

2018 IL App (2d) 160202-U
No. 2-16-0202
Order filed August 20, 2018

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07-CF-3445
)	
HEZEKIAH HAMILTON,)	Honorable
)	James C. Hallock,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's motion for testing under section 116-3: as the trial evidence had established that there was no blood on defendant's pants and had overwhelmingly established his guilt, the testing of those pants to confirm the absence of blood would not have produced any noncumulative evidence material to his claim of actual innocence.

¶ 2 Defendant, Hezekiah Hamilton, appeals *pro se* from an order of the circuit court of Kane County denying his motion for forensic testing. Because defendant failed to establish that the proposed testing could produce any new, noncumulative evidence that was materially relevant to his claim of actual innocence, we affirm.

¶ 3

I. BACKGROUND

¶ 4 Defendant was indicted on one count of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2006)), arising out of the stabbing death of Brenetta Beck.

¶ 5 Following a bench trial, defendant was found guilty and sentenced to 55 years' imprisonment. Defendant appealed, challenging only his sentence, and we affirmed. See *People v. Hamilton*, 2011 IL App (2d) 100739.

¶ 6 Defendant subsequently filed a postconviction petition (see 725 ILCS 5/122-1 *et seq.* (West 2012)), contending that his trial counsel was ineffective regarding the admission of other-crimes evidence. We affirmed the first-stage dismissal of the petition, holding that, because the evidence was overwhelming, no prejudice could be shown. See *People v. Hamilton*, 2014 IL App (2d) 130313-U, ¶ 2.

¶ 7 Defendant then filed a *pro se* motion for forensic testing (see 725 ILCS 5/116-3 (West 2014)). He sought to have forensically tested a pair of work pants that he allegedly wore on the day of the murder. He asserted that the lack of the victim's blood on the pants would materially advance his claim of actual innocence.

¶ 8 On November 18, 2015, the trial court denied defendant's motion. In doing so, the court explained that the pants had already been examined for the presence of blood, and, because no blood was found, there was nothing to submit for DNA testing.

¶ 9 On March 8, 2016, defendant filed a *pro se* notice of appeal. The notice of appeal was dated January 20, 2016, notarized on February 22, 2016, and postmarked February 23, 2016. Because the time for filing a notice of appeal had expired on December 18, 2015, the State filed an objection to the late notice of appeal. Defendant, through his appellate counsel, filed, pursuant to Illinois Supreme Court Rule 606(c) (eff. Dec. 11, 2014), a motion for leave to file a

late notice of appeal. He asserted that the failure to file a timely notice of appeal should be excused, because, during the month of December 2015, the prison had been flooded and under lockdown, thereby precluding any outgoing mail. This court granted defendant's motion for leave to file a late notice of appeal.

¶ 10 Appellate counsel subsequently moved for leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993). Counsel contended that there was no meritorious issue regarding the forensic testing of the pants. We granted counsel's motion to withdraw and allowed defendant to proceed *pro se*.

¶ 11

II. ANALYSIS

¶ 12 On appeal, defendant contends that the trial court erred in denying his motion for forensic testing of the pants, because the absence of the victim's blood on the pants, which he asserts he was wearing on the day of the murder, would show that he did not commit the crime.

¶ 13 The State responds that (1) we lack jurisdiction, because defendant's notice of appeal was late and, in seeking leave to file it under Rule 606(c), he failed to include an affidavit averring that his claim has merit and that he was not culpably negligent in failing to file it on time; and (2) forensic testing would not produce any new, noncumulative evidence that would significantly advance defendant's claim of actual innocence.

¶ 14 We will first address whether we have jurisdiction. We do.

¶ 15 Our jurisdiction depends on the filing of a timely notice of appeal. *People v. Coleman*, 2017 IL App (4th) 160770, ¶ 15. A notice of appeal must be filed within 30 days after the entry of the final judgment. Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014). However, we have the authority to allow the late filing of a notice of appeal upon a motion supported by an affidavit showing that

there is merit to the appeal and that the failure to file a timely notice of appeal was not due to the appellant's culpable negligence. Ill. S. Ct. R. 606(c) (eff. Dec. 11, 2014).

¶ 16 In this case, the final judgment was entered on November 18, 2015. Therefore, the notice of appeal was required to be filed no later than December 18, 2015. Because it was not filed until March 8, 2016, it was late.

¶ 17 Defendant, however, sought leave to file a late notice of appeal. In doing so, he asserted, via appellate counsel, that there was merit to the appeal and that he was unable to file a timely appeal because flooding and a lockdown at the prison precluded him from doing so. Attached to his motion was an affidavit of appellate counsel, which swore that the facts set forth in the motion were true and correct to the best of counsel's knowledge and belief.

¶ 18 Defendant's counsel's affidavit satisfied Rule 606(c), as it swore to the truth of the assertions in the motion, including that there was merit to the appeal and that defendant was not culpably negligent in failing to file a timely notice of appeal. That was all that Rule 606(c) required. See Ill. S. Ct. R. 606(c) (eff. Dec. 11, 2014). Further, even if counsel's affidavit did not technically comply with Rule 606(c), the ends of justice were served by allowing the late notice, as defendant clearly indicated the intent to appeal within the six-month period allowed by Rule 606(c). See *In re K.M.*, 70 Ill. App. 3d 915, 918-19 (1979) (citing *People v. Williams*, 59 Ill. 2d 243 (1974)). Thus, we have jurisdiction over this appeal.

¶ 19 We next decide whether the trial court erred in denying defendant's motion for forensic testing. It did not.

¶ 20 We begin by noting that we detailed the evidence from defendant's trial when we disposed of his appeal from the dismissal of his postconviction petition. See *Hamilton*, 2014 IL

App (2d) 130313-U, ¶¶ 6-42. Thus, we will not repeat those facts here. We will refer to the evidence, however, in discussing the forensic-testing issue.

¶ 21 We review *de novo* a trial court's ruling, without an evidentiary hearing, on a motion for testing pursuant to section 116-3. *People v. English*, 2013 IL App (4th) 120044, ¶ 14. Accordingly, we are not bound by the trial court's reasoning and can affirm the judgment on any basis in the record. *English*, 2013 IL App (4th) 120044, ¶ 14.

¶ 22 A defendant may bring a motion for forensic testing if either the evidence that is sought to be tested was not previously subject to the testing now requested, or it was previously tested but can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial and that would provide a reasonable likelihood of more probative results. 725 ILCS 5/116-3(a) (West 2014). Under section 116-3, a defendant must establish a *prima facie* case that identity was at issue at trial and that the evidence to be tested was subject to a sufficiently secure chain of custody. 725 ILCS 5/116-3(b) (West 2014). The trial court shall allow testing if it determines that the requested testing uses a generally-accepted scientific method and that the results have the potential to produce new, noncumulative evidence that is materially relevant to the defendant's assertion of actual innocence, even if the results might not completely exonerate the defendant. 725 ILCS 5/116-3(c) (West 2014). Evidence is materially relevant to a claim of actual innocence if it tends to significantly advance the claim. *English*, 2013 IL App (4th) 120044, ¶ 21. To make such a determination, the court must evaluate both the trial evidence and the evidence that the defendant seeks to have tested. *English*, 2013 IL App (4th) 120044, ¶ 21.

¶ 23 Here, defendant's request for forensic testing of the pants would not produce any new, noncumulative evidence. As noted, defendant sought to have the pants tested to show that the

victim's blood was not on the pants. However, Detective John Cebulski testified that there was no blood on the pants. Indeed, the State did not argue that the victim's blood was on the pants. Accordingly, further evidence that there was no blood on the pants would be cumulative. See *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009) (evidence is cumulative when it adds nothing to what was already before the jury). Thus, even if the pants were subjected to additional forensic testing showing that the victim's blood was not on the pants, such evidence would not be new or noncumulative. That alone supports the denial of defendant's motion.

¶ 24 Additionally, even if the evidence of the absence of the victim's blood would be new and noncumulative, it would not significantly advance defendant's claim of actual innocence. As we noted in our order disposing of defendant's appeal from the dismissal of his postconviction petition, the evidence against defendant was overwhelming. See *Hamilton*, 2014 IL App (2d) 130313-U, ¶ 2. Indeed, the evidence showed that the victim's blood was on defendant's sock, on his boot, and in his vehicle. That evidence, along with the incriminating evidence regarding defendant's actions on the morning of the murder, painted a compelling picture of defendant's guilt. In light of the significant incriminating evidence, the mere fact that the victim's blood was not on defendant's pants would not significantly advance his claim of actual innocence. Thus, defendant also failed to show that the forensic testing could produce evidence that was materially relevant to his claim of actual innocence.

¶ 25 Because the forensic testing sought by defendant would not have produced new, noncumulative evidence materially relevant to his claim of actual innocence, the trial court properly denied the motion for forensic testing.

¶ 26

III. CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of Kane County. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 28 Affirmed.