

No. 1-11-2361

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. TM-007-149
)	
BRIAN O'SULLIVAN,)	Honorable
)	Diana L. Kenworthy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE Palmer delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Second stage dismissal of defendant's combined postconviction petition and section 2-1401 motion affirmed where defendant failed to meet procedural and substantive requirements.
- ¶ 2 Defendant, Brian O'Sullivan, appeals from an order of the circuit court of Cook County dismissing his combined petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 et sec. (West 2008)) (Act) and motion for a new trial pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 2-1401 (West 2008)) (Code) (combined petition). He claims

that the circuit court erred in dismissing his combined petition because he "alleged significant facts and newly discovered evidence" that the State withheld exculpatory evidence and that his conviction was obtained as a result of perjury.

¶ 3 The record shows that following a 2007 bench trial, defendant was convicted of driving under the influence of alcohol (DUI) and illegal transportation of alcohol, then sentenced to 24 months' conditional discharge. Defendant did not file a direct appeal from that judgment.

¶ 4 On May 28, 2009, defendant, through counsel, filed the combined petition at bar, contending that the central issue at trial was whether he was actually driving at the time he was arrested. Defendant stated that at trial, Chicago police officer Joe Parker testified that he observed defendant sitting in a parked car drinking alcohol, then pull out from his parking spot. Defendant testified that he was merely sitting in his parked car making a phone call.

¶ 5 Defendant sought a hearing under the Act regarding his claims that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that Officer Parker had previously been arrested for DUI. In his section 2-1401 motion for a new trial, defendant claimed that there was "newly discovered evidence" that Officer Parker was under investigation for misuse of a disabled license plate, and for "framing drivers with DUIs by providing entirely false accounts in his police reports[,] attaching three newspaper articles in support. Defendant also attached an affidavit from retired Chicago police officer John O'Shea, who contended that he was an eyewitness to defendant's arrest, that he did not see defendant's vehicle move prior to the time he was arrested, and that he was unwilling to come forward to testify until the recent allegations regarding the officer's conduct came to light.

¶ 6 Defendant's petition was advanced to the second stage, and, on July 9, 2009, the State filed a motion to dismiss it. In that motion, the State asserted that defendant's postconviction petition should be dismissed because it was untimely filed, and because defendant failed to comply with the statutory pleading requirements under the Act or the Code. The State also alleged, *inter alia*, that defendant's claims were meritless, in that he could not establish a *Brady* violation, and that the proposed evidence was not newly discovered or admissible at trial. The State further alleged that defendant failed to demonstrate due diligence in presenting his claims under the Code. The parties indicate that the court conducted a hearing on July 22, 2011, then granted the State's motion to dismiss defendant's combined petition.

¶ 7 In this court, defendant claims that the court erred in doing so because he alleged sufficient facts and presented newly discovered evidence that the State withheld exculpatory evidence relating to Officer Parker's credibility, and that his conviction was obtained as a result of perjury by Parker. The State responds that the combined petition was properly dismissed because the postconviction petition was untimely, defendant failed to comply with the verification affidavit requirement of section 122-1(b), and the petition lacked merit. The State also contends that defendant's section 2-1401 portion of the combined petition was properly denied where defendant failed to demonstrate due diligence in presenting his claim, or that the proposed evidence constituted a meritorious defense. The State additionally asserts that defendant's own testimony at trial established his guilt of the charged offense, and as such, defendant's new claims could have had no effect on the outcome of the trial.

¶ 8 As an initial matter, the State points out the inadequacy of the record on appeal. We note that defendant has only filed the common law record of the trial and postconviction proceedings,

and has not filed a copy of the order dismissing his combined petition, or a transcript or acceptable substitute of the hearing on the State's motion to dismiss defendant's combined petition or the preceding bench trial.

¶ 9 The appellant has the burden of providing a sufficiently complete record to support his claims of error, and any doubts or deficiencies arising from an incomplete record will be construed against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). In the absence of that record on appeal, we will presume that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92. Where, however, the merits of defendant's appeal may be analyzed without reference to these omitted materials, the failure to include them in the record does not preclude our review. *Walker v. Iowa Marine Repair Corp.*, 132 Ill. App. 3d 621, 626, (1985).

¶ 10 During the second stage of postconviction proceedings under the Act, the circuit court must determine whether defendant has made a substantial showing of a constitutional violation through his petition and any accompanying documentation. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). We review the circuit court's dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 11 The State first contends that defendant's petition was untimely under the Act. The parties agree that because defendant was convicted of a misdemeanor, his postconviction petition was due within six months of judgment (*People v. Warr*, 54 Ill. 2d 487, 493 (1973)), and that he actually filed his petition on May 28, 2009, almost 15 months after he was sentenced.

Defendant's petition was therefore untimely filed, and subject to dismissal at the second stage of

proceedings. *People v. Shanklin*, 304 Ill. App. 3d 1056, 1058-59 (1999); *People v. Perkins*, 229 Ill. 2d 34, 43 (2007).

¶ 12 Defendant contends, however, that his untimeliness may be excused because he alleged sufficient facts in his petition to show that the delay was not due to his culpable negligence. Defendant did not raise this claim in the circuit court, and, as the State points out, the applicability of the "culpable negligence" exception was not discussed by the court in *Warr*. In any event, we need not reach the merits of this contention because, even if we were to resolve it in defendant's favor, defendant's petition would nonetheless be subject to dismissal based on his failure to comply with the verification requirement of section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2008)). *People v. Hommerson*, 2014 IL 115638, ¶ 13.

¶ 13 The purpose of the section 122-1 affidavit requirement is to confirm that the defendant's allegations are brought truthfully and in good faith. *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 21. A deficiency in compliance with section 122-1(b)'s verification affidavit requirement is properly the subject of a motion to dismiss at the second stage of proceedings. *Hommerson*, 2014 IL 115638, ¶ 13. As such, defendant's failure to comply with this requirement, even after the omission was brought to his attention in the State's motion to dismiss, authorized the court to dismiss his petition at the second stage. *Hommerson*, 2014 IL 115638, ¶ 13.

¶ 14 Moreover, we find that the substantive issue contained in defendant's petition was meritless. A *Brady* claim requires a showing 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. *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008).

¶ 15 In his postconviction petition, defendant contended that the State committed a *Brady* violation by failing to disclose that Officer Parker had previously been arrested for DUI. A witness may be impeached by attacking his or her character with proof of a *conviction* of a crime punishable by death or imprisonment of one year or more or of a crime that involves dishonesty or false statements, but proof of an arrest is not admissible for this purpose. *People v. Pecoraro*, 175 Ill. 2d 294, 309 (1997). Because the evidence defendant alleges was undisclosed would not have been admissible at trial, it is not material under *Brady*, and his claim is meritless.

Pecoraro, 175 Ill. 2d at 310. Thus, we conclude that defendant failed to make a substantial showing of a constitutional deprivation, subjecting his postconviction petition to dismissal at the second-stage of proceedings. *Harris*, 224 Ill. 2d at 126.

¶ 16 We next consider defendant's claims under section 2–1401. The purpose of a section 2–1401 petition is to bring facts to the attention of the circuit court which, if known at the time of judgment, would have precluded its entry. *People v. Haynes*, 192 Ill. 2d 437, 463 (2000). To obtain relief under section 2–1401, defendant must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2–1401 petition for relief. *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003). Absent an evidentiary hearing on a petition, we review the dismissal of a section 2–1401 petition *de novo* (*People v. Vincent*, 226 Ill. 2d 1, 14-15 (2007)), and may

affirm the dismissal on any basis supported by the record, regardless of the reasoning or the grounds relied upon by the circuit court (*People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008)).

¶ 17 Here, defendant claimed that there was "newly discovered evidence" that the officer misused a disabled license plate, that he was under investigation for providing false accounts in DUI cases, and that defendant's conviction was based on perjured testimony. The State responds that defendant's claims fail because they lack merit, and because defendant failed to show due diligence in bringing them. The State asserts that even if the proposed evidence regarding Officer Parker was introduced at trial, it would have had no effect on the outcome because defendant's own testimony was that he was sitting in the driver's seat of the vehicle with one set of car keys in his pocket and another in the console, thus establishing that he was in actual physical control of the vehicle and his guilt of the charged offense. *City of Naperville v. Watson*, 175 Ill. 2d 399, 402 (1997).

¶ 18 Defendant contends that the proposed evidence would show that Officer Parker lied and would change the result on retrial. To be entitled to relief under section 2-1401 on the basis of perjured testimony, however, defendant must show, by clear and convincing evidence, that the testimony was not merely false, but willfully and purposefully given, material to the issue tried and not merely cumulative, and that it probably controlled the determination. *People v. Sanchez*, 115 Ill. 2d 238, 286 (1986). Defendant has not made such a showing here, nor provided an adequate record to permit meaningful review.

¶ 19 We observe that a person may be convicted of DUI based on actual driving *or* actual physical control of a vehicle. 625 ILCS 5/11-501 (West 2010). The supreme court has stated that "[a] person need not drive to be in actual physical control of a vehicle, nor is the person's

intent to put the car in motion relevant to the determination of actual physical control.” *Watson*, 175 Ill. 2d at 402, citing *People v. Davis*, 205 Ill. App. 3d 431, 435 (1990). Whether a motorist is in actual physical control of a vehicle “is determined on a case-by-case basis giving consideration to factors such as whether the motorist is positioned in the driver's seat of the vehicle, has possession of the ignition key and has the physical capability of starting the engine and moving the vehicle.” *Watson*, 175 Ill. 2d at 402, citing *Davis*, 205 Ill. App. 3d at 435.

¶ 20 Given defendant's failure to make the required showing that the proposed evidence would have precluded entry of the judgment against him (*Pinkonsly*, 207 Ill. 2d at 566), or to provide an adequate record on appeal (*Foutch*, 99 Ill. 2d at 391-92), we find no error in the dismissal entered by the circuit court, and affirm its judgment.

¶ 21 Affirmed.