

No. 1-12-3363

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. 07 CR 37
)	
TRACY WILLIAMS,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

O R D E R

¶ 1 **Held:** Summary dismissal of defendant's postconviction petition affirmed where defendant's allegation that the State committed a *Brady* violation was contradicted by the record.

¶ 2 Defendant Tracy Williams appeals from an order of the circuit court of Cook County summarily dismissing his postconviction petition as frivolous and patently without merit. On appeal, defendant contends that the circuit court erred in dismissing his petition because he presented a meritorious claim that the State withheld information in violation of *Brady v.*

Maryland, 373 U.S. 83 (1963), that its key witness had been beaten by police before giving his grand jury testimony.

¶ 3 Following a 2009 jury trial, defendant was convicted of first degree murder for fatally beating Mark Friend with a baseball bat in the bedroom of David Reed's house, then sentenced to 37½ years' imprisonment. This court affirmed that judgment on direct appeal (*People v. Williams*, No. 1-09-1957 (2011) (unpublished order under Supreme Court Rule 23)), and the supreme court subsequently denied defendant's petition for leave to appeal (*People v. Williams*, No. 112758 (Sept. 28, 2011)).

¶ 4 On June 29, 2012, defendant, through privately retained counsel, filed the instant petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant alleged, *inter alia*, that he was denied his right to due process and a fair trial because law enforcement authorities failed to notify defense counsel that the State's star witness, Andre Smith, was beaten by police just before he testified to the grand jury that he saw defendant carrying a baseball bat prior to the killing. Defendant noted that Smith had testified at trial that he saw defendant return to Reed's house concealing a hard object inside his sleeve, and was impeached with his grand jury testimony in which he stated that he saw six inches of a baseball bat protruding from defendant's sleeve. In addition, defendant asserted that an assistant State's Attorney testified that before his grand jury testimony, Smith said that he saw defendant with a bat. However, Monroe Harris averred in his attached affidavit that shortly before Smith testified before the grand jury, he was punched in the face twice by a Chicago police officer who called Smith a liar, and further that Smith told Harris that he did not see defendant return to the house with a bat.

¶ 5 Defendant also alleged that Smith admitted to Harris, Harry Williams and Valerie Williams that police struck him. Defendant explained that he could not provide an affidavit from

Smith because Smith refused to sign one and refused to discuss what he actually saw at the time of the killing based on his attorney's advice and pressure from police. Defendant asserted that the information that Smith was beaten by police just before testifying before the grand jury was exculpatory evidence, in that there is a reasonable probability that had the information been tendered to defense counsel before trial, the jury would have returned a verdict of not guilty or guilty of second degree murder. Defendant added that, even if the prosecutors were unaware of the beating, they had a duty to assure that there was a free flow of information between law enforcement entities to insure that such information was shared with defense counsel.

¶ 6 In support of his petition, defendant attached an affidavit from Monroe Harris stating that, one day during the fall of 2006 after Friend's death, he was having breakfast with Andre Smith and Kenneth Cosby at Cosby's home, and Smith and Cosby stated that they did not see defendant with a bat or any other object in his hand when he returned to Reed's house the night Friend was killed. Harris added that he was not at Reed's house that night. Harris also averred that three police officers kicked in the door to Cosby's home, and one of the officers punched Smith twice in the face and called him a liar. The police then took the three men to the police station for questioning. Harris further averred that on June 24, 2012, he was being interviewed about this matter by appellate counsel at the home of Harry and Valerie Williams when Smith and Cosby entered the room and Smith acknowledged that one of the officers had hit him. Harris stated that Smith said his lawyer advised him not to discuss the case because the police were harassing him and trying to take his house, and Smith was frightened that he would be charged with perjury. Harris further stated that he never shared this information with anyone because he did not realize it was important until he happened to be walking down the street and saw appellate counsel interviewing Cosby outside Cosby's home.

¶ 7 Defendant also attached to his petition an affidavit from Harry Williams which was substantially similar to Harris' affidavit. Williams added that Andre Smith told him that defendant did not have a bat in his hand when he re-entered Reed's house the night Friend was killed, and that the police beat him inside Cosby's house the day they arrested him and took him to the grand jury. Smith told Williams that he lied to the grand jury about seeing defendant with a bat because the police hit him and the prosecutor "kept pressing him" to say that he saw the bat. Williams also averred that on June 24, 2012, Smith acknowledged that the police had hit him, but refused to discuss the case any further based on his lawyer's advice.

¶ 8 Defendant attached a third affidavit to his petition that is signed by "Valerie Williams," but opens with the pronouncement: "I, HARRY WILLIAMS, being duly sworn under oath" as the affiant. In addition, the content of the affidavit mirrors Harry Williams' affidavit, but omits three sentences.

¶ 9 The circuit court found, in pertinent part, that Harris' affidavit contained hearsay statements of Smith which were not admissible as substantive evidence. Nevertheless, the court found that these statements did not lessen or detract from the admissibility and strength of Smith's grand jury testimony that he saw defendant enter the house with a bat in his sleeve. The court further found that the statements in Harris' affidavit were contradicted by Smith's testimony in the trial record, and the statements in the other affidavits could merely impeach Smith's grand jury testimony. The court found that the evidence in this case was not closely balanced, and that there was no reasonable probability that the result of the trial would have been different if the jury had been told that Smith was allegedly mistreated by police. The circuit court finally concluded that all of the allegations in defendant's postconviction petition were frivolous and patently without merit, and summarily dismissed the petition.

¶ 10 On appeal, defendant contends that the circuit court erred in dismissing his petition because he presented a meritorious claim that the State withheld information in violation of *Brady* that its key witness, Andre Smith, had been beaten by police before giving his grand jury testimony. Defendant argues that the police beating of Smith was exculpatory evidence because it impeached Smith's grand jury testimony by suggesting his testimony was a lie, and explaining why Smith had lied. Defendant claims that even if the State's suppression of this evidence was inadvertent, its failure to secure this information with the police constituted a *Brady* violation. He further claims that if the police beating and Smith's perjury before the grand jury had been disclosed, there is a reasonable probability that the outcome of his trial would have been different.

¶ 11 The State responds that defendant's claims are contradicted by the record, and specifically, by Smith's trial testimony where he expressly testified that he was treated fairly by the police who brought him to the grand jury, and that the prosecutor did not pressure him into stating that defendant had a bat. The State maintains that the affidavits do not establish that the alleged police beating ever occurred, and there is no indication that there was any exculpatory evidence, such as a report or documentation, for the State to disclose. The State notes that defendant admitted at trial that he took control of the bat from Friend and struck him three times while Friend was unarmed, and that this court found on direct appeal that there was no evidence of self-defense or second degree murder; therefore, there is no possibility that the result of the trial would have been different even if defendant did not bring the bat into the house.

¶ 12 The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2012); *Coleman*, 183 Ill. 2d at 378-79. The supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit if it has "no arguable basis either in

law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Id.* Our review of the circuit court's summary dismissal of defendant's postconviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 13 Under plenary review, the reviewing court is required to make its own independent assessment of the allegations raised in the postconviction petition, and is "free to substitute its judgment for that of the circuit court in order to formulate the legally correct answer." *Coleman*, 183 Ill. 2d at 388. Accordingly, we may affirm the circuit court's dismissal of a postconviction petition on any basis shown in the record. *People v. Davis*, 382 Ill. App. 3d 701, 706 (2008)

¶ 14 Here, defendant claimed that he was deprived of a fair trial and due process by an alleged *Brady* violation. Pursuant to *Brady*, the State is required to disclose to the defense all evidence that is favorable to defendant and material to either his guilt or punishment. *Brady*, 373 U.S. at 87. To obtain relief under *Brady*, defendant must demonstrate that: (1) the withheld evidence was favorable to him because it was either impeaching or exculpatory; (2) the evidence was withheld by the State either willfully or inadvertently; and (3) he suffered prejudice as a result of the withholding. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 112.

¶ 15 In this case, we find that the trial record expressly contradicts defendant's allegation that the State withheld information that Andre Smith had been beaten by police before giving his grand jury testimony, and that the summary dismissal of his petition was proper. *People v. Deloney*, 341 Ill. App. 3d 621, 626 (2003), citing 725 ILCS 5/122-2.1(c) (West 1998), and *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). As a threshold matter, we note that defendant asserts in his brief that the purpose of a postconviction petition "is to bring to the attention of the trial court evidence which is not in the record," and that "*Brady* material which is impeaching

will by definition be contradicted by the trial record." However, the contradiction in this case does not lie with the alleged *Brady* evidence, *i.e.*, whether or not Smith was beaten by police. The question is whether or not the State withheld such information from defendant, and the record affirmatively shows that it did not.

¶ 16 The record reveals that, following the trial and prior to sentencing, defendant filed a *pro se* motion for a new trial based on ineffective assistance of counsel. In that motion, defendant expressly alleged:

"That this attorney Mr. Federman [defense counsel] knowing that Andre Smith was giving false testimony because he had been beaten by Chicago Police Officers with a pistol and threatened by the assistant state's attorney with perjury charges failed to bring this out at trial. Attorney Federman being aware of thjis [*sic*] exonerative evidence and choosing to suppress it from the trier was in violation of BRADY VS. MARYLAND."

Although defendant misunderstood the legal concept of *Brady*, his allegation clearly shows that both he and defense counsel were aware of the alleged police beating of Smith prior to trial.

¶ 17 The record further shows that the trial court conducted a *Krankel* hearing to address defendant's motion and asked counsel about the above allegation. Counsel replied that the record showed that he asked Smith if he was pressured by the prosecutor and Smith denied it.

Defendant then presented further argument on this issue and the following exchange occurred:

"[THE DEFENDANT:] And this, Andre giving false testimony. He gave several different statements at the police station. He was threatened to give the grand jury statement, which was not allowed to be brought out, and was threatened not to give – not to cooperate with my defense. The state's attorney threatened to charge him with accountability and accessory of a homicide.

THE COURT: Where do you come up with this from, Mr. Williams?

THE DEFENDANT: It was a known fact through associates that I have been in contact with that knew the dealings of the State and Andre Smith and officers that I could not bring forth because Andre was threatened to make the statements that he made. That's why he had maybe, I believe, seven different statements. All seven of the different statements are either false or only one of them is the truth and six is false.

Either way, the statements were false and coerced to be given."

In response, counsel stated that he had an investigator interview Smith, that Smith testified that he was not pressured to testify about the bat, and counsel then presented testimony from his private investigator, Wayne Bunch, to impeach Smith's testimony.

¶ 18 The above excerpts from the record clearly establish that the defense was aware of the alleged police beating of Andre Smith prior to trial, and that counsel attempted to show that Smith's grand jury testimony was coerced. Accordingly, defendant's allegation that the State withheld such information in violation of *Brady* is directly contradicted by the record, and the circuit court's summary dismissal of his postconviction petition as frivolous and patently without merit was proper.

¶ 19 For these reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's postconviction petition.

¶ 20 Affirmed.