

2014 IL App (2d) 121334-U
No. 2-12-1334
Order filed March 17, 2014
Modified upon Denial of Rehearing **April 17, 2014**

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 98-CF-1228
)	
KEITH D. BARMORE,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition, as none of defendant's myriad claims established a substantial showing of a constitutional violation.

¶ 2 Defendant, Keith D. Barmore, appeals from an order of the circuit court of Winnebago County granting the State's motion to dismiss his *pro se* petition under the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq.* (West 2002)) for relief from his conviction, following a jury trial, of first-degree murder (720 ILCS 5/9-1(a)(2) (West 1998)). We affirm.

¶ 3 Defendant's conviction arose from the death of defendant's three-year-old stepson, Kevon Middleton-Wright, in May 1998. In June 1998, a Winnebago County grand jury indicted defendant. The indictment alleged that defendant, "without lawful justification, struck [Kevon's] head on a surface, knowing such act created a strong probability of great bodily harm, thereby causing [Kevon's] death[.]" At trial, the State presented evidence that, at the time of Kevon's death, Kevon and his mother, defendant's wife Cynthia Barmore, were residing in an apartment in Rockford with defendant, his son, and Cynthia's sons O.D. Patton and Danetrik Winfrey.

¶ 4 O.D. testified that, on May 8, 1998, he came home from school at about 3 p.m. Kevon was playing with toys, and O.D. described him as healthy and playful. At about 4 or 4:30 p.m., O.D. heard Kevon throwing up. O.D. explained that Kevon had been sick and had been throwing up about a week earlier. O.D. saw defendant pick Kevon up and take him into the bathroom. O.D. looked in the bathroom and saw defendant shaking Kevon and asking him why he was going back to his old habits. O.D. went to his room, at which point he heard a "bump noise." O.D. then saw defendant take Kevon into Kevon's room. Kevon appeared to be "out of it." Defendant told O.D. that Kevon had slipped on vomit and had hit his head. O.D. went into Kevon's room and talked to Kevon, but Kevon did not respond. Kevon was moaning. He was not moving, his eyes were fixed, and he was vomiting out of the side of his mouth. That evening, as O.D. was going to bed, his mother told him that they were taking Kevon to the hospital.

¶ 5 Craig Brown, a physician, testified that he examined Kevon in Rockford Memorial Hospital's emergency room at about 11:05 p.m. on May 8, 1998. Kevon was comatose and exhibited stiffening of the extremities indicative of a brain injury. Brown noted retinal hemorrhages secondary to shaking. A CAT scan of Kevon's brain showed a subdural hematoma

on the right, some bleeding or a contusion on the left, and diffuse brain injury. Brown spoke with defendant, who indicated that Kevon fell, hit his head, and then started vomiting. After Brown advised defendant that Kevon had several different injuries, defendant revised his account; defendant indicated that, after falling and hitting his head, Kevon vomited and then slipped in the vomit and hit his head again. Brown testified that defendant's account was not consistent with Kevon's injuries.

¶ 6 Robert Restuccia, a pediatric physician, testified that he examined Kevon at about midnight on May 9, 1998. Kevon was in extremely critical condition. A CAT scan revealed a midline fracture of the occipital bone in the back of Kevon's head. Additionally there was evidence of swelling of the brain. Defendant told Restuccia that Kevon had fallen twice in the bathroom, hitting his head on the linoleum floor both times. Restuccia testified that two falls onto a linoleum floor could not have caused the injuries that Kevon sustained. Kevon was pronounced dead at 5:06 a.m.

¶ 7 Joseph Micho, a radiologist at Rockford Memorial Hospital, testified that CAT scans taken around midnight on May 9, 1998, showed a linear skull fracture and swelling in the brain. The swelling would have occurred anywhere from 6 to 24 hours following the injury.

¶ 8 Larry Blum, a forensic pathologist, performed an autopsy on Kevon on the morning of May 9, 1998. Blum observed a large skull fracture, a subdural hematoma, and bleeding in the arachnoid membrane. Blum testified that the type of skull fracture Kevon sustained would have left him unconscious, comatose, or extremely ill. One or two falls from the standing height of a child would not have caused the type of injuries Kevon sustained.

¶ 9 David Chadwick, a pediatrician who had previously served as director of the Center for Child Protection at Children's Hospital in San Diego, testified that a 1991 study of children

brought to Children's Hospital with injuries from falls showed that deaths from falls of less than four feet were rare and that deaths from falls of 10 to 40 feet were very uncommon. In Chadwick's opinion, Kevon's head injury did not result from falling once or twice on a linoleum floor; it resulted from being forcibly slammed backward against a hard or firm surface. Kevon would have been unconscious within seconds after the injury.

¶ 10 Chadwick acknowledged that he had reviewed a medical report from April 22, 1998, when Kevon visited the emergency room after reportedly falling from a jungle gym. Chadwick testified that, although such a fall could have led to a subdural or subarachnoid hematoma, the April 22, 1998, medical report indicated that Kevon had not lost consciousness and that a neurological exam showed no signs of injury to the brain. According to Chadwick, the subdural and arachnoid hematomas occurred on May 8, 1998, and not before.

¶ 11 Defendant did not present any evidence, and the jury found him guilty. The trial court sentenced defendant to a 60-year prison term. On direct appeal, we affirmed defendant's conviction and sentence. *People v. Barmore*, No. 2-00-1263 (2002) (unpublished order under Supreme Court Rule 23). In 2003 defendant filed a *pro se* petition for relief under the Act. The trial court summarily dismissed the petition (see 725 ILCS 5/122-2.1 (West 2002)). However, because the trial court failed to do so within the time prescribed by law, we reversed the dismissal and remanded for further proceedings. *People v. Barmore*, No. 2-03-0024 (2005) (unpublished order under Supreme Court Rule 23). On remand, defendant proceeded without an attorney. In 2008, defendant filed an amended *pro se* petition. On November 7, 2012, the trial court granted the State's motion to dismiss the petition, and this appeal followed.

¶ 12 Under the Act, a person imprisoned for a crime may mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Erickson*, 183

Ill. 2d 213, 222 (1998). Proceedings under the Act are divided into three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). During the first stage, the trial court independently examines the petition. If the petition is frivolous or patently without merit, it will be summarily dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2008). If the petition survives first-stage review, it proceeds to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *Gaultney*, 174 Ill. 2d at 418. At the second stage, the petition may be dismissed “when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation.” *People v. Alberts*, 383 Ill. App. 3d 374, 376 (2008). A petition that is not dismissed at the first or second stage advances to the third stage, at which an evidentiary hearing is held. *Gaultney*, 174 Ill. 2d at 418. Here, defendant’s petition proceeded to the second stage and was dismissed on the State’s motion. Accordingly, the question before us is whether defendant made a substantial showing of a violation of a constitutional right. With that in mind, we turn to defendant’s arguments on appeal.

¶ 13 Defendant argues that misconduct during the proceedings before the grand jury violated his right to due process of law. Howard Forrester, a detective with the Rockford police department, appeared before the grand jury and testified that, in the course of investigating Kevon’s death, he obtained a written statement from defendant. Forrester read the statement to the grand jury. Defendant argues that the statement read to the grand jury was an altered copy of his actual statement. Defendant further argues that Forrester committed perjury by testifying that May 8, 1998, was the date on which Kevon’s skull was fractured. The following principles set forth in our recent decision in *People v. Legore*, 2013 IL App (2d) 111038, are germane to those contentions:

“The grand jury’s role is to determine whether probable cause exists that a person has committed a crime, which would warrant a trial. [Citation.] Prosecutors advise the grand jury by informing it of the proposed charges and pertinent law. [Citation.] Generally, a defendant may not challenge the validity of an indictment that a legally constituted grand jury returns, but a defendant may challenge an indictment procured through prosecutorial misconduct. [Citation.] To obtain the dismissal of the indictment, a defendant must show that the prosecutorial misconduct affected the grand jury’s deliberations and rose to the level of a deprivation of due process or a miscarriage of justice. [Citation.] ‘The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence.’ [Citation.] The prosecutor’s deception need not be intentional. [Citation.] The defendant must show that the denial of due process is ‘unequivocally clear’ and resulted in prejudice that is ‘actual and substantial.’ [Citation.] Prosecutorial misconduct resulting in a due process violation is actually and substantially prejudicial only if the grand jury would not have otherwise indicted the defendant. [Citation.]” *Id.* ¶ 23

¶ 14 We are unpersuaded by defendant’s contention that he is entitled to postconviction relief because an altered version of his statement was read to the grand jury. Defendant states that “One of the altered statements reads Keith D. Barmore Sr,” whereas “the original supposed statement just reads Keith Barmore.” Defendant also asserts that “the signature [*sic*] are not the same at all petitioner’s or the detective [*sic*] Howard Forrester.” However, defendant does not indicate that the actual content of the statement read to the grand jury deviated from his “original supposed statement.” Our own review of the two versions of the statement does not reveal any

substantive discrepancies or support the implication that false evidence was submitted to the grand jury.

¶ 15 Nor is there any merit to defendant's contention that Forrester falsely testified before the grand jury that May 8, 1998, was the date on which Kevon's skull was fractured. Defendant contends that medical evidence at trial established that the head injury could have occurred when Kevon fell from a jungle gym. To the contrary, evidence at trial indicated that Kevon would have exhibited neurological symptoms very soon after sustaining the fracture. Kevon was taken to the emergency room on April 22, 1998, after he fell from the jungle gym. The medical report for that visit indicated that Kevon showed no signs of neurological impairment indicative of a significant head injury. Accordingly, there is no basis for defendant's assertion that Forrester's grand jury testimony was false or misleading.

¶ 16 Defendant contends that newly discovered evidence establishes that the prosecution "coerced" O.D. Patton into providing false testimony against defendant at trial. " 'A conviction obtained by the knowing use of false testimony [will] be set aside if there is a reasonable likelihood that the false testimony could have affected the verdict.' " *People v. Nowicki*, 385 Ill. App. 3d 53, 96 (2008) (quoting *People v. Thurman*, 337 Ill. App. 3d 1029, 1032 (2003)). The newly discovered "evidence" in question is a letter to defendant from his stepfather, Robert Sturgis. Sturgis related that, in August 2002, he spoke with Dorman Terry. Terry and O.D.'s father were cousins. Terry told Sturgis that O.D.'s father had related to Terry that prosecutors had paid for O.D. and his father to travel to Rockford and had paid for their meals and lodging. According to Sturgis's letter, O.D.'s father told Terry that prosecutors "had O.D. and [his father] picked up and taking [*sic*] down town [*sic*] and told that boy just what to say over and over again until he got it right." The quoted language in the preceding sentence, if offered for the truth of

the matter asserted, would be triple hearsay. Accord *People v. Hughes*, 274 Ill. App. 3d 107, 114 (1995). Furthermore, although the letter suggests that O.D.'s testimony was coached, it does not indicate in what respect, if any, the testimony was actually false. Accordingly, defendant has failed to make a substantial showing of a constitutional violation.

¶ 17 Defendant contends that the State knowingly presented false testimony from one of its medical experts concerning the documents he reviewed prior to testifying. Defendant's argument, as we understand it, is that the witness in question falsely testified that he had reviewed a report from Kevon's April 22, 1998, emergency visit. Defendant argues that the testimony is inconsistent with an email from the witness to the prosecutor. According to defendant, however, the email was sent in September 1998. The case did not proceed to trial until 2000. The witness had an ample opportunity to review the report during the intervening period. Thus defendant has failed to make a substantial showing that the witness committed perjury.

¶ 18 Defendant argues that he did not receive the effective assistance of counsel at trial. Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. Defendant maintains that "[i]t was ineffective assistance of counsel a deficient failure to not at all call any of my witnesses not call my wife as a witness or to straight out lie and coerce [defendant] that his expert witness the doctor Dr. Pless, would [be] there to testify as his witness

at trial ***.” As explained below, defendant’s argument fails because he has not established that he suffered any prejudice from counsel’s failure to call witnesses.

¶ 19 Defendant contends that expert testimony would have explained that Kevon’s exposure to pesticides “irritated the balance of his [e]quilibrium.” According to defendant, such evidence “certainly suggest[s] the intracranial pressure was already increasing, the death accidental from the prior jungle gym fall ***.” Defendant’s argument, as we understand it, is that there was evidence available to support a theory that Kevon’s death could have been the result of the fall from the jungle gym about two weeks prior to Kevon’s death. This theory seemingly fails to explain Kevon’s skull fracture and the absence of signs of neurological impairment following that jungle gym accident. The State presented evidence that neurological impairment would have been evident very soon after the fracture. Defendant does not contend that Dr. Pless or any other medical expert would have testified that Kevon’s skull fracture could have been essentially asymptomatic for over two weeks. Accordingly, there is no reasonable probability that testimony from Dr. Pless or another medical expert would have affected the outcome of the case.

¶ 20 Although defendant also contends that the failure to call his wife and other witnesses represents ineffective assistance of counsel, defendant has offered no description of what testimony those witnesses would have provided or how their testimony might have assisted the defense. Accordingly, defendant has failed to make a substantial showing of prejudice under *Strickland*.

¶ 21 Defendant argues that trial counsel violated his right to testify by “unduly” pressuring him to waive that right. Defendant’s specific allegations suggest that counsel actively discouraged defendant from testifying, but do not reveal any “undue” pressure.

¶ 22 Defendant contends that the indictment charging him with first-degree murder was unconstitutional because it did not “mirror” the jury instructions. Thus, according to defendant, the jury found him guilty of a different offense from the one with which he was charged in the indictment. We agree with the State that the argument is refuted by the record, which clearly shows that the jury was properly instructed on the offense charged in the indictment.

¶ 23 Finally, defendant maintains that, after imposing sentence, the trial court failed to admonish him that, in order to challenge his sentence on appeal, he needed to file a motion in the trial court for reconsideration of his sentence. Although Illinois Supreme Court Rule 605(a)(3)(A) (eff. Oct. 1, 2001), currently requires such an admonition, the requirement was not in effect when defendant was sentenced. In any event, defendant did move to reconsider his sentence, but he withdrew the motion. On direct appeal, we held that defendant thereby acquiesced in any sentencing error. Admonishing defendant about the need to file a motion to reconsider the sentence would not have changed this outcome. Accordingly, defendant has not shown reversible trial error, let alone a violation of his constitutional rights.

¶ 24 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 25 Affirmed.