2013 IL App (4th) 120363-U

NO. 4-12-0363

FILED
December 13, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Logan County
PERRY ALBERTS,	)	No. 00CF221
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas M. Harris, Jr.,
	)	Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The denial of defendant's postconviction petition after an evidentiary hearing is affirmed over defendant's contention the circuit court erred when it found defendant had failed to substantiate his claim of actual innocence based on the affirmative defense of involuntary intoxication so as to warrant a new trial.

¶ 2 Defendant, Perry Alberts, appeals from the third-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2004)). Defendant contends the circuit court erred by applying the wrong standard in making its determination that defendant had failed to establish proof of his involuntary intoxication at the time of the offense of such conclusive nature that it would probably change the result on retrial. Defendant claims he presented sufficient evidence to support a jury instruction on his claimed affirmative defense on retrial. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In March 2002, defendant was convicted of 11 counts of aggravated criminal sexual assault and sentenced to 111 years in prison. Defendant appealed. This court reversed one count and vacated the corresponding sentence on the basis of the one-act, one-crime rule. We otherwise affirmed. *People v. Alberts*, No. 4-02-0506 (Dec. 2, 2004) (unpublished decision under Supreme Court Rule 23). In September 2005, defendant filed a *pro se* postconviction petition. The circuit court appointed counsel, who filed several amended petitions. The State filed a motion to dismiss, which the circuit court granted. Defendant appealed. This court reversed the circuit court's dismissal related to two allegations: (1) defendant's claim that his trial counsel was ineffective for failing to demand a fitness hearing; and (2) defendant's claim of actual innocence due to his involuntary intoxication at the time of the offense. We affirmed the court's dismissal of the remaining allegations in defendant's petition. *People v. Alberts*, 383 Ill. App. 3d 374, 385 (2008).

¶ 5 On remand, in September 2011, the circuit court conducted a third-stage evidentiary hearing on the two remaining postconviction allegations. First, defendant testified that he and his wife, Carla, began having marital problems in 1985. In 1992, he discovered Carla was having an extramarital affair. He sought psychiatric therapy and was prescribed medication, which he took as prescribed. He and Carla reconciled and remained a couple until early 2000, when defendant again sought professional help and was prescribed Paxil and Trazodone to help with depression. In April 2000, Carla asked for a divorce because she was seeing someone else. However, she and defendant continued to live together. Sometime in May 2000, defendant asked Carla if she was still seeing someone else. She replied it was none of his business. She

packed her clothes and moved from the house. A few days later, defendant had a severe anxiety attack. His daughter took him to the hospital. The staff gave him a shot and he returned home. A few days later, he began taking two tablets of Trazodone every hour until he fell asleep. When a family member telephoned him, he was unable to communicate clearly. Fearing defendant was attempting suicide, his family called an ambulance. At the hospital, he was treated for a mental illness. A few weeks after defendant's release from the hospital, sometime in mid-June 2000, Dr. Glenn Pittman prescribed Effexor, Temazepam, and Lorazepam. Defendant took the medications as prescribed, but he said they caused him to suffer "a loss of reality" and become "delusional at times." He said he had never been delusional until he began taking these medications. He was seeing a counselor, Kendra Moses, at the time, and he said he told her of his delusions. (This complaint is not referenced in the records of Moses or Pittman.) In June 2000, he said he told Dr. Pittman of the delusions, and Dr. Pittman advised his body would eventually get used to the medication. Defendant said he was never warned of these side effects. He said Dr. Pittman only warned him of a likely loss of libido.

¶ 6 On June 26, 2000, defendant and Carla got into an altercation where Carla hit him and he bit her. She obtained an order of protection against him as a result. In July 2000, defendant filed for divorce and in August 2000, Carla told defendant she was not certain she wanted a divorce, as she was not seeing anyone at the time. By this time, defendant had lost 85 pounds in approximately four months. He said the medications were causing swelling in his throat and he could not eat. Defendant was seeing psychiatrist Dr. Baluga and internist Dr. Hauter. In August 2000, Dr. Hauter increased defendant's dose of Lorazepam from two 0.5 milligram tablets daily to three tablets. According to defendant, Dr. Hauter was aware of the

other prescription medications defendant was taking. She administered no warning as to (1) side effects, (2) how the medications may react with one another, or (3) the effects of combining them with alcohol. However, defendant acknowledged, Dr. Pittman had advised keeping his alcohol consumption to one to two cans of beer per day.

¶ 7 On September 12, 2000, the date of the incident subject to the underlying convictions, defendant took 0.1 milligrams of Synthroid (a thyroid medication), a 75 milligram tablet of Effexor five times that day (three in the morning and two later in the day), three 0.5 milligram tablets of Lorazepam in the afternoon, and a 30 milligram tablet of Temazepam. Defendant described himself as lethargic, paranoid, delusional, and "a mess." He explained that he and Carla were sitting on the deck outside talking when Carla began telling him of the numerous affairs she had during the marriage. The conversation made defendant feel as if he was responsible for her conduct. He felt "pretty miserable" and "pretty well [at] the bottom." After Carla's confession, defendant retrieved a gun and put it to his head, feeling like he had "to pay for [their] sins." He felt he had nothing "left to live for on Earth." He planned to have Carla watch him commit suicide, so he tied her up. He shaved her pubic area and intended to shave her head, but she asked him not to. He began quoting Bible verses. He said he felt "disassociated at that time. It was like [he] was watching it from a distance." He said he did not think what he was doing was wrong and he did not realize his actions could be construed as criminal.

¶ 8 Just as defendant was ready to pull the trigger, Carla asked defendant for a drink of water. When defendant went downstairs to get a drink for her, he took three more Lorazepam. Carla talked defendant out of committing suicide, he put the gun down, untied her, and she

initiated sex. He was unable to have sex with her due to impotency. He eventually apologized for his actions after he "start[ed] to see some of the things that [he] did were so wrong" in the moral sense. Though, he said, he still did not consider his actions illegal in the criminal sense. After Carla left the house, defendant took the gun, some beer, and a bottle of rum into the timber and drank. The police arrived and arrested him.

¶ 9 Defendant next called Dr. James Thomas O'Donnell, an expert in the field of pharmacology. He said the medications defendant was taking at the time of the offense were intended to alleviate the overall general effects of depression. Though the prescribed dosage of Effexor, 375 milligrams, was considered a maximum dose, it was considered "excessive" for defendant. Dr. O'Donnell said Effexor was an antidepressant, Temazepam was a sleeping pill, and Lorazepam was an antianxiety drug. He said the side effects of Effexor, which included dysphoria, aggression, impulsivity, and suicidal and homicidal tendencies, were not recognized in 2000, and are still not completely understood. He said defendant had been "rapidly accelerated to" the maximum dose of Effexor, which only served to increase the drug's toxicity. Most likely, the toxicity of Effexor, which manifested itself in the form of increased agitation, caused defendant to take more Lorazepam than what had been prescribed.

¶ 10 Dr. O'Donnell formed his professional opinion after (1) reviewing some of defendant's medical records, (2) a telephone interview of defendant, and (3) applying his knowledge of the effects of this medication. In Dr. O'Donnell's opinion, defendant could not have conformed his conduct to meet the requirements of the law. According to the doctor, defendant was involuntarily intoxicated as a result of the excessive dose of Effexor and could not appreciate the criminality of his conduct. At the time defendant took the additional three

Lorazepam tablets, he was already involuntarily intoxicated.

¶ 11 Dr. O'Donnell testified he had relied on Dr. Baluga's psychiatric notes from a September 25, 2000, meeting with defendant, where defendant had described himself as zombie-like. (It is important to note that Dr. Baluga reported she had lost her clinical notes and had reconstructed her report sometime later. This reconstructed report indicated defendant was still taking Effexor, though defendant had actually stopped taking Effexor approximately one week prior to September 25, 2000.)

¶ 12 On cross-examination, Dr. O'Donnell acknowledged that alcohol, a voluntary act, would add to defendant's intoxication, and that defendant had been warned by Dr. Pittman not to drink alcohol with Effexor. Dr. O'Donnell also acknowledged he had read the State's expert, Dr. Pan's, report, as well as some of the excerpts that Dr. Pan had relied upon in preparing his report. One such excerpt was from defendant's counseling session with Marilyn Reinhart on June 28, 2001, where defendant told Reinhart that he realized he had a " 'severe problem' " with alcohol, and that alcohol " 'had a lot to do with him attacking his wife.' " However, Dr. O'Donnell stated this admission by defendant did not change his ultimate opinion, though he did reiterate that alcohol could either exacerbate or lower inhibitions, especially when combined with Effexor.

¶ 13 Defendant also presented the testimony of Wayne Alberts, defendant's brother. Wayne said he visited defendant in jail on the night of the incident and, according to Wayne, defendant acted like he did not know he had committed a crime. "[H]e didn't know what he was doing there." In Wayne's opinion, defendant could not have appreciated the criminality of his conduct.

¶ 14 The State called its expert, Dr. Philip Pan, a psychiatrist who had conducted a

clinical interview of defendant on October 23, 2009. In his written report from the interview, Dr. Pan opined, to a reasonable degree of psychiatric certainty, Effexor did not involuntarily intoxicate defendant on the date of the incident. Dr. Pan believed defendant was intoxicated on the night of the incident after taking an excessive dose of Lorazepam and combining Temazepam and Lorazepam with alcohol, causing defendant to be *voluntarily* intoxicated. Dr. Pan's opinion was based on defendant's description of how he took the medication and how it had been prescribed. Dr. Pan further opined, again within a reasonable degree of psychiatric certainty, that defendant's intoxication was not to a point where he could not appreciate the criminality of his conduct or conform his conduct to the requirements of the law. Dr. Pan said he believed defendant had not before taken three Lorazepam tablets together as he had on the day of the incident. Dr. Pan noted he found Dr. Baluga's reconstructed report to be of little use and unreliable due to her reported inaccuracies.

¶ 15 On cross-examination, Dr. Pan said Effexor most likely did not play any role in defendant's intoxication. Defendant had not reported the negative side effects he now reports to any of his medical or mental-health professionals.

¶ 16 On March 29, 2013, the trial court entered a detailed 23-page order denying defendant postconviction relief on his allegations of ineffective assistance of trial counsel and actual innocence based on involuntary intoxication. This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant presented evidence on two issues at his third-stage evidentiary hearing. He has since abandoned one of those issues (his claim of ineffective assistance of trial counsel), leaving this court with only the claim related to whether he is entitled to a new trial on the issue

of involuntary intoxication. Defendant insists he presented sufficient evidence at the third-stage evidentiary hearing to warrant a new trial—a trial where defendant would present evidence of actual innocence based on his involuntary intoxication, an affirmative defense which became available only after the Illinois Supreme Court's decision in *People v. Hari*, 218 Ill. 2d 275 (2006), four years after defendant's trial. In *Hari*, the supreme court expanded the involuntary intoxication defense (720 ILCS 5/6-3 (West 2004)) to apply to individuals suffering from unexpected and unwarned adverse side effects of prescribed medication. *Hari*, 218 Ill. 2d at 293. In our previous appeal in this case, we held *Hari* could be applied retroactively in postconviction proceedings. See *Alberts*, 383 Ill. App. 3d at 385. Accordingly, we remanded with directions to conduct an evidentiary hearing to determine whether the affirmative defense could have been substantiated. *Alberts*, 383 Ill. App. 3d at 385.

¶ 19 Defendant initially claims the circuit court applied the wrong standard in making its decision. He contends the court applied the standard associated with a claim of actual innocence based on newly discovered evidence, not the standard applicable for a claim of actual innocence based on a new rule. Defendant insists that he "should be placed in the same position as if the affirmative defense of involuntary intoxication was available at the time of his trial." We disagree and reject his claim that he needed to present only that amount of evidence sufficient to warrant a jury instruction on the affirmative defense. We do not equate defendant's burden in these postconviction proceedings with the burden he would need to overcome on the same issue if presented during the trial, or even on direct appeal.

¶ 20 A postconviction petition is a collateral attack on a conviction and sentence; thus, postconviction proceedings involve only constitutional matters that have not been, and could not

have been, previously decided. *People v. Rissley*, 206 Ill. 2d 403, 411-12 (2003). Following a third-stage evidentiary hearing, where fact finding and credibility determinations are made, the circuit court's decision will not be reversed unless it is manifestly erroneous. *People v. Beaman*, 229 Ill. 2d 56, 72 (2008). However, if no new evidence is presented at the evidentiary hearing and the issues presented are pure questions of law, review is *de novo*. *Beaman*, 229 Ill. 2d at 72. Contrary to defendant's assertion, our review involves the circuit court's fact finding and credibility determinations, and is thus not a pure question of law. Accordingly, we review whether the court's decision was manifestly erroneous. *Beaman*, 229 Ill. 2d at 72.

¶ 21 At a third-stage evidentiary hearing, " 'the defendant bears the burden of making a substantial showing of a constitutional violation.' " *People v. Crenshaw*, 2012 IL App (4th) 110202, ¶ 12, *reh'g denied* (Sept. 28, 2012), *appeal denied*, 982 N.E.2d 771 (2013) (quoting *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006)). "An actual innocence-claim should be treated procedurally like any other postconviction claim[.]" *People v. Coleman*, 2013 IL 113307, ¶ 92. Thus, we find defendant's burden of proving a substantial showing of a deprivation of his constitutional rights is inconsistent with the burden of proof required at trial to support the submission of an instruction to the jury. See *People v. Unger*, 66 Ill. 2d 333, 338 (1977) (the jury is entitled to an instruction on a defendant's theory if "some evidence" was introduced to support it). In other words, more than the presentation of "some" evidence is needed at this stage of the proceedings.

¶ 22 We find it reasonable for the circuit court to have applied the standard associated with a defendant's claim of actual innocence based on newly discovered evidence. In order to succeed on a claim of actual innocence, a defendant must show the evidence he seeks to present

is (1) newly discovered; (2) material and not cumulative; and (3) of such conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319 (2009). Actual innocence claims based on newly discovered evidence are protected by the due process clause of the Illinois Constitution. *Ortiz*, 235 Ill. 2d at 333. As such, this standard contemplates defendant's constitutional rights and, therefore, is a reasonable guide for our determination here.

¶ 23 "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Coleman*, 2013 IL 113307, ¶ 96. Material and not cumulative evidence means it "is relevant and probative of the petitioner's innocence" and it "adds to what the jury heard." *Coleman*, 2013 IL 113307, ¶ 96. Conclusive evidence means it would probably lead the jury to a different result. *Coleman*, 2013 IL 113307, ¶ 96. Although the evidence presented at the third-stage evidentiary hearing cannot be described as "new," as the testimony related to the side effects of his medication which were discoverable prior to defendant's trial, the relevance and legal effect of such evidence is indeed new in light of *Hari* and could now provide defendant with a potential defense to the charges. Likewise, the evidence can be described as material and noncumulative because it was not presented to the jury previously and such evidence would go directly to defendant's claimed affirmative defense of involuntary intoxication. Given the above, due to the nature of the evidence, which had not or could not have been presented at trial previously, the first two elements of the standard have been met. Thus, the issue before this court turns on the third element, *i.e.*, whether the evidence would probably change the result on retrial.

¶ 24 Again, we review the circuit court's decision to deny postconviction relief following the evidentiary hearing for manifest error. *Beaman*, 229 Ill. 2d at 72. Manifest error is

" 'clearly evident, plain, and indisputable.' " *Coleman*, 2013 IL 113307, ¶ 98 (quoting *People v. Morgan*, 212 Ill. 2d 148, 155 (2004) (Internal quotation marks omitted.)). "[A] decision is manifestly erroneous when the opposite conclusion is clearly evident." *Coleman*, 2013 IL 113307, ¶ 98. The court in *Coleman* held the circuit court's decision to deny postconviction relief was manifestly erroneous because the evidence presented at the third-stage hearing placed the evidence presented by the State at trial in "a new light and undermine[d] [the] confidence in that evidence and the result it produced." *Coleman*, 2013 IL 113307, ¶ 113. We cannot say the same here.

¶ 25 The statute at issue here states in relevant part:

> "A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition either:
>
> ***
>
> (b) Is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."
>
> 720 ILCS 5/6-3 (West 2000).

¶ 26 In his postconviction petition, defendant claims his constitutional rights were violated when he was not able to present evidence at his trial supporting his affirmative defense that he was involuntarily intoxicated at the time of the offense. At the time of his trial in 2002, defendant's affirmative defense of involuntary intoxication would have been rejected because the defense was available only to those who were intoxicated as a result of "trick, artifice[,] or force." *People v. Rogers*, 123 Ill. 2d 487, 508 (1988). However, after *Hari*, a defendant could

present the defense if he could prove he was taking prescribed medication and suffered unexpected and unwarned adverse side effects, which caused mental deficiencies at the time he committed the offense. See *Hari*, 218 Ill. 2d at 293.

¶ 27 Defendant alleges at the time of the offense he was involuntarily intoxicated as the result of taking the prescription medication Effexor in combination with his other prescribed medications, Temazepam and Lorazepam. He asserts his prescribed daily dose of 375 milligrams of Effexor was an extremely high dose and he was not warned of the side effects of combining these drugs. His expert, Dr. O'Donnell, supported defendant's claim, noting a normal dose was generally between 75 and 225 milligrams per day. The toxicities that Effexor could manifest in the form of increased impulsivity, increased aggression, and suicidal and homicidal tendencies, were not recognized until 2007. Thus, defendant was not and could not have been warned of these side effects in 2000 when he began taking Effexor. And, after taking this "excessive" dose of Effexor, defendant was involuntarily intoxicated at the time of the offense.

¶ 28 On the other hand, the State's expert, Dr. Pan, testified that taking Lorazepam, in combination with Effexor, would serve to amplify the side effects of both medications, while adding the third drug, Temazepam, could only increase the chance of some type of adverse side effect. On the day of the incident, defendant had taken his prescribed doses of Effexor and Temazepam, and knowingly took an excessive dose of Lorazepam, beyond that which had been prescribed.

¶ 29 In Dr. Pan's opinion, if defendant was intoxicated (which he did not necessarily believe because, in his opinion, defendant *was* able to appreciate the criminality of his conduct), it was *voluntary* because defendant had knowingly exceeded his prescribed dose of Lorazepam

and because he had consumed alcohol in combination with his prescribed medication. Even Dr. O'Donnell acknowledged that, if defendant drank alcohol, his voluntary intoxication would add to the effects of his involuntary intoxication. In support, according to Dr. Pittman's testimony in his evidentiary deposition, an excessive dose of Effexor combined with alcohol "could be a very bad combination."

¶ 30 As the circuit court pointed out, Dr. O'Donnell's opinion was not supported by the extent of the evidence relied upon by Dr. Pan. For example, Dr. O'Donnell relied only upon defendant's statements to him in a telephone conversation, and not in a clinical in-person interview. Dr. O'Donnell admitted defendant's statements could have been considered self-serving. Dr. Pan relied on defendant's medical reports, trial transcripts, interviews, court documents, and a clinical examination of defendant. Further, Dr. O'Donnell had relied on defendant's report of feeling as if he was having an out-of-body experience on the night of the incident, as well as defendant's report to Dr. Baluga that he was in a zombie-like state a few weeks after the incident. Neither of these reports is supported by reliable or competent evidence. Defendant's report of an out-of-body experience was not relayed to his counselor until 2004 and Dr. Baluga's report had been reconstructed from memory sometime after her examination of defendant.

¶ 31 Dr. O'Donnell also ignored, as the circuit court pointed out, that defendant had been taking this "excessive" dose of Effexor since June 2000 and was able to continue his employment as a truck driver and was regularly monitored by Dr. Pittman, who noted no significant issues with defendant's mental state as a result of taking Effexor. Dr. Pan suggested that any negative side effects usually manifested themselves soon after the medication was

begun. Apparently, defendant never reported to any of his treating professionals any of the symptoms he complained of at the evidentiary hearing.

¶ 32 The circuit court concluded, based upon its consideration of the evidence, that "the record contains substantial evidence supporting Dr. Pan's conclusion that the intoxication was voluntarily induced." We agree with the court's conclusion. According to the language in the statute, a person who is in a *voluntary* "drugged condition" is not entitled to invoke the defense.

¶ 33 In this case, defendant admitted he exceeded his prescribed dose of Lorazepam on the day of the incident. He took 150 milligrams of Effexor at 2 a.m., 3 tablets of 0.5 milligrams of Lorazepam at approximately 6 a.m., 30 milligrams of Temazepam at approximately 11 a.m., and 225 milligrams of Effexor at approximately 2 p.m. All of those drugs and dosages were as prescribed. However, at approximately 4 p.m., defendant took an additional three tablets of Lorazepam. In Dr. Pan's opinion, these additional Lorazepams, taken *voluntarily* beyond the prescribed amount, resulted in defendant's intoxication. Contrary to Dr. O'Donnell's opinion, according to Dr. Pan, it was not the "excessive," yet prescribed, amount of Effexor that caused defendant's intoxication. Additionally, the evidence presented at the evidentiary hearing suggested defendant had admitted that alcohol had played a major role, in his opinion, in his conduct on the day of the incident. No evidence suggested defendant's consumption of alcohol and the additional Lorazepam were something other than voluntary acts, done by his own choice or free will.

¶ 34 It may very well be true that defendant, as he testified to and as reported by his brother, did not, in fact, realize his conduct was criminal. However, it is most likely, as the

circuit court noted, that defendant's reported confusion stemmed from his lack of knowledge of the legal criminal implications associated with his actions, rather than confusion as defined from a mental-health perspective.

¶ 35 With respect to the application of the defense, Illinois courts have held that the ingestion of alcohol or illegal drugs precludes a defendant's use of the involuntary-intoxication defense. See *Rogers*, 123 Ill. 2d at 508 (ingestion of illegal drugs is a voluntary act); *People v. Downey*, 162 Ill. App. 3d 322, 335 (1987) (being addicted to cocaine did not render a defendant's use involuntary); *People v. Gerrior*, 155 Ill. App. 3d 949, 953 (1987) (the defendant was aware of the nature of prescribed medications and the danger associated with combining them with alcohol and was thus voluntarily intoxicated); and *People v. Walker*, 33 Ill. App. 3d 681, 687 (1975) (a defendant who took a tranquilizer and consumed alcohol acted voluntarily). Defendant knew the effects of Lorazepam, as well as the effects of his other medications; he had been warned not to consume alcohol with Effexor; and he had apparently not complained of any mental difficulties related to his prescription medications within a month or so of the incident. Based on this record, we affirm the circuit court and conclude defendant failed to demonstrate he suffered a substantial deprivation of his constitutional rights by not being allowed to present at a future trial an affirmative defense of involuntary intoxication.

¶ 36 III. CONCLUSION

¶ 37 For the foregoing reasons, we affirm the circuit court's judgment denying defendant postconviction relief. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 38 Affirmed.