

No. 1-09-0883

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 85 CR 3245-46
EDWARD SMITH,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Evelyn B. Clay,
	)	Judge Presiding.

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JUSTICE SALONE delivered the judgment of the court.  
Justices Pucinski and Sterba concurred in the judgment.

**ORDER**

*HELD:* Defendant's second-stage post-conviction petition was properly dismissed where he failed to make a substantial showing of a due process violation based on the destruction of evidence without bad faith.

BACKGROUND<sup>1</sup>

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<sup>1</sup> Defendant's cases have an extended history which is largely irrelevant to the issue before us. See *People v. Smith*, 199 Ill. App. 3d 839 (1990), and *People v. Smith*, 222 Ill. App. 3d 473 (1991) for a full recitation of the facts surrounding defendant's convictions.

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Defendant, Edward Smith, was convicted of criminal sexual assault in two separate trials, for his role in the 1984 sexual assaults of J.S. and S.W., respectively. In 1985, following defendant's arrest, defense counsel filed a discovery request asking for all physical evidence and scientific reports from the State. The State responded to the request by informing defendant that the results of any testing would be used in both trials. However, because the evidence recovered was limited, defense counsel consented to the testing being performed by the State and the results being provided to his expert witness. The physical evidence collected from J.S. in the Vitullo kit included fingernail scrapings, vaginal swabs containing bodily fluids but lacking semen, and a blonde human head hair, found in the victim's pubic region. The physical evidence collected from S.W. in the Vitullo kit consisted of encrusted panties, two vaginal swabs and a cervical swab, which contained semen. In 1986, following a jury trial, defendant was convicted of sexually assaulting J.S.

January 12, 1988, was the first day of defendant's trial for this criminal sexual assault. On that day, defense counsel requested that DNA testing be done on the semen swabs recovered in the Vitullo kit. The State objected, arguing that DNA testing was not generally accepted as accurate in the Illinois Courts and that the kit could not be located. The trial court denied defendant's motion. S.W., who had previously identified defendant as her attacker in a lineup, again identified defendant as her attacker at trial. The State provided additional evidence from its serologist that defendant could not be excluded as the contributor of the semen recovered from S.W.'s vagina, cervix, and panties. Defendant put forth evidence, through his own expert witness, that his blood type excluded him as the contributor of the semen recovered. Three days

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later, the jury found defendant guilty of aggravated criminal sexual assault. On February 5, 1988, the trial court, at defense counsel's request, entered an order to preserve the physical evidence against defendant. This court upheld defendant's conviction on direct appeal in *People v. Smith*, 222 Ill. App. 3d 473 (1991), and his petition for leave to appeal was denied by the supreme court on February 5, 1992. In 1998, defendant, relying on section 116-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-3 (West 1998)), filed a motion requesting DNA testing be done on the physical evidence collected from two of his criminal sexual assault convictions. That motion was denied by the circuit court and its denial was reversed by this court in *People v. Smith*, Nos. 1-99-1167 and 1-99-1882 (2000) (unpublished under Supreme Court Rule 23).

In that reversal this court ordered the circuit court to ascertain the location of the evidence, which was reportedly lost or destroyed, and ordered that DNA testing be performed on the evidence if it were located. In the event that the evidence could not be located, the circuit court was to determine why the evidence was destroyed and whether that destruction constituted bad faith.

From 2001, through 2005, the circuit court held hearings and endeavored to ascertain the location of the evidence. After holding multiple hearings with testimony, the circuit court concluded that the evidence was destroyed and that defendant failed to establish that the destruction was done in bad faith. Accordingly defendant's request was denied. Defendant then appealed that order to this court, and we affirmed that judgment. *People v. Smith*, 1-05-1867 (2008) (unpublished under Supreme Court Rule 23).

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On June 19, 2003, while the circuit court was continuing its investigation, defendant filed the post-conviction petition at issue. In that petition defendant contends that his due process rights were violated when the State destroyed the evidence before DNA testing could be performed on it.<sup>2</sup> On June 1, 2005, the circuit court completed its investigation and found that the evidence had been destroyed, through human error, on October 5, 1987, in accordance with the Chicago Police Department policy in effect at the time, which mandated destruction of evidence three years after its collection. The court further noted that defendant failed to establish that the evidence was destroyed in bad faith, and, as such, denied defendant's motion for DNA testing or other relief. This court affirmed the circuit court's ruling in *People v. Smith*, 1-05-1867 (2008) (unpublished under Supreme Court Rule 23). In that appeal, defendant raised the issue of whether his due process rights were violated absent a showing of bad faith. However, this court held that the issue was not properly before us because it was raised for the first time in his post-conviction petition.

Thereafter, defendant filed a motion for a ruling on his post-conviction petition. The petition was advanced to second-stage proceedings because it was not dismissed within the 90-day statutory period. The circuit court dismissed defendant's petition, wholly adopting the State's brief, which contended that defendant's petition was untimely and his claims were barred by *res judicata*. In addition to its bad faith argument, defendant's post-conviction petition also contended that the due process clause of the Illinois Constitution (Ill. Const. 1970, art.I, § 2) was

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<sup>2</sup> Defendant claimed a federal constitution due process violation based on bad faith and a state due process violation without alleging bad faith. Defendant solely argues his state claim in this appeal.

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violated absent a showing of bad faith. On appeal, defendant's sole substantive claim is that even absent bad faith his due process rights were violated by the destruction of evidence. For the reasons that follow, we affirm the dismissal order of the circuit court.

### DISCUSSION

In noncapital cases the Post-Conviction Hearing Act ("Act") (725 ILCS 5/122-1 *et seq.* (West 2008)) creates a three-stage procedure of postconviction relief. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). The second stage of postconviction proceedings are reserved to determine whether the petition and any accompanying documentation make a substantial showing of a violation of constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). In determining whether to grant an evidentiary hearing, all well-pleaded facts are taken as true. *People v. Towns*, 182 Ill. 2d 491, 501 (1998). We review dismissals of second-stage post-conviction petitions *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998).

As noted above, the history of this case is extensive, and largely irrelevant to the issue before us. The sole issue presented by defendant is whether the State violated his due process rights when it destroyed evidence, absent a showing of bad faith. Defendant, citing our supreme court's interpretation of the due process clause in *People v. Newberry*, 166 Ill. 2d 310 (1995), contends that a showing of bad faith is not necessary to establish a due process violation based on the State's destruction of evidence. The State responds that defendant cannot maintain a claim absent a showing of bad faith, and that to whatever extent defendant argues bad faith, his claim is barred by *res judicata* because this court has already found that the evidence was destroyed by human error, but not destroyed in bad faith. *People v. Smith*, 1-05-1867 (2008) (unpublished under Supreme Court Rule 23).

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We begin by acknowledging that the issue of bad faith surrounding the destruction of evidence has been resolved and is not before this court. Thus, we limit our analysis to defendant's claim that the trial court erred in dismissing his complaint, absent a showing of bad faith. Defendant primarily relies on *Newberry* to support his claim. However, we find defendant's reliance on *Newberry* is misplaced, because *Newberry* is factually inapposite.

In *Newberry*, the State charged defendant with possession of a controlled substance with intent to deliver. *Newberry*, 166 Ill. 2d at 311. Defense counsel then filed a motion for discovery to examine all tangible objects seized from defendant. One year later, the evidence was inadvertently destroyed and the trial court dismissed the State's case. The dismissal was upheld by this court and the Illinois Supreme Court held that dismissal was proper as a discovery sanction and based on the violation of defendant's due process rights. *Newberry*, 166 Ill. 2d at 311. In reaching its conclusion, our supreme court reasoned that a "fundamental distinction" between that case and the United States Supreme Court cases of *Arizona v. Youngblood*, 488 U.S. 51 (1988) and *California v. Trombetta*, 467 U.S. 479 (1984), which reached the opposite result, was that the police in *Newberry* destroyed the evidence after defense counsel requested access to it. *Newberry*, 166 Ill. 2d at 317. The supreme court in *Newberry* also relied upon the fact that the evidence that was destroyed was "the sole basis for bringing criminal charges against the [defendant]." *Newberry*, 166 Ill. 2d at 316.

In this case, unlike *Newberry*, the evidence to be used in the prosecution for sexually assaulting S.W. was destroyed before defendant requested DNA testing. Moreover, the semen swabs were not the sole basis for bringing criminal charges against defendant. Defendant confessed to the sexual assaults during interrogation and the victim testified and identified

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defendant in a lineup and in court. In addition, defendant's expert was given access to the test results and opined before the jury, that defendant was excluded as a possible contributor to the recovered semen. Thus, defendant was not completely deprived of the evidence, as was the defendant in *Newberry*. Therefore, defendant's claim is factually distinct from *Newberry*. A defendant's claim fails where, as here, he asserts a due process violation based on the destruction of evidence without bad faith, and his claim is factually inapposite to *Newberry*. *People v. Sutherland*, 223 Ill. 2d 187, 240 (2006).

This case more readily parallels the facts in *Sutherland*, 223 Ill. 2d at 240-41, where the supreme court found that defendant's claim was factually distinct from the claim in *Newberry*, such that *Newberry* was inapplicable. *Sutherland*, 223 Ill. 2d at 240-41. Specifically, the supreme court found that the destroyed evidence in *Sutherland* did not form the basis of the charges against defendant, as was the case in *Newberry*. Also, the defendant in *Sutherland*, unlike *Newberry*, had an opportunity to review the evidence, which was later destroyed before retrial. The supreme court also distinguished the situation of the defendant in *Sutherland* from that of the defendant in *Newberry* based on the fact that the evidence in *Sutherland* was destroyed before it was requested, unlike the evidence in *Newberry*.

Defendant also contends that his claim is viable based solely on the due process granted by the Illinois Constitution and not federal due process rights. To that end, defendant contends that *Newberry* remains good law on the point that the Illinois Constitution does not require a showing of bad faith like the United States Constitution (*Illinois v. Fisher*, 540 U.S. 544, 549 (2004)).

Defendant is correct that state courts are free to interpret their own constitutions more

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broadly than the Supreme Court of the United States interprets similar federal constitutional provisions. *People v. McCauley*, 163 Ill. 2d 414, 426 (1994). However, our supreme court has repeatedly indicated that it does not read the due process clause of the Illinois Constitution any broader than was interpreted in *Fisher*, which required a showing of bad faith. *Sutherland*, 223 Ill. 2d at 241. In *Sutherland* the supreme court, citing *People v. Pecoraro*, 175 Ill. 2d 294 (1997), stated that had defendant not forfeited his state law claim of a due process violation for the destruction of evidence, the result would have been the same that the court reached under the federal due process claim, in that absent a showing of bad faith it failed. Following *Sutherland*, we hold that defendant's Illinois-specific due process claim fails where he failed to establish bad faith. *Sutherland*, 223 Ill. 2d at 241.

Defendant also cites, *People v. Kladis*, 403 Ill. App. 3d 99 (2010), in support of his contention that Illinois reviewing courts recognize a post-*Newberry* claim of error where evidence was erroneously destroyed. However, this court, in *Kladis*, 403 Ill. App. 3d 111-12, reviewed a discovery violation claim and not a due process claim. Thus, to the extent that defendant relies on *Kladis* we find it inapplicable. Indeed, the court in *Kladis*, reiterated the requirement that a defendant, in order to prove a due process violation absent bad faith, must establish that the evidence which was destroyed was material and exculpatory. *Kladis*, 403 Ill. App. 3d 111-12.

Defendant raised no such argument below.

We need not determine whether defendant's petition was also procedurally barred, given that the circuit court ruled on both, and doing so would waste judicial resources, where he failed to make a substantial showing of a constitutional violation. *People v. Guillen*, 261 Ill App. 3d

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1092, 1097 (1994).\_\_\_\_\_

CONCLUSION

\_\_\_\_\_Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.