

FOURTH DIVISION
March 9, 2017

No. 1-14-3454

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. 94 CR 22236
)	
JAMES STUCKEY,)	Honorable
)	Timothy Joseph Joyce,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the trial court's judgment denying defendant's petition for leave to file a successive postconviction petition; defendant failed to show cause for failing to bring the specific claim in the petition in his initial postconviction petition and failed to show prejudice from the alleged error; therefore, defendant cannot satisfy the cause-and-prejudice test as required before leave to file a successive postconviction petition will be granted.

¶ 2 Defendant, James Stuckey, is imprisoned on convictions for attempt murder and aggravated criminal sexual assault. A Vitullo kit¹ was performed on the victim but never tested. The Vitullo kit was discarded prior to defendant's trial. Police began looking for defendant the day after the attack on the victim. However, the trial was delayed for eight years due in part to defendant's flight to Atlanta, Georgia after the crime occurred and because he assumed a different name. This court affirmed defendant's convictions and sentence on direct appeal. In February 1997 defendant filed a postconviction petition alleging, *inter alia*, he was denied due process when the State lost the Vitullo kit. The trial court granted the State's motion to dismiss the postconviction petition and defendant appealed, but he did not raise the issue of the lost Vitullo kit on appeal. In June 2003 this court affirmed the dismissal of defendant's first postconviction petition.

¶ 3 In August 2008 defendant filed a successive postconviction petition alleging, *inter alia*, that the loss of the Vitullo kit violated his right to due process. The trial court denied defendant leave to file a successive postconviction petition, and in March 2010 this court affirmed the trial court's judgment. In June 2010 defendant filed a motion for forensic testing. Initially, defendant's motion asked for testing of the Vitullo kit; later, defendant filed amended motions also seeking forensic testing of the victim's clothing. In the course of proceedings on the motion, the State informed defendant the Vitullo kit had been discarded. The State provided defendant with a document from the Chicago Police Department stating that the Vitullo kit and extracts had been destroyed. In November 2013 this court affirmed the trial court's judgment denying defendant's motion for forensic testing of the victim's clothing.

¹A Vitullo kit consists of materials used to gather and preserve physical evidence from the person of the victim in sexual assault investigations, which includes samples taken from the victim's vagina. See *People v. Hall*, 192 Ill. App. 3d 819, 823 (1989).

¶ 4 In June 2014, defendant filed a motion for leave to file a successive postconviction petition that is the subject of this appeal. The petition filed with defendant's June 2014 motion alleged the State violated defendant's right to due process when it intentionally destroyed the Vitullo kit prior to trial, defendant had cause for failing to bring this claim sooner because he did not learn until February 2012 that the Vitullo kit had been destroyed, and he was prejudiced because he was deprived access to potentially exculpatory evidence. In October 2014 the trial court denied defendant's June 2014 motion.

¶ 5 For the following reasons, we affirm.

¶ 6 **BACKGROUND**

¶ 7 The circuit court of Cook County convicted defendant of the 1986 attempt murder and aggravated criminal sexual assault of a minor, 14-year-old T.S. In several prior appeals this court has set forth the facts of the offense in varying degree, and another recitation of the details of defendant's crime is not necessary for an understanding of the disposition of the instant appeal. For purposes of this appeal it will suffice to restate that the victim testified that defendant and two other men forced her into a vehicle at gunpoint and drove her to a wooded area. The three men forced her to undress then simultaneously and repeatedly sexually assaulted the victim. The sexual assaults included the men forcibly penetrating the 14-year-old victim's mouth and vagina. The victim was not allowed to put her clothes back on. Defendant tied her, naked, to the rear bumper of his vehicle and dragged her behind his car for over a block before she was untied and left lying in the street. Also relevant to the issue in this appeal is the victim's testimony that one day prior to the assault by defendant and his coassailants, she engaged in multiple acts of prostitution at defendant's direction; and on the day of the offense at issue, prior to arriving in the wooded area, one of the coassailants, Bruce Davis, sexually assaulted her in the vehicle. The victim positively identified defendant the day after the crime occurred, and again in

a line up. Defendant was tried before a jury and convicted in 1995. A Vitullo kit had been performed on the victim at the time of the offense in 1986. At trial, defendant's attorney argued the absence of evidence from the Vitullo kit in his closing argument. A report by the Chicago Police Department indicates that sperm was identified on one of the vaginal swabs. According to the police department report the Vitullo kit was destroyed in May 1989, and the extracts were destroyed in May 1989 and July 1990. Defendant learned police destroyed the Vitullo kit and extracts in February 2012 during proceedings on defendant's motion for forensic testing on the Vitullo kit and the victim's clothing.

¶ 8 Defendant's *pro se* postconviction petition that is the subject of this appeal alleges that members of the Chicago Police Department knowingly destroyed "vital evidence" thereby depriving defendant of his right to procedural and substantive due process.² Defendant asserts police acted in bad faith because they violated department policies. The petition alleges that police had an obligation under department policies to preserve the Vitullo kit for up to two years after a defendant has been convicted, yet the Vitullo kit in this case was destroyed five years before defendant was brought to trial.³ In the petition, defendant alleged he did not bring this claim sooner because he received ineffective assistance of counsel at trial, on appeal, and in his earlier postconviction proceedings, and as a result he did not learn of the destruction of the

²Defendant's *pro se* petition also attempted to state a claim under *Brady v. Maryland*, alleging that two assistant state's attorneys either conspired with the Chicago Police Department or acted on their own to withhold the information that the evidence had been destroyed, thereby violating defendant's right to due process. Defendant, now represented by counsel, abandoned his *Brady* claim on appeal.

³The petition also stated the timing of the destruction of the kit was suspicious because, according to defendant, it was very near the beginning of what a public watchdog organization called "the start of the DNA-Exoneration era in Illinois." Defendant abandoned this argument on appeal.

Vitullo kit until February 9, 2012. The trial court denied defendant leave to file the successive postconviction petition.

¶ 9 This appeal followed.

¶ 10 ANALYSIS

¶ 11 Defendant’s motion for leave to file a successive postconviction petition and the petition are governed by section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2014)). “The [Act] provides that, generally, a defendant may only file one postconviction petition. 725 ILCS 5/122-1(f) (West 2008). In order to file a successive postconviction petition, a petitioner must first obtain ‘leave of court.’ [Citation.]” *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 70.

“The trial court may grant leave to file a successive postconviction petition under section 122-1(f) only if the petitioner demonstrates cause for the failure to bring the claim in the initial postconviction proceedings and that prejudice results from that failure.

Section 122-1(f) further provides that

‘(1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.’ [Citation.]”
People v. Smith, 2014 IL 115946, ¶ 33.

The cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard that is set forth in section 122-2.1(a)(2) of the Act. *Id.* ¶ 35. The defendant must submit enough in the way of documentation to allow a circuit court to make the cause-and-prejudice determination. *Id.*

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. *Id.* “[W]e apply *de novo* review to the denial of leave to file defendant’s successive postconviction petition.” *Warren*, 2016 IL App (1st) 090884-C, ¶ 75.

¶ 12 In this case, defendant argues on appeal that new information that the Vitullo kit was destroyed (rather than lost) “established cause for why he did not raise this issue previously.” He also argues that “he was prejudiced because the bad faith destruction of potentially exculpatory evidence warrants sanctions up to and including dismissal of the charges.”

¶ 13 1. Cause

¶ 14 Defendant argues the fact he was unaware police “destroyed” the Vitullo kit is cause for his failure to bring his claim in his initial petition because he could not make a showing of a due process violation without the new evidence. The United States Supreme Court has held that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). (Defendant thus concedes the evidence is only potentially useful and not exculpatory.) The question is whether this specific claim could have been raised in his original postconviction petition. See *People v. Guerrero*, 2012 IL 112020, ¶ 17. We find that it could.

¶ 15 Defendant argues that before he learned the Vitullo kit and extracts were destroyed and not simply lost, he could only show negligence (rather than bad faith) on the part of police. “[A] defendant’s *pro se* motion for leave to file a successive postconviction petition will meet the section 122-1(f) cause and prejudice requirement if the motion adequately alleges facts

demonstrating cause and prejudice.” *Smith*, 2014 IL 115946, ¶ 34. We find that defendant has failed to allege facts demonstrating his ability to raise this specific claim was impeded during his initial postconviction proceedings.

¶ 16 Defendant alleges police acted in bad faith when they destroyed the Vitullo kit and extracts. Defendant’s petition argues bad faith is demonstrated by the fact that “proper procedure would dictate that [the evidence] be preserved for trial.” During the initial postconviction proceedings, defendant knew police had not preserved the Vitullo kit and extracts. Defendant’s initial postconviction petition alleged he was denied due process when the State lost the Vitullo kit. The fact that police were required by departmental rule to preserve the evidence obtained from the Vitullo kit was discoverable by defendant prior to filing his initial postconviction petition. See *People v. Anderson*, 375 Ill. App. 3d 990, 1011 (2007) (holding defendant waived claim by failing to raise it in original postconviction petition where exhibits submitted in support of defendant’s claim were discoverable prior to his filing his original postconviction petition). Moreover, the fact that defendant did not have the Chicago Police Department document defendant obtained from the State affirmatively stating the Vitullo kit and extracts were destroyed does not establish that defendant could not bring this particular claim in his initial postconviction petition. That document is only arguably additional evidence to support his claim, which is insufficient to satisfy the cause prong of the cause-and-prejudice test. *People v. Green*, 2012 IL App (4th) 101034, ¶ 40 (“the Act contemplates the filing of only one postconviction petition and allows a successive petition as an exception to that rule when new evidence comes to light, giving rise to a new claim. [Citation.] Defendant’s claim *** is not new. [A] memorandum that defendant recently uncovered *** may arguably be additional evidence to support that claim, but that does not make that claim new. Defendant has asserted, in one form or another, in each of his previous collateral attacks, the claim ***.”).

¶ 17 If evidence has been lost or destroyed and that evidence is only potentially helpful to defendant, our supreme court has held the defendant must show bad faith on the part of the police, regardless of whether the evidence was lost or destroyed.

“In order to promote the preservation of exculpatory evidence, there must be the possibility of a sanction where evidence is lost or destroyed. On the other hand, a defendant should not be rewarded for the inadvertent loss of a piece of evidence where other evidence sufficient to support his conviction remains. The proper balance between these competing interests can be accomplished through careful consideration of (1) the degree of negligence or bad faith by the State in *losing* the evidence, and (2) the importance of the lost evidence relative to the evidence presented against the defendant at trial.” (Emphasis added.) *People v. Hopley*, 159 Ill. 2d 272, 307 (1994).

Thus,

“the due process concerns implicated in *Brady* makes the good or bad faith of the State irrelevant when the State fails to disclose material exculpatory evidence. However, due process concerns require a different result when the court is confronted with the failure of the State to preserve evidentiary material of which no more can be said than that it might have exonerated the defendant. [Citation.] Therefore, where evidence has been *lost or destroyed*, ‘unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.’ [Citations.]” (Emphasis added.) *In re C.J.*, 166 Ill. 2d 264, 272-73 (1995).

¶ 18 Defendant has not alleged any facts that demonstrate bad faith by police that he was not aware of or which were not discoverable when he filed his initial postconviction petition.

Therefore, the factual basis of defendant's claim was reasonably available during the initial postconviction proceedings and leave to file a successive postconviction petition was properly denied. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 460-62 (2002). Defendant attempts to draw a distinction between a failure to preserve evidence and a destruction of evidence to support his argument he could not have raised this claim sooner; however, our inquiry is whether the facts known to defendant would have permitted him to raise the specific claim contained in his successive petition in his initial petition. *Smith*, 2014 IL 115946, ¶ 33.

¶ 19 Because defendant knew police failed to preserve the Vitullo kit and extracts, and because the department's evidence retention policy (the sole factual basis for a finding of bad faith on the part of police) was discoverable during initial postconviction proceedings, we find defendant could have raised this specific claim during initial postconviction proceedings. See *Guerrero*, 2012 IL 112020, ¶ 17 (citing *Murray v. Carrier*, 477 U.S. 478, 486 (1986) (the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default)). Defendant knew the evidence at issue was not exculpatory during the initial postconviction proceedings and, therefore, that he was required to show bad faith on the part of the police. Defendant claimed the loss of the evidence denied his right to due process, however, his initial postconviction petition failed to argue that police acted in bad faith in failing to preserve the evidence. That claim could have been based on the same allegations contained in the instant petition. Therefore, defendant forfeited the specific argument in the petition at issue in this case. See *People v. Smith*, 341 Ill. App. 3d 530, 540 (2003) (finding claim that could have been raised in first postconviction petition waived).

¶ 20 Defendant has failed to identify an objective factor that prevented him from raising this specific claim in earlier postconviction proceedings. Therefore, we hold defendant has failed to demonstrate cause for failing to raise this claim sooner.

¶ 21 2. Prejudice

¶ 22 We have determined defendant failed to show cause why he should be allowed to file a successive postconviction petition. However, if we assume defendant had shown cause for the failure to bring this claim in the initial postconviction proceedings, he cannot show prejudice, the second prong of the cause-and-prejudice test. “To show prejudice, a defendant must establish that the alleged error so infected his entire trial that his conviction violates due process. [Citation.]” *Smith*, 341 Ill. App. 3d at 540. To make that determination we review the merits of the issue to determine whether it would have been successful even if raised in defendant’s first petition. *Id.* at 540-41. See also *Pitsonbarger*, 205 Ill. 2d at at 469-70 (holding the defendant would not have been entitled to an evidentiary hearing on his claim he was denied his right to a fair trial “even if he had raised it in his initial post-conviction petition. He, therefore, will suffer no prejudice if the procedural bar of section 122-3 is strictly applied.”). In this case, defendant argues the bad faith destruction of potentially exculpatory evidence is a due process violation, the remedies for which include a new trial or dismissal of the charges. Defendant’s argument does not address the effect of the inability to test the evidence collected with the Vitullo kit on his trial. We find that the missing evidence did not so infect defendant’s trial such that the resulting conviction or sentence violates due process. We base our finding on the fact that whether defendant’s DNA was found as a result of testing on the Vitullo kit or was not found, the results of the testing would not have been exculpatory.

¶ 23 The State cites *People v. Gholston*, 297 Ill. App. 3d 415 (1998), in support of its argument defendant was not prejudiced. Defendant argues *Gholston* is distinguishable because

“*Gholston* involved a case where the State presented overwhelming evidence of the defendant’s guilt and the same cannot be said in this case.” While we agree there was evidence of the defendant’s guilt in *Gholston* that is not present here (see *Gholston*, 297 Ill. App. 3d at 419-20), we nonetheless find its analysis instructive. The defendant in *Gholston* sought DNA testing on vaginal swabs from the victim of the sexual assault for which the defendant in that case was convicted. On appeal the court found that “under the circumstances of this particular case, the performance of genetic testing would not provide evidence that is material to [the] defendant’s assertion of actual innocence and could not provide evidence that would probably change the result on retrial.” *Gholston*, 297 Ill. App. 3d at 418. The court noted that “[e]jaculation is not an element of the sexual assault offenses of which defendant was convicted. [Citation.]

Consequently, the absence of defendant’s DNA from the Vitullo kit could establish that defendant did not ejaculate during the sexual assault, but could not conclusively establish that defendant did not sexually assault the victim.” *Id.* at 420.

¶ 24 Although defendant does not claim actual innocence in this case, as did the defendant in *Gholston*, we do not believe that evidence defendant did not ejaculate would so diminish the other evidence of his guilt that we can say that his conviction violates due process. The victim’s father saw the victim in the car she testified defendant used in the commission of the offense. The victim identified defendant from a photo array the day after the crime occurred, and she identified him again at a lineup eight years later and at trial. Further, the evidence in this case, like in *Gholston*, established that defendant would be “responsible for the sexual assault of the *** victim *** under a theory of accountability” (*id.* at 421), and testing the Vitullo kit samples for defendant’s DNA would do nothing to diminish his coassailants’ role in the crime. In addition to eyewitness identification by the victim of the sexual assault in *Gholston*, in that case the State elicited identifications from victims of a related crime, as well as self-incriminating

statements by the defendant. *Id.* Defendant did not make incriminating statements in this case, but we find that the evidence defendant complains of in his successive postconviction petition could not overcome the evidence of his guilt (including multiple positive identifications by the victim and evidence corroborating her testimony), and its absence from defendant's trial does not offend due process. See *People v. Newberry*, 166 Ill. 2d 310, 315 (1995) (distinguishing *Youngblood*, 488 U.S. at 58, on the basis that the disputed material in *Youngblood* "was not essential for establishing the defendant's guilt or innocence. Its value was speculative, and it played no role in the prosecution's case."). Similarly here, a detective testified the State never requested testing on the Vitullo kit.

¶ 25 Defendant has failed to demonstrate that the claim not raised during his initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process. Therefore, we hold defendant has failed to demonstrate he will be prejudiced within the meaning of the Act by not being able to argue the State denied his right to due process by destroying the Vitullo kit and extracts prior to his trial.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 28 Affirmed.