

2019 IL App (2d) 180180-U
No. 2-18-0180
Order filed April 15, 2019

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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 Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 01-CF-879
)	
ERNEST E. GWINN,)	Honorable
)	Mark L. Levitt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 Held: We granted appellate counsel’s motion to withdraw, as the trial court did not arguably err in denying defendant’s postconviction petition.

¶ 2 After a bench trial, defendant, Ernest E. Gwinn, was found guilty of unlawfully possessing a controlled substance, cocaine, with the intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2000)) and sentenced to 25 years’ imprisonment. We affirmed his conviction and sentence. *People v. Gwinn*, 2011 IL App (2d) 090138-U. Later, defendant petitioned for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), claiming actual innocence and ineffective assistance of counsel. The trial court granted the State’s motion

to dismiss, but we reversed and remanded for third-stage proceedings. *People v. Gwinn*, 2013 IL App (2d) 130193-U. After an evidentiary hearing, the court denied the petition.

¶ 3 We must set out the facts in some detail as a prelude to explaining our decision.

¶ 4 The trial evidence was as follows. On the evening of March 14, 2001, Detective Vince Nichols interviewed Tony Robinson, a confidential informant. Nichols observed Robinson place a call on his cell phone to a preprogrammed number that the phone identified as belonging to “Gene.” Defendant’s middle name is Eugene. Later, Robinson called Gene again and told Nichols that Gene would be at the Walgreens at Lewis and Belvidere in Waukegan in 15 minutes. Agents set up surveillance there but it was unsatisfactory. That evening, Robinson called Gene a third time and told Nichols that Gene was minutes away from the Walgreens.

¶ 5 The evidence continued as follows. At about 11:30 p.m., an officer saw a car drive slowly through the Walgreens parking lot, flash its lights, and exit south. A different officer stopped the car. A third officer arrived. Defendant was driving the car and was the sole occupant. He provided the car’s rental agreement, in the name “Shay Causey.” He said that Causey was his girlfriend. He exited the car while holding his cell phone. At the other officers’ request, Nichols had Robinson call “Gene” twice. Both times, defendant’s cell phone rang. Defendant consented to a search of the car, which yielded a purse with Causey’s driver’s license. He told the officers that the license belonged to his girlfriend, who was home in Zion and had permitted him to use the car. No drugs or weapons were found in the car or on defendant.

¶ 6 Two officers drove to a Home Depot across the street from the Walgreens. Causey was standing outside. As the officers approached, she removed a glove from her pants. The glove contained cocaine. Informed of this incident, defendant denied knowing Causey.

¶ 7 The trial court found defendant guilty. The court noted that defendant drove his car suspiciously and passed the Home Depot where Causey was standing even though the store was closed. Defendant told the officers that his middle name was Eugene; his phone rang when Robinson called “Gene”; Causey’s purse and license were in the car defendant was driving; he said that he knew her and was driving the car with her permission; and Causey possessed cocaine.

¶ 8 After this court affirmed the judgment, defendant filed his petition under the Act. It alleged that he was actually innocent and that his trial counsel had been ineffective for failing to interview and call Robinson, Causey, Tanya Allen, and defendant. The petition attached affidavits from these potential witnesses. We summarize their content.

¶ 9 Robinson’s original affidavit stated as follows. On March 14, 2001, he and Causey, his girlfriend, left their Waukegan apartment and drove to North Chicago, where he planned to deliver cocaine. En route, he gave her cocaine in a black glove to hold for him. He then asked her to get out and wait for him near Walgreens. He drove to North Chicago, but immediately police officers surrounded him, searched his car, and found the ounce of cocaine that he had intended to deliver. After he was arrested, an officer told him to make a phone call and get the rest of the cocaine. He scrolled down his phone, called a random number, and said, “[M]eet me at Walgreens with the drugs.”

¶ 10 Robinson’s supplemental affidavit stated as follows. On the morning of March 14, 2001, his barber, defendant, told him that his truck was in the garage. Robinson suggested that defendant use Causey’s car. Defendant did so and dropped Robinson off at his home near the barbershop. Later that day, Causey got angry at Robinson for lending the car without her permission and unknowingly leaving her possessions inside. After the police arrested Robinson,

they offered him a break if he called his supplier. He scrolled through his phone, dialed random numbers, and pretended that he was asking for drugs, but he never actually spoke to anyone. Next, the police told him to call “Gene.” He called Causey’s cell phone twice, hoping that defendant would answer, since he knew that her phone was in the rental car. Nobody answered. He called a third time; defendant answered. Robinson told him to go to the Walgreens and pick up his girlfriend. Defendant said that it would take time, as he was now in Zion.

¶ 11 Robinson stated that he never showed the police his phone or told them he was calling “Gene.” He never called “Gene.” He had never called defendant by that name. No attorney or investigator for defendant ever talked to Robinson until the postconviction proceedings.

¶ 12 Causey’s original affidavit stated as follows. On March 14, 2001, at approximately 6 p.m., she and Robinson were at home in Waukegan. They were arguing because he had lent her rental car to defendant and her belongings were in the car. Robinson asked her to ride in his car with him. During the ride, he gave her a black glove with cocaine in it. She put the glove into her panties and agreed to hold it for him. He asked her to wait for him and, when he returned from North Chicago, to meet him at the Walgreens at Lewis and Belvidere. As she walked to the Walgreens, police stopped her and discovered the cocaine. They asked her about defendant. She said that she knew nothing about him except that he had her car.

¶ 13 Causey’s supplemental affidavit added the following. At a hearing on defendant’s motion to suppress evidence, she had testified that Robinson gave her the cocaine to hold for him. Causey never talked to defendant’s attorney until the postconviction proceedings. Before then, her attorney had never said that defendant’s attorney wanted to talk to her.

¶ 14 Allen stated as follows in her original affidavit. On March 14, 2001, she resided with defendant in Zion. That day, she called him at his job because his daughter had been

misbehaving, and she asked him to come home. He said that he was busy but would be home at the usual time, about 7 p.m. Defendant was with Allen in the time leading up to his arrest. He spent the time during which he was allegedly involved in a drug deal at home attending to their daughter. Nobody had ever asked Allen to testify at defendant's trial.

¶ 15 Allen stated as follows in her supplemental affidavit. On the morning of March 14, 2001, defendant left home to go to work and did not return that evening. The police never came to her house to question her and no attorney ever contacted her about defendant's case.

¶ 16 Defendant's original affidavit stated as follows. On March 14, 2001, he lived in Zion with Allen, Tage (their son), and Shalie (his daughter by Angela Watkins). That day, he borrowed a rental car from Robinson because his truck was at the dealer's for service. After giving Robinson a haircut, he dropped him off at his home. On his way to Zion, he heard a phone inside a purse ring. He answered it. Robinson was calling; he said that his girlfriend was upset that defendant had borrowed her rental car. Robinson asked defendant to drop the car off. Defendant said that he was at home in Zion and would drop off the car soon. Later, he left to drop off the car to Causey. The phone in the car rang; Robinson asked him to pick up Causey from the Walgreens. When defendant arrived there, he drove slowly through the parking lot but did not see Causey. He exited the parking lot and was going to drive to Watkins' home in North Chicago. The police pulled him over. They asked him where his girlfriend was; he said that she was home in Zion. They told him that she was at the Home Depot, with drugs on her. Defendant never told the police that Causey was his girlfriend. He never saw Causey.

¶ 17 In his supplemental affidavit, defendant stated that he had asked his attorney to contact Allen, Causey, and Robinson. He explained their potential testimony. The attorney told him that

the State's case was weak and there was no need to call witnesses. Despite defendant's protests, the attorney did not call any of the potential witnesses.

¶ 18 At the evidentiary hearing, Causey and defendant testified; Robinson and Allen did not, but the court admitted Robinson's affidavit. We summarize the testimony.

¶ 19 Causey testified on direct examination that, in March 2001, she had been dating Robinson and suspected that he was selling drugs. She was working mornings at Allstate in Zion and taking classes in Rosemont. Her employer provided her a rental car. Robinson had his own car, but she regularly let him use hers. Before March 14, 2001, she had never met defendant.

¶ 20 Causey recounted the events of March 14, 2001, as follows. After getting out of work at noon, she drove home and took a nap. Robinson was there. They drove the rental car to go grocery shopping. At some point, Causey let him borrow the car so he could go get a haircut. After he returned, she said that she wanted to remove her purse and phone from the car. Robinson told her that he had lent the car to defendant. She was upset, and they argued. Two hours later, though, he drove her in his car to Walgreens, where Robinson had asked her to stop. Before they arrived, they passed the Home Depot and resumed arguing. Causey said she would get out and walk across the street by herself. He gave her the glove with cocaine and told her to put it into her pants and wait there; he was going to "run around the corner and come back."

¶ 21 Causey testified that, after taking the glove from Robinson, she went inside the Home Depot, went to the Walgreens, then came back to the Home Depot and stood outside. Robinson had not come back when the police arrived. They told her to give them the drugs that her boyfriend had said she had. Eventually, she surrendered the cocaine.

¶ 22 Causey testified on cross-examination as follows. She arrived at the Home Depot before 10 p.m., when it was still open. The police apprehended her "[p]robably before midnight."

Thus, she was outside for about two hours after Robinson dropped her off. Causey denied that she had never met defendant until they encountered each other in court. She denied that defendant had driven her in her car to the Walgreens to help him sell cocaine and had dropped her off with the cocaine at the Home Depot. She admitted that defendant was driving her rental car when the police stopped him. She explained that she had left her purse, with the phone inside, in her car after she and Robinson went grocery shopping in the afternoon. She had not realized this when she let Robinson use the car to drive to the barbershop. Robinson had not needed to borrow her car, but he preferred it to his own “because it was a rental car and it was newer.”

¶ 23 Causey described the timing of the events of March 14, 2001, as follows. She drove the rental car to work at 8 a.m. and returned between 12:30 and 1 p.m., after which she took a nap and hung around with Robinson. At about 3 p.m., they drove the rental car a short distance to the grocery store. After a little more than an hour, they returned home. Robinson removed the groceries from the car; they went inside, and Causey cooked dinner. After a while, Robinson borrowed the rental car to get a haircut. He returned at about 6 or 7 p.m. In all this time, it had not dawned on Causey that she had left her purse and phone inside the car. Confronted with her 2001 testimony that she had let Robinson use the car at sometime before 10 a.m., Causey said that she did not know whether she had made that statement, but she conceded, “I guess I did.”

¶ 24 Asked how Robinson had returned after lending defendant her car, Causey testified, “I guess [defendant] dropped him off.” But she admitted that she did not know. After Robinson returned from his haircut, they went back out “[a]fter 9:00, maybe.” They drove out so that Causey could get her car. Robinson told her that he “had to make a run,” but she did not realize that he was going to sell drugs. She did not know where she was going to retrieve her car, and

she did not ask. She figured that it was wherever he was going to meet his friend, because he had told her that he had to meet a guy to get her car and that he had to “make a run.” She did not know what he meant by “mak[ing] a run.”

¶ 25 Causey testified that she and Robinson had been arguing during the ride and that she was very angry at him. Nonetheless, she complied when he requested, without any explanation, that she take the cocaine-filled glove and stand outside the Home Depot until he returned. Asked whether the fact that the police found her near midnight with cocaine on her person across the street from where defendant had just stopped was just a coincidence, Causey said that it was.

¶ 26 Defendant testified on direct examination as follows. He “grew up with” Robinson, whose older brother was defendant’s long-time close friend. On March 14, 2001, defendant dropped his truck off at the dealer up the street from the barbershop, then got a ride from the dealer to work. Robinson came into the shop that day, and defendant gave him a haircut. At some point, Allen called the shop and told defendant that Shalie had bitten her. A couple of hours later, Allen called and said that Shalie had bitten her again. Defendant decided to go home and take Shalie to Watkins’ home in North Chicago. However, since his truck was in the shop, he told Robinson that he needed a ride home. Robinson told defendant that he could use Causey’s rental car if he dropped Robinson off at home. This was toward the end of the workday, which was 7:30 p.m. Defendant wrapped up at the shop and dropped Robinson off near a Jewel supermarket around the corner from the barbershop.

¶ 27 Defendant testified that, as he was about halfway home, he heard a phone ring. It was not his phone, which he had left in his truck. He answered. Robinson was calling. He said that his girlfriend Shay was angry that he had lent defendant the car; he asked defendant to return it immediately. Defendant had never heard of “Shay.” He told Robinson that he was in Zion

attending to a family emergency but would take care of the matter as soon as he could. Robinson told him just to go to the Walgreens and pick up Shay. At that time, defendant did not consider how he would recognize Shay.

¶ 28 Defendant testified that after he spoke with Robinson he drove home, parked, and entered his house. He had planned to pick up Shalie right away, but Allen had cooked dinner, so he stayed for a while. Defendant then drove Shalie to Watkins' house and dropped her off. However, he "kind of lost track of time" and got to conversing with Watkins and watching television. When the news went off, he remembered that he had to get to the Walgreens and return the car to Robinson's girlfriend. As defendant left the house, Robinson called on the phone (which phone is unclear), and defendant told him that he would be at the Walgreens soon.

¶ 29 Defendant testified that he drove away, headed north on Lewis, and entered the Walgreens parking lot. He was wondering how he would recognize "Shay." Robinson had never described her. Defendant drove around slowly, flashing the car's headlights, but he did not see Shay outside or inside. He tried to park, but all the spots were taken, so he pulled out onto the street and turned west, then drove south back to Watkins' house. When he realized that Watkins was not there, he figured that his home in Zion was too far away and would delay things even further, so he drove south on Lewis. As he passed the Home Depot, a police car pulled up behind him and flashed its lights. Defendant turned left and pulled over.

¶ 30 Defendant testified that, after he stopped, an officer requested his driver's license. Defendant said that he did not have it, but he provided other identification, and the officer went to his squad car. The officer returned and asked whether he had a license or registration. Defendant told him that the car was rented, and he produced the rental receipt. Another police car pulled up; an officer exited and ordered defendant out. The officer patted down defendant

and placed him into the squad car. After about five minutes, the officer let him out. Defendant asked why he had been stopped. An officer asked him where his girlfriend was. Defendant responded that she was home in Zion. The officer told him “no, your girlfriend is at Home Depot with drugs on her.” Defendant reiterated that his girlfriend was home in Zion. The officer asked him if he knew Quinesha Causey; defendant said that he did not. (Robinson had never given him that name.) He denied knowing anything about any drugs and said that Robinson had just told him to pick up a woman at Walgreens.

¶ 31 Defendant testified on cross-examination as follows. He had known Robinson since 1983 or 1984. Before March 2001, he “[n]ever really spoke” to Robinson on the phone, unless Robinson called the barbershop for a haircut. Defendant had a cell phone then but did not know whether Robinson did. Before March 14, 2001, defendant never received a call on his cell phone from Robinson. He was “just [Robinson’s] barber.”

¶ 32 Defendant testified that his middle name was Eugene but that in 2001 nobody ever called him “Gene.” He did not recall testimony from his trial that in 2001 he was known as “Gene.” Robinson always called him “GBO,” as did everyone else. He did not “specifically” remember any officers testifying that they had Robinson press the name “Gene” on his phone’s contact list and that defendant’s phone rang as a result. Defendant testified that, when the police pulled him over, the only cell phone in the rental car was the one that had been left there; his own phone was still in his truck at the dealer’s. He had dropped off the truck at 10 a.m. but had forgotten about the phone, because he had been preoccupied with his family matters.

¶ 33 Defendant testified that on March 14, 2001, he believed that Robinson resided off Grand near the Jewel, which was where he dropped him off. The location was across town from the Walgreens on Lewis, where Robinson told him to meet Shay and drop off the rental car.

Defendant did not know where Shay lived, as he had never met her before and Robinson had not told him that he and Shay lived together. Although Robinson's call requesting the return of the car was urgent, defendant spent several hours running errands. When he entered the Walgreens parking lot to look for Shay, he did not know how he would get home after dropping off her car, but he was "kind of hoping that she would take [him] home." He had not considered what to do if she did not give him a ride back to Zion.

¶ 34 The trial court denied defendant's petition. The court stated that none of the testimony he had offered was "in any way credible." There was no reasonable probability that the evidence would have changed the result; indeed, there was "no probability whatever."

¶ 35 Defendant timely appealed. Pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993), the appellate defender has moved to withdraw as counsel. In his motion, counsel states that he read the record and found no issue of arguable merit. Counsel further states that he advised defendant of his opinion. Counsel supports his motion with a memorandum of law providing a statement of facts, a list of potential issues, and arguments why those issues lack arguable merit. We advised defendant that he had 30 days to respond to the motion. Defendant has responded.

¶ 36 In his memorandum of law, appellate counsel explains that the only potential issue on appeal is whether the trial court improperly denied defendant's petition. Counsel concludes that it would be frivolous to argue that the court erred. Although we agree with counsel's conclusion, his discussion of the potential issue on appeal is manifestly incomplete and inadequate for our purposes. Therefore, we provide our own explanation without further reference therein to counsel's memorandum of law.

¶ 37 Defendant’s petition raised claims of both actual innocence and ineffective assistance of trial counsel, although his argument after the evidentiary hearing emphasized the latter claim.¹ To establish a claim of actual innocence, a defendant must produce newly-discovered evidence that is so conclusive that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). To establish ineffective assistance of counsel, a defendant must show that (1) counsel’s performance was objectively unreasonable and (2) it is reasonably probable that, absent counsel’s errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Domagala*, 2013 IL 113688, ¶ 36. We recognize that both claims required the court to assess not whether it believed defendant’s new witnesses but whether there was a reasonable probability that the finder of fact would credit these witnesses. But we agree with the trial court that there was no such reasonable probability, and we agree with appellate counsel that it would be frivolous to argue otherwise.

¶ 38 The trial court rightly noted that the narrative that defendant’s new witnesses presented was simply too improbable to stand a reasonable chance of being credited, particularly to the extent of leaving the fact finder with a reasonable doubt. The State’s evidence at trial accounted successfully for the simultaneous presence at or near midnight of (1) defendant in or near the

¹Counsel’s memorandum of law discusses only the actual-innocence claim and does not cite the legal standard that defendant must meet to prevail on that claim. Further, it confines its discussion of the evidence adduced at the third-stage hearing to a single paragraph, and the remainder of the explanation appears to be premised on the assumption that defendant’s newly-discovered evidence was insufficient merely because it contradicted the State’s evidence at defendant’s bench trial—an assumption that would foreclose almost all claims of actual innocence, and a great many other categories as well.

parking lot of a closed Walgreens, driving Causey's car, and (2) Causey across the street in front of a closed Home Depot. A drug transaction prearranged between these two people would be wholly consistent with their having traveled to where they otherwise had no apparent purpose being.

¶ 39 By contrast, the evidence that defendant put on in the postconviction hearing did not reasonably account for either his or Causey's presence at their respective locations, much less their simultaneous presence there. Causey herself conceded that, under her version of the events, that was a "coincidence."

¶ 40 The back story also strained common sense, as well as consistency with some of the evidence from the underlying criminal proceeding. According to defendant's version, he agreed to return Causey's car by driving to a Walgreens that was located far from her home and had no other apparent relationship to either her or defendant. He did this at the request of Robinson, but Robinson did not disclose anything about Causey or how to identify her. And defendant himself knew nothing about Causey even though she had been residing with Robinson, the brother of his long-time friend (although, despite this long relationship, defendant did not know Robinson's home address and had remained "just his barber"—which, however, did not prevent Robinson from lending him Causey's rental car without her knowledge). Once on his way to the Walgreens, defendant had no idea how he would return home after he dropped off the car. He also exited the parking lot because he could not find a parking space—even though it was approximately midnight. Defendant ended up at the Walgreens at that inopportune hour only because, although Robinson had told him that the return of the car was urgent, the emergency slipped his mind for several hours while he did a variety of other things, such as chat and watch the TV news.

¶ 41 From Causey's perspective, the story contained equally implausible elements. Robinson's odd choice to use her rental car instead of his own to go to the barbershop, which was within walking distance, might have been credited. However, their evening jaunt in his car raised deeper problems. According to Causey, Robinson took her along both so that she could retrieve her car at the Walgreens (which had no apparent connection with either her or defendant) and so that he could sell cocaine in North Chicago. However, even though they had been in an argument, she acquiesced in his request to hold a large quantity of cocaine for him while he sold a small amount elsewhere. Although she was to pick up her car at the Walgreens (having learned that only after agreeing to ride with Robinson), she decided to get out across the street and wait in the dark in front of a Home Depot, where she spent two hours in front of the closed store. The police found her there and correctly suspected her of possessing cocaine, even though their previous contact had been with defendant across the street and Robinson had told them nothing about Causey's possession of the cocaine.

¶ 42 Aside from these major infirmities, Causey and defendant also testified inconsistently with some of the evidence in the underlying criminal case. Causey had testified there that she lent Robinson her rental car at approximately 10 a.m., not early in the evening. Several witnesses had also testified that defendant was often referred to as "Gene."

¶ 43 We agree with appellate counsel that defendant did not meet the requirements for his claims of actual innocence and ineffective assistance of counsel and that it would be frivolous to contend otherwise.

¶ 44 In his response to counsel's motion to withdraw, defendant does not directly confront most of the numerous evidentiary weaknesses that led the trial court to reject his petition. Insofar as his contentions are actually germane to the potential issue on appeal or appellate

counsel's motion to withdraw, defendant asserts baldly that the evidence at the hearing was so inherently exculpatory that the trial court had no basis for discrediting it. For the reasons just given at some length, we disagree. Defendant also appears to argue that his counsel on direct appeal was ineffective for failing to argue that the evidence was insufficient to prove him guilty beyond a reasonable doubt. This contention was not raised in the petition that is the subject of this appeal and obviously is not before us now.

¶ 45 After examining the record, the motion to withdraw, the memorandum of law, and the response, we agree with counsel that this appeal presents no issue of arguable merit. Thus, we grant the motion to withdraw, and we affirm the judgment of the circuit court of Lake County.

¶ 46 Affirmed.