2013 IL App (3d) 110217-U

Order filed January 7, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-11-0217
	)	Circuit No. 06-CF-178
CRAIG DAVIS,	)	
	)	Honorable Glenn H. Collier,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Wright and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred when dismissing defendant's postconviction petition at the second stage. The petition makes a substantial showing of actual innocence and, as such, this matter should proceed to a third stage evidentiary hearing. Reversed and remanded.

¶ 2 A Peoria County jury convicted defendant, Craig Davis, of criminal sexual assault (720 ILCS 5/12-13(a)(2) (West 2006)) for which the Peoria County circuit court sentenced him to ten

years' imprisonment. This court affirmed defendant's conviction on direct appeal. *People v. Davis*, No. 3-07-0384 (unpublished order pursuant to Supreme Court Rule 23). Defendant filed a postconviction petition, which the trial court dismissed. Defendant appeals that dismissal, claiming his case should have proceeded to an evidentiary hearing as his petition made a substantial showing of actual innocence.

¶ 3 BACKGROUND

¶ 4 On February 15, 2006, the State charged the defendant by information with two counts of criminal sexual assault. In count I, the State alleged that defendant committed criminal sexual assault by knowingly committing an act of sexual penetration upon B.T. by the use of force, a Class 1 felony. 720 ILCS 5/12--13(a)(1) (West 2006). In count II, the State alleged the defendant committed criminal sexual assault by engaging in intercourse with her knowing that she was unable to give consent, a Class 1 felony. 720 ILCS 5/12--13(a)(2) (West 2006).

¶ 5 The defendant's jury trial commenced on March 20, 2007. B.T., who was 17 years old at the time of the incident, testified. She noted that on February 13, 2006, she lived with her son, Avenya Davis, a close family friend, Avenya's husband Craig Davis, who is the defendant, and Avenya's children. On that day, B.T. worked during the afternoon. She then walked to Avenya's home so she could watch her son and three of Avenya's children that evening. After B.T. returned home, Avenya left with Avenya's oldest son and Candace Howard, another family friend. B.T. was left alone with the children and defendant. B.T. testified that she had a headache, so she took two Vicodin pills around 8 p.m. However, she did not feel better, so at

8:30 p.m., B.T. took three more Vicodin pills. By 8:45 p.m., B.T. felt dizzy, faint and sleepy. B.T. testified that she became concerned about her ability to supervise the children, so she found the defendant in his bedroom and told him that she had ingested five Vicodin pills.

¶ 6 B.T. claimed she then went back into the living room and sat on the couch. The defendant came into the room and told B.T. to get up, but she refused. The defendant pulled her up by her arm and as she glanced at a clock, she noticed it was 9:13 p.m. B.T. testified that she could not move so defendant carried her over his shoulder and brought her into his bedroom. The defendant then removed B.T.'s pants and underpants, but stopped when he heard one of the children causing a commotion. The defendant left the room to attend to the child and B.T. attempted to dress herself. Before she could dress, the defendant came back into his bedroom where the two had sexual intercourse.

¶ 7 B.T. testified that when defendant began sexually assaulting her, she stated, "no, no[,]" but she "couldn't do nothing *** couldn't fight him[.]" Afterwards, the defendant dressed B.T., carried her over his shoulder into the living room and put her on the couch. According to B.T., she was unable to move from the couch where she ultimately lost consciousness. The next thing B.T. remembered was Candace Howard, the family friend, sitting on the couch and calling her name. B.T. told Howard that defendant "raped [her]." B.T. testified that she lost consciousness again and did not regain consciousness until sometime after she had been taken to the hospital.

¶ 8 Howard testified that on the night in question, Avenya called her and said that the defendant was going to pick up Howard and bring her to Avenya's home. The defendant arrived

to pick her up between 9 and 9:30 p.m. According to Howard, the defendant explained to her that B.T. had taken five Vicodin and "we weren't going to call the police because we [didn't] want to get DCFS involved."

¶ 9 When Howard arrived at Avenya's home, she noticed that B.T. looked "placed" on the couch in the living room and was asleep. Howard attempted to wake B.T. up by turning on fans and placing a cold compress on her face. After 10 or 15 minutes, Howard successfully roused B.T. According to Howard, after sitting on the couch quietly for a few minutes, B.T. leaned towards Howard and stated that the defendant "raped" her. Howard testified that B.T.'s speech was incoherent and she was in and out of consciousness. Howard telephoned B.T.'s mother, Nichelle Green, who arrived shortly thereafter with B.T.'s uncle. According to Green, B.T. could not sit up or be awoken. Since B.T. was unconscious, Green and B.T.'s uncle dragged her from the home and into a car to go to the hospital.

¶ 10 Dr. Dwayne Bernard testified that he examined B.T. at the hospital at 11:25 p.m. on the night of the incident. Dr. Bernard noted that during his initial encounter with B.T., she was incoherent, sleepy, unresponsive and could not answer his questions or follow his commands. After confirming B.T.'s history with a toxicology screen, Bernard administered an antidote that reversed the effects of the Vicodin. B.T. regained coherency and told Bernard that she had ingested five or six Vicodin by 9 p.m. Bernard confirmed that a nurse performed a sexual assault examination of B.T. The exam did not disclose visible trauma related to intercourse, but Bernard explained that visible trauma does not occur in every person who was sexually assaulted.

¶ 11 Dr. Phillip Jobe testified as an expert in neuropharmacology, which is the study of the effects of drugs on the brain and on other parts of the nervous system. He opined to a reasonable degree of medical certainty that on the night of the incident, B.T. overdosed on Vicodin and "would have been impaired at the time of the assault[.]" He further specified that the symptoms of an overdose of Vicodin included a decrease in coordination, unresponsiveness and sleepiness. According to him, B.T. would have started to feel the effects of the Vicodin within 30 to 45 minutes and the effects of the Vicodin would have reached peak levels 60 to 90 minutes after they were ingested.

¶ 12 The parties stipulated that, among other things, deoxyribonucleic acid (DNA) analysis was performed on the clothing B.T. wore on the night in question. The testing revealed the presence of semen. Further DNA testing of the semen revealed that it matched defendant's DNA.

¶ 13 The defendant testified that he had consensual intercourse with B.T. on the night in question as well as on previous occasions. The defendant offered conflicting testimony regarding whether he was aware that B.T. ingested Vicodin that evening. Specifically, the defendant stated that: (1) he did not know that B.T. had taken Vicodin that evening; (2) B.T. told him that she had taken Vicodin because she was trying to kill herself, but defendant did not believe her; and (3) he called Avenya and told her that B.T. had taken five Vicodin pills and had passed out.

¶ 14 According to defendant, B.T. appeared "normal" prior to intercourse. He further testified that during intercourse, she was coherent, "knew exactly what was going on[,]" and did not tell him to stop having intercourse with her. About 30 minutes after they had intercourse, B.T.

appeared to be sleepy and impaired so the defendant called Avenya. He informed Avenya that B.T. had taken five Vicodin pills, "was on the bed passed out" and may have been impaired, and he needed someone to watch the children so he could go to work. The defendant then spoke to Howard, who agreed to watch the children. Before he left the house to pick up Howard, the defendant carried B.T. from his bedroom and put her on the couch. Shortly after 9:30 p.m., the defendant picked up Howard. He told her that B.T. had tried to kill herself, but to refrain from calling the authorities to avoid any DCFS involvement.

¶ 15 The jury found the defendant guilty of both counts of criminal sexual assault. However, under the one-act, one-crime principle, the court entered a conviction on only the second count and imposed a 10-year term of imprisonment. This court affirmed petitioner's conviction on direct appeal. *People v. Davis*, No. 3-07-0384 (unpublished order pursuant to Supreme Court Rule 23).

¶ 16 During the pendency of defendant's direct appeal, he filed a *pro se* postconviction petition, alleging numerous instances of ineffective assistance of counsel. The trial court appointed counsel to represent defendant on December 9, 2008. On March 10, 2010, defendant filed an amended postconviction petition alleging, *inter alia*, a claim of actual innocence supported by affidavits of the victim and Rodney Richmond, a pharmacist from Morgantown, West Virginia.

¶ 17 B.T.'s affidavit states that she became involved in a sexual relationship with defendant in the winter months of 2005 that stretched until the incident of February 13, 2006. She denied the

relationship during her testimony at trial. She noted that it "was customary, when Craig's wife would leave the house, he and I would engage in consensual intercourse." She noted the only element different on the night of February 13, 2006, was the fact that she had consumed five Vicodin tablets making her become "disoriented during the sexual intercourse itself."

¶ 18 The affidavit notes, "I experienced a total blackout and once revived by a roommate, I assumed that Craig and I had got caught in our adulterous affair. Fearing the consequences and embarrassment of my actions, I accused Craig Davis of assaulting me. This is an accusation that I now acknowledge as false ***."

¶ 19 Richmond's affidavit discusses his qualifications as a pharmacist, then concludes that given the fact the victim took two Vicodin tablets a half hour before taking three Vicodin, "it is unreasonable to conclude that [B.T.] was impaired to the point that she was unable to consent to the sexual intercourse that occurred." The State filed a motion to dismiss, which the trial court granted. This appeal followed.

¶ 20 ANALYSIS

¶ 21 Defendant raises two claims of error. Initially, he argues the trial court erred in dismissing his petition, claiming the petition made a substantial showing of actual innocence. Defendant further argues this cause should be remanded "because the record does not contain a supreme court rule 651(c) certificate and does not otherwise show that appointed counsel complied with rule 651(c)."

¶ 22 A. Actual Innocence

¶ 23 We review *de novo* a trial court's decision to dismiss a petition at the second stage of postconviction proceedings. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 24 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2010)) provides a statutory remedy to criminal defendants where substantial violations of their constitutional rights occur at trial. *People v. Eddmonds*, 143 Ill. 2d 501, 510 (1991). The Act is not a substitute for an appeal but, rather, is a collateral attack on a final judgment. *People v. Ruiz*, 132 Ill. 2d 1, 9 (1989). As such, where a petitioner has previously taken an appeal from a judgment of conviction, the ensuing judgment of the reviewing court will bar, under the doctrine of *res judicata*, postconviction review of all issues actually decided by the reviewing court, and any other claims that could have been presented to the reviewing court will be deemed waived. *People v. Edwards*, 2012 IL 111711, ¶ 21. Nevertheless, our supreme court has recognized the right of postconviction petitioners to assert a claim of actual innocence based on newly discovered evidence under the Act. "The conviction of an innocent person violates the due process clause of the Illinois Constitution." *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). *People v. Washington*, 171 Ill. 2d 475, 489 (1996). In *Morgan,* our supreme court stated:

> "To win relief under that theory, the evidence adduced by the defendant must first be 'newly discovered.' That means it must be evidence that was not available at defendant's original trial and that the defendant could not have discovered sooner through diligence. The evidence must also be material and noncumulative. In

addition, it must be of such conclusive character that it would probably change the result on retrial." *Morgan*, 212 Ill. 2d at 154.

¶ 25 To merit a third-stage evidentiary hearing, the postconviction petition and supporting documents must make a substantial showing of a constitutional violation. *People v. Henderson*, 171 Ill. 2d 124, 140 (1996). Defendant claims he has met this burden, arguing his postconviction petition contains newly discovered evidence of actual innocence.

¶ 26 Our supreme court recently commented on a claim of actual innocence as analyzed through the postconviction spectrum. In *People v. Edwards*, 2012 IL 111711, the court stated:

> "The elements of a claim of actual innocence are that the evidence in support of the claim must be "newly discovered"; material and not merely cumulative; and of such conclusive character that it would probably change the result of retrial. [Citations.] We deem it appropriate to note here that the United States Supreme Court has emphasized that such claims must be supported 'with new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial.' [Citation.] The Court added: 'Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.' " *Id*. at ¶ 32

¶ 27 With these principles in mind, we turn to B.T.'s affidavit in which she claims she was of sound mind during the intercourse with defendant, that the intercourse was consensual, and she lied about the encounter in fear that her affair with the married defendant had been uncovered. Undoubtedly, B.T.'s new testimony is of such conclusive character that it would probably change the result on retrial. The question presented, however, is can it be deemed "newly discovered" evidence that is not cumulative? We find it can.

¶ 28 Before engaging in our analysis regarding the new and noncumulative nature of B.T.'s affidavit, we are compelled to address an issue raised by the State. Citing to *People v. Brown*, 169 Ill. 2d 94 (1995), the State contends that "when raising an allegation of false or perjured testimony in trying to establish a constitutional violation, a defendant must allege that the People knowingly used the alleged false testimony, or at the least exhibited some lack of diligence in allowing the testimony to go forward."

¶ 29 *Brown* differs from the case at bar, however, as the sole claim of a constitutional violation in *Brown* stemmed from convicting defendant "based on the false testimony of one of the complaining witnesses." *Id*. at 95. The *Brown* defendant, unlike the defendant herein, made no claim of actual innocence. *Id.* Four months after issuing the *Brown* decision, our supreme court found in *People v. Washington*, 171 Ill. 2d 475 (1996), that "when newly discovered evidence indicates that a convicted person is actually innocent" the person's "procedural and substantive due process" rights are implicated. *Id.* at 487. Therefore, in such instances, "there is footing in the Illinois Constitution for asserting freestanding innocence claims based upon newly

discovered evidence under the Post-Conviction Hearing Act." *Id*. at 489.

¶ 30 It becomes abundantly clear when reading *Brown* and *Washington* that postconviction claims based solely on perjured testimony are not identical to freestanding claims of actual innocence. We are concerned here with the latter. Therefore, as noted above, "relief has been held to require that the supporting evidence be new, material, noncumulative and, most importantly, of such conclusive character as would probably change the result on retrial." (Internal quotation marks omitted.) *Washington*, 171 Ill. 2d at 489.

¶ 31 The State argues that B.T.'s testimony cannot be deemed new or noncumulative as defendant testified that she was conscious and alert during the encounter, that the intercourse was consensual, and that her trial testimony was false. "Evidence is considered cumulative when it adds nothing to what was already before the jury." *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009).

¶ 32 The *Ortiz* court, in holding that the trial court erred in dismissing a postconviction petition, as the petition contained newly discovered evidence of actual innocence, relied heavily on *People v. Molstad*, 101 Ill. 2d 128 (1984). In discussing the applicability of *Molstad* to such situations, the *Ortiz* court noted:

> "This case is similar to *Molstad*, in which the defendant filed a motion for new trial and submitted the affidavits of his five codefendants, all of whom alleged that the defendant was not present during the attack on the victim. [Citation.] At trial, the State offered one eyewitness who testified that defendant was

> present during the crime. None of the codefendants testified because of the risk of self-incrimination. We affirmed the appellate court's decision to vacate defendant's conviction and remanded for a new trial on the basis of the newly discovered evidence. We held that the evidence was not cumulative because it went to 'an ultimate issue in the case: Who was present at the time of the attack ***?' [Citation.] Although the defendant offered alibi testimony at trial, the introduction of the five codefendants' statements at the posttrial stage raised additional questions concerning the trial court's verdict." *Ortiz*, 235 Ill. 2d at 336.

¶ 33 While *Molstad* involved a posttrial motion, as opposed to a postconviction petition brought under the Act (725 ILCS 5/122-1 *et seq.* (West 2010)), *Ortiz* makes it clear that the same path of analysis regarding newly discovered and cumulative evidence used by the *Molstad* court applies to postconviction cases. Despite the fact the *Molstad* defendant testified at trial that he was elsewhere when the crime occurred, the *Molstad* court rejected the State's contention that the codefendants' affidavits were "merely cumulative" even though they corroborated defendant's testimony already before the jury indicating he was not at the scene of the crime.

¶ 34 Similarly, while the defendant herein testified that the encounter with B.T. was consensual and that she was coherent during it, we reject the State's contention that B.T.'s affidavit recanting her testimony to the contrary was merely cumulative and not newly discovered

evidence. Again, evidence "is considered cumulative when it adds nothing to what was already before the jury." *Ortiz*, 235 Ill. 2d at 335.

¶ 35 This case evinces the very model of a proverbial he said/she said scenario. We reject the notion that nothing would be added to "what was already before the jury" by B.T.'s testimony that the encounter was, in fact, consensual and that she was of sound mind during the encounter. We find defendant's petition and supporting documents make a substantial showing of a constitutional violation; that being, a freestanding claim of actual innocence. Therefore, we hold the trial court erred in dismissing the petition at the second stage and remand this matter for a third stage evidentiary hearing.

¶ 36 In doing so, we are mindful of the skepticism with which courts view recantations and make no comment on the veracity of B.T.'s affidavit or original testimony. The *Morgan* court noted, that "recantation of testimony is regarded as inherently unreliable. As a result, the courts will not grant a new trial on that basis except in extraordinary circumstances." *Morgan*, 212 Ill. 2d at 155 (citing *People v. Steidl*, 177 Ill. 2d 239 (1997)). *Morgan* involved the dismissal of a postconviction petition following an evidentiary hearing. The *Morgan* court praised the trial court for being "duly mindful of the law's skepticism of recanted testimony" and went on to note that the "court held an evidentiary hearing at which [the witness recanting his testimony] testified. It observed [the witness's] demeanor and assessed his new testimony against the facts and circumstances previously established at trial. In the end, the court concluded that [the witness's] new testimony was not credible." *Morgan*, 212 Ill. 2d at 155.

¶ 37 To be clear, our reversal is not a directive to the trial court to provide defendant the postconviction relief he seeks. We merely find that the defendant's petition makes a substantial showing of actual innocence and, therefore, he is entitled to an evidentiary hearing. Just as the trial judge did in *Morgan*, it is for the trial court herein to observe the demeanor of witnesses and assess the new testimony against the facts and circumstances previously established at trial prior to determining whether or not to grant or deny the defendant posttrial releif.

¶ 38 B. Rule 651(c) Certificate

¶ 39 Defendant notes that at the time he filed his opening brief with this court, no certificate had been filed by his postconviction counsel as required by Illinois Supreme Court Rule 651(c) (eff. April 26, 2012). Therefore, defendant requests this cause be remanded for proceedings to determine if his counsel complied with Rule 651. Having reversed the order dismissing defendant's petition and remanded for further proceedings, we need not address this issue.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, the order of the circuit court of Peoria County is reversed and this cause remanded.

¶ 42 Reversed and remanded.