2019 IL App (1st) 163030-U

SIXTH DIVISION
June 21, 2019

No. 1-16-3030

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
	)	Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	04 CR 28306-02
	)	
RICHARD WORTHY,	)	
	)	
	)	Honorable Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly denied defendant leave to file a successive postconviction petition where the claims raised therein were barred by *res judicata*, forfeited, or failed to satisfy the cause-and-prejudice test; pursuant to our supreme court's recent decision in *People v. Buffer*, 2019 IL 122327, defendant's unconstitutional *de facto* life sentence is vacated and the cause is remanded for resentencing; defendant's claim for presentence custody credits also remanded pursuant to Illinois Supreme Court Rule 472(e); denial of leave to file successive postconviction petition affirmed, sentence vacated, and cause remanded with directions.

¶ 2 Defendant, Richard Worthy, appeals from a judgment of the circuit court of Cook County, denying him leave to file a successive petition for relief under section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2014)). The trial court denied defendant leave to file his successive petition, finding that his claims were waived, barred by *res judicata*, or failed to satisfy the cause-and-prejudice test. We affirm the circuit court's decision to deny defendant leave to file a successive petition, but vacate defendant's sentence and remand for resentencing and to allow defendant to raise his claim for presentence custody credit.

¶ 3 BACKGROUND

¶ 4 At the outset, we find it pertinent to note that this is the third time this case has appeared before this court, and thus we set forth only those facts necessary to resolve the instant appeal. Facts regarding defendant's trial and direct appeal were taken from our first decision, *People v. Worthy*, No. 1-06-2953 (2008) (unpublished order under Supreme Court Rule 23), and facts stemming from the appeal of defendant's initial postconviction petition were taken from our second decision, *People v. Worthy*, No. 1-09-3498 (2011) (unpublished order under Supreme Court Rule 23).

¶ 5 Trial / Direct Appeal

¶ 6 After a 2006 jury trial, defendant was found guilty of first degree murder, aggravated battery with a firearm, and aggravated discharge of a firearm for fatally shooting Terrance Brown and wounding Andreas Collier on October 21, 2004, in the 11700 block of South Hale in Chicago. Defendant and his codefendant, Matthew Gaddis, were tried simultaneously with separate juries. At trial, the following facts were adduced.

¶ 7 On the date of the shooting, Collier picked up Shawn Clark and Brown and drove to South Hale to pick up Collier's girlfriend, Ashley Curtis, as she had been attending a birthday

party for her friend, Andrea Butts. Upon arriving, Collier sent a text to Curtis, telling her to meet them outside. Collier got out of the car, and walked around the passenger side of the car to meet Curtis. Brown and Clark also got out and leaned against the middle of the car. During this time, Butts had also stepped outside. Butts and Curtis both testified that while they were talking, defendant, whom they knew from school as "Nate," approached the car with some other individuals, one of whom was codefendant Gaddis, whom they knew as "Matthew." Brown indicated to Collier that he "didn't feel right," and was nervous about the situation. Curtis told Collier to take Brown and Clark home first, and then come back to get her. At that point, Brown got into the passenger-side front seat of the car and Clark got into the back seat. Collier walked around to the driver-side door to get in the car.

¶ 8 Defendant then asked Collier where he was from and what he claimed to be. Collier testified that he responded that he was "nothing." Collier tussled with someone as he attempted to close the driver-side door of the car. Brown was down by Collier's leg trying to push on the gas pedal and was telling Collier to "go, go, go." Collier then heard shots fired through the car's window, which shattered the glass. Butts, Curtis, and Clark all testified that they saw defendant pull out a gun and saw shots fired into the car as Collier was attempting to drive away. Curtis testified that codefendant Gaddis (or "Matthew") had a gun, but only defendant fired any shots, and none of the car's passengers were armed. On cross-examination, Clark admitted that he could not see Brown's hands inside the car but testified that Brown did not fire a gun. Collier then sped off as fast as he could, subsequently stopping the car and calling for assistance. Collier was shot non-fatally in the leg. Brown was fatally shot in the head.

¶ 9 At the close of the State's evidence, defendant rested without presenting any evidence. The jury found him guilty of first degree murder, aggravated discharge of a firearm, and

aggravated battery with a firearm. He was sentenced, respectively, to 45, 15, and 10 years' imprisonment, to be served consecutively.

¶ 10 On direct appeal, defendant argued that his trial counsel rendered ineffective assistance because his performance was incompetent, where counsel misunderstood the law of accountability, improperly conceded that defendant fired his gun, eliminated the defense of misidentification, failed to object to hearsay testimony that bolstered a witness's identification of defendant, misunderstood the rules of laying a proper foundation for impeachment, misstated the evidence during closing argument, and was ineffective in cross-examining the medical examiner. Defendant also argued that the trial court erred in denying his motion to suppress the line-up identification, the trial court abused its discretion in denying defendant's challenge to a prospective juror for cause, and the trial court erred in denying defendant's motion *in limine* to exclude his jury from the cross-examination of witnesses by codefendant Gaddis. We rejected all of defendant's claims, including his claim for ineffective assistance, and affirmed his convictions and sentences. See *People v. Worthy*, No. 1-06-2953 (2008) (unpublished order under Supreme Court Rule 23).

¶ 11 Initial Post-Conviction Petition

¶ 12 On September 9, 2009, through new counsel, defendant filed a petition pursuant to the Act. Defendant's postconviction petition argued that due process was denied when the trial court prohibited trial counsel from raising the issue of the suggestiveness of the line-up identification of defendant in front of the jury, and that his trial counsel was ineffective when he failed to raise self-defense. Defendant's postconviction petition contained the following ineffective assistance allegations:

"7. Counsel rendered ineffective assistance of counsel when counsel did not raise a self-defense defense. Defendant had told his counsel facts that demonstrate self-defense or at least unreasonable self-defense. Defendant told counsel the following:

'Affiant explained to counsel that he was [interested] in hiring him to represent him on the charge of murder in the first degree. Counsel asked affiant to explain the details surrounding the allegation at which time affiant explained the following;

Himself along with [approximately] twenty (20) other people had attended a party at 117[00] S. Hale at the residence of one Louis Crump (Crump) who was throwing the party for Andrea Butts.

Affiant and several other party goers were standing in front of Crumps' house at which time affiant noticed Andrea and her friend Ashley Curtis walk up to a car. Once affiant had recognized the car as belonging to an individual who he knew sold marijuana he began to approach the car on the driver's side in an attempt to buy some marijuana from this individual. Andrea and Ashley had already departed from the car [approximately] 3-5 [minutes] earlier.

Affiant was [approximately] 4 [feet] away from the driver side window when he [saw] the passenger swiftly reach under his seat while simultaneously looking in his direction. Affiant was under the impression that this unknown individual was reaching for a gun due to the timing of his reaching and look on his face. All of which prompted affiant to reach for his own weapon which was under his shirt tucked in his waist [band] because he [believed] that this individual was reaching for the gun in an attempt to harm and/or kill him. Once affiant had

his weapon out he fired the weapon in the direction of the passenger in an attempt to prevent him from retrieving what he believed was a weapon (gun).

Affiant explained to counsel that that it was never his intention to kill the passenger, instead he was simply trying not to get shot or killed himself. Counsel asked affiant was he under the influence of any drugs or alcohol at the time of the shooting, and affiant informed counsel that he was.

Counsel told affiant that he would take care of it and affiant thereafter turned himself into police custody.

On December 10, 2004[,] affiant and counsel once again spoke in regards to what led up to the shooting. Affiant repeated the aforementioned facts, and once again stress[ed] that the only reason he pulled out his gun and fired was because he believed that the passenger was trying to retrieve a gun to shoot or kill him.' ***

8. Defendant was denied ineffective assistance of counsel when counsel would not present defense chosen by defendant, *i.e.*, defense of self-defense, and refused to have submitted defense that would acquit defendant or reduce offense to second degree murder. ***

9. Defendant was denied appellate counsel in not raising issues that could have been raised on appeal but were not.

10. Defendant was denied effective assistance of counsel when defense counsel who filed a discovery answer claiming the defense of alibi, and then in opening statement conceded that the defendant had fired the gunshots."

As an exhibit to his postconviction petition, defendant attached his declaration, consisting of statements nearly identical to those above, which was signed by defendant but not notarized. On November 6, 2009, the trial court found the allegations of defendant's petition were frivolous and patently without merit and summarily dismissed the petition. Specifically, the trial court determined that defendant's claims that his trial counsel was ineffective for failing to present a theory of self-defense were barred by the doctrine of waiver because defendant failed to raise such claims on direct appeal. Subsequently, defendant appealed the dismissal of his postconviction petition.

¶ 13 In affirming the trial court's dismissal of defendant's postconviction petition, this court determined that defendant failed to comply with the Act when he submitted a declaration that was not notarized, rather than a notarized affidavit or other supporting record. This court acknowledged defendant's alternative argument that his postconviction petition showed he was prejudiced because his counsel refused to pursue a defense under which he would have been acquitted or that would have reduced his conviction to second degree murder. Defendant specifically argued "that a second degree murder instruction was justified by the evidence, and counsel's failure to request such instruction constituted ineffective assistance." This court ultimately rejected defendant's ineffective assistance claims because counsel's decision not to put on the defense chosen by defendant was a matter of trial strategy that was virtually unchallengeable. See *People v. Worthy*, No. 1-09-3498 (2011) (unpublished order under Supreme Court Rule 23).

¶ 14 Successive Post-Conviction Petition

¶ 15 On June 16, 2016, through yet another new counsel, defendant filed a successive postconviction petition, arguing: (1) defendant was denied effective assistance of counsel

because his trial attorney did not tender jury instructions on self-defense and second degree murder even though trial counsel elicited evidence that defendant fired the gun in self-defense; (2) defendant's sentence was unconstitutional; (3) the State committed a *Brady* violation when it knowingly used false testimony at defendant's trial; and (4) defendant was entitled to 576 days of presentence custody credit.

¶ 16 As to the first issue, defendant specifically asserted that his successive postconviction petition satisfied the cause-and-prejudice test because it "alleges for the first time that trial counsel was ineffective for not requesting jury instructions on self-defense and second-degree murder when the defense theory was that [defendant] fired his gun in self-defense." Defendant argued that a main part of his defense was that he fired the gun in self-defense and that trial counsel had elicited testimony from nearly all of the State's witnesses to that effect, rendering the jury instructions warranted. Defendant argued that the incompetence of his direct appeal counsel and initial postconviction counsel constituted cause and the failure to instruct the jury on self-defense and second degree murder established prejudice since it precluded self-defense from the jury's considerations. Defendant further contended that his ineffective assistance of trial counsel claims were not waived because his direct appeal counsel was ineffective for failing to raise the issue. Defendant noted that direct appeal counsel argued trial counsel's incompetence for not sufficiently consulting with defendant, conceding defendant's guilt during opening statement, examining the State's witnesses without evidentiary support, misunderstanding how to impeach a witness, not objecting to hearsay testimony, and misstating the evidence during closing arguments. However, defendant argued that trial counsel's ineffectiveness for presenting evidence of self-defense but not requesting the corresponding instructions was a patently meritorious issue that direct appeal counsel should have raised. Defendant also argued that his

successive postconviction petition was not procedurally barred because defendant's initial postconviction counsel also provided unreasonable assistance by improperly framing the issues on appeal regarding trial counsel's ineffectiveness. Defendant asserted that his initial postconviction petition did not raise the issue of trial counsel's ineffectiveness for not requesting jury instructions on self-defense and second degree murder when the defense theory was self-defense.

¶ 17 Second, defendant's successive postconviction petition argued his sentence violated the eighth amendment because it was a *de facto* life sentence imposed without any reference to his age or youthful characteristics.

¶ 18 Third, defendant alleged that a *Brady* violation occurred. At defendant's trial, Butts identified defendant as the shooter. However, unbeknownst to defendant, Marcus Parker, another witness who testified at trial, told prosecutors that Butts was lying and was not looking at the car when the shooting occurred. Thus, the State's failure to disclose Parker's statement violated defendant's right to due process.

¶ 19 Fourth and finally, defendant argued that he was entitled to 576 days of presentence custody credit. Defendant was arrested on October 22, 2004, released on bond on February 21, 2006, had his bond revoked on June 27, 2006, and was sentenced on September 22, 2006. However, defendant never received credit for the time he spent in presentence custody.

¶ 20 On September 9, 2016, the trial court denied defendant's motion for leave to file a successive postconviction petition, finding that defendant's claims that his trial counsel was ineffective, the State committed a *Brady* violation, and he was entitled to presentence custody credit were "procedurally barred by the doctrine of waiver." The court further stated that even if waiver did not apply, each of defendant's claims failed on the merits. The court found that the

ineffective assistance of counsel claim based on trial counsel's failure to ask for self-defense or second degree murder instructions lacked merit because defendant did not establish cause or prejudice. Additionally, defendant's specific contention that his counsel was ineffective for failing to request instructions fell within the general argument that trial counsel was ineffective, which was raised in defendant's initial postconviction petition and thus was barred by *res judicata*.

¶ 21 Also in its September 9, 2016, order, the court rejected defendant's claim regarding the constitutionality of his sentence, finding that defendant failed to establish prejudice. Similarly, the court found unconvincing defendant's *Brady* violation claim because he did not allege cause and could not establish prejudice because even if the State failed to disclose Parker's statement that Butts was lying, the outcome of the trial would not have been different. Finally, the court denied defendant's claim for presentence credit because defendant failed to attach any documentation in support of this allegation. The court determined that defendant's conclusory statements were not enough to establish prejudice.

¶ 22 Defendant filed his timely notice of appeal on October 6, 2016.

¶ 23 ANALYSIS

¶ 24 On appeal, defendant argues that the circuit court erred when it denied him leave to file a successive postconviction petition.

¶ 25 "The Act provides a method for criminal defendants to assert 'in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both.' " *People v. Smith*, 2014 IL 115946, ¶ 22 (quoting 725 ILCS 5/122-1(a)(1) (West 2008)). A postconviction proceeding is a collateral attack upon a final judgment and its purpose is not to determine guilt or innocence, but

to inquire into constitutional issues that have not been adjudicated. *People v. Eddmonds*, 143 Ill. 2d 501, 510 (1991). Therefore, issues that were already raised and decided are barred from consideration as *res judicata* and issues that could have been raised, but were not, are considered procedurally defaulted. *People v. Young*, 2018 IL 122598, ¶ 16.

¶ 26 Section 122-1(f) of the Act addresses successive postconviction petitions, and states as follows:

> "(f) Except for petitions brought under paragraph (3) of subsection (a) of this Section, only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (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." 725 ILCS 5/122-1(f) (West 2014).

¶ 27 Both prongs of the cause-and-prejudice test must be satisfied in order for a defendant to prevail. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 28. This court reviews *de novo* the denial of a defendant's motion for leave to file a successive postconviction petition. *Id.* ¶ 37.

¶ 28 Here, defendant's motion for leave to file a successive postconviction petition alleged: (1) defendant's trial counsel was ineffective for failing to request jury instructions on self-defense and second degree murder; (2) defendant's *de facto* life sentence was unconstitutional;

(3) the State committed a *Brady* violation; and (4) defendant was entitled to additional presentence credit. We examine each of the four bases alleged in the successive petition in turn.

¶ 29 Ineffective Assistance of Counsel

¶ 30 In defendant's motion for leave to file a successive postconviction petition, he argued that he was denied his constitutional right to effective assistance of counsel because his trial counsel did not tender jury instructions on self-defense and second degree murder where defendant's defense was that he fired the gun in self-defense. Defendant asserted that he could show "cause" based on the incompetency of his direct appeal and initial postconviction counsels. He argued he could show "prejudice" because due to trial counsel's failure to tender instructions, the jury could not even consider defendant's theory of self-defense.

¶ 31 It is well-settled that a defendant faces a daunting procedural hurdle when bringing a successive postconviction petition that is only lowered when fundamental fairness so requires. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). The aforementioned cause-and-prejudice test is the analytical tool used to discern whether fundamental fairness requires a court to make an exception to the waiver provision of section 122-3 of the Act and consider the successive postconviction claims on the merits. *Id.* To establish cause, a defendant must show that an objective factor external to the defense impeded his ability to raise the claim in the initial postconviction proceeding. 725 ILCS 5/122-1(f) (West 2014); see also *People v. Tenner*, 206 Ill. 2d 381, 393 (2002).

¶ 32 In this case, defendant fails to show cause because the claim—ineffective assistance of counsel for failure to present self-defense and second degree murder jury instructions—was, in fact, raised in his initial postconviction proceedings and thus is barred by *res judicata*. "[A]ll issues actually decided on direct appeal or in the original postconviction petition are barred by

the doctrine of *res judicata*." *People v. Anderson*, 375 Ill. App. 3d 990, 1000 (2007). Defendant argues that this issue is not barred by *res judicata* because the specific issue of trial counsel's failure to request jury instructions relating to self-defense has not been previously adjudicated. Defendant asserts that his initial postconviction petition merely argued that his counsel was ineffective for failing to present defendant's theory of self-defense, not that his trial counsel elicited evidence in support of self-defense from nearly every one of the State's witnesses and argued self-defense to the jury in closing argument, but failed to request jury instructions on self-defense or second degree murder. Defendant contends that the latter point was the error, not the failure to pursue a self-defense theory.

¶ 33 We find that defendant is attempting to draw a distinction without a difference and thus his contention is without merit. The primary aspects of defendant's ineffective assistance claim involving counsel's alleged failure to request self-defense and second degree murder instructions were raised and rejected in defendant's initial postconviction petition. See, *e.g.*, *People v. Erickson*, 183 Ill. 2d 213, 224 (1998). A review of the allegations in defendant's successive postconviction petition compared to his initial postconviction petition reveals essentially the same claim. See, *e.g.*, *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). Here, defendant's initial postconviction petition contains the following specific allegation: "Defendant was denied ineffective assistance of counsel when counsel would not present defense chosen by defendant, *i.e.*, defense of self-defense, and refused to have submitted defense that would acquit defendant or reduce offense to second degree murder." Further, in our February 8, 2011, decision addressing the trial court's decision to summarily dismiss defendant's initial postconviction petition, we summarized the allegations of defendant's initial postconviction petition as follows:

> "On September 9, 2009, defendant, through his newly retained counsel, filed the instant petition for relief under the [Act]. Defendant alleged, *inter alia*, that his trial counsel rendered ineffective assistance because he did not argue the theory that defendant acted in self-defense after defendant apprised him of facts that demonstrated self-defense, or an unreasonable belief that he had to act in self-defense. Defendant claimed that counsel was ineffective for not presenting defendant's chosen defense, and refusing to present a defense under which he would have been acquitted or had his offense reduced to second degree murder." *People v. Worthy*, No. 1-09-3498 (2011) (unpublished order under Supreme Court Rule 23).

Later in that same order, this court set forth defendant's argument on appeal, stating:

> "Defendant first contends that his trial counsel rendered ineffective assistance because he failed to argue that defendant acted in self-defense, which was the theory of defense chosen by defendant. *** Defendant also claims that a second degree murder instruction was justified by the evidence, and counsel's failure to request such instruction constituted ineffective assistance." *Id.*

Ultimately, we found as follows:

> "Moreover, we reject defendant's contention that his post-conviction petition presented a meritorious claim that trial counsel rendered ineffective assistance when he failed to pursue defendant's choice of defense and argue a theory of self-defense. It is well established that choices of trial strategy, including counsel's choice of one defense theory over another, are 'virtually unchallengeable' because such choices involve counsel's professional judgment, which is not subject to a review of his competency. [Citation.]" *Id.*

¶ 34 Because defendant previously raised this issue and we ruled on it, defendant's ineffective assistance of counsel claim relating to his trial counsel's failure to request self-defense and second degree murder instructions is barred by *res judicata*.

¶ 35 Defendant's *De Facto* Life Sentence

¶ 36 Defendant, who was 16 years old at the time of the offense, argues that the court below imposed an unconstitutional *de facto* life sentence of 70 years in prison, consisting of 45, 15, and 10-year terms to be served consecutively. The State agrees and suggests that defendant should receive further postconviction proceedings on this issue.

¶ 37 Subsequent to the submission of the parties' briefs in this appeal, our supreme court decided *People v. Buffer*, and found that "a prison sentence of 40 years or less imposed on a juvenile offender does not constitute a *de facto* life sentence in violation of the eighth amendment." 2019 IL 122327, ¶ 41. In *Buffer*, the defendant committed an offense at the age of 16 that subjected him to a legislatively-mandated minimum sentence of 45 years and for which he was sentenced to 50 years. *Id.* ¶ 42. The court found that because the defendant's sentence was greater than 40 years and the trial court failed to consider the defendant's youth and attendant characteristics, his sentence violated the eighth amendment and must be vacated. *Id.* The court further determined that "[b]ased on the particular issue raised in this appeal and in the interests of judicial economy," the proper remedy was to vacate defendant's sentence and remand for a new sentencing hearing. *Id.* ¶ 47.

¶ 38 The *Buffer* holding stemmed from the United States Supreme Court's landmark decision in *Miller v. Alabama* that the eight amendment prohibits mandatory life sentences for juveniles who commit murder. 567 U.S. 460, 489 (2012). The holding in *Miller* was deemed to apply retroactively in cases on collateral review in *Montgomery v. Louisiana*, 136 S. Ct. 718, 732

(2016). See also *People v. Davis*, 2014 IL 115595, ¶¶ 39, 42. Thus, in order to prevail on a claim based on *Miller* and its progeny, a defendant sentenced for an offense he or she committed as a juvenile must show that: "(1) the defendant was subject to a life sentence, mandatory or discretionary, natural or *de facto*, and (2) the sentencing court failed to consider youth and its attendant characteristics in imposing the sentences." *Buffer*, 2019 IL 122327, ¶ 27 (citing *People v. Holman*, 2017 IL 120655, ¶ 40 and *People v. Reyes*, 2016 IL 119271, ¶ 9).

¶ 39 In this case, defendant was convicted of first degree murder, aggravated battery with a firearm, and aggravated discharge of a firearm, which subjected him to minimum sentences of 45, 6, and 4 years' imprisonment, respectively, for a minimum total of 55 years. The trial court sentenced defendant to 45, 15, and 10 years to be served consecutively, for a total of 70 years' imprisonment. Based on our supreme court's holding in *Buffer*, this amounts to a *de facto* life sentence because it is in excess of 40 years. *Buffer*, 2019 IL 122327, ¶ 41. In fact, defendant's sentence for first degree murder alone constituted a *de facto* life sentence.

¶ 40 As a result, we turn to whether the trial court failed to consider defendant's youth and its attendant characteristics in imposing the *de facto* life sentence. It is undisputed that the trial court did not consider these factors and thus we find defendant's 70-year sentence violates the eighth amendment. Pursuant to *Buffer* (*id.* ¶ 47), based on the procedural posture of this case, and in the interests of judicial economy, we vacate defendant's sentence and remand for a new sentencing hearing in accordance with section 5-4.5-105 of the Unified Code of Corrections (730 ILCS 5/5-4.5-105 (West 2016)), which provides guidelines as to what the court shall consider when sentencing an individual who was under the age of 18 at the time when the offense was committed.

¶ 41 State's *Brady* Violation

¶ 42 Defendant next argues that during trial, the State acted in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), when its witness Butts identified defendant as the shooter, even though another witness, Parker, was interviewed by prosecutors and told them that Butts was lying because she was not looking at the car when the shooting occurred.

¶ 43 Under *Brady*, the State must disclose evidence favorable to the defendant and "material either to guilt or to punishment." (Internal quotation marks omitted.) *People v. Jarrett*, 399 Ill. App. 3d 715, 727 (2010). In order to establish a *Brady* violation, a defendant must show that: (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *Id.* at 728. Evidence is material "if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *Id.* Defendant did not raise a *Brady* claim in his initial postconviction petition, and thus he must satisfy both prongs of the cause-and-prejudice test in order to prevail. See *Crenshaw*, 2015 IL App (4th) 131035, ¶ 28.

¶ 44 Defendant's brief does not clearly identify an objective factor that impeded his ability to raise this *Brady* violation during his initial postconviction proceedings, as is required to establish "cause." 725 ILCS 5/122-1(f) (West 2014). Defendant attempts to establish "prejudice" by asserting that because Parker's statement casts doubt on the reliability of Butts's identification of defendant as the shooter, a new trial is warranted. However, his claim fails because the facts upon which it is based are unclear, his argument is underdeveloped, and his brief fails to comply with Illinois Supreme Court Rule 341(h)(7) (eff. May 25, 2018)).

¶ 45 Supreme court rules are mandatory and are not mere suggestions. *People v. Houston*, 226 Ill. 2d 135, 152 (2007). Rule 341(h)(7) provides that the argument section of an appellant's

brief "shall contain the contentions of the appellant and the reasons therefor, with citation of authorities and the pages of the record relied on. Evidence shall not be copied at length, but reference shall be made to the pages of the record on appeal where evidence may be found. ***" Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018)). A reviewing court is entitled to have the issues before it clearly defined, and is not simply a repository into which appellants may dump the burden of argument and research. *People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005). The failure to provide proper citations to the record violates this rule, the consequences of which are forfeiture of the argument lacking those citations. *People v. Sprind*, 403 Ill. App. 3d 772, 779 (2010).

¶ 46 Here, with the exception of a generic, concise recitation of applicable law, defendant's brief contains only the following paragraph regarding the alleged *Brady* violation:

> "The State had interviewed Marcus Parker approximately one month after the shooting occurred. During that interview, Parker told authorities that he was outside with Andrea Butts right before the shooting. He and Butts were walking toward Louis's house, and way from the location of the shooting, when they heard shots. They immediately ran into the house. (P.C. 62, 97-99). Despite the fact that Parker had told the prosecutors that Butts was looking away during the shooting, this information was not turned over to the defense. The State's failure to disclose Parker's statement violated [*Brady*]. In light of Parker's statement, Andrea Butts did not witness the shooting and, therefore, could not identify the shooter or know whether anyone inside the car fired a gun. Parker's statement casts doubt on the reliability of Butts'[s] identification of [defendant] as the shooter, as well has [*sic*] her belief that [defendant] incited a confrontation with the men in the car and that no one inside the car had a gun. As such, [defendant] suffered

> prejudice and is entitled to a new trial. Initial post-conviction counsel, whose incompetency has already been discussed, provided unreasonable assistance in not addressing this issue in the initial post-conviction petition."

¶ 47 Based on the deficiencies of defendant's argument in this section, defendant's *Brady* violation claim is forfeited. The foregoing paragraph does not contain any citation to legal authority. Most detrimentally, this paragraph does not provide a record citation to Parker's statement to police "one month after the shooting occurred," and thus we do not know the contents of that statement. The sole record citation contained in this paragraph refers to pages 62 and 97-99 of the record. Page 62 of the record contains a page of defendant's successive postconviction petition and pages 97-99 of the record contain Parker's affidavit, dated March 17, 2012, which was attached to defendant's successive postconviction petition and stated the following in its entirety:

> " I, Marcus Parker, swear to the following statement. On 10/21/04, in front of Louis Crump['s] home, I was attending a birthday party for Andrea Butts. Approximately, 15 to 20 people [were] also attending the party.
>
> I was on the sidewalk near the front end of the car on the passenger side. I was having a conversation with Ashley. My back was to the car. I walked toward Louis'[s] house (gang way) as Andrea was coming out of the house. I walked toward Louis['s] house to greet Andrea. I grabbed her hand as were walking toward Louis'[s] house to go in. I heard a shot, I grabbed Andrea and we ran to my house.
>
> I am willing to testify in court on [defendant's] behalf. I have not been promised anything for giving this affidavit."

¶ 48 Parker's affidavit does not refer to any previous statement that he made to police or when such a statement would have been made. Parker's affidavit does not establish, contrary to defendant's contentions, that Butts "lied" to police or even that she did not witness the shooting. The affidavit does not even indicate in which direction Butts was looking. It merely reflects that Parker was holding Butts's hand and that they were walking toward the house when they heard shots. Parker did not attest to the direction in which Butts was looking at the time of the shooting, so it is possible that Butts was turned around looking at the car. Defendant argues that "Parker had told the prosecutors that Butts was looking away during the shooting," but does not cite to any portion of the record to support such a contention and Parker's affidavit does not provide support. Thus, defendant's contentions on this point are confusing, at best. In light of defendant's underdeveloped argument and his failure to comply with our supreme court rules we find defendant has forfeited review of this issue. *Sprind*, 403 Ill. App. 3d at 779.

¶ 49 Exactly what evidence defendant intended to rely upon to form a *Brady* violation is unclear given his failure to comply with Rule 341(h)(7). Nevertheless, it is apparent that defendant cannot satisfy the three requirements of *Brady*, even if forfeiture did not apply. The evidence upon which defendant appears to rely, *i.e.*, Parker's affidavit, is not impeaching, let alone exculpatory. See *Jarrett*, 399 Ill. App. 3d at 728. Parker's affidavit does not establish much of anything because even without Butts's testimony, the State's evidence overwhelmingly established defendant's guilt. In addition to Butts, there were two other witnesses, Curtis and Clark, who testified that they saw defendant pull out a gun and saw shots fired into the car as Collier attempted to drive away. See *People v. Worthy*, No. 1-06-2953 (2008) (unpublished order under Supreme Court Rule 23). In fact, Curtis also testified that although defendant's

codefendant had a gun, no one other than defendant fired any shots. *Id.* Thus, the other evidence firmly established that defendant was the shooter.

¶ 50 The second *Brady* requirement is willful or inadvertent suppression by the State. *Jarrett*, 399 Ill. App. 3d at 728. Defendant provides no indication how his claim satisfies this prong. As previously mentioned, defendant has failed to cite to any portion of the record containing evidence of Parker's interview with police. Defendant similarly does not indicate when or how the State failed to disclose this statement. Further, defendant has not established that the evidence at issue is material to guilt or punishment (*id.*), and as such, defendant cannot satisfy any of the three requisite elements of a *Brady* violation. As we have already stated, there was plenty of other testimony establishing defendant as the shooter. Thus, even if Butts did not see the shooting and did not testify that defendant was the shooter, the outcome would not have changed. As such, defendant's *Brady* claim fails because he cannot satisfy the cause-and-prejudice test even if his claim was not forfeited.

¶ 51 Defendant's Presentence Credit

¶ 52 Finally, defendant contends that he is entitled to 576 days of sentence credit to reflect the time that he spent in presentence custody. Specifically, defendant was arrested on October 22, 2004, released on bond on February 21, 2006, had his bond revoked on June 27, 2006, and was sentenced on September 22, 2006. Less the time he was out of prison on bond, defendant spent a total of 576 days in presentence custody. Defendant points out that according to the Illinois Department of Corrections website, his projected parole date is December 22, 2072, which does not include the 576 days of presentence credit that he is owed. In relevant part, the mittimus entered on September 22, 2006, states:

> "The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of ___ days as of the date of this order.
>
> * * *
>
> IT IS FURTHER ORDERED THAT COUNTS 1, 2, & 8 IS TO MERGE INTO COUNT 7, DEF [*sic*] IS TO BE GIVEN CREDIT FOR ALL TIME SERVED IN CCDOC, STAY OF MITT [*sic*] 9/29/06."

Based on the absence of presentence custody credit reflected on the mittimus, defendant asks that we issue a corrected mittimus to reflect that he is owed 576 days of credit.

¶ 53 In defendant's opening brief, he relies on *People v. Andrews*, for the proposition that "[a]n amended mittimus may be entered at any time." 365 Ill. App. 3d 696, 699 (2006). However, approximately five months after defendant filed his opening brief, *Andrews* was overruled by our supreme court's decision in *People v. Young*, 2018 IL 122598. In *Young*, the defendant requested that the court announce a new rule that would allow defendants to seek a correction of a miscalculation of presentence custody credit at any time and at any stage of proceedings, but the court stated that it had recently referred another appeal to its rules committee to address another defendant's similar request for a rule that, if adopted, would provide "a mechanism that would enable defendants to obtain a corrected calculation of presentence custody credit in the circuit court." *Id.* ¶ 32.

¶ 54 Subsequent to *Young*, our supreme court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, "[e]rrors in the calculation of presentence custody credit[.]" Ill. S. Ct. R. 472(a)(3) (eff. Mar. 1, 2019). Rule 472 provides that, effective March 1, 2019, the circuit court retains jurisdiction to correct these errors at any time following judgment in a criminal case, even during

the pendency of an appeal. *People v. Barr*, 2019 IL App (1st) 163035, ¶¶ 5-6 (citing Ill. S. Ct. R. 472(a) (eff. Mar. 1, 2019)). "No appeal may be taken" on the ground of any of the sentencing error enumerated in the rule unless that alleged error "has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. Mar. 1, 2019). Rule 472 was subsequently further amended to add the following subsection:

> "(e) In all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 55 In this case, defendant arguably raises this issue for the first time on appeal. Defendant did not raise this issue at sentencing, in his posttrial motion, in his motion to reconsider sentence, on direct appeal, or in his initial postconviction petition. While defendant did assert this argument in his successive postconviction petition, he was never granted leave to file that petition. *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007) (concluding that, "A second postconviction petition will not be considered filed until leave to file is expressly granted by the circuit court in accordance with section 122-1(f) of the Act."). Further, because the State concedes that resentencing is appropriate, it also does not object to the circuit court considering the issue of defendant's presentence custody credit at that time as well. As such, pursuant to Rule 472(e), we remand the issue of defendant's presentence custody credit to the circuit court, so that defendant may be allowed to file a motion pursuant to that new rule.

¶ 56 CONCLUSION

¶ 57 For the foregoing reasons, the judgment of the circuit court is affirmed, defendant's sentence is vacated, the cause is remanded for resentencing in accordance with section 5-4.5-105

of the Unified Code of Corrections (730 ILCS 5/5-4.5-105 (West 2016)), and is remanded in accordance with Supreme Court Rule 472(e) (eff. May 17, 2019).

¶ 58 Affirmed.
Sentence vacated and cause remanded with directions.