

**NOTICE**

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2014 IL App (4th) 130035-U

NO. 4-13-0035

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

December 22, 2014  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
JEREMY M. McGUIRE,	)	No. 05CF149
Defendant-Appellant.	)	
	)	Honorable
	)	John B. Huschen,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.  
Justices Knecht and Turner concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant cannot demonstrate prejudice by his inability to undermine the credibility of a State's witness when the jury acquitted him of the offense involving that witness.

¶ 2 Defendant appeals from the circuit court's denial of his postconviction petition after a third-stage evidentiary hearing. Defendant claims the court erred in denying his petition after he had sufficiently demonstrated prejudice in the outcome of the trial when he was prevented from questioning the credibility of the State's "key witness." He argues (1) the State violated his due-process rights by not producing evidence to the defense before trial that this witness had been previously convicted of larceny, and (2) his trial counsel was ineffective for not investigating the witness's criminal background or pointing out at trial that the witness had lied on the witness stand. We affirm.

¶ 3

## I. BACKGROUND

¶ 4 In April 2006, a jury found defendant guilty of two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2004)) (counts I and II), acquitting defendant of a third count (count III). The State had listed as one of its witnesses a "confidential source," whose name was not released until the day of trial. Defense counsel interviewed the confidential source, Catherine Cowan, for 30 minutes prior to the start of the trial but did not request a continuance to conduct a further investigation of Cowan's background. During her testimony at trial, Cowan testified her motivation for helping the police was the murder of her daughter by a "serial killer [who] was high on crack cocaine."

¶ 5 At trial, Cowan testified she met with defendant on three separate arranged transactions and purchased cocaine from defendant each time. First, on November 2, 2005, Cowan arranged a buy from defendant and informed the police of the impending transaction. The police set up surveillance and witnessed the transaction supporting the allegation in count I. The police officer also testified to this transaction. Two days later, on November 4, 2005, a second officer witnessed Cowan enter the residence of James Cashaw for the purpose of purchasing cocaine from defendant. The officer testified at trial that he never saw defendant during that transaction, which was the basis of the allegation in count III. For the third transaction, on November 5, 2005, an officer arranged for an audio recording of the scheduled buy between Cowan and defendant in Cowan's vehicle. The officer testified at trial he had set up surveillance and watched defendant enter and exit Cowan's vehicle. This transaction supported the allegation in count II. Again, the jury found defendant guilty of counts I and II, but not count III.

¶ 6 The trial court sentenced defendant to two concurrent 25-year prison terms. Defendant appealed. This court affirmed defendant's convictions and sentences, finding the only issue he raised on appeal had been forfeited. Defendant had argued he was not properly admonished at sentencing pursuant to Illinois Supreme Court Rule 605(a)(3) (eff. Oct. 1, 2001). This court held defendant had voluntarily absented himself from the courtroom, thereby effectively forfeiting his right to be properly admonished. *People v. McGuire*, No. 4-06-0469 (2007) (unpublished order under Supreme Court Rule 23).

¶ 7 In December 2007, defendant filed a *pro se* postconviction petition, alleging his constitutional rights were violated when (1) the jury was not made aware of Cowan's criminal background; (2) the trial court imposed an excessive sentence; and (3) the court failed to properly admonish defendant at sentencing. The circuit court appointed counsel to represent defendant in the postconviction proceedings. After counsel chose not to file an amended petition, the court granted the State's motion to dismiss at the second stage of the proceedings. Defendant appealed the dismissal. This court reversed the dismissal, finding defendant's appointed counsel failed to provide a reasonable level of assistance. *People v. McGuire*, No. 4-08-0743 (2010) (unpublished order under Supreme Court Rule 23).

¶ 8 On remand, defendant retained postconviction counsel, who filed a first amended postconviction petition on July 7, 2011. In the petition, defendant alleged his trial counsel rendered ineffective assistance of counsel when he failed to (1) investigate the criminal history of Cowan; and (2) reveal, until the sentencing hearing, that he had worked for the presiding judge during the judge's career as an attorney. Defendant also alleged his appellate counsel was ineffective for raising only one issue on direct appeal when other issues were arguably meritorious. For example, defendant alleged appellate counsel should have raised an issue

regarding the sentencing court's failure to consider (1) relevant factors in mitigation and (2) the possibility of imposing a nonextended term. The State filed a motion to dismiss, which, after a hearing, the circuit court denied.

¶ 9 In May 2012, defendant filed a second amended petition for postconviction relief, requesting that this petition "be read in conjunction with the *pro-se* petition previously filed." In this latest petition, defendant added details regarding Cowan's criminal history. Apparently, she was convicted of larceny in North Carolina and discovered to have committed perjury in court. Defendant claims his trial counsel's failure to ascertain this information and the identity of the State's witness listed only as the "confidential informant" on the witness list constituted ineffective assistance of counsel. Defendant also added an allegation the State had committed a *Brady* violation (see *Brady v. Maryland*, 373 U.S. 83 (1963)) by failing to disclose Cowan's prior conviction for a crime involving dishonesty.

¶ 10 In June 2012, the State filed an answer to the petition, denying defendant had sufficiently alleged a constitutional violation. At the evidentiary hearing conducted in August 2012, the parties presented the circuit court with a stipulation, defendant's only evidence, regarding Cowan's testimony. According to the stipulation, if she were called to testify, she would admit (1) she used cocaine; (2) she was convicted of larceny; and (3) the "crack-addicted serial killer that raped and murdered [her] daughter" was actually her live-in boyfriend, who she knew was not a serial killer.

¶ 11 After taking the matter under advisement and waiting for additional information from both parties, in November 2012, the circuit court entered an order denying defendant's postconviction petition. The court found defendant had failed to demonstrate he suffered any prejudice from his trial counsel's failure to ascertain that Cowan had been convicted of larceny.

The court further found an unintentional *Brady* violation occurred, but the violation did not affect the results of the proceedings. The court denied defendant's motion to reconsider. This appeal followed.

¶ 12

## II. ANALYSIS

¶ 13

### A. State Failed To Disclose Cowan's Prior Conviction

¶ 14

First, defendant claims the circuit court erred in denying his postconviction petition after a third-stage evidentiary hearing when the evidence demonstrated his due-process rights were violated, pursuant to *Brady*, when the State failed to disclose Cowan's prior conviction for larceny. Defendant claims he presented sufficient information to demonstrate the State should have used due diligence to obtain information about Cowan's conviction and disclose that information to the defense prior to trial.

¶ 15

At issue in this appeal is whether the denial of defendant's postconviction petition was proper. Under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)), individuals convicted of criminal offenses may challenge their convictions based on constitutional violations. *People v. Domagala*, 2013 IL 113688, ¶ 32. In adjudicating such claims, the Act provides a three-stage process. *People v. English*, 2013 IL 112890, ¶ 23. As noted, this appeal concerns the denial of claims following a third-stage evidentiary hearing. "After an evidentiary hearing where fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous." *English*, 2013 IL 112890, ¶ 23. However, as in this case, when no live testimony was presented and the issue is one of law, our standard of review is *de novo*. *English*, 2013 IL 112890, ¶ 23.

¶ 16

In *Brady*, the Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either

to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

"[F]or defendant to obtain a new trial under *Brady*, he must show (1) the State suppressed evidence and that evidence was (2) favorable to him and (3) material to his guilt or punishment. A *Brady* claim may arise in the following three circumstances: (1) where previously undisclosed evidence reveals the prosecution introduced trial testimony it knew or should have known was perjured, (2) where the State fails to comply with a defense request for disclosure of some specific exculpatory evidence, and (3) where the State fails to voluntarily give the defense exculpatory evidence never requested or requested only in a general manner. [Citation.] In addition to exculpatory evidence, impeachment evidence falls within the *Brady* rule. [Citation.]" *People v. Snow*, 2012 IL App (4th) 110415, ¶ 35.

¶ 17 Defendant contends the State violated *Brady* when it failed to disclose to the defense that its star witness, Cowan, had been convicted of a crime of dishonesty, a useful piece of information for defendant for the purpose of impeaching her credibility at trial. See *People v. Rapp*, 343 Ill. App. 3d 414, 418 (2003) (favorable evidence, like a prior conviction, is material and prejudicial when there is a reasonable probability the outcome of the case would have been different had it been disclosed). However, defendant's argument fails to consider the fact that defendant was acquitted of the charge involving Cowan, where she was the only person present

during the drug transaction. The two other drug transactions (alleged in counts I and II) were witnessed by police officers, who each testified regarding those transactions.

¶ 18 In other words, the jury convicted defendant only for the offenses witnessed by the police officers, not Cowan. Thus, even if defendant was able to impeach Cowan's credibility by using her larceny conviction against her, the result of the trial would not have been different. The jury relied on the testimony of the police officers and found defendant guilty of the two offenses witnessed by them. The jury did not convict defendant of the offense supporting the allegation in count III, where only Cowan was present. Therefore, defendant's impeachment of Cowan's credibility would have had no impact on the jury's verdict. That is, defendant cannot demonstrate prejudice even assuming the State committed a *Brady* violation by failing to produce all relevant information regarding Cowan's criminal history. We find no error in the circuit court's denial of defendant's postconviction claim alleging a *Brady* violation.

¶ 19 B. Ineffective Assistance of Trial Counsel

¶ 20 Next, defendant argues the circuit court erred by denying defendant's postconviction claim of ineffective assistance of trial counsel when it was apparent trial counsel had failed to investigate Cowan's criminal record and the circumstances of her daughter's murder, details of which Cowan had lied about under oath. Defendant contends, had counsel properly investigated these issues, he could have used them at trial to undermine Cowan's credibility, which, in effect, could have changed the outcome of the trial.

¶ 21 A claim of ineffective assistance of counsel presented in a postconviction petition is reviewed under the test established in *Strickland v. Washington*, 466 U.S. 668 (1984). The petitioner must show counsel's performance was deficient and that prejudice resulted from the deficient performance. *People v. Brown*, 236 Ill. 2d 175, 185 (2010). "If it is easier to dispose of

an ineffective assistance claim on the ground that it lacks sufficient prejudice, then a court may proceed directly to the second prong and need not determine whether counsel's performance was deficient." *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 22 To prove prejudice, a defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *People v. Haynes*, 192 Ill. 2d 437, 473 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *People v. King*, 316 Ill. App. 3d 901, 913 (2000).

¶ 23 As we explained in the analysis on the first issue regarding the State's failure to produce information on Cowan's history, we similarly hold defendant cannot demonstrate prejudice with regard to his ineffective-assistance issue regarding counsel's failure to ascertain the details of Cowan's criminal history or perjury about her daughter's murder. Because the jury seemingly disregarded Cowan's testimony, defendant is unable to prove he was prejudiced by his inability to call her credibility into question. Had defendant impeached Cowan with her prior conviction, drug use, or perjured testimony regarding her daughter's murder, the result of the trial would not have been any different. Only if the jury would have found defendant guilty of count III, the offense wherein Cowan testified she met with defendant inside Cashaw's house and purchased cocaine from defendant, out of the surveilling officer's sight, would her credibility have possibly made any difference in the outcome of the trial. That is, of course, not the circumstance here. The two police officers provided eyewitness testimony of the two transactions supporting counts I and II. Cowan's questionable credibility would have had no effect on the testimony provided by the officers. Therefore, we find defendant cannot demonstrate a reasonable probability that, but for counsel's error in failing to ascertain Cowan's

criminal history, the result of the proceedings would have been different. We affirm the circuit court's denial of defendant's postconviction claim.

¶ 24

### III. CONCLUSION

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

¶ 26

Affirmed.