

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

HARRY MILLER,	:	RULING AND ORDER
	:	
Petitioner,	:	Case No. 080907781
	:	
v.	:	Judge Sheila K. McCleve
	:	
STATE OF UTAH,	:	Date: September 26, 2008
	:	
Respondent.	:	

This matter is before the Court on Respondent's Motion to Dismiss. Having considered the memoranda, the Court finds that the Motion should be GRANTED.

Petitioner seeks a determination that he was actually innocent of the charges against him, which were ultimately dismissed. Actual innocence hearings are governed by Utah Code Annotated §78B-9-402 which provides:

(2) (a) A person who has been convicted of a felony offense may petition the district court in the county in which the person was convicted for a hearing to establish that the person is factually innocent of the crime or crimes of which the person was convicted, if the person asserts factual innocence under oath and the petition alleges:

- (i) newly discovered material evidence exists that establishes that the petitioner is factually innocent;
- (ii) the petitioner identifies the specific evidence the petitioner claims establishes innocence;
- (iii) the material evidence is not merely cumulative of evidence that was known;
- (iv) the material evidence is not merely impeachment evidence;
- (v) viewed with all the other evidence, the newly discovered evidence demonstrates that the petitioner is factually innocent; and
- (vi) (A) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction motion, and the evidence could not have been discovered by the petitioner or the petitioner's counsel through the

exercise of reasonable diligence;

(B) a court has found ineffective assistance of counsel for failing to exercise reasonable diligence in uncovering the evidence; or

(C) the court waives the requirements of Subsection (2)(a)(vi)(A) or (2)(a)(vi)(B) in the interest of justice.

In his Petition, Petitioner asserts that the following new evidence exists which establishes that he is factually innocent. (1) the Affidavit of Beverly Kolder, a registered nurse who provided Petitioner home health care in Louisiana on December 7, 2000 and December 14, 2000 and (2) the Affidavit of Berthella Miller. The Court finds that Petitioner has not made the required showing for a hearing.

First, it is apparent from the record that Petitioner cannot meet either subsection (vi)(A) or (vi)(B). Specifically, Petitioner was aware of the substance of this evidence at the time of trial and it was all presented to his appellate counsel for purposes of making ineffective assistance of counsel claims on appeal. Additionally, the Court found that trial counsel was *not* ineffective. Although the Court could waive either or both of these requirements in the interest of justice, the Court finds that Petitioner has not met other prongs of Section 78B-9-402.

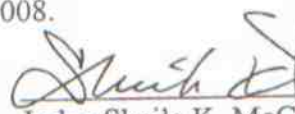
Petitioner has not shown that the evidence, upon which he seeks to rely, is not cumulative of evidence presented at trial. Petitioner presented his alibi defense at trial. These additional witness would have served only to bolster his testimony, not to present a wholly new assertion.

Finally, Petitioner cannot show that this evidence would "establish" that he was innocent. Although the evidence makes it unlikely that Petitioner committed the crime, the Court reviewed this evidence as part of a remand from the court of appeals and determined that there was "no reasonable probability of a different outcome at trial even if [the new witnesses] had testified."

For the foregoing reasons, the State's Motion to Dismiss is GRANTED. This Ruling and Order shall

serve as the final order on this matter. No further order need be prepared by the parties

DATED this 30 day of September, 2008.


Judge Sheila K. McC
District Court Judge



MAILING CERTIFICATE

I certify that a copy of the Minute Entry was sent to the following, by the following method on the 30th day of September, 2008

Method

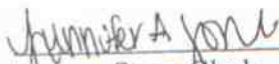
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Dated this the 30th day of September, 2008


Deputy Court Clerk