

No. 1-09-1938

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).

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. 92 CR 6935
)	
MICHAEL SMITH,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

- ¶ 1 *Held:* Where defendant's assertion in second post-conviction petition that investigator's interview with victim was material such that failure to disclose interview constituted Brady violation was merely speculative, defendant did not meet cause and prejudice requirements; the denial of leave to file a successive post-conviction petition was affirmed.
- ¶ 2 Defendant Michael Smith appeals the circuit court's order denying him leave to file a second post-conviction petition. On appeal, defendant contends he met the cause-and-prejudice

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test for leave to file a successive petition by asserting the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose the existence and substance of interviews that a federal agent conducted with the State's main witness at defendant's criminal trial. We affirm.

¶ 3 Following a bench trial, defendant was convicted in January 1994 of attempted first degree murder, conspiracy to commit first degree murder, solicitation of murder, aggravated battery with a firearm and aggravated kidnaping. At trial, Stephanie Powe, the victim, testified defendant was a high-ranking member of the Gangster Disciples, and she and defendant were arrested in Will County in May 1990 and charged with armed violence and possession of cocaine with intent to deliver. The Will County case against defendant and Powe remained pending at the time of defendant's trial.

¶ 4 Powe testified that on February 19, 1992, defendant was in prison and directed two men to kill her in Chicago because she was cooperating with Will County law enforcement officials about the pending case in that county. Powe was shot twice in the head and once in the arm. The defense strategy at trial was to question Powe's credibility as the State's main witness.

¶ 5 At sentencing, the State indicated defendant had two previous offenses, including a 1976 murder conviction. Based on that criminal history, defendant was sentenced to a mandatory term of life imprisonment. On direct appeal, this court affirmed. *People v. Smith*, 278 Ill. App. 3d 343 (1996). Defendant did not appeal to the Illinois Supreme Court.

¶ 6 On December 30, 1996, counsel for defendant filed a petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 1996)). The petition stated that Powe "gave perjured testimony" when she said at his Cook County trial that her testimony was being offered because she believed defendant tried to have her killed. The petition asserted Powe's testimony was given in exchange for leniency in the pending Will County case, an arrangement that defendant contended was made prior to his trial.

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¶ 7 Attached to the petition was a document from the Will County State's Attorney, dated October 1996. According to that document, charges against Powe in the Will County case were dismissed in exchange for her "continued complete cooperation with the prosecution of Michael Smith, including, but not limited to, her agreement to provide truthful testimony" in the Will County case. Defendant asserted the failure to disclose that arrangement denied him a fair trial.

¶ 8 The State moved to dismiss the petition, asserting the petition was not timely filed and did not establish a deprivation of a constitutional right necessary for an evidentiary hearing. The State argued the October 1996 notification reflected an agreement in defendant's Will County case and did not pertain to his Cook County trial. The State further pointed out Powe testified at the Cook County trial in 1994, which was two years before the date of the Will County agreement.

¶ 9 Defendant responded his petition's untimeliness should be excused because he did not learn of Powe's cooperation with Will County officials until October 1996, and he argued Powe had an agreement with Will County at the time of his trial. On June 26, 1997, the circuit court granted the State's motion to dismiss defendant's petition, finding the petition was not timely filed and did not allege facts showing the delay was not attributable to defendant's own culpable negligence.

¶ 10 About a month after that dismissal, counsel for defendant filed a motion for leave to supplement defendant's petition to argue his trial counsel was ineffective in failing to ask Powe at trial whether she agreed to testify against defendant in exchange for favorable treatment in the Will County case. The motion also asserted the State failed to disclose *Brady* material that could have been used to impeach Powe, namely the October 1996 notification, which defendant asserted was "clear" proof of Powe's cooperation with the State. The motion argued "an offer of leniency must have been made" before Powe would have agreed to be added as a witness in the

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Will County case in May 1993, prior to defendant's trial, though the motion conceded "a clear-cut deal might not have been on the table." Defendant's motion for leave to supplement his petition was denied.

¶ 11 Defendant then appealed the dismissal of his first post-conviction petition, and this court affirmed in *People v. Smith*, No. 1-97-3606 (1999) (unpublished order under Supreme Court Rule 23). This court observed that defendant provided no evidence that Powe was lying or had been offered a deal in the Will County case in exchange for her testimony in the Cook County prosecution; rather, the notification established her cooperation only as to the Will County case involving her and defendant. The court held defendant's petition was correctly dismissed without an evidentiary hearing.

¶ 12 On May 19, 2009, defendant, acting *pro se*, filed a successive post-conviction petition asserting, *inter alia*, he was deprived of a fair trial because the State "intentionally withheld several interviews" of Powe in violation of *Brady*.¹ The petition stated that in 2001, defendant was interviewed by Mary Hodge, who was then an investigator for the Illinois Department of Corrections. According to the petition, Hodge told defendant that in her previous position as a federal agent, she had interviewed Powe in the hospital several weeks after the February 1992 events and that she had submitted her reports, notes and records of that interview to the prosecution in that case.

¶ 13 Defendant asserted he subsequently requested copies of those materials from Hodge but did not receive them. He stated the prosecution never disclosed to the defense the content of Hodge's interview of Powe. He asserted those documents contained "exculpatory evidence as

¹ The State Appellate Defender acknowledges on appeal that the third of defendant's three claims raised in the successive petition is "largely the same" claim that was raised in his initial petition, *i.e.*, that the prosecution did not disclose Powe's deal for leniency and allowed her to give false testimony at trial.

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well as *Brady* evidence which would or could have assisted him in the preparation and defense of his case." The circuit court denied defendant leave to file his successive post-conviction petition.

¶ 14 On appeal, defendant contends he stated an "arguable basis of cause and prejudice" in regard to the non-disclosure of Hodge's interview of Powe. He contends the documentation of that interview could have been used to impeach Powe, as the State's main witness. He further contends Powe's statements to Hodge "might well have demonstrated that Powe was making the statements in consideration of her pending drug case."

¶ 15 We first address the applicable standard to be applied in reviewing successive post-conviction petitions. Defendant argues, citing *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006), *aff'd on other grounds*, 227 Ill. 2d 39 (2007), that he need only state the "gist" of a meritorious constitutional claim of cause and prejudice. The Act provides that a defendant may file a successive post-conviction petition after obtaining leave of the circuit court and satisfying the cause and prejudice test, under which he must demonstrate both cause for failing to raise the error in prior proceedings and actual prejudice resulting from the claimed error. 725 ILCS 5/122-1(f) (West 2008). Our review of the circuit court's ruling on leave to file a successive post-conviction petition is *de novo*. *People v. Anderson*, 402 Ill. App. 3d 1017, 1028-29 (2010).

¶ 16 In addition to citing the "gist" standard from *LaPointe*, defendant relies on the language from *People v. Hodges*, 234 Ill. 2d 1 (2009), that *pro se* petitioners need only state a post-conviction claim with an "arguable basis in law or fact." We squarely reject the applicability of *Hodges*, which involved an initial post-conviction filing, to this case, which involves a successive post-conviction petition. Indeed, our supreme court, in a case decided after *LaPointe*, has distinguished the "gist" standard applicable to initial post-conviction petitions from the "more exacting" cause-and-prejudice test required for successive petitions. *People v. Conick*,

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232 Ill. 2d 132, 142 (2008).

¶ 17 As the State points out in this appeal, the supreme court's decision in *LaPointe* was silent on the appellate court's application of the "gist" standard to the cause and prejudice test.

Therefore, we reject defendant's assertion that at this stage, the merits of his successive petition should be reviewed using the less stringent "gist" standard. In keeping with *Conick* and section 122-1(f) of the Act, we apply the requirements of cause and prejudice in this case. See, e.g., *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010) (citing supreme court decision in *LaPointe* and applying cause and prejudice without reduced "gist" standard).

¶ 18 Cause and prejudice are express statutory requirements to obtain leave to file a successive petition. See 725 ILCS 5/122-1(f) (West 2008). "Cause" is defined as an objective factor that impeded defense counsel's efforts (or here, the efforts of this *pro se* defendant) to raise the claim in the initial post-conviction petition; "prejudice" occurs when the claimed error so infected the trial that the conviction or sentence denied the defendant due process. 725 ILCS 5/122-1(f) (West 2008). Where a defendant fails to satisfy the requirements of section 122-1(f), a reviewing court does not reach the merits of his petition or consider whether the successive petition states the gist of a constitutional claim. *People v. Welch*, 392 Ill. App. 3d 948, 955 (2009).

¶ 19 Defendant stated in his petition that the prosecution did not disclose Hodge's interview of Powe, and he contends Powe's statements to Hodge were "arguably material" because at trial, Powe provided the only evidence connecting defendant to the crime.

¶ 20 A criminal defendant's rights to due process and a fair trial are violated when the prosecution fails to disclose material evidence favorable to the defense, and such claims pursuant to *Brady* are cognizable in post-conviction proceedings. *People v. Harris*, 206 Ill. 2d 1, 44 (2002). In *Brady*, the United States Supreme Court held that a prosecutor violates a defendant's

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due process rights when the prosecutor fails to disclose to the defendant, either willfully or inadvertently, exculpatory evidence that is material to guilt or punishment. *Brady*, 373 U.S. at 87. To establish a *Brady* violation, the defendant must show (1) the evidence was favorable to him, (2) the prosecutor failed to disclose the evidence in response to a specific request, and (3) the evidence was material. *People v. Cheers*, 389 Ill. App. 3d 1016, 1028-29 (2009). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Chears*, 389 Ill. App. 3d at 1029.

¶ 21 It is true that impeachment evidence such as pending criminal charges against a State witness is evidence that is favorable to the accused and therefore must be disclosed to the defendant during discovery. *Chears*, 389 Ill. App. 3d at 1029. Defendant ascribes relevance to the contents of Powe's interview with Hodge because Powe had pending charges in Will County at the time of defendant's trial, which took place in Cook County. Defendant argues it is possible the statements Powe made to Hodge revealed that her testimony against defendant in the Cook County case was offered in return for leniency.

¶ 22 More precisely, defendant argues the documentation of Powe's statements to Hodge in the weeks after the crime would have allowed the defense "to explore the veracity" of Chicago police officer Terrance Gibbons' trial testimony. Officer Gibbons testified that when he arrived at the crime scene, a gravely wounded Powe told him that defendant was responsible for her injuries. The defense was able to, and indeed did, question Officer Gibbons about those events at trial via cross-examination.

¶ 23 Defendant also asserts Powe's statements to Hodge "might well have demonstrated that Powe was making the statements in consideration of her pending drug case." As with the impact on Officer Gibbons' testimony, defendant's reliance on the unknown contents of Powe's

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interview with Hodge is entirely speculative. Defendant does not, and indeed cannot, provide any specific facts about Powe's statements to Hodge; his position is that information was never disclosed to him. A claim of prejudice must be founded upon more than speculation or conjecture. *People v. Ramsey*, 147 Ill. App. 3d 1084, 1090-91 (1986); *People v. Velez*, 123 Ill. App. 3d 210, 219 (1984) (speculation by a defendant that he might have been able to use information in question does not establish materiality under *Brady*).

¶ 24 The agreement presented in the record involves the dismissal of charges in Will County against Powe by the Will County's State's Attorney in return for her cooperation against defendant in the narcotics case in Will County. As for the effect of Powe's cooperation in the Will County case on her testimony in the Cook County prosecution, this court has expressly rejected the notion that a State's Attorney for one county can dismiss or agree not to pursue charges in another jurisdiction. *People v. Turley*, 174 Ill. App. 3d 621, 626 (1988); see also *People v. Centanni*, 164 Ill. App. 3d 480, 490-93 (1987). No evidence was presented of pending charges against Powe in Cook County that could have provided the impetus for her testimony against defendant; rather, Powe's testimony at the instant trial was that of a crime victim, describing life-threatening injuries she sustained at defendant's direction. Therefore, even if defendant met the cause requirement excusing his failure to present this claim in his earlier petition, he has not established he was prejudiced by the inability to present Powe's statements to Hodge following the instant crimes.

¶ 25 In summary, defendant was required to show not merely an "arguable basis" for cause and prejudice or the materiality of Powe's interview with investigator Hodge. To bring this claim in a successive post-conviction petition, defendant was required to show the failure to disclose that evidence denied him due process. Under *Brady*, defendant must show a reasonable probability that, had that evidence been disclosed, the result of his proceeding would have been

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different. Defendant has not shown that the unknown content of Powe's statements to Hodge was material and would have outweighed Powe's compelling trial testimony implicating defendant.

¶ 26 Accordingly, the circuit court's denial of leave to file defendant's successive post-conviction petition is affirmed.

¶ 27 Affirmed.