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2018 IL App (3d) 170230-U

Order filed August 23, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
Plaintiff-Appellee,)	of the 13th Judicial Circuit,
)	Grundy County, Illinois.
)	
v.)	Appeal No. 3-17-0230
)	Circuit No. 12-CF-200
)	
KIMBERLY A. SMITH,)	The Honorable
Defendant-Appellant.)	Howard C. Ryan Jr.
)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly dismissed defendant’s postconviction petition and petition for postjudgment relief where “new evidence” of ARDC proceedings against complaining witness was (1) not material to defendant’s guilt of theft, (2) cumulative of evidence introduced at trial, and (3) not so conclusive that it would have changed the result of trial.

¶ 2 In 2012, defendant Kimberly A. Smith was charged with theft by deception of more than \$10,000 but less than \$100,000, a class 2 felony. 720 ILCS 5/16-1(a)(2)(A), (b)(5) (West 2012). Following a bench trial, the trial court found defendant guilty of theft by deception of more than

\$500 but not more than \$10,000, a class 3 felony. 720 ILCS 5/16-1(a)(2)(A), (b)(4) (West 2012). The trial court sentenced defendant to four years of probation. In 2016, defendant filed a postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)), as well as a petition for postjudgment relief under section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)). The trial court dismissed both petitions. Defendant appeals the dismissals. We affirm.

¶ 3

FACTS

¶ 4

Defendant Kimberly Smith worked as a secretary for attorney Mark Rigazio from 2004 to 2012. In October 2012, defendant was charged, by indictment, with theft by deception for writing checks and incurring credit card charges on Rigazio’s office accounts “to purchase personal items for herself, as well as for family members and friends.” The value of the property stolen was alleged to be “in excess of \$10,000 but less than \$100,000[.]” The case proceeded to a bench trial.

¶ 5

At trial, defendant testified that she began working as Rigazio’s secretary in 2004. In 2006, Rigazio authorized her to use the office credit card for personal and office expenses. When the credit card bill came each month, Rigazio reviewed it with defendant and labeled her personal expenses as either “office” to signify that he was writing the purchase off as an office expense or “Kim” to signify that defendant was responsible for paying for the item. Defendant then wrote Rigazio a check for the items marked “Kim.” Rigazio decided what he wanted her to pay back and “what he was going to write off on his taxes, because being a sole practitioner, he said he needed more write-offs.”

¶ 6

Defendant testified that beginning in 2008, she began receiving an extra check from Rigazio each pay period with no payroll deductions. Those checks were not reflected on her W-

2's. When she asked for a raise in 2010 and 2011, the amount of the extra check increased. Rigazio told her he was treating the extra checks as office expenses.

¶ 7 Rigazio testified that defendant asked to be added to the office credit card in 2006 so she could order office supplies. Rigazio complied. Soon thereafter, Rigazio's bookkeeper, Stephanie Heap, told Rigazio that defendant was using the office credit card for personal expenses. Rigazio told defendant she could use the office card for personal expenses of up to \$50 but had to reimburse him.

¶ 8 In 2012, when defendant left for medical leave, Rigazio opened the office credit card statement for the first time and was "shocked" to find large purchases by defendant that he never authorized her to make. He testified that defendant made unauthorized purchases from Dollar General, Jewel and Walmart for baby items, personal gifts, textbooks for her daughter, lanyards for her sister, bras, panties, feminine hygiene products, nylons, pet supplies, fax machines, t-shirts, NASCAR tickets and hunting and fishing licenses. He estimated that the amount of unauthorized purchases defendant made using the credit card from 2007 to 2012 was \$15,000 to \$20,000. He also testified that defendant used his Federal Express account, without his authority, to send her monthly mortgage payments to her lender, Chase Financial.

¶ 9 Rigazio testified that until 2008, he gave defendant one check per pay period from which payroll deductions were made. In 2008, he began giving defendant an additional check each pay period that was not subject to payroll deductions. Rigazio admitted that he identified the extra checks as office expenses from 2008 to 2012. He also admitted that he paid another employee, Steven Marcellis, in the same way, categorizing Marcellis' pay as office expenses. Rigazio admitted these were not accurate categorizations of the checks.

¶ 10 Stephanie Heap testified that she worked as Rigazio’s bookkeeper for 15 years. In 2007, Rigazio authorized defendant to use the office credit card. Shortly thereafter, Rigazio told her that defendant had permission to use the office credit card for personal expenses. Heap testified that defendant reimbursed Rigazio for some of the items and others were itemized by defendant as “office supplies.” Heap testified that defendant made unauthorized purchases using the credit card, including baby items, lanyards, tampons, bras, panties, nylons, Cubs tickets, Chicagoland Speedway tickets, hunting licenses, and textbooks. Heap determined that defendant’s personal expenses on the office credit card totaled \$14,383.41 from 2007 to 2012.

¶ 11 Heap also testified that beginning in 2007, defendant began using Rigazio’s Federal Express office account to mail overnight mortgage payments to Chase Financial. Defendant told her that Rigazio authorized her to do so, but Rigazio denied giving her permission to use the account. The total amount charged to the office Federal Express account for overnight payments to Chase was \$2,546,61.

¶ 12 Heap confirmed that Rigazio authorized defendant to receive an additional check each payroll period in 2008, which was itemized as “office supplies.” Rigazio authorized Heap to increase the amounts of the checks in 2010 and 2011 and to continue to itemize them as office expenses. Rigazio also instructed Heap to itemize each check written to Steven Marcellis as “office supplies.”

¶ 13 The trial court found defendant guilty of theft by deception of over \$500. In reaching its verdict, the court explained that in assessing credibility, it looked at “the entire picture” including the “collateral issue” that “there was something going on *** during the course of this relationship which has consequences with regard to the Internal Revenue Service.” The court stated that Rigazio had “personal issues he’s going to have to deal with in the future as far as

writing checks without taking withholdings.” Nevertheless, the court was convinced beyond a reasonable doubt that defendant intended to take funds from Rigazio. The trial court sentenced defendant to four years’ probation and ordered her to pay restitution of \$7,500.

¶ 14 In April 2015, the Attorney Registration and Disciplinary Commission (ARDC) filed a complaint against Rigazio. Count I alleged that he falsely coded portions of defendant’s salary as office expenses and evaded paying his portion of Social Security and Medicare taxes from 2007 to 2012. Count II alleged that Rigazio falsely coded income he paid to Steve Marcellis as office expenses from 2008 to 2013. Count III alleged that Rigazio falsely coded portions of two other employees’ salaries as office expenses from 2012 to 2013.

¶ 15 In August 2016, the hearing board issued its report and recommendation. The board found that Rigazio engaged in dishonesty by (1) filing false employer tax returns and wage statements for seven years (2007-2013), (2) evading payment of his share of Social Security and Medicare taxes for his employees, (3) enabling employees to under-report income, and (4) misrepresenting law office wage expenses in his income tax returns. The board recommended that Rigazio be suspended for 60 days, stayed by a one-year term of probation, with conditions.

¶ 16 In December 2016, defendant filed a petition for postconviction relief, pursuant to the Act, alleging (1) newly discovered evidence (the ARDC proceedings), (2) ineffective assistance of counsel for failing to subpoena Rigazio’s tax returns, and (3) actual innocence. She also filed a section 2-1401 petition for postjudgment relief, pursuant to the Code, asserting that the ARDC proceedings against Rigazio constituted newly discovered evidence.

¶ 17 The trial court dismissed defendant’s postconviction petition, finding it frivolous or patently without merit. The court explained that it was made aware of Rigazio’s “office practice and potential violations of law and tax requirements” at defendant’s criminal trial and

“considered credibility evidence as well as all the evidence in arriving at its verdict.” The court stated:

“The newly discovered evidence only tells the Court what it already knew when it assessed credibility. The court bore in mind all witness credibility when it noted that some expenditures were with apparent authority while some were not. Defendant’s explanations of authority were not sufficient. Even if failure of Defendant’s trial counsel to subpoena tax records fell below competent standards, the contents of the returns would not have changed the outcome of the verdict.”

¶ 18 The court also dismissed defendant’s section 2-1401 petition for postjudgment relief. The court explained: “The complaining witness’s credibility was exposed and considered by the Court. *** Further presentation of poor or unlawful office practices, or attempts at impeachment of complaining witness would not have prevented the entry of the judgment the court rendered.”

¶ 19 ANALYSIS

¶ 20 I. Postconviction Petition

¶ 21 Defendant argues that the trial court erred in summarily dismissing her postconviction because she presented arguable claims of (1) ineffective assistance of counsel, and (2) actual innocence.

¶ 22 The Postconviction Hearing Act provides: “Any person imprisoned in the penitentiary may institute a proceeding under this Article.” 725 ILCS 5/122–1(a) (West 2012). A petitioner has standing to file a petition under the Act even if not presently imprisoned if the petitioner’s “liberty in some way or another was curtailed to a degree by the state.” *People v. Carrera*, 239 Ill. 2d 241, 246 (2010). Those sentenced to probation may file petitions under the Act. *Id.*

¶ 23 The Act provides a method by which persons under criminal sentence can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction action is not an appeal from the judgment of conviction but is a collateral attack on the trial court proceedings. *People v. Tate*, 2012 IL 112214, ¶ 8.

¶ 24 At the first stage of postconviction proceedings, the circuit court must “independently review the petition, taking the allegations as true, and determine whether ‘the petition is frivolous or is patently without merit.’ ” *Hodges*, 234 Ill. 2d at 10 (quoting 725 ILCS 5/122–2.1(a)(2) (West 2006)). A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Id.* at 11–12. This first stage in the proceeding allows “the circuit court to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit.” *People v. Rivera*, 198 Ill. 2d 364, 373 (2001).

¶ 25 A. Ineffective Assistance of Counsel

¶ 26 At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel’s performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. When a defendant’s allegation of ineffective assistance is premised on counsel’s failure to subpoena documents and present them at trial, a defendant cannot show prejudice if the documents would have been cumulative of other evidence provided to the court. See *People v. Falconer*, 168 Ill. App. 3d 618, 624 (1988). Additionally, the documents must be material to defendant’s guilt of the crime charged. *People*

v. Walls, 323 Ill. App. 3d 436, 446 (2001). If the evidence is not material to defendant's guilt, its absence does not prejudice the defendant. *Id.*

¶ 27 Here, defendant claims that her counsel's failure to subpoena Rigazio's tax returns constituted ineffective assistance. Defendant sought, through Rigazio's tax returns, to show that Rigazio improperly coded certain expenses, including her personal expenses and pay checks, as "office expenses." However, that evidence already came out at trial. Rigazio admitted that he began giving defendant an extra pay check each pay period in 2008 and improperly characterized the extra pay as an "office expense." Additionally, Heap testified that some of Rigazio's personal expenses from the office credit card were itemized as "office expenses." Because there was already evidence establishing the facts defendant sought to reveal through Rigazio's tax returns, defendant was not prejudiced by her counsel's failure to subpoena Rigazio's tax returns. See *Falconer*, 168 Ill. App. 3d at 624.

¶ 28 Additionally, defendant failed to state the gist of an ineffective assistance claim because Rigazio's tax returns were not material to her guilt of theft. Rather, Rigazio's improper reporting of taxable expenses was a "collateral issue," as the trial court stated in rendering its verdict. To the extent that Rigazio's inappropriate tax reporting affected his credibility at defendant's trial, the court explained that it looked at "the entire picture" in assessing credibility, including evidence of Rigazio's tax improprieties. Nevertheless, the court was convinced beyond a reasonable doubt that defendant intended to take funds from Rigazio. Because Rigazio's tax returns were not relevant to whether defendant committed theft, defendant cannot show that he was prejudiced by her counsel's failure to subpoena them. See *Walls*, 323 Ill. App. 3d at 446.

¶ 29 It is not arguable that defendant was prejudiced by his counsel’s failure to subpoena Rigazio’s tax returns. Thus, the trial court properly dismissed defendant’s ineffective assistance claim.

¶ 30 B. Actual Innocence

¶ 31 When a defendant raises a postconviction claim of actual innocence based on newly discovered evidence, the focus “is on the new evidence itself, and whether it would totally vindicate or exonerate the defendant.” *People v. Flowers*, 2015 IL App (1st) 113259, ¶ 33. The evidence supporting an actual innocence claim must be (1) newly discovered, (2) material and not merely cumulative, and (3) of such conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009).

¶ 32 Evidence is newly discovered if it was found since the trial and could not have been discovered earlier through due diligence. *Id.* Material means the evidence is relevant and probative of the defendant’s innocence. *People v. Coleman*, 2013 IL 113307, ¶ 96. Evidence is cumulative when it does not add anything to what was previously before the trier of fact. *Ortiz*, 235 Ill. 2d at 335. Evidence is conclusive if it totally vindicates or exonerates the defendant. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40. “[W]here newly discovered evidence is both exonerating and contradicts the State’s evidence at trial, it is capable of producing a different outcome at trial.” *People v. Harper*, 2013 IL App (1st) 102181, ¶ 49.

¶ 33 The requirements of an actual innocence claim are “extraordinarily difficult to meet.” *People v. Coleman*, 2013 IL 113307, ¶ 94. “Courts rarely grant postconviction petitions based on claims of actual innocence.” *People v. Wallace*, 2015 IL App (3d) 130489, ¶ 14.

¶ 34 In her postconviction petition, the “newly discovered” evidence defendant presented – that Rigazio “cooked his books” to reduced his tax liability and that of his employees – is

cumulative of other evidence presented at defendant’s trial and not material to defendant’s guilt. At her trial, defendant presented evidence that Rigazio improperly itemized and deducted personal expenses and employee wages as “office expenses.” The trial court found that evidence related to a “collateral issue.” We agree. That Rigazio committed wrongdoing in reporting certain items as expenses on his taxes does not make it more or less likely that defendant committed theft against him. Additionally, because this evidence was already before the trial court, the “new” evidence contained in the ARDC proceedings was merely cumulative.

¶ 35 Moreover, the “new” evidence of the ARDC proceedings was not of such conclusive character that it would probably change the result on retrial. The ARDC proceedings do not exonerate defendant or contradict the State’s evidence against her. While the “new” evidence shows that Rigazio was deceitful to the IRS, it does not show that Rigazio was lying when he testified that defendant used his credit card and Federal Express accounts for her personal use without his authorization. As the trial court explained in denying defendant’s petition, if the ARDC proceedings against Rigazio were available and presented as evidence at defendant’s trial, it would not have changed its decision to convict defendant. The trial court did not err in dismissing defendant’s postconviction claim of actual innocence.

¶ 36 II. Section 2-1401 Petition

¶ 37 The purpose of a section 2-1401 petition is to bring to the court’s attention facts which, if they had been known at the time of judgment, would have precluded its entry. *People v. Haynes*, 192 Ill. 2d 437, 463 (2000). Section 2-1401 of the Code “provides a comprehensive statutory procedure by which final orders, judgments, and decrees may be vacated after 30 days from their entry.” *Id.* at 460-61.

¶ 38 To obtain relief under section 2-1401, a petitioner must set forth specific factual allegations demonstrating (1) the existence of a meritorious defense or claim, (2) due diligence in presenting the defense or claim to the circuit court in the original action, and (3) due diligence in filing the section 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). In order to justify setting aside a judgment on the basis of newly discovered evidence, it must be shown that the new evidence was not known to the petitioner at the time of trial and could not have been discovered by the petitioner with the exercise of reasonable diligence. *People v. Hallom*, 265 Ill. App. 3d 896, 906 (1994). Further, the new evidence must be so conclusive that it would probably change the result if a new trial is granted, must be material to the issues, and must be more than merely cumulative to the trial evidence. *Id.*

¶ 39 In this case, as explained above, the ARDC proceedings were not material to defendant's guilt or innocence but, rather, were related to a "collateral issue." To the extent that the "new evidence" affected Rigazio's credibility, the trial court was already made aware of Rigazio's tax reporting improprieties and considered them in weighing the credibility of the witnesses. Despite his shortcomings, the court believed Rigazio was telling the truth about defendant using the office credit card without authorization for personal expenses. Additionally, the ARDC proceedings were cumulative of the evidence presented at defendant's trial regarding Rigazio's false coding of wages and personal expenses as "office expenses." Finally, the ARDC proceedings were not so conclusive that they would probably change the result if a new trial was granted. As explained by the trial court, the ARDC's finding that Rigazio engaged in wrongful acts would not have changed the trial court's decision to find defendant guilty of theft. Thus, the court properly dismissed defendant's section 2-1401 petition.

¶ 40

CONCLUSION

¶ 41 The judgment of the circuit court of Grundy County is affirmed.

¶ 42 Affirmed.