

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

BOWJEAN

SIXTH DIVISION
December 16, 2005

No. 1-04-0868

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	86 CR 15796
)	
JASON GRAY,)	Honorable
)	Fred G. Suria Jr.,
Defendant-Appellant.)	Judge Presiding

ORDER

Once again we must review a decision Judge Suria has made in the prosecution of defendant, Jason Gray, for three murders. A jury found defendant guilty on all counts and Judge Suria denied defendant's motion for a new trial. We affirmed that decision on direct appeal. People v. Gray, 247 Ill. App. 3d 133 (1993). Judge Suria later denied defendant's posttrial motion filed pursuant to section 2-1401 of the Code of Civil Procedure (Ill. Rev. Stat. 1989, ch. 110, par. 2-1401), and we also affirmed that decision (People v. Gray, No. 1-98-4310 (2001) (unpublished order under Supreme Court Rule 23)). Defendant filed a petition for relief pursuant to the Postconviction Hearing Act (725 ILCS 5/122-1 et seq. (West 1996)). He based the petition on both newly discovered evidence and trial counsel's incompetent failure to present available evidence of actual innocence. Judge Suria

1-04-0868

held an evidentiary hearing on the petition, following which he granted the petition and ordered a new trial. The prosecution now appeals. For a third time in this litigation, we affirm Judge Suria's decision.

BACKGROUND

On November 7, 1986, Joanne McGuire, then 12 years old, attended a party in the basement of her neighbor's home. About 40 teens remained crowded into the basement a little after midnight, when a knock sounded on the back door. Jessie Villagomez opened the door. Someone in the doorway fired several shots from a .380 automatic gun and fled. The gunshots killed three of the teenagers attending the party.

Police took about 20 of the teens from the party, including McGuire, to the police station in a paddy wagon. Police did not permit McGuire's mother to come with her to the station. When officers first spoke with McGuire she said she had been in the front half of the basement, away from the door, at the time of the shooting. She could not identify the shooters. However, she told police "Little Hawk" and "Inkey" might have participated in the murders.

McGuire returned to a room with other teens from the party. They discussed the shooting. Police brought to the station two members of the Two-Six gang: Manuel Bobe, known as "Little Hulk," and defendant, known as "Ace." McGuire saw an array of photographs that included defendant's picture. Police later

1-04-0868

showed her a lineup that included defendant, who is tall and blond, and several short dark Mexican boys. McGuire identified defendant as the shooter. Prosecutors charged defendant and Bobe with the three murders.

Detective Michael Kill interviewed defendant, and an assistant State's Attorney later took a statement from defendant. Defendant admitted that he had driven past the party on the evening of November 7.

Judge Suria suppressed evidence of the lineup identification because "the lineup [was] so remarkable in it[]s suggestiveness." However, Judge Suria found that McGuire had an adequate independent basis to identify defendant in court as the shooter.

At trial McGuire explained that she initially told police that she did not see the shooter because she feared defendant, whom she knew from the neighborhood. She had known him for about two years before the trial. She told police about "Little Hawk" and "Inkey" because she heard other partygoers say those two participated in the shooting.

The prosecution presented two important witnesses to support McGuire's testimony. Sam Rehder (whose name we spelt "Rahder" in our prior opinion) testified that he picked up some friends, members of the Two-Two gang, to take them to the party on November 7, 1986. On the way they encountered defendant and another member of the Two-Six. Defendant threw a bottle at Rehder's car and displayed hostile gang signals. Later, in a

1-04-0868

separate encounter, defendant and his friend got out of their car to confront Rehder, but when Rehder and the other Two-Two members got out of Rehder's car, defendant retreated and left the scene.

Kill testified that in the interview at the police station defendant admitted that he had a .380 automatic gun on the evening of November 7, 1986. The admission did not appear in any police report of the interview with defendant, and the statement the assistant State's Attorney took made no mention of a gun.

Defendant presented one witness who testified that defendant spent the evening with her. The testimony largely corroborated the alibi defense in the statement defendant gave to the assistant State's Attorney.

Defense counsel also presented Villagomez, the person who opened the door right before the shooting started, to say that he did not see defendant at the door. However, on cross-examination the prosecutor pointedly led Villagomez through testimony that culminated with Villagomez stating he saw defendant near the party shortly before the shooting. Apart from McGuire and Villagomez, no other witness saw defendant near the area around the time of the shooting.

Defense counsel protested strenuously that the prosecutors had not disclosed the fact that they interviewed Villagomez shortly before trial, and they also failed to disclose the evidence that Villagomez saw defendant outside the party near the time of the shooting. Judge Suria denied defendant's motion for

1-04-0868

mistrial, but he ordered the prosecution to refrain from arguing that Villagomez's testimony placed defendant at the scene of the crime.

The jury found defendant guilty of the three murders. A different jury, in another trial over which Judge Suria presided, found Bobe also guilty of the same three murders. Judge Suria sentenced defendant and Bobe to natural life in prison.

In support of his motion for new trial, defendant offered affidavits from two of McGuire's friends. They swore that McGuire told them she did not see who shot the victims, but she intended to testify against defendant anyway. Judge Suria said:

"[I]f Joanne McGuire had not testified in this case, whether it was a bench or a jury, we could bet on the outcome. There would be a not guilty."

At the conclusion of the hearing Judge Suria found that if the jury had heard and believed the proffered evidence from McGuire's friends, the jury might have reached a different conclusion. Judge Suria granted the motion for a new trial.

The prosecution moved for reconsideration, arguing that Judge Suria had applied the wrong standard for deciding a motion for new trial. Judge Suria agreed with the prosecution. Applying the proper standard, Judge Suria held that the two affidavits from McGuire's friends did not constitute clear and convincing evidence of such conclusive character that they would probably change the result on retrial. Therefore, he denied the

1-04-0868

motion for new trial.

In December 1988 defendant filed an appeal, and in January 1989, he separately moved for posttrial relief under section 2-1401 of the Code of Civil Procedure (Ill. Rev. Stat. 1989, ch. 110, par. 2-1401). For the 2-1401 motion defendant presented an affidavit in which Villagomez swore that he did not see defendant near the party. He saw him much earlier on the day of the party. He decided to testify to facts the prosecutors wanted because prosecutors had charged him with unlawful possession of ammunition and failure to pay restitution in violation of his probation. Judge Suria dismissed the 2-1401 motion without an evidentiary hearing.

This court affirmed the conviction on direct appeal but reversed the denial of the 2-1401 motion and remanded the matter for an evidentiary hearing. Gray, 247 Ill. App. 3d at 148.

Because the parties could not find Villagomez, Judge Suria postponed the evidentiary hearing. In January 1997, while the parties still sought Villagomez for the ordered evidentiary hearing on the 2-1401 motion, defense counsel filed a petition for relief under the Postconviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 1996)). Judge Suria permitted defendant to file the motion, but he held all proceedings on the petition in abeyance pending resolution of the 2-1401 motion.

In June 1998 a warrant brought Villagomez to court. He swore that the lead prosecutor at defendant's trial spoke with

1-04-0868

Villagomez in the prosecutor's office shortly before Villagomez testified at defendant's trial. The prosecutor told Villagomez not to mention their discussion to defense counsel. The prosecutor threatened to charge Villagomez as a co-defendant, with defendant and Bobe, if Villagomez did not give the testimony at trial the prosecutor sought. Villagomez testified that his affidavit correctly reflected the incidents of November 7, 1986. That is, he saw defendant earlier in the day, not right before the shooting.

But on cross-examination Villagomez said that he was not sure whether he lied at defendant's trial. Villagomez saw defendant drive past him about four blocks from the party, and after the party had started. When he told prosecutors about that encounter, one of the prosecutors told him "it would be better if [Villagomez] saw him a shorter period of time" before the shooting.

The lead prosecutor testified that when he interviewed Villagomez at the start of trial, Villagomez said he saw defendant on the day of the shooting. Villagomez stopped the interview when the prosecutor asked for specifics about when and where he saw defendant. The prosecutor admitted that he did not notify defense counsel of the interview or the information he then obtained.

Judge Suria found:

"Villagomez cannot be believed. He is untruthful,

1-04-0868

unworthy of trust in any way, shape, or form throughout this entire trial."

Judge Suria held that the prosecution's case did not depend on Villagomez's testimony at trial, and therefore his new testimony, showing that all of his testimony lacked value, did not warrant a new trial. Judge Suria denied the 2-1401 motion.

On appeal this court again affirmed Judge Suria's decision. Defendant tried to raise on appeal some of the issues addressed in the postconviction petition. This court refused to decide the issues because the trial court had not ruled on that petition.

Following our decision affirming denial of the 2-1401 motion, defendant amended his postconviction petition. In the amended petition defendant contended that he did not receive effective assistance of trial and appellate counsel, and that newly discovered evidence showed his innocence.

Defendant supported his ineffective assistance claim with affidavits from several witnesses defense counsel could have called at the original trial. One of the boys who had been in the car with Rehder swore that they had no encounter with defendant or any other members of the Two-Six on the night of the shooting. Two more persons swore that they stayed with defendant on the night of the shooting, and defendant did not go near the address of the party at any time near midnight.

Two witnesses from the party said they saw three Hispanic males, gang members, approaching the party. One of the males

1-04-0868

asked the witnesses about their gang affiliations. One of the witnesses saw a gun in the hand of one of the three Hispanics. Minutes later, just after the witnesses joined the party in the basement, the shooting occurred. The two witnesses said they did not see defendant anywhere near the party. Two other witnesses swore they saw McGuire at the party and she was not near the door at the time of the shooting.

For the newly discovered evidence defendant submitted an affidavit in which Rehder admitted that he lied at trial, and that he had not encountered defendant on the night of the shooting. Bobe, following his unsuccessful challenges to his conviction for the murders, swore that he did not see defendant anywhere near the party and defendant did not participate in the shootings.

The cornerstone for the postconviction petition, and the most significant newly discovered evidence, came in an affidavit from an attorney who swore that McGuire told her she may have mistakenly identified defendant as the shooter.

Defendant in the amended petition sought to explain the late filing date. He swore that he asked his attorney to file a postconviction petition. The attorney said he would do so and he did not inform defendant of any deadline for filing.

Defendant also submitted a deposition of Kill in which Kill swore that he obtained confessions in 90 percent of the murder cases on which he worked, for a total of about 1500 confessions.

1-04-0868

He admitted that in 90 percent of those cases defense attorneys filed motions to suppress "based on allegations of unnecessary use of physical force." In every case Kill swore that he did not use any physical force.

Allegations of physical abuse by various officers including Kill led the police department's Office of Professional Standards to appoint a special investigator to look into the charges, focusing on allegations of abuse committed under the supervision of Commander Jon Burge. See Wiggins v. Burge, 173 F.R.D. 226, 227 (N.D. Ill. 1997). The investigator reported:

"In the matter of alleged physical abuse, the preponderance of the evidence is that abuse did occur and that it was systematic. *** The type of abuse described was not limited to the usual beating, but went into such esoteric areas as *** planned torture."

The State's Attorney, who would usually bear responsibility for further prosecution of any charges against the officers involved in the abuse, had previously represented Burge. The circuit court found, in a separate proceeding, that the prior representation of Burge disqualified the State's Attorney from acting as prosecutor for any charges involving Burge. The court appointed a special prosecutor to look into the possibility of bringing criminal charges against "police officers under the command of Jon Burge."

The prosecutor in the case against defendant sought

1-04-0868

clarification of whether the order appointing a special prosecutor for certain cases precluded him from further representing the State in the postconviction proceedings. In response defendant admitted that Kill did not work under Burge's command when he interviewed defendant. Defendant did not object to the prosecutor continuing to work on the postconviction proceedings. The judge who appointed the special prosecutor agreed that the State's Attorney's office could continue to represent the State in proceedings on defendant's postconviction petition.

The prosecutor moved to dismiss the postconviction petition as untimely. Defense counsel admitted that defendant did not file the original petition within the statutory time frame, but she argued that defendant's affidavit showed that the delay resulted from counsel's erroneous advice, not from defendant's culpable negligence. Counsel also pointed to newly discovered evidence, unavailable within time for a postconviction petition, as grounds for the delay. And counsel asked the court to address the petition regardless of timeliness because defendant presented a compelling claim of actual innocence.

Judge Suria said:

"There's always time in this *** court *** to give additional time to determine whether or not a mistake was made. The timeliness would not affect my decision."

1-04-0868

The court denied the motion to dismiss, and granted defendant an evidentiary hearing on the postconviction petition.

Prior to the hearing the prosecutor orally asked Judge Suria to recuse himself. The prosecutor said:

"I respect your Honor's integrity, and legal knowledge, and ability, beyond reproach. I don't think there is a fairer judge in this country -- however, I have to do as I am instructed *** [and] I have been asked at this time if your Honor would still recuse himself, the People *** request you do so."

Judge Suria summarized his views on the evidence presented through the long history of the case. He said:

"Under these circumstances, I would recuse myself and give somebody, one of my colleagues, an opportunity to review it without any bias or prejudices that may have occurred as a result of what they have heard previously in this case."

Defendant by written motion asked Judge Suria to reconsider his decision to recuse himself. Defendant argued that Judge Suria applied the wrong standard when deciding the oral motion. The prosecution responded that Judge Suria's decision to recuse himself itself provided grounds for an objective observer to believe that he had improperly prejudged the case. The prosecutor pointed to no evidence of actual bias.

Judge Suria reconsidered his recusal and said:

1-04-0868

"any comments that I have made have been based upon the record, not bias or prejudice for or against counsel for either of the parties in this case or for or against the defendant or the victims in this case. It is predicated solely upon the evidence as has been received."

On reconsideration Judge Suria denied the motion for recusal.

At the evidentiary hearing on the postconviction petition McGuire testified that she knew defendant when he was quite young. She had last seen him five or six years before the shooting. She did not remember whether she saw defendant's face in the doorway at the party at the time of the shooting. She admitted that she told an attorney that she "didn't think [she] saw the shooter's face." At the police station she heard others from the party say they had seen defendant near the party. Defense counsel asked, "why do you think it was that you came to believe it was [defendant] that did the shooting?" McGuire answered: "A lot of people were saying his name."

The prosecutor cross-examined McGuire as follows:

"Q. *** [Y]ou told us that you are not recanting any of your trial testimony, is that correct?

A. Correct.

Q. And is that your position today that you are not recanting or changing your trial testimony?

A. No.

* * *

Q. Did you tell the truth when you testified at [defendant's] trial?

A. Best of my knowledge."

Judge Suria sought clarification:

"THE COURT: *** [I]n speaking to *** [the attorney who signed the affidavit supporting the petition] you have indicated that you are not sure who the shooter was?

THE WITNESS: Correct.

THE COURT: Is that your basic statement today?

THE WITNESS: Yes.

THE COURT: Is anybody forcing you[,] coercing you to say that?

THE WITNESS: No.

THE COURT: But you were being truthful when you testified at the trial?

THE WITNESS: Yes."

After a continuance of some weeks the prosecutor brought McGuire back into court for further testimony. McGuire testified that she suffered from lupus, a terminal illness. Stress raises her blood pressure and accelerates the progress of the disease. McGuire felt great stress every time she testified. She clarified that she had the disease when she testified at the original trial. She "was an emotional wreck" when she first

1-04-0868

testified on the postconviction petition. She admitted that she was "emotionally distraught" at the time of her renewed testimony on the postconviction petition. The prosecutor asked, "Are you experiencing any physical problems relating to being nervous today?" She said, "Besides throwing up, just I don't want to be here." The prosecutor also elicited the following testimony:

"Q. *** [I]s there any doubt in your mind that [defendant] is the person you saw shooting into the party ***?

A. No.

Q. Has there ever been any doubt in your mind that [defendant] is the man you saw shooting at people at that party?

A. No.

Q. Have you ever told anyone that you were not sure that [defendant] was the shooter?

A. No."

McGuire contradicted much of the testimony she gave at the prior hearing on the postconviction petition. She last saw defendant two or three years, not five or six years, before the shooting. She explained that she misunderstood the question, and many of the other questions defense counsel posed to her. She had "no idea" why she gave other answers. She had not understood the questions Judge Suria had asked at the prior hearing. She explained that she "wasn't in the right state of mind" that day.

1-04-0868

She did not explain why she testified at the original trial that she had known defendant for about two years before the shooting, testimony that she contradicted in two different ways at the two hearings on the postconviction petition.

Judge Suria summarized the evidence presented on the postconviction petition. He said he would not consider Kill's testimony in his decision on the petition. He recounted the affidavits stating that three Hispanic males, one carrying a gun, approached the party a few minutes before the shooting. No one saw defendant near those three males. Judge Suria added:

"And lastly and most importantly we have the varying testimony of the State's only eyewitness, the only one that places the gun in [defendant's] hands as the shooter[, who] has made the multiple statements that she has made.

*** [T]he two recantations that were *** never heard by the jury ***. They didn't hear the impeachment and contradiction *** of the testimony of Mr. R[e]hder. Mr. Villagomez I've already indicated *** was totally untrustworthy and add[ed] absolutely nothing to this case if it were a bench trial.

So I must consider whether or not it is reasonably possible that different verdict would be arrived at if all the testimony I now have before me were in fact

heard by the jury that heard this case in the first place.

*** [B]ased upon the evidence now before me along with *** arguments that counsel makes for the defense about competency of counsel for not calling other witnesses that were readily available *** I would find that there is a reasonable possibility that a jury today would *** enter a different verdict as to [defendant].

For that reason *** I would grant a new trial."

Prior to entry of the written order for a new trial, Judge Suria, in response to defense counsel's questions, clarified that he granted the new trial based on trial counsel's failure to present available evidence, and he also granted a new trial based on the newly discovered evidence, mostly from McGuire, that "would probably change the results on retrial."

ANALYSIS

Motion to Dismiss

On appeal the prosecution argues first that the trial court should have dismissed the petition as an improper successive petition under the Act. "[T]he Act *** contemplates the filing of only one postconviction petition." People v. Washington, 348 Ill. App. 3d 231, 236 (2004). However, the Act explicitly permits amendment of petitions. See 725 ILCS 5/122-3, 122-5 (West 2002). Defendant presented his first petition under the

Act in 1997. Before the court ruled on that petition, defendant amended the petition and the court addressed all of its rulings solely to the amended petition. The prosecution does not explain why we should regard this amendment as an improper successive petition. The court did not err by allowing the amendment and failing to dismiss the amended petition as a successive petition.

The prosecution argues that the trial court should have dismissed the petition on grounds of laches, because defendant failed to move for a hearing on the petition within a reasonable time after the original filing in 1997. But the prosecution forfeited this argument by failing to raise it in the trial court. See People v. Hawkins, 181 Ill. 2d 41, 54 (1998).

Next, the prosecution argues that the trial court should have dismissed the petition as untimely. The Act includes an exception to its time constraints, if "the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2002). The Act establishes no time limit for claims delayed without culpable negligence. People v. Bocclair, 202 Ill. 2d 89, 98 (2002).

In People v. Rissley, 206 Ill. 2d 403, 421 (2003), the defendant remained in contact with counsel throughout extensive posttrial proceedings, and the defendant relied on his attorney's erroneous advice about the time for filing the postconviction petition. Defendant here alleged effectively indistinguishable facts about his posttrial attorneys. Like the defendant in

1-04-0868

Rissley, defendant here kept in contact with his attorneys and relied on their erroneous advice about the time for filing the postconviction petition.

Moreover, in this case defendant supported his postconviction petition with allegations of evidence showing actual innocence. Our supreme court has reminded us that "to allow the circuit court to dismiss summarily post-conviction petitions for failure to present evidence of actual innocence in a timely manner could lead to a miscarriage of justice." Bocclair, 202 Ill. 2d at 102. The trial court did not err by denying the motion to dismiss the petition as untimely.

Recusal

Judge Suria initially granted the prosecution's oral motion for recusal to give another judge "an opportunity to review [the case] without any bias or prejudices that may have occurred as a result of what they have heard previously in this case." Defendant moved for reconsideration. Judge Suria held that he had recused himself improperly, and that he had applied an improper standard. The prosecution asks us to reverse Judge Suria on grounds that he should have granted the motion for recusal.

Usually, the judge who presided over the original trial should preside over postconviction proceedings unless the party requesting substitution can show substantial prejudice. Wright, 189 Ill. 2d at 13. The party seeking a change of judge bears the

burden of establishing such prejudice through "a showing of animosity, ill will, or distrust." People v. Kluppelberg, 257 Ill. App. 3d 516, 535-36 (1993).

The prosecutor admitted that he saw no indication of prejudice or unfairness, and he did not allege animosity, ill will or distrust. Judge Suria initially granted the motion only because he thought the parties might benefit from having another judge look at the case with a fresh perspective, not influenced by the many years of proceedings in the case. As the court realized on defendant's motion for reconsideration, the desire for a fresh perspective does not constitute adequate grounds for transferring the case to another judge. The prejudice to which Judge Suria referred arose only from his extensive knowledge of matters raised in court over the years during which he presided over the case. The prosecution did not indicate any grounds for finding that Judge Suria bore any bias stemming from an extrajudicial source. See People v. Algee, 228 Ill. App. 3d 401, 406 (1992). Judge Suria correctly denied the motion for recusal.

New Trial

The prosecution contends that Judge Suria applied an improper standard when he granted the petition and ordered a new trial. In the initial oral ruling on the postconviction petition the court found a "reasonable possibility" that the evidence supporting the petition would have changed the result of the trial. When a defendant bases his petition under the Act on

1-04-0868

newly discovered evidence, the court should grant the new trial only if the evidence would "probably change the result on retrial." People v. Baker, 16 Ill. 2d 364, 374 (1959).

Prosecutors did not ask Judge Suria to reconsider his ruling in light of the proper standard, nor did prosecutors in any other way raise this issue before the trial court. We require parties to raise issues before the trial court "to insure that the trial court is informed of possible errors so that the court has an opportunity to correct those errors [and] *** to eliminate unnecessary reviews and reversals." People v. Lett, 61 Ill. App. 3d 467, 470-71 (1978).

The prosecutor's failure to raise the issue here is especially egregious because Judge Suria has throughout this litigation repeatedly shown himself willing to correct any errors he may have made. He initially granted defendant's motion for a new trial, but he reconsidered that decision and reversed himself after the prosecution pointed out that he had applied an improper standard. Judge Suria also initially recused himself at the prosecutor's request, but he reconsidered and reversed himself when defense counsel pointed out that he had applied an improper standard. Therefore, by failing to challenge in the trial court the standard the judge applied in granting the postconviction petition, the prosecution waived the issue. See Hawkins, 181 Ill. 2d at 54.

Moreover, defense counsel sought clarification of the

1-04-0868

court's ruling, and Judge Suria affirmed that his comments about "reasonable possibility" pertained to the claim based on ineffective assistance of counsel. Insofar as defendant based his claim on newly discovered evidence, Judge Suria found that the evidence "would probably change the results on retrial." Thus, the prosecution has not shown that Judge Suria used an improper standard for deciding the postconviction petition.

The prosecution maintains that the evidence does not support the decision to grant defendant a new trial. Because the trial court held an evidentiary hearing, we will not disturb the decision on the petition unless the court committed manifest error. People v. Morgan, 212 Ill. 2d 148, 155 (2004).

As this court held on the direct appeal, the conviction here rested primarily on McGuire's identification testimony, corroborated to some extent by the testimony of Villagomez, Rehder and Kill. Judge Suria ordered the new trial because defendant significantly impeached the testimony of these four witnesses while also substantially bolstering his alibi defense. The prosecution contends that the court assessed the credibility of the testimony incorrectly.

The prosecution does not challenge the court's finding that Villagomez's testimony had no value due to his proven capacity for prevarication. Instead, the prosecutor contends only that the rejection of Villagomez's testimony, standing alone, does not provide grounds for a new trial.

Judge Suria found that the evidence at the postconviction hearings gave strong reason to doubt Rehder's trial testimony. First, Rehder recanted his testimony. Second, one of Rehder's friends, one who rode with him to the party on November 7, 1986, swore that no encounter with defendant occurred on the way to the party. Thus, the friend contradicted Rehder's trial testimony and corroborated Rehder's recantation.

The prosecution argues that we must reassess the credibility of the evidence and hold Rehder's trial testimony more credible than his recantation. Rehder first recanted his testimony shortly after Bobe's trial, and Bobe used the recantation in support of his motion for a new trial. Judge Suria held that the recantation did not warrant a new trial for Bobe. This court affirmed. People v. Bobe, 227 Ill. App. 3d 681, 690-91 (1992).

In Bobe, Judge Suria and the appellate court did not see all of the evidence that Judge Suria saw in this case. Judge Suria did not then know of Villagomez's propensity for lying, nor had he seen evidence of Kill's participation in abuse of suspects. McGuire had not undercut her testimony with later equivocations. And Bobe did not present testimony from any of Rehder's companions. Now that one of the companions has sworn to facts that contradict Rehder's trial testimony, Judge Suria has grounds for reassessing the credibility of Rehder's trial testimony. In light of all the evidence, Judge Suria found that Rehder's trial testimony provides no significant credible support for the facts

1-04-0868

to which Rehder testified. We cannot say that Judge Suria committed manifest error by so reappraising the value of Rehder's testimony.

We also find no manifest error in the reassessment of Kill's testimony. At trial Kill said that defendant told him he had a .380 caliber automatic gun on the night of the shooting. No police report, even those written after Kill's interview, mention an admission relating to any gun, let alone a .380 automatic. The statement the assistant State's Attorney took from defendant also mentions no gun. Defendant supported his postconviction petition with evidence that in 90 percent of his cases Kill obtained confessions, and 90 percent of the defendants who confessed to Kill accused Kill of physical abuse. Although Kill testified that all such claims were false, an internal investigation of the police department found evidence of systematic physical abuse that extended to planned torture. In light of this evidence, Judge Suria decided to omit Kill's testimony altogether from his assessment of the strength of the evidence against defendant.

The prosecution argues that Judge Suria had an obligation to ignore the evidence concerning Kill's participation in physical abuse of suspects, and the questionable veracity of testimony Kill gave under oath both in a deposition and at other trials. Most allegations of physical abuse, and the department's investigation into that abuse, centered on officers working for

1-04-0868

Commander Jon Burge. When the trial court appointed a special prosecutor to investigate police officers under Burge's command, the prosecutor here sought clarification of whether he or the special prosecutor would continue as the prosecutors in the case against defendant. Defendant admitted that Kill did not join Burge's unit until some time after he interviewed defendant. Defendant argued that the court order regarding the special prosecutor had no effect on the case against defendant. The prosecution argues that because of this concession, defendant could not use in this case Kill's testimony from a deposition taken in the investigation of the charges against Burge and his officers.

The charges against Burge have no bearing on this case. Kill's actions, and the possibility that he may have testified falsely under oath in a deposition and in many other prosecutions, has much bearing on the credibility of his testimony here. Especially in light of the police reports and statement to the assistant State's Attorney here, we cannot say that Judge Suria committed manifest error by reassessing Kill's trial testimony and finding that it provided no credible support for the facts to which Kill testified.

Thus, Judge Suria found that defendant's evidence effectively undercut all of the significant corroboration of McGuire's trial testimony. That testimony stood alone as the grounds for the conviction of defendant for three murders and for

1-04-0868

the sentencing of defendant to natural life in prison without the possibility of parole.

When police first interviewed McGuire she said she did not see who shot the victims. She told police she stood far from the door. Two other witnesses later corroborated this account, as they swore McGuire was not near the door at the time of the shooting. McGuire told the police the nicknames of two persons who might have participated in the murders. She told police about "Little Hawk," and through subsequent investigation police identified Bobe, known as "Little Hulk," as a participant in the shooting. Judge Suria entered judgment against Bobe for the three murders.

McGuire later viewed a lineup. Judge Suria disallowed evidence concerning the lineup because he found that the lineup impermissibly drew McGuire's attention to defendant. Despite the suggestive lineup Judge Suria permitted McGuire to testify that she stood near the door and she saw defendant shoot the victims. The testimony completely contradicted her initial report to police. She explained that she feared defendant, but that fear seems inconsistent with the apparently accurate information she gave police that helped lead to the arrest of Bobe. Her fear of defendant seems particularly odd in light of her later testimony that she had not seen him at all for five or six years before the shooting.

At the hearing on the postconviction petition McGuire gave

1-04-0868

new evidence that shed much light on her trial testimony. She suffered from an incurable illness that caused her to suffer greatly, far more than most suffer, in stressful situations. She admitted that testifying at postconviction hearings, and testifying at trial, caused such harmful stress.

Judge Suria saw firsthand the effect stress had on her testimony. When defense counsel examined her, she did not remember whether she had seen the shooter. She said she gave police defendant's name because she heard others from the party say they heard that defendant committed the murders. When the prosecutor examined her she said that she saw defendant shoot the victims. When the court examined her she stated that she was not sure who the shooter was.

Thus, the evidence at the hearing on the postconviction petition showed how McGuire's responses to questioning could vary in stressful situations. The answers gave the court a new perspective on the statements she made to police on the night of the shooting. Police took a highly suggestible twelve year old girl to the police station, and they did not allow her mother to accompany her. They left her in a room with other witnesses who all talked about what they heard. Police later showed her a lineup that suggested the identification of defendant as the shooter. McGuire subsequently made that identification.

Judge Suria found that the evidence impeaching the prosecution's witnesses, together with added alibi evidence and

1-04-0868

testimony from others at the party indicating that three Hispanics committed the murders, probably would have changed the result on retrial. We cannot say that the finding is manifestly erroneous.

Conclusion

Defendant filed an amended postconviction petition, not a second successive petition, and the prosecution waived any issue of laches. Judge Suria correctly denied the motion to dismiss the petition as untimely, both because the evidence showed that defendant did not act with culpable negligence, and because defendant made a viable claim of actual innocence. Judge Suria also correctly denied the motion for recusal, as the prosecutor showed no proper grounds for the request. The prosecution waived any claim that Judge Suria applied improper standards in the assessment of the evidence at the postconviction hearing. And the evidence at the hearing, especially McGuire's explanation of her disease and the apparent effect of stress on her testimony, considered in light of the convincing impeachment of all significant corroborating evidence and the bolstering of defendant's alibi, amply supported Judge Suria's decision to grant defendant a new trial. Accordingly, we affirm.

Affirmed.

McNULTY, P.J., with TULLY and FITZGERALD-SMITH, JJ., concurring.