

No. 1-12-3016

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	
)	No. 95 CR 18896
KING GARLAND,)	
)	Honorable William G. Lacy
Defendant-Appellant.)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Liu concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant should be granted leave to file a successive postconviction petition because defendant can demonstrate cause for his failure to bring his current claim in his initial postconviction proceeding, as the unavailability of the information in the signed affidavit of a witness who testified against him at trial is an objective factor that impeded his ability to previously bring his claim, and can demonstrate prejudice resulting from that failure, as there is a reasonable likelihood that the State's knowing use of the witness' allegedly false testimony could have affected the jury's verdict.

¶ 2 Defendant, King Garland, appeals from an order of the circuit court of Cook County denying his request for leave to file a successive petition under the Post-Conviction Hearing Act

(Act) (725 ILCS 5/122-1(f) (West 2010)). On appeal, defendant contends that he should be allowed file a successive petition because he can demonstrate cause for his failure to bring his current claim in his initial postconviction proceeding and prejudice resulting from that failure. For the reasons that follow, we reverse and remand.

¶ 3

BACKGROUND

¶ 4 Defendant was charged with the first degree murder of Shelby Redmond. At trial, Terrell Hudson and James Taylor testified that they were driving in a vehicle when they saw defendant fire four or five gunshots at someone and then run away. Hudson and Taylor also testified that defendant crossed in front of their vehicle as he ran and that they were able to see his face as he did so. Hudson and Taylor further testified that they identified defendant as the shooter in a lineup conducted at a police station.

¶ 5 Marcus Hardy testified that he witnessed the shooting, the shooter was an unknown black male, and defendant was not the shooter. Hardy also testified that he, defendant, and Redmond were all members of the Gangster Disciples gang at the time of the shooting and that, although a gang member could be beaten for testifying against a fellow gang member, he could not get in trouble with the gang for testifying because he was no longer a member. Hardy further testified that he signed a written statement implicating defendant as the shooter because the police told him that they would frame him for the murder if he did not sign the statement and that he did not make the statements set forth therein.

¶ 6 The State introduced Hardy's written statement, which was admitted into evidence, and in which Hardy related that defendant shot Redmond, he did not want to be a witness in a murder

case, and he believed defendant shot Redmond because Redmond had shot defendant two years earlier. Officers Matthew Brandon and Donald McGraw each testified that Hardy told them that defendant was the shooter and Detective Robert Lenihan testified that Hardy identified a picture of defendant from a photo array. In addition, the evidence showed that Redmond was released from jail a few months before the shooting and that defendant was released from jail about six months before the shooting.

¶ 7 Defendant, his cousin, and his father testified that defendant was at his grandmother's house with various other family members on the night of the shooting. Defendant also testified that Redmond shot him about two years prior to the shooting in a dispute over money and drug sales. Based on this evidence, the jury found defendant guilty of first degree murder and the trial court sentenced him to 55 years' imprisonment.

¶ 8 On direct appeal, defendant contended that the State failed to present sufficient evidence to prove him guilty beyond a reasonable doubt, he was denied the effective assistance of counsel, one of the jurors received an improper outside communication during trial, and the court erred by admitting evidence regarding his gang membership, and this court affirmed his conviction and sentence. *People v. Garland*, No. 1-97-3170 (1999) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a *pro se* postconviction petition, the circuit court granted the State's motion to dismiss the petition, and the appellate court affirmed that dismissal, holding that the jury was properly instructed regarding gang evidence and, therefore, neither trial counsel nor appellate counsel rendered ineffective assistance. *People v. Garland*, No. 1-08-1224 (2010) (unpublished order under Supreme Court Rule 23).

¶ 9 On April 6, 2012, defendant filed a *pro se* petition requesting leave to file a successive postconviction petition, alleging that newly discovered evidence established that he was actually innocent. Defendant attached copies of various newspaper articles from November 19, 1999, to June 19, 2001, relating that Officer McGraw had been convicted on federal charges of narcotics conspiracy and theft. Defendant asserted that the newly discovered evidence showed that Officer McGraw had a propensity to commit crimes and supported Hardy's trial testimony that he was coerced into signing the written statement identifying defendant as the shooter. Defendant also asserted that his appellate and postconviction counsels were ineffective for failing to raise this issue in prior appellate and postconviction proceedings. The court denied defendant's petition, finding that he had not demonstrated cause for his failure to bring the claim in his initial petition and prejudice resulting from that failure.

¶ 10 On May 9, 2012, defendant filed a motion for rehearing in which he asserted that he was unaware that he needed to attach supporting affidavits to his petition for leave to file a successive postconviction petition and to which he attached a signed affidavit by Hudson dated June 21, 2011. In the affidavit, Hudson related that police officers threatened to charge him and Taylor with Redmond's murder if they did not identify defendant as the shooter and that he and Taylor decided to identify defendant as the shooter as a result of those threats. Hudson also related that he and Taylor did not know defendant prior to viewing the lineup from which they identified him, police officers told them that they would be able to identify defendant from the lineup by his eyes, and they picked out defendant because he was the only person in the lineup with light-colored eyes. On May 25, 2012, the court denied defendant's motion, finding there was no basis

for rehearing.

¶ 11

ANALYSIS

¶ 12 Defendant contends that he should be granted leave to file a successive postconviction petition in which he could allege that the State violated his right to due process by knowingly using Hudson's perjured testimony to obtain his conviction. The Act provides a remedy for a defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Williams*, 209 Ill. 2d 227, 232 (2004). A defendant is entitled to postconviction relief when he demonstrates that he suffered a substantial deprivation of his constitutional rights in the proceedings that produced his conviction or sentence. *People v. Caballero*, 228 Ill. 2d 79, 83 (2008).

¶ 13 Although a defendant is only entitled to the filing of one postconviction petition, the circuit court may grant leave to file a successive petition if the defendant "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." 725 ILCS 5/122-1(f) (West 2010). The defendant bears the burden of obtaining leave of the court to file a successive petition before the petition may be filed and must submit sufficient documentation to allow the court to decide whether leave to file a successive petition is warranted. *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010). A defendant demonstrates 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 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 2010).

As with an initial postconviction petition, all well-pleaded facts set forth in a petition for leave to file a successive petition and supporting affidavits are taken as true. *People v. Pitsonbarger*, 205 Ill. 2d 444, 467 (2002); *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25; *People v. Williams*, 392 Ill. App. 3d 359, 367 (2009). The denial of a request for leave to file a successive petition is reviewed *de novo*. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 30.

¶ 14 Defendant asserts that he can establish cause for his failure to bring his current claim in the prior postconviction proceeding because the unavailability of Hudson's affidavit during the prior proceeding is an objective factor that impeded his ability to raise his claim. The State first responds that Hudson's affidavit cannot establish cause for defendant's failure to bring his claim that the State knowingly used Hudson's perjured testimony at trial because Hudson did not disavow his trial testimony in his affidavit or aver that he perjured himself at trial.

¶ 15 At trial, Hudson and Taylor identified defendant as the shooter and testified that they had previously identified defendant as the shooter in a police lineup. In his affidavit, Hudson averred that he and Taylor wrongly identified defendant as the shooter at a lineup at the direction of the police, did not know the identity of the shooter, and had not met defendant prior to identifying him. Thus, although Hudson did not specifically disavow his trial testimony in his affidavit, his averments that he and Taylor did not know the shooter's identity and that they wrongly identified defendant as a result of police coercion, if true, establish that he was not telling the truth when he identified defendant as the shooter at trial.

¶ 16 The State, citing *People v. McDonald*, 405 Ill. App. 3d 131 (2010), next responds that defendant cannot establish cause for failing to previously bring his current claim because Hudson

was extensively cross-examined at trial regarding his identification of defendant as the shooter. In *McDonald*, the court held that a witness' posttrial statement in which he recanted his trial testimony was not newly discovered evidence and did not establish cause to warrant leave to file a successive petition because "defense counsel vigorously cross-examined [the witness] about his testimony, raising inferences that were intended to call [the witness'] credibility into question with the jury" and that the defendant could not establish prejudice because he did not allege that the State knowingly used perjured testimony at trial. *Id.* at 136. In this case, Hudson did not just recant his trial testimony in his affidavit, but also averred that he and Taylor wrongly identified defendant as a result of police coercion. Thus, unlike *McDonald*, where defense counsel could cross-examine the witness as to his credibility and motive for testifying against the defendant, here counsel did not have the opportunity to cross-examine Hudson regarding his claim of police coercion because that information was not available to defendant until Hudson filed his affidavit. As such, defendant has demonstrated cause for his failure to bring his current claim in his initial postconviction proceeding because the unavailability of the information in Hudson's affidavit is an objective factor that impeded his ability to previously raise that claim.

¶ 17 Defendant asserts that he can demonstrate prejudice resulting from his failure to raise his current claim in his initial postconviction proceeding because Hudson's affidavit establishes that the State knowingly used Hudson's false testimony at trial and there is a reasonable likelihood that the use of that evidence affected the outcome of the trial. The State responds that Hudson's allegedly false testimony in which he identified defendant as the shooter did not so infect the trial that the resulting conviction violated due process because other evidence of defendant's guilt was

sufficient to sustain his conviction.

¶ 18 A conviction obtained through the knowing use of false testimony violates a defendant's right to due process (*People v. Brown*, 169 Ill. 2d 94, 103 (1995)) and must be reversed if there is any reasonable likelihood that the false testimony could have affected the jury's verdict (*People v. Lucas*, 203 Ill. 2d 410, 422 (2002)). In determining whether false testimony was knowingly used to obtain a conviction, the prosecutor is charged with the knowledge of its agents, including the police. *People v. Ellis*, 315 Ill. App. 3d 1108, 1113 (2000) (citing *People v. Martin*, 56 Ill. 2d 322, 325 (1974)). There is a reasonable likelihood that the knowing use of false testimony could have affected the jury's verdict when the error is not harmless (*People v. Olinger*, 176 Ill. 2d 326, 348 (1997)), which is the case when the State cannot prove beyond a reasonable doubt that the jury's verdict would have been the same absent the error (*People v. Patterson*, 217 Ill. 2d 407, 428 (2005)).

¶ 19 The allegations in Hudson's affidavit, if true, establish that the police threatened to charge Hudson and Taylor if they did not identify defendant as the shooter, directed Hudson and Taylor during the lineup, and coerced Hudson into wrongly identifying defendant at the lineup and trial. As a prosecutor is charged with the knowledge of its agents, including the police, the prosecutor in this case would be charged with the knowledge of the coercive conduct in which the police engaged to obtain identifications from Hudson and Taylor. Moreover, the State does not dispute the claim that the allegations in Hudson's affidavit establish that the prosecutor knowingly used Hudson's false testimony to convict defendant. Thus, we must now decide whether there is a reasonable likelihood that the prosecutor's knowing use of Hudson's false testimony could have

affected the jury's verdict.

¶ 20 At trial, Hudson and Taylor identified defendant as the shooter and the State presented evidence showing that Hudson, Taylor, and Hardy had all previously identified defendant as the shooter to the police. Thus, aside from Hudson, whose testimony the State knew to be false if the allegations in Hudson's affidavit are taken as true, the only other people to identify defendant as the shooter were Taylor and Hardy. However, Taylor's identification of defendant is strongly undermined by Hudson's allegation of police coercion and Hardy recanted his identification at trial and testified that, similar to the allegations in Hudson's affidavit, he identified defendant as the shooter because the police threatened to frame him for Redmond's murder if he did not do so. As such, the State cannot prove beyond a reasonable doubt that the jury would have reached the same verdict absent Hudson's testimony and we determine that there is a reasonable likelihood that Hudson's testimony could have affected the jury's verdict.

¶ 21 While the State maintains that the allegations in Hudson's affidavit could merely call into question Hudson's credibility and that a witness' recantation of his trial testimony is inherently unreliable, we reiterate that all well-pleaded facts set forth in a petition requesting leave to file a successive postconviction petition and its supporting affidavits are taken as true (*Pitsonbarger*, 205 Ill. 2d at 467; *Edwards*, 2012 IL App (1st) 091651, ¶ 25; *Williams*, 392 Ill. App. 3d at 367). Thus, regardless of whether the claims in Hudson's affidavit are actually true, we must consider them as true for the purpose of determining if defendant has established cause for his failure to bring his current claim in a prior proceeding and prejudice resulting from that failure. As such, we conclude that defendant can satisfy the cause-and-prejudice test and that he should be granted

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leave to file a successive postconviction petition.

¶ 22

CONCLUSION

¶ 23 Accordingly, we reverse the order denying defendant's motion for rehearing on his petition for leave to file a successive postconviction petition and remand the matter to the circuit court of Cook County for further proceedings.

¶ 24 Reversed and remanded.