

No. 1-10-3134

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. 02 CR 16582
)	
GLENN CARTER,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Neville and Justice Steele concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly denied *sua sponte* defendant's *pro se* section 2-1401 petition which alleged a *Brady* violation based on newly discovered evidence, where the petition lacked merit and failed to establish that the State had constructive notice prior to trial of information favorable to the defense.
- ¶ 2 Defendant Glenn Carter appeals from the trial court's *sua sponte* denial of his *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). On appeal, defendant contends he was entitled to section 2-1401 relief on his *Brady* claim that the State failed to disclose that the minor

complainant was schizophrenic and on anti-psychotic medication at the time of defendant's trial on charges that he sexually assaulted her. We affirm.

¶ 3 Following a bench trial, defendant was found guilty of predatory criminal sexual assault of a child, aggravated criminal sexual abuse, and criminal sexual assault. Defendant's convictions merged into a single count of predatory criminal sexual assault of a child, and he was sentenced to 30 years in prison.

¶ 4 The charges against defendant arose from an incident on the morning of May 29, 2002. At that time, Krishenna Winfield was defendant's fiancée. Winfield lived with her 11-year-old daughter, K.L., and her 6-year-old son, T.L. Defendant had spent the previous night in Winfield's apartment. In the morning, when Winfield left the apartment on an errand, defendant called K.L. into Winfield's bedroom. K.L. testified that defendant began to kiss her on her mouth, and she began to cry. Defendant lifted up her shirt and kissed her breasts, then he removed her pants, laid her on the bed, and got on top of her. Defendant removed his clothes and attempted to insert his penis into her vagina. K.L. was crying and asked defendant to stop, but he did not. K.L. and her brother, T.L., both testified that during that time, T.L. opened the bedroom door and saw what defendant was doing. Defendant told him to "get the f*** out" of the room.

¶ 5 After the sexual assault, K.L. got dressed and went to school. Winfield picked up K.L. from school that afternoon and took her home. K.L. said nothing to her mother at that time because she was scared. When they arrived home, K.L. took a shower. Winfield testified it was unusual for her daughter to shower in the afternoon after school. That evening, T.L. reported that K.L. was in her bedroom, crying. Winfield went to K.L., who told her mother about defendant's sexual assault on her that morning. Winfield took K.L. and T.L. to her mother's home. From there, Winfield telephoned the police, who took K.L. and Winfield to the hospital. However, K.L. refused to allow medical personnel to examine her because she was scared.

¶ 6 The State rested after presenting the testimony of Winfield and her children. Defendant's motion for a directed finding of not guilty was denied. The parties stipulated that if a physician from the hospital were called, he would testify that he found no physical trauma to K.L.'s introitus but his examination was limited due to K.L.'s lack of cooperation. The trial court found defendant guilty on all counts after finding that the testimony of K.L. and T.L., though uncorroborated by physical evidence, was credible and "very honest."

¶ 7 When the cause came before the court on September 14, 2004, for posttrial motions and sentencing, defense counsel Steve Pernick had been prepared to file a written motion for a new trial. At that time, he advised the court that the victim-impact statement of Winfield had been filed, describing the trauma she and her children had sustained as the result of defendant's attack on K.L. The court was tendered a copy of Winfield's statement, and Pernick drew the court's attention to one specific portion of the statement: "My daughter suffers from severe depression, insomnia and anxiety attacks. She is also heavily medicated and has been since the beginning of this ordeal. My children and I have been receiving counseling, both as a family and individually." After reading the statement, Pernick told the court, "I'm sure the State was not aware of this ***." Pernick requested that Winfield be subjected to *voir dire* examination about her victim-impact statement; the court denied his request. Pernick argued there was a possible *Brady* discovery issue and was given leave by the court to amend his post-trial motion. He added to the written motion for a new trial a new paragraph: "The defendant was deprived of a fair trial due to the withholding of essential information by the victim's family which severely hampered his ability to prepare a proper defense." After Pernick argued the balance of his motion for a new trial, the court stated that it had found the testimony of the children to be honest, truthful, and convincing. The court concluded: "I don't see that the victim impact statement at this point has

any impact at all with respect to the motion for a new trial, and the motion for a new trial will be denied."

¶ 8 In the sentencing hearing that followed, the State presented argument in aggravation. In mitigation, Pernick called Winfield to testify and examined her about the victim-impact statement she had signed. She testified that before defendant's assault on K.L., neither she nor her children had been taking any medications. During trial and at the present time, K.L. was on Trilafon, Seroquel, and Zoloft. On the day T.L. testified, he was taking Atretol, a drug prescribed for ADHD. At the conclusion of the hearing, the court sentenced defendant to 30 years in prison on one count of predatory criminal sexual assault of a child.

¶ 9 Pernick filed a motion asking the court to reconsider its denial of defendant's motion for a new trial. The motion stated that prior to trial Winfield had not allowed him to interview K.L. and that he was not aware until Winfield testified at the sentencing hearing that during trial K.L. was taking prescription drugs for schizophrenia and depression. The motion argued that Winfield's testimony about the drugs K.L. was taking was newly discovered evidence showing defendant was denied access to K.L.'s mental health and treatment information prior to trial and that information "would have provided powerful tools for cross-examination." Copies of the motion to reconsider and the accompanying affidavit of defense counsel appear in duplicate in the record before us. The motion was unsigned. Counsel's affidavit stated that if he had the psychological/psychiatric treatment and medication information of the minor witnesses before trial, he could have conducted a far more extensive cross-examination of K.L. He also would have "forcefully challenged both witnesses['] competency to testify and advised my client not to waive jury." Counsel's affidavit was neither signed nor notarized. The date "2004" was printed in the unsigned notarial certificate at the bottom of the document.

¶ 10 On October 29, 2004, the parties appeared in court on defendant's motion to reconsider. At that time, Pernick noted that his documents were previously unsigned and asked that he be sworn to his affidavit that was attached to the motion to reconsider. Pernick was sworn to the affidavit, after which the court took the motion under advisement. On November 16, 2004, the court denied the motion to reconsider its denial of the motion for a new trial. The court also denied defendant's motion to reconsider and reduce sentence.

¶ 11 Defendant appealed, contending, *inter alia*, that his due process rights were violated when the State failed to disclose K.L.'s post-occurrence use of psychotropic medications. On July 13, 2006, we affirmed defendant's conviction and affirmed his sentence as modified. *People v. Carter*, No. 1-04-3430 (2006) (unpublished order under Supreme Court Rule 23). Our order stated that "defendant does not dispute that he and the State learned in a victim impact statement written by" Winfield that since the occurrence K.L. had suffered from severe depression, insomnia and anxiety attacks and was also heavily medicated. We noted that the record did not show "that the information was known to the State before or during trial." We observed that alleged victims in criminal cases are not deemed to be under the control of the State, that case law did not place upon the State the burden of investigating the mental health records of a witness, and that defendant had failed to show the State had violated its mandate under *Brady*.

¶ 12 In February 2010, defendant filed a *pro se* section 2-1401 petition for relief from judgment. His petition alleged that the trial court erred in denying petitioner's post-trial requests to investigate the status of K.L.'s mental health, and that the State failed to disclose evidence favorable to his defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In support of his *Brady* claim, defendant appended to his petition a statement labeled "affidavit" but which was not notarized. That statement, by defendant's brother, Willie Carter, averred that Winfield told him in 2005 that, prior to defendant's trial, she "told authorities from the Cook County Sheriff's

Department investigating the case that K.L. was schizophrenic and had been taking psychotropic medication for schizophrenia." Defendant's petition contended that because Winfield had told agents of the State about K.L.'s mental state and medications, the prosecution had constructive notice of that information but improperly failed to disclose it to the defense before trial.

¶ 13 Other documents attached to the petition were a copy of defendant's pretrial motion for discovery and the first page of his posttrial motion to reconsider denial of his motion for a new trial; the affidavit of defendant's trial counsel, Steve Pernick; and the affidavit of Althea Ray Toolie. Pernick's affidavit was the identical affidavit that had been appended to the motion to reconsider and that Pernick had sworn to in open court on October 29, 2004. However, the affidavit now bore the purported signature of Pernick and a notarial certification signed and dated March 5, 2008; the original 2004 date had been amended by imposing a hand-written number "8" over the number "4". Althea Ray Toolie's affidavit did not identify her but stated that on some unspecified date she contacted "Bobbie Wright Mental Health *** to ask about obtaining information on the families of [K.L.] and K. Winnfield [*sic*] [and T.L.] for the years of 2001 2002." She was told an attorney would have to obtain that information on behalf of defendant.

¶ 14 The State filed neither a response to the section 2-1401 petition nor a motion to dismiss the petition. On March 10, 2010, the trial court denied the petition *sua sponte* "[b]ecause petitioner has failed to show the existence of a meritorious claim and due diligence." The court observed that defendant was required to file his petition within two years of the 2004 judgment entered against him but that it was filed in 2010, and as a consequence dismissal on the basis of lack of due diligence was warranted. The court noted that the trial court's denial of a defense request to investigate K.L.'s mental health was waived where that issue was not raised on direct appeal. The court ruled that the *Brady* issue had been raised on direct appeal, that this court had ruled the State did not possess the information before receiving the impact statement and had no

duty to investigate K.L.'s mental history, and that the issue was barred thereafter by the doctrine of *res judicata*.

¶ 15 On appeal, defendant contends that the trial court's dismissal of his section 2-1401 petition without a hearing was error where his claim of a *Brady* discovery violation was meritorious, supported by evidence that the mental health condition and medications of K.L. were known by agents of the State prior to trial but not disclosed to the defense.

¶ 16 Dismissal of a section 2-1401 petition for relief from final judgment is reviewed *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). A section 2-1401 petition is the forum in which to correct all errors of fact occurring in a criminal prosecution that were unknown to the defendant and the court at the time judgment was entered, which, if then known, would have prevented its rendition. *People v. McLaughlin*, 324 Ill. App. 3d 909, 917 (2001). The petition must be filed no later than two years after the judgment was entered, unless the party seeking relief is under legal duress or disability, or the ground for relief has been fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2010); *People v. Thomas*, 364 Ill. App. 3d 91, 98 (2006). "To obtain relief under section 2-1401, the defendant 'must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.' " *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003), citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986).

¶ 17 In *Brady*, the Supreme Court of the United States held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Illinois Supreme Court Rule 412(c) (eff. Mar. 1, 2001) codifies the *Brady* disclosure requirement. Such evidence is material if a reasonable probability

exists that the result of the defendant's trial would have been different if the State had disclosed the evidence to the defense. *Thomas*, 364 Ill. App. 3d at 101.

¶ 18 Defendant asserts his petition's untimeliness was not a proper basis for the trial court's *sua sponte* denial of the petition and that the doctrine of *res judicata* did not preclude his raising a claim of a *Brady* discovery violation where newly discovered evidence came to light after his direct appeal. The State concedes that the trial court was not permitted to dismiss the section 2-1401 petition on its own motion on the basis of timeliness, and both parties cite *People v. Malloy*, 374 Ill. App. 3d 820 (2007). There, this court held that the trial court erred in dismissing the defendant's petition for relief from judgment, on its own motion, on the basis of timeliness where the State did not assert untimeliness as an affirmative defense (*id.* at 824), but that the error was harmless where the petition lacked merit (*id.* at 824-25). Here, regardless of the trial court's reasons for denying defendant's petition, we can affirm that court's judgment on any basis supported by the record. *Beacham v. Walker*, 231 Ill. 2d 51, 61 (2008). We do so here where, as in *Malloy*, defendant's petition was meritless.

¶ 19 However, the trial court correctly ruled that defendant's *Brady* claim was defeated by the doctrine of *res judicata*. On direct appeal, defendant charged the State with a *Brady* discovery violation in failing to inform the defense prior to trial about K.L.'s mental health and medications, and he asserted that the failure to disclose denied him a fair trial and sentencing hearing. We ruled that our review of the case law indicated the State had no duty to investigate the mental health records of victims such as K.L. but suggested "that the matter is to be brought before the court for a determination upon motion of the defendant if a specific request for discovery of mental health records is resisted by the State." We concluded that defendant had failed to show the State violated its duty in this case as mandated under *Brady*. This issue having been decided on direct appeal, we agree with the State that defendant was barred by the doctrine

of *res judicata* from subsequently relitigating his *Brady* claim. *People v. Johnson*, 191 Ill. 2d 257, 268 (2000)

¶ 20 Defendant asserts that *res judicata* is inapplicable because his section 2-1401 petition contained newly discovered information obtained subsequent to the original judgment. The petition claimed that before trial, Winfield had told the Cook County Sheriff's Department, an agent of the State, that K.L. was schizophrenic and had been taking psychotropic drugs for schizophrenia. Defendant concludes that Winfield's statement contradicted a finding that the State did not know of K.L.'s medications or medical treatment before the victim-impact statement was made available in court.

¶ 21 Defendant's argument fails because the factual allegations in his section 2-1401 petition were insufficient to establish a legal basis for section 2-1401 relief. Section 2-1401(b) of the Code requires that a petition for relief from judgments "must be supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b) (West 2010). The only arguable support for defendant's 2010 petition was Willie Carter's 2008 alleged affidavit about a 2005 statement Winfield had made to him, that she had told the Sheriff's Department that K.L. was schizophrenic and had been taking psychotropic medication. Defendant contends that when the State did not file a responsive pleading to defendant's petition, it admitted Willie's "affidavit" to be true and waived any challenge to its legal sufficiency. However, "if the facts alleged [in a section 2-1401 petition] cannot state a legal basis for the relief requested, *i.e.*, the petition is insufficient as a matter of law, the pleading may be challenged at any time, even on appeal." *Vincent*, 226 Ill. 2d at 8-9. Willie's statement did not provide a basis for defendant's *Brady* claim. The statement was not an affidavit; there was no certificate of a notarial act as required by section 6-103 of the Illinois Notary Public Act. 5 ILCS 312/6-103 (West 2008). Moreover, the statement was mere hearsay, with no foundation for the truth of the matter asserted by Winfield.

Generally, hearsay affidavits are insufficient to warrant relief under section 2-1401. See *People v. Sanchez*, 115 Ill. 2d 238, 284 (1986). Willie's statement and the remaining documents attached to the petition, including the affidavit of Pernick (the date of which appears to have been altered) and the affidavit of Toolie, were insufficient to establish a legal basis for defendant's claim. The petition also failed to establish that the information was so favorable to defendant that it was reasonably probable the result of his trial would have been different if the State had disclosed the information before trial.

¶ 22 The trial court's *sua sponte* dismissal of defendant's section 2-1401 petition for relief from judgment was harmless because the petition did not plead a meritorious basis upon which relief could be granted. Accordingly, we affirm the judgment of the trial court.

¶ 23 Affirmed.