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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 90 CR 24789
)	
ROBERT ORNELAS,)	
)	The Honorable
Defendant-Appellant.)	Nicholas Ford,
)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* circuit court order denying the defendant's *pro se* motion for forensic testing results filed pursuant to section 116-3 of the Illinois Code of Criminal Procedure of 1963 (725 ILCS 5/116-3 (West 2014)) affirmed where defendant failed to present a *prima facie* case that testing was warranted. Even if defendant could satisfy the statute's *prima facie* case requirement, postconviction forensic testing would not produce any new, noncumulative evidence materially relevant to a claim of actual innocence.

¶ 2 Defendant Robert Ornelas appeals the circuit court's denial of his *pro se* motion for forensic testing results filed pursuant to section 116-3 of the Illinois Code of Criminal Procedure

of 1963 (Criminal Code) (725 ILCS 5/116-3 (West 2014)). For the reasons explained herein, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4

The Crime

¶ 5

This appeal stems from the November 11, 1990, shooting deaths of Jay Mosqueda and Robert Cheeks. The men were shot in the face and neck with a shotgun while they were seated in a vehicle located near the area of 104th Street and Calhoun, in Chicago.

¶ 6

Circumstances Leading to Defendant's Arrest

¶ 7

On November 15, 1990, several days after the crime, an Illinois State Trooper responded to a call about a fight in progress at a White Hen store located in Frankfort, Illinois. Defendant was present at location and was in the company of three other men. All of the men appeared to be under the influence of drugs. Although defendant was not found with narcotics or contraband on his person, he was arrested along with the other men. After the men were taken into police custody, one of them informed an investigating officer that defendant had been involved in a recent shooting in Chicago. In response to questioning about his involvement in a shooting, defendant admitted to shooting Mosqueda and Cheeks, but alleged that he had done so in self-defense. According to defendant, Mosqueda used to beat him up when they were both younger and was a member of a rival gang. Defendant explained that he fired his shotgun into their vehicle because he believed that they were going to run over him with their car. Following his statement, defendant was charged with the first degree murder of Mosqueda and Cheeks. At the

time of his arrest, defendant was wearing a dark colored sweatshirt.¹ It was inventoried in accordance with police protocol.

¶ 8

PreTrial and Trial Proceedings

¶ 9

After being formally charged with the murder of Mosqueda and Cheeks, but prior to trial, defendant filed motions to quash his arrest and suppress his statement. In the motion to suppress, defendant argued that suppression of his inculpatory statement was warranted because he was under the influence of narcotics at the time he confessed to the crime, and as a result he did not have the capacity to waive his *Miranda* rights or give a voluntary statement. The motion also contained an allegation that defendant's statement was involuntary because it was obtained as a result of physical, psychological, and mental coercion. The cause proceeded to a hearing on the motion, where the circuit court heard evidence about the circumstances that led to defendant's arrest and his statement. After considering the evidence, the circuit court denied defendant's motion to suppress his statement, finding that defendant was coherent at the time he made his statement and that the statement was voluntarily given.

¶ 10

Following the circuit court's ruling on defendant's pretrial motions, defendant elected to waive his right to a jury trial and proceeded by way of a bench trial. At trial, defense counsel relied on a self-defense strategy and argued that defendant's statement showed that he only fired his weapon because he feared that Mosqueda and Cheeks were going to run him over with their vehicle. After considering the evidence, however, the circuit court was not persuaded that defendant had acted in self-defense; rather, the court convicted defendant of first degree murder and sentenced him to natural life imprisonment in the Illinois Department of Corrections.

¹ The item of clothing is described in the record as a sweatshirt. The briefs filed by the parties on appeal also refer to the item of clothing defendant was wearing at the time of his arrest as a sweatshirt. As will be discussed below, however, defendant refers to this item of clothing as a sweater in his *pro se* motion filed pursuant to section 116-3 of the Criminal Code. For the sake of consistency and clarity, we will refer to the item of clothing as a sweatshirt.

¶ 11

Direct Appeal

¶ 12

Defendant appealed his conviction and sentence. On appeal, defendant argued that the circuit court erred in denying his pretrial motions to quash his arrest and suppress his statement. He also challenged the sufficiency of the evidence, arguing that he was not proven guilty of first degree murder because he acted in self-defense. In a written opinion, this court rejected defendant's claims of error and affirmed his conviction. *People v. Ornelas*, 295 Ill. App. 3d 1037 (1998). In pertinent part, we rejected defendant's sufficiency of the evidence claim, concluding that "a rational tier of fact could have concluded that defendant did not act in self-defense." *Id.* at 1049.

¶ 13

Postconviction Proceedings

¶ 14

After his conviction was upheld on direct appeal, defendant filed a petition for postconviction relief, and an amendment thereto, in accordance with the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)). In his filings, defendant alleged that he was denied his constitutional right to effective assistance of trial and appellate counsel. Defendant argued, in pertinent part, that his trial attorney rendered ineffective assistance when he failed to call witnesses and present evidence at the hearing on defendant's motion to suppress that would have shown that defendant's statement was the result of physical abuse, inflicted by two detectives, one of whom was identified as a "player" in the report authored by Michael Goldston (Goldston Report) about the systemic physical abuse of suspects by Area 2 personnel under the tenure of Chicago Police Lieutenant Jon Burge from May 1973 to October 1986. Defendant further argued that appellate counsel was ineffective for failing to raise this argument on appeal.

¶ 15 The cause ultimately proceeded to a third-stage evidentiary hearing, where the circuit court heard from a number of witnesses, including defendant and his trial attorney. At the conclusion of the hearing, the circuit court denied defendant’s petition for postconviction relief. In doing so, the court found defendant’s testimony “not credible” and concluded that he “failed to identify ineffective assistance” of trial counsel. Given defendant’s failure to show that trial counsel was ineffective, the circuit court necessarily concluded that appellate counsel was not ineffective for failing to challenge trial counsel’s representation on appeal.

¶ 16 Defendant subsequently appealed the circuit court’s denial of his petition for postconviction relief, and in an unpublished order, this court affirmed the circuit court’s ruling. *People v. Ornelas*, 2012 IL App (1st) 102100-U. In doing so, we found it significant that defendant’s trial attorney had testified that he was well aware of past Area 2 abuse and had specifically inquired about defendant’s treatment at the hands of the Chicago detectives; however, defendant had denied such abuse. *Id.* ¶ 83. Moreover, the type of abuse defendant claimed he suffered in his petition for postconviction relief differed significantly from the types of abuse documented in the Goldston Report. *Id.* ¶ 88.

¶ 17 Section 116-3 Motion

¶ 18 Thereafter, on August 28, 2014, defendant filed his *pro se* motion pursuant to section 116-3 of the Criminal Code. In his motion, entitled “Motion for Integrated Ballistic Identification System, or Forensic Testing Results,” defendant alleged the following:

- (1) That Petitioner is presently incarcerated at Stateville C.C. at P.O. Box 112; Joliet, Illinois 60434-0112.

(2) that upon November 15, 1990 Petitioner was arrested in Frankfort Illinois for first degree murder, and on October 22, 1996 Petitioner was sentenced to life natural by Judge Ralph Reyna.

(3) [O]n November 15, 1990 Petitioner's sweater was seized for ballistic test and was given Inv. #809969, Tr-10 showing chain of custody,

(4) In the year of 1994 petitioner's sweater again was sent out to be tested by the State's crime lab. See Tr-499.

(5) Petitioner transcript records are silent of the State's findings.

(6) Petitioner has contacted numerous Agencies [*sic*] in hopes to obtain the results. See exhibit B, Atty. Gen. Lisa Madigan, Chgo. Police Depart., Cook County State's Atty. Anita Alvarez, and State Police Crime Lab...

(7) Both Public Defender's and the State's files of Petitioner mysteriously came up missing—vanished from their storage areas.”

¶ 19 Defendant urged the circuit court to grant his request “for the results of the Ballistic Tests*** in hopes of the invests [*sic*] of the interests of the public.” Attached to his motion were copies of the letters sent to various agencies requesting results and transcripts of the record in which the parties discussed the fact that his sweatshirt had been sent out for forensic testing.

¶ 20 In a detailed written order, the circuit court denied defendant's 116-3 motion. The court explained its rationale as follows:

“In the instant case, petitioner's request is not proper and, even if construed to be applicable, fails under section 116-3. Petitioner requests results of testing already conducted. In support of his motion, he attaches Freedom of Information Act letters of request to multiple agencies to attest to his previous efforts to obtain the results.

Petitioner does not request additional testing utilizing a method not scientifically available at the time of trial. Paragraph (a) of the statute requires that either the evidence was not subject to testing or can be subjected to additional testing not previously available. Obtaining the results of previously conducted tests is not provided for by Section 116-3; therefore, petitioner's motion for forensic testing results under Section 116-3 is not proper.

Furthermore, an alternative construction of petitioner's motion, interpreting it as a request for additional testing, does not allow the granting of his motion because he fails to sufficiently allege facts which would establish a prima facie case as required by Section 116-3(b). *** In petitioner's case, he made a confessional statement to investigating officers, declaring that he shot the victims in self-defense. His direct appeal and post-conviction petition reflect petitioner's consistent raising of the issues regarding his statement and contention of self-defense; however, do not assert any issues of identification. In the instant motion, petitioner alleges unreliable witness testimony was presented during trial and asserts that the State's case against him depended on the word of a fellow arrestee on an unrelated offense. Petitioner does not effectively show that identify was at issue during trial. He simply questions the reliability of witnesses who testified indicating he was guilty of shooting the two victims. Petitioner's speculative assertions, in contradiction to his earlier claims of self-defense, are insufficient to establish that identity was at issue during his trial. Petitioner's failure to demonstrate that identity was at issue during trial defeats presentment of a prima facie case as required by 725 ILCS 5/116-3(b), therefore, his motion must be denied."

¶ 22

ANALYSIS

¶ 23

On appeal, defendant submits that the circuit court erred in denying his motion filed pursuant to section 116-3 of the Criminal Code. He argues, in pertinent part, that he is entitled to forensic testing on the sweatshirt that was seized at the time of his arrest because the identity of the perpetrator of the crime is at issue and his motion met the pleading requirements of the postconviction forensic testing statute.

¶ 24

The State, in turn, responds that the circuit court's denial of defendant's section 116-3 motion was "proper" because he is unable to establish a *prima facie* case required under the statute to obtain postconviction forensic testing. Namely, defendant cannot establish that the identity of the perpetrator was at issue during his trial because defendant confessed to the crime and proceeded with a self-defense theory at his bench trial.

¶ 25

Section 116-3 of the Criminal Code was enacted to "provide an avenue for convicted defendants who maintained their innocence to test available [forensic] material capable of producing new and dramatic evidence materially relevant to the question of innocence." *People v. Urioste*, 316 Ill. App. 3d 307, 310 (2000). Because the right to forensic testing under section 116-3 "is a legislatively created right" (*People v. O'Connell*, 227 Ill. 2d 31, 37 (2007)), a defendant is required to show that he satisfies the specific "prerequisites" set forth in the statute in order obtain postconviction forensic testing (*People v. Smith*, 2014 IL App (1st) 113265, ¶19). The circuit court's ruling on a 116-3 motion for postconviction forensic testing is subject to *de novo* review. *People v. Stoecker*, 2014 IL 115756, ¶ 21; *People v. Grant*, 2016 IL App (3d) 140211, ¶ 14.

¶ 26

Section 116-3, in its current form, provides, in pertinent part, as follows:

“§ 116-3. Motion for fingerprint, Integrated Ballistic Identification System, of forensic testing not available at trial or guilty plea regarding actual innocence.

(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint, Integrated Ballistic Identification System, or forensic DNA testing, including comparison analysis of genetic marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5-4-3 of the Unified Code of Corrections, on evidence that was secured in relation to the trial or guilty plea which resulted in his or her conviction, and:

- (1) was not subject to the testing which is now requested at the time of trial; or
- (2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. Reasonable notice of the motion shall be served upon the State.

(b) The defendant must present a prima facie case that:

- (1) identity was the issue in the trial or guilty plea which resulted in his or her conviction; and
- (2) the evidence to be tested 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 respect.

(c) The trial court shall allow testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence (i) materially relevant to the defendant's assertion of actual innocence when the defendant's conviction was the result of a trial, even though the results may not completely exonerate the defendant; or (ii) that would raise a reasonable probability that the defendant would have been acquitted if the results of the evidence to be tested had been available prior to the defendant's guilty plea and the petitioner had proceeded to trial instead of pleading guilty, even though the results may not completely exonerate the defendant; and

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3 (West 2014).

¶ 27 As a threshold matter, we note that the statute provides for forensic testing in two limited circumstances. That is, pursuant to section (a)(1), a defendant can seek to have testing performed on evidence not previously subjected to prior testing or, pursuant to section (a)(2), a defendant may seek to have evidence that was subjected to prior testing retested using a method that was not scientifically available at the time of trial, which has a reasonable likelihood of producing more probative results. 725 ILCS 5/116-3(a)(1), (a)(2) (West 2014); see also *People v. Kines*, 2015 IL App (2d) 140518, ¶ 20 (section (a) "distinguishes between evidence that has previously undergone [forensic] testing and evidence that has never been tested"). Defendant's motion, however, entitled "Motion for Integrated Ballistic Identification System, or Forensic Testing Results," does not request testing provided for in either section (a)(1) or (a)(2) of the

statute; rather, it simply requests results of testing that was already conducted on his sweatshirt.² Indeed, the record contains several references regarding the fact that the sweatshirt defendant was wearing at the time of his arrest was sent for forensic testing to determine if it tested positive for the presence of any blood or gunshot residue. As defendant notes, however, the record is silent as to the results of the testing, and neither the results nor the sweatshirt were introduced at trial. Although this explains the rationale behind defendant's request for testing "results," the circuit court correctly observed that the type of relief that defendant is seeking in his *pro se* motion is not the type of relief provided for by section 116-3 of the Criminal Code. The circuit court's denial of defendant's 116-3 motion, on this basis alone, was thus proper. Nonetheless, even if we could construe defendant's motion as a proper request for forensic testing under section (a) of the statute, we would nonetheless find that the circuit court properly denied his motion because he cannot satisfy the *prima facie* case requirement set forth in section (b) of the statute.

¶ 28 Section (b) of the statute requires a defendant seeking postconviction forensic testing pursuant to either section (a)(1) or (a)(2), to present a *prima facie* case that: (1) identity was an issue at his trial and (2) the evidence to be tested 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 respect. 725 ILCS 116-3(b) (West 2014); *People v. Smith*, 2014 IL App (1st) 113265, ¶ 22. "When the legislature required a showing that identity was the issue at the trial that led to the conviction, it sought to guard against frivolous requests by limiting the remedy to those cases where identity was truly at issue, cases where the use of new technology could test properly

² In his appellate brief, defendant suggests that his sweatshirt was "apparently never tested," in an effort to satisfy section (a)(1) of the statute; however, defendant's claim on appeal is belied by his own motion as well as the record, which contains multiple references to the fact that the sweatshirt was sent out for forensic testing and that the parties were awaiting the results.

preserved [evidence] to either confirm or decidedly negate other identification evidence that produced the conviction.” *Urioste*, 316 Ill. App. 3d at 313. For purposes of the statute, identity is deemed to have been “at issue” in a criminal trial when the perpetrator’s identity was “disputed or in question.” *Grant*, 2016 IL App (3d) 140211, ¶ 18; see also *People v. Hockenberry*, 316 Ill. App. 3d 752, 756 (2000) (“Customarily, when courts speak of ‘identity’ in a criminal case, they are referring to whether the defendant was indeed the perpetrator or whether somebody else committed the crime”). “A defendant makes a sufficient showing that identity was an issue at trial when he denied committing the crime at trial.” *Grant*, 2016 IL App (3d) 140211, ¶ 18. Where, however, “a defendant contests guilt based upon *self-defense*, compulsion, entrapment, necessity or a plea of insanity, identity ceases to be an issue,” and he may not later avail himself of postconviction forensic testing under section 116-3 of the Criminal Code. (Emphasis added.) *Urioste*, 316 Ill. App. 3d at 316.

¶ 29 Here, there is no dispute that defendant confessed to the crime and proceeded with a self-defense theory at trial. Therefore, the identity of the perpetrator was not in issue at defendant’s trial, and he is unable to satisfy section 116-3’s first *prima facie* case requirement. *Id.* Defendant, however, suggests that the identity of the perpetrator became a material issue in this case when he filed a postconviction petition alleging that his confession was the result of physical abuse. Because his “post-conviction proceedings have put identity at issue,” defendant argues that he has satisfied the statute’s identity requirement. Defendant’s argument, however, fails to accord with the plain language of the statute, which expressly provides that in order for a defendant to obtain testing, he must establish a *prima facie* case that “identity was the issue *in the trial* *** which resulted in his or her conviction.” (Emphasis added.) 725 ILCS 5/113-3(b)(1) (West 2014).

¶ 30 In an effort to circumvent the plain language of the statute, defendant observes that the statute was recently amended in 2014 and “expanded the scope of who is entitled to forensic testing.” Pub. Act 98-0948 (eff. August 15, 2015). Prior to the 2014, only defendants convicted of offenses following a trial in which the identity of the perpetrator was at issue were able to seek relief under the statute and defendants who entered guilty pleas were precluded from obtaining postconviction forensic testing pursuant to section 116-3 of the Criminal Code. See *O’Connell*, 227 Ill. 2d at 37 (concluding that under the prior version of the statute, “defendants who plead guilty may not avail themselves of section 116-3” because “[t]hose defendants are a separate group who have not contested identity at trial”). In recognition that an individual may plead guilty to a crime, notwithstanding his or her innocence, in order to obtain lesser charges or a reduced sentence, the statute was amended in 2014 and now permits defendants who can show that “identity was the issue *in the trial or guilty plea* which resulted in his or her conviction” to seek postconviction forensic testing. (Emphasis added.) 725 ILCS 5/116-3(b)(1) (West 2014). Although we agree with defendant that the 2014 amendment expanded the scope of individuals who may seek postconviction forensic testing, we disagree that the amendment has any impact on the case at bar because, simply put, defendant did not plead guilty. Instead, defendant proceeded to trial, where he argued that he acted in self-defense and the identity of the perpetrator was not put in issue. Because identity was not at issue in defendant’s trial, he cannot satisfy the first element of the statute’s *prima facie* case requirement. Therefore, we conclude that the circuit court properly denied defendant’s 116-3 motion.

¶ 31 We emphasize, however, that even if defendant could satisfy the statute’s *prima facie* case requirement and establish that identity was at issue at trial and that the sweatshirt was subject to a proper chain of custody, any testing of the sweatshirt would not provide any new

noncumulative evidence materially relevant to any assertion of actual innocence as required by section (c) of the statute. 725 ILCS 5/116-3(c)(1)(i) (West 2014). “Evidence which is ‘materially relevant to a defendant’s claim of actual innocence is simply evidence which tends to significantly advance that claim.” *People v. Savory*, 197 Ill. 2d 203, 213 (2001); see also *Kines*, 2015 IL App (2d) 140518, ¶ 31. This determination requires an analysis of the evidence introduced at trial as well as the evidence subject to the 116-3 motion. *People v. Johnson*, 205 Ill. 2d 381, 396 (2002); *People v. Navarro*, 2015 IL App (1st) 131550, ¶ 13. In this case, the sweatshirt at issue was recovered from defendant four days after the shooting. There is no evidence that defendant was wearing that same article of clothing on the date of the crime or that testing on the sweatshirt could yield any relevant results relating to the crime. The sweater was not introduced into evidence at trial and played no role in defendant’s conviction. Rather, the State relied on defendant’s confession, which he did not dispute as being accurate at trial, and testimony from a friend of his about his involvement in a recent shooting. Therefore, even if defendant could satisfy the statute’s prerequisites to be eligible for postconviction forensic testing, any such testing would not provide any materially relevant evidence. Therefore, the circuit court’s denial of defendant’s 116-3 motion was proper.

¶ 32

CONCLUSION

¶ 33

The judgment of the circuit court is affirmed.

¶ 34

Affirmed.