

NOTICE
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2012 IL App (4th) 110419-U

Filed 7/13/12

NO. 4-11-0419

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Adams County
ROBERT E. FELDER,)	No. 06CF383
Defendant-Appellant.)	
)	Honorable
)	Alesia A. McMillen,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justice Steigmann concurred in the judgment.
Justice Cook dissented.

ORDER

¶ 1 *Held:* Where defendant failed to plead in his postconviction petition the materiality element of his *Brady*-violation claim, the trial court properly dismissed defendant's claim at the second stage of the postconviction proceedings.

¶ 2 Defendant, Robert E. Felder, appeals the Adams County circuit court's grant of the State's motion to dismiss defendant's *pro se* postconviction petition in its entirety. On appeal, defendant only argues he is entitled to an evidentiary hearing on his claim the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose its witness, Elliot Muldrow, received a cash payment from the police on the day he testified against defendant. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 2007, a jury found defendant guilty of one count of narcotics racketeering (725 ILCS 175/4(a) (West 2006)) and two counts of criminal drug conspiracy (720 ILCS

570/405.1 (West 2006)). In December 2007, the trial court sentenced defendant to concurrent prison terms of 25 years. Defendant appealed, and this court affirmed defendant's convictions and sentences. *People v. Felder*, No. 4-07-1019 (June 12, 2009) (unpublished order under Supreme Court Rule 23).

¶ 5 In November 2008, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2008)). In December 2008, the trial court summarily dismissed defendant's petition at the first stage of the postconviction proceedings. Defendant appealed, and this court reversed the dismissal and remanded the cause for appointment of counsel and second-stage proceedings. *People v. Felder*, No. 4-09-0001 (July 12, 2010) (unpublished order under Supreme Court Rule 23). In reversing the dismissal, we found defendant's *Brady* claim stated the gist of a constitutional claim. *Id.* at 9.

¶ 6 On remand, defendant waived counsel, and the State filed a motion to dismiss defendant's postconviction petition. The State identified 15 issues defendant raised in his petition and argued 14 of the 15 issues were either forfeited or frivolous. As to defendant's *Brady* claim, the State asserted the nondisclosure was not material because no reasonable probability existed the disclosure of the payment to Muldrow would have made a difference in the result of the proceeding. Defendant filed two *pro se* responses to the State's motion to dismiss.

¶ 7 On April 28, 2011, the trial court held a hearing on the State's motion to dismiss defendant's postconviction petition. After hearing the parties' arguments, the court granted the State's motion to dismiss in its entirety. Regarding the *Brady* claim, the court found the nondisclosed evidence would not have affected the jury's opinion of Muldrow because the

evidence at trial revealed he was an unsavory character; involved in the drug trade; and for his testimony, the State reduced the maximum penalty for his crime from 60 years to 5 years.

¶ 8 On May 16, 2011, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

¶ 9 II. ANALYSIS

¶ 10 The Postconviction Act provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007.

¶ 11 At the first stage, the trial court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2008). On the other hand, if the court does not dismiss the petition, it proceeds to the second stage, where, if necessary, the court appoints the defendant counsel. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss

or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. In this case, the State did file a motion to dismiss, and the court granted that motion.

¶ 12 With the second stage of the postconviction proceedings, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Postconviction Act. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). However, our supreme court has emphasized that, when a petitioner's claims are based upon matters outside the record, the Postconviction Act does not intend such claims be adjudicated on the pleadings. *People v. Simms*, 192 Ill. 2d 348, 360, 736 N.E.2d 1092, 1105 (2000). At a dismissal hearing, the court is prohibited from engaging in any fact finding. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at 1071. Thus, the dismissal of a postconviction petition at the second stage is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 388, 701 N.E.2d at 1075. We review *de novo* the trial court's dismissal of a postconviction petition at the second stage. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 13 Defendant argues the court erroneously dismissed his postconviction petition because it applied the wrong standard in analyzing the State's motion to dismiss. This court has held the use of an improper standard in analyzing a postconviction petition at the second stage of the proceedings does not itself serve as a basis for reversal because our *de novo* review utilizing the proper standard addresses the trial court's use of an improper one if it did so. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 17, 964 N.E.2d 1139, 1148. Accordingly, we need not specifically address whether the trial court used the wrong standard. See *Id.* at ¶ 17, 964 N.E.2d at 1148.

¶ 14 For a defendant to establish a due-process violation under *Brady*, the defendant must show the following: "(1) the State suppressed evidence and that evidence was (2) favorable to him and (3) material to his guilt or punishment." *Id.* at ¶ 35, 964 N.E.2d at 1151 (citing *Brady*, 373 U.S. at 87). In its motion to dismiss, the State asserted defendant could not establish the materiality element. Nondisclosed evidence is material " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J., joined by O'Connor, J.)). A "reasonable probability" of a different result exists when the State's evidentiary suppression " 'undermines confidence in the outcome of the trial.' " *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

¶ 15 Here, defendant's *pro se* postconviction petition asserts the following regarding his *Brady* claim:

"[Defendant] was also denied a fair trial, under the fundamental fairness [*sic*] in that petitioner requested several discovery under

supreme court rule 412 and 415. Any and all deals in exchanged [sic] for the informant testimony. Two years later [defendant] filed a lawsuit, and learned the informant was paid to testify against him. See, informant testimony regarding that issue, page 35, Line 7-13. Day (2), [defendant's] trial, stating the (5) years was the extent of his deal, and the State failed to correct him."

Defendant attached to his postconviction petition a copy of an Illinois State police receipt showing a \$145 payment to China White, Muldrow's pseudonym. At the second stage of the proceedings, defendant waived counsel and did not amend his petition. At the hearing on the State's motion to dismiss, defendant stated he could have challenged Muldrow's testimony he was paid nothing for his testimony with the nondisclosed payment and could have properly defended himself with that evidence.

¶ 16 While defendant's petition was sufficient to meet the low threshold of a gist of a constitutional claim as to the *Brady* issue, the petition does not meet the higher burden of a substantial showing of a constitutional violation on that issue. The mere nondisclosure of favorable evidence does not constitute a due-process violation unless the evidence is *material*. See *Snow*, 2012 IL App (4th) 110415, ¶ 35, 964 N.E.2d at 1151 (citing *Brady*, 373 U.S. at 87). None of defendant's claims of materiality in his briefs were raised in his petition. In fact, defendant's petition does not address materiality at all. Our supreme court has held "[t]he question raised in an appeal from an order dismissing a post-conviction petition is whether *the allegations in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the [Postconviction] Act." (Emphasis added.) *Coleman*, 183 Ill. 2d at 388, 701 N.E.2d at

1075. Moreover, to the extent defendant could have cured his failure to amend his postconviction petition to include the essential elements of a *Brady* claim by raising the element at the hearing on the motion to dismiss (see *People v. Turner*, 187 Ill. 2d 406, 413, 719 N.E.2d 725, 729 (1999) (noting counsel could have overcome the failure to make necessary amendments to the petition by raising the additional elements of petitioner's claims at the motion to dismiss hearing)), defendant's arguments at the hearing again did not address materiality. Since defendant failed to plead one of the essential elements of a due-process claim under *Brady*, defendant did not make a substantial showing of a constitutional claim on his *Brady*-violation issue.

¶ 17 Here, we have found defendant's *Brady* claim failed to make a substantial showing of a constitutional issue, and defendant does not challenge the trial court's dismissal of the other 14 issues in his petition. Thus, we hold the trial court properly dismissed defendant's postconviction petition in its entirety at the second stage of the proceedings.

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, we affirm the Adams County circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 20 We affirm.

¶ 21 JUSTICE COOK, dissenting:

¶ 22 I respectfully dissent, and would remand for a third-stage hearing. Defendant's postconviction petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Postconviction Act. The State's cash payment to a key witness on the day of trial seems clearly material to guilt or innocence, and did not require a great deal of explanation by the petitioner. Why did the State make that payment? Were other payments or inducements to testify made? Those matters should not be decided on the pleadings, which are to be liberally construed. The office of the State Appellate Defender's reply brief states that petitioner cited *People v. Vasquez*, 313 Ill. App. 3d 82, 97, 728 N.E.2d 1213, 1225 (2000) and *People v. Aguilar*, 218 Ill. App. 3d 1, 9-11, 578 N.E.2d 109, 115-16 (1991), to the trial court. Those cases clearly explain how cash payments to prosecution witnesses are material to guilt or innocence.