2019 IL App (2d) 161080-B
No. 2-16-1080
Order filed October 16, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRIAN P. HARTLEP, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Jo Daviess County. No. 13-CF-43 Honorable William A. Kelly, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in denying defendant's section 2-1401 petition based on newly discovered evidence, as defendant could have discovered the evidence before trial through the exercise of due diligence.

¶ 2 In 2015, defendant, Brian P. Hartlep, was convicted of theft (720 ILCS 5/16-1(a)(1)(A) (West 2012)). He appeals the trial court's denial of his petition filed under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)) based on newly discovered evidence. The trial court found that defendant failed to exercise due diligence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 2013, defendant was charged with two counts of theft in connection with his installation of a furnace paid for by his employer in an apartment owned by his former attorney, Philip Jensen. In October 2015, a jury trial was held.

¶ 5 Evidence at trial showed that defendant was the maintenance manager at the Apple Canyon Lake Property Owners Association (Apple Canyon). In January 2012, defendant submitted a purchase order to Paula Lange, Apple Canyon's general manager, that included a wall furnace. No building at Apple Canyon used that type of furnace and it was not among materials needed for any projects at Apple Canyon. The furnace was later found installed in Jensen's apartment.

¶ 6 Lange testified under a cooperation agreement with the State releasing her from liability for any criminal offenses involving Apple Canyon after February 2006. She testified that she approved the purchase order that included the wall furnace and she believed that all of the materials were going into an Apple Canyon renovation project. She said that she did not give defendant permission to purchase the furnace for Jensen's apartment and that she never approved the use of Apple Canyon funds for personal purchases. She had no conversation with Jensen about installing the furnace in his apartment.

¶ 7 Jensen testified that he was Apple Canyon's attorney and had been defendant's attorney and that he owned a building in which he was doing renovation. Defendant owed Jensen legal fees and asked to work them off by working at the apartment. Jensen paid for some materials but believed that defendant paid for most of them. Jensen testified that he did not know where the furnace came from or how much it cost. He also said that he never agreed to reimburse Apple Canyon for it.

¶ 8 Defendant testified that, in January 2012, Jensen hired him to remodel the apartment to pay off outstanding legal fees. The apartment needed a new furnace. Defendant told Jensen that Apple Canyon was ordering equipment for a renovation project and he would see if he could add on the furnace in order to get a discount and free shipping. Defendant called Lange on a speaker phone in the presence of his fiancée, Julie Klar, and asked if he could order the furnace though Apple Canyon's renovation project and have Jensen reimburse Apple Canyon for it. According to defendant, Lange approved it. The furnace was shipped to Apple Canyon, and defendant took it and had it installed in the apartment. Defendant believed that Jensen had paid Apple Canyon for the furnace until defendant was arrested. Defendant then sent a cashier's check to Apple Canyon for the furnace, but Apple Canyon did not cash the check. Klar testified and corroborated defendant's testimony about the phone call to Lange.

¶ 9 Defendant also testified that he met with Lange after he was charged and she told him that she thought he did nothing wrong and that she had given him permission to buy the furnace. Klar testified that, during the meeting, defendant called her and she spoke to Lange, who told her the same thing.

¶ 10 The jury found defendant guilty, and he was sentenced to one year of probation and periodic imprisonment. In June 2016, defendant filed his section 2-1401 petition. He alleged that two people who were working for him during the apartment renovation overheard conversations between himself and Jensen in which Jensen agreed to pay for the furnace. He alleged that he did not find out that the conversations were overheard until after trial and attached as an exhibit a transcript of his attorney's investigator's interview of them. He did not make any allegations concerning pretrial attempts to interview anyone associated with work done to the apartment.

¶ 11 In October 2016, an evidentiary hearing was held. Andrew England testified that he was married to defendant's niece and saw defendant about six times per year at family gatherings. Since August 2014, he also worked at the same place as defendant and occasionally saw defendant there. England served in the military between 2012 and 2013, but after that he was gone for only two periods of about a month each between 2013 and 2015. England worked for defendant on the apartment renovation and said that he overheard three conversations between defendant and Jensen about the furnace and Jensen's agreement to pay for it. England told defendant about overhearing the conversations in the summer of 2016 when defendant was talking about the case at a family gathering. England admitted that he read about the case in the paper in 2013 when he arrived home from military service but did not talk to defendant about it because he did not want to interfere in defendant's business. After England told defendant about overhearing the conversations, he spoke to defendant's investigator about it, but he did not answer requests from the police for him to contact them.

¶ 12 Bart Cruse testified that, in 2012, defendant was friends with his sister. Cruse worked for defendant on the apartment and testified that he told defendant and Jensen that he could get a new furnace through a supply house that he used, but they discussed how they could get a better deal by going through Apple Canyon. Cruse later installed the furnace in the apartment. Cruse had moved multiple times and changed his phone number after working at the apartment. In late 2015, Cruse ran into defendant at a grocery store and they talked about defendant getting Cruse's son an interview at defendant's place of employment. Sometime after that, the conversation between Cruse, defendant, and Jensen was brought up, and Cruse spoke to defendant's investigator.

¶ 13 Defendant testified that he did not discuss the matter with England and Cruse because he did not know that they overheard his conversations with Jensen. Jensen testified that he did not have any conversations with defendant about purchasing the furnace through Apple Canyon and that he did not know England or Cruse.

¶ 14 The trial court found that defendant failed to meet his burden to prove that he exercised due diligence in discovering the new evidence. Accordingly, the court denied the petition, and defendant appealed. Although the appeal was initially dismissed for lack of jurisdiction, the supreme court issued a supervisory order, directing us to treat the appeal as validly filed. *People v. Hartlep*, No. 125043 (Ill. July 23, 2019) (supervisory order).

¶ 15 II. ANALYSIS

¶ 16 Defendant contends that the trial court abused its discretion by denying his petition. The State contends that the trial court properly found that defendant failed to show due diligence and that the evidence merely discredited or impeached witnesses. We agree that the trial court did not abuse its discretion when it found that defendant failed to show due diligence.

¶ 17 "[N]ewly discovered evidence warrants a new trial when: (1) it has been discovered since the trial; (2) it is of such a character that it could not have been discovered prior to the trial by the exercise of due diligence; (3) it is material to the issue but not merely cumulative; and (4) it is of such a conclusive character that it will probably change the result on retrial." *People v. Williams*, 295 Ill. App. 3d 456, 462 (1998). "Motions for new trial on grounds of newly discovered evidence are not looked upon favorably by the courts and should be subject to the closest scrutiny." *Id.* "[T]he denial of a motion for a new trial based on newly discovered evidence will not be disturbed on appeal absent an abuse of discretion." *Id.* Likewise, a trial court's decision to deny relief under section 2-1401 will not be disturbed absent an abuse of

discretion. *Warren County Soil & Water Conservation District. v. Walters*, 2015 IL 117783, ¶ 51.

¶ 18 "[A] defendant seeking relief on the basis of newly discovered evidence bears the burden of demonstrating 'that there has been no lack of due diligence on his [or her] part.' " *People v. Wingate*, 2015 IL App (5th) 130189, ¶ 26 (quoting *People v. Harris*, 154 Ill. App. 3d 308, 318 (1987)). This is consistent with the requirement that newly discovered evidence must be evidence that was discovered after trial that the defendant could not have discovered sooner through due diligence. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). Even when there has been an evidentiary hearing, the failure to exercise due diligence in discovering the evidence before trial is sufficient alone to deny a new trial without reaching the issue of whether the evidence otherwise would have warranted a new trial. *People v. Son*, 111 Ill. App. 3d 273, 283 (1982).

¶ 19 " '[D]ue diligence assumes at least some level of deductive reasoning *in an active effort* to discover evidence based on the knowledge and information already possessed by litigants[.]' ([E]mphasis added)." *People v. Barnslater*, 373 Ill. App. 3d 512, 526 (2007) (quoting *Schlicht v. United States*, No. CIV03-1606 PHX RCB, 2006 WL 229551, at *2 (D. Ariz. Jan. 30 2006)). Thus, where witnesses were employees of the defendant, the court held that the defendant could have discovered the evidence if due diligence were exercised. *Halka v. Zupan*, 68 Ill. App. 3d 616, 620 (1979).

¶ 20 Here, while defendant presented evidence that the witnesses failed to come forward before trial and might have been difficult to locate at times, he made no allegations about his independent efforts to find them. Both witnesses worked for defendant at the apartment during times when Jensen was present and, in the case of Cruse, even took part in the alleged conversation. Thus, defendant had reason to know that they might have overheard or actually

taken part in defendant's conversations with Jensen. Yet, defendant, who also had personal connections to both witnesses, employed an attorney, and later had an investigator look into the matter, presented no evidence that he attempted to discover what those witnesses might have heard before trial. The material point is not that the evidence came to defendant's knowledge after trial; it is that the evidence could have been procured earlier through due diligence. See *O'Malley v. Illinois Publishing & Printing Co.*, 194 Ill. App. 544, 557 (1915). This is especially true when the same agencies that discovered the evidence after trial were available to defendant before trial. See *id.* Under these circumstances, it was reasonable for the trial court to find that defendant failed to meet his burden to prove that he exercised due diligence in discovering the evidence. Accordingly, the court did not abuse its discretion when it denied his petition.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, the judgment of the circuit court of Jo Daviess County is affirmed.

¶ 23 Affirmed.