

No. 1-11-0167

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. 81 C 2158
)	
JOSEPH MAX,)	Honorable
)	Thomas V. Gainer, Jr.,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The trial court did not err when it denied defendant leave to file his successive postconviction petition, where his *Brady v. Maryland*, 373 U.S. 83 (1963) claim was supported only by a single hearsay affidavit.

¶ 2 Following a 1981 jury trial, defendant Joseph Max was found guilty of first degree murder and sentenced to 70 years' imprisonment. Defendant unsuccessfully challenged his conviction on direct appeal (see *People v. Max*, 1-82-0794 (1984) (unpublished order under Supreme Court Rule 23)) and in two postconviction petitions (see *People v. Max*, Nos. 1-01-0815 and 1-01-0893 (cons.) (2002) & 1-05-1052 (2006)(unpublished orders under Supreme

Court Rule 23)). In 2009, defendant moved for leave to file his third postconviction petition. The trial court denied defendant leave to file the petition. Defendant appeals contending that the trial court erred because his petition established sufficient cause and prejudice to warrant filing where he alleged that the prosecution improperly withheld evidence that a witness had a criminal charge pending against him in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). We affirm.

¶ 3 Defendant's conviction arose out of a shooting where the victim was struck and killed by a bullet fired from a rifle. According to the State's theory of the case, the shooting was gang-related and defendant personally discharged the rifle. The State supported its theory, in part, with testimony from Mark Baltazar. Mark testified, *inter alia*, that he was a member of the Party Players gang and that defendant was head of the gang. Mark also testified that on February 14, 1981, he had a conversation with defendant during which defendant said he "Just got through lighting up some Night Crew."

¶ 4 In 2009, defendant mailed his third postconviction petition to the trial court. The petition alleged, *inter alia*, that the State committed a *Brady* violation when it failed to disclose that Mark Baltazar was facing criminal prosecution at the time he testified against defendant. Defendant supported his claim with the affidavit of a fellow prisoner, Charles Russell. Russell averred that at some time in 1995 or 1996, he was incarcerated at the Sheridan Correctional Center in the same building as Shawn "Pirate" Baltazar. During a conversation with Pirate, Russell mentioned defendant. Pirate told Russell that Mark was his brother, and that Mark had "been forced to testify against Max in order to avoid some rap the prosecutor was holding over his head." Russell subsequently encountered defendant in the law library at the Illinois River Correctional Center. At that time, he related the information he had learned from Pirate, and subsequently prepared an affidavit on defendant's behalf. The affidavit did not indicate when the conversation between defendant and Russell occurred, but the affidavit was dated June 10, 2008.

¶ 5 Defendant subsequently filed a "motion to be heard" which was in the nature of a motion for leave to file the successive postconviction petition. The motion alleged that defendant had established cause because he had been denied the effective assistance of appellate and collateral review counsel. The motion alleged that defendant had established prejudice because there was "ample evidence of prosecutorial misconduct, including suppression of evidence favorable to petitioner's defense." The trial court ultimately denied defendant leave to file his successive postconviction petition. Defendant timely appeals.

¶ 6 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) provides a method for imprisoned defendants, who claim substantial violations of their constitutional rights, to collaterally attack their convictions. *People v. Edwards*, 2012 IL 111711, ¶ 21. Successive petitions, however, are disfavored, and both the Act and supreme court precedent prohibit filing a successive petition without leave of the trial court. *Id.*; see also 725 ILCS 5/122-1(f) (West 2008). In order to obtain leave of the court a defendant must either demonstrate "cause and prejudice" or a "fundamental miscarriage of justice." *Edwards*, 2012 IL 111711, ¶ 22-23. The denial of leave to file a successive postconviction petition is reviewed *de novo*. *People v. Little*, 2012 IL App (5th) 100547, ¶ 14; *People v. Croom*, 2012 IL App. (4th) 100932, ¶ 21.

¶ 7 Here, defendant seeks to invoke the cause and prejudice exception to the general prohibition on successive postconviction petitions. Under the Act,

"(1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the

resulting conviction or sentence violated due process." 725 ILCS
5/122-1(f) (West 2008).

A defendant must satisfy both elements or prongs of the cause-and-prejudice test, if he seeks leave to file a successive petition. *People v. Guerrero*, 2012 IL 112020, ¶ 15.

¶ 8 On appeal, defendant has abandoned several claims made in his postconviction petition arguing only that his *Brady* claim was sufficient to warrant leave to file. That claim is supported solely by Russell's affidavit. His affidavit consists of nothing more than double hearsay. He was not a witness at defendant's trial, and does not even aver to have spoken directly to a witness. Instead, Russell avers that he spoke to the witness' brother who told him that the witness told him that the State had some kind of "rap" hanging over him. As a general rule, hearsay affidavits are insufficient to support a postconviction petition. See *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003). Although defendant argues that it would have been difficult for him to obtain Mark's affidavit, we see no reason to relax the general rule in this case. Not only is the affidavit defendant did present hearsay, it contains no facts that could be verified to support defendant's claim. For example, defendant makes no allegations regarding the nature of the "rap" hanging over Mark. Without these basic factual underpinnings the affidavit has little value. Under these circumstances, we conclude that the experienced judge below did not err when he denied defendant leave to file his postconviction petition.

¶ 9 The judgment of the circuit court of Cook County is affirmed.

¶ 10 Affirmed.