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2012 IL App (3d) 100038-U

Order filed May 22, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 9th Judicial Circuit,
)	Warren County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0038
v.)	Circuit No. 03-CF-31
)	
KENNETH REGISTER,)	Honorable
)	David L. Vancil,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Schmidt and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court's denial of the defendant's petition for postconviction relief on the basis of newly discovered evidence of actual innocence was not manifestly erroneous where the evidence presented was either cumulative of other trial testimony, known before trial, or not likely to change the result on retrial; (2) the trial court's denial of the defendant's postconviction claim for ineffective assistance of counsel was not manifestly erroneous where the defendant failed to show that he was prejudiced by his trial counsel's allegedly deficient performance; (3) the defendant is entitled to an additional five days of credit against his prison term for time spent in presentence custody between the date of his arrest and the date he posted bond; and (4) the defendant is not entitled to a credit of \$5 per day towards the payment of the DNA analysis fee.

¶ 2 After a bench trial, the defendant, Kenneth Register, was convicted of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2002)) and sentenced to 18 years' imprisonment. After his conviction and sentence were affirmed on appeal, the defendant filed a petition for postconviction relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). The trial court denied the defendant's petition after an evidentiary hearing. This appeal followed.

¶ 3 The parties are aware of the facts and the findings of the trial court. Accordingly, we will discuss the facts in this order only as they pertain to the issues presented.

¶ 4 1. The Defendant's Claim for a New Trial Based on Newly Discovered Evidence

¶ 5 The defendant argues that the trial court erred in denying his petition because the defendant presented newly discovered evidence of his actual innocence. The wrongful conviction of an innocent person violates due process under the Illinois Constitution. *People v. Washington*, 171 Ill. 2d 475, 487-89 (1996). Accordingly, a freestanding claim of actual innocence is cognizable under the Act. *Id.*; see also *People v. Edwards*, 2011 IL 111711, ¶ 32. "To warrant a new trial based on newly discovered evidence, the evidence: (1) must be of such conclusive character that it would likely change the result on retrial; (2) must be material to the issue but not merely cumulative; and (3) must have been discovered since the trial and be of such character that it could not have been discovered sooner through the exercise of due diligence." *People v. Smith*, 177 Ill. 2d 53, 82 (1997); see also *Edwards*, 2011 IL 111711, ¶ 32; *People v. Molstad*, 101 Ill. 2d 128, 134 (1984). We review a trial court's dismissal of a postconviction petition following an evidentiary hearing for manifest error. *People v. Pitsonbarger*, 205 Ill. 2d

444, 456 (2002). “Manifest error” is error that is clearly evident, plain, and indisputable. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 6 In support of his claim of actual innocence, the defendant relies upon testimony that his girlfriend, Amanda Switzer, and his cousin, Brett Fry, presented during the evidentiary hearing on the defendant's postconviction petition. Switzer testified that that she was at the defendant's mother's house the entire weekend that the victim, A.F., and the defendant's sons were there visiting the defendant. She signed an affidavit stating that she knew the defendant did not sexually abuse A.F. because she was present at the time the abuse allegedly occurred. Switzer testified that she spoke with the defendant's counsel before the trial about her willingness to testify on the defendant's behalf, but defense counsel never called her to testify. The trial court found that Switzer's testimony was known to the defendant at the time of the trial, was cumulative to the testimony presented by the defendant's mother at trial, and would not have changed the result if presented at trial.

¶ 7 After reviewing the record, we cannot conclude that these findings were manifestly erroneous. During the trial, A.F., the defendant's eleven-year-old stepson, testified that the defendant had sexually abused him in the Wataga home where A.F. previously lived with his mother and the defendant and also in the bathroom of the defendant's mother's home. The defendant's mother testified that A.F. only came to her house to visit the defendant twice and she never saw the defendant take A.F. into the bathroom. Moreover, the defendant's mother testified that, even if she were out of the house at a time when A.F. was visiting, other people who lived in the home at the time, such as Switzer, would have been there and would have told her that A.F. had visited. The trial court correctly found that Switzer's testimony would have been

cumulative of the defendant's mother's testimony and would not likely change the outcome on retrial. Moreover, by her own admission, Switzer told the defendant's counsel before the trial that she would be willing to testify as an alibi witness. Thus, Switzer's testimony was not "newly discovered."

¶ 8 Switzer also testified that she overheard the defendant's ex-wife telling her minor sons that "if they said what she told them to say [on the witness stand] they would get—I don't remember what it was—afterward." However, Switzer did not recall whether the defendant's ex-wife also made this statement to A.F., who was the most important witness against the defendant. More importantly, Switzer merely heard the defendant's ex-wife tell her sons to "say what she told them to say"; Switzer did not know what the defendant's ex-wife had previously told the boys to say, and she admitted that it was possible that she had merely told them to tell the truth on the witness stand. Accordingly, Switzer's testimony regarding the statements made by the defendant's ex-wife was not "of such conclusive character that it would likely change the result on retrial." *Smith*, 177 Ill. 2d at 82.

¶ 9 In addition, even if it were more "conclusive," Switzer's testimony would not have presented the type of newly discovered evidence that could justify a new trial. Switzer's testimony regarding the statements made by the defendant's ex-wife did not "present[] a state of facts which differ[ed] from that to which [a] witness testified" (*Smith*, 177 Ill. 2d at 82-83); at most, Switzer's testimony would merely have undermined the credibility of some of the State's witnesses. That is not a proper reason to grant a new trial on the basis of newly discovered evidence (*Id.*), particularly where, as here, the new evidence would not necessarily impeach the

credibility of the State's principal witness. Thus, the trial court's refusal to grant the defendant a new trial based upon Switzer's testimony was not manifestly erroneous.

¶ 10 Fry's testimony was also insufficient to warrant a new trial. Fry, who was the defendant's cousin, testified that A.F. told him that the defendant was innocent. Fry also claimed that, after he encouraged A.F. to come forward and tell the truth, A.F. refused because he believed he would get in trouble with his mother and with "the law." Fry initially testified that this conversation with A.F. took place before the defendant was convicted. However, after Fry was reminded that he had previously signed an affidavit stating that the conversation took place after the trial, Fry testified that he "th[ought]" and "believed" that the conversation took place after the defendant was convicted.

¶ 11 In explaining its ruling from the bench, the trial court stated that Fry's testimony did not entitle the defendant to a new trial based on newly discovered evidence because it would not "result in a different outcome at trial."¹ The trial court suggested that Fry's testimony was not

¹ The defendant argues that the trial court applied an incorrect standard in denying his petition because, in its written order, the court applied the standards for establishing a constitutional violation based on the use of perjured testimony, rather than the standards for granting a new trial based on newly discovered evidence of actual innocence. However, in its oral ruling denying the defendant's petition, the trial court acknowledged that the defendant was seeking a new trial based on newly discovered evidence, referenced the relevant standard governing such claims, and found that Fry's testimony failed to satisfy that standard. "When a trial court's oral pronouncement is in conflict with its written order, the oral pronouncement prevails." *In re K.L.S-P.*, 383 Ill. App. 3d 287, 294 (2008). Thus, although the trial court's oral

reliable, noting that Fry was "not even sure exactly when [the conversation with A.F.] took place," and that evidence was not presented as to "all the conditions in which [A.F.'s] statement was made." The trial court also noted that A.F. had not recanted his testimony under oath. After reviewing the record, we agree with the trial court. Claims for a new trial based on newly discovered evidence of actual innocence must be "supported 'with new *reliable* evidence *** that was not presented at trial.'" (Emphasis added.) *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). As the trial court noted, Fry did not testify in detail as to the context of his alleged conversation with A.F., and he seemed uncertain as to when the alleged conversation took place. These facts call into question the reliability of Fry's testimony. Thus, Fry's testimony was not "of such conclusive character that it would likely change the result on retrial." *Smith*, 177 Ill. 2d at 82. Accordingly, the trial court's decision not to grant the defendant a new trial based upon Fry's testimony was not manifestly erroneous.

¶ 12 2. The Defendant's Claim of Ineffective Assistance of Counsel

¶ 13 The defendant also argues that his trial counsel was ineffective because she failed to call Switzer as a witness to contradict and impeach A.F.'s trial testimony. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). More specifically, a defendant must show that his counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for _____ order also referenced the standard governing perjury claims, we conclude that the trial court did not decide the case based upon an incorrect standard.

counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland, 466 U.S. at 694; see also *People v. Cathey*, 2012 IL 111746, ¶ 22.

¶ 14 Here, the defendant cannot establish prejudice. As the trial court correctly found, Switzer's testimony that the defendant could not have abused A.F. while A.F. was visiting the defendant at his mother's home was cumulative of the defendant's mother's testimony. Moreover, Switzer's testimony that the defendant's ex-wife told her sons to "say what she told them to say" on the stand would not have affected the outcome of the trial because Switzer did not know what the defendant's ex-wife had previously told the boys to say, and she admitted that it was possible that she had merely told them to tell the truth. In addition, Switzer could not recall whether A.F. was present when the defendant's ex-wife spoke to her other sons. Thus, even assuming that Switzer's testimony might have impeached the other boys to some degree, it would not have impeached the testimony of A.F., the State's pivotal witness. Given this, and given the other evidence against the defendant (including his own statements to the police), the defendant cannot show that there is a reasonable probability that the result of the proceedings would have been different if Switzer had testified. Thus, the trial court's denial of the defendant's postconviction claim for ineffective assistance of counsel was not manifestly erroneous.²

² Further, it is improper for the defendant to use Switzer's testimony both as "newly discovered evidence" supporting a freestanding claim of actual innocence and as evidence supporting a postconviction claim for ineffective assistance of counsel. See *People v. Orange*, 195 Ill. 2d 437, 459-60 (2001) (holding modified on other grounds by *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002)).

¶ 15

3. Presentence Credit

¶ 16 The defendant also argues that he is entitled to an additional five days of credit against his prison term under former section 5-8-7(b) of the Unified Code of Corrections (730 ILCS 5/5-8-7(b) (West 2002) (repealed by Pub. Act 95–1052 § 95 (eff. July 1, 2009))) for time spent in presentence custody between the date of his arrest and the date he posted bond. The State agrees that the defendant is entitled to an additional five days of presentence credit, and so do we. An appellate court may modify a mittimus to reflect additional presentence custody credit when the case is before the court on appeal from the denial of a postconviction petition "if the record sufficiently reveals to what credit the defendant is entitled." *People v. Gomez*, 409 Ill. App. 3d 335, 341 (2011). Here, the record reveals that the defendant spent five days in custody from the time he was arrested until he posted bond and that he never received credit for this time. We therefore modify the mittimus to reflect that the defendant was in custody for a total of 44 days, not 39 days.

¶ 17

4. Whether the Defendant is Entitled to a Credit of \$5 Per Day Towards the Payment of the DNA Analysis Fee

¶ 18 Finally, the defendant argues that he should receive a \$5 per day sentencing credit towards the payment of the \$200 DNA analysis fee required by section 5-4-3(j) of the Unified Code of Corrections. 730 ILCS 5/5-4-3(j) (West 2002). Section 110–14 of the Code of Criminal Procedure (Code) provides, in pertinent part: "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110–14(a) (West 2002). The defendant argues that the DNA analysis assessment is a "fine" for which he is entitled to presentence custody credit under section 110-14 of the Code.

¶ 19 This issue was recently decided by our supreme court in *People v. Johnson*, 2011 IL 111817. In *Johnson*, our supreme court held that the DNA analysis fee was "a one-time charge intended to cover the cost of analyzing the DNA sample submitted by the qualifying offender," not a punitive sanction. *Id* at ¶ 28. Thus, the supreme court concluded that the DNA analysis fee was not a "fine" subject to offset by the section 110-14 presentence incarceration credit. Based upon the supreme court's ruling in *Johnson*, we reject the defendant's argument on this issue.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court of Warren County dismissing the defendant's postconviction petition. However, we modify the mittimus to reflect that the defendant is awarded 44 days of credit for time served before sentencing.

¶ 22 Affirmed; mittimus modified.