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2013 IL App (3d) 100758-U

Order filed May 24, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Kankakee County, Illinois,
	)	
v.	)	Appeal No. 3-10-0758
	)	Circuit No. 99-CF-338
	)	
TERRANCE D. HAYNES,	)	Honorable
	)	Kathy Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justice Lytton concurred in the judgment.  
Justice McDade dissented.

**ORDER**

- ¶ 1 *Held:* Defendant's right to due process was not violated; therefore, the trial court did not err in dismissing defendant's postconviction petition.
- ¶ 2 Following a jury trial, defendant, Terrance D. Haynes, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) and sentenced to a 45-year term of imprisonment. Thereafter, defendant filed a section 2-1401 petition. 735 ILCS 5/2-1401 (West 2008). The trial court dismissed defendant's petition *sua sponte*. Defendant appeals the dismissal, arguing that

his constitutional right to due process was violated when the State failed to disclose that one of its witnesses was the cousin of an assistant State's Attorney involved in the case. We affirm.

¶ 3

### FACTS

¶ 4 Following the shooting death of Cezaire Murrell, the State charged defendant with first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 1998)). As part of its case, the State presented the testimony of two eyewitnesses. One of the eyewitnesses, 11-year-old Marcus Hammond, was examined by assistant State's Attorney Frank Astrella. Marcus testified that he saw Murrell and defendant standing about five feet apart in front of a residence. As he watched, he saw defendant pull a gun out from "the back of his body." Defendant then extended his arm and, while holding the gun with his right hand, pulled the top of the gun back with his left hand. Marcus testified that two shots were fired. He saw Murrell roll down the stairs and defendant run down the sidewalk to an alley.

¶ 5 The second occurrence witness, eight-year-old Penny Hammond, testified that she looked out the front door and saw defendant arguing with another man in front of the residence. Defendant yelled at her to go back in the house. Penny went to the back of the house. When she reached the back porch, she heard a gunshot.

¶ 6 Defendant testified that on the night of the incident, Murrell approached him and demanded money he thought defendant owed him. Defendant told Murrell that he did not know what he was talking about, and Murrell made a motion suggesting he would hit defendant. Thereafter, Murrell showed that he had a gun, and defendant grabbed his friend's gun, which was sitting under a shirt on the porch. Murrell said he was going to kill defendant and started running toward him with his hand on his gun. Defendant closed his eyes and started shooting. He

testified that he was afraid Murrell was going to shoot and kill him. After he fired the gun, he saw Murrell fall down the stairs.

¶ 7 At the conclusion of the trial, the jury found defendant guilty of first degree murder. The trial court sentenced defendant to 45 years in the Department of Corrections. Thereafter, while an appeal was pending, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In the petition, defendant alleged that his due process rights were violated when the State failed to disclose in discovery that Marcus was the cousin of Michael Jeneary, an assistant State's Attorney who acted as co-counsel in prosecuting the case. Attached to the petition was a letter from Jeneary acknowledging that Marcus was his cousin and admitting that he did not disclose the relationship. According to the letter, Jeneary had discussed the matter with Astrella, and they decided that disclosure was not required. The trial court dismissed defendant's section 2-1401 petition *sua sponte*. The court stated that Jeneary "probably should have" disclosed the relationship, but since it concerned only bias and witness credibility, the court would not order a new trial. Defendant appeals.

¶ 8 ANALYSIS

¶ 9 Defendant argues that the trial court erred in dismissing his section 2-1401 petition *sua sponte*. Section 2-1401 establishes a comprehensive statutory procedure that allows for the vacation of a final judgment older than 30 days. 735 ILCS 5/2-1401 (West 2008). Petitions filed under section 2-1401 seek to remedy errors of fact, not law, occurring in the prosecution of a case that were unknown to the petitioner and court at the time the judgment was entered. *People v. Pinkonsly*, 207 Ill. 2d 555 (2003). In order to succeed under section 2-1401, the petitioner 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 discovering the defense or claim; and (3) due diligence in filing the section 2-1401 petition. *People v. Vincent*, 226 Ill. 2d 1 (2007). Further, the petition must be supported by an affidavit or other appropriate showing as to matters not of record. 735 ILCS 5/2-1401 (West 2008). We review a trial court's *sua sponte* dismissal of a section 2-1401 petition *de novo*. *Vincent*, 226 Ill. 2d 1.

¶ 10 Initially, we note that the State argues that defendant's petition was untimely. Importantly, the State did not raise the timeliness issue before the trial court, and the trial court did not dismiss the petition as untimely. Even though an appellee is generally allowed to raise any argument in support of the trial court's judgment regardless of whether it was raised below, the supreme court has carved out an exception to the rule for petitions under both the Post-Conviction Hearing Act and section 2-1401. *Pinkonsly*, 207 Ill. 2d at 564. In those cases, the State waives its ability to raise timeliness on appeal if it is not raised in the trial court. *Id.* Therefore, the State has waived this argument, and we proceed to the merits of defendant's petition.

¶ 11 Defendant's petition alleges that his right to due process was violated when the State failed to disclose the fact that one of its witnesses was the cousin of an assistant State's Attorney involved in the prosecution of defendant's case. Defendant's petition included an affidavit from Jeneary admitting that Marcus was his cousin and that he did not disclose that fact to defendant. In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that a defendant's rights to due process are violated when the State withholds certain favorable evidence that is material either to the defendant's guilt or punishment. Illinois Supreme Court Rule 412(c)

(eff. Mar. 1, 2001) codified the *Brady* rule in Illinois and requires the State to disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused. However, even when a fact should have been disclosed, a reviewing court will only find a due process violation if the defendant establishes that: (1) the evidence is favorable because it is either exculpatory or impeaching; (2) the evidence was wilfully or inadvertently withheld by the State; and (3) withholding the evidence resulted in prejudice to the defendant. *Strickler v. Greene*, 527 U.S. 263 (1999).

¶ 12 Evidence with potential impeachment value that may cast doubt on the credibility of a State witness tends to negate the guilt of the accused. *People v. Sharrod*, 271 Ill. App. 3d 684 (1995). It follows, therefore, that impeachment evidence is favorable to the accused. See *People v. Cheers*, 389 Ill. App. 3d 1016 (2009). In this case, the information regarding the relationship between Marcus and Jeneary could have been used for impeachment purposes. Thus, we conclude that the information was favorable to defendant and the State should have disclosed it.

¶ 13 We also find that the State wilfully withheld the information from defense counsel. This conclusion is evident from the fact that Jeneary admitted that he discussed whether to disclose the relationship with a colleague prior to trial. Therefore, defendant has satisfied the first two prongs necessary to establish a due process violation. We are at a loss to understand why the information was not disclosed to defendant.

¶ 14 In order to succeed on the last prong, the defendant must show that the withheld information was material, *i.e.*, that there is a reasonable probability that if the evidence had been disclosed to the defendant, the outcome of the case would have been different. *People v. Rapp*, 343 Ill. App. 3d 414 (2003). Here, defendant has failed to establish a reasonable probability that

the result of the proceedings would have been different had he been informed of the relationship between Marcus and Jeneary. Defendant contends that, had the information been disclosed, it would have given the defense an opportunity to establish that Marcus was biased in favor of the prosecution. Defendant's contention, however, offers little by way of prejudice, as he does not provide any evidence that Marcus and Jeneary were close, that they had conversations prior to or during trial, or that they in any way colluded against defendant. Without more, the relationship (cousins) between a witness and an assistant State's Attorney involved in this case does not establish a reasonable probability that the outcome of the case would have been different had defendant known of the relationship. Therefore, we find that defendant has not established prejudice. Defendant's due process rights were not violated, and the trial court did not err in dismissing his section 2-1401 petition.

¶ 15

#### CONCLUSION

¶ 16 The judgment of the circuit court of Kankakee County is affirmed.

¶ 17 Affirmed.

¶ 18 JUSTICE McDADE, dissenting.

¶ 19 The majority has affirmed the *sua sponte* dismissal of the section 2-1401 petition filed in this case by the defendant, Terrance Haynes. In so doing, it has found that the State has waived its timeliness objection to the filing of the petition and has also found, with respect to defendant's claim of due process violation, that the first two of the three prongs necessary to prove the *Brady* violation have been satisfied. I am in complete agreement with those findings. Because I would find that defendant has also satisfied the third prong and has proven the violation of his constitutional right to due process, I respectfully dissent from the majority's ultimate decision.

¶ 20 As the majority has recited in ¶ 11, *supra*, supreme court rule 412, which codifies the U.S. Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), sets out the three prongs the defendant must prove to establish the due process violation. On the first prong, the majority has found that: "In this case, the information regarding the relationship between Marcus and Jeneary could have been used for impeachment purposes. Thus, we conclude that the information was favorable to defendant and the State should have disclosed it." (¶ 12, *supra*)

¶ 21 On the second prong, the majority has found: "We also find that the State wilfully (sic) withheld the information from defense counsel. This conclusion is evident from the fact that Jeneary admitted that he discussed whether to disclose the relationship with a colleague prior to trial." The majority then professes bewilderment as to why the information was not disclosed to defendant. (¶ 13, *supra*)

¶ 22 I would suggest that the reason *could* be that Marcus was not just "a witness," or "an occurrence witness," or "an eyewitness." He was crucial to the prosecution as he was the *only* witness who claimed to have actually seen the defendant pull a gun and shoot the victim and who contradicted defendant's testimony that the victim had a gun. He was an 11-year-old boy and his cousin was sitting at the prosecution table as the second chair. A child witness could be suggestible and eager to please a cousin involved in the prosecution of a criminal case – and perhaps even in awe of him.

¶ 23 It is ironic that the majority bases its finding that the defendant has failed to establish rule 412's third requirement of prejudice on an absence of the very information that the State's failure to disclose prevented defense counsel from eliciting either through pretrial investigation or through cross-examination of Marcus at trial. That is, "any evidence that Marcus and Jeneary

were close, that they had conversations prior to or during trial, or that they in any way colluded against defendant." (¶ 14, *supra*.)

¶ 24 For the foregoing reasons, I believe the circuit court's *sua sponte* dismissal of defendant's section 2-1401 petition was erroneous and I dissent from the majority's contrary decision.