

No. 1-11-0654

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 12045
	)	
CARL HEMPHILL,	)	Honorable
	)	Thomas Hennelly,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE McBRIDE delivered the judgment of the court.  
Justices Howse and Taylor concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant cannot show that State witness had one more pending drug charge than witness attested to at defendant's trial, defendant has not established prejudice so as to bring claim in successive post-conviction filing; the judgment of the circuit court is affirmed.

¶ 2 Defendant Carl Hemphill appeals the circuit court's order denying him leave to file a successive post-conviction petition. He contends his successive petition should be allowed because it states a viable claim that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that a witness at his trial had two pending criminal cases.

Defendant asserts he has satisfied the cause and prejudice requirements to raise that claim in a successive post-conviction filing. We affirm.

¶ 3 In 1999, defendant was charged together with Toussaint Daniels and Troy Ballard with, among other counts, the first degree murder, aggravated kidnapping, armed robbery and attempted armed robbery of Terry Sales.<sup>1</sup> Defendant was convicted of those offenses following a January 2003 bench trial and was sentenced to 40 years for murder and 10 years for each of the three other convictions, with all terms to be served concurrently. On direct appeal, defendant alleged the trial court erred in denying his motion to suppress his statement to police, and this court affirmed. *People v. Hemphill*, No. 1-03-0895 (2005) (unpublished order under Supreme Court Rule 23).

¶ 4 In 2006, defendant filed a *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2006)), asserting his trial and appellate counsel were ineffective in failing to raise the issue of his diminished mental capacity and his ability to challenge the voluntariness of his inculpatory statement, among other alleged deficiencies. The circuit court summarily dismissed the petition as frivolous and patently without merit. On appeal, this court affirmed. *People v. Hemphill*, No. 1-06-3481 (2010) (unpublished order under Supreme Court Rule 23).

¶ 5 On October 25, 2010, defendant filed a motion for leave to file a successive petition for post-conviction relief. Among the six issues raised was that the State violated *Brady* by failing to disclose that Antwonn Leslie had two pending drug cases, as Leslie had admitted in Daniels' trial in July 2003, and not one pending case, as Leslie had testified in defendant's trial.

¶ 6 As a State witness at defendant's trial, Leslie acknowledged prior felony convictions for possession of a stolen motor vehicle, for which he served four years in prison, and possession of

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<sup>1</sup> Defendant, Daniels and Ballard were tried separately.

a controlled substance, for which he received a three-year sentence. Leslie stated at defendant's trial that he had a pending drug case but that no agreement had been made to secure his testimony. Leslie testified he was with Sales, the victim, the morning of the crimes and that Sales' pager went off every 15 or 20 minutes and Sales left him at about 2 p.m. On cross-examination, Leslie said he did not know defendant or if Sales knew defendant.

¶ 7 As to defendant's post-conviction claim regarding Leslie, he attached numerous exhibits to his successive petition, including the following documents pertinent to this appeal: (1) a notarized affidavit of Daniels in which he stated that in 2006, defendant requested transcripts of Daniels' trial but that Daniels did not provide defendant with those documents until 2009; (2) notarized affidavits of defendant that in March 2009, he learned of Leslie's second pending case by reading the transcripts of Daniels' trial and also stating had he known Leslie had a second pending drug case at the time of his trial, he would not have chosen to have a bench trial. On February 4, 2011, the circuit court denied defendant leave to file a successive post-conviction petition.

¶ 8 On appeal, defendant contends the circuit court erred in barring him from filing his successive post-conviction petition. He argues the State did not disclose Leslie's second pending drug case before Leslie testified at defendant's trial, and he asserts he could only raise this claim after receiving in 2009 the transcript of Daniels' trial in which Leslie acknowledged two pending narcotics cases.

¶ 9 The Act generally contemplates the filing of only one post-conviction petition. *People v. Ortiz*, 235 Ill. 2d 319, 328-29 (2009). Leave to file a successive post-conviction petition will be granted, however, where a defendant has satisfied the cause-and-prejudice test. 725 ILCS 5/122-1(f) (West 2010); see also *People v. Edwards*, 2012 IL 111711, ¶ 22. Our review of the circuit

court's denial of a motion to file a successive post-conviction petition is *de novo*. *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 11.

¶ 10 We note defendant's suggestion that the summary dismissal standard that has been applied to initial post-conviction filings should also govern requests to file successive petitions. More precisely, defendant proposes a melding of those standards such that a defendant need only present a gist of a claim of cause and prejudice that has an "arguable" basis in law and fact. See *People v. Hodges*, 234 Ill. 2d 1, 16-17 (2009). Indeed, our supreme court in *People v. Evans*, 2013 IL 113471, ¶¶ 11, 18, has recently acknowledged "important deficiencies" in the Act's requirements for successive petitions, such as whether a defendant must only plead, or must actually prove, cause and prejudice. However, the supreme court in *Evans* found it need not reach those questions in the proceedings before it. *Id.* at ¶¶ 12, 18.

¶ 11 Accordingly, we apply the existing cause and prejudice standards to the instant case. The Act expressly conditions the leave to file a successive petition upon meeting the cause and prejudice tests. 725 ILCS 5/122-1(f) (West 2010); see *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007). A petitioner must establish cause by showing an objective factor that impeded his ability to raise a specific claim in the initial post-conviction proceeding, and also must demonstrate prejudice, meaning the error so infected the defendant's trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2010).

¶ 12 A criminal defendant's right to due process and a fair trial is violated by the prosecution's failure to disclose material evidence favorable to the defense, and such claims are cognizable in post-conviction proceedings. *People v. Harris*, 206 Ill. 2d 1, 44 (2002). Here, defendant contends he first learned in 2009 that Leslie had a second pending drug case by reading the transcript of Daniels' trial.

¶ 13 Even if defendant established cause to bring this claim at this stage, he fails to meet the prejudice requirement. To establish a *Brady* violation, the defendant is required to show the suppressed evidence was both material and favorable to his defense. Evidence, such as a prior conviction of a State witness, is material if there is a reasonable probability that the result of the defendant's trial would have been different had the prosecution disclosed the evidence. *People v. Anderson*, 375 Ill. App. 3d 990, 1011 (2007); *People v. Rapp*, 343 Ill. App. 3d 414, 418 (2003). "Accordingly, to succeed on a claimed *Brady* violation, a defendant must demonstrate that (1) the undisclosed evidence is favorable to him because it is either exculpatory or impeaching, (2) the evidence was either willfully or inadvertently withheld by the State, and (3) withholding the evidence resulted in prejudice to him." *Anderson*, 375 Ill. App. 3d at 1011.

¶ 14 Defendant contends Leslie's testimony that he was paged the day of the crimes provided critical corroboration of defendant's statement to police, and "evidence of an additional pending case would have undermined [Leslie's credibility]". Absent from defendant's argument is any assertion that the State intentionally withheld any of Leslie's criminal history in violation of *Brady*.

¶ 15 In addition, defendant failed to demonstrate that Leslie *actually* had two pending cases at the time of defendant's trial in January 2003 as opposed to the time of Daniels' trial which was six months later, in July 2003. Defendant argues that the minimal pleading standard applicable to first-stage proceedings in an initial post-conviction petition should allow a liberal construction of the claim in this successive petition and, therefore, we must presume the truth of the allegation because it is not rebutted by the record. However, the testimony of Leslie, as presented by defendant in his petition, reveals a substantial difference between the two trials. In defendant's January 2003 trial, Leslie testified he was then currently working as a self-employed owner of a hair salon and was living in Chicago Heights. Furthermore, defendant's trial record reveals that

Leslie was not in custody at the time he testified because the court admonished Leslie at defendant's trial that he had been served with a subpoena to return for defendant's co-offender Ballard's case. In Daniels' July trial, Leslie testified he was living in Harvey but was currently in the Cook County jail due to a pending drug case and he also had another drug case pending in Markham. The contrasting testimony of Leslie does not support defendant's representation that Leslie had two, rather than one, pending charges at the time of defendant's January trial.

¶ 16 Even assuming *arguendo* that Leslie had a second pending drug case when he testified at defendant's trial, defendant cannot meet the requirement of *Brady* that the outcome of his trial would have been different, particularly given defendant's statement incriminating himself in the offense. Moreover, while defendant argues he would not have chosen to undergo a bench trial had he known Leslie had two pending drug cases instead of one, he does not explain how a jury trial would have improved his chances at acquittal.

¶ 17 Accordingly, the circuit court's order denying defendant leave to file a successive post-conviction petition is affirmed.

¶ 18 Affirmed.