

stabbed Joseph Cummings with a knife knowing such act created a strong probability of death and thereby caused the death of Cummings. Following a September 2000 jury trial, defendant was convicted of first degree murder. In November 2000, the trial court sentenced him to 30 years' imprisonment. Defendant thereafter filed a direct appeal, and this court affirmed. See *People v. Green*, No. 4-01-0090 (Nov. 27, 2002) (unpublished order under Supreme Court Rule 23). The facts relevant for a proper disposition of defendant's section 2-1401 petition are as follows.

¶ 5 A. Evidence Presented at Trial

¶ 6 In the early morning hours of February 18, 2000, defendant, Cummings, Charles Knight, and LaShawna Tucker (Shawnee) were at Brooke Owens' apartment on Canedy Street in Springfield, Illinois. Knight testified, prior to the incident, he had been visiting friends, when a woman he knew as LaShawna Pierce (Shawnee) approached him to ask for a ride to Canedy Street to find her boyfriend. Around 2 or 3 a.m., Knight and Shawnee entered Owens' apartment through a door off the kitchen. While inside, Knight observed Cummings on the couch. He explained Cummings seemed agitated defendant was there. Knight testified, as Cummings sat up from the couch and stood in the "entrance out of the kitchen into the living room area," defendant approached Cummings. Knight testified Cummings was angry at defendant and "his temper was raised a bit." Knight saw the two men "tussling," but he did not see who struck the first blow. Cummings then pushed defendant into the kitchen, and Knight immediately left the apartment with Shawnee. He testified he never saw anyone with a knife and did not see Cummings get stabbed.

¶ 7 Owens testified he was letting Cummings stay at his apartment on February 18, 2000. He explained defendant had come over that morning, and Cummings, who had been

asleep on the couch when defendant arrived, got mad and started yelling about defendant's "stuff" being in the apartment. Cummings told defendant he did not want him in the apartment anymore. At one point, Cummings came into the kitchen and started "provoking" defendant, who was smoking crack cocaine. Owens testified he did not see defendant or Cummings with a knife, but he saw Cummings bleeding and heard defendant say, "do you want me to deaden you, do you?" Owens then called 9-1-1 at Shawnee's direction.

¶ 8 Defendant testified on his own behalf. He explained, at around 2:45 a.m. on February 18, 2000, he went to Owens' apartment to spend the night because Owens' apartment was right across the street from his workplace. When he arrived, he heard Cummings say, "I don't want you here." Later, a man defendant did not know (Knight) and Shawnee showed up at the apartment looking for a friend who lived in the same apartment complex. Defendant showed Shawnee where the person lived, and they all went back into Owens' apartment to "socializ[e] with some crack."

¶ 9 Defendant testified, while they were sitting in the kitchen, Cummings got up from the couch, put on his shoes, and walked toward the kitchen in an "aggressive" manner. Defendant explained he was afraid of Cummings, who was a large man and who had a reputation as being violent and quick to lose his temper. Once in the kitchen, Cummings hit defendant in the mouth with his hand and said, "I told your mother [f*** a***] to leave." Cummings hit defendant a few more times, and defendant noticed Cummings had a knife in his hand. Defendant tried to get the knife out of Cummings' hand but was unsuccessful. Defendant then grabbed Cummings, pulling off his necklace, and both men fell to the floor. When defendant tried to push Cummings off him, he noticed Cummings was bleeding at the neck. Defendant realized he had stabbed Cummings and immediately began applying pressure to the wound and

administering first aid until the police arrived. Once the police were on the scene, defendant told them he had no recollection of stabbing Cummings and did not intend to do so.

¶ 10 Following presentation of the evidence, the jury was given instructions on first degree murder, second degree murder, involuntary manslaughter, and self-defense. The jury thereafter returned a verdict finding defendant guilty of first degree murder.

¶ 11 B. "Shawnee"

¶ 12 Prior to trial, the State submitted its witness list, which included one "LaShawna Williams" and one "Lachion R. Pierce." Defendant's list of witnesses included one "LaShaunda Williams" residing at 401 North Milton #3 in Springfield, Illinois. On September 11, 2000, the State informed the trial court two women on its witness list—LaShawna Williams and Lachion Pierce—were the same person, but people refer to her by both names. The State explained, "She was served in Oakford on Friday, Judge, I don't know if she will appear or if we will be asking for a body attachment for her." Defense counsel then stated the defense "may" call her as a witness. The record shows one "LaShawna Williams Tucker" served on September 8, 2000. The summons was filed with the circuit clerk on September 15, 2000, one day after defendant's jury trial. All of the names listed above refer to Shawnee, who was present at Owens' apartment at the time of the February 18, 2000, incident.

¶ 13 C. Posttrial Proceedings

¶ 14 In July 2003, defendant filed a lengthy *pro se* postconviction petition and was appointed counsel. In a letter dated June 14, 2005, and filed on June 15, 2005, defendant wrote to the trial judge stating he had obtained a background check on Shawnee, knew through a family friend she had moved to Chicago, and identified her by several aliases, including "Lashaundra Tucker." In the letter, defendant indicated the State served a subpoena on Shawnee

prior to trial, but the subpoena was not filed with the circuit clerk until after the jury found him guilty.

¶ 15 On April 4, 2006, defendant filed a *pro se* supplemental petition for postconviction relief, alleging the State misled the defense about the whereabouts of Shawnee. In May 2007, defendant's postconviction counsel filed an amended postconviction petition, incorporating by reference all previous pleadings, including defendant's *pro se* allegation concerning Shawnee. As of the filing of the notice of appeal in this case, proceedings on defendant's postconviction petition were still ongoing and are not the subject of this appeal.

¶ 16 On February 3, 2009, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(e) (West 2008)). In the petition, defendant alleged the prosecution deprived him of his constitutional right to due process and a fair trial, his right to compulsory process to obtain witnesses in his favor, and violated the rules of discovery by fraudulently concealing the identity and whereabouts of a material witness, *i.e.*, Shawnee.

¶ 17 Defendant alleged he was unable to locate Shawnee prior to trial. Then, in January 2006, he purchased a certified copy of the court docket sheet, where he found an entry entitled "People's Subpoena served September 8, 2000. Served on 'Lashawna Tucker.' " He claimed this name was never turned over to the defense in discovery, nor was the trial court ever notified of the name. He claims the State misled both the court and the defense because it only mentioned Shawnee by her aliases, LaShawna Williams and Lachion Pierce, and the return receipt from the subpoena was not filed with the circuit clerk's office until September 15, 2000—the day after he was found guilty of first degree murder.

¶ 18 Defendant's petition alleged, had Shawnee's real identity and location been turned over to the defense, he could have located her to testify, and her testimony would have supported his theory of self-defense because she would have contradicted Knight's testimony defendant was the initial aggressor.

¶ 19 Attached to defendant's petition was a copy of the filed subpoena and Shawnee's February 22, 2000, statement to the police. In the statement, which she signed as "Lachion Pierce," Shawnee stated:

"At about 3:00 a.m. Charles and I drove to 206 West Canedy and got out of the car. I saw Joseph Cummings and Lawrence arguing at the apartment door of apartment #19, they then entered the apartment. I went into the kitchen of apartment #19 and inside was Brooke Owens, Joe Cummings, Lawrence, Charles, and I. Lawrence and Cummings were still yelling back and forth. I seen Lawrence and Cummings wrestling in the kitchen and the next thing I saw was blood flying all around the kitchen. I did not see who had a knife or who stabbed who. Lawrence was holding Cummings['] neck, I think to stop the bleeding. Charles and I took off in Charles['] car."

¶ 20 On February 26, 2009, the State filed a motion to dismiss defendant's section 2-1401 petition. The State alleged defendant's petition was untimely, as it was filed more than eight years after his conviction. It argued, even if defendant could reasonably allege his grounds for relief were somehow "fraudulently concealed," he only had two years from the date he learned of the fraudulent concealment to file his petition, which he did not do.

¶ 21 On March 11, 2009, following a hearing, the trial court denied the State's motion to dismiss, finding defendant's petition was timely.

¶ 22 On April 9, 2009, the State filed its answer to defendant's section 2-1401 petition, denying defendant's allegation of fraudulent concealment and maintaining Shawnee's testimony would not have furthered his defense.

¶ 23 On May 2, 2013, defendant filed a motion for summary judgment on his section 2-1401 petition. Defendant's motion alleged he had served interrogatories on both prosecutors involved in his case concerning the concealment of Shawnee's identity and location. From the interrogatories, he learned the State had conducted a background check on Shawnee. His motion for summary judgment maintained the facts alleged in his petition showed the State concealed Shawnee's identity in order to advance the false testimony of Knight, and judgment should be granted in his favor as a matter of law.

¶ 24 On July 30, 2013, the State filed a cross-motion for summary judgment alleging, even if Shawnee had testified at trial to what she told the police, defendant would still have been convicted of first degree murder because Shawnee's testimony could not plausibly have helped his case.

¶ 25 On October 18, 2013, the trial court held a hearing on the parties' cross-motions for summary judgment. Defendant was present and argued his motion telephonically. Following the hearing, the trial court took the matter under advisement, and on December 4, 2013, it entered an order granting the State's motion for summary judgment and denying defendant's motion for summary judgment. The court found no genuine issue of material fact supported defendant's contention the State fraudulently concealed Shawnee's identity or the result of his jury trial would have been different had Shawnee testified.

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, defendant argues his section 2-1401 petition presented a substantial question of material fact deserving of an evidentiary hearing rather than the grant of summary judgment in the State's favor. He maintains whether the misinformation as to Shawnee was the result of fraudulent concealment by the State, or whether the defense could have been more diligent in locating her, can only be determined after an evidentiary hearing.

¶ 29 The State argues the trial court's grant of summary judgment in its favor was proper because the case presents no genuine issues of material fact and defendant's section 2-1401 petition failed to show the prosecution fraudulently concealed Shawnee's identity and whereabouts. In the alternative, the State argues (1) defendant failed to show due diligence in both ascertaining his rights and acting upon them; (2) all of the evidence defendant relies upon in his petition was known before the court's entry of judgment; and (3) Shawnee's statement would have been of no value to defendant's claim of self-defense. For the following reasons, we agree with the State.

¶ 30 A. Standard of Review

¶ 31 This case is before us following the trial court's grant of summary judgment. Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. A triable issue precluding summary judgment exists where the

material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). We review a trial court's grant of summary judgment *de novo*. *Essig v. Advocate BroMenn Medical Center*, 2015 IL App (4th) 140546, ¶ 39, 33 N.E.3d 288.

¶ 32 B. Defendant's Section 2-1401 Petition

¶ 33 Section 2-1401 of the Code allows for relief from final judgments more than 30 days after their entry. 735 ILCS 5/2-1401(a) (West 2008). Although a petition brought pursuant to section 2-1401 is usually characterized as a civil remedy, its remedial powers extend to criminal cases. *People v. Vincent*, 226 Ill. 2d 1, 8, 871 N.E.2d 17, 22-23 (2007). "Relief under section 2-1401 is predicated upon proof, by a preponderance of [the] evidence, or a defense of claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Id.* at 7-8, 871 N.E.2d at 22. To be entitled to relief under section 2-1401, the petitioner must set forth specific factual allegations supporting each of the following elements: "(1) the existence of a meritorious claim or defense; (2) due diligence in presenting the claim or defense to the trial court ***; and (3) due diligence in filing the section 2-1401 petition." *People v. Bramlett*, 347 Ill. App. 3d 468, 473, 806 N.E.2d 1251, 1255 (2004) (quoting *In re Estate of Barth*, 339 Ill. App. 3d 651, 662, 792 N.E.2d 315, 324 (2003)).

¶ 34 1. *Timeliness of Defendant's Petition*

¶ 35 A section 2-1401 petition must be filed within two years after the entry of the judgment being challenged, and a petition filed beyond this two-year limitation will normally not be considered. 735 ILCS 5/2-1401(c) (West 2008); *People v. Caballero*, 179 Ill. 2d 205, 210, 688 N.E.2d 658, 660 (1997). Pursuant to the statute, "Time during which *** the ground for

relief is fraudulently concealed shall be excluded in computing the period of 2 years." 735 ILCS 5/2-1401(c) (West 2008).

¶ 36 To make a successful showing of fraudulent concealment for purposes of section 2-1401, the defendant must " 'allege facts demonstrating that his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief and must offer factual allegations demonstrating his good faith and reasonable diligence in trying to uncover such matters before trial or within the limitations period.' " *People v. Coleman*, 206 Ill. 2d 261, 290, 794 N.E.2d 275, 293 (2002) (quoting *People v. McLaughlin*, 324 Ill. App. 3d 909, 918, 755 N.E.2d 82, 89 (2001)). "It is well established that fraudulent concealment sufficient to toll the two-year statute of limitations period of the statute requires 'affirmative acts or representations designed to prevent discovery of the cause of action or ground for relief.' " *Id.* at 290-91, 794 N.E.2d at 293 (quoting *Crowell v. Bilandic*, 81 Ill. 2d 422, 428, 411 N.E.2d 16, 18 (1980)).

¶ 37 On appeal, defendant argues the case presents an issue of material fact regarding whether the State fraudulently concealed Shawnee's identity and whereabouts that can only be determined following an evidentiary hearing. In support of this contention, defendant cites *Smith v. National Carriers, Inc.*, 188 Ill. App. 3d 119, 544 N.E.2d 20 (1989). In *Smith*, the plaintiffs, Byrle and Lorraine Smith, brought an action against National Carriers, Inc., seeking damages for injuries sustained when their car was struck by a National Carriers truck. At the time of trial, the defense had listed an "A. Eggers" as a witness in discovery, but the plaintiffs were unable to locate him to testify on their behalf. The case was tried before a jury, which returned verdicts for the defendant on all counts. Approximately two years later, the plaintiffs filed a section 2-1401 petition for postjudgment relief, alleging they had located the eyewitness, "Acie Eggerson." The petition maintained Eggerson's proposed testimony substantially supported their version of the

accident. Attached to the petition was an affidavit from Eggerson, stating the driver of the truck, a National Carriers employee, had given him an accident form, which he filled out, indicating his full name, address, and other information. *Smith*, 188 Ill. App. 3d at 121, 544 N.E.2d at 21-22.

¶ 38 The defendant filed a motion to strike and dismiss, alleging, *inter alia*, the plaintiffs' petition failed to set forth any facts demonstrating due diligence in filing their petition and failed to show how the new evidence was so decisive it could have prevented judgment against them. The trial court struck the petition, finding while the petition clearly demonstrated due diligence, the plaintiffs could not possibly show Eggerson's testimony could have prevented judgment against them. *Smith*, 188 Ill. App. 3d at 122, 544 N.E.2d at 22.

¶ 39 The appellate court reversed, noting the motion to strike addressed only the legal sufficiency of the petition, and the plaintiffs had successfully stated a cause of action. In doing so, the court noted the questions of whether the misinformation about Eggerson's name was the result of fraudulent concealment by the defendant and, if not, how the mistake bore on the issue of diligence must be resolved by the trial court before it could properly determine whether diligence was shown. *Smith*, 188 Ill. App. 3d at 124-25, 544 N.E.2d at 24. Defendant maintains the same result is warranted in this case. We disagree.

¶ 40 In *Smith*, the plaintiffs' petition was dismissed on the pleadings before the defendant ever had a chance to respond to the plaintiffs' allegations. In remanding to the trial court for further proceedings, the appellate court specifically noted an evidentiary hearing was warranted only if the defendant's answer controverted central facts of the plaintiffs' petition. Here, the State was given the opportunity to respond to defendant's petition, both parties filed cross-motions for summary judgment, inviting the court to decide the issues as questions of law

(*Stevens v. McGuirewoods LLP*, 2015 IL 118652, ¶ 11, ___ N.E.3d ___), and the trial court decided the petition. This was the appropriate course of action.

¶ 41 Turning to the merits of defendant's petition, the first issue before us is defendant's allegation of fraudulent concealment. We need not determine whether the State's actions with regard to Shawnee's identity and whereabouts amounted to fraudulent concealment because, even if they did, the two-year statute of limitations provided in section 2-1401 is only tolled during the time in which the grounds for relief were fraudulently concealed. See 735 ILCS 5/2-1401(c) (West 2008). Defendant's claim of fraudulent concealment rests entirely on statements the prosecutor made on the record on September 11, 2000, and the State's withholding of a subpoena prior to trial, which was then filed with the circuit clerk on September 15, 2000. In other words, the information defendant is now alleging was fraudulently concealed by the State has been a matter of public record since September 2000.

¶ 42 Defendant fails to point to any affirmative act or representation on the part of the State that prevented him from discovering the information contained in the subpoena after it was filed. Rather, defendant simply asserts he first learned Shawnee's real name was LaShawna Tucker and she was in Rockford, not Oakford, at the time of the trial after he filed an informational request in January 2006. Thus, because defendant's section 2-1401 petition was filed more than eight years after the State's subpoena was entered into the record, defendant's petition was untimely, and the trial need not have considered it. See 735 ILCS 5/2-1401(c) (West 2008).

¶ 43 Even if the two-year statute of limitations began running at the time defendant first learned of the State's filing of its subpoena on Shawnee, his February 3, 2009, petition was still untimely filed. Although defendant claims he first learned Shawnee's last name and

whereabouts in January 2006, this assertion is contradicted by the record. In a letter to the trial judge dated June 14, 2005, defendant referred to Shawnee as "Lashaundra Tucker" and explained he knew she was living in Chicago and the subpoena filed by the State in his case had not been filed with the circuit clerk until after he was convicted. Thus, although the trial court did not dismiss defendant's petition on the basis of untimeliness, we find no error in the trial court's grant of summary judgment in favor of the State. See *Caballero*, 179 Ill. 2d at 211, 688 N.E.2d at 661 ("[W]e may affirm for any reason warranted by the record, regardless of the reasons relied on by the lower court.").

¶ 44 *2. The Effect of Shawnee's Purported Testimony*

¶ 45 If we were to excuse the untimeliness of the defendant's petition, we would still find the trial court was correct in granting the State's motion for summary judgment. As mentioned above, section 2-1401 requires specific factual allegations showing " '(1) the existence of a meritorious claim or defense; (2) due diligence in presenting the claim or defense to the trial court in the original action; and (3) due diligence in filing the section 2-1401 petition.' " See *Bramlett*, 347 Ill. App. 3d at 473, 806 N.E.2d at 1255 (quoting *In re Estate of Barth*, 339 Ill. App. 3d at 662, 792 N.E.2d at 324).

¶ 46 Defendant failed to set forth specific factual allegations showing the result of his jury trial would have been different had Shawnee testified. Defendant was unable to secure an affidavit from Shawnee regarding what she would testify to. Instead, he attached a copy of the written statement she gave the police directly following the incident. Defendant claims this statement would have gone far to support his theory of self-defense because it contradicts Knight's statement defendant had advanced on Cummings while Cummings was standing in the living room. We disagree Shawnee's statement would have had such an effect.

