

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

C.O.A
351605

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

vs.

Case No. 92-001856-01-FC
Hon. Lawrence S. Talon

CARL HUBBARD,
Defendant.

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY *Lauretha Kiel*
DEPUTY CLERK

ORDER AND OPINION DENYING DEFENDANT'S
SUCCESSIVE (3RD) MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court held in the Frank
Murphy Hall of Justice on OCTOBER 2, 2019
PRESENT: HON. LAWRENCE S. TALON
Circuit Court Judge

PROCEDURAL POSTURE

On September 2, 1992, following a bench trial before Judge Richard P. Hathaway, Defendant was found guilty of **Homicide – Murder First Degree – Premeditated MCL 750.316-A**; the Defendant was found not guilty of Weapons Felony Firearm and the Court dismissed the Habitual Fourth Offense Notice.

On September 23, 1992 Judge Richard P. Hathaway sentenced Defendant to a term of life imprisonment for the **Homicide-Murder First Degree-Premeditated** conviction.

On December 19, 1995 the Michigan Court of Appeals unpublished per curiam Opinion [Docket No. 159160] Affirmed Defendant's conviction and life sentence for Homicide-Murder First Degree-Premeditated.

On October 28, 1996 Michigan Supreme Court Order [Docket No. 105540] Denied Defendant's Application for Leave to Appeal.

On March 18, 2009 Judge James R. Chylinski Denied Defendant's Motion to Expand the Record or for an Evidentiary Hearing.

On March 15, 2012 Judge Michael M. Hathaway Denied Defendant's Motion for Relief from Judgment.

On May 31, 2012 Judge Michael M. Hathaway Denied Defendant's Motion for Reconsideration.

On May 7, 2013 the Michigan Court of Appeals [Docket No. 311427] Denied Defendant's Delayed Application for Leave to Appeal the March 15, 2012 Order Denying Defendant's Motion for Relief from Judgment and Motion to Remand.

On September 30, 2013 the Michigan Supreme Court Order [Docket No. 147211] Denied Defendant's Application for Leave to Appeal the Michigan Court of Appeals Order; Defendant failed to meet the burden of establishing entitlement to relief under **MCR 6.508(D)**.

On March 30, 2015 Judge Michael M. Hathaway Denied Defendant's successive Motion for Relief from Judgment.

On June 2, 2015 Michigan Court of Appeals Order [Docket No. 326995] Motion to Remand is Denied; Defendant's Delayed application for Leave is Dismissed; no appeal

may be taken from the denial or rejection of a successive motion for Relief from Judgment MCR 6.502(G)(1).

On July 26, 2016 Michigan Supreme Court Order {Docket No. 151806} Denied Defendant's Leave to Appeal the June 2, 2015 Michigan Court of Appeals Order.

On May 17, 2018 Defendant filed pro se the instant Motion for Relief from Judgment (3rd Successive).

On June 21, 2018 Defendant filed a supplement to the Motion for Relief from Judgment with a DVD recording in which Defendant contends he obtained a videotaped copy of the polygraph examination of Curtis Collins that reveals his demeanor in answering questions prior to and during the polygraph examination.

Defendant now claims and contends in his third (3rd) successive MRJ that he is entitled to a new trial based on new evidence that was not discovered before his earlier motions which shows that his conviction was obtained through perjured testimony and in Defendant's Supplement to the Motion for Relief from Judgment¹ requests the Court to allow him to supplement Exhibit B² of the Motion for Relief from Judgment to include a recorded polygraph examination of Curtis Collins³ which reveals his demeanor in answering questions prior to and during the polygraph examination. Defendant argues that this will better assist the Court in determining whether or not to grant his motion for an evidentiary hearing pursuant to MCR 6.508(C).⁴

¹ DVD/disk included with Defendant's Motion to Supplement Motion for Relief from Judgment

² Motion for Relief from Judgment Exhibit B Copy of a Polygraph Report dated February 1, 2018

³ Prosecution's key witness (COA Opinion December 19, 2015 Dkt No. 159160)

⁴ March 18, 2009 Order Denying Defendant's Motion to Expand the Record Pursuant to MCR 6.507(A) or for an Evidentiary Hearing Pursuant to MCR 6.508(D)

Following review and inspection of the DVD/disk submitted by Defendant, the DVD/disk was found to be unreadable to play any audio or content and appears defective.

On October 17, 2018 the Court held Defendant's Motion for Relief from Judgment and Supplemental Motion for Relief from Judgment were held in abeyance for thirty (30) days to allow the Defendant to present to the Court a working DVD/disk and to file a proper proof of service.⁵

On or about November 14, 2018 Defendant presented to the Court a working DVD/Disk representing a recorded polygraph exam of Curtis Collins.

January 22, 2019 Defendant by and through his attorney filed a Stipulated Adjournment of Defendant's 6.500 Motion for (60) days to allow counsel for defendant to supplement Defendant's existing successive 6.500 motion and to have the prosecutor's conviction and integrity unit review the underlying conviction.

On April 3, 2019, the Court entered an Order Granting Defendant's Counsel Motion to Withdraw and Order for the Prosecutor to Respond to Defendant's Successive Motion for Relief from Judgment.

FACTUAL SUMMARY

Defendant was tried for the homicide of Rodnell Penn. Defendant stipulated that he had been charged with a prior murder and that the case had been dismissed after Rodnell Penn and other witnesses failed to come to court on the date of the trial.

⁵ MCR 6.503(B)

Penn had testified against defendant at the preliminary examination. Defendant also agreed that he has a three to four inch scar on the left and backside of his head.⁶

The victim's brother, Leon Penn, testified that the night before the murder he saw his brother Rodnell with the defendant. He heard Defendant tell Rodnell that he would see Rodnell the next day. Penn knew that his brother was selling drugs for Defendant for approximately two years and had personally seen Defendant picking up money from the victim and dropping of drugs.

The first witness called at trial was twenty-year-old Curtis Collins. Contrary to his police statement given under the alias of Tony Smith, and his preliminary examination testimony, Collins, testified that he was not at the party store or in the area at the time of the crime. He claimed unfamiliarity with the area of Gray and Mack. He also claimed to know Defendant as Ghost. Collins was impeached with his preliminary examination testimony. He admitted that at the preliminary examination he had testified that he was in the party store on that date and time, that he saw Defendant and the deceased in the store. He stated that he left before Defendant, that he heard gunshots, turned around and saw Defendant running and when Collins ran back across Mack, he saw the deceased lying in a driveway. Collins knew it was the Defendant because he could see the scar on Defendant's head and he had gotten a good look at him. He also testified that he saw no one else in the area. Collins was very particular about what he did and did not say at the exam about the events at the store, while at the same time claiming that it was all a lie because he had not been at the scene at all.

⁶ Trial Transcript, Vol. 9/2/1992, Page 96

Collins also admitted giving a statement to the police just days after the crime further admitting that he had given a false name to the police when he gave them a statement because he was on escape status and did not want the police to know. Collins admitted at trial that in his police statement he said he was inside the party store, saw the defendant with the victim, that he left the store first, after he heard a gunshot, he looked back and saw a body lying in front of a house, and he saw the defendant run across a vacant lot towards Springfield.⁷ When asked why he told the police that he was present, Collins claimed that he was on a tether and the police told him "they were going to do this and this to me because I was on escape on a tether."⁸ Collins did not explain how the officers could have known he was on tether considering he had given a false name. Collins was already in custody when he gave his testimony at the preliminary examination. On cross examination Collins added that the police offered him \$10,000 to send him to Texas and give him a new identity. He felt that something could happen to him because he was lying on someone so he wanted to clear it up to stop being afraid. This was part of Defendant's explanation for recanting his preliminary examination testimony.

The trial judge asked him if he had ever had a problem with Defendant before the crime. Collins stated that they had started disliking each other, but there was nothing specific between them. The judge asked why "out of all the people in the world", did he tell the police that you saw Carl Hubbard after you heard the shot; that you saw Mr. Hubbard standing over the deceased and that you saw Mr. Hubbard

⁷ Trial Transcript, Vol. 8/31/1992, Pages 35-38

⁸ Trial Transcript, Vol 8/31/1992, Page 39

running away from the deceased?⁹ Why did you pick out Mr. Hubbard? Collins' reply was long, unclear and did not tell the judge why he chose to say that it was Hubbard.

During his testimony, Collins admitted that he was worried about his life and that of his mother and children. He also stated that he had not been threatened and it was not why he was recanting. "Homicide" had made him lie. "Homicide" was telling him little stuff, and he was really upset about his best friend who had been killed and "the first thing that was coming through my mind I was just saying it, you know. It wasn't meant to be said, you know"¹⁰

On the third day of trial the People called Collins back to the stand. He testified that he wanted to tell the truth. He admitted that he had lied to the Court on the first day of trial.¹¹ He was present on the scene on January 17, 1992 at approximately 9:30 p.m. He had lied because he heard rumors about what was going to happen to his family. He believed the rumors and that is why he "told the judge a story."¹²

Collins affirmed that he had been at the party store on January 17th and did see Defendant with a person he would later find out was the victim. He had heard gunshots after he left the store and he had turned around and looked back across Mack in the direction of the victim. He seen the deceased lying in the driveway and he had seen the Defendant running through the field. He recognized the Defendant from the scar on his head.¹³

⁹ Trial Transcript, Vol 8/31/1992, Page 58

¹⁰ Trial Transcript, Vol 8/31/1992, Page 42

¹¹ Trial Transcript, Vol 9/2/1992, Page 37

¹² Trial Transcript, Vol 9/2/1992, Page 40

¹³ Trial Transcript, Vol 9/2/1992, Page 66

Defendant presented four witnesses in his defense. Raymond Williams and Rodney Fulton both testified that they were with Curtis Collins at the time of the murder. Defendant also presented the testimony of Thomas and Vanessa Spells. On the evening of the 17th Thomas Spells and Defendant left the house at about 9 or 10 p.m. to go to Defendant's mother's house to pick up their son. Vanessa Spells testified that on the 17th she came home from work around 8:15 or 8:20 p.m. Her husband and Defendant were at the house at the time she arrived and they left at 10 p.m.¹⁴

The trial judge found that Collins seemed quite nervous when he testified. The judge then reiterated all of the testimony that he heard and found Defendant guilty of first-degree murder.¹⁵

On appeal, Defendant moved the Court of Appeals for a remand to explore the reasons for Curtis Collins' trial recantation. The People argued that the reasons for recantation were of record.¹⁶ The Court denied the motion.

In March of 1994, defendant filed a supplemental brief on appeal including a claim that Curtis Collins lied to the police initially. However, at trial Collins admitted that he had given that first statement using the alias Tony Smith.

The Court of Appeals affirmed Defendant's conviction in 1995 and Defendant continued to raise questions about Curtis Collins in the Michigan Supreme Court.

Defendant filed several motions in the trial court. He filed a motion for an evidentiary hearing in 2009¹⁷ and his first motion for relief from judgment in 2011.

¹⁴ Trial Transcript, Vol 9/2/1992, Page 148

¹⁵ Trial Transcript, Vol 9/2/1992, Pages 176, 185

¹⁶ People's response filed August 18, 1993

Attached to this motion were affidavits from prisoners Askis Hill, Ray Burford, Emmanuel Randall, and Elton Carter. This motion was denied in 2012.¹⁸

Defendant filed his second motion for relief in 2015. To this motion he attached affidavits from the party store owners who claim to remember that on January 17th, 20 years ago Collins had not been allowed in the store that night. The motion was denied in 2015.¹⁹

Defendant's third motion for relief is based on his claim that Curtis Collins is again recanting his police statement, preliminary examination testimony, and the trial testimony taken on September 2, 1992. He also provides a report stating Collins passed a polygraph examination on three questions and a video of the polygraph test and the interview.

This court ordered the People to answer Defendant's current motion. The People reached out to Curtis Collins. He agreed to come to the Prosecutor's office on Friday, May 17th, but did not keep his appointment and would not return the call. During a visit to his home on May 20, 2019 he told Detective Richard Pomorski that his attorney, Jon Posner, told him not to talk to the prosecutors. Jon Posner, however, died in 2017 leaving the People without a way to interview the witness.

Defendant fired his most recent attorney and insisted that the prosecutor's conviction and integrity unit not to investigate the case.

¹⁷ On March 18, 2009 Judge James R. Chylinski Denied Defendant's Motion to Expand the Record or for an Evidentiary Hearing.

¹⁸ On March 15, 2012 Judge Michael M. Hathaway Denied Defendant's Motion for Relief from Judgment.

¹⁹ On March 30, 2015 Judge Michael M. Hathaway Denied Defendant's successive Motion for Relief from Judgment.

STANDARD OF REVIEW

The standard of review is de novo for all issues of law on appeal. *People v. Laws*, 218 Mich App 447; 554 NW2d 586 (1996). Factual findings are reviewed to see if they are clearly erroneous. **MCR 2.613(C)**; *People v. Tracey*, 221 Mich App 321; 561 NW2d 133 (1997). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *People v. Lombardo*, 216 Mich App 500; 549 NW2d 596 (1996).

In order to advance an allegation in a motion for relief from judgment that could have been made in a prior appeal or motion, a defendant must demonstrate "good cause" for failure to raise the grounds on appeal and actual prejudice resulting from the alleged irregularities that support the claim of relief, pursuant to **MCR 6.508(D)(3)(b)**. The cause and prejudice standards are based on precedent from the United States Supreme Court. *Wainwright v Sykes*, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977).

A court may not grant relief, if the defendant alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction of the sentence or in a prior motion for relief from judgment; unless defendant demonstrates good cause for the failure to previously raise the grounds and actual prejudice from the alleged irregularities that support the claim. **MCR 6.508(D)(3)**; *People v Brown*, 196 Mich App 153; 492 NW2d 770 (1992), *People v Watroba*, 193 Mich App 124; 483 NW2d 441 (1992).

ANALYSIS

To file a successive motion for relief from judgment defendant must show a retroactive change in the law or new evidence that was not discovered before the prior motion. In the case at bar Defendant presents a recanting witness who had already recanted at trial and his polygraph results regarding questions were not relevant. Defendant's evidence does not meet the test for filing a successive motion.

Even if a defendant could meet the test barring a successive motion for relief, the proposed evidence would have to meet the *Cress* test for newly discovered evidence. *People v. Cress*, 468 Mich 578, 692 (2003). Collins recanted at trial and his current recantation is not new, and is considered cumulative, as the evidence would not make a different result probable on retrial, and was actually discovered before his prior to Defendant's first motion for relief. As such, Defendant cannot meet the *Cress* test for newly discovered evidence. *Id.*

Defendant moves for relief from judgment raising four issues. He maintains that he may file a successive motion because he has new evidence that was not discoverable before his other motions for relief. The witness now providing an affidavit had already recanted at trial, thus his recanting affidavit is not actually new. This fact bars his successive motion.

Defendant claims that the affidavit amounts to new evidence because Collins is claiming at trial he disavowed his prior recanting testimony because of pressure by the police and prosecutor. However, the only relevancy of the affidavit is a reiteration of the claim that Collins was not near the area of Gray and Mack the night of the murder.

This is the exact claim he made in his recanting testimony at trial. Even the reasons for the disavowal are not new, as Collins has already claimed that pressure from the police caused him to lie. *Cress, Id.*

Moreover, Defendant provides a report and videotape of Collins' polygraph examination and interview. However, none of the questions that were used in the test are new evidence. Indeed, the polygraph questions are things both sides agreed to in 1992. Collins never testified that he was with Hubbard when Hubbard shot Penn or that he saw the shooting or that Hubbard shot anyone else. The questions all presupposed that Collins had testified to seeing the shooting. Because the questions do not prove anything that was not known in this case, the polygraph test results cannot meet the test for new evidence not discovered before the previous motions. MCR 6.502(G). Therefore, the polygraph results also do not help Defendant meet the bar against successive motions.

In the affidavit, Collins states that he told Raymond Williams in 2014 that he was again willing to claim that he had not been present on Gray and Mack. Williams was the person Collins claimed had told him to say he was on Corbet Street on the night of the crime and Williams himself testified at trial that Collins was with him on Corbet. In paragraph six Collins states, "I contacted Raymond Williams in 2014 informing him that I had lied on Carl Hubbard...and that I would do an affidavit..."

Raymond Williams, then, was helping defendant gather affidavits in 2014, and Williams had this information in 2014. As such, Collins' desire to sign an affidavit was known to Defendant in 2014 before his 2015 motion for relief. MCR 6.502(A) requires

that every motion for relief from judgment must include all of the grounds for relief which are available to the defendant. Collins' newest desire to recant is not new evidence. Defendant had the information in 2014 and was required to raise the claim in his 2015 motion.

Defendant also contends that the cab company subpoena is new evidence but he does not include the results of the subpoena. Knowing that the People attempted to gather information before trial is not new evidence. Absent the results of the subpoena and a *Brady* violation regarding those results, the subpoena is not evidence of anything. *Brady v. Maryland*, 373 US 83 (1963).

Defendant attached other evidence for the court's consideration, but all of the other exhibits have been previously presented in other motions for relief and cannot be considered newly discovered so as to meet the successive motion bar.

Therefore, Defendant's motion should be barred because it is a successive motion which does not present new evidence not discovered before his previous successive motion.

Even if Defendant could get past the successive motion bar, the affidavit from Collins and the polygraph test result would not merit Defendant a new trial. *People v. Cress*, 468 Mich 578, 692 (2003), held that evidence is newly discovered if: (1) the evidence, not just its materiality, is newly discovered; (2) is such that its admission would render a different result probable upon a retrial of the case; and (4) the defendant could not, with reasonable diligence, have discovered and produced the evidence at trial.

As argued above, the evidence is not newly discovered. The witness testified on the first day of trial that he was not on Gray and Mack. Two days later he admitted that he was present on Gray and Mack and that his new testimony was a lie. Moreover, because Collins had told Williams the information in 2014 and Williams was helping Defendant gather the information in 2014 which was part of Defendant's 2015 motion, Defendant had the information about Collins in time for the 2015 motion for relief. The polygraph results add nothing because the questions upon which it was based are all new things both parties agree on during trial. Collins' latest claims are not new.

Even if it was new, the evidence would be cumulative because this exact witness testified to this same claim at trial and the polygraph results would not be admissible. Defendant cannot meet the second prong of the *Cress* test.

repeal the testimony
which they gave under
The Trial.

The evidence would not render a different result probable on retrial. Under Michigan law, affidavits recanting prior sworn testimony are suspect. *People v. Dailey*, 6 Mich App 99, 102 (1967). Recantation alone does not require the court to order a new trial if the court determines that the recanted testimony is untrustworthy. *People v. Van den Dreissche*, 233 Mich 38, 46 (1925).

The circumstantial evidence against Defendant was surprisingly strong and Collins' recanting at a retrial would not make a difference. Defendant's presentation of other new evidence provided by other prisoners who have heard Collins regret his testimony against Defendant or who now remember that they were at the party store that night and Collins was not in there would also not likely change the result.

The last thing Defendant has to show is that he could not have, with reasonable diligence, discovered and produced the evidence at trial. This factor points out that not only could Defendant have presented this evidence at trial, this evidence was actually was presented at trial. Collins testified at trial that he was not on Gray and Mack that night. This is exactly what he would testify to at a new trial. As such, Defendant cannot show any of the *Cress* factors and his motion would be denied, even if he could get past the successive motion bar.

Defendant attempts to use Collins' affidavit to prove that the Court should grant him a new trial. He avers that the People used perjured testimony. However, when Collins recanted on the first day of trial, the prosecutor immediately impeached him with his preliminary examination testimony.

Neither the police nor the prosecutor intimidated the witness after his initial recanting. The police and prosecutor have not intimidated the witness because the witness was forced to face perjury charges or testify against a man accused of murder. There was no intimidation, only a tough choice that Collins had brought about by his own actions.

The prosecutor did not withhold evidence. Neither the police nor the prosecutor had a reason to threaten Collins. As the facts have shown, there was no *Brady* violation.²⁰

Even if these claims could be sustained now, Defendant would still have to show good cause for failing to raise the issues previously and prejudice in order to prevail.

²⁰ *Brady v Maryland*, 373 US 83, 87 (1963).

Defendant argues that he does not need to do so because he is actually innocent. However, Defendant was seen in the area both before and after the shots. Indeed, Defendant's multiple lies to the police showed his guilty state of mind. This court also finds that Defendant's alibi witnesses were not credible.

As Defendant proffers no claim upon which relief may be granted, his argument, and his motion for relief from judgment must be denied for lack of merit.

Therefore, **IT IS HEREBY ORDERED** that Defendant's Successive (3rd) Motion for Relief from Judgment is **DENIED**.

DATED: OCT 02 2019

LAWRENCE S. TALON

Judge Lawrence S. Talon
Circuit Court Judge

PROOF OF SERVICE

I certify that a copy of the above instrument was served upon the attorneys of record and/or self-represented parties in the above case by mailing it to the attorneys and/or parties at the business address as disclosed by the pleadings of record, with prepaid postage on 10/02/2019.

Name