2013 IL App (1st) 111313-U

FOURTH DIVISION
May 23, 2013

No. 1-11-1313

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. 07 CR 18196
	)	
KEITH BLUNT,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justice Fitzgerald Smith concurred in the judgment.
Justice Pucinski dissented.

O R D E R

¶ 1 *Held*: The trial court's *sua sponte* dismissal of defendant's petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2–1401 (West 2010)) was proper where the affidavit in support of the claim of perjured testimony was hearsay.

¶ 2 Defendant Keith Blunt appeals from the circuit court's *sua sponte* dismissal of his petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2–1401 (West 2010). On appeal, defendant contends that the trial court "prematurely" dismissed his petition where he alleged that an occurrence witness committed perjury on a

material fact supporting his conviction for aggravated battery and he attached affidavits and other documents in support of the claim.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the events of August 17, 2007. On that date, defendant, Andretta Crockett, with whom he had a long-term dating relationship, and Travontae Howard, Crockett's 13-year-old son, engaged in a physical altercation. As a result of the fight, Crockett received 10 staples to close a wound on her head. Howard testified at defendant's trial that defendant slashed him on the arm. He also showed the jury a three-inch scar on his right arm that he indicated resulted from the slashing. Defendant was charged with several counts of aggravated domestic battery, aggravated battery, and domestic battery. As relevant to this appeal, defendant was charged with the aggravated battery of Howard in that he struck Howard about the body and cut him with a knife.

¶ 5 The jury convicted defendant of the aggravated domestic battery of Crockett and the aggravated battery of Howard. Based on his criminal background, defendant was sentenced as a Class X offender to 12 years' imprisonment for aggravated domestic battery and an extended 10-year term of imprisonment for aggravated battery, to be served concurrently. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Blunt*, No. 1-09-1331 (2010) (unpublished order under Supreme Court Rule 23). This court also affirmed the circuit court's dismissal of defendant's *pro se* motion to allow DNA testing. *People v. Blunt*, No. 1-11-1789 (2012) (unpublished order under Supreme Court Rule 23).

¶ 6 Defendant filed a section 2-1401 petition (735 ILCS 5/2–1401 (West 2010)), raising numerous arguments. As relevant to this appeal, defendant asserted that newly discovered evidence showed that Howard lied at trial with regard to defendant having slashed him in the arm with a knife. Specifically, defendant alleged that at a deposition that took place after trial, taken

in the course of a federal lawsuit he brought against various police officers and the City of Chicago, Howard stated that the scar on his arm was the result of defendant hitting him with a broom. In support of his allegations, defendant attached the following documents: (1) a self-executed affidavit, swearing to the truth of his allegations; (2) a second self-executed affidavit, reasserting the allegations of the petition and stating that he was present at Howard's deposition; (3) a "notice of deposition" indicating that Howard was subpoenaed to be deposed on August 25, 2010; (4) a letter from a transcription company indicating that it would cost $227.50 to order a transcript of Howard's deposition testimony (and another $455 for two other transcripts about which defendant had inquired); and (5) a copy of defendant's prison trust account statement, showing that he had $7.71 in available funds a few months after he corresponded with the transcription company.

¶ 7 The trial court *sua sponte* dismissed defendant's petition.

¶ 8 On appeal, defendant contends that the trial court prematurely dismissed his petition where he raised an arguably meritorious claim that his aggravated battery conviction rested on perjured testimony and he included affidavits and other documents in support of his claim that Howard committed perjury on a material fact. Defendant argues that Howard's trial testimony that he was cut with a knife was the State's sole evidence supporting the conviction for aggravated battery. He asserts that had Howard testified at trial as he did at the deposition, where he allegedly stated his wound was the result of being hit with a broom, the State would have had no evidence to sustain its aggravated battery charge. Defendant argues that he supported his argument with specific factual allegations not contradicted by the record, and that those allegations must be taken as true. He maintains that the trial court should have held an evidentiary hearing where Howard could have been cross-examined to determine which of his contradictory statements was false.

¶ 9 Section 2-1401 provides a comprehensive statutory procedure for defendants to challenge final orders, judgments, and decrees more than 30 days after they have been entered. *People v. Haynes*, 192 Ill. 2d 437, 460 (2000). The purpose of a petition brought pursuant to section 2-1401 is to correct errors of fact unknown at the time of trial but which, if then known, would have prevented the judgment. *People v. Coleman*, 206 Ill. 2d 261, 288 (2002). The petition "must be supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2–1401(b) (West 2010). Because proceedings under section 2-1401 are subject to the usual rules of civil practice, the State's failure to answer a defendant's petition with a responsive pleading results in an admission of all well-pleaded facts and renders the petition ripe for adjudication. *People v. Vincent*, 226 Ill. 2d 1, 9-10 (2007). An unanswered petition is subject to *sua sponte* dismissal if it fails to state a cause of action. *Vincent*, 226 Ill. 2d at 14. A trial court's dismissal of a section 2-1401 petition without an evidentiary hearing is reviewed *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 10 Defendant's claim for section 2-1401 relief rests on his self-executed affidavit, in which he attests that Howard stated at a posttrial deposition that the scar on his arm was the result of defendant hitting him with a broom. The State argues that defendant's affidavit is insufficient to merit relief under section 2-1401 because it is a hearsay affidavit and is comprised only of defendant's own self-serving statements. We agree with the State.

¶ 11 An affidavit submitted in support of a section 2-1401 petition must be made by a person who has first-hand knowledge of the factual allegations. *People v. Perkins*, 260 Ill. App. 3d 516, 518 (1994). A supporting affidavit that is based on hearsay is insufficient to warrant relief. *People v. Sanchez*, 115 Ill. 2d 238, 284 (1986); *People v. Cole*, 215 Ill. App. 3d 585, 587 (1991). As a rule, hearsay is excluded because of the absence of tests for ascertaining the trustworthiness

of the declarant. M. Graham, Cleary & Graham's Handbook of Illinois Evidence at 753 (10th ed. 2010).

¶ 12 Defendant's affidavit, which was offered to establish that Howard lied at trial, is hearsay because it relates what defendant purports to be Howard's deposition testimony. In his reply brief, defendant argues that his affidavit is not hearsay because he was present at Howard's deposition and has first-hand knowledge as to what he heard Howard say at the deposition. Defendant's argument fails. What makes the statement hearsay is the fact that defendant is relating what he heard Howard (the declarant) say. The fact that defendant heard Howard say it "first-hand" does not alleviate the problem with hearsay, which is the inability to test the underlying trustworthiness of the declarant's statement.

¶ 13 The affidavit defendant provided in support of his section 2-1401 petition is insufficient to warrant relief under section 2-1401. *Cole*, 215 Ill. App. 3d at 587. Accordingly, dismissal of the petition was proper.

¶ 14 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 15 Affirmed.

¶ 16 JUSTICE PUCINSKI, dissenting:

¶ 17 I respectfully dissent from the majority's decision affirming the circuit court's *sua sponte* dismissal of defendant's section 2-1401 petition.

¶ 18 Defendant has correctly asserted new evidence unavailable to him at trial, *i.e.*, the deposition of Travontae Howard in a federal trial which occurred after defendant's Illinois criminal trial.

¶ 19 Defendant was convicted of aggravated battery against Howard based on Howard's testimony at trial that defendant slashed him with a knife and Howard showing the jury a slash scar which he said was from that knife.

¶ 20 In the later federal case Howard testified under oath in a deposition that the wound was actually caused when defendant struck him with a broom. In addition, in the same federal case, Howard's mother testified under oath in a deposition that Howard hit defendant with a bottle before defendant hit Howard with the broom after Howard joined a fight between defendant and Howard's mother.

¶ 21 Defendant provided affidavits to the court in support of his section 2-1401 petition, based on his own knowledge of the deposition testimony of Howard since defendant was there. That affidavit was, therefore, from a person who had first hand personal knowledge of the matter at issue.

¶ 22 In addition and perhaps more important, defendant provided information to the court that he is unable to afford the cost of the transcripts of the deposition testimony.

¶ 23 It is a sorry system that stops a case because a defendant does not have the money to provide transcripts, when the court could just as well take testimony from Howard and his mother to determine if Howard's two statements under oath were in conflict.

¶ 24 I would reverse. If Howard engaged in perjury the result on that criminal count is unsupportable.