2025 IL App (4th) 240904-U

NO. 4-24-0904

FILED
March 21, 2025
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Peoria County
TRAY B. HARGROW,	)	No. 15CF428
Defendant-Appellant.	)	
	)	Honorable
	)	Katherine S. Gorman,
	)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Doherty and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed, finding the trial court erred when it granted the State's motion to dismiss defendant's amended petition at the second stage of postconviction proceedings.

¶ 2 On January 26, 2017, defendant, Tray B. Hargrow, pleaded guilty to first degree murder (720 ILCS 5/9-1(a)(3) (West 2014)). In August 2019, defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)), which was dismissed by the trial court as frivolous and patently without merit. Defendant appealed. The appellate court reversed and remanded for second-stage proceedings pursuant to the Act. See *People v. Hargrow*, 2022 IL App (3d) 190792-U. Upon remand, postconviction counsel filed an amended petition, which the trial court dismissed. On appeal, defendant argues (1) he made a substantial showing of actual innocence through new, material, and noncumulative evidence by way of affidavits and (2) postconviction counsel

provided unreasonable assistance where the record rebuts counsel's compliance with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). We reverse.

¶ 3 I. BACKGROUND

¶ 4 In June 2015, the State charged defendant by indictment with three counts of first degree murder for the shooting and subsequent death of Rogelio De La Rosa, which occurred on December 2, 2014. Ultimately, the State proceeded to trial on one count of first degree murder under a theory of accountability.

¶ 5 In December 2015, defendant—while represented by counsel—filed a *pro se* motion seeking funds to hire a handwriting "expert" regarding letters, or "kites," written by Demetrious Bell, also known as "Gangsta Meech." At a hearing in January 2016, defendant indicated, through counsel, he no longer wished to "pursue [the] issue" and did not need the funds as previously requested. At the hearing, defendant indicated he did not want another continuance in his case and wanted to proceed to trial. When the trial court asked defendant if he would object to another continuance, defendant explained Bell had written him letters "about killing people."

¶ 6 In August 2016, defendant, through counsel, filed a motion indicating Bell was a key witness for the State. Attached to the motion was a handwritten letter purportedly written by Bell to the Peoria County state's attorney stating he witnessed defendant shoot and kill De La Rosa and that Robert Mister (also known as "CT") was involved but only had a "small part" in the incident. In exchange for his testimony, Bell requested he be released from prison. Additionally, six other letters purportedly written by Bell were attached. In the letters, Bell allegedly wrote he "wasn't there" and "I don't know s*** about your case." Defendant requested funds to hire a forensic expert to examine the handwriting to confirm if Bell had, in fact, written

the letters.

¶ 7 At a hearing in December 2016, the trial court indicated the State was no longer calling Bell as a witness and defendant was withdrawing his request for funds to hire an expert witness. The matter was set for a jury trial. The court asked defendant, "[I]s all of that all right with you?" Defendant replied it was. The matter proceeded to a jury trial in January 2017. The evidence from trial is as follows.

¶ 8 A. Jury Trial and Plea Proceedings

¶ 9 On December 2, 2014, at approximately 10 p.m., Peoria police officers Brian Sylvester and Jacob Beck were performing a traffic stop when they heard multiple gunshots. The officers were informed the gunshots came from the area of Perry Avenue and Morton Street. Upon arriving to the area, De La Rosa's body was discovered unresponsive, lying on the ground in an alleyway off Perry Avenue. Several other police officers arrived to the area to assist, but no eyewitnesses to the incident were found. Officers discovered De La Rosa's wallet and pieces of his cell phone nearby.

¶ 10 A search of De La Rosa's residence later revealed a substantial amount of synthetic marijuana (K2). Officers searched De La Rosa's workplace, USA Technologies, and recovered another cell phone. De La Rosa's work shift began between approximately 3 and 3:30 p.m. and lasted until midnight. De La Rosa's timecard indicated he had "punched in" for work on December 2 at 3:10 p.m. However, he did not "clock out" of work.

¶ 11 Barbara Price testified she had recently begun dating De La Rosa. De La Rosa called her from work at approximately 9 p.m. At one point, De La Rosa told Price he needed to "step outside" to talk to someone. While on the phone, Price overheard De La Rosa talking to two men, who she described as sounding "agitated." She overheard De La Rosa state, " 'You can

have everything I got, just go.' " Another individual responded, " 'Just get in the car.' " Price overheard a conversation ensuing but could not understand what was being said until the phone call abruptly ended.

¶ 12 Marco McKnight testified he was incarcerated at the Peoria County jail related to both federal and state drug offense convictions. McKnight observed defendant undergo a buccal swab for DNA testing. Defendant asked McKnight," 'Man, they just came with a subpoena for my DNA. What do you think that was for?' " McKnight replied, " 'Well, I don't know what that's for, only you know what that's for. You ain't got to tell me, but you know what it's for.' " After which, defendant gave McKnight a "scenario" for why the police would be interested in his DNA. Defendant stated, " 'What if I set up a robbery and somebody got killed?' " McKnight responded, " 'Well, you're gonna get more time than the actual shooter because you set the crime up.' " Defendant described the victim who was killed as "Latin folk[ ]." Defendant told McKnight that he and the victim had previously resided together at a federal halfway house, where the victim had been selling K2. Defendant and his friends were "looking for money to party with." Defendant contacted the victim because the other individual, CT, who was with defendant, did not know the victim. Defendant and CT took the victim to an alley on "Perry and Evans," where they intended to rob him. However, the victim would not give them "whatever he had," so CT shot and killed him. Defendant then went into the victim's pocket and took money.

¶ 13 McKnight reached out to the police to let them know he had "information." The following day, defendant confronted McKnight about "t[elling] on him." McKnight responded, " 'Man, I mean, I don't want to even talk to you no more.' " Defendant then physically attacked McKnight until correctional officers broke up the incident. McKnight stated he had entered into a cooperation agreement with federal authorities. As part of his agreement, he was required to

provide complete and truthful information to law enforcement officials. McKnight explained he had not entered into the cooperation agreement until after he had reached out to the police to provide information he had learned from defendant.

¶ 14 Jason Spanhook testified, on the date of the incident, he was a detective for the Peoria Police Department. Spanhook reviewed video from a Caterpillar facility, which showed the USA Technologies building where De La Rosa worked. Spanhook said he observed a "silver, light-colored minivan" pull up to USA Technologies near the employees' entrance at approximately 9:51 p.m. Spanhook did not observe any individuals get in or out of the vehicle.

¶ 15 Defendant was interviewed by Spanhook after being detained on an unrelated matter. Defendant indicated he was friends with CT. Defendant stated he knew De La Rosa from living with him at a halfway house, knew he sold K2 to residents, and had purchased K2 from him.

¶ 16 Cell phone records admitted into evidence showed multiple phone calls between Price and De La Rosa on December 2, 2014. That evening, De La Rosa last called Price at 9:47 p.m. That call was discontinued at 9:55 p.m. Defendant called De La Rosa 11 times that day. Mister called De La Rosa one time at 9:50 p.m. Mister called defendant 22 times that day.

¶ 17 Following the conclusion of the State's evidence, defendant moved for a directed verdict, which was denied.

¶ 18 Spanhook testified again as a defense witness. Spanhook confirmed defendant and De La Rosa had not resided at the halfway house at the same point in time. Brent Christians testified he was working at the Peoria County jail on January 16, 2015, when defendant and McKnight got into a fight.

¶ 19 Prior to defendant deciding whether he would testify in his own defense, he

indicated he wished to plead guilty. Upon reviewing the plea documents, the trial court asked defendant a series of questions to determine whether the plea was knowing and voluntary. When asked if he was satisfied with his attorney's services, defendant stated he was not. Defendant explained he was concerned about the maximum sentence he faced if convicted at trial, which piqued his interest in accepting the plea offer from the State. Defendant indicated he wished to plead guilty, remained dissatisfied with his attorney's services, and was worried if he said he was dissatisfied, the State would revoke its offer. Defendant complained the jurors learned he was a gang member through his recorded interview with Spanhook, his lawyer had refused to ask questions of witnesses defendant had requested, and Mister's name had come up at trial.

¶ 20 Defendant's counsel noted many of defendant's concerns fell "under the heading of either trial strategy or improper questions." Counsel also noted any testimony purported to have been said by Mister would not be admissible, given Mister was deceased. Counsel agreed defendant's gang membership "shouldn't slip out," but he said the State did not stress this issue in its opening statement and did not believe the State would argue this point in its closing argument.

¶ 21 Defendant reiterated the statement about his gang membership could not be unheard by the jury. He then focused on his attorney's cross-examination of McKnight. Specifically, McKnight had testified defendant had said he resided at a halfway house at the same time as De La Rosa. Defendant denied residing at a halfway house at the same time as De La Rosa, and he was upset his attorney did not challenge McKnight on this testimony. The trial court noted defendant's counsel *did* challenge McKnight's testimony through the testimony of Spanhook, who had confirmed defendant and De La Rosa did not have overlapping stays at a halfway house.

¶ 22 Defendant then redirected his concerns to the jury hearing about his gang membership. His counsel stated, "We're not unduly emphasizing or drawing attention to gang membership, that was never part of this trial. So that's all I'll have to say to that."

¶ 23 Defendant continued to reiterate his concerns but, ultimately, changed course and answered to the trial court he was satisfied with his attorney's services. He entered into a fully negotiated plea of guilty to first degree murder. Pursuant to his plea, he was sentenced to 35 years' imprisonment and an unrelated felony case was dismissed.

¶ 24 B. Postconviction Proceedings

¶ 25 On August 12, 2019, defendant filed a *pro se* postconviction petition. In his petition, defendant alleged someone named "Meech was caught with the Murder weapon and even confess[ed] to bein[g] at the Murder [scene] when the victim was killed yet the [S]tate or my lawyer didn't call him as a witness!" Defendant stated: "Why didn't my public defender call him as a witness when I told him to?" He also argued trial counsel did not send a private investigator to speak to the residents of a home near where De La Rosa was found dead. He alleged he met Steve Holcomb, who had witnessed De La Rosa's murder, while they were incarcerated together. He stated, "If my lawyer would [have] did his job we would [have] had this information at the time of thi [*sic*] but he didn't. So I had no way of knowin[g] about [Holcomb] until I bump[ed] into him in prison." Additionally, Edward Spiller, whom defendant also met while incarcerated, informed him that he overheard McKnight say he intended to lie at defendant's trial to get his sentence reduced. Defendant concluded he was under duress at trial and pleaded guilty because he was "97%" sure the jury would have found him guilty, so he took the minimum sentence available through the plea agreement. He alleged he was innocent and his trial counsel failed to do "his job." He alleged the evidence was newly discovered and was not

known at the time of trial. Defendant attached to his petition affidavits from Holcomb and Spiller.

¶ 26 Holcomb's affidavit stated as follows:

"My name is Steve Holcomb and I lived on Perry and Morton when the Mexican was killed in December of 2014, and I seen the 2 people that killed the man. It was CT the Rapper that was murdered he pulled the trigger he shot the man a few times he fell and then he shot him some more, then I seen Gangsta Meech [bend] over the body I couldn't really see what was going on but I think he was checking his pockets or something. It was only there 2 people there nobody else then I seen them jump in a blue van and speed off."

¶ 27 Spiller's affidavit stated as follows:

"Marco Mcknight *** told me in the Peoria County Jail Bullpen That he was finna lie on [defendant] about a murder and robbery so that he could get a Time Cut on his own case he said that he was [facing] a lot of time and would do anything to get out early he said that he was going and gone tell the police, detectives that [defendant] told him that he was involved in the murder but in all [actual] he said [defendant] didn't tell him anything he had heard somethings about the murder elsewhere and seen the news what happen and read the newspapers, and then said he made the best guess about what he had thought happen and he told the Peoria

police [defendant] told him these things he told me that how he
was going to get a (Time Cut) and get out of State (prison sooner),
I Edward Spiller is willing to testify under oath."

¶ 28 The trial court dismissed defendant's petition at the first stage, finding it frivolous and patently without merit. The court stated trial counsel's failure to call Bell as a witness was trial strategy, given defendant himself claimed in his own *pro se* filing from December 2015 that Bell was "not a credible witness." Furthermore, defendant's efforts regarding Bell proved successful when the State had foregone his testimony as a witness. The court found trial counsel was not ineffective for failing to find Holcomb as a witness because Holcomb was alleged to have been unknown to everyone including defendant. The court stated defendant's request to question " 'people in the neighborhood' " did not require counsel to "find an unknown witness." The court noted Holcomb's affidavit claims he saw two people, but it does not explicitly exonerate defendant. Holcomb's affidavit alleges Mister shot and killed De La Rosa and impliedly states Bell was the second person, who reached over the victim's body. Lastly, the court found counsel was not ineffective for failing to call Spiller as a witness to impeach McKnight. The court noted McKnight's credibility was challenged by counsel at trial through Spanhook's testimony and Spiller's testimony would have been cumulative. Defendant appealed.

¶ 29 On appeal, defendant argued the trial court erred because he had made an arguable claim of actual innocence. *Hargrow*, 2022 IL App (3d) 190792-U, ¶ 18. Specifically, Holcomb's and Spiller's affidavits constituted new, material, and noncumulative evidence. *Id.* The appellate court found both affidavits were arguably new. *Id.* ¶ 20. The court found Holcomb's affidavit was "arguably noncumulative because there was no eyewitness testimony presented at trial." *Id.* ¶ 21. The court found Spiller's affidavit was "arguably noncumulative

because no direct evidence was presented at trial that McKnight fabricated his story." *Id.* Lastly, the court found the affidavits were material because they both undermined the credibility of McKnight, whose testimony "essentially amount[ed] to an admission of guilt by defendant" and reduced the State's case to being "entirely circumstantial." *Id.* ¶ 22. The court reversed and remanded for second-stage proceedings. *Id.* ¶ 23.

¶ 30 Upon remand, postconviction counsel filed an amended petition. The petition argued defendant involuntarily pleaded guilty due to his trial counsel's deficient advice and failure to prepare for trial. The petition attached Holcomb's and Spiller's affidavits and argued their testimony would undermine the State's case. Spiller's testimony would have contradicted McKnight's testimony, which would have left the State with little more than circumstantial evidence regarding a high volume of phone calls between defendant and De La Rosa. Holcomb's testimony would have further showed defendant was not even present where the alleged shooting occurred. The State filed a motion to dismiss the petition.

¶ 31 The trial court granted the State's motion and dismissed the amended petition. In its written order, the court adopted its reasoning from its initial dismissal of defendant's petition at the first stage.

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, defendant argues (1) he made a substantial showing of actual innocence through new, material, and noncumulative evidence by way of affidavits from a witness claiming to have observed De La Rosa's murder and a witness claiming to have heard McKnight admit to perjuring himself and (2) postconviction counsel provided unreasonable assistance where the record rebuts counsel's compliance with Rule 651(c).

¶ 35 "The [Act] provides a procedural mechanism through which criminal defendants can assert that their federal or state constitutional rights were substantially violated in their original trials or sentencing hearings." *People v. Buffer*, 2019 IL 122327, ¶ 12. A postconviction petition must clearly set forth the ways in which a defendant claims his constitutional rights were violated. 725 ILCS 5/122-2 (West 2018). "The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." *Id.*

¶ 36 "The Act provides a three-stage process for the adjudication of postconviction petitions." *Buffer*, 2019 IL 122327, ¶ 45. Once a postconviction petition moves from the first to the second stage, the trial court may appoint counsel to represent the defendant and the State may file responsive pleadings. *People v. House*, 2021 IL 125124, ¶ 17. During the second stage, the court determines "whether the postconviction petition and any accompanying documentation make a substantial showing of a constitutional violation." *Id.* If a defendant fails to make a substantial showing of a constitutional violation, his postconviction claims are subject to dismissal. *Id.* Where a defendant makes a claim of actual innocence, our supreme court has explained a substantial showing of a constitutional violation as follows:

> "Substantively, in order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. [Citation.] New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative

> means the evidence adds to what the jury heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result." *People v. Coleman*, 2013 IL 113307, ¶ 96.

While we must review whether a defendant's evidence is new, material, and noncumulative, "[a]ll well-pleaded factual allegations not positively rebutted by the trial record must be taken as true for purposes of the State's motion to dismiss." *People v. Sanders*, 2016 IL 118123, ¶ 42. The trial court's dismissal of a defendant's claims at the second stage of postconviction proceedings is subject to *de novo* review. *People v. Johnson*, 2017 IL 120310, ¶ 14.

¶ 37 Defendant contends both Holcomb's and Spiller's affidavits constitute new evidence that was not available through due diligence at trial. Defendant notes the police canvassed the area of the murder for witnesses but were unsuccessful. Indeed, at defendant's trial, no eyewitness testimony was produced. Defendant did not know either Holcomb or Spiller until he met them while incarcerated. Furthermore, defendant had no way of knowing at trial that McKnight had been overheard by Spiller confessing he intended to perjure himself at defendant's trial.

¶ 38 The State does not meaningfully contest whether Holcomb's affidavit is new. The State argues Spiller's affidavit is not new because Spiller stated he had overheard McKnight say he was intending to perjure himself, meaning Spiller was aware of this information prior to defendant's trial and, thus, Spiller could have been discovered as a witness by defendant through due diligence.

¶ 39 Evidence is new, for the purposes of postconviction proceedings, when it is discovered after trial and could not have been discovered earlier through the exercise of due diligence. *Coleman*, 2013 IL 113307, ¶ 96. We find the discovery of the witnesses and the information contained in their respective affidavits constitute new evidence. Holcomb was a purported eyewitness from whom the police were not able to obtain a statement. Defendant asserts he did not meet Holcomb until he was incarcerated sometime after he had pleaded guilty. Certainly, the information Spiller purported would have been available prior to trial given the verb tense Spiller used in his affidavit. He suggested McKnight intended to perjure himself but had not yet done so. The State puts the onus on defendant, claiming he should have scoured the jail seeking witnesses to contradict McKnight. It is difficult for this court to conclude such a task, without more, would have been a reasonable expectation of trial counsel as part of his due diligence. Therefore, we find both Holcomb's and Spiller's affidavits likely constitute new evidence.

¶ 40 Defendant contends both Holcomb's and Spiller's affidavits are material evidence. Regarding Holcomb, defendant argues the State proceeded under a theory of accountability for defendant's role in what was essentially an armed robbery which resulted in De La Rosa's death. Holcomb's affidavit seems to contradict the State's evidence that Mister and defendant were present for De La Rosa's death. Rather, it appears Mister and Bell were impliedly the only two individuals present. Regarding Spiller, defendant notes McKnight's testimony was critical for the State's case because there were no eyewitnesses presented at trial. McKnight's testimony was tantamount to a confession by defendant. Spiller's affidavit directly impeaches McKnight's credibility.

¶ 41 In turn, the State contends Holcomb's affidavit is not material because, as he

states in his affidavit, he could not see what was happening. Additionally, the State claims, Spiller's affidavit is not material because McKnight's motive to lie was already thoroughly pursued by defendant's counsel during cross-examination. We disagree with the State.

¶ 42 Evidence is material when it is relevant and probative to a defendant's claim of actual innocence. *Id.* Holcomb's use of the phrase "I couldn't really see what was going on" is contextually explainable and inconsistent with the State's interpretation. First, Holcomb's affidavit identifies two people as involved in De La Rosa's murder. Though Holcomb uses the term "Mexican," we cannot, at this stage, affirmatively determine "the Mexican" refers to De La Rosa. According to Holcomb, Mister shoots De La Rosa and "then" Bell bends over De La Rosa's body. It is here where Holcomb's inability to "see what was going on" is contextualized by his speculation—"but I think"—that Bell was checking De La Rosa's pockets. The fact that Holcomb's affidavit impliedly asserts defendant was not present at the time of De La Rosa's murder is material enough. Furthermore, trial counsel's attempt to implore the jury to find McKnight's testimony incredible, by pointing to a self-interested motivation for McKnight to lie about defendant, is simply not the same as a witness, Spiller, testifying he overheard McKnight's intention to perjure himself. Therefore, we find both Holcomb's and Spiller's affidavits are material.

¶ 43 Defendant contends both Holcomb's and Spiller's affidavits are noncumulative. He argues Holcomb's affidavit asserts he was not present during the murder and Spiller's affidavit asserts McKnight falsely testified he was there.

¶ 44 The State argues Holcomb's affidavit is cumulative because it asserts, like McKnight's testimony, that Mister shot and killed De La Rosa. The State does not provide an argument that Spiller's affidavit is cumulative.

¶ 45 Noncumulative evidence adds to what the jury heard. *Id.* It is true that both Holcomb's affidavit and McKnight's testimony at trial assert Mister shot and killed De La Rosa. But the overlap stops there. Holcomb's affidavit arguably adds to a jury's deliberation because it presents purported eyewitness testimony of the identification of the shooter and evidence that defendant was impliedly not present. McKnight's testimony was not eyewitness testimony. Instead, it was essentially a confession by defendant claiming he was there and witnessed Mister shoot and kill De La Rosa. Spiller's affidavit cannot be considered cumulative because there was no evidence presented by trial counsel that McKnight lied. Trial counsel attempted to discredit McKnight's testimony by suggesting to the jury McKnight had a motive to lie. Presenting evidence that a State's witness is lying versus cross-examining a State's witness to argue they have a motive to lie are two distinct things. Therefore, we find both Holcomb's and Spiller's affidavits are noncumulative.

¶ 46 Lastly, defendant contends both affidavits are of such conclusive character they would probably lead to defendant's acquittal at retrial. Defendant argues Holcomb's affidavit shows defendant was not present, while Spiller's affidavit directly undermines the State's strongest evidence in McKnight's testimony. We agree.

¶ 47 We do not need to find that the evidence in the affidavits would definitively result in defendant's acquittal at retrial. Rather, we must determine whether the evidence is of such a conclusive character it would *probably* lead to defendant's acquittal at retrial. *Id.* Ultimately, a jury would make a determination of credibility as to whether Holcomb or Spiller are believable. At the second stage of postconviction proceedings, our review of Holcomb's and Spiller's affidavits does not and cannot include a credibility assessment. See *Sanders*, 2016 IL 118123, ¶ 42 ("[C]redibility is not an issue at the second stage of postconviction proceedings."). Thus,

when taking the claims from the respective affidavits as true, we are left with two things: (1) purported eyewitness testimony which would arguably show defendant was not present at the time of De La Rosa's death and (2) testimony that directly undermines the State's most vital evidence from McKnight. As it stands, evidence of this nature is of such a conclusive character it would probably lead to a different result at defendant's retrial. Therefore, we conclude the trial court erred when granting the State's motion to dismiss defendant's amended petition at the second stage of postconviction proceedings and remand the matter to the trial court for third-stage proceedings pursuant to the Act. Because we find the court erred when dismissing defendant's amended petition, we need not determine whether postconviction counsel complied with Rule 651(c).

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we reverse the judgment of the trial court and remand for further proceedings consistent with this order.

¶ 50 Reversed and remanded.