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2016 IL App (3d) 140314-U

Order filed March 25, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 13th Judicial Circuit,
)	La Salle County, Illinois,
Plaintiff-Appellee,)	
)	Appeal Nos. 3-14-0314 and 3-14-0336
v.)	Circuit No. 08-CF-213
)	
CALVIN MERRITTE,)	Honorable
)	Howard C. Ryan,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The court did not err in denying defendant's motion for leave to file a successive postconviction petition.

¶ 2 Defendant, Calvin Merritte, appeals from the court's denial of leave to file a successive postconviction petition. Defendant argues that reversal and remand for further postconviction proceedings is warranted because his motion presented a colorable claim of actual innocence. We affirm.

¶ 3

FACTS

¶ 4

At the outset, we note that the facts of this case were previously set forth in detail in defendant's postconviction appeal (*People v. Merritte*, 2013 IL App (3d) 110640-U). We have relied on this previous case, in conjunction with the record, in summarizing the facts relevant to this appeal.

¶ 5

Defendant was charged with one count of criminal drug conspiracy (720 ILCS 570/401, 405.1(a) (West 2008)) and four counts of possession of a controlled substance with intent to deliver (720 ILCS 570/401 (West 2008)). The conspiracy charge named defendant, Clarence Merritte, Michael Goldsmith, Paul Forbes, Michael Thompson, Aaron Flex, Johnny Andrews, Kwame Riddle, Darnell Smith, Melissa Lobb, Shelby Stevens, Joy Forbes, and William Bradley as codefendants. In June 2008, the case proceeded to a bench trial.

¶ 6

Rachel Milby testified that she had known defendant since 2006. Milby purchased heroin from defendant, and in the summer of 2006, defendant asked Milby to work for him as a driver. Milby agreed, and she made 10 to 20 trips where she transported various individuals to drug transaction locations. These individuals included: "Silk"; Flex; Goldsmith; and Clarence. Milby also said that she went with defendant to pick up drugs at Joy's house in Chicago. On one of these trips, Milby helped defendant package drugs. Milby stowed the drugs in her purse, and she and defendant returned to Ottawa where they hid the drugs at locations along the side of the road.

¶ 7

On January 5, 2007, Milby was arrested while she was driving a white van that Goldsmith had registered in her name. At the time, Clarence was a passenger in the van. A subsequent search of Milby's person uncovered 18 bags of heroin. Milby said the heroin came from Goldsmith.

¶ 8 Lindsay Lavalley testified that she had known defendant for two years, and she would call defendant to purchase drugs. After making the call, Lavalley would meet defendant at a location where she gave defendant money in exchange for the drugs. Lavalley estimated that these exchanges occurred 20 times. Lavalley also held drugs in her pants, sold drugs, and drove for defendant. When Lavalley was a driver, defendant or another individual would tell her the destination. At that location, Lavalley gave the drugs to the buyer and took his or her money. When defendant rode with Lavalley on these drug transactions, Lavalley gave the money from the sale to defendant.

¶ 9 On February 19, 2007, Lavalley went to "George's" house on West Jackson Street in Ottawa. Defendant had previously told Lavalley that she could get drugs at this location. Lavalley waited in the car as Mike Rodriguez picked up the drugs. After Rodriguez returned to the car and they left the area, the car was stopped by the police. Lavalley dropped a package of drugs as she exited the car and was placed under arrest.

¶ 10 Gina Genseke testified that on February 20, 2007, she met defendant and two other men at Duffy's Auto Sales in Ottawa. Defendant and the other individuals paid cash for a Buick Century and Chevrolet Suburban. Genseke was the only person with a driver's license, and the vehicles were titled in her name. Genseke drove the Buick a few times, but she predominantly drove her Dodge Neon.

¶ 11 Inspector Robert Nilles testified that he participated in the execution of a search warrant at 1503 West Jackson Street on February 20, 2007. Jorge "George" Hernandez was inside the residence at the time of the search. While searching the house, Paul, defendant, and Brittany Givens drove up in a Buick. Thereafter, Goldsmith, Joshua Glass, and Clarence arrived in a Chevrolet, and Genseke and Thompson drove up in a Dodge. Two other individuals also came

to the house while officers were conducting the search. The search uncovered needles, bags of powder, a scale, drug cutting agents, and a grinder with residue on it. Nilles said that the grinder was used to cut raw cocaine or heroin into less potent products.

¶ 12 Officer James Girton of the La Salle police department testified that he, Nilles, and several other officers executed a search warrant at the home of Joy Forbes in Chicago. Inside of the house, officers detained Joy. According to Girton, Joy said that "Da Hittaz" was a group led by defendant and based out of Ottawa. Other members of the group included Paul and Clarence. Defendant helped pay for Joy's house with money that he got from "the boys in Ottawa," which meant "Da Hittaz." Joy said "the boys" made money selling drugs. During the search, officers found: plastic baggies; two scales, one of which contained drug residue; several drug cutting agents; and rubber gloves. The scale with the drug residue was located in a bedroom which Joy said that defendant used.

¶ 13 Mary Beth Morelli testified that on March 24, 2007, she saw Goldsmith walking along the river bluff. Goldsmith dropped something onto the ground and brushed some leaves over the object. Later that day, Goldsmith returned to the location to look for the item.

¶ 14 Dierdre Sinkler testified that she met defendant in January 2007 while she was trying to buy drugs from an individual that was with defendant. Sinkler said defendant was a member of a group called "Da Hittaz." Sinkler said that the group name frequently came up during her subsequent drug purchases from members of the group. Sinkler explained that the group was all about having sexual intercourse and selling drugs.

¶ 15 On the morning of April 23, 2007, Sinkler received a telephone call from defendant. Defendant said he needed a place to "shake down his dope," and Sinkler told defendant to come

to her parent's house. Defendant went to the basement of the house where Sinkler helped him package heroin. Defendant paid Sinkler in heroin for allowing him to use the house.

¶ 16 Later in the day, Flex asked Sinkler to drive his Buick, and Clarence gave Sinkler heroin and crack cocaine to hold during the drive. Sinkler drove Clarence and Flex to Naplate. On the route, police stopped and searched the Buick. During the search, Sinkler was placed in a patrol car where she attempted to conceal the drugs inside her vagina. An officer located the drugs during a subsequent strip search. Sinkler estimated that she drove for defendant or Clarence between 10 and 20 times, and defendant and Clarence paid her in heroin.

¶ 17 Sinkler pled guilty to possession with intent to deliver a controlled substance, but she did not receive a plea deal in exchange for her testimony in the instant case.

¶ 18 Rendelle Farrell testified that she had been arrested for retail theft which resulted in a violation of her probation. In exchange for her testimony in the present case, the State agreed not to revoke Farrell's probation.

¶ 19 In the summer of 2006, defendant came to Farrell's apartment. Defendant gave Farrell and her boyfriend heroin. A few days later, defendant asked Farrell to drive him to Chicago. Farrell agreed, and drove defendant to Joy's house where Farrell saw a mass quantity of heroin in the kitchen. Farrell used some of the heroin and came back to Ottawa with defendant.

¶ 20 In the summer of 2007, Farrell purchased 20 bags of drugs from defendant for approximately \$120. Paul also brought drugs to Farrell's apartment to sell. Paul gave Farrell drugs in exchange for letting him use Farrell's apartment to sell drugs. Farrell occasionally participated in the drug sales.

¶ 21 On July 17, 2007, Farrell was at Robert Bishop's house. That morning, defendant stopped at the house. Farrell went with defendant, Paul, and Brooke Henry to pick up drugs on

Lymon's Mound Road. At the time, defendant drove a red truck. Paul grabbed the drugs and gave them to Farrell and Henry to hold. After they returned to Bishop's house, Farrell was arrested during a drug raid. At the time of her arrest, Farrell had drugs concealed in her underwear.

¶ 22 Henry agreed to testify in exchange for the recall of several arrest warrants. Henry said that on the morning of July 17, 2007, she went to Bishop's house with Farrell and Flex. A few minutes later, defendant and Paul picked up Henry and Farrell in a red truck. The group drove to Lymon's Mound Road where Paul picked up heroin. Paul gave the heroin to Henry and Farrell. Henry "crotched" the heroin and defendant dropped Henry and Farrell off at Bishop's house. Thereafter, the police arrested Henry, Farrell, and Bishop at the house.

¶ 23 Henry did not use heroin or crack cocaine, and Paul paid her between \$300 and \$600 every two weeks to hold drugs. For two weeks prior to her arrest, Paul gave Henry drugs to hold. During this time, Henry also held money, which she gave to Paul. Once, Henry saw Paul give money to defendant. Henry explained that when she held money, she first gave the money to Paul who gave it to defendant.

¶ 24 Henry also testified that she was familiar with a group from Ottawa called "Da Hittaz." Henry said that defendant was the leader of the group.

¶ 25 Smith agreed to testify in the present case in exchange for the dismissal of several of his criminal charges and a recommended seven-year sentence on a remaining charge. Smith said that he became a member of "Da Hittaz" in August 2007. Smith sold drugs for the group with Flex.

¶ 26 Tara Morgan testified pursuant to the State's subpoena, and said that she did not want to testify. In February 2007, Morgan began socializing regularly with defendant. Defendant

provided Morgan with heroin, and Morgan also received drugs from Flex. Defendant told Morgan that he was a member of "Da Hittaz." Other members of the group included Flex, Goldsmith, and Thompson. Defendant asked Morgan if she would drive "his boys" around and sell drugs. Morgan agreed, and defendant told Morgan to carry the drugs inside her vagina while she drove. Morgan carried drugs and drove for whoever defendant instructed her to drive. At the location of the drug transaction, Morgan removed the drugs and handed them to the passenger. The passenger separated the amount of drugs requested by the buyer, made the sale, and gave the money to Morgan.

¶ 27 Morgan said defendant was the boss, and she once saw defendant with \$4,000 or \$5,000. Morgan said that defendant derived his income from drug sales, and when she was in a relationship with defendant, Morgan did not personally have to pay for food or clothes as defendant paid for these items from the drug sale proceeds.

¶ 28 Morgan said that she drove defendant to Joy's house in Chicago two or three times. On one of the trips, she saw defendant package drugs in the basement. Defendant gave the packaged drugs to Morgan to hold. Morgan concealed the drugs in her vagina, and she later sold the drugs in Ottawa.

¶ 29 Morgan testified that defendant also arranged for "Bill" at Skin Scribe tattoo parlor to provide Morgan with two tattoos. Morgan did not see defendant pay for the tattoos. Morgan recalled that defendant, Genseke, and some other individuals hung out at the tattoo parlor. Morgan also used drugs at the tattoo parlor.

¶ 30 In February 2007, Morgan was at the tattoo parlor when she got a bag of heroin stuck inside her vagina. Defendant came into the room with a video camera and removed the bag. Morgan said the incident was video recorded, and the State admitted the recording into evidence.

Morgan said that some of the other scenes on the video were staged. Defendant never asked Morgan if she wanted to be part of the video recording.

¶ 31 Bradley testified that he owned the Skin Scribe tattoo parlor. Bradley gave tattoos to and purchased drugs from members of "Da Hittaz." Bradley identified defendant as the leader of the group. Bradley once saw defendant with \$1,000 to \$2,000 and he did not see other members of the group with that much cash. Bradley said other members of the group included Flex, Andrews, Goldsmith, Clarence, Paul, Lobb, and Mike Bell. Members of the group socialized and sold drugs at Bradley's tattoo parlor.

¶ 32 Once, Bradley purchased drugs directly from defendant. On other occasions, defendant directed other individuals to provide Bradley with the drugs. Bradley said that "[t]here always seemed to be a middle person involved," and defendant never directly gave him the drugs. Defendant arranged for Bradley to provide a tattoo for Joy. During the tattoo session, Joy told Bradley that defendant had made a mistake when he bought vehicles for his friends that the police later seized. Joy told Bradley that Clarence was going to bring Bradley some drugs as payment for the tattoo.

¶ 33 Lobb testified pursuant to a plea agreement that she had made with the State. Lobb dated and lived with Hernandez at 1503 West Jackson Street. In December 2006, defendant, Clarence, Goldsmith, and Flex inspected the house, and defendant decided that the house would be used to sell drugs. In exchange for the use of the house, Lobb received heroin and crack cocaine.

¶ 34 At the house, Lobb helped process the drugs by cutting them with additives in a blender and placing the output into tin foil and bags. Lobb also saw several other individuals, including defendant process and package drugs in the house. Lobb thought that one of the members of "Da Hittaz" had brought the blender that was used to cut the drugs to Hernandez's house. Lobb said

that defendant, Clarence, Paul, Flex, Riddle, Goldsmith, and "Silk" were members of "Da Hittaz." Lobb said the group sold drugs.

¶ 35 Lobb testified that she also sold drugs for defendant out of the Jackson Street house. Lobb also conducted approximately 10 to 15 sales at other locations that were prearranged by defendant. On other occasions, Lobb was with defendant when he received telephone calls to arrange drug sale locations. When defendant arranged Lobb's sales, Lobb got the drugs from defendant or Clarence before the sale. Typically, defendant or Clarence would come to the Jackson Street residence, give the drugs to Lobb, and if they were not processed and packaged, Lobb would blend and bag the drugs. At the time, Lobb sold the heroin for \$10 per bag and the crack cocaine for \$20 per rock. In the time that Lobb was selling drugs, she gave defendant over \$4,000 in proceeds from the sales.

¶ 36 Lobb also made between 5 and 10 trips to Joy's house in Chicago. At Joy's house, defendant gave Lobb a sample of heroin. On several of the visits, Lobb saw defendant and others bagging drugs in the house. Defendant instructed Lobb to hold the drugs, and Lobb placed the drugs in her pants. Lobb and defendant then drove back to Ottawa. In Ottawa, Lobb and defendant dropped the drugs on the side of various roads that included Lymon's Mound Road, the road behind Wal-Mart, and Route 6.

¶ 37 Brittany Vasquez testified that she was familiar with a group called "Da Hittaz." Vasquez knew that members of the group dealt drugs. Vasquez met defendant in the summer of 2007 and discussed buying a gram of heroin. Defendant and Vasquez then drove to Chicago to Joy's house to pick up the heroin. Defendant directed Vasquez to come into the house to help him bag the heroin and crack cocaine. Inside the house, defendant gave Vasquez some heroin. Vasquez snorted the heroin, and later, defendant gave Vasquez more heroin. Vasquez injected

the second amount of heroin. Vasquez's next memory was waking up in the Cook County hospital. When Vasquez was released from the hospital, she did not have shoes, a cell phone, or money. Vasquez telephoned an individual she knew as "Hood." An individual whom Vasquez thought could be defendant answered the telephone and directed Vasquez to walk two blocks down the street. At that location, Vasquez met up with defendant. Defendant and Vasquez got into a car, and Vasquez asked for more heroin. Defendant initially refused but later in the day he gave Vasquez more heroin.

¶ 38 After the incident in Chicago, Vasquez said she was shortchanged in several drug transactions. In response, Vasquez contacted defendant about the quality of the drugs she had received from the dealers. Vasquez thought defendant was the leader of the dealers, and defendant directed Vasquez to address her complaints to an individual named "Boston."

¶ 39 The court found defendant guilty of four counts of unlawful possession of a controlled substance with intent to deliver and one count of criminal drug conspiracy. The court sentenced defendant to 20 years in prison for the criminal drug conspiracy conviction. The court did not enter a sentence on the other counts. On direct appeal, we affirmed defendant's conviction and sentence. *People v. Merritte*, No. 3-08-0677 (2010) (unpublished order under Supreme Court Rule 23).

¶ 40 On June 3, 2011, defendant filed a *pro se* postconviction petition. The court summarily dismissed the petition, and we affirmed the dismissal on appeal. *Merritte*, 2013 IL App (3d) 110640-U.

¶ 41 On April 8, 2013, defendant filed a motion for leave to file a successive postconviction petition. In the motion, defendant made a claim of actual innocence. In support of his claim,

defendant included affidavits or statements from Flex, Paul, Clarence, Joy, Goldsmith, and Glass.

¶ 42 Flex averred that, on July 17, 2007, he provided Farrell and Henry with the crack cocaine and heroin that was discovered after their arrests.

¶ 43 Paul averred that Henry and Farrell's testimony that defendant and Paul drove them to Lymon's Mound Road to get drugs was false. Paul said defendant was not involved in the incident, and defendant lived in Chicago. Paul rarely saw defendant in La Salle County. Paul said that he did not provide a statement sooner because he thought the State would bring additional charges against him and he did not want to make a statement against Flex. Paul concluded that he and Flex were not involved with the rest of the conspirators. Paul also averred that Inspector Nilles repeatedly punched him after he was arrested and placed him in handcuffs.

¶ 44 Clarence averred that he gave Sinkler the drugs that were found in her possession on April 23, 2007. Earlier on April 23, Sinkler and defendant packaged drugs. At the time, Sinkler was fading in and out of consciousness because she had used heroin. Clarence recalled that Sinkler called him by defendant's name. Clarence said that he and defendant had a strong resemblance and they were often mistaken for one another. Clarence said when Sinkler was arrested, she either mistakenly or intentionally indicated that defendant had committed Clarence's offenses.

¶ 45 Joy averred that she did not provide the statement described in Girton's testimony. Joy also said she had no knowledge of defendant's involvement in any criminal offense. Joy did not send this affidavit sooner because she was incarcerated and unable to contact defendant until she was released in June 2012.

¶ 46 Goldsmith averred that he had never engaged in criminal activity with defendant.

Goldsmith said he was innocent of his own convictions, and he only pled guilty because he lacked adequate legal representation.

¶ 47 Glass averred that he sold drugs, and that Inspector Nilles beat him in the fall of 2007 because he would not make a false statement against defendant.

¶ 48 On May 31, 2013, defendant filed a supplement to his motion for leave to file a successive postconviction petition. The motion was supported by an affidavit from Andrews. Andrews averred that he had not engaged in criminal activity with defendant, Clarence, Paul or Joy, and that they had no knowledge or involvement in Andrew's criminal activity.

¶ 49 On June 12, 2013, the court denied defendant's motion for leave. Defendant filed a motion to reconsider the ruling. The court denied defendant's motion, and defendant appeals.

¶ 50 ANALYSIS

¶ 51 Defendant argues that the court erred in denying his motion for leave to file a successive postconviction petition because he presented a colorable claim of actual innocence. Defendant argues the affidavits and statements in support of his motion establish that key members of the conspiracy admitted that defendant had no involvement in their own drug offenses which were alleged at trial to have been made in furtherance of the conspiracy. After reviewing defendant's motion and supporting documentation with the trial record, we find that defendant's claim was not of such conclusive character that it would likely change the outcome, and we conclude that the court did not err.

¶ 52 The Post-Conviction Hearing Act contemplates the filing of a single postconviction petition. 725 ILCS 5/122-1(f) (West 2012)). Successive petitions are disfavored and are only permitted where a petitioner has obtained leave of the court. *Id.* Leave of the court shall be

granted in two situations: (1) the petitioner satisfies the statutory cause and prejudice test (*id.*); or (2) the petitioner demonstrates actual innocence (*People v. Ortiz*, 235 Ill. 2d 319, 330 (2009)).

In this case, defendant argues that he is entitled to leave because he made a valid claim of actual innocence. To warrant a successive petition, the evidence of actual innocence must be: (1) newly discovered; (2) not discoverable earlier through the exercise of due diligence; (3) material and not merely cumulative; and (4) of such conclusive character that it would probably change the result on retrial. *People v. Edwards*, 2012 IL 111711, ¶ 32. Regarding the fourth criterion, leave of the court should only be granted where a petitioner's supporting documents raise the probability that it is more likely than not that no reasonable juror would have convicted petitioner in light of the new evidence. *Id.* ¶ 24. In practice, this factor requires that the court determine whether the newly discovered evidence places the trial evidence in a different light and "undercuts the court's confidence in the factual correctness of the guilty verdict." *People v. Coleman*, 2013 IL 113307, ¶ 97. We review the denial of defendant's motion for leave to file a successive postconviction petition *de novo*. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 38.

¶ 53 Defendant argues that his newly discovered evidence raises the probability that the court would not have found him guilty. To sustain defendant's criminal drug conspiracy conviction, the State was required to prove that defendant possessed a controlled substance with the intent to deliver, and defendant agreed with another individual to commit the offense and defendant committed an act in furtherance of the agreement. 720 ILCS 570/401, 405.1 (West 2008).

¶ 54 Milby, Lavalley, Sinkler, Farrell, Morgan, Bradley, Lobb, and Vasquez all testified that they: made an arrangement with defendant to buy drugs; purchased drugs from defendant; or defendant gave them drugs. Milby, Sinkler, Morgan, Lavalley, Farrell, and Lobb said they either

drove, carried, packaged or sold drugs for defendant and other members of "Da Hittaz." Several of these individuals also testified that they had engaged in a combination of these activities. Additionally, Henry, Morgan, Bradley, and Vasquez identified defendant as the leader of "Da Hittaz"—a group that was known to sell drugs in Ottawa. Thus, the trial evidence readily established defendant's guilt of criminal drug conspiracy.

¶ 55 Defendant's newly discovered evidence is directed predominantly at the testimonies of Farrell, Henry, Sinkler, and Girton. The new evidence does not refute the testimonies from Milby, Lavallo, Morgan, Bradley, Lobb, and Vasquez that implicated defendant in the criminal drug conspiracy. Rather, defendant argues that the new evidence presents a contradicting version of events—where defendant was not involved in the criminal acts—which would cause the fact finder to reconsider its determination of guilt. However, the affidavits and statements in support of this opposing perspective carry little weight when contrasted with the testimonial evidence and the video recording that connect defendant to the criminal drug conspiracy.

¶ 56 Defendant also argues that the court should have granted leave because his new evidence had the potential to cause the fact finder to reconsider its credibility determinations. In making this argument, defendant calls our attention to the fact that several witnesses received plea deals from the prosecution in exchange for their testimonies. The motivations for the trial witnesses' testimonies, however, were part of the trial record and considered by the fact finder. Despite these credibility issues, the witnesses' testimonies were largely consistent and corroborative of each other. Moreover, we note the substance of the affidavits were generic in contrast to the detailed testimonies of the remaining witnesses who were generally consistent. Viewing these facts, in conjunction with the uncontested testimonies of Milby, Lavallo, Sinkler, Morgan,

Bradley, Lobb, and Vasquez, we conclude that the affidavits and statements defendant presented as new evidence would not cause the fact finder to reconsider its verdict.

¶ 57 Finally, we note that the court served as the fact finder at trial and reviewed defendant's motion for leave to file a successive petition. In this dual role, the court was readily able to determine from its recollection of the trial proceedings and defendant's new evidence whether the new evidence undercut its confidence in the guilty verdict. Ultimately, the court concluded, when it denied defendant's motion, that the new evidence did not alter its view of the trial evidence. Having reviewed the record and defendant's motion for leave, we agree with the court's implicit conclusion and affirm the denial of defendant's motion.

¶ 58 CONCLUSION

¶ 59 The judgment of the circuit court of La Salle County is affirmed.

¶ 60 Affirmed.