2015 IL App (1st) 112456-U

THIRD DIVISION
February 25, 2015

No. 1-11-2456

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, Plaintiff-Appellee, v. DERWIN WRIGHT, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 96 CR 30301 The Honorable Arthur F. Hill, Jr., Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court, with opinion.
Justices Hyman and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant failed to establish cause and prejudice to justify leave to file his successive postconviction petition. He also failed to establish postconviction counsel provided unreasonable assistance.

¶ 2 Following a bench trial, defendant Derwin Wright was found guilty of murdering two people, attempted murder, and home invasion. He was sentenced to life imprisonment. Defendant has filed a successive postconviction petition challenging his conviction. He contends he established cause and prejudice to justify leave to file the present postconviction petition because he made a substantial showing of a constitutional violation that the State failed to

disclose a plea deal given to one of the main witnesses against defendant, thereby violating *Brady v. Maryland*, 373 U.S. 83 (1963). Defendant also contends postconviction counsel failed to comply with Supreme Court Rule 651(c) (eff. Feb. 6, 2013) because she did not amend his petition. Lastly, defendant contends the mittimus must be corrected to reflect a single conviction for home invasion. We affirm and correct the mittimus.

¶ 3 BACKGROUND

¶ 4 Defendant was tried separately but simultaneously to two other codefendants for murdering Ronald Goodwin and James Scott, Jr., and for attempting to murder Arlene Owens during a home invasion.

¶ 5 Trial commenced on November 18, 1999. Doris McCarty (whose aliases included Doris Clark and Debra Jones) testified at trial that on the evening of October 21, 1996, she was outside in her southside neighborhood when defendant, together with codefendants Jermaine Daniels and Maurice Hardaway and another, commissioned her to knock on her friend Jordan Yancy's door, so they could gain admission. McCarty, an admitted drug addict with four felony theft convictions and two misdemeanors, knew the group from the neighborhood and had bought drugs from them. She knocked on Yancy's door, but when there was no answer, expressed she could not help. Defendant pulled out a gun, then stated, "bitch, if [you] don't get this door open I'm going to blow your brains out." McCarty yelled up at Yancy to let her in while defendant and the group hid on the side of the building. When Yancy eventually opened the door, defendant and his cohorts pushed Yancy upstairs. McCarty subsequently heard rapid gunfire from upstairs and ran away. Several days after the shootings, McCarty identified both defendant (whom she knew by his nickname, “Dirt”) and codefendant Hardaway from photo arrays and

physical lineups and also identified codefendant Daniels to police (Daniels was at that time walking on the street).

¶ 6 Relevant to this appeal, at trial the parties focused at some length on McCarty's own criminal background for impeachment purposes. During direct examination, McCarty acknowledged that after the murders in this case, but before trial, she had violated probation imposed on several theft convictions and, as a result, was sentenced to 6 years in prison. McCarty further admitted that about 10 months before defendant's trial, her 6-year sentence was reduced to 3 years. The State specifically queried, "[a]nd then in February of 1999, this year, through your attorney your sentence was reduced to three years IDOC, correct?" McCarty said, "correct." She acknowledged she was on mandatory supervised release (MSR) at the time of trial and that she had abused drugs. McCarty was relocated at the State's expense two different times, in 1996 and 1999 for $2,677 and $1,464, respectively.

¶ 7 On cross-examination, McCarty further admitted that she had given authorities aliases so as to avoid investigation and committed theft to support her drug habit. Two of her felony theft convictions were "in fact from this courtroom" and committed after the murders. She admitted that originally she had received probation "from this honorable judge" on those cases but then violated her probation by not following the rules. She explicitly responded "no" to the question, "[d]id the State tell you that they would make a deal with you *** for your testimony in this particular case?" She stated that since that time, the State had not indicated it would "tender to you consideration for your testimony in this case." She also explicitly stated the 3-year sentence on her violation of probation and theft was not in consideration for her trial testimony. McCarty further indicated that around November of 1996, she had been threatened regarding her status as a witness in this murder case but stated she had not taken any bribes from anyone.

¶ 8 Returning to the trial narrative in defendant's case, Yancy testified that pursuant to McCarty's beckoning, he opened the apartment door but only saw McCarty for a moment before a person thrust a gun in his eye. Several people forced him upstairs, and once inside the apartment, he was ordered to face the wall. The intruders apparently proceeded down the hall, and Yancy heard someone say "shoot him in the head," which was followed by gunshots. Yancy was able to escape to the bathroom and heard about five more gunshots, as well as people running past his door. He later found Goodwin and Scott with gunshot wounds. Owens was slouched in the corner calling Yancy's name with her eyes "waddling around in her head."

¶ 9 The State presented evidence that all three victims had been shot in the head, and Goodwin was shot 15 times. As stated, Goodwin and Scott died as a result.

¶ 10 Owens lived and testified at trial that Goodwin and Scott were in the apartment with her and that McCarty yelled up to Yancy just before the home invasion. Thereafter, three men entered the room and, when Goodwin said he did not have their money, one of the men shot him. Owens said "please don't kill me," but the man responded, "shut up," and shot her in the head. He also shot Scott. She heard a "lot of shots" that night. About eight days later, while still in the hospital, Owens identified defendant from a photo array. She testified that he was one of the intruders with a gun. She had seen him some eight times over the years, including the day before the shooting. She was able to identify him even though she had done cocaine the morning of the shooting.

¶ 11 Annette Harris lived in the second floor of the apartment building where the crime occurred. On the evening in question, she had seen Goodwin, Scott, and Owens in Yancy's room. Later, she was awakened by pounding and kicking downstairs. A woman called up to Yancy from outside, someone walked downstairs, and then Harris heard footsteps and running

upstairs. As they passed her room, Harris heard someone say, "you want to keep fucking with my money." There were several shots and a male voice ordered, "[s]hoot him in the head." Harris then heard footsteps exiting the apartment building. She eventually went to the room and observed the victims.

¶ 12 Defendant was found guilty on this evidence. The court sentenced him to two concurrent terms of life imprisonment for the murders, together with three concurrent 30-year terms for the attempted murder and home invasion.

¶ 13 Defendant filed a direct appeal, and this court granted appellate counsel's motion for leave to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), after concluding that defendant's claims of a speedy trial violation and ineffective assistance of counsel had no arguable merit. *People v. Wright*, No. 1-00-0929 (unpublished order under Supreme Court Rule 23) (2001).

¶ 14 In 2003, the trial court summarily dismissed defendant's untimely *pro se* postconviction petition alleging that his home invasion conviction violated the one-act, one-crime rule and that his natural life sentences were unconstitutional. Notably, he did not raise any argument relating to the present appeal. In 2007, defendant filed an unsuccessful petition under section 2-1401 of the Civil Code of Procedure (735 ILCS 5/2-1401 (West 2006)), wherein he raised a similar claim as that set forth immediately below.

¶ 15 On June 25, 2008, defendant filed the present successive *pro se* postconviction petition. Defendant alleged in relevant part that he "recently learned" McCarty had received a reduced sentence in exchange for her trial testimony. Specifically, her 6-year sentence imposed on her guilty plea was reduced to 3 years (citing case Nos. 97 CR 12570 & 97 CR 13409) after McCarty had filed a motion to reduce her sentence. Defendant alleged the State's failure to "disclose the

existence of a deal" violated his due process rights under *Brady*, which held that the State's failure to disclose evidence favorable to the defense and material to guilt or punishment violates a defendant's due process rights. See 373 U.S. at 87.

¶ 16 In support of his claim, defendant attached a number of documents relating to McCarty's guilty plea hearings. In particular, defendant attached:

(1) McCarty's initial guilty plea hearing transcript, dated August 28, 1998, before Judge Moran in 97 CR 12570 (violation of probation) and 97 CR 13409 (retail theft). At the hearing, the court noted that it was willing to give McCarty 6 years' imprisonment on the violation of probation and underlying theft cases. When McCarty protested, stating she had 7 kids, the court stated: "Do you really want to get me started?" The court then stated that it had previously given McCarty much consideration, but she "still went out and violated probation, disregarded probation, picked up a new case, and then picked up another new case." The court stated she was "out of order" and had to "suffer the consequences," then asked if McCarty wished "to accept the offer of the Court?" She stated she would take the offer.

(2) A letter, dated December 29, 1998, from Gateway Foundation stating that McCarty had successfully completed 13 weeks of drug abuse treatment.

(3) McCarty's motion to reduce her sentence in 97 CR 12570 (violation of probation) and 97 CR 13409 (retail theft), dated February 3, 1999, and filed some five months after entering her guilty plea. McCarty argued her 6-year sentence for the probation violation in her theft case was excessive in light of the nature of the thefts (under $300 in both cases), her criminal background, and her drug and alcohol dependency (which was being corrected), as well as the fact that she had seven children.

(4) The transcript of the subsequent hearing on McCarty's motion to reduce her sentence, dated February 5, 1999, before Judge Moran. The transcript indicates that ASA Fabio Valentini was present but did not participate in the hearing. At that hearing, McCarty's attorney asked to pass the case until the prosecutor for defendant's case (ASA Alesia) showed in court. When the court asked whether that prosecutor was handling McCarty's case, her defense attorney stated: "He is the State's Attorney for the double homicide." The State ultimately did not appear and McCarty's case was called. The court noted the State's absence and said, "the State that is handling the matter isn't here, so I don't know what the agreement between the parties is…" Defense counsel stated: "I don't know if there's an agreement with the parties. The State is not objecting to the reduction of the sentence. I was going to make my argument and leave it up to your Honor." The case was passed again and when recalled, the court granted the defense motion and reduced McCarty's sentence to three years.

(5) A "corrected" order, dated February 5, 1999, and signed by Judge Moran, sentencing McCarty to three years in prison for retail theft in case No. 97 CR 13409-01, to run concurrent with 97 CR 12570-01 and 98 CR 441012-01.

¶ 17 Defendant's postconviction petition was docketed for further consideration, and defendant was appointed counsel. Postconviction counsel ultimately filed a certificate pursuant to Rule 651(c) (eff. Feb. 6, 2013) stating, as required, that she had consulted with defendant regarding his constitutional deprivations, reviewed the trial records, and determined the defendant's petition adequately represented his contentions. She rested on the original petition absent amendment.

¶ 18 The State filed a motion to dismiss defendant's successive petition, arguing defendant did not meet the cause and prejudice test, that the claims were barred by *res judicata*, the petition was untimely, and, regardless, defendant failed to make a substantial showing of a constitutional violation. During argument on its motion, the State emphasized that the petition did not satisfy the cause and prejudice test, noting that the petition did not even address that procedural hurdle. The State argued that all of the supporting documentation was available to defendant when he filed his first postconviction petition, yet he did not then attach the documents.

¶ 19 The trial court granted the State's motion to dismiss. The court noted defendant "failed to seek leave to file" his successive postconviction petition, so he failed to satisfy the cause and prejudice test. The court further determined there was no indication of a "hidden deal" and that the claim was barred since defendant previously raised it in his 2-1401 petition. The court dismissed the present case, and this timely appeal followed.

¶ 20 ANALYSIS

¶ 21 The Post–Conviction Hearing Act provides a means for a criminal defendant to assert that, in the proceedings resulting in his conviction, there was a substantial denial of his constitutional rights. *People v. Evans*, 2013 IL 113471, ¶ 10. The Act permits the filing of only one petition without leave of court (725 ILCS 5/122–1(f) (West 2008)) and expressly provides that any claim not raised in the original or amended petition is waived (725 ILCS 5/122–3 (West 2008)). *Id*. A defendant faces "immense procedural default hurdles when bringing a successive post-conviction petition," which "are lowered in very limited circumstances" because successive petitions "plague the finality of criminal litigation." *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). In short, such actions are generally disfavored by Illinois courts. *Smith*, 2014 IL 115946, ¶ 31; *People v. Edwards*, 2012 IL 111711, ¶ 29.

¶ 22 To initiate a successive postconviction petition, a defendant must first obtain leave of court, which is granted only when a defendant shows cause for his failure to bring the claim in his initial postconviction petition and prejudice resulting from that failure. 725 ILCS 5/122–1(f) (West 2008); *Evans*, 2013 IL 113471, ¶ 10. To show cause, a defendant must identify an objective factor that impeded his ability to raise a specific claim during his initial postconviction proceedings. *Id*. To show prejudice, a defendant must demonstrate that the claim not raised during initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process. *Id*.

¶ 23 It is the defendant's burden to obtain leave before further proceedings on his claims can follow. *Smith*, 2014 IL 115946, ¶ 30. The cause-and-prejudice determination must be made on the pleadings prior to the first stage of successive postconviction proceedings (*People v. Smith*, 2014 IL 115946, ¶ 33), and both elements must be satisfied for the defendant to prevail (*People v. Guerrero*, 2012 IL 112020, ¶ 15). The supreme court in *Smith*, recently clarified that "the cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard," and therefore is a more "exacting standard." 2014 IL 115946, ¶ 35; see also *People v. Edwards*, 2012 IL 111711, ¶¶ 22–29; *People v. Conick*, 232 Ill. 2d 132, 142 (2008). *Smith* further held that "leave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." 2014 IL 115946, ¶ 35.

¶ 24 On appeal, defendant asserts the trial court erred in dismissing his successive postconviction petition without an evidentiary hearing because he made a substantial showing,

and also satisfied cause and prejudice, that the State violated his right to due process by failing to disclose evidence of a deal between the State and McCarty. We review *de novo* defendant's contention that he is entitled to file a successive postconviction petition with respect to the alleged *Brady* violation. See *People v. Wrice*, 2012 IL 111860, ¶ 50; *cf. People v. Guerrero*, 2012 IL 112020, ¶ 13 (holding that *de novo* review was improper where the court had held an evidentiary hearing).

¶ 25 We note that defendant is the last among his two codefendants, also imprisoned for the murders at issue, to assert through a postconviction petition this similar *Brady* claim relating to an allegedly undisclosed plea deal between the State and McCarty. See *People v. Daniels*, 2012 IL App (1st) 093581 and *People v. Hardaway*, 2012 IL App (1st) 093580. In separate orders, this court ultimately determined codefendants Daniels and Hardaway were unable to establish the alleged plea deal was a material factor in their convictions or a reasonable likelihood existed that the juries would reach a different outcome. As a reason, this court noted that McCarty provided the same information regarding the murders and perpetrators even before the alleged deal, and also noted the codefendants' separate statements inculpating the group and the consistent testimony among the trial witnesses. Defendant's own independent petition alleging a *Brady* violation fairs no better.

¶ 26 Under *Brady*, the State violates a defendant's right to due process by failing to disclose evidence that is favorable to the accused and material to either guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). A *Brady* claim requires a defendant to demonstrate that (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was wilfully or inadvertently suppressed by the State; and (3) the accused was prejudiced as a result because the evidence was material to guilt or punishment. *Id.*

at 73-74. Thus, this rule encompasses impeachment evidence. *Strickler v. Greene*, 527 U.S. 263, 280 (1999); see also *People v. Ellis*, 315 Ill. App. 3d 1108, 1117 (2000) (where the State intends to inform a judge who will be sentencing a witness of that witness' cooperation, this constitutes a benefit which the State must disclose); see also *People v. Diaz*, 297 Ill. App. 3d 362, 371-72 (1998) (an agreement need not be so specific that it comports with the requirements for an enforceable contract and an implicit agreement may be found even where a deal has not been voiced).

¶ 27 Evidence is material where a reasonable probability exists that had the evidence been disclosed, the outcome of the proceeding would have been different. *Smith v. Cain*, 565 U.S. __, __, 132 S. Ct. 627, 630 (2012); see also *Strickler*, 527 U.S. at 281 ("Strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict"). A reasonable probability does not require it to be more likely than not that the defendant would have received a different verdict with the additional evidence, but rather, the likelihood of a different result must be great enough to undermine confidence in the verdict. *Id*. This is not a sufficiency of the evidence test. *People v. Coleman*, 183 Ill. 2d 366, 393 (1998). Nonetheless, impeachment evidence may not be material where the State's remaining evidence is strong enough to preserve confidence in the verdict. *Smith*, 565 U.S. __, __, 132 S. Ct. 627, 630. Moreover, the cumulative effect of the suppressed evidence also informs the materiality determination. *Coleman*, 183 Ill. 2d at 393.

¶ 28 Similarly, the State may not knowingly use, or permit to go uncorrected, perjured testimony bearing on facts concerning the credibility of a witness. *People v. Nino*, 279 Ill. App. 3d 1027, 1036 (1996). This strict standard of materiality also applies where a *Brady* claim is

based on both perjured testimony and the failure to disclose evidence. *People v. Harris*, 206 Ill. 2d 1, 51 (2002).

¶ 29 Notably, the standard for successive petitions of "cause and prejudice" parallels several of the components of the alleged *Brady* violation itself. See *Banks v. Dretke*, 540 U.S. 668, 69 (2004). For example, if evidence is suppressed by the State, a defendant might show "cause" when the reason for his failure to develop the claim was indeed the State's suppression of the evidence supporting that claim. See *id*. Likewise, a defendant might show "prejudice" for successive petition purposes where the suppressed evidence is "material" under *Brady*. See *id*. Thus, if defendant in this case were to succeed in establishing "cause and prejudice," he might succeed in establishing a *Brady* claim.

¶ 30 Having now reviewed the pleadings and documents submitted in support of defendant's postconviction petition, we conclude he has established neither cause nor prejudice to justify further proceedings, and he therefore has not established a *Brady* claim.

¶ 31 In reaching this conclusion, we first address the State's motion to strike certain portions of the supplemental record, upon which defendant relies, because the documents were not actually attached to defendant's postconviction petition. Those documents include a writ, dated January 29, 1999, calling McCarty to court "to attend and testify" in defendant's case ("96 CR 30301") on February 5, 1999, and "from day to day thereafter until completion of the trial before the Honorable Judge Moran." On February 5, 1999, McCarty also appeared in court before Judge Moran on her own case (97 CR 12570 & 97 CR 13409) and obtained a reduction in her guilty plea sentence from six to three years. Defendant argues the confluence of events supports his contention that there was a plea deal.

¶ 32 The documents defendant now cites also include his second *pro se* successive postconviction petition, but without the full record relating to that petition. Defendant's second successive petition was filed on January 19, 2012, months after the present petition was denied, and the appeal is apparently now pending before this court (No. 1-12-1781), but has not yet been fully briefed. The petitions were neither consolidated in the circuit court, nor before this court. In his second successive petition, defendant raises a claim of actual innocence and has attached the affidavit of Owens (dated September 8, 2011), wherein she states she provided false testimony at defendant's trial. In particular, Owens states the police officers, who visited her while she was still in the hospital, essentially told her to identify defendant, and she later testified to "what the State's Attorney needed" her "to say." Defendant utilizes the second successive petition to further buttress his present postconviction claims, specifically as they relate to prejudice.

¶ 33 The State argues it is improper to rely on documents that were never presented to the circuit court, while defendant counters that the documents are public records, of which we make take judicial notice. *People v. Alvarez-Garcia*, 395 Ill. App. 3d 719, 726 (2009) (noting this court may take judicial notice of matters that are readily verifiable from sources of indisputable accuracy). While we deny the State's motion to strike due to the public nature of the documents in the supplemental record, we nonetheless agree that it would be improper practice to consider these documents or the additional documents not attached to defendant's postconviction petition.

¶ 34 The purpose of appellate review is to evaluate the record presented in the trial court, and review must be confined to what appears in the record. *People v. Canulli*, 341 Ill. App. 3d 361, 367-68 (2003). Matters not properly in the record or presented to the trial court will not be considered on review. *Jenkins v. Wu*, 102 Ill. 2d 468, 483-484 (1984); see also *Alvarez-Garcia*,

395 Ill. App. 3d at 726 (citing *Jenkins* and noting same; the rules do not permit evidence or documents not considered by the trial court to be included in the record on appeal). In this case, defendant could have supplemented his petition with these documents below. To allow him to do so now is contrary to both appellate practice and the spirit and purpose of the Act, which requires that a petition have attached thereto "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2008); see *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010) (to meet the cause and prejudice test, a defendant must "submit enough in the way of documentation to allow a circuit court to make that determination."); *Edwards*, 2012 IL 111711, ¶ 24 (same); see also *People v. Delton*, 227 Ill. 2d 247, 255 (2008) (failure to attach affidavits, records, or other evidence or explain their absence is "fatal" to a postconviction petition). Permitting this practice would be akin to considering arguments not actually set forth in the petition, which the supreme court has explicitly held the appellate courts cannot do. See *People v. Jones*, 213 Ill. 2d 498, 508-09 (2004). In addition, this practice would place an undue burden on appellate counsel to secure documents that either the defendant or his postconviction counsel did not obtain in support of the petition. As a result, we will not consider the supplementary documents, nor will we consider defendant's second successive postconviction petition, as support for the present petition.

¶ 35 We further note that regardless of whether we consider the attached documents relating to McCarty's plea, defendant's *Brady* claim must fail because he cannot establish the requisite cause or prejudice, which is a standard never once explicitly mentioned in his postconviction petition.

¶ 36 As stated, cause is established by identifying an objective factor that impeded defendant's ability to raise a specific claim during his initial postconviction proceedings. 725 ILCS 5/122-1(f) (West 2008). A ruling on an initial postconviction petition has *res judicata* effect with

regard to all claims that were raised or could have been raised in the initial petition. *Guerrero*, 2012 IL 112020, ¶ 17. The only "cause" defendant alleges in his postconviction petition is that he "recently learned" of the alleged plea deal. In his appeal, defendant argues he neglected bringing his *Brady* claim earlier because "the State failed to disclose the agreement it had with Doris McCarty." At best, defendant has presented circumstantial evidence of a possible deal between the State and McCarty. That is, the State's failure to object to her sentence reduction obtained through her attorney months after her initial guilty plea, could be construed as an implicit agreement benefiting McCarty for her testimony in defendant's case. Regarding McCarty's alleged plea deal on February 5, 1999, the parties essentially appear to have revested the trial court with jurisdiction, which normally ends after 30 days, in order to reduce McCarty's sentence. See *People v. Bailey*, 2014 IL 115459, ¶ 25. Nonetheless, we would be hard-pressed to accept that it was the State's failure to disclose this implicit agreement as constituting "cause" or an objective factor external to the defense impeding defendant from raising the claim earlier. Procedural default jurisprudence concentrates on a defendant's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time. *McCleskey v. Zant*, 499 U.S. 467, 490 (1991). Here, the documents supporting defendant's *Brady* claim were public documents, which he or another could have obtained when he filed his initial postconviction petition. Indeed, the theory that there was an implicit deal between McCarty and the State was apparent as early as trial, where McCarty revealed that her sentence had been reduced by half only 10 months before, that she was relocated at the State's expense two times between the 1996 offenses and the 1999 trial, and that there was some question regarding threats against her or a bribery attempt on her. See *McCleskey*, 499 U.S. at 498, 500 ("Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the

claim."); *People v. Jones*, 2013 IL App (1 st) 113263, ¶ 25 (merely failing to recognize your claim cannot be an objective factor external to the defense that prevents one from bringing the claim in the initial posconviction petition); *cf. People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002) ("cause" may be shown where "the factual or legal basis for a claim was not reasonably available to counsel"). Thus, McCarty had clearly obtained some benefits from the State when she testified at trial. Defendant has not persuaded us that his claimed ignorance of the trial facts or the legal claim arising from those facts is sufficient to establish cause in this case. *Cf. Evans*, 2013 IL 113471, ¶ 13 (the defendant's "subjective ignorance" of his MSR term could not be an objective factor impeding the defendant's ability to raise the claim sooner, as all citizens are charged with knowledge of the law).

¶ 37 Anticipating this analysis, defendant now cites codefendant Daniels's case in support of his argument for "cause." See *Daniels*, 2012 IL App (1st) 093581. As stated, codefendant Daniels raised a similar claim in his postconviction petition, arguing the State and McCarty had an agreement in violation of *Brady*. Daniels, however, raised his claim in his initial postconviction petition, which was untimely, and argued he was not culpably negligent for failing to raise the *Brady* claim earlier because his postconviction counsel had just discovered the documents to support it. We credited this explanation as satisfying the culpable negligence test, as it was reason for Daniels' "unintentional yet negligent conduct" for failing to raise the *Brady* claim earlier. This case is distinguishable in several respects. Here, defendant's petition is successive, reaching this court at a different procedural stage, and he therefore must meet the more exacting standard of establishing "cause and prejudice." Moreover, as stated, in his petition he has offered scant explanation for his failure to raise the claim in his initial postconviction petition, which was itself untimely.

¶ 38 Nonetheless, let us assume defendant credited McCarty's trial statement that there was no deal in exchange for her testimony, and so he had no reason to seek out the documents or raise the *Brady* claim earlier. See *Banks*, 540 U.S. at 695 (defendants need not scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed). We might also assume defendant lacked the resources to actually obtain the public documents supporting the *Brady* claim. Still, our judgment would not change because defendant also has failed to establish prejudice.

¶ 39 That is, considering the total evidence (see *Beaman*, 229 Ill. 2d at 74), defendant has failed to establish the alleged deal was a material factor in his conviction. Defendant cites a number of cases finding a *Brady* violation where there was an undisclosed deal or uncorrected testimony relating to a deal, about which the jury was unaware. See, *e.g.*, *People v. Jimerson*, 166 Ill. 2d 211, 223 (1995). This bench trial case is distinguishable. If the State made an implicit deal with McCarty, then the trial court *knew* about this implicit deal. See *People v. Thurman*, 337 Ill. App. 3d 1029, 1032 (2003). Judge Moran presided over McCarty's multiple theft cases, including the sentence reduction hearing (for 97 CR 12570 & 97 CR 13409) and also defendant's bench trial. The court then had to know that the parties had some sort of implicit understanding, even if it was not a typical plea deal governed by Rule 402 (eff. July 1, 2012). Moreover, again, McCarty's trial testimony made clear that she ultimately benefitted from cooperating with authorities. Yet, even this information did not dissuade the trial court from finding McCarty credible in her identification of defendant as the perpetrator of the crime. Nor did McCarty's multiple convictions, aliases, drug addiction, or two-time relocations by the State. In short, the implicit plea deal defendant now complains of as "hidden" was essentially before the court, McCarty was thoroughly impeached, and the court had adequate information before it

to assess McCarty's credibility. See *People v. Williams*, 332 Ill. App. 3d 254, 263 (2002) (where State witness denied testimony was in exchange for his sentence reduction, any possible deal was before the jury, the jury was able to assess the witness's credibility, and uncorrected false testimony did not contribute to verdict). We do not believe McCarty's misstatement, if we can even call is a misstatement, affected the verdict under *Brady*, notwithstanding the State's failure to correct the allegedly false statement and to clarify that an implicit deal existed. See *People v. Hansen*, 352 Ill. App. 3d 40, 52 (2004); *Thurman*, 337 Ill. App. 3d at 1032.

¶ 40 In any event, it is significant that McCarty identified defendant mere days after the murders and cooperated with police. Detective Cornelius Longstreet testified at trial that on October 26, 1996, McCarty identified defendant from a photo array and, shortly thereafter, identified defendant as "Dirt" in a physical lineup. She stated he was "one of the subjects who accosted her outside of that residence and had her yell upstairs to get the door open." See *Thurman*, 337 Ill. App. 3d at 1033. McCarty went on to testify at the grand jury hearing on November 7, 1996, before her alleged plea deal. The information she provided against defendant well before her sentence reduction was consistent with her trial testimony. This evidence also supports McCarty's statement at trial that she did not testify in exchange for her sentence reduction, as does the fact that she committed several of the crimes *after* the murders at issue, notwithstanding any implicit deal on the State's side. Clearly, leniency from the State was not the key motivator for McCarty's behavior, and her testimony likewise did not depend on leniency from the State. See *Thurman*, 337 Ill. App. 3d at 1033.

¶ 41 To counter this conclusion, in his reply brief, defendant again points to printouts from the clerk of the circuit court, which is evidence not originally appended to his postconviction petition. These printouts show that a charge against McCarty for theft in case 96114300201 was

nolle prossed on October 25, 1996, just after she spoke with police regarding the murders. Defendant argues these documents show McCarty had motives to lie from the beginning of the police investigation and that she was benefiting from her involvement in the case early on. We have already determined it is improper for this court to consider arguments not properly set forth in a defendant's postconviction petition and documents not properly attached for review by the circuit court. Apart from this, we find defendant's argument wholly speculative and contradicted by the supplemental record, which contains the October 25 hearing before Judge Walter Williams, and reveals the State decided to *nolle pros* the case after the complaining witness did not appear in court, and the court denied the State's request for a continuance.

¶ 42 In addition to McCarty's consistent identification of defendant, McCarty's testimony was corroborated by both Yancy and Owens. Like McCarty, Yancy testified that McCarty yelled up to his apartment. When he opened the apartment door, he saw McCarty only momentarily before a gun was thrust in his face, and he was forced upstairs by several men. Owens likewise heard McCarty yell up to Yancy immediately before the home invasion by three men. Owens also identified defendant and testified he was one of the intruders with a gun. Like McCarty, she knew defendant from the neighborhood. While Harris did not actually see the events that unfolded, she corroborated that a woman called up for Yancy from downstairs, and there were footsteps up and down the stairs before she entered the rooms to observe the carnage.

¶ 43 For the foregoing reasons, defendant cannot establish prejudice under *Brady* because the evidence of the alleged plea deal between the State and McCarty was not material. As stated, there is no showing that the evidence was *not disclosed*, where the basis for the implicit plea deal appears in defendant's trial record and that of McCarty. Even if the alleged deal had not been disclosed and even if false testimony went uncorrected, there is not a reasonable probability the

outcome of the proceeding would have been different. See *Thurman*, 337 Ill. App. 3d at 1033-34; c*f. Smith v. Cain*, 565 U.S. __, __, 132 S. Ct. 627, 631. We do not believe the impeachment evidence places the whole case in such a different light as to undermine confidence in the verdict. *Strickler*, 527 U.S. at 289-90. Because defendant cannot establish prejudice under *Brady*, he cannot establish prejudice under the Act.

¶ 44 The trial court rightly denied defendant leave to file his successive postconviction petition for having failed to establish, let alone expressly allege, cause and prejudice.

¶ 45 Defendant next contends his postconviction counsel violated her duties under Rule 651(c) because she did not amend his petition to include "available facts" demonstrating cause and prejudice and to overcome *res judicata*. Here, the trial court, in error, docketed defendant's successive petition before first determining whether defendant had overcome the procedural hurdle of establishing cause and prejudice to justify further proceedings. The trial court also, in error, permitted the State to engage by filing a motion to dismiss. Because defendant never overcame the procedural hurdle of establishing cause and prejudice, however, he was not entitled to have his petition docketed or to the appointment of counsel. See *Smith*, 2014 IL 115946, ¶ 29, 33 (noting that further proceedings may follow on successive postconviction petitions, but the petitioner first must obtain leave of court by demonstrating cause and prejudice); see also *Wrice*, 2012 IL 111860, ¶ 87 (remanding the petitioner's successive postconviction petition for second-stage proceedings and the appointment of counsel after the petitioner satisfied the cause-and-prejudice test).

¶ 46 Regardless, even if defendant were entitled to postconviction counsel, an indigent defendant has a statutory right to only reasonable assistance of counsel during second-stage proceedings under the Act. 725 ILCS 5/122-4 (West 2008); *People v. Perkins*, 229 Ill. 2d 34, 42

(2007). Moreover, the filing of a Rule 651(c) certificate gives rise to a presumption that postconviction counsel provided reasonable assistance during second-stage proceedings under the Act. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Defendant bears the burden of overcoming that presumption by showing counsel failed to substantially comply with 651(c) duties. *Id*.

¶ 47 Here, postconviction counsel filed a Rule 651(c) certificate attesting that she had fully reviewed defendant's petition, sought to ascertain his constitutional claims of deprivation, and made any amendments necessary. She confirmed this representation orally before the court, stating she had reviewed defendant's petition, codefendants' petitions, and defendant's trial file. In addition, counsel stated she had spoken to defendant and written to him on several occasions. Counsel represented that defendant had stated his petition was late due to several prison lockdowns and slow communications with his codefendants. The record indicates she also subpoenaed defendant's prison records. Although counsel previously stated she would file a supplemental petition, she was not required to amend defendant's petition, especially where such amendments would only further a nonmeritorious claim. See *People v. Turner*, 187 Ill. 2d 406, 412 (1999); *People v. Profit*, 2012 IL App (1st) 101307, ¶ 23. Given defendant's postconviction contentions, the Rule 651(c) certificate and counsel's oral representations, we can only presume that were defendant able to establish cause and prejudice, counsel would have amended to the petition to reflect that. *Perkins*, 229 Ill. 2d at 51-52. In other words, the record does not demonstrate that defendant could have overcome the procedural hurdle of cause and prejudice or succeeded on his substantive claim. The record therefore does not rebut postconviction counsel's 651(c).

representations. Defendant has not met his burden of establishing counsel provided unreasonable assistance, even assuming he was entitled to such assistance.

¶ 48 Defendant lastly asserts, and the State concedes, that we must correct the mittimus to show he was convicted of a single count of home invasion. The parties correctly observe that defendant was found guilty of two counts of home invasion but that both counts were based on a single entry, which can support only one conviction. See *People v. Cole*, 172 Ill. 2d 85, 102 (1996) (holding that a single entry can support only a single conviction for home invasion, regardless of the quantity of occupants); see also *People v. McCurry*, 2011 IL App (1st) 093411 ¶ 9 (ordering the mittimus to be corrected to reflect convictions comporting with the one-act, one-crime doctrine). This court has the authority to correct the mittimus at any time, even when affirming denial of leave to file a successive postconviction petition. See *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008); see *People v. Petero*, 384 Ill. App. 3d 594, 600–601 (2008). Accordingly, we order the mittimus to be corrected to reflect one conviction for home invasion.

¶ 49 CONCLUSION

¶ 50 We affirm the trial court's denial of leave to file defendant's successive postconviction petition for his failure to establish cause and prejudice.

¶ 51 Affirmed; mittimus corrected.