2017 IL App (1st) 130177-U
Nos. 1-13-0177, 1-13-2279 & 1-15-2995 (cons.)
Order filed August 8, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSEPH BOOKER, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 02 CR 25224 The Honorable Arthur F. Hill, Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's denial of defendant's postconviction petition after a third-stage evidentiary hearing was not against the manifest weight of the evidence where one witness recanted her affidavit supporting the petition and the trial court found a second witness was not credible; trial court's denial of defendant's request to test the five bullet casings for DNA was not manifestly erroneous.

¶ 2 On direct appeal, this court affirmed defendant Joseph Booker's conviction for murder. Booker filed a postconviction petition asserting actual innocence based on an affidavit from a witness stating she saw who shot the victim, and it was not Booker. This court reversed and

remanded for further proceedings the trial court's summary dismissal of the petition. In this appeal, Booker argues actual innocence because the evidence implicating the shooter exonerates him and would change the result on retrial. Booker also contests the trial court's denial of his request for DNA testing, which he maintains, "has the potential to produce noncumulative evidence materially relevant to [his] actual innocence claim."

¶ 3 The trial court conducted a full postconviction evidentiary hearing. Based on this record, the trial court's decision was not against the manifest weight of the evidence. Additionally, the trial court's denial of the request to test the five bullet casings for DNA was not error.

¶ 4 Background

¶ 5 In September 2002, Charles Rials was fatally shot while walking in the Wentworth Gardens Housing Development, Chicago. Police arrested Booker the next day after three eyewitnesses identified him as the shooter. The eyewitnesses, all of whom testified at Booker's trial, were Kenneth Williams and Darnell Brown, both Black Gangster Disciples, and Louis Dean, 13-years-old on the night of the shooting.

¶ 6 Kenneth Williams knew Booker from having seen him multiple times at Wentworth Gardens over the previous three months. Booker drove a blue, four-door Pontiac Grand Prix and often visited Melissa Westmoreland, who lived there. On the evening of September 8, Williams was standing with some friends across the street from Westmoreland's house when Booker arrived with several friends. Booker's group argued with Williams and his friends before going into Westmoreland's house. A short time later, Booker and his friends came outside, resumed arguing, and then drove away. Booker returned minutes later with a gun and walked up to Rials who was walking down the street. Williams saw Booker point the gun at Rials and shoot him in

the head. Booker then stood over Rials and shot him several more times, before running away. The next day, Williams spoke to the police and identified Booker in a lineup.

¶ 7 Darnell Brown testified that around 11:00 p.m. on September 8, he was walking with Rials down 38th toward Williams who was sitting on some steps. Brown stopped to talk to someone and Rials kept walking. Brown heard a gunshot and started walking toward the sound. Brown heard four more gunshots and then saw Booker with a gun standing next to Rials, putting the gun away on his hip. Booker got into a Grand Prix and drove away. Five days later, Brown went to the police station and identified Booker in a lineup.

¶ 8 Louis Dean lived at Wentworth Gardens with his parents and grandmother. On the night of the shooting Dean was in his second-floor bedroom watching television. He looked out of his window and saw Rials, whom he knew from the neighborhood. Dean saw Booker walk up behind Rials and shoot him. After Rials fell, Booker stood over him and fired additional shots. Two days later, Dean identified Booker from a lineup as the shooter. On cross-examination, Dean admitted he gave a signed statement to an Assistant State's Attorney and a Chicago detective that he heard the first shot, but did not see it. Dean also stated he did not remember telling the Grand Jury that he did not know where the shots came from. Dean testified that his previous statement was incorrect and that he was telling the truth when he testified that he actually saw Booker shoot Rials.

¶ 9 Physical evidence recovered at the scene included a baseball cap, CTA transit card, five cartridge cases, four metal fragments, and a blood specimen from the sidewalk. A Chicago Police Department forensic investigator identified five bullet casings found at the scene as Winchester .40-caliber Smith and Wesson pistol ammunition fired from the same gun. No gun was recovered.

¶ 10 During deliberations, the jury sent two notes to the trial court indicating a deadlock. A jury convicted Booker after being given the *Prim* instruction.

¶ 11 Appeal No. 1-03-3533

¶ 12 On direct appeal, this court affirmed Booker's conviction, rejecting his arguments that the eyewitness testimony was unreliable and that the trial court erred by giving the *Prim* instruction. This court held that the identifications were not so "vague or doubtful that no rational jury could have concluded that defendant committed the offense of first degree murder." *People v. Booker*, 1-03-3533 (2005) (unpublished order under Illinois Supreme Court Rule 23).

¶ 13 Appeal No. 1-06-2581

¶ 14 On May 31, 2006, Booker filed a postconviction petition asserting both trial counsel and appellate counsel were ineffective; the State engaged in prosecutorial misconduct by withholding a material witness and information from the defense; and newly discovered evidence proved his actual innocence, attaching the affidavit of Ellen Anderson.

¶ 15 Anderson stated in her affidavit that around 11:05 p.m. on September 8, 2002, she was visiting Wentworth Gardens when she saw Williams, Brown, and a third man whom she did not know. Anderson had a conversation with Brown while Williams and the other man began to walk away. Anderson heard a gunshot and saw the other man lying on the ground. Anderson then saw Williams approach the man on the ground and shoot him several more times. Afterward, as Anderson ran to catch a cab, Brown followed, threatening her, and telling her to "keep [her] mouth shut."

¶ 16 The trial court summarily dismissed the petition. Booker appealed and this court reversed. *People v. Booker*, No. 1-06-2581 (2008) (unpublished order under Supreme Court Rule 23). We

found Anderson's proffered testimony "material to the issue of whether defendant shot Rials," not cumulative of the evidence presented at trial, and of such a conclusive nature that it would "probably change the result on retrial." *Id.* at 4. Moreover, although three eyewitnesses identified defendant as Rials' murderer, Anderson's affidavit suggested that Williams and Brown were motivated to fabricate their accounts. *Id*. Further, the third witness, Dean, did not actually see the shooting. This court concluded that "this testimony, considered in conjunction with Anderson's proffered account of the incident provide[d] weak evidence of [Booker's] guilt." *Id.* at 6. Thus, we remanded for further proceedings.

¶ 17 The trial court granted the State's motion to dismiss finding Booker's ineffective assistance of trial counsel claims could have been raised in his direct appeal. The trial court ordered a hearing on the actual innocence claim in Booker's petition. In September 2014, the State informed the trial court that Anderson had recanted her affidavit and given a videotaped statement to that effect.

¶ 18 In December 2014, the State tendered recently discovered reports from the Chicago Police Department relating to its investigation of the murder. Among the reports was a handwritten statement from Westmoreland that Booker was at her house, left about 1/2 hour before she heard gunshots, and that another neighbor told her that Williams and "W.K" were arguing before the shooting. After viewing these documents, Booker filed a motion to reconsider the trial court's order granting the State's motion to dismiss. Attached to his motion was a signed statement from Ford, dated December 12, 2014, that on September 8, 2002, Ford was with his fiancé on her porch next door to Westmoreland's house and that around 6:30 or 7:00 p.m. he saw Booker arrive

there and go inside. Ford also saw Williams and 15 to 20 other Gangster Disciples "drinking and smoking weed" across the street.

¶ 19 Around 10:00 or 10:15 p.m., Ford saw Booker leave Westmoreland's and drive away. About 15 or 20 minutes later, Ford saw Rials arrive. Ford saw Rials and Williams arguing, and a short time later saw Williams shoot Rials in the head and again while he was on the ground. Ford also stated that he spoke to the police on the night of the shooting and told them he had only heard shots but had not seen anything because he knew Williams saw him outside and he was afraid for himself and his family.

¶ 20 The trial court denied Booker's motion to reconsider and advanced Booker's actual innocence claim to a third-stage evidentiary hearing. At the hearing, Anderson, Ford, and Booker testified. Booker testified that he did not shoot Rials, and that the only people he knew at Wentworth Gardens were Westmoreland and her family.

¶ 21 Anderson testified that her sworn affidavit stating she saw Williams shoot Rials was false, but she signed it because she loved Booker and did not want to see him in prison. Sporadically over 10 years, she and Booker had been in a romantic relationship but they were not dating in 2002. In 2003, she learned that Booker was in prison, and in 2005, Booker's mother called her. Anderson went to visit Booker in prison about 10 times but never talked to him about the case. Anderson thought he was innocent

¶ 22 Ford testified that he belonged to the Black Disciples gang until 2001, and at the time of the hearing was serving a 60-year sentence for an unrelated murder and armed robbery. His testimony and his affidavit were essentially the same. Ford added that he had talked to the police on the night of the shooting but denied seeing anything because he was afraid for himself, his

fiancé, and her three children. According to Ford, he saw Williams shoot Rials with a pistol as Rials was attempting to walk away from Williams. On cross-examination, Ford stated the shooting occurred in the middle of the street.

¶ 23 The trial court denied Booker's petition, noting that Anderson testified that her affidavit was "a lie, that she was not out there, that she did not see any shooting, that she had had a relationship with [petitioner] and she felt badly for him, she wanted to help him." The trial court also noted that Ford's credibility was doubtful and that Booker "of course" denied committing the murder.

¶ 24 Booker requests reversal of the third-stage denial of his petition asserting his innocence and remand for a new trial.

¶ 25 Forensic Testing

¶ 26 Booker filed a *pro se* motion for forensic testing, requesting DNA and fingerprint testing on the recovered cartridge casings. 725 ILCS 5/116.1, *et seq*. (West 2012). The State objected based on Booker's inability to meet his burden of establishing that the evidence had been properly preserved. 725 ILCS 5/116-3 (West 2012). At the hearing on the motion, Illinois State Police latent fingerprint examiner Christy Fischer testified she tested the five cartridge casings in 2002. Fischer wore latex gloves, a coat, and eyewear but did not cover her mouth because it was not "common practice" to do so. Had DNA testing been initially requested, it would have been done before other testing.

¶ 27 The technician who conducted "firearms analysis" of the casings did not wear gloves or protective face-wear when handling the casings. Two other technicians handled the casings while

processing them. And the casings were sent to a state police lab in Carbondale where technicians would also have handled them without protective gear.

¶ 28 DNA expert Greg Didomenic testified he reviewed the lab reports pertaining to the shell casings. Didomenic opined that the small size of the cartridge casings and the fact that several persons handled the casings without protective gear meant that the casings were "potentially contaminated." Didomenic would not expect to find "meaningful DNA" on the casings. Had "clean technique" precautions been taken, getting DNA evidence would have been more likely.

¶ 29 The trial court found that (i) DNA testing was not requested in 2002, (ii) Illinois State Police followed procedures in place for the requested tests, and (iii) any destruction of the DNA evidence was not malicious. Accordingly, the court held that "DNA testing would not yield probative results in this case," and denied Booker's motion.

¶ 30 Analysis

¶ 31 The Due Process Clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. 1, § 2) affords postconviction petitioners the right to assert a claim of actual innocence based on newly discovered evidence. *People v. Parker*, 2012 IL App (1st) 101809, ¶ 80. To succeed on a claim of actual innocence, a petitioner must present: (i) evidence that has been discovered since the trial and could not have been discovered earlier through due diligence. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009); (ii) which is relevant and probative of the petitioner's innocence ("material") and adds to the evidence which the jury heard (noncumulative); and (iii) of such a conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. "Probability" is the key, not certainty, because the trial court predicts what another jury would likely do, considering the new and the old evidence together. *Id.* ¶ 97.

¶ 32 At the second stage of postconviction proceedings, the trial court takes all well-pleaded facts that are not positively rebutted by the trial record as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Here the trial court not only had Anderson's affidavit before it, but also Ford's signed statement attached to Booker's motion. In ordering the evidentiary hearing, the trial court explicitly stated that Ford's testimony was needed.

¶ 33 At a third-stage evidentiary hearing, the trial court must determine whether the evidence introduced demonstrates that the petitioner is entitled to relief under the Act. *People v. Domagala*, 2013 IL 113688, ¶ 34. The trial court serves as a fact finder and determines the credibility of witnesses, weighs testimony and evidence, and resolves any evidentiary conflicts. *Id*. New evidence produced at the postconviction stage need not exonerate the defendant. This is a comprehensive approach and involves credibility determinations that are uniquely appropriate for the trial judge. *Coleman*, 2013 IL 113307, ¶ 97.

¶ 34 We must decide whether the trial court committed manifest error by determining that the evidence was not conclusive enough to "probably" change the result on retrial. See *id.*, ¶¶ 1, 104. Where fact-finding and credibility determinations are involved, we will not reverse the trial court's decision unless it is manifestly erroneous. *People v. English*, 2013 IL 112890, ¶ 23; *People v. Beaman*, 229 Ill. 2d 56, 72 (2008) (quoting *People v. Morgan*, 212 Ill. 2d 148, 155 (2004) ("Manifestly erroneous" means the trial court's error is "clearly evident, plain, and indisputable.").

¶ 35 Ford did not come forward until December 2014, more than 12 years after the shooting, while incarcerated for an unrelated murder. Booker attempts to justify the lengthy delay by arguing Ford feared retaliation from Williams' gang, and that Ford was unaware of Booker's real

name. But Ford was imprisoned in 2004 and waited until 2014 to make his statement. This delay alone raises questions as to Ford's credibility. "The omission of a witness to state a particular fact under circumstances rendering it likely that he would state that fact, if true, may be shown to discredit his testimony as to such fact." *People v. Brown*, 47 Ill. App. 3d 920, 928-29 (1977). Although couched in terms of impeachment of a witness at trial, this principle impairs Ford's credibility as a witness. See *People v. Fabran*, 42 Ill. App. 3d 934, 938 (1976).

¶ 36 Additionally, Ford's status as a convicted felon adversely affected his credibility. See *People v. Montgomery*, 47 Ill. 2d 510,516 (1971) (test used to determine admissibility of witness's prior conviction). The trial court read Ford's statement, heard him testify about what he observed in 2002, and was the ultimate arbiter of Ford's credibility.

¶ 37 Similarly, Anderson did not come forward until 2006, four years after the crime. Anderson stated she saw Booker's mother at church and told her that she knew Booker was not guilty. After visiting Booker in prison multiple times over the next few years, Anderson swore out an affidavit that she later recanted. The affidavit was the basis for advancing the matter to a third-stage hearing.

¶ 38 Regarding Anderson's affidavit, Booker asserts that Anderson's recantation was suspect because she feared Brown, who belonged to the Gangster Disciples, and she was pressured by the prosecutors to talk to them and recant. Booker urges this court to view with skepticism Anderson's recantation testimony. Anderson disavowed her affidavit via a videotaped statement and testified at the evidentiary hearing. While recantation of testimony is viewed with suspicion (*People v. Morgan*, 212 Ill. 2d 148, 155 (2004)), the trial judge heard this witness, both in person and on video, discuss her reasons for recanting the statements in the affidavit.

¶ 39 We find no reason to disturb the postconviction trial judge's credibility determinations. *People v. Coleman*, 183 Ill. 2d 366, 381, (1998).

¶ 40 DNA Testing

¶ 41 Booker contends that our standard of review is *de novo* because this issue presents a legal question. A *de novo* standard is appropriate where the trial court's decision is not based on the assessment of the credibility of the witnesses. See *People v. Brooks*, 221 Ill. 2d 381, 393 (2006) (denial of request made pursuant to section 116-3 reviewed *de novo*).

¶ 42 Booker argues that the trial court erred by denying his request for DNA on the five bullet casings recovered from the scene. Booker contends that section 116-3 of the Code entitles him to the DNA testing because the statute provides that where identity was an issue at trial, the evidence was subject to a sufficient chain of custody, and the evidence is new, non-cumulative, and materially relevant to an actual innocence claim, the trial court "shall allow" the evidence to be tested. See 725 ILCS 5/116-3(b), (c) (West 2012).

¶ 43 Identity was the central issue at trial, satisfying the first requirement. The chain of custody evidence, however, refutes Booker's argument as to the second requirement. The bullet casings were recovered at the scene and sent to the state police lab for fingerprint testing. The technicians doing that testing followed all protocols, including using protective gear while handling the casings. After fingerprint testing was completed, the casings were sent to ballistics, where protective gear is not necessary. Ballistics tests determined all five bullet casings were Winchester .40 caliber Smith and Wesson pistol ammunition fired from the same gun. No further testing was done.

¶ 44 In this case, as in *Brooks*, the technology was available but no request was made at the time of trial, and our supreme court has stated that a request should be granted only where "the technology for the testing was unavailable at the time of defendant's trial." *Brooks*, 221 Ill. 2d at 393. According to *Brooks*, courts nationwide have recognized the technology having been available since the mid-1990s. *Id.*

¶ 45 Further, the evidence established that had DNA testing been requested before trial, this would have been done in advance of any other testing. But DNA testing was not requested by the defense, and Booker has not met his burden under the statute to present a *prima facie* case that "the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect." 725 ILCS 5/116-3(b), (c) (West 2012).

¶ 46 Finally, as to the third requirement, DNA evidence obtained from the bullet casings would be new, and possibly non-cumulative, but whether it would be materially relevant is highly doubtful. Even if a meaningful sample were obtained and test results matched DNA to Williams, for example, or even to Booker, that evidence would not necessarily prove who actually fired the gun. Anyone loading the pistol would have touched the bullet casing. Any person's DNA on a bullet casing shows only that much, and nothing more. The trial court's denial of Booker's request after a full hearing at which experts on fingerprints, ballistics, and DNA testified was not manifestly erroneous.

¶ 47 Affirmed.