

2011 IL App (1st) 092050-U
No. 1-09-2050

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SECOND DIVISION
July 12, 2011

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.)	No. 81 C5 351
)	
GREGORY SMITH,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Karnezis and Connors concurred in the judgment.

O R D E R

HELD: Dismissal of defendant's section 2-1401 petition as untimely, affirmed.

¶ 1 Defendant Gregory Smith appeals from an order of the circuit court of Cook County dismissing his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil

Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). He maintains that his actual innocence claim was not untimely, and that he is entitled to an evidentiary hearing.

¶ 2 Following a 1982 jury trial, defendant was convicted of the March 1981 first degree murder of the victim, Regina Tatton, attempted murder of the victim's nephew, Edward Boyle, burglary, aggravated battery, home invasion, and two counts of armed violence predicated on murder and attempted murder. He was then sentenced to an extended term of 60 years' imprisonment for murder, and lesser concurrent terms on the remaining offenses. On direct appeal, this court vacated defendant's armed violence convictions, affirmed his remaining convictions, and remanded the cause for resentencing on his murder conviction. *People v. Smith*, 127 Ill. App. 3d 622 (1984). On remand, defendant was sentenced to a 40-year term of imprisonment for murder.

¶ 3 In 1998, defendant filed a post-conviction petition requesting deoxyribonucleic acid (DNA) testing. This court affirmed the circuit court's denial of defendant's request which it considered as a motion for testing under section 116-3 of the Code of Criminal Procedure of 1963 (Criminal Procedure) (725 ILCS 5/116-3 (West 1998)). *People v. Smith*, No. 1-98-1769 (1999) (unpublished order under Supreme Court Rule 23). In 2000, defendant again sought DNA testing based on documentation that had recently become available to him. On appeal, this court

reversed the circuit court's denial of that request and remanded for further proceedings. *People v. Smith*, No. 1-01-0378 (2003) (unpublished order under Supreme Court Rule 23). In 2003, the circuit court granted defendant's request, and in 2004, defendant was discharged from parole after serving his prison sentence.

¶ 4 On March 30, 2007, the DNA test results were released. The lab report showed that a DNA profile obtained from defendant in August 1981 did not match the profile obtained from him on March 6, 2007, and that an "additional standard" from him was necessary to confirm the analysis. The report also indicated that DNA was recovered from the "sidewalk rear stairs," "sidewalk near rear stairs," and front screen door, but does not indicate whether these locations were at or near defendant's home or that of the victim.

¶ 5 The report further provided that low levels of a human male DNA were found on the "sidewalk rear stairs," from which Boyle and the 1981 profile of defendant can be excluded, but that the profile contained insufficient information to exclude or positively identify defendant's 2007 profile. Low levels of a human male DNA profile were also found on the interior side of the front screen door from which Boyle cannot be excluded, but defendant's 1981 and 2007 profiles can be excluded. No human DNA profile was identified on the "sidewalk near rear stairs." The report further indicated that Boyle's DNA was found on the

victim's pajamas, but defendant could be excluded from that profile.

¶ 6 On October 27, 2008, defendant filed a post-conviction petition alleging actual innocence based on newly discovered evidence which, he claimed, included DNA test results and evidence that his confession was coerced by Detective Daniel McWeeney. Defendant asserted that the new DNA results excluded him as the source of the trail of blood from the victim's residence to his home, and showed that Boyle was likely the offender because his blood was found on the victim's clothing.

¶ 7 Defendant further alleged that his confession was involuntary as shown by the newly discovered evidence that Detective McWeeney routinely coerced confessions and was a member of Commander Jon Burge's torture ring. He maintained that this evidence discredited his alleged confession, which he had claimed was coerced at the hearing on his suppression motion.

¶ 8 In support of his petition, defendant attached cases detailing the abuse of other criminal detainees by Commander Burge and Detective McWeeney (*People v. Patterson*, 192 Ill. 2d 93 (2000); *People v. Cannon*, 293 Ill. App. 3d 634 (1997)). Defendant also attached the affidavit of G. Flint Taylor, who attested that he represented persons tortured by detectives working under Commander Burge at Areas 2 and 3, and that the commander and/or his detectives tortured 60 people from 1973 to

1991. Additional attached documentation showed that Detective McWeeney was implicated in eight of the torture cases dating from 1982 to 1991, at Areas 2 and 3.

¶ 9 The State filed a motion to strike defendant's post-conviction petition based on the fact that he had been discharged from parole. Defendant withdrew that petition, and on March 4, 2009, filed the section 2-1401 petition at bar essentially reiterating the allegations in his post-conviction petition. He also alleged that the two-year time limitation for filing a section 2-1401 petition did not apply because his petition was based on section 116-3 of the Criminal Procedure (735 ILCS 5/2-1401 (West 2008)), and that the jury would have acquitted him because the new DNA results showed that he did not leave the trail of blood as the State had argued at trial. He claimed that the trail of blood evidence was used to corroborate his alleged confession, and thus played a critical role in the guilty verdict returned by the jury. Defendant further alleged that if the court heard that the detective had a pattern of coercing confessions, it would have suppressed his confession, and the jury would have acquitted him.

¶ 10 In support of his section 2-1401 petition, defendant referred to the exhibits attached to his withdrawn post-conviction petition. Defendant claimed that the DNA report showed that the trail of blood did not contain human blood, that

he did not leave the trail of blood, and that Boyle was the offender. Defendant also cited cases dating back to 1991 which, he alleged, showed that Detective McWeeney was investigated in claims of torture by individuals who were later pardoned.

¶ 11 The State filed a motion to dismiss the petition alleging that the DNA evidence failed to show that an error of fact was made at trial or that a meritorious defense existed. The State maintained that the DNA report did not reflect that a non-human DNA profile was taken from the sidewalk near the rear stairs, or that defendant was excluded from another DNA sample taken from that area; but rather, reflects that there was too little DNA to exclude or positively identify defendant. The State also maintained that the fact that Boyle's blood was found on the victim's clothing had no bearing on the outcome of the trial because he was stabbed multiple times by defendant. The State further maintained that defendant's claim regarding the detective was time barred because it was filed outside the two-year time limitation, and his supporting documentation showed that allegations had been made against the detective as early as 1990.

¶ 12 In response to the State's motion, defendant alleged that the DNA report failed to explain what was meant by the finding that no human DNA profile was found on the sidewalk near the rear stairs, and that since he disagreed with the State on

the meaning of the DNA results, a hearing was necessary to determine if the blood sample in question contains human blood and why no profile can be detected from it.

¶ 13 Defendant further alleged that the two-year time limitation did not apply to his claim regarding the detective because "grounds for relief" have been and continue to be fraudulently concealed. He claimed that until the Special Prosecutor launched an investigation in 2002, which ended in 2006, evidence regarding the detective was scant, concealed and unavailable to him, and thus, the State's claim that he could have re-raised his claim of abuse prior to his 2-1401 petition was without merit.

¶ 14 At the hearing on the State's motion to dismiss, the State claimed that the DNA results were inconclusive, useless, and would not affect the outcome on retrial. The State also noted that defendant was now "a little too convenient[ly]" attempting to shift the blame to Boyle, who is deceased.

¶ 15 Defendant responded that he brought two distinct errors of fact under section 2-1401, *i.e.*, the trail of blood, and the detective's perjured testimony. Defendant maintained that the trail of blood was an error of fact because if the trail did not contain his blood, he would have been acquitted. He also claimed that the statute of limitations did not apply because he was

maintaining his innocence with regard to the DNA evidence, and that the information regarding the detective was concealed.

¶ 16 The court granted the State's motion to dismiss defendant's section 2-1401 petition. In doing so, the court noted that defendant's claim that his confession was coerced was not new evidence where he had raised that issue since he was charged, and the fact that there may be new ways to prove his position does not alleviate his responsibility to comply with the statute of limitations. The court, therefore, concluded that the petition was untimely.

¶ 17 On appeal, defendant contends that he is entitled to an evidentiary hearing on his actual innocence claim. He maintains that the new DNA results and the evidence that Detective McWeeney routinely tortured other criminal detainees to obtain confessions support his claim that the detective coerced his confession, and suggest that the trail of blood did not belong to him, and that Boyle was the offender.

¶ 18 The purpose of a section 2-1401 petition is to bring facts to the attention of the circuit court which, if known at the time of judgment, would have precluded its entry. *People v. Haynes*, 192 Ill. 2d 437, 463 (2000). To obtain relief under this section, defendant must file a petition no later than two years after the entry of the order of judgment (735 ILCS 5/2-1401 (West 2008)), and set forth a meritorious defense or claim, due

diligence in presenting that defense or claim to the circuit court, and due diligence in filing the petition (*People v. Glowaki*, 404 Ill. App. 3d 169, 171 (2010)). Absent an evidentiary hearing on a petition, our review of the dismissal of a section 2-1401 petition is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 14-15 (2007).

¶ 19 In this case, the circuit court dismissed as untimely defendant's section 2-1401 petition which was filed 27 years after judgment was entered. Defendant challenges that determination, claiming, *inter alia*, that the evidence regarding Detective McWeeney's abuse of criminal detainees was, and continues to be, fraudulently concealed.

¶ 20 Under the fraudulent concealment exception to the section 2-1401 time limitation, defendant must allege facts demonstrating that his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief and must offer factual allegations showing his good faith and reasonable diligence in trying to uncover such matters before trial or within the limitations period. *People v. McLaughlin*, 324 Ill. App. 3d 909, 918 (2001). This burden is a heavy one, and defendant may not merely assert that he is entitled to the exception or make vague, conclusory assertions as to why it applies to him. *McLaughlin*, 324 Ill. App. 3d at 918.

¶ 21 Here, defendant maintains that evidence of detective McWeeney's misconduct against other criminal detainees has and continues to be fraudulently concealed, and that new evidence of the detective's treatment of criminal detainees continues to be uncovered. Defendant claims that the alleged concealment went on until he filed his post-conviction petition in 2008, about 26 years after he was convicted and sentenced, and that it continues.

¶ 22 We observe, however, that defendant's 1981 arrest predates Detective McWeeney's earliest recorded misconduct under Commander Burge in 1982. In addition, an abundance of information regarding Detective McWeeney's misconduct became public long before defendant filed his post-conviction petition in 2008 and his 2-1401 petition in 2009. See *People v. Patterson*, 192 Ill. 2d 93 (2000); *People v. Hopley*, 159 Ill. 2d 272 (1994); *People v. Cannon*, 293 Ill. App. 3d 634 (1997); *People v. Moman*, 201 Ill. App. 3d 293 (1990). In light of this available information, it cannot be said that there was an attempt to conceal these matters from defendant which precluded its discovery by him. *People v. Coleman*, 206 Ill. 2d 261, 291 (2002). Thus, defendant's failure to allege sufficient facts to support his claim that he was prevented from obtaining and raising this issue earlier due to concealment, subjected his

section 2-1401 petition to dismissal as untimely. *McLaughlin*, 324 Ill. App. 3d at 918-19.

¶ 23 Defendant further maintains that his claim of actual innocence was not subject to the two-year limitation period of section 2-1401, insofar as it was based upon DNA test results obtained pursuant to section 116-3 of the Criminal Procedure (725 ILCS 5/116-3 (West 2008)). The State maintains that defendant's reliance on section 116-3 does not exempt his petition from the section 2-1401 time limitation. Defendant responds that case law supports his contention.

¶ 24 The cardinal principle of statutory construction is to ascertain and give effect to the intent of the legislature (*People v. Lieberman*, 201 Ill. 2d 300, 307 (2002)), and the plain language of the statute is the best indicator of that intent (*People v. Bailey*, 386 Ill. App. 3d 68, 71-72 (2008)). The statutory language must be given its plain and ordinary meaning, and when it is clear and unambiguous, it is not necessary to resort to other aids of construction. *Bailey*, 386 Ill. App. 3d at 72.

¶ 25 Section 2-1401(c) of the Code provides, in relevant part, that except as provided in Section 20b of the Adoption Act and Section 2-32 of the Juvenile Court Act of 1987 (Juvenile Act), or in a petition based on section 116-3 of the Criminal Procedure, a petition must be filed no later than two years after

the entry of the judgment. 735 ILCS 5/2-1401 (West 2008). Section 116-3 provides a mechanism to move for DNA testing that was not available at trial, where it is materially relevant to defendant's claim of actual innocence. 725 ILCS 5/116-3 (West 2008). This section contains no time limitation (*People v. Schultz*, 344 Ill. App. 3d 87, 92 (2003)), nor impose limits on the number of petitions that can be filed (*Bailey*, 386 Ill. App. 3d at 72).

¶ 26 The State maintains that since the Adoption Act and the Juvenile Court Act provide specific time limitations for filing a section 2-1401 petition, the absence of such a limitation in section 116-3 means that the two-year limitation of section 2-1401 applies to defendant. We disagree. Section 2-1401(c) specifically excepts "a petition based upon [Section 116-3]," from the two-year filing requirement, thereby providing defendant a mechanism to preserve a claim with information obtained through a section 116-3 inquiry. We, thus, conclude that defendant's section 2-1401 petition, which was based upon DNA testing under section 116-3, fell within the exception provided in the statute and was not untimely, *per se*.

¶ 27 That said, a section 2-1401 petition is subject to dismissal where the petitioner fails to set forth a cause of action or the petition on its face shows that petitioner is not entitled to relief. *Ostendorf v. International Harvester Co.*, 89

Ill. 2d 273, 279-80 (1982). To be entitled to relief under section 2-1401, the newly discovered evidence must be so conclusive that it would probably change the outcome on retrial, discovered after trial, of such character that it could not have been discovered prior to trial with due diligence, material to the issues, and not merely cumulative to the trial evidence. *People v. Hallom*, 265 Ill. App. 3d 896, 906 (1994).

¶ 28 Here, the DNA evidence relied upon was inconclusive as to whether defendant's blood was identified in the trail of blood, but showed that Boyle's blood was found on the victim. The trial evidence showed that Boyle resided with the victim. On the night in question, defendant used a butcher knife to stab Boyle three times in the upper body, causing a cut 6 inches long, a deep laceration 6 to 8 inches long, and another cut 10 inches long. Defendant also severed part of Boyle's finger. When police arrived, Boyle was bleeding, appeared to be in great pain, and spontaneously uttered that defendant was the offender upon seeing his aunt lying on her back in the bedroom and bleeding from her chest. The trial evidence further showed that when defendant was arrested, he accused Johnny Tuck, who told police that defendant had asked him to assist with the theft of the apartment where the victim and Boyle resided, but that he had refused. When defendant was confronted with this information, he confessed. Thus, defendant failed to establish that the DNA results were

material to his identity as the offender or would have altered the outcome of the trial.

¶ 29 Defendant maintains, however, that the DNA results potentially exclude him as the source of the trail of blood and are favorable to him, and that an evidentiary hearing should be held to determine their probative value, *i.e.*, whether the results are so conclusive to warrant a new trial. In support of his argument, defendant cites *People v. Dodds*, 344 Ill. App. 3d 513, 522-23 (2003), where this court reviewed a post-conviction case, and determined that an evidentiary hearing was warranted because the new DNA evidence indicated that there was a nonmatch between the bloodstains on defendant's clothing and the victim's blood which could have supplied a favorable inference of his innocence.

¶ 30 Notwithstanding the procedural variance between these cases, the DNA trail of blood evidence here did not provide a nonmatch, but, rather, was inconclusive in that there was insufficient information to exclude or positively identify defendant's 2007 profile. Furthermore, defendant acknowledges that the DNA evidence was not conclusive, but rather, maintains that it was "potentially" exonerating. Thus, the DNA evidence does not provide a favorable inference of innocence such that it would have changed the outcome of the trial especially where the trial evidence overwhelmingly proved defendant's guilt. We

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therefore conclude that the circuit court did not err in dismissing defendant's section 2-1401 petition without an evidentiary hearing. *Hallom*, 265 Ill. App. 3d at 906.

¶ 31 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.