and defendant alleged vaguely that Johnson sent him the affidavit "since my trial." However, Johnson did not testify at trial despite being at the shooting (which is consistent with his averment that he could not make a positive identification then) so that a diligent defendant could conclude that his affidavit would not be the basis of a successful claim. By contrast, Szwed did testify against defendant at trial, identifying him as the shooter. He signed his affidavit in August 2011, and defendant alleged that Szwed sent him the affidavit that same month. We respectfully disagree with the circuit court and find that defendant was sufficiently diligent in filing his petition in February 2012.

¶ 15 That said, the key fact about the affidavits of Szwed and Johnson is that neither avers that defendant is *not* the shooter: Szwed avers that he did not see who shot Gaeta, and Johnson avers that he could not at the time of trial and cannot now identify the shooter. Thus, in a new trial with Szwed and Johnson testifying consistently with their affidavits as we must presume at this stage, they add very little to the impeachment of the key eyewitness testimony of Munoz and Stanil already raised unsuccessfully at trial. It does not follow inherently from the new admission by Szwed and Johnson, that they identified defendant only because he was a Latin King member, that Munoz did the same: neither avers that he was directed to, or agreed with anyone to, give false identifications. The jury knew of Munoz's gang membership that gave him motive to implicate defendant as member of a rival gang, and moreover no evidence then or now ties Stanil to either of the gangs in this case. The affidavits of Szwed and Johnson also add nothing to the impeached

defense evidence of alibi and physical inability. On this record, and again accepting the affidavits of Szwed and Johnson at face value, the circuit court did not err in concluding that the new evidence was unlikely to change the outcome at a retrial. Its dismissal of the petition was therefore not erroneous.

¶ 16 Accordingly, the judgment of the circuit court is affirmed.

¶ 17 Affirmed.