2017 IL App (3d) 160091-U

Order filed November 17, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0091
v.	)	Circuit No. 87-CF-321
	)	
NANCY RISH,	)	Honorable Gordon Lee Lustfeldt, Judge, Presiding.
Defendant-Appellant.	)	

JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted the State's motion to dismiss defendant's 2015 successive postconviction petition alleging actual innocence because, assuming the contents of the affidavits are true, the affidavits did not contain additional information that was so conclusive in character that it would probably change the result on retrial.

¶ 2 Following a jury trial, Nancy Rish (defendant) was convicted by a jury of first-degree murder and aggravated kidnapping based on the theory of accountability for the actions of Danny Edwards in 1988. Defendant received a sentence of natural life imprisonment for murder and a

concurrent 30-year term for kidnapping. This court affirmed defendant's convictions on direct appeal in *People v. Rish*, 208 Ill. App. 3d 751 (1991).

¶ 3 On April 22, 2015, defendant filed a successive postconviction petition (2015 successive petition) alleging newly discovered evidence, by way of affidavits, established defendant's actual innocence. The trial court granted the State's second-stage motion to dismiss the 2015 successive petition on November 2, 2015. Defendant appeals the trial court's dismissal of the 2015 successive petition and requests this court to remand the matter to the trial court for a third-stage evidentiary hearing.

¶ 4 FACTS

¶ 5 For purposes of this appeal, we rely on the statements of facts recited by this court in *People v. Rish*, 208 Ill. App. 3d 751 (1991) and *People v. Rish*, 344 Ill. App. 3d 1105 (2003).

¶ 6 On September 2, 1987, Stephen B. Small was kidnapped and a ransom demand was made by telephone to his home. Law enforcement immediately initiated an investigation. Shortly thereafter, the investigation focused on defendant and Danny Edwards, defendant's boyfriend. At the time of the kidnapping, Edwards and defendant lived together in Bourbonnais.

¶ 7 On September 4, 1987, following the execution of a search warrant, the police arrested defendant and Edwards. That same night, Edwards led the police to a rural area where Small's body was recovered. It appeared that Small had been placed in a wooden box that was fitted with a PVC pipe designed to give Small air for 24 to 48 hours. Additionally, the box contained a light connected to an automobile battery, a one gallon jug of water, candy bars, gum, and a flashlight. Small's wrists were handcuffed and the box was buried. The coroner later determined that Small died of "asphyxia due to suffocation."

¶ 8 Between September 4, 1987, and September 8, 1987, the police questioned defendant with counsel present. Defendant provided eight statements to the police concerning her knowledge and actions in the early days of September. All of defendant's statements varied in some way.

¶ 9 On October 1, 1987, the State charged defendant by indictment with first-degree murder and aggravated kidnapping for her alleged role in Small's death. Defendant's jury trial began on November 2, 1988. During the jury trial, the State was unable to present any direct physical evidence linking defendant to the kidnapping and death of Small. However, in addition to introducing defendant's eight inconsistent statements into evidence, the State's witnesses testified that they saw defendant at various times with Edwards when he was purchasing some of the items found with Small's body. Other witnesses observed defendant at various related locations throughout the course of the kidnapping and ransom calls. Lastly, the State submitted evidence that Edwards had used his and defendant's garage to build the box in which Small's body was found.

¶ 10 The jury found defendant guilty on both counts, and the court sentenced defendant to a term of natural life imprisonment and a concurrent 30-year term. Thereafter, an extensive appellate history ensued. Defendant's conviction was affirmed by this court in *People v. Rish*, 208 Ill. App. 3d 751 (1991), and postconviction proceedings followed.

¶ 11 On April 10, 2015, the trial court granted defendant leave to file a successive postconviction petition. On April 22, 2015, defendant filed the 2015 successive petition at issue in this case. The 2015 successive petition alleged actual innocence pertaining to defendant's convictions for aggravated kidnapping and the subsequent death of Stephen Small. In the 2015 successive petition, defendant alleged the attached affidavits included information that was not

only newly discovered, material, noncumulative, but was also conclusive and would probably change the result on retrial. Defendant attached two affidavits prepared by Daniel Edwards which stated that Edwards actively worked to conceal his plot to kidnap the victim and secure a ransom from the victim's family.[1]

¶ 12 The portions of Edwards's first affidavit that are relevant to the issues raised in this appeal are set forth below:

> "8. I alone planned and committed the kidnapping of Mr. Small, which resulted in his unintended death.
>
> 9. I never told Nancy Rish about the kidnapping either during the planning stage, the commission of the kidnapping, or the making of ransom demands.
>
> 10. In fact, I actively worked to conceal my plan from Nancy Rish so that she would have no knowledge of what I was doing.
>
> 11. The reason I built the wooden box as a container to conceal Stephen Small was because I could not bring him back to our residence after his abduction or Nancy Rish would learn of my plan. Burying Stephen Small in a secluded location would ensure that Nancy Rish remained unaware of the kidnapping.
>
> 12. I made all of the ransom calls from drive-up pay phones.
>
> 13. When Nancy Rish and I were in the car together prior to my making a ransom call, I had her park at least ten (10) feet away from the phones so that I could get out of the car and make the phone calls without her hearing any of the conversations.

[1]Defendant also attached an affidavit from Maxine Shores to the petition. However, defendant did not raise any argument with regard to this affidavit in the trial court or now on appeal.

14. I wanted to testify at Nancy Rish's trial as to her lack of knowledge and involvement in the kidnapping of Stephen Small but my attorney would not permit me to do so because it would admit my guilt and would adversely affect my appeals.

* * *

20. Nancy Rish did not knowingly participate or aid me in any way in the planning or carrying out of the kidnapping of Stephen Small or with my ransom demands to the Small family.

21. Nancy Rish is innocent of the acts alleged against her."

The portion of Edwards's second affidavit that is relevant to the issues raised in this appeal is set forth below:

"4. I did not tell Nancy Rish the truth about why I was building the box in the [summer] of 1987. I planned to put Stephen Small in the box while I was trying to collect the ransom money.

5. I committed this crime completely on my own. If I had had anyone to help me, that person could have guarded Mr. Small while I went to make ransom calls. If I had had someone helping me, I would not have needed to put Mr. Small in the box.

6. I made the first call to the Small home when Mr. Small's son answered the phone, and I made all of the ransom calls.

7. During the days right after Mr. Small's kidnapping, I was very nervous around Nancy. I asked her to drive me to various pay phones, and to drop me off and pick me up at places in the middle of the night…

8. Since Nancy knew I had been involved in dealing drugs, I thought she might think my strange actions had to do with a drug deal.

9. All of the time she was with me in the car from September 1 through our arrest on September 4, 1987, I made sure she knew nothing about what I was doing. All she knew was that I was making calls, going to stores, leaving in the middle of the night, having her pick me up from various places, and being nervous. She drove me to places like the electrical supply store where I bought ties, but she never knew what I bought or why."

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11. "On September 2, 1987, at about 10:00 PM. I told Nancy "Get your stuff" meaning her keys and purse, "we will take your bike to Jack's shop to get it fixed." We put the bike in the trunk of Nancy's car. When we were going through Aroma Park, we pulled into old Sonoco Station. I told her I would call Jack to make sure he was home before we drove the rest of the way out there. I called the Small home and spoke to Mrs. Small. I had a small cassette player I had carried inside my coat and I played a tape of Mr. Small to Mrs. Small. On the tape, I can be [heard] telling him what to tell her about where to bring the money. I saw what I thought was an undercover police car drive by, so I hung up, put recorder in my coat, got back in the car. I told Nancy Jack was not home.

12. We drove to another pay phone in Kankakee and I called Mrs. Small again. Nancy asked who I needed to call again, and I said "mind your own business. It has nothing to do with you.""

¶ 13 Defendant's testimony during the 1988 jury trial is also relevant to the issues raised in this appeal. Consequently, the following facts are reproduced, *verbatim*, from our opinion in defendant's direct appeal in *People v. Rish*, 208 Ill. App. 3d 751, 764-67 (1991).

"The defendant testified [on] her own behalf. She stated that on August 30, 1987, she and Edwards travelled to the state park on his motorcycle. They ran into Tracy Storm and Storm and Edwards had a conversation. Storm came over to the defendant's residence later that same afternoon and the two men spoke again. Edwards and Storm left in Storm's car. About ten minutes after the two men left, she received a strange call from a male caller asking about Edwards. The defendant testified that she did not leave the house until after 6:00 p.m. and spoke on the telephone to several people. Edwards returned to the residence at approximately 1:00 a.m. on August 31, 1987.

On August 31, 1987, the defendant testified that she awoke at approximately 7:30 a.m. and got her son off to school. Edwards left the house in his van at approximately 9:30 a.m. She did not know where Edwards went. Edwards returned at 12:00 p.m. and the defendant left at 1:30 p.m. to go to her friend Julie Enright's house for the afternoon. She returned home at approximately 4:30 p.m. It was at that time that she noticed that the wooden box was missing from her residence. Edwards arrived home at approximately 5:00 p.m. and was in and out throughout the evening. The defendant testified that she was not aware of what he was doing.

On September 1, 1987, Edwards left the residence in his van at approximately 10:00–10:30 a.m. Edwards returned home around noon, and, following a conversation with Edwards, the defendant rescheduled a hair appointment until later in the day. She then left the residence with Edwards, and, with Edwards driving, they drove out of town to some railroad tracks that he wanted the defendant to note. When they arrived home, the defendant's son had not yet arrived home from school. During the course of the afternoon, the defendant accompanied Edwards to the electric supply store. The

defendant testified that this was not uncommon. The defendant testified that she waited in the van while Edwards went inside. She testified that she did not know what he purchased.

At approximately 5:00 p.m., the defendant dropped off her son at football practice and went to get her hair done. This took about an hour and a half. From there she went home, had a light supper and helped her son with his homework.

The defendant testified that she spoke with several friends during the evening. At about 8:00 p.m., Edwards left in his van and was not gone long.

Rish did not know where he went. When he returned home he was tense and nervous. Edwards was in and out quite a bit. After talking with Edwards they both left in their own vehicles at about 11:45 p.m. the defendant followed Edwards to Mike Spaulding's house. The defendant was aware that at one time Spaulding had set Edwards up on a drug bust. Edwards placed a bag in the trunk of the defendant's vehicle and, following a conversation, the defendant drove with Edwards to a Phillips 66 station. She parked about six feet from the phone booth, waited in the car and did not shut off the engine while Edwards placed a call. The defendant testified that she did not know who he was calling nor did she hear any part of the conversation. Edwards returned to the vehicle, told the defendant to drive to Cobb Park and to hurry up. Once at Cobb Park, Edwards exited the vehicle, went to the trunk, and then told Nancy to go straight home and get out of the area. The defendant returned home and watched a rented video until 2:30 a.m. At that time she left in her car, pursuant to Edwards' request, and picked him up at the earlier noted railroad tracks. Edwards got in the car and told the defendant to return to where his vehicle was parked in front of Spaulding's. They then returned home.

Once home the defendant noticed Edwards appeared nervous, jumpy and, at times, panicky. Shortly thereafter, about 3:30 a.m., Edwards again left in his van and was gone about twenty minutes. The defendant went to bed and when Edwards returned he stayed downstairs the rest of the night.

At 7:30 that morning, the defendant got her son off to school and called the dog groomer's to get an appointment to get her dog groomed. After dropping the dog off, the defendant and Edwards, with Edwards driving the defendant's vehicle to 300 Southeast and took a road that stopped in front of a ranch. This was near where Small's body would eventually be recovered. Edwards told the defendant to pick him up in an hour. The defendant drove to her sister's house and stayed there for forty-five to fifty minutes. The defendant then left to pick up Edwards and at approximately 4:30 p.m. they picked up the dog at the groomer's. On the way home, Edwards stopped the car at a drive-up phone near a Phillips 66 station in Aroma Park. Although this was a drive-up phone, Edwards parked away from the phone and walked up to it. Edwards' back was turned toward the defendant and she did not hear anything that was said nor did she see any tape recorder while he was making the call. He was not on the phone long and when the call was completed they returned home. Edwards was in and out of the house, and appeared preoccupied, tense and very nervous.

Between 10:30 and 11:00 p.m., Edwards put the defendant's bicycle in the trunk of her car and, with the defendant driving, they drove out to Aroma Park. At Edwards' direction, the defendant pulled up to the curb across from a grocery store and Edwards got out of the car to make yet another call. Once again his back was to the defendant, the car was running and she did not hear the conversation. This call occurred at

approximately 11:30 p.m. and did not last very long. Edwards then directed the defendant to drive to Sandbar Road, where he took a duffle bag from the rear seat and placed it in some evergreens. They then drove to another pay phone near a Marathon station and the defendant parked about ten to fifteen feet away, left the car running and again did not hear any portion of the conversation. After this call, Danny's demeanor was panicky and mad at the same time. Edwards said, "Something is wrong. Something is not right." At some point during this phone call, the defendant saw the tape recorder and recognized it as belonging to Edwards' son. The defendant became bewildered, confused and scared. Edwards then drove back into Aroma Park and past the phone booth across from the super market. Edwards told the defendant that he saw a car there and that he did not like the looks of it and drove away. The defendant testified that Edwards was very nervous.

At about 1:00 or 2:00 a.m. on September 3, 1987, they arrived back home. Edwards removed the bicycle from the car and placed it in the garage. He then left again alone in the van and told the defendant he was going out for cigarettes. He was gone twenty to thirty minutes. When he returned he seemed somewhat relieved. After some conversation the defendant went upstairs to bed and Edwards stayed downstairs.

At about 7:30 a.m. that morning the defendant left to drop her son off at school and Edwards left in his van. When the defendant returned at 8:30 a.m., Edwards was not there but returned a short time later with the duffle bag he had the previous evening. Edwards told her what was in the bag and what he wanted the defendant to do with it. None of it made any sense to the defendant and she at no time had any idea of the significance of the bag or its contents. The defendant spent most of the morning lying on the couch. Edwards was outside most of the day washing the car and taking the garbage

out. At about 4:30 to 4:45 p.m., the defendant dropped her son off at his football practice and she and Edwards proceeded to an Econo Drug for some lozenges for her sister. They proceeded to her sister's house for ten minutes. They then returned home and the defendant prepared dinner. Edwards was not eating or sleeping this week and after a bite he went upstairs to lie down. Later in the evening the defendant drove to the store to get some ice cream for her and her son. When she returned she and her son had ice cream and watched T.V. After several phone calls, she went to bed.

On September 4, 1987, she woke up between 7:00 and 7:30 a.m. and sent her son off to school. She then returned to bed and re-awoke at 10:30 a.m. with a man in Army fatigues pointing a pistol at her face. It was at this time that the search warrant was executed and the defendant was taken into custody.

The defendant also described various domestic disputes that she and Edwards had recently had. When asked by her attorney why she had lied to the police in several of her statements, she responded that it was because she realized that Edwards had used her and was putting her in the middle of this whole thing without her knowledge. She stated that she was 'scared to tell the truth.' "

¶ 14 I. The Trial Court's Ruling on the 2015 Successive Petition

¶ 15 On June 1, 2015, the State filed a motion to dismiss defendant's 2015 successive petition. On July 17, 2015, the trial court conducted a hearing on the State's motion to dismiss the 2015 successive petition and took the matter under advisement following the hearing.

¶ 16 On November 2, 2015, the trial court issued a written decision granting the State's motion to dismiss defendant's 2015 successive petition. The trial court's order found that the 2015 successive petition was insufficient as a matter of law to establish actual innocence.

Relying on the decision in *People v. Edwards*, 2012 IL 111711, the trial court found that the affidavits attached to defendant's 2015 successive petition failed to raise the probability "that it is more likely than not that no reasonable juror would have convicted [defendant] if they heard that testimony, and this Court finds that this evidence is not of such conclusive character that it would probably change the result on retrial."

¶ 17 On December 1, 2015, defendant filed a motion to reconsider the trial court's ruling. On February 3, 2016, defendant filed a supplemental motion to reconsider based on the Illinois Supreme Court's decision in *People v. Sanders*, 2016 IL 118123.

¶ 18 On February 17, 2016, the trial court conducted a hearing on defendant's request for reconsideration of the ruling on the 2015 successive petition in light of the decision in *Sanders*. The trial court denied the request to reconsider the court's prior decision dismissing the 2015 successive petition alleging actual innocence. On February 22, 2016, defendant filed a timely notice of appeal.

¶ 19 ANALYSIS

¶ 20 Defendant raises two issues in this appeal pertaining to the 2015 successive petition. Defendant argues the trial court committed reversible error by improperly considering the reliability of the assertions contained in Edwards's affidavits that were attached to the 2015 successive petition. Therefore, defendant requests this court to reverse the trial court's ruling and remand the case for an evidentiary hearing. In addition, defendant contends that the trial court erroneously found the affidavits attached to the 2015 successive petition were not conclusive concerning the actual innocence claims. The State argues the trial court applied the appropriate legal standard and properly held that the affidavits were not conclusive in nature.

¶ 21 In this case, the trial court granted defendant leave to file the 2015 successive petition. Thus, the postconviction proceedings automatically advanced to the second stage. *People v. Wrice*, 2012 IL 111860, ¶ 87. During second stage proceedings, it is well established that all well-pleaded facts must be taken as true, and the trial court is barred from making factual or credibility determinations when hearing a motion to dismiss. *Sanders*, 2016 IL 118123, ¶ 37.

¶ 22 To prevail at the second stage, a petitioner must make a substantial showing of actual innocence so as to warrant an evidentiary hearing. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). In order to satisfy this burden, a petitioner must present evidence that is newly discovered, material, noncumulative, and of such a conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 84; *Sanders*, 2016 IL 118123, ¶ 24. The case law recognizes that defendant's burden "is extraordinarily difficult to meet." *Coleman*, 2013 IL 113307, ¶ 94. This court reviews the trial court's second stage dismissal of defendant's petition *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 23 With regard to defendant's argument that the trial court used an improper standard to review defendant's 2015 successive petition at the second stage, we note that this court reviews the trial court's judgment, not the reasons cited. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010). We may affirm any judgment supported by the record regardless of any argument or authority utilized by the court as a basis for its judgment. *Id*. Even if the trial court utilized an improper standard to come to its conclusion, our *de novo* review utilizing the proper standard serves to cure any error. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 17.

¶ 24 In the case at bar, our review is *de novo*. Like the trial court, we must presume the information in Edwards's affidavits is truthful. Consequently, to avoid confusion, we emphasize that for purposes of this appeal we accept the truthfulness of the premise that Edwards did not

share his plans to kidnap Small as set forth in Edward's affidavits. We also presume that it is true that defendant merely drove with Edwards to the electrical supply store where Edwards bought ties, that defendant transported Edwards to various places in the middle of the night, and that defendant waited, beyond ear shot, while Edwards made phone calls from pay phones demanding ransom money from Small's family. We also presume Edwards truthfully formulated his own belief that defendant remained clueless and had no direct knowledge of Edwards's plan because Edwards did not discuss his plan to kidnap Small with defendant, and took further steps to conceal his plot from defendant.

¶ 25 Significantly, the information set forth in Edwards's affidavits precisely mirrors the information defendant provided to the jury during her sworn testimony. For example, when testifying in her own defense during her jury trial, defendant told the jurors that she rode with Edwards to the electrical supply store where Edwards bought ties, transported Edwards to various places in the middle of the night, waited while Edwards used pay phones, and that she had no knowledge of Edwards's plot when these acts took place. The evidence at trial also included the sworn testimony of witnesses that was consistent with defendant's testimony and informed the jurors that they saw defendant with Edwards at various locations during the course of the kidnapping and the ransom calls.

¶ 26 Here, Edwards's affidavits are cumulative of the evidence the jury received from defendant's own testimony denying that she had any direct personal knowledge of the plot. However, the circumstantial evidence introduced by the State during the jury trial supported the State's theory that even though the couple did not personally discuss or have a direct conversation about the process, defendant pieced together Edwards's criminal design based on

events she witnessed pertaining to defendant's course of conduct over a prolonged period of time rather than from his actual words.

¶ 27 On one hand, the jury had defendant's version that she knew nothing about the plot. On the other hand, the jury had defendant's evolving prior statements that attempted to conceal damaging information from the police and her sworn testimony admitting being present at key times during the relevant time frame. The jury relied on the State's strong circumstantial evidence that supported the conclusion that defendant was aware of the plan and intended to help Edwards secure the ransom money.

¶ 28 In sum, the affidavits attached to the 2015 successive petition were not so conclusive in character that the information set forth in the affidavits probably would have changed the result on retrial. See *Sanders*, 2016 IL 118123. We find no support for defendant's assertion that the jury would likely return a different verdict if Edwards had also testified before the jury consistent with the information set forth in his affidavits.

¶ 29 Since this court holds that the affidavits were not conclusive on the issue of actual innocence, we need not address whether the affidavits were newly discovered, material, and noncumulative.

¶ 30 CONCLUSION

¶ 31 The judgment of the circuit court of Kankakee County is affirmed.

¶ 32 Affirmed.