

No. 1-09-1325

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).

SECOND DIVISION
February 8, 2011

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. 02 CR 10455
)	
MARGARET DEFRANCISCO,)	Honorable
)	Lawrence E. Flood,
Defendant-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

O R D E R

HELD: The *sua sponte* dismissal of defendant's *pro se* section 2-1401 petition was affirmed where the affidavits relied upon to allege perjured testimony were hearsay and the alleged perjured testimony was cumulative and not controlling of the ultimate determination.

Defendant Margaret Defrancisco appeals the *sua sponte* dismissal of her *pro se* petition for relief from judgment under

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section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2006)) by the circuit court of Cook County. She contends that this court should reverse that order because she stated a cognizable claim that her conviction was obtained through perjured testimony.

The record shows that defendant was sentenced to 46 years' imprisonment on her 2004 jury conviction for felony murder predicated on armed robbery. This court affirmed that judgment on direct appeal. *People v. Defrancicso*, No. 1-05-0068 (2006) (unpublished order under Supreme Court Rule 23). On November 5, 2007, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)), which was summarily dismissed as frivolous and patently without merit.

On November 25, 2008, defendant filed the instant *pro se* petition for relief from judgment alleging that she was convicted on the perjured testimony of Veronica Garcia and Jessica Tellez who falsely testified against her due to threats from police. She also alleged that Garcia testified falsely for the State in exchange for a five-year sentence, and the assurance that her son would not be taken away from her. Defendant further claimed that Garcia told her cellmate, Diana Salazar, that she lied at trial due to threats from the police and the assistant State's Attorneys.

In support of her perjury allegation, defendant attached the affidavits of Salazar and Crystal Sims. Salazar averred that she was "roomates [sic] with" Garcia, who told her that she was convicted for a murder that she did not do. Garcia also said that the assistant State's Attorneys scared her by taking her child, and that she had to lie because her husband and child were on the line. Salazar further averred that Garcia told her that Luciana Macias, another State witness, was also threatened. In her affidavit, Sims averred that she was driving with defendant when they saw Tellez walking down the street. Tellez told defendant that the detectives threatened her and told her they would take her son away if she did not cooperate with them.

On April 10, 2009, the circuit court denied defendant's petition finding that defendant failed to present a claim or defense which would entitle her to relief under section 2-1401. The court noted that Salazar met Garcia in jail and did not contribute any new evidence which would have prevented the judgment entered. The court also noted that Sims' affidavit was previously included in defendant's post-conviction petition which was dismissed as frivolous and patently without merit. The court thus concluded that defendant failed to present a meritorious defense or claim, or due diligence in presenting that claim and in filing the petition.

Defendant now challenges that ruling on appeal. She contends that she stated a cognizable claim for relief in her section 2-1401 petition based on the perjured testimony of Garcia as evidenced by the affidavit of Salazar.

As an initial matter, we observe that defendant has made no argument on appeal regarding the alleged perjured testimony of Tellez as set forth by Sims. Accordingly, any claim regarding Tellez is waived, and we may not address it *sua sponte*. *People v. Givens*, 237 Ill. 2d 311, 326 (2010).

To obtain relief under section 2-1401 of the Code, defendant must file a petition no later than two years after the entry of the order of judgment (735 ILCS 5/2-1401 (West 2006)), and set forth a meritorious claim or defense, due diligence in presenting that claim or defense to the circuit court and due diligence in filing the petition (*People v. Glowaki*, 404 Ill. App. 3d 169, 171 (2010)). The petition must also be supported by affidavit or other appropriate showing as to matters not of record. *People v. De Leon*, 387 Ill. App. 3d 1035, 1039 (2009). A circuit court may dismiss a section 2-1401 petition *sua sponte* if the allegations do not entitle defendant to relief as a matter of law, and we review such a dismissal *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 10, 13, 18 (2007).

Defendant maintains that she stated a claim for section 2-1401 relief that her conviction was obtained through perjured

testimony. In support of this allegation, she attached the affidavit of Garcia's cellmate, Salazar, who attested that Garcia told her that she had lied at trial due to threats from police and prosecutors.

We observe, however, that an affidavit in support of a section 2-1401 petition must be made by a person having first-hand knowledge of the factual allegations (*People v. Perkins*, 260 Ill. App. 3d 516, 518 (1994)), and an affidavit based on hearsay is insufficient to warrant relief (*People v. Morales*, 339 Ill. App. 3d 554, 565 (2003), citing *People v. Cole*, 215 Ill. App. 3d 585, 587 (1991)). Salazar's affidavit, which was offered to establish that Garcia lied at trial, is clearly based on hearsay since Salazar has no first-hand knowledge about the shooting.

Although Supreme Court Rule 191 (eff. July 1, 2002), provides for an exception for hearsay affidavits where the material facts which ought to appear in the affidavit are known only to persons whose affidavits are not available by reason of hostility or otherwise (*People v. Sanchez*, 115 Ill. 2d 238, 284-85 (1986)), defendant has not invoked or satisfied this exception to the general rule against hearsay affidavits. Defendant has not alleged that Garcia's affidavit could not be obtained due to hostility, her invocation of the fifth amendment or some other reason. *Cole*, 215 Ill. App. 3d at 588, citing *Sanchez*, 115 Ill. 2d 238. Accordingly, we find that Salazar's hearsay affidavit

was insufficient to support defendant's contention or to warrant the relief sought under section 2-1401. *Cole*, 215 Ill. App. 3d at 587.

Defendant, however, citing the special concurrence in *People v. Garcia*, 298 Ill. App. 3d 34 (1998), maintains that a petition supported by a hearsay affidavit alleging perjured testimony requires an evidentiary hearing. Although that position was articulated in the special concurrence, it was not part of the holding or decision of this court. *People v. Johnson*, 356 Ill. App. 3d 208, 210 (2005). In fact, no analysis was conducted in *Garcia*, and the case was remanded for an evidentiary hearing solely in compliance with the supervisory order entered by the supreme court. *Garcia*, 298 Ill. App. 3d at 34-35.

Moreover, to be entitled to relief on the basis of perjured testimony, 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. *Sanchez*, 115 Ill. 2d at 286. Defendant has not made such a showing here.

Defendant's allegation that she was convicted on the perjured testimony of Garcia is based primarily on her claim that Garcia testified falsely for the State in exchange for a five-year sentence for concealment of a homicidal death. This bare

allegation is unsubstantiated by the trial evidence which showed that Macias testified that defendant confessed to her that before the victim arrived, she placed plastic on the floor, and made sure he was standing on it before she shot him in the back of the head. She then took his wallet and jewelry. Defendant also told Tellez that when she shot the victim, he fell down like a baby with cheese-like ooze coming out of his head.

Garcia testified that defendant asked her to bring over her boyfriend's gun so that she could use it to rob the victim. When the victim arrived at defendant's house, defendant followed him and her sister into the basement. A few seconds later Garcia heard the gun go off, and went downstairs where she saw defendant going through the victim's pockets. Defendant later disposed of the victim's body by setting it on fire in an alley. Further evidence showed that the victim's brother saw defendant driving the victim's car after the murder, and when he asked her if she had seen the victim, she smiled at him. She also attempted to avoid detection by changing her hair color and hiding from police for two years (*People v. Simpson*, 286 Ill. App. 3d 1034, 1039 (1997)), and initially accused someone else of killing the victim (*People v. Floyd*, 160 Ill. App. 3d 80, 85 (1987)).

Based on the above, we find that the hearsay affidavit and defendant's bare allegation that her conviction was obtained through the perjured testimony of Garcia did not entitle her to

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relief as a matter of law, and therefore conclude that the circuit court did not err in dismissing her section 2-1401 petition *sua sponte*. *Vincent*, 226 Ill. 2d at 10, 13.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.