

No. 1-11-1253

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 Cook County
Plaintiff-Appellee,)	
)	
v.)	07 CR 13167
)	
MALCOLM HOWARD,)	
)	Honorable
Defendant-Appellant.)	Thomas M. Davy,
)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 HELD: Where, in his section 2-1401 petition for relief, defendant failed to provide any facts or documents that were unknown to him or the trial court at the time of trial, the trial court properly dismissed his petition.

¶ 2 Defendant Malcolm Howard appeals from the trial court's dismissal of his petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). On appeal, defendant contends that the trial court erred in dismissing his petition because his allegation that evidence technician Elizabeth Vera gave purposely false

1-11-1253

testimony pertaining to the recovered firearm warranted relief. We affirm.

¶ 3 Defendant was charged with aggravated kidnaping and unlawful possession of a weapon by a felon based on his holding Ricardo Sosa at gunpoint for approximately 28 hours, from June 12-13, 2007, and his holding Jennelle Owens at gunpoint for a period of time within those 28 hours in the same apartment where defendant held Sosa.. Ultimately, defendant was apprehended after crashing Sosa's car while fleeing from the police. The police recovered a firearm from the area near where defendant was arrested.

¶ 4 Defendant represented himself at trial. Before trial began, defendant told the trial court he had "black and white evidence that a gun ha[d] been manufactured" against him. In support, defendant relied on a report from evidence technician Elizabeth Vera, a firearms trace summary from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF report), and two pages of lab reports from forensic scientist Caryn Tucker. Defendant claimed that Tucker's lab report indicated Tucker analyzed a gun with obliterated serial numbers and that the restoration techniques she used revealed a serial number different from the serial number used in the ATF report. Defendant argued that Tucker received and analyzed a different gun than the one recovered from the crime scene and asked the trial court to "look at it as far as a malice [*sic*] error was committed" and dismiss the case. The trial court declined to dismiss the case and told defendant that defendant would have to question the witnesses in support of his arguments.

¶ 5 At trial, Ricardo Sosa testified that, in June 2007, he was the assistant property manager for the Fine Living Association Group (FLAG), a company owned and managed by Phil Joseph. FLAG owned an apartment building at 8118-8126 South Drexel Avenue, as well as apartment

1-11-1253

buildings on South Loomis and South Ellis Avenues. On June 12, 2007, at around 3 p.m., Sosa was collecting rent from the Drexel building residents. While he was standing in the courtyard area, Sosa approached a man, identified by Sosa as defendant, who insisted on seeing an apartment. Sosa took defendant to see unit 3N on the third floor of 8122 South Drexel. Once inside, while Sosa was showing defendant the apartment, Sosa turned to see defendant pointing a gun at Sosa's head. At defendant's instruction, Sosa laid face-down on the floor while defendant shut the door. Defendant took Sosa's business and personal cell phones, keys, and the recently collected rent checks. Defendant told Sosa to put a pillowcase over Sosa's head. Sosa felt the gun at the back of his head while defendant explained that defendant was part of an elite organization that was holding Sosa for ransom. Sosa feared for his life. Defendant soon guided Sosa to the kitchen while holding the gun at Sosa's back and ordered him to write a ransom letter, stating, among other things, that Sosa owed "some people" approximately \$6,000 or \$8,000. Over the next several hours, defendant moved Sosa between the bedroom and bathroom of the apartment, always holding the gun to Sosa's back. Several times, defendant threatened to kill Sosa if Sosa failed to obtain the ransom money. Defendant also hit Sosa in the back of the head with the gun barrel multiple times. When Sosa was left alone, he heard footsteps outside the room and believed there were more people inside the apartment involved in the kidnaping. Defendant kept Sosa in the apartment overnight, occasionally entering the bedroom to hit Sosa in the back of the head with the gun barrel. The next morning, Sosa told defendant that he would write defendant a check if defendant brought Sosa the checkbook from Joseph's office. While defendant was gone, Sosa did not try to run because he again heard footsteps in the apartment.

1-11-1253

Defendant came back once without the checkbook and threatened to kill Sosa if Sosa had lied about the checkbook's location. Defendant left again then returned with the checkbook and told Sosa to get rid of Joseph. With defendant holding the gun to his back, Sosa called and told Joseph that the building on Loomis had been ransacked, causing Joseph to leave and check on it. When Joseph called Sosa shortly after, explaining that no ransacking had occurred, Sosa told Joseph that Sosa was taking his fiancée to the hospital, a story Sosa made up at defendant's instruction. Defendant again left Sosa lying on the bedroom floor. Sometime between noon and 1 p.m., defendant brought an hysterical Jennelle Owens, Joseph's secretary, into the bedroom. Defendant guided Sosa to the kitchen with the gun at Sosa's back and left Owens in the bedroom. Then there was a knock on the apartment door, and defendant ordered Sosa to get rid of whoever it was. Sosa opened the door to Kenneth and Louis Williams, both of whom did odd jobs around the building. They had work to do in the apartment, so defendant immediately walked Sosa down the stairs into the alley and to Sosa's car, a blue Honda with Texas license plates. Defendant drove with one hand on the steering wheel and the other holding the gun pointed toward Sosa in the passenger seat. Defendant eventually parked Sosa's car in an alley, then gave Sosa his cell phone back and ordered Sosa to make the first of numerous calls to Joseph, informing Joseph that Sosa was being held for ransom. Sosa later learned that nine of his calls with Joseph had been recorded. These calls were played for the jury and Sosa identified his own voice, Joseph's voice, and defendant's voice on the recordings. At defendant's instruction, Sosa told Joseph to leave the ransom money in a dumpster, then to leave the area. After the last phone call to Joseph, a police car drove up and stopped next to Sosa's car. When the officers asked

1-11-1253

defendant and Sosa to exit the car, defendant "[t]ook off" through the alley at about 50 miles per hour and soon lost control of Sosa's car, striking another car. Sosa opened the door and ran to nearby police officers. Sosa was soon brought back to the alley where he and defendant had been parked, and identified defendant, who had been apprehended, as the man who had held him hostage for the previous 28 hours. Sosa identified the State's Exhibit No. 8 (Exhibit No. 8) as the gun defendant used during the kidnaping.

¶ 6 Phil Joseph substantially corroborated Sosa's testimony. Joseph was familiar with defendant, who had been an employee of the Drexel building before Joseph purchased it. Defendant completed one paint job for Joseph, but Joseph was unsatisfied with the work and did not hire defendant again. On the morning of June 13, 2007, after checking on the Loomis building, Joseph called Sosa and Sosa explained that he was taking his fiancée to the hospital. Upon returning to the office, Joseph noticed his checkbook was missing. Owens told Joseph that a man had come in and taken something from Joseph's desk. Joseph called the police after Sosa told Joseph he had been kidnaped. Joseph continued to have phone contact with Sosa, and was told that for \$8000, the kidnapers would let Sosa free. Later the ransom was reduced to \$4000. The FBI became involved and recorded the phone calls. At trial, Joseph identified the voice of himself, Sosa, and defendant on the recordings.

¶ 7 Jennelle Owens and Kenneth Williams both substantially corroborated Sosa and Joseph's testimony. While Joseph was gone, defendant came into the office and took something from Joseph's desk. Later, when Owens went to unit 3N to unlock the door for the Williams, defendant pulled her into the apartment, held a gun to her head, and guided her to the bedroom.

1-11-1253

Owens identified defendant as the man that had taken Joseph's checkbook and held her at gunpoint in the apartment. Owens also identified Exhibit No. 8 as the gun defendant had used. Williams saw a man behind Sosa in unit 3N when he knocked on the door, but did not observe the man closely enough to identify him.

¶ 8 Officer Jonathan Newsome testified that at approximately 7 p.m. on June 13, 2007, he and his partner drove past an alley at the 7200 block of South Emerald and noticed a blue car parked halfway down. Newsome observed two occupants in the car, a black man in the driver seat and a Hispanic man in the passenger seat. The officers drove up to and stopped next to the car. Newsome identified defendant as the driver. As soon as the officers attempted to exit their vehicle, defendant "took off *** heading northbound from the alley." Newsome reported the blue Honda with Texas plates over the radio. He lost sight of the blue Honda, but Newsome and his partner continued looking for it. Soon, they located the Honda, which had crashed into another car, and secured the scene.

¶ 9 Officer Kevin Rake testified that at about 7 p.m. on June 13, 2007, he heard a dispatch reporting a black male fleeing into an alley near the 7200 block of South Emerald Avenue, from a car that officers had been chasing on Green Street. Rake arrived at the alley and saw an individual running into a backyard in the middle of the block. Rake exited the car and ran into the yard at 7222 South Emerald. He saw defendant lying down in the stairwell of 7224 South Emerald and placed defendant under arrest.

¶ 10 Officer Mark Hein testified that at approximately 7 p.m. on June 13, 2007, he went to the 7200 block of South Emerald Avenue and learned defendant was in custody. Hein located a

1-11-1253

semi-automatic firearm in the backyard of 7222 South Emerald and notified his supervisor. He did not touch or move the firearm in any way and did not inspect it for a serial number. Hein identified Exhibit No. 8 as the gun he discovered. On cross-examination, Hein read the serial number off of the gun as 1788380.

¶ 11 Officer Elizabeth Vera, an evidence technician, testified that on June 13, 2007, she was assigned to process two locations related to an aggravated kidnaping. First, she processed a vehicle that had crashed near 7224 South Green Street. Vera dusted the vehicle for prints and lifted a partial palm print from the driver's side window of the vehicle, which she preserved for testing. Vera then processed the scene at 7222 and 7224 South Emerald. She photographed and then recovered a weapon that was being guarded by another officer, which she identified as Exhibit No. 8. The night she recovered the weapon, "[i]t was obliterated and really, really dirty." She wrote the serial number she saw that night on her inventory report dated June 13, 2007. At trial, Vera read the number from her report as 1723360. On cross-examination, defendant had the following exchange with Vera:

DEFENDANT: Can you recall the serial numbers off the gun?

VERA: It's the one I wrote down here. Do you want me to look at it and read the serial numbers off that gun?

DEFENDANT: You say the gun - well, that's the serial number as far as off the gun. Can you recall the serial number off the gun in which - well, read it.

1-11-1253

VERA: No, I can't read it. It's been worked on. I can't read that very well.

DEFENDANT: You can't make no determination as to the serial number?

VERA: It's whatever I wrote down here. It's been worked on. It's been cleaned up. (Reading) - 360 is the last three numbers I can see there."

¶ 12 Sheila Daugherty, a forensic scientist and expert in latent fingerprint and palm print identification, testified that she was able to analyze the latent palm print lift taken from Sosa's car. After examination, she concluded, within a reasonable degree of scientific certainty, that the palm print belonged to defendant. Daugherty also testified that, after running numerous tests, she was unable to find any suitable latent impressions for print comparison on Exhibit No. 8. On cross-examination, Daugherty read the serial number on Exhibit No. 8 as 1788380.

¶ 13 Caryn Tucker, an expert in the field of firearm identification, testified that the recovered firearm was a Raven Arms gun, model MP-25. Upon her initial examination, Tucker was only able to determine a partial serial number due to "obliteration." She explained that she could see the first two numbers were a "1" and a "7." The next two characters were "partial" but each looked like an "8." The last three numbers were "380." Tucker then polished the obliterated area and applied chemicals to "visualize" the numbers. After, she was able to read the serial number as 1788380. On cross-examination, Tucker stated that the sixth character was "a visible 8." She explained it "does happen" that she determines the serial number to be a different number than

1-11-1253

the police initially wrote down. Tucker read the serial number on Exhibit No. 8 as 1788380.

¶ 14 Detective James Carlassare testified that when he interviewed defendant on July 3, 2008, defendant asked if aggravated kidnaping was a federal offense and whether it would be on the news.

¶ 15 The parties stipulated that defendant had a prior felony conviction, relating only to the count of unlawful possession of a firearm by a felon.

¶ 16 Before the jury deliberated, defendant objected to the admission of Exhibit No. 8 into evidence. He argued that the trial court and jury "pretty much heard evidence of a manufactured gun, one after the next, testifying that they can recall the serial number being this and - you know - you got someone else saying different." The trial court overruled the objection.

¶ 17 In closing, the State argued that defendant's knowing possession of a weapon was proved by Sosa's and Owens's identification of Exhibit No. 8 as the gun defendant had used during the kidnaping. In response, defendant claimed that the gun recovered from the scene was not the gun entered into evidence at trial, and drew attention to the fact that two different serial numbers were testified to at trial - the number from Vera's report, 1723360, and the number read off of Exhibit No. 8 by multiple witnesses at trial, 1788380. Defendant also emphasized that when Vera attempted to read the number from Exhibit No. 8, she was only able to read the last three numbers as "360." Defendant told the jury, "I'm alleging corruption, is what I'm alleging, and I got black and white evidence saying corruption."

¶ 18 The jury found defendant guilty of the aggravated kidnaping of Sosa based upon a ransom demand, the aggravated kidnaping of both Sosa and Owens based upon the use of a firearm, and

1-11-1253

unlawful possession of a weapon by a felon.

¶ 19 Defendant filed several posttrial motions including a motion to vacate the guilty verdicts and dismiss the indictment, a motion requesting evidentiary hearing, and a motion for a new trial. Defendant argued that he had objected to the use of the firearm identified by serial number 1788380 being used at trial because it was not the firearm that was recovered from the crime scene. Defendant further asserted that the police acted in bad faith, as supported by Vera's report referring to a firearm with serial number 1723360, the four-page ATF report for serial number 1723360 and Tucker's report in regard to serial number 1788380.

¶ 20 In denying defendant's motions, the trial court observed, "[i]n the great scheme of things, the production, or non-production of the weapon really has very little to do with the return of the guilty verdict, and the overwhelming testimony against Mr. Howard that has been introduced."

¶ 21 The trial court sentenced defendant to two concurrent 65-year extended-term sentences for the kidnaping of both Sosa and Owens while armed with a firearm.

¶ 22 On direct appeal, this court affirmed defendant's convictions and remanded for resentencing. *People v. Howard*, No. 1-09-0129 (unpublished order under Supreme Court Rule 23). Upon remand, defendant was resentenced to a 60-year prison term.

¶ 23 On November 24, 2010, defendant filed his section 2-1401 petition, alleging that the gun presented as evidence against him at trial was not the gun recovered from the crime scene, that the gun that was actually recovered from the crime scene would be potentially useful evidence, and that the police acted in bad faith by failing to present the correct gun for analysis. Defendant attached several documents in support of his petition, including:

1-11-1253

- (1) a June 13, 2007, crime scene processing report from Vera indicating that the recovered weapon was a Raven Arms MP-25, with serial number 1723360 and inventoried under number 11005450;
- (2) a June 2007 CPD inventory form listing a Raven Arms MP25 with serial number 1723360 and inventory number 11005450, completed by Vera and approved with an electronic signature;
- (3) a July 25, 2007, Chicago Police Department (CPD) inventory report, printed July 25, 2007, listing a recovered firearm under inventory number 11005450, with serial number 1723360;
- (4) a July 24, 2007, preliminary firearm examination report indicating that Melissa Nally from the ISP crime lab examined a "Raven/MP-25," with inventory number 11005450 and an "oblit" serial number, and found it to be functioning properly;
- (5) an August 15, 2007, ATF trace request report for a Raven Arms MP-25 with serial number 1723360;
- (6) a firearm receipt and worksheet for a Raven Arms MP-25 with serial number 1723360 and inventory number 11005450, indicating the serial number was obliterated and the weapon was being forwarded to the ISP for serial number restoration;
- (7) a CPD evidence submission form requesting restoration of the

1-11-1253

- obliterated serial number on a Raven Arms MP-25 firearm;
- (8) a June 12, 2008, ISP firearm worksheet, completed by Caryn Tucker, indicating that the firearm received under inventory number 11005450 had an obliterated serial number which, prior to restoration, showed the first digit as a 1, the second digit as a 7, the fifth digit as an 8, and the sixth digit as a 0;
- (9) a July 10, 2008, Illinois State Police (ISP) report from forensic scientist Caryn Tucker indicating that she had received a Raven Arms MP-25 under inventory number 11005450 with an obliterated serial number, revealed to be number 1788380 after using standard restoration techniques;
- (10) a form from the ISP asking that a "Ravens Arms 25 caliber semi-automatic" weapon with inventory number 11005450 be examined for latent prints;
- (11) a May 27, 2008, report from the ISP crime lab that the firearm received with inventory number 11005450 revealed no latent fingerprints suitable for comparison;

¶ 24 On March 25, 2011, the trial court denied defendant's petition. In its written order, the court observed that the argument presented in the petition "was raised extensively both before the trial began and during the course of the trial as the defendant notes in his petition." Therefore, the court concluded that defendant failed to provide a legal basis for relief under section 2-1401.

1-11-1253

¶ 25 On appeal, defendant contends that the trial court erred in dismissing his petition because his petition showed Vera gave purposely false testimony at trial, entitling him to relief.

¶ 26 Section 2-1401 of the Code provides a statutory procedure for relief from a final judgment or order after 30 days from its entry. 735 ILCS 5/2-1401 (West 2010); *People v. Moore*, 2012 IL App (4th) 100939, ¶ 26. Proceedings under section 2-1401 are governed by the rules of civil practice, even if the underlying proceeding is criminal. *People v. Clemons*, 2011 IL App (1st) 102329, ¶ 9 (citing *People v. Vincent*, 226 Ill. 2d 1, 8 (2007)). "Section 2-1401 is intended to correct errors of fact, unknown to petitioner and the court at the time of the judgment, which would have prevented the rendition of the judgment had they been known." *People v. Muniz*, 386 Ill. App. 3d 890, 893 (2008) (citing *People v. Pinkonsly*, 207 Ill. 2d 555, 565-66 (2003)). "Points previously raised at trial *** cannot form the basis of a section 2-1401 petition for relief." *People v. Addison*, 371 Ill. App 3d 941, 945 (2007) (quoting *People v. Haynes*, 192 Ill. 2d 437, 461 (2000)). A defendant is entitled to relief under section 2-1401 if he provides "proof, by a preponderance of the evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Vincent*, 226 Ill. 2d at 7-8. The dismissal of a section 2-1401 petition as legally insufficient will be reviewed *de novo*. *Vincent*, 226 Ill. 2d at 17-18.

¶ 27 Here, defendant has failed to allege facts which, had they been known at the time of trial, would have prevented the judgment being entered in his case. The allegations in defendant's petition are based on his contention that the gun introduced against him at trial was not the same gun that was recovered at the time he was arrested. In support of his claim, defendant rehashed

1-11-1253

trial testimony, particularly that of Vera and Tucker. Defendant emphasized that, when asked, Vera admitted to writing down the recovered firearm's serial number as 1723360 on her report, but that Tucker analyzed a firearm with serial number 1788380. Defendant also pointed out that Vera still "misread" the serial number from Exhibit No. 8 as ending with "360" at trial while Tucker, Officer Hein, and Daugherty were able to read the serial number from Exhibit No. 8 in its entirety as "1788380." In further support of his petition, defendant attached several documents, including Vera's June 2007 crime scene report listing the firearm serial number as 1723360, an ATF report for a firearm with serial number 1723360, and Tucker's firearm worksheet for a firearm with serial number 1788380. However, fatal to defendant's argument, all of the documents and facts on which he relies in support of his petition were available, known, and reviewed by him prior to or during trial. More importantly, defendant put forth the same argument based on the same documents, Vera's report, the ATF report, and Tucker's worksheet, before trial, in closing argument, and in his posttrial motions. We observe that both the jury and the trial court rejected his claims. Defendant has failed to present any error of fact that was unknown to him or the trial court at the time of trial, and has therefore failed to provide a legal basis for relief pursuant to section 2-1401. *Muniz*, 386 Ill. App. 3d at 89; *Addison*, 371 Ill. App. 3d at 945.

¶ 28 Moreover, the allegations in defendant's petition do not support the claim that Vera testified falsely. A criminal defendant who seeks to overturn his conviction based on perjured testimony must do more than simply allege perjury by a State witness, but "must present clear, factual allegations of perjury and not mere conclusions or opinions." *People v. Thomas*, 364 Ill.

1-11-1253

App. 3d 91, 104 (2006). Perjury is committed when someone makes a false statement under oath or affirmation that he believes to be false. 720 ILCS 5/32-2(a) (West 2006).

¶ 29 The allegations in defendant's petition amount to mere conclusion and opinion. Defendant addressed Vera's "misreading" of the serial number on Exhibit No. 8 as ending in "360" to be "suspect and troubling" in light of her experience and training as an evidence technician. However, defendant provides no facts to support his claim that Vera falsely testified. At most, defendant has once again highlighted the difference in testimony between Vera and Tucker as to the serial number on Exhibit No. 8. Notably, "inconsistencies in testimony cannot be equated with perjury." *People v. Craig*, 334 Ill. App. 3d 426, 439 (2002). Vera remained consistent in her testimony, stating that she wrote down the serial number she saw the night the weapon was recovered and that the serial number was "obliterated and very, very dirty." Vera reading the last three numbers on Exhibit No. 8 at "360" does not amount to proof by a preponderance of the evidence that she committed perjury. Under these circumstances, we find the trial court properly dismissed defendant's section 2-1401 petition.

¶ 30 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 31 Affirmed.