2019 IL App (1st) 161540-U

No. 1-16-1540

Order filed April 24, 2019

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 21890
	)	
TERRY BROWN,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Where the hospital record advanced by defendant in support of his claim of actual innocence is not of such conclusive character that it would probably change the result on retrial, the trial court did not err in denying leave to file a successive postconviction petition.

¶ 2 Defendant Terry Brown appeals from the denial of his motion for leave to file a successive petition for postconviction relief. On appeal, defendant contends that the trial court erred in denying leave to file where newly discovered evidence attached to his petition provides

him an alibi. Because we find that defendant's proffered evidence pertains to a different date than that of the crime, and therefore, is not exonerating, we affirm.

¶ 3 Based on events occurring "on or about August 7, 2005," defendant was charged with six counts of aggravated criminal sexual assault, one count of unlawful restraint, and one count of violating the Sex Offender Registration Act. The State proceeded to trial on two counts of criminal sexual assault. Following a 2009 jury trial, defendant was convicted of both counts and sentenced to two consecutive 40-year terms of imprisonment. On direct appeal, this court affirmed defendant's convictions and sentences and ordered correction of the mittimus. *People v. Brown*, 2012 IL App (1st) 093577-U. In the course of doing so, we briefly set forth the underlying facts of the case. The facts will be repeated here in more detail due to the nature of defendant's postconviction claim.

¶ 4 At trial, Q.G. testified that during the time frame in question, she lived on the second floor of a two-flat apartment building in Chicago. Defendant, who was her cousin, had been staying on her couch for a week or two while he saved up money to get his own place. The prosecutor then asked Q.G. about "the day we're talking about August the 7th of 2005." In response to the prosecutor's questions, Q.G. stated that she went to sleep in her bedroom sometime between 9 and 11 p.m. At some point during the night, while she was asleep, defendant came into the room and "got on top" of her. Q.G. told defendant to get off of her, grabbed him, tried to "scratch his eyes out," and started screaming "rape." Defendant put his arm around Q.G. and choked her so she could not breathe. He said that if she stopped hollering, he would stop choking her. When Q.G. complied, defendant warned her that if she started screaming again, he would resume choking her.

¶ 5 Defendant pulled Q.G.'s pants off, put his mouth on her vagina, and then penetrated her vagina with his penis. He did not ejaculate. When defendant let Q.G. up to go to the bathroom, she ran out the front door and down to the first-floor apartment, wearing nothing but a t-shirt. She told her downstairs neighbor that defendant "tried to rape" her. She used those words because defendant was her cousin and she was embarrassed. The neighbor and her son went upstairs with her with bats, but defendant was gone and the back door was open. At some point, Q.G. called her daughter, who came over. Another neighbor urged Q.G. to call the police, but she did not do so right away because she was embarrassed. Eventually, sometime "early that morning," she called the police, who came to the house and then took her to the hospital.

¶ 6 On cross-examination, when asked whether she told the police that the assault occurred at approximately midnight, Q.G. stated that she "probably" said that, but could not remember. Similarly, when asked whether she told the doctor at the hospital that she was assaulted at approximately midnight, she answered, "I guess so." Q.G. explained that she did not remember the exact time of the assault.

¶ 7 Dena Smith testified that she lived downstairs from Q.G. In the "very early morning hours" of August 7, 2005, she heard someone beating on her window. Smith got up and found Q.G. outside, crying and disheveled. Q.G. told her that defendant had tried to rape her. Smith and her sons searched the building for defendant. They did not find him, but noticed that the back door was open. Later that morning, Smith spoke with the police.

¶ 8 Dr. Earl Fredrick testified that he examined Q.G. in the emergency room on August 7, 2005, and that a rape kit was conducted. Q.G. told Fredrick and a nurse that she had been sexually assaulted, that her vagina had been penetrated by the offender's penis, and that oral sex

had occurred. Fredrick did not find any bruising on Q.G.'s neck, but agreed that it is possible for a person to have been choked without sustaining visible bruising. On cross-examination, Fredrick agreed that Q.G. arrived at the emergency room at 8:55 a.m.

¶ 9 The parties entered a number of stipulations, among them the following: on August 7, 2005, a Chicago police officer photographed and processed the crime scene, a process that included collecting Q.G.'s bed sheet; on August 7, 2005, an emergency room nurse sealed the rape kit conducted on Q.G. and turned it over to the police, along with Q.G.'s clothing; and that on August 7, 2005, a Chicago police officer collected the rape kit from the hospital and inventoried it.

¶ 10 Karri Broaddus, a forensic scientist with the Illinois State Police Forensic Science Laboratory, testified that she was assigned to work on Q.G.'s case. Broaddus testified that male DNA was present in the vaginal swabs collected from Q.G. in the emergency room, and that Y-chromosome DNA analysis of those swabs resulted in a "match" with defendant's Y-chromosome DNA profile. She stated that the profile would be expected to occur in approximately 1 in 370 unrelated African-American males, 1 in 430 unrelated Caucasian males, and 1 in 290 unrelated Hispanic males.

¶ 11 The parties stipulated that testing done on the fingernail scrapings collected from Q.G. in the emergency room showed low levels of a human DNA profile, but the profile did not contain enough information to either exclude or imply any positive association between defendant and Q.G. Testing done on Q.G.'s bed sheet, shorts, and shirt did not reveal the presence of semen.

¶ 12 The jury found defendant guilty of both counts of criminal sexual assault. Defendant and defense counsel filed posttrial motions, which the trial court denied. The court thereafter

sentenced defendant to two consecutive 40-year terms of imprisonment, for a total sentence of 80 years in prison.

¶ 13 On direct appeal, defendant contended that (1) his right to due process was violated where the trial court manifested a *bona fide* doubt about his fitness and ordered a behavioral clinical examination (BCX), then "mechanically accepted" the examining psychiatrist's conclusion that he was fit for trial without holding a fitness hearing; and (2) that his mittimus should be corrected to reflect conviction for two counts of criminal sexual assault, rather than one count of criminal sexual assault and one count of aggravated criminal sexual assault. This court found that appellate counsel failed to argue that either prong of plain error doctrine applied to the fitness issue, and thus defendant had forfeited it on appeal. We affirmed defendant's convictions and sentences and ordered correction of the mittimus. *People v. Brown*, 2012 IL App (1st) 093577-U.

¶ 14 On January 30, 2013, defendant filed a *pro se* postconviction petition, alleging that appellate counsel was ineffective for failing to properly argue that the trial court's failure to order a fitness hearing was plain error. He also argued that trial counsel was ineffective for failing to inform him that he faced potential consecutive sentences, and that had he known, he would have accepted the State's plea offer. The trial court found defendant's claims to be frivolous and patently without merit and summarily dismissed the petition. On appeal, this court found that the postconviction petition failed to set forth an arguably meritorious claim of a violation of constitutional rights, and affirmed the summary dismissal. *People v. Brown*, 2015 IL App (1st) 130986-U.

¶ 15 On September 10, 2015, defendant filed a *pro se* motion for leave to file a successive postconviction petition, alleging that he had obtained newly-discovered medical records showing he was "admitted in St. Barnard mental ward on the morning of August 07, 2005, at 0553 hour" and, therefore, "could not have committed said crime on August 07, 2005, between 9:00 p.m. and 11:00 p.m." Accompanying the motion was a petition, to which defendant attached a single photocopied page titled "Discharged Patient Progress Note," printed on July 9, 2015. The page indicated defendant was admitted to a facility on August 7, 2005, at 5:53 a.m., and included treatment notes entered by a "mental health worker" ranging from 11:41 a.m. to 10:18 p.m. on that date.

¶ 16 The trial court denied leave to file. Defendant appealed.

¶ 17 On appeal, defendant contends that the trial court erred in denying him leave to file a successive petition where the petition set forth a colorable claim of actual innocence. He argues that in denying leave, the trial court "speculated and conjured up fact situations" that are not supported in the record and would only be appropriate following an evidentiary hearing. Defendant asserts that the hospital record attached to his petition is newly discovered because he is a *pro se* litigant and due to his psychiatric difficulties, he was unable to sufficiently communicate to his various attorneys his location at the time of the offense; that the report is material and noncumulative where nothing at trial addressed the circumstances found in it; and that the report is of such conclusive character that it would probably change the result on retrial because, assuming its truth, it makes "clear" that he was in a mental hospital at the time Q.G. said she was assaulted.

¶ 18 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) contemplates the filing of only one postconviction proceeding. *People v. Edwards*, 2012 IL 111711, ¶ 22. However, our supreme court has provided two bases upon which the bar against successive proceedings may be relaxed. *Id.* The first basis is when a defendant establishes "cause and prejudice" for failing to raise the claim earlier. *Id.* The second is the "fundamental miscarriage of justice" exception, under which the defendant must show actual innocence. *Id.* ¶ 23.

¶ 19 When a defendant claims actual innocence, the question is whether his petition and supporting documentation set forth a colorable claim; that is, whether they raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Id.* ¶¶ 24, 31, 33. The evidence supporting the claim of actual innocence 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. *Id.* ¶ 32. The conclusiveness of the evidence is the most important element of an actual innocence claim. *People v. Sanders*, 2016 IL 118123, ¶ 47. Evidence of actual innocence must support total vindication or exoneration, not merely present a reasonable doubt. *People v. Green*, 2012 IL App (4th) 101034, ¶ 36; *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 40. We review the denial of leave to file a successive petition claiming actual innocence *de novo*. *People v. Jones*, 2016 IL App (1st) 123371, ¶ 71 (citing *Edwards*, 2012 IL 111711, ¶ 30).

¶ 20 Here, the evidence advanced by defendant, taken as true, shows that he was admitted at some sort of medical facility at 5:53 a.m. on August 7, 2005, and stayed there until at least 10:18 p.m. on August 7, 2005. As such, it provides an alibi for those hours. However, a careful reading

of the record reveals that Q.G. was assaulted well before defendant was admitted to the medical facility.

¶ 21 The parties' confusion as to timing stems from Q.G.'s somewhat ambiguous testimony. At trial, the prosecutor directed Q.G.'s attention to "the day we're talking about August the 7th of 2005." Q.G. then related that she had gone to bed sometime between 9 p.m. and 11 p.m. and was assaulted during the night, after she had fallen asleep. She testified that after escaping defendant, she fled to her downstairs neighbor's apartment and, after some cajoling, called the police "early that morning" and went to the hospital. Based on Q.G.'s testimony alone, it could be inferred that she was assaulted sometime after 9 p.m. on August 7, 2005. However, the other trial evidence established that she was assaulted sometime after 9 p.m. on *August 6*, 2005: Q.G.'s downstairs neighbor testified that Q.G. pounded on her window during the "very early morning hours" of August 7, 2005; the emergency room doctor testified that Q.G. arrived at the hospital at 8:55 a.m. on August 7, 2005; a nurse collected the rape kit on August 7, 2005; the police retrieved and inventoried the kit on August 7, 2005; and the police photographed and processed the crime scene on August 7, 2005.

¶ 22 It is clear from the record that Q.G. was assaulted sometime between 9 p.m. on August 6, 2005, and the "very early" morning hours of August 7, 2005. As such, the document indicating defendant was admitted to a medical facility at 5:53 a.m. on August 7, 2005, does not provide him with an alibi, does not qualify as exonerating evidence that supports a claim of actual innocence, and does not raise the probability that if it had been presented at trial, it is more likely than not that no reasonable juror would have convicted defendant. See *Edwards*, 2012 IL 111711, ¶ 40. Because the document is not of such conclusive character that it would probably

change the result on retrial, defendant has failed to assert a colorable claim of actual innocence. See *id*. ¶¶ 40-41.

¶ 23 Here, where the document attached to defendant's petition is not of such conclusive character that it would probably change the result on retrial, we need not address whether the document could have been discovered earlier in the exercise of due diligence or whether it is material and not merely cumulative. *Sanders*, 2016 IL 118123, ¶ 47. The document attached to the petition does not exonerate defendant. Accordingly, the trial court did not err in denying defendant leave to file his successive postconviction petition.

¶ 24 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 25 Affirmed.