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DePaul Law Review

Volume 35
Issue 2 *Winter 1986*

Article 8

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INTRODUCTION

On July 9, 1977, law enforcement officials found Ms. Cathleen Crowell (now Mrs. Cathleen Crowell Webb) wandering the streets of Homewood, Illinois. She alleged that she had been kidnapped by three young men, one of whom had raped her. As a result of this factual recitation and a subsequent identification, the police arrested Gary Dotson and charged him with the crimes of kidnapping, rape, and attempted murder.[1] Dotson was convicted of rape and given a severe sentence.[2]

The conviction must be considered the result of Webb's testimony and credibility as a witness, because the physical evidence failed to connect Dotson with the crime. Despite this scant evidence, the jury found Dotson guilty, and the appellate court affirmed the conviction.[3] Consequently, Dotson was imprisoned on July 12, 1979.

On March 14, 1985, Webb recanted her earlier testimony.[4] She told the Illinois State's Attorney that she had not, in fact, been raped and that her pre-trial statements and trial testimony were false. She further stated that she merely wanted to advance the truth and secure the defendant's release from wrongful incarceration.

At the time of Webb's recantation, many lay persons expressed the opinion that it was unseemly to keep a man imprisoned after his accuser retracted

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1. Although Ms. Webb indicated that three persons were involved in the alleged incident, Dotson was the only person charged.

2. In 1984, the average sentence imposed for rape was eleven and one-half years. The average convicted rapist actually served a sentence of only four and one-half years. ILL. DEP'T OF CORRECTIONS, STATISTICAL PRESENTATION 9, table 5 (1984). Dotson was sentenced to twenty-five to fifty years and served that sentence from July 12, 1979, until Governor Thompson commuted his sentence on May 12, 1985.

3. People v. Dotson, 99 Ill. App. 3d 117, 424 N.E.2d 1319 (1st Dist. 1981).

4. Recant means "to retract, renounce or withdraw in a formal or public way a previous statement or belief." It is derived from the Latin *re* (again, back) and *cantare* (to sing). The act itself is called recantation. Interestingly, when an underworld character confesses to the misdeeds of himself and his accomplices (recanting his previous statements), he is said to "sing." COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 227-28 (3d ed. 1973).

previous testimony. In contrast to this public perception, courts consider recanted testimony to be unreliable.[5] As a result, persons who seek to overturn convictions on the basis of recanted testimony must prove that a recantation is sincere and that prior events establish their innocence.[6] This article discusses different procedural approaches available to one who seeks release from prison on the basis of recanted testimony.

I. STATE COURT PROCEDURE

Both the criminal law and the civil law provide procedural methods for seeking release from prison on the basis of recanted testimony.[7] Regardless of which procedural method is used, the petitioner must overcome an extraordinary burden. He or she must show, by clear and convincing evidence, that the recanted testimony was false, that it was knowingly and purposefully given, and that the recanted testimony was substantially responsible for the guilty verdict.[8] This burden arises from a concern for finality in the judicial process, notions of judicial economy, and the judiciary's inherent mistrust of recanted testimony.[9]

A. Criminal Law Remedies

The Post-Conviction Hearing Act governs the criminal procedure.[10] This Act requires a petitioner to assert that a substantial denial of state or federal constitutional rights occurred during the proceedings and resulted in conviction.[11] To succeed in a post-conviction hearing based primarily upon recantation, the petitioner must plead and prove that the prosecutor either (1) knew the recanted testimony was false, or (2) could have readily ascertained its falsity.[12] The mere unknowing use of

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5. *See, e.g.*, People v. Marquis, 344 Ill. 261, 265, 176 N.E.2d 314, 315 (1931) ("recanted testimony is regarded as very unreliable, and a court will usually deny a new trial based on that ground where it is not satisfied that such testimony is true").

6. *See* People v. Nash, 36 Ill. 2d 275, 222 N.E.2d 473 (1966) (recanting affidavit of witness was evasive, self-contradicting, unresponsive and highly improbable, and prior events established defendant's guilt).

7. The criminal procedure is governed by the Post-Conviction Hearing Act, ILL. REV. STAT. ch. 38, art. 122 (1985). The civil remedy is codified at ILL. REV. STAT. ch. 110, § 2-1401 (1985).

8. People v. Hilliard, 109 Ill. App. 3d 797, 800, 441 N.E.2d 135, 138 (1st Dist. 1982).

9. *See, e.g.*, People v. Marquis, 344 Ill. 261, 265, 176 N.E.2d 314, 315 (1931); People v. Bickham, 23 Ill. App. 3d 1074, 1078, 320 N.E.2d 478, 481 (1st Dist. 1974).

10. ILL. REV. STAT. ch. 38, art. 122 (1985).

11. ILL. REV. STAT. ch. 38, § 122-1 (1985) ("[a]ny person . . . who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his [federal or state constitutional] rights . . . may institute a proceeding under this Article").

12. Prosecutorial subornation of, or acquiescence in, perjury clearly violates due process. Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Holohan, 294 U.S. 103, 112-13 (1935). Use of perjured testimony can constitute a due process violation even if a prosecutor's failure

perjured testimony is not usually sufficient to support a post-conviction petition.[13]

Courts are divided as to whether a conviction based on perjured testimony violates a constitutional right.[14] This division is apparent, not only among various jurisdictions, but even among the various divisions of the Appellate Court for the First District of Illinois.[15] Because of this division, the forum

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to discover the perjury is due to negligence. *See* United States v. Agurs, 427 U.S. 97 (1976). Such due process violations compel a re-trial if there is "any *reasonable likelihood* that the false testimony could have affected the judgment of the jury." *Id.* at 103 (emphasis added). *See also* Giglio v. United States, 405 U.S. 150, 153-54 (1972).

13. People v. Frank, 48 Ill. 2d 500, 272 N.E.2d 25 (1971); People v. Bickham, 23 Ill. App. 3d 1074, 1079, 320 N.E.2d 478, 479 (1st Dist. 1974).

14. The United States Court of Appeals for the Seventh Circuit requires the defendant to show that the prosecutor knowingly and intentionally used material and perjurious testimony. United States *ex rel,* Burnett v. Illinois, 619 F.2d 668, 674 (7th Cir.), *cert. denied,* 449 U.S. 880 (1980); Anderson v. United States, 403 F.2d 451, 454 (7th Cir. 1968), *cert. denied,* 394 U.S. 903 (1969). The Illinois Appellate Courts for the First District, Fourth Division, and the Fifth District take the same position. *See* People v. Berland, 115 Ill. App. 3d 272, 450 N.E.2d 979 (1st Dist. 1983); People v. Oswalt, 26 Ill. App. 3d 224, 324 N.E.2d 666 (5th Dist. 1975). Other courts have held that even the inadvertent use of perjured testimony is constitutional error. The Illinois Appellate Court for the First District, Second Division, observed: "[k]nown to the State or not, the use of . . . perjured testimony is a miscarriage of justice which is abhorrent to fundamental fairness and as such is intolerable. Perjury is the mortal enemy of justice, and the battle must be waged at every level, including the constitutional." People v. Shannon, 28 Ill. App. 3d 873, 878, 329 N.E.2d 399, 404 (1st Dist. 1975). *Accord* People v. Cihlar, 125 Ill. App. 3d 204, 465 N.E.2d 625 (1st Dist. 1984), *aff'd,* 111 Ill. 2d 212 (1986); People v. Hilliard, 65 Ill. App. 3d 642, 382 N.E.2d 441 (1st Dist. 1978), *appeal after remand,* 109 Ill. App. 3d 797, 441 N.E.2d 135 (1st Dist. 1982). It is difficult, if not impossible, to prove that a prosecutor knowingly and intentionally used perjured testimony. In order to do so, a petitioner must: (1) identify the source of the alleged evidence of perjury; (2) determine its availability for the hearing; and (3) identify the content of the evidence. *See* People v. Farnsley, 53 Ill. 2d 537, 293 N.E.2d 600 (1973). It is more logical to give no weight to the prosecutor's knowledge, because the use of perjured testimony presents the factfinder with less than the total truth, regardless of whether the perjury is known to the state. A corrective judicial remedy must be applied when perjured testimony contributes to conviction and imprisonment.

15. *Compare* People v. Cihlar, 125 Ill. App. 3d 204, 465 N.E.2d 625 (1st Dist. 1984) (2d Div.), *aff'd,* 111 Ill. 2d 212 (1986); People v. Hilliard, 109 Ill. App. 3d 797, 441 N.E. 2d 135 (1st Dist. 1982) (3d Div.), *and* People v. Shannon, 28 Ill. App. 3d 873, 878, 329 N.E.2d 399, 404 (1st Dist. 1975) (2d Div.), *with* People v. Berland, 115 Ill. App. 3d 272, 450 N.E.2d 979 (1st Dist. 1983) (4th Div.). The Supreme Court of Illinois has failed to address the issue directly. In *People v. Frank,* 48 Ill. 2d 500, 272 N.E.2d 25 (1971), the court held that failure to allege a knowing use of perjured testimony was a fatal flaw in the defendant's petition. However, in *People v. Martin,* 56 Ill. 2d 322, 307 N.E.2d 388 (1974), the court acknowledged that a conviction based on the perjurious testimony of a police officer constituted a denial of due process regardless of whether or not the state knew that the testimony was false. The court stated that the prosecutor need not be aware of the falsity, because the prosecutor is charged with the knowledge of its agents, including the police. *Id.* at 325, 307 N.E.2d at 390. The court held in *People v. Cornille,* 95 Ill. 2d 497, 448 N.E.2d 857 (1983), that the state's lack of diligence in verifying an expert's qualifications constituted sufficient use of false testimony to establish a due process violation. *Id.* at 513, 448 N.E.2d at 865.

in which a convict brings his post-conviction petition can be outcome-determinative.[16] Accordingly, venue is a crucial consideration when filing a post-conviction petition.

The criminal law remedy is less attractive than the civil law remedy because of the added burden of proving a constitutional violation. Nevertheless, the criminal law remedy offers one attractive feature. In contrast to the civil remedy, where the petitioner must appear before the original trial judge,[17] the criminal law remedy provides the petitioner with the option of appearing before a different judge.[18] This avoids the obvious danger that the original judge might act as an advocate for the original result.[19]

B. The Civil Law Remedy

The civil remedy was the only remedy reasonably available to Gary Dotson. In Dotson's case, there was nothing to indicate that the prosecutor knew or should have known that Ms. Webb's testimony was false. According to the evidence available to the trial court, the conviction was proper.[20] Therefore, it would have been difficult to prove the necessary elements under the Post-Conviction Hearing Act.[21]

The civil remedy is governed by section 2-1401 of the Illinois Code of Civil Procedure.[22] In a civil proceeding, the post-conviction petitioner has an affirmative duty to show by clear and convincing evidence that perjured testimony was knowingly used in the trial.[23] If the use of perjured testimony is established, the burden shifts to the state to prove beyond a reasonable

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16. Some courts will deny the petitioner a hearing if he cannot produce witnesses or other evidence that would substantially prove the prosecutor's knowledge of perjured testimony. The same petition, however, would warrant at least an evidentiary hearing in other jurisdictions. *See supra* note 14.

17. *See* ILL. REV. STAT. ch. 110, § 2-1401(b) (1985).

18. Although the criminal code mandates that the petition be heard by a different judge than the original trial judge, ILL. REV. STAT. ch. 38, § 122-8, the Illinois Supreme Court recently found this requirement to be unconstitutional. People v. Joseph, 113 Ill. 2d 36, 495 N.E.2d 501 (1986) (section of Post-Conviction Hearing Act that required that all post-conviction proceedings be conducted and all petitions considered by a judge not involved in original proceeding encroached upon area of court administration and violated separation of powers clause of the Illinois Constitution).

19. The United States Supreme Court has recognized that some judges have a human tendency to identify with the trial's result and that therefore a reversal is viewed as an offense to self. United States v. Offutt, 348 U.S. 11, 14 (1954) ("[J]udges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law").

20. This leaves aside the misleading and false nature of the forensic testimony that was presented at trial. *See* Chicago Lawyer, May 1986, at 1, col. 1.

21. *See supra* notes 10-12 and accompanying text.

22. ILL. REV. STAT. ch. 110, § 2-1401 (1985).

23. The use of perjured testimony will serve to shift the burden of proof if that use extends to any material aspect of the trial. *See, e.g.*, Napue v. Illinois, 360 U.S. 264 (1959) (principle that the state may not knowingly use false testimony to obtain a conviction applies even when false testimony goes only to the credibility of a witness).

doubt that the perjured testimony did not contribute to the conviction.[24] Essentially, the defendant must prove that the recanting witness is now telling the truth. With such a substantial burden, the defendant may need additional corroborative evidence. This task is difficult, because the petitioner has been imprisoned for a lengthy period of time during which witnesses' memories may have faded and physical evidence may have disappeared.

The civil remedy requires that the petitioner appear before the original trial judge.[25] This requirement creates the possibility that the judge may be prejudiced in favor of the original verdict. Even if a judge could not have known that testimony was false when given, he may not be willing to admit that he was deceived. The judicial office in such a circumstance can be likened to that of a baseball umpire who stubbornly defends a misjudgment despite obvious facts.

II. FEDERAL PROCEDURE

A. Criminal Law Remedy

Several options are available in the federal courts for a victim of recanted testimony. Rule 29 of the Federal Rules of Criminal Procedure provides that a petitioner may move to set aside a verdict and substitute a judgment of acquittal within seven days after the jury returns a verdict.[26] Therefore, the motion for judgment of acquittal is appropriate if the victim or any other witness retracts testimony within that short time period.

If more than seven days elapse before a witness recants original testimony, the court may grant a new trial in the interest of justice.[27] If the original trial was a bench trial, the court need only take additional testimony and enter a new judgment.[28] A motion for new trial based on newly discovered evidence must be made within two years after the entry of final judgment.[29] A motion based on other grounds must be made within seven days after a verdict or finding of guilt, unless the time period is extended by the trial court.[30]

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24. People v. Cornille, 95 Ill. 2d 497, 448 N.E.2d 857 (1983) (false testimony of state's expert witness possibly affected jury's decision, entitling defendant to new trial); People v. Martin, 56 Ill. 2d 322, 283 N.E.2d 685 (1974) (state sustained burden of proving beyond a reasonable doubt that perjured testimony of informer did not contribute to defendant's conviction); People v. Bracey, 51 Ill. 2d 514, 283 N.E.2d 685 (1972) (defendant failed to establish the presence of perjured testimony, and even if perjured testimony was present, it was harmless beyond a reasonable doubt).

25. ILL. REV. STAT. ch. 110, § 2-1401(b) (1985).

26. FED. R. CRIM. P. 29(c).

27. FED. R. CRIM. P. 33.

28. *Id.*

29. *Id.*

30. *Id.*

B. Civil Law Remedy

Recanted testimony can also arise in civil cases. Appropriately, there are parallel remedies available under the Federal Rules of Civil Procedure, which are similar to the above-cited rules regarding motions for judgment of acquittal and motions for new trial.[31] Other proceedings are available to defendants whose constitutional rights are substantially violated.[32] The *writ of error coram nobis* is designed to serve as a shorter version of a full *habeas corpus* proceeding.[33] This motion may be brought at any time in any federal court. However, a court need not hear more than one motion from the same petitioner.[34] Additionally, a federal court may rule on *habeas corpus* petitions from the state courts if the defendant alleges that he or she is imprisoned in violation of the United States Constitution.[35]

III. Discussion

Convictions based upon perjured testimony are inherently unfair and compromise judicial integrity. The United State Supreme Court reflected this concern when it stated that:

> [The informant], by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity . . . This Court has . . . [a duty] to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.[36]

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31. Fed. R. Civ. P. 59 (motion for new trial must be served within ten days after entry of judgment, and court, of its own initiative, may order new trial for a reason stated or not stated in motion); Fed. R. Civ. P. 60 (motion to relieve party from judgment must be made within one year after judgment, and court may grant motion when, *inter alia*, there is newly discovered evidence which, by due diligence, could not have been discovered in time to move for new trial under Rule 59).

32. 28 U.S.C. § 2255 (1985). *See generally* W. LaFave & J. Israel, Criminal Procedure 953-1084 (1985) (discussing post-conviction review, appeals and collateral remedies); Note, *Beyond Custody: Expanding Collateral Review of State Convictions*, 14 U. Mich. J.L. Ref. (1981) (discussing the insufficiency of direct appeal to check state intrusions upon federal rights).

33. 28 U.S.C. § 2255 reviser's note (1985) ("This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus").

34. 28 U.S.C. § 2255 (1985).

35. *See* 28 U.S.C. § 2254(a) (1985) ("The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States").

36. Mesarosh v. United States, 352 U.S. 1, 14 (1956) (footnote omitted) (responding to charges that a paid government informer in the case had, concurrently with his testimony at the trial, committed perjury in a different proceeding).

Courts would be well advised to pay stricter attention to the rights of those who may have been wrongly imprisoned rather than to the credibility, or lack thereof, of admitted perjurers.[37]

Gary Dotson's situation was unique in several ways. Ms. Webb was the sole witness against him. Her trial testimony was not corroborated by any significant extrinsic evidence. Moreover, her recantation apparently arose from a personal catharsis and a desire to publish the truth regardless of the consequences. Her recantation did not appear to be coerced in any way.

Reported Illinois case law deals almost exclusively with recantations by witnesses or co-defendants,[38] rather than alleged victims.[39] Nevertheless, the trial court denied Dotson's motion to vacate on the basis of existing case law.[40] The court favored the legal presumption of the unreliability of recanted testimony over the more desired approach of a close and critical scrutiny of the facts that led to Dotson's conviction. The guarded approach of the courts toward recanted testimony should be balanced by a desire to avoid the incarceration of the innocent.

CONCLUSION

Justice Felix Frankfurter has noted:

> American criminal procedure has its defects. That we know on the authority of all who have made a special study of its working. But its essentials have behind them the vindication of centuries. Only ignorant and uncritical minds will find in an occasional striking illustration of its fallibilities an attack upon its foundations or lack of loyalty to its purposes. All systems of law, however wise, are administered through men, and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism. Grave injustices, as a matter of fact, do arise even under the most civilized systems of law and

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37. Research indicates that at least 25 people have been executed in the United States since 1920 for crimes they did not commit. Nineteen others came within hours of execution before being spared. Chicago Tribune, Dec. 23, 1975, at 2, col. 2.

38. *See* People v. Molstad, 101 Ill. 2d 128, 461 N.E.2d 398 (1984) (co-defendant); People v. Miller, 79 Ill. 2d 454, 404 N.E.2d 199 (1980) (co-defendant); People v. Nash, 36 Ill. 2d 275, 222 N.E.2d 473 (1967) (co-defendant); People v. Hilliard, 109 Ill. App. 3d 797, 441 N.E.2d 135 (1st Dist. 1978) (witness); People v. Olson, 60 Ill. App. 3d 535, 377 N.E.2d 371 (4th Dist. 1978) (witness); People v. Smith, 59 Ill. App. 3d 480, 375 N.E.2d 941 (1st Dist. 1978) (witness); People v. Johnson, 52 Ill. App. 3d 843, 368 N.E.2d 111 (3d Dist. 1977) (witness); People v. Williams, 39 Ill. App. 3d 449, 350 N.E.2d 135 (1st Dist. 1976) (co-defendant), *cert. denied*, 429 U.S. 1107 (1977).

39. *See* People v. Montgomery, 93 Ill. App. 3d 498, 417 N.E.2d 686 (1st Dist. 1981) (subsequent inconsistent statements of victim held not to be a recantation); People v. Ellison, 89 Ill. App. 3d 1, 411 N.E.2d 350 (5th Dist. 1980) (victim (1) testified against defendant at trial; (2) recanted this testimony at a subsequent deposition; (3) reasserted her original testimony at a post-conviction hearing; (4) reasserted the recanted testimony out of court; and (5) asserted the recanted testimony at a second post-conviction hearing).

40. Record at 229, People v. Dotson, 7716-5200 (April 11, 1985).

> despite adherence to the forms of procedure intended to safeguard against them.[41]

The law does not exist in a vacuum. It is firmly rooted in, and derives from, the inculcation of human experience. While a court must recognize and follow legal precedent, it must follow precedent in a manner that is equitable and just in light of the facts of the case before it.

Recanted testimony is suspect because it comes from an admitted perjurer. However, this is not the fault of the wrongly incarcerated prisoner. Without selfless objectivity from a court, such a prisoner will remain imprisoned alone, a victim of a lie too strong to be later overcome by the truth.

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41. F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI 108 (1962).