2019 IL App (3d) 180587-U

Order filed October 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Tazewell County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-18-0587
v.	)	Circuit No. 90-CF-116
	)	
JAMES L. PACK,	)	Honorable
	)	Cornelius J. Hollerich,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice O'Brien dissented.

ORDER

¶ 1 *Held*: Circuit court's determination that the victim's recantation testimony would not probably result in a different outcome at a potential retrial was not manifestly erroneous.

¶ 2 Defendant, James L. Pack, appeals following the denial of his successive postconviction petition following a third-stage evidentiary hearing. He argues that the evidence adduced at that

hearing sufficiently proved that he would likely be acquitted in a retrial, and that the Tazewell County circuit court therefore erred in denying that relief. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 26, 1990, defendant was charged via indictment with aggravated criminal sexual abuse (Ill. Rev. Stat. 1987, ch. 38, ¶ 12-16(c)(1)(i)).[1] The indictment alleged that in 1988 defendant fondled the penis of J.M., who was under 13 years of age.

¶ 5 J.M., who was 12 years old at the time of defendant's jury trial, testified that sometime before August 4 in the summer of 1988, he spent the night at defendant's house and took a bath with defendant's son, Randy. Randy got out of the bathtub first and left the bathroom. Defendant entered the bathroom and sat on the toilet. J.M. testified that he pulled the plug from the drain and began to get out of the bathtub. At that point, defendant used his hand to touch J.M.'s penis for approximately one minute, telling J.M. that he had a rash. J.M. testified that defendant threatened to hurt his family if he told anyone. J.M. eventually left the bathroom and told Randy what had happened. J.M. testified that he spent that night at defendant's house as planned. J.M. did not reveal the incident to the police until April 1990. Officer Cary Martin testified that he interviewed J.M. in April 1990, and verified that this was what J.M. told him.

¶ 6 Randy recalled taking a bath with J.M. on one occasion. He testified that defendant remained in the bathroom for the duration of the boys' bath, sitting on the toilet reading a newspaper. Randy testified that after he got out of the bathtub, he saw defendant reach into the

[1]The facts of defendant's case have been set forth, in whole or in part, by three previous courts. *People v. Pack*, No. 3-91-0283 (1993) (unpublished order under Illinois Supreme Court Rule 23); *People v. Pack*, 224 Ill. 2d 144 (2007); *People v. Pack*, 2013 IL App (3d) 120019-U. For consistency and economy, we rely on those cases in reproducing the facts here, adding further facts where necessary to this disposition of this case.

bathtub while J.M. was still sitting in it. Later that night, J.M. told Randy that defendant had touched him. Randy testified that the night of the bath had been some time in September.

¶ 7 Multiple defense witnesses testified that J.M. had a poor reputation for truthfulness. Defendant himself testified that J.M. had never taken a bath in his house and that he never molested J.M.

¶ 8 The jury found defendant guilty. On April 19, 1991, the circuit court sentenced defendant to a term of seven years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Pack*, No. 3-91-0283 (1993) (unpublished order under Illinois Supreme Court Rule 23). Notably, on November 25, 1991, defendant, having been found guilty of aggravated criminal sexual assault in an unrelated case, was sentenced to a term of 60 years' imprisonment. That sentence was ordered to be served consecutively to the seven-year sentence in the present case.

¶ 9 On February 20, 2004, defendant filed a postconviction petition. The circuit court granted the State's motion to dismiss the petition, finding that defendant's seven-year sentence as well as his term of mandatory supervised release had expired. This court affirmed that dismissal. *People v. Pack*, No. 3-04-0948 (2006) (unpublished order under Illinois Supreme Court Rule 23). Our supreme court reversed, holding that "a prisoner serving consecutive sentences is 'imprisoned' under any one of them" for postconviction purposes. *People v. Pack*, 224 Ill. 2d 144, 152 (2007). Following the reversal, defendant did not pursue his appeal in this court; accordingly, we dismissed the appeal.

¶ 10 On December 27, 2010, defendant filed a *pro se* successive postconviction petition, and the circuit court granted defendant leave to file. On May 2, 2011, appointed counsel filed an amended petition, alleging defendant's actual innocence based on newly discovered evidence.

Attached to the amended petition was an affidavit from the victim in this case, J.M., dated December 15, 2010. In the affidavit, J.M. averred that defendant "never molested me and he never touched me in an appropriate manner or in any sexual way. He never did anything like that to me. My testimony was false and a lie. I had in fact, been sexually molested by several different persons but never [defendant]."

¶ 11 On October 28, 2011, appointed counsel filed a second amended petition. A second affidavit from J.M. was attached to the petition, as well as an affidavit from Randy. In his affidavit, Randy averred that "Kirk Shombine [*sic*] of the Tazewell County State's Attorney's Office" had instructed him to testify that he had taken a bath with J.M., that defendant was in the bathroom, that defendant reached into the water, and that J.M. spent the night at defendant's house that night. Randy stated in his affidavit that he "was told by Kirk Shombine that if I did not give this story I would never see my family again and that I would stay in Foster Care until I turned eighteen (18) years of age." Randy also averred that he "was promised by Kirk Shombine that he *** would give me $5.00 and let me out of Foster Care and my Father would go to a really nice place."

¶ 12 On November 28, 2011, the State filed a motion to dismiss, asserting that defendant's allegation of perjured testimony was not newly discovered evidence of actual innocence. The State also asserted that without defendant's allegation of the State's knowing use of the false testimony, he could not establish a due process violation. The circuit court agreed and granted the State's motion to dismiss.

¶ 13 On appeal from that dismissal, this court reversed. *People v. Pack*, 2013 IL App (3d) 120019-U. We reasoned that defendant's claim should be analyzed as a freestanding claim of actual innocence, rather than a perjury-based due process claim. *Id.* ¶ 16. Taking all well-pleaded facts as true at the second stage of postconviction proceedings, we held that J.M.'s recantation

made a substantial showing of a constitutional violation, and remanded for a third-stage evidentiary hearing. *Id*. ¶¶ 20-21.

¶ 14 Defendant's third-stage hearing commenced on July 27, 2018. The hearing was presided over by Cornelius J. Hollerich, of the Thirteenth Judicial Circuit, because Kirk D. Schoenbein, who originally prosecuted defendant and was likely to be called as a witness, had become a judge of the Tenth Judicial Circuit.

¶ 15 J.M. testified that he currently lived at the Danville Correctional Center, serving a sentence for predatory criminal sexual assault. He testified that he referred to defendant as "Big Randy" and defendant's son as "Little Randy." J.M. testified that he was sexually molested in the summer of 1988, but he did not remember the name of the man who did it. He continued:

> "I don't know the guy's name. I know who he is. I knew that he was a member of our church. I knew that I played with his son. I remember staying the night at the house. I know the details of the bathroom of the house where it happened. And that's about it."

J.M. recalled being at the man's house, getting in the bathtub, and taking a bath with the man's son. It was not defendant's house. J.M. did not remember the man's name because he did not talk to him that much. He testified: "I was more familiar with the son that I had played with on a couple different occasions and spent the night over at his house." J.M. "believe[d]" the son's name was Brian, but did not know his last name.

¶ 16 J.M. testified that after taking a bath with Brian, "[t]he dad" came in and handed them towels. The man then put some salve on a rash near J.M.'s groin area. J.M. testified that the man touched his "private parts" for approximately one minute. J.M. could not remember if he told Brian what had happened.

¶ 17 J.M. recalled that he recounted the incident to a counselor two or three weeks later. After that, J.M. explained that his family believed that the person who had molested him was defendant. His family told him that defendant was a bad man, and that what happened had been J.M.'s fault because he should not have been going to defendant's house. J.M. testified: "[N]obody wanted to listen to me about who it really was." J.M. testified that some time after telling his story to the counselor, he was interviewed by a female police officer, whose name he did not remember. He did not recall defendant's name ever being mentioned in that interview.

¶ 18 J.M. explained how he came to testify against defendant:

> "[L]ater on that's when here I am coming to court for [defendant], and I'm trying to figure out how [defendant] even becomes involved in this. And as this is going on, it's getting drilled in my head over and over; I'm hearing [defendant's] name from all different angles, so I go along with it. I go along with it, and I'm like, 'okay, you know, yeah, it was [defendant], you know.' But the thing about it was I always known in the back of my mind that it wasn't [defendant]. It was this other guy."

J.M. testified that he considered defendant a friend. He believed that his mother and sister thought that defendant was a bad man "because of some speculations that were going on in the neighborhood" relating to defendant having a prior criminal conviction of some sort. J.M. opined that "they used me to sign, seal[,] and deliver [defendant]." J.M. did not remember anyone urging him to lie and say that defendant had molested him.

¶ 19 Counsel asked J.M. if he had ever heard the name of Rick Tyler. J.M. responded that he had not. J.M. remembered a Tom Tyler from his church, but did not know if that was the man

who molested him. J.M. did not recall giving the name of Rick Tyler to a Department of Children and Family Services (DCFS) caseworker.

¶ 20 J.M. testified that Kirk Schoenbein was the prosecutor at defendant's trial. He remembered Schoenbein as being "a real nice guy *** almost like a big brother." J.M. had seen Schoenbein in the courthouse on occasion since defendant's trial, often stopping to talk with him. J.M. did not remember Schoenbein ever urging him to give false testimony. When asked why he only came forward recently with his recantation, J.M. replied: "I have to get this off my back so I can live peacefully."

¶ 21 On cross-examination, J.M. testified that he first told his sister that defendant had not molested him, in approximately 2000. In October 2010, J.M. was in the Tazewell County jail when he told attorney John Lonergan that defendant had never molested him. J.M. signed an affidavit to that effect at that time. J.M. could not say why he testified that defendant molested him.

¶ 22 Lonergan testified that he represented defendant at his trial in 1990. He also represented J.M. in his predatory criminal sexual assault case in 2010. Lonergan testified that in the course of his representation of J.M., J.M. indicated that he had lied at a trial years prior. When J.M. mentioned defendant's name, Lonergan remembered the case, though J.M.'s reference to "Randy" initially confused him. J.M. indicated that he wanted to do whatever he could to help defendant.

¶ 23 The State called J.M.'s mother, Debra Rassi, as its first witness. Rassi testified that J.M. told his counselor that he had been molested, and the police subsequently requested that Rassi bring him to the police station for an interview. She recalled that the police had already spoken with J.M. without her being present. She learned from the police that J.M. had named defendant as his molester.

¶ 24 Rassi denied ever telling J.M. that it was defendant who molested him and denied ever encouraging him to lie in any way. She never witnessed anyone else tell J.M. that defendant had molested him. Rassi further denied that J.M. had ever denied to her that defendant molested him until many years later. Only in 2010, when J.M. was in prison, did he tell Rassi that he had lied at defendant's trial. Rassi did not recall ever going to church with, living near, or having heard the name Rick Tyler.

¶ 25 Schoenbein testified that he prosecuted defendant while working for the Tazewell County State's Attorney's office. Schoenbein recalled reviewing the report of an interview with J.M. conducted by Martin, and subsequently filing an information against defendant. He testified that he met with J.M. on at least two occasions. He remembered that J.M. "seemed firm in his account" of the incident. Schoenbein noticed that J.M. was consistent each time he detailed the incident. J.M. consistently indicated that defendant had molested him.

¶ 26 Schoenbein testified that he had seen J.M. once at the courthouse, sometime between 2002 and 2007. Schoenbein did not recognize him, but J.M. approached him. Schoenbein testified: "He said 'I'm [J.M.] You prosecuted James Pack for me, and I've never thanked you. I just want to say thank you." J.M. made no mention of lying at defendant's trial at that time.

¶ 27 On cross-examination, Schoenbein recalled the name of Rick Tyler coming up in his preparation for defendant's case. Schoenbein testified that "there was either a DCFS report or some information that [J.M.] had said that [Tyler] had molested him as well. According to the information Schoenbein had seen, J.M. had alleged that that incident also took place in a bathroom. J.M. never indicated to Schoenbein that he had been molested by Tyler.

¶ 28 After brief arguments from the parties, the circuit court took the matter under consideration.

¶ 29 In a written order dated September 27, 2018, the circuit court denied defendant's postconviction petition. The court found that the recantation evidence was new, material, and noncumulative. The court observed the operative issue with respect to defendant's actual innocence claim, then, was whether the new evidence "would probably result in a different outcome on retrial."

¶ 30 The court concluded in its written order that J.M.'s recantation would not probably result in a different outcome on retrial. The court opined that while J.M. appeared earnest, his testimony lacked key details, such as who the actual offender was and why he testified against defendant originally. The court contrasted that vague testimony with J.M.'s original trial testimony, providing a series of examples of J.M.'s detailed trial testimony, including his description of defendant's bathroom. The court suggested that it would be unlikely that a 12-year-old child could "provide this much *invented* detail." Finally, the court pointed out the extreme lapse of time as well as Schoenbein's testimony that J.M. had later thanked him for defendant's prosecution. Ultimately, the court concluded, J.M. was not a credible witness.

¶ 31 II. ANALYSIS

¶ 32 On appeal, defendant argues that the circuit court erred in denying his postconviction petition following the third-stage evidentiary hearing. He contends that the court's conclusion that the new evidence would not probably lead to a new result on retrial was manifestly erroneous.

¶ 33 In order to obtain a new trial based on a claim of actual innocence, a defendant must present evidence that is (1) newly discovered, (2) material, (3) noncumulative, and (4) " 'of such conclusive character that it would probably change the result on retrial.' " *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009) (quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)). At a third-stage evidentiary hearing, a defendant must demonstrate each of these elements by a preponderance of

the evidence. *People v. Coleman*, 2013 IL 113307, ¶ 92. Because a third-stage evidentiary hearing requires the circuit court to resolve conflicting evidence and make credibility determinations, that court's decision will not be disturbed unless it is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A judgment is considered manifestly erroneous if it is arbitrary, unreasonable, and not based on the evidence presented. *People v. Wells*, 182 Ill. 2d 471, 481 (1998).

¶ 34 The circuit court in the present case found summarily that defendant had presented new, material, noncumulative evidence in the form of J.M.'s recantation testimony. The only remaining issue, for the circuit court and on this appeal, was whether that evidence was "of such conclusive character that it would probably change the result on retrial." *Morgan*, 212 Ill. 2d at 154. That question requires the circuit court to consider whether a new jury at a hypothetical retrial, considering the original evidence presented as well as the new evidence, would probably acquit defendant. *Coleman*, 2013 IL 113307, ¶¶ 96-97.

¶ 35 The circuit court here found that the new evidence presented at the third-stage hearing would not probably lead to a different result on retrial, because J.M. lacked credibility in his recantation. J.M. testified that the events to which he testified in 1990 were largely accurate, with the exception of the identity of his molester. He could provide no details of that person's true identity, however. J.M. did not know his first or last name. Though J.M. testified he was more familiar with the man's son, he only "believe[d]" that the son's name was Brian.

¶ 36 J.M. testified that he told multiple people, including his mother and sister, that it was not defendant, but this other man, who molested him in 1988. Rassi directly refuted this testimony at the third-stage hearing, testifying that J.M. had made no such comment to her. Schoenbein cast

further doubt on J.M.'s testimony when he testified that J.M. had never indicated in their pretrial meetings that anyone other than defendant had molested him.

¶ 37 Further, J.M. was unable to explain with any level of detail why he had lied at the 1990 trial. Though he vaguely referenced a conspiracy involving his mother and sister, he ultimately testified that he had not been directed to lie at trial. Both Rassi and Schoenbein testified that they had never instructed J.M. to lie. Indeed, contrary to being unduly pressured by Schoenbein, J.M. remembered him as being "a real nice guy."

¶ 38 Finally, J.M. failed to explain why it took him 20 years to withdraw his accusation for the first time. Though J.M. indicated his desire to unburden himself by coming forward with the truth, there was no clarification as to why his desire to right a purported wrong first manifested itself in 2010. Further doubt was cast on J.M.'s already insufficient explanation when Schoenbein testified that J.M. had thanked him for prosecuting defendant more than a decade after the trial.

¶ 39 A new jury at a potential retrial would be unlikely to credit vague testimony given some 30 years after the fact over the more detailed testimony given relatively soon thereafter. That new jury would also be less likely to accept J.M.'s recantation testimony in the face of the direct refutation of Rassi and Schoenbein. Finally, that new jury would still hear the corroborative trial testimony of defendant's son, Randy, and Officer Martin. Accordingly, the circuit court's determination that J.M.'s recantation would not probably result in a retrial was not unreasonable or arbitrary, and was thus not manifestly erroneous.

¶ 40 III. CONCLUSION

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

¶ 42 Affirmed.

¶ 43 JUSTICE O'BRIEN, dissenting:

¶ 44 I respectfully dissent from the majority. I would find that defendant has shown by a preponderance of the evidence that J.M.'s recantation testimony, when considered along with the original evidence presented at trial, would probably result in defendant's acquittal at a potential retrial. See Ortiz, 235 Ill. 2d at 333.

¶ 45 As our supreme court has recognized, recantation is regarded as inherently unreliable and as a result courts should only grant a new trial on the basis of recanted testimony in extraordinary circumstances. Morgan, 212 Ill. 2d at 155 (citing People v. Steidl, 177 Ill. 2d 239, 260 (1997)). However, in deciding whether such circumstances exist, the identity of the recanter must be a significant factor. Just as courts should use caution in accepting recanting testimony, they should use caution before allowing a conviction to stand where the victim himself declares that the defendant is innocent. This is especially so where, as here, there is no apparent motivation for the victim to fabricate his recanting testimony.

¶ 46 In the present case, J.M.'s recanting testimony is partially corroborated by Schoenbein's testimony and by the trial record. J.M. testified at the third-stage hearing that the events he originally testified to at trial were largely correct, except for the identity of his molester. J.M. reaffirmed that he was molested by a man in 1988 while in the bathroom of the man's house after taking a bath with his son. He denied, however, that that man was defendant.

¶ 47 Schoenbein testified that, around the time of defendant's 1991 trial, he became aware of a DCFS report indicating that J.M. had accused a different person of molesting him in a bathroom. The record indicates that the defense was also aware of that DCFS report. In fact, the defense attempted to put that accusation into evidence, accurately pointing out that the similarities in the accusations would lend credence to its theory that J.M. was mistaken regarding the identity of his

molester. Pack, No. 3-91-0283. Ultimately, the circuit court barred that evidence from coming in.

¶ 48 Thus, J.M.'s potential confusion is not a new issue, raised only decades after the fact. Rather, the possibility that J.M. had been molested by someone other than the defendant was an issue at the time of defendant's trial. J.M.'s testimony years later confirms that he was, in fact, unsure about the molester's identity during the trial.

¶ 49 At a potential retrial, a jury would be likely to acquit defendant where the victim testified that defendant did not commit the offense and the evidence shows that the victim was even unsure about the identity of the molester at the time he provided his original trial testimony. In addition, it is also likely that the DCFS report defense counsel was not allowed to introduce during the first trial may be admissible at a future trial that included the recantation. Accordingly, I would find that the circuit court committed manifest error in denying defendant's postconviction petition. I would reverse that order, vacate defendant's conviction for aggravated criminal sexual abuse, and remand for a new trial.