2012 IL App (1st) 1093580-U

FOURTH DIVISION
March 8, 2012

No. 1-09-3580

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. 96CR30301
	)	
MAURICE HARDAWAY,	)	The Honorable
	)	John J. Fleming
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Sterba concurred in the judgment.

ORDER

Held: The trial court properly dismissed defendant's postconviction petition without an evidentiary hearing based on his failure to make a substantial showing of a due process violation resulting from the State's failure to disclose evidence and the State's presentation of perjured testimony regarding an alleged agreement between the State and its witness. Defendant could not make a substantial showing that the alleged improprieties could have affected the jury's judgment.

¶ 1 This appeal arises from the trial court's order dismissing defendant Maurice Hardaway's petition filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West

2002)) without an evidentiary hearing. On appeal, defendant asserts the trial court improperly dismissed his petition because he was not culpably negligent for the untimely filing of the petition and because his petition made a substantial showing of a constitutional claim based on the State's failure to disclose an agreement with a witness, pursuant to which the witness received a sentence reduction in exchange for her testimony at defendant's trial. For the following reasons, we affirm the dismissal of defendant's petition.

¶ 2 I. BACKGROUND

¶ 3 Defendant, codefendant Jermaine Daniels and codefendant Derwin Wright were charged with multiple counts arising from a triple shooting which occurred at 626 East 71st Street in Chicago on October 21, 1996. As a result of the shooting, 34-year-old James Scott died from a gunshot wound to the head. Ronald Goodwin, who was 28 years old, died after sustaining 15 gunshot wounds, 5 of which were from the neck up. Arlene Owens was shot in the head but survived. Following his simultaneous, but separate, jury trial in 1999, defendant was convicted of the first degree murder of 28-year-old Ronald Goodwin, the first degree murder of 34-year-old James Scott, two counts of home invasion, in which the same two individuals were the victims, and the attempted murder of Arlene Owens.

¶ 4 At trial, Assistant State's Attorney (ASA) Ursula Walowski testified that she was present when defendant gave a statement, which she then published for the jury. Defendant, age 23, stated that at about 8:30 p.m. on October 20, 1996, Brian Willis drove defendant and

codefendants to Hirsch High School, where codefendants exited the car to speak to a man named Darryl. Codefendants returned to the car and said they had to go to Green's house to "kick Ron's ass" "[b]ecause Kevin shot Buddha and Buddha wanted their whole family beat up." Defendant explained that Ron, apparently referring to Goodwin, was related to Kevin. In addition, codefendant Wright and Willis were each carrying a revolver. The four men eventually drove to a vacant house at 7101 South St. Lawrence Avenue, where they smoked marijuana, drank and sold crack. At some point, codefendants reiterated that they were going to "kick Ron's ass."

¶ 5 At about 1 a.m., Doris McCarty approached the vacant house.[1] Defendant asked her whether she needed any crack but she declined. As she walked away, codefendant Wright grabbed her and walked her toward Green's home. The three other men followed. Outside of Green's building, codefendant Wright had McCarty yell for someone to open Green's front door. When codefendant Wright brought McCarty to the front of the house, he stood on the doorstep while the other three men stood to the side of the door. McCarty was screaming and defendant told her to calm down. Codefendant Wright had his revolver out at that time. When Green opened the door, codefendant Wright pushed the door in. Defendant and his companions then ran upstairs, where codefendant Wright pointed his revolver at Goodwin. Willis also took out his revolver. In addition to Goodwin, another man and a woman were present. Upon inquiry, Goodwin told

[1] Our record contains references to several aliases for Doris McCarty, such as Doris McCarthy, Doris Clark and Debra Jones. We exclusively refer to her as McCarty.

codefendant Wright that he did not have any money. Defendant then yelled, "get his ass." Defendant was about to grab Goodwin when codefendant Wright began shooting at Goodwin. Defendant, codefendant Daniels and Willis fled. As defendant ran down the stairs and left the building, he heard more shots being fired.

¶ 6 On cross-examination, ASA Walowski testified that she had not shown defendant the statement previously made by codefendant Daniels. In addition, defendant never told her that codefendant Wright had beat up defendant's pregnant girlfriend. Neither ASA Walowski nor defendant suggested that he could make a statement to seek revenge for codefendant Wright harming defendant's girlfriend.

¶ 7 Jordan Yancy, nicknamed "Green," testified that on October 20, 1996, he and Owens were in his second-floor apartment located at the rear of the building at 626 East 71st Street. Early in the day, they had consumed a small amount of crack. Goodwin, who Yancy knew from the neighborhood, came over that afternoon. At about 10:30 p.m., Goodwin left and returned a couple of hours later with Scott. About an hour later, Yancy heard his friend McCarty calling to him from outside. When Yancy opened the door downstairs, he briefly saw McCarty. Someone then stuck a pistol in Yancy's eye and forced him back inside. The individual continued to hold the pistol in Yancy's eye as he was forced up the stairs and he could see only the pistol. Upstairs, Yancy was walked toward the restroom and instructed to face the wall. He heard someone say to shoot "him" or "them" in the head. As Yancy heard gunshots, the person holding the pistol to his eye walked away and Yancy stepped into the restroom, shutting the door. Yancy

heard additional shots as well as people running past the restroom door and leaving. Following a lull in the commotion, Yancy heard another person pass the door and leave. When he and his neighbor Annette Harris came out of their rooms, he had her go downstairs and flag down a policeman. In his apartment, he saw that Goodwin and Scott were dead, but Owens was moving.

¶ 8 Harris testified that on the day of the shooting, she and Yancy lived on the same floor. At about 1 a.m., she was awaken by the sound of pounding on the front door. Her own door was closed. She subsequently heard a woman call to Yancy and then heard someone who she presumed to be Yancy walk down the hall and go down the stairs. She also heard the footsteps of multiple people come up the stairs, pass her room and go to the rear of the floor. In addition, she heard a man say, "you want to keep fucking with my money." Harris then heard multiple gunshots being fired and a man repeatedly say, "shoot him in the head." After hearing people leave, Harris eventually came out when she heard Owens call her name. When Harris saw that Owens had been injured in the head, Harris flagged down a police officer.

¶ 9 Doris McCarty testified that at about 1:30 a.m. on October 21, 1996, she saw four men standing in the vestibule of a house but could not see their faces because the house was dark. She had turned to walk away when one of the men called her name and inquired whether she wanted drugs. She declined. Although McCarty had generally used cocaine around that period, she had not used drugs that night. McCarty began walking to Yancy's home, but the four men ran after her. Codefendant Wright said they needed her to do

something for them. McCarty had purchased drugs from both codefendants and also recognized defendant but could not recall his name. Codefendant Wright said he wanted McCarty to get Yancy to open his door. She knocked on the door but no one answered. Codefendant Wright pulled out a gun, grabbed McCarty and said, "bitch, if [you] don't get this door open I'm going to blow your brains out." Defendant told her to cooperate and codefendant Wright would not hurt her. McCarty then walked to the side of the building, yelled Yancy's name and asked him to let her in. When McCarty returned to the front of the building and Yancy opened the door, the four men rushed up the stairs. Yancy also went upstairs. After the door closed, McCarty heard multiple gunshots being fired upstairs where Yancy lived and she fled. She did not call the police because she was scared.

¶ 10 Three days later, detectives brought McCarty to the police station. McCarty testified that she decided not to use drugs after the shooting and thus, was not under the influence of drugs during her conversations with the police. She eventually identified both codefendants. In addition, on November 2, 1996, she identified a photograph of defendant. McCarty testified that she had forgotten the name Reece, the name she knew defendant by in 1996, but immediately recognized the name when the police mentioned it. McCarty's identification testimony was substantially corroborated by Detective Steven Bradley and Detective Cornelius Longstreet, however, Detective Longstreet testified that neither he nor McCarty attributed the name Reece to defendant's photograph.

¶ 11 McCarty testified that she had several theft convictions stemming from her chronic drug

use. In addition, McCarty had previously given the police aliases and differing birth dates in her theft cases so they would not be connected. Around this time, McCarty went to prison, stopped using cocaine and received treatment. McCarty testified that in 1998, she violated a sentence of probation and was sentenced to six years in prison. During McCarty's testimony, ASA Alesia asked McCarty whether the six-year prison term she had been serving was reduced to three years in prison "through [her] attorney." McCarty confirmed this was correct and that she was currently serving her mandatory supervised release term. She further testified that the State's Attorney's Office paid for her to stay in a hotel for a couple of days and to be relocated.

¶ 12 Defendant testified that in 1996, he knew McCarty and Yancy from the neighborhood, but had never been in Yancy's home. He was also friends with Willis and codefendants. In September 1996, Juanita Harris, defendant's pregnant girlfriend, was beaten and robbed by codefendant Wright. Codefendant Wright also stole defendant's car and crashed it. These events were not reported to the police however. In the late evening hours of October 20, 1996, into the early morning hours the next day, defendant was at home with his mother and his girlfriend.

¶ 13 On November 2, 1996, the police arrested defendant and brought him to the police station, where he talked to ASA Walowski. Defendant told her he was at his mother's house on October 21, 1996, identified a photograph of codefendant Wright and told ASA Walowski that he had beat up Harris. ASA Walowski then informed defendant that codefendant Wright was in custody for a double homicide. Later that day, ASA

Walowski showed defendant a statement made by codefendant Daniels. After reading the statement, defendant expressed his desire to ensure that codefendant Wright remained in custody. When ASA Walowski told defendant he could make a statement, he said he would do so to get back at codefendant Wright for harming Harris. Together, defendant and ASA Walowski made defendant's statement. All of the information therein was taken from codefendant Daniels' statement or otherwise fabricated with the assistance of ASA Walowski. On cross-examination defendant was confronted with certain inconsistencies between his statement and codefendant Daniels' statement to show that he had not merely copied codefendant Daniels' statement and had independent knowledge of the crime. Defendant testified that codefendant Daniels had falsely stated that defendant pulled out a gun, that defendant said they had to shoot everyone in the head, and that defendant shot the man in front of him. Although defendant was read his rights, ASA Walowski never told him he was a suspect in this case.

¶ 14 Lena Hardaway, defendant's mother, testified that she did not remember whether defendant was at home on the evening of October 20, 1996, and did not know whether he was at home at 1 a.m. the next morning.

¶ 15 In rebuttal, ASA Walowski testified that defendant never told her he was at his mother's house at the time of the shooting, that codefendant Wright had beaten and robbed defendant's girlfriend or that codefendant Wright had crashed defendant's car. Although not included in defendant's statement, defendant had told ASA Walowski that he had sold $2,000 worth of drugs per day from Yancy's home. ASA Walowski never spoke to

codefendant Daniels and never had a copy of his statement. In addition, defendant had told ASA Walowski everything that was contained in his statement and she did not help him "brainstorm" information to include therein.

¶ 16 Officer Quadir Dawan also testified in rebuttal that on the afternoon of November 2, 1996, he informed defendant he was under arrest for the homicide that occurred at 626 East 71st Street. Defendant admitted he was aware of the incident and said that a person named Buddha had ordered him and a couple of other men to go "hit" a man named Ronald.

¶ 17 The jury found defendant guilty of the first degree murders of Goodwin and Scott, the attempted first degree murder of Owens and two counts of home invasion, in which Goodwin and Scott were the victims. Defendant was sentenced to life in prison for first degree murder and received concurrent 30-year prison terms for the remaining offenses. On direct appeal, we reversed and remanded for the trial court to vacate one home invasion conviction pursuant to the one-act, one-crime doctrine and otherwise affirmed the trial court's judgment. *People v. Hardaway*, No. 1-00-0297 (2001) (unpublished order under Supreme Court Rule 23(c)).

¶ 18 Defendant filed a *pro se* postconviction petition on October 28, 2002, and filed an amended *pro se* petition in May 2003. The claims raised in these petitions are not at issue. In June 2007, defendant, through appointed counsel, filed a supplemental petition alleging, in pertinent part, that defendant was denied due process when the State failed to disclose the existence of a deal, pursuant to which McCarty received a sentence reduction

in exchange for her testimony at defendant's trial in violation of *Brady v Maryland*, 373 U.S. 83 (1963).

¶ 19 The attached records from McCarty's criminal cases show that on August 28, 1998, McCarty appeared before Judge John Moran (case Nos. 97 CR 12570 and 97 CR 13409), the same judge who subsequently presided over defendant's trial. Following a pretrial conference, the court stated that if McCarty pled guilty in these two cases, which apparently involved a violation of probation that had been imposed for retail theft and another retail theft offense, the court would sentence McCarty to two concurrent six-year prison terms. When McCarty expressed concern regarding the length of the sentence in light of her seven children, the court responded, "[d]o you really want to get me started?" Judge Moran referred to all of the consideration he had already given McCarty, despite her criminal record, and stated that she was "out of order." McCarty then pled guilty pursuant to the aforementioned agreement. Months later, on February 3, 1999, McCarty filed a motion to reduce her sentence in the same two cases, arguing that the sentences were excessive and noting that she had participated in a substance abuse treatment program since September 30, 1998.

¶ 20 On February 5, 1999, McCarty again appeared before Judge Moran. The transcript indicates that ASA Fabio Valentini was present but did not participate in the hearing. When McCarty's case was called, the following colloquy ensued:

"MR. STUDENROTH [Defense Counsel]: Your Honor, can you pass that case until the Assistant State's Attorney, Joe Aleshia [*sic*], gets here?

THE COURT: Did he handle the case?

MR. STUDENROTH: He is the State's Attorney for the double homicide.

THE COURT: Pass it."

When the case was recalled, Studenroth stated he was ready to proceed. ASA Alesia, the prosecutor in defendant's case, was not present. The following colloquy ensued:

"THE COURT: [T]he State that is handling the matter isn't here, so I don't know what the agreement between the parties is or not agreement with the parties is [*sic*].

MR. STUDENROTH: I don't know if there's an agreement with the parties. The State is not objecting to the reduction of the sentence. I was going to make my argument and leave it up to your Honor."

After the court passed the case again, ASA Alesia had not appeared and the court reduced McCarty's sentence in case No. 97 CR 13409 to three years in prison. It appears that her sentence in case No. 97 CR 12570 may also have been reduced to three years on a prior date.

¶ 21 Defendant's supplemental petition, as well as codefendant Daniels' supplemental petition, which defendant adopted, argued that McCarty's six-year sentence entered pursuant to a negotiated guilty plea was reduced to three years in prison so that she would not be a prisoner when testifying at defendant's trial. Although McCarty's motion was filed after the trial court had lost jurisdiction, the State did not object. Defendant also alleged that the reduction occurred with the implicit support of ASA Alesia, the prosecutor in defendant's case. In addition, defendant argued that the court had previously been

unamenable to a lower sentence and there was no basis for the reduction. He further argued that a proper challenge to McCarty's sentence required her to have filed a motion to vacate the guilty plea within 30 days of its entry and that her testimony that her sentence was reduced through her attorney was misleading. Defendant also argued he was not culpably negligent for the late filing of his petition, citing medical problems, institutional lockdowns, and limited access to the law library.

¶ 22 On June 17, 2008, the State moved to dismiss defendant's petition, arguing that the transcripts relied on by defendant did not show there was an agreement between the State and McCarty and that her sentence was reduced following her successful participation in substance abuse treatment. The State also argued that even with evidence of this alleged agreement, the result of trial would not have been different. At a hearing on the State's motion, the State added that defendant's petition should be dismissed as untimely. The trial court initially denied the State's motion to dismiss defendant's petition, but reconsidered its decision.

¶ 23 On December 17, 2009, the trial court granted the State's motion to dismiss defendant's petition, finding that he had failed to show he was not culpably negligent for the untimely filing of his petition and that the record attached to his petition did not demonstrate an agreement existed between McCarty and the State. The court also found that even if there was an agreement, the evidence was not material, as required to show a violation pursuant to *Brady*.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant asserts the trial court erred in dismissing his petition without an evidentiary hearing because he made a substantial showing that the State violated his right to due process by failing to disclose evidence of a deal between the State and McCarty. Defendant contends he made a substantial showing that the State permitted McCarty to commit perjury by use of a misleading question to elicit testimony suggesting McCarty's sentence reduction was procured solely through her attorney. We review the second-stage dismissal of a postconviction petition *de novo*. *People v. Garcia*, 405 Ill. App. 3d 608, 614 (2010). Thus, we may affirm on any basis appearing in the record. *People v. Stoecker*, 384 Ill. App. 3d 289, 292 (2008). To withstand a motion to dismiss, a defendant must make a substantial showing of a constitutional violation. *People v. Demitro*, 406 Ill. App. 3d 954, 956 (2010). At this stage, we must accept all well-pled allegations in the petition as true, unless positively rebutted by the record. *Garcia*, 405 Ill. App. 3d at 614.

¶ 26 Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the State violates a defendant's right to due process by failing to disclose evidence that is favorable to the defense and material to either guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). A *Brady* claim requires a defendant to demonstrate that (1) the undisclosed evidence is favorable to the defense because it is either exculpatory or impeaching; (2) the evidence was wilfully or inadvertently suppressed by the State; and (3) the accused was prejudiced as a result because the evidence was material to guilt or punishment. *Beaman*, 229 Ill. 2d at 73-74. Thus, this rule encompasses impeachment evidence. *Strickler v. Greene*, 527

U.S. 263, 280 (1999); see also *People v. Ellis*, 315 Ill. App. 3d 1108, 1117 (2000) (where the State intends to inform a judge who will be sentencing a witness of that witness' cooperation, this constitutes a benefit which the State must disclose); see also *People v. Diaz*, 297 Ill. App. 3d 362, 371-72 (1998) (an agreement need not be so specific that it comports with the requirements for an enforceable contract and an implicit agreement may be found even where a deal has not been voiced).

¶ 27 Evidence is material where a reasonable probability exists that had the evidence been disclosed, the outcome of the proceeding would have been different. *Smith v. Cain*, No. 10-8145, 2012 WL 43512, at *2 (U.S. Jan. 10, 2010). A reasonable probability does not require it to be more likely than not that the defendant would have received a different verdict with the additional evidence, but rather, the likelihood of a different result must be great enough to undermine confidence in the verdict. *Smith*, No. 10-8145, 2012 WL 43512, at *2. This is not a sufficiency of the evidence test. *People v. Coleman*, 183 Ill. 2d 366, 393 (1998). Nonetheless, impeachment evidence may not be material where the State's remaining evidence is strong enough to preserve confidence in the verdict. *Smith*, No. 10-8145, 2012 WL 43512, at *2.

¶ 28 Similarly, the State may not knowingly use, or permit to go uncorrected, perjured testimony bearing on facts concerning the credibility of a witness. *People v. Nino*, 279 Ill. App. 3d 1027, 1036 (1996). Where the State's case includes perjured testimony and the State knew or should have known the testimony was perjured, a strict standard of materiality is utilized so that the conviction must be set aside if any reasonable likelihood

exists that the false testimony could have affected the jury's judgment. *Coleman*, 183 Ill. 2d at 391-92. This strict standard of materiality also applies where a *Brady* claim is based on both perjured testimony and the failure to disclose evidence. *People v. Harris*, 206 Ill. 2d 1, 51 (2002).

¶ 29 Here, despite protestations to the contrary, defendant does not offer proof of a *Brady* violation. At best, defendant has presented circumstantial evidence of a possible deal between the State and McCarty that was not disclosed. If we assume the State indeed failed to disclose that McCarty's sentence was reduced pursuant to an agreement with the State and that the State suborned perjury in this case, which is a bit of a leap based on this record, defendant still must show that this evidence was material in order to demonstrate that his right to due process was violated. Defendant contends that had the jury been informed of the State's involvement, the jury would have found the veracity of McCarty's testimony to be doubtful. We find this possibility to be extremely unlikely however, as the jury was also aware that McCarty cooperated with police at all times and that the information she provided to the police, well before her sentence was reduced, was consistent with her trial testimony. This strongly indicates that the substantive content of her testimony, as it related specifically to defendant's involvement, did *not* depend on leniency from the State. More significantly, even if the jury were to reject McCarty's testimony in its entirety, no reasonable likelihood exists that result of his trial would have been different.

¶ 30 The evidence presented at trial was more than sufficient. In an avowed effort to prove

materiality, defendant rather volubly suggests that only McCarty's testimony links him to this crime. *Cf. Smith*, No. 10-8145, 2012 WL 43512, at *2 (evidence impeaching the only evidence linking the defendant to the crime was material). In making this argument, defendant leans on a rather slender reed. The State presented ASA Walowski's testimony regarding the inculpatory statement defendant made after he was arrested. *Cf. People v. Vasquez*, 313 Ill. App. 3d 82, 98-99 (2000) (*Brady* claim was material because although the defendant made an inculpatory statement placing him at the scene, he was charged as the shooter)*; Diaz*, 297 Ill. App. 3d at 364-67, 373-74 (new trial required where the inculpatory nature of the defendant's statement was equivocal in light of the defense theory and a crucial witness presented perjured testimony that he had no agreement with the State). In his statement, defendant acknowledged going to the crime scene with three other men, two of whom had guns, in order to attack Goodwin. Defendant acknowledged that they used McCarty and Yancy to gain entry to the apartment and that once inside, codefendant Wright began shooting. The result of the trial essentially turned on whether the jury believed the account of events presented in defendant's statement to ASA Walowski or, whether the jury believed defendant's trial testimony that he was at home with his mother on the night of the triple shooting.

¶ 31 Although defendant disavowed his inculpatory statement, ASA Walowski's testimony regarding his statement was substantially unimpeached. *Cf. Coleman*, 183 Ill. 2d at 395-96 (*Brady* claim was remanded for an evidentiary hearing where four witnesses testified that the defendant told them about the killings in great detail but two of the witnesses

were under police suspicion, the third witness was a sister of one of those witnesses and the fourth witness was a jailhouse informer whose credibility was severely challenged). Putting McCarty's testimony aside, the statement itself was corroborated by Yancy, Harris and Officer Dawan. Notwithstanding Yancy's inability to identify defendant, Yancy corroborated defendant's statement that Yancy opened the door to his building after McCarty shouted toward his apartment. Defendant had also stated that after codefendant Wright shot at Goodwin, only defendant, codefendant Daniels and Willis left immediately. Yancy similarly testified that he heard shots being fired, the sound of multiple people leaving and subsequently heard another person leave, suggesting that one person had remained behind. In addition, Harris somewhat corroborated defendant's statement that Yancy went downstairs after his name had been shouted and that money had been discussed after additional people came upstairs. Furthermore, defendant's statement that Buddha indicated he wanted Goodwin beaten was corroborated by Officer Dawan's testimony that defendant told him a man named Buddha ordered defendant and a couple of other men to go "hit" a man named Ronald. Neither Yancy, Harris, nor Officer Dawan were substantially impeached.

¶ 32 In contrast, defendant's trial testimony was not only uncorroborated, it was contradicted by the testimony of his own mother and ASA Walowski. See also *Potter*, 384 Ill. App. 3d at 1063 (if the defendant chooses to explain an incriminating situation, he should provide a reasonable account or be judged by its improbability). Contrary to defendant's testimony, his mother testified that she did not know where he was at the time of the

shooting. In addition, ASA Walowski denied virtually every aspect of defendant's testimony and maintained that he alone made a statement without assistance from her or codefendant Daniels' statement. Because the outcome of the trial did not depend on McCarty's testimony, but rather, a finding by the jury that defendant's incriminating statement was more credible than his trial testimony, any undisclosed evidence or perjury concerning a deal between McCarty and the State could not have affected the jury's judgment. For the same reason, the State's closing argument references to McCarty's testimony would not have affected the outcome. Accordingly, defendant has failed to demonstrate that the evidence in question is material as required to make a substantial showing that his right to due process was violated. As a result, the trial court properly dismissed his petition without an evidentiary hearing. In light of our determination, we need not consider defendant's argument that he was not culpably negligent for the untimely filing of his petition.

¶ 33 For the foregoing reasons, we affirm the trial court's judgment.

¶ 34 Affirmed.