2014 IL App (1st) 130477-U

Nos. 1-13-0477 & 1-13-1931 (consolidated)

SIXTH DIVISION
December 12, 2014

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 29874
	)	
CRAIG LOMAX,	)	The Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶1 *HELD*: We affirm the summary dismissal of defendant's postconviction petition where he failed to sufficiently present a claim for a *Brady* violation.

¶2 Defendant, Craig Lomax, appeals the dismissal of his *pro se* petition filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122 *et seq*. (West 2002)) (Act). Defendant contends the trial court erred in dismissing his postconviction petition on the basis of waiver where his petition alleged a claim for a *Brady* violation based on newly-discovered evidence. Based on the following, we affirm.

¶3 FACTS

¶4 Following a jury trial, defendant was convicted of two counts of first degree murder, two counts of aggravated kidnapping, two counts of aggravated battery, and three counts of armed robbery. Defendant was subsequently sentenced to two concurrent terms of natural life imprisonment for the two murder convictions, a concurrent 20-year sentence for the armed robbery convictions, and two five-year sentences for the aggravated battery convictions to run consecutive to the armed robbery sentence. The trial court vacated the aggravated kidnapping convictions. On direct appeal, defendant claimed the trial court erred in denying his motion to suppress police statements. We held the trial court did not commit manifest error in concluding that, after having invoked his *Miranda* rights earlier, defendant initiated contact with police before he made a statement implicating himself in the underlying crimes. *People v. Lomax*, 2011 IL App (1st) 092186-U, ¶ 20.

¶5 In his *pro se* postconviction petition, which is the subject of the instant appeal, defendant alleged the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose evidence that one of its witnesses, Inesha Scott, was paid in exchange for her testimony. Defendant additionally alleged that his trial counsel was ineffective for failing to investigate and discover the payment of Scott, for failing to investigate and discover the State's offer of a reduced charge in exchange for another witness', Shaun Glover's, cooperation, and for failing to challenge his pretrial detention. In a written opinion, the trial court summarily dismissed defendant's *pro se* postconviction petition as frivolous and patently without merit on the basis of waiver[1] where defendant failed to raise the allegations on direct appeal.

[1] In its written opinion, the trial court referenced the doctrine of forfeiture, but ultimately stated that the postconviction petition was dismissed based upon waiver. This court recognizes that the doctrines of waiver and forfeiture have been used interchangeably in the past (see *People v. Blair*, 215 Ill. 2d 427, 443 (2005)), but we will rely on the appropriate doctrine of forfeiture going forward.

¶6 The trial evidence included the presentation of over 20 witnesses. We summarize only the evidence necessary for the disposition of the question before us. According to defendant's police statement, Lazarek Austin assembled a group of men to rob the Economy Auto Shop located at 1535 North Lawndale in Chicago, Illinois, and gathered the equipment used to execute the offense, including masks, guns, and a van borrowed from Shaun Glover. Austin selected the repair shop to rob of a large amount of cocaine because he had purchased drugs at the location in the past. On January 3, 2002, Dwayne Harrison, Olauden Slaughter, Austin, and defendant proceeded to the auto repair shop. Harrison and Slaughter entered the shop first, pretending to need a vehicle repaired. Defendant and Austin entered the shop a few minutes later wearing masks. Defendant and Austin demanded money and drugs at gunpoint, battered and restrained a number of the shop employees, and ultimately left the shop with Jamie Flores, the shop owner, and Rene Tapia, an employee. Flores and Tapia were transported in the van away from the shop. Austin directed defendant, who was driving, to various locations including the home of Marquand Williams' girlfriend, where Harrison obtained a butcher knife and returned to the van. Austin eventually directed defendant to park the van at 358 N. Kenton. Defendant was instructed to act as a lookout while Austin, Slaughter, and Harrison disappeared with Flores and Tapia. Defendant then heard several gunshots before Austin, Slaughter, and Harrison returned to the van. Austin instructed defendant to drive the van to a car wash. Defendant complied and left the van at the car wash. The four men split $1,400, which were the proceeds from the robbery.

¶7 Three witnesses testified regarding the events that occurred at the auto repair shop. Cleo Smith, a patron, testified that a man approached him with a handgun, covered his head with a coat, and forced him into a closet. Smith could not identify anyone. Javier Solano testified that he worked as a mechanic at the repair shop and was ordered to the ground by an armed man

wearing a mask. Solano was hit twice with a gun, blindfolded, bound, and placed into a car. Solano was unable to identify his attacker. Adelia Palencia, the repair shop receptionist, testified that defendant repeatedly struck her in the head with a gun until she lost consciousness. When she regained consciousness, she was laying on the repair shop floor with her hands and feet bound. Palencia was able to identify defendant in a lineup despite the fact that he had worn a face mask.

¶8 Naketa Douglas testified that she was cooking dinner during the early evening on the night in question when defendant knocked on her window and asked if Williams was home. When she responded in the negative, defendant requested to borrow the kitchen knife she was using. Defendant never returned the knife.

¶9 Inesha Scott testified that she had two children with Austin and she knew defendant and Slaughter. During the early morning hours of January 3, 2002, Scott was at Austin's brother's home. According to Scott, Slaughter was present with ski masks and gloves; and Austin, who was also present, retrieved a handgun from a safe. Scott further testified that, later on the night of January 3, 2002, defendant was at Austin's apartment along with Slaughter and Lydell Cardine. Scott overheard defendant tell Austin that he took the van to the car wash to get the blood cleaned out of it. Scott also testified to observing money on top of the television.

¶10 Glover testified that he loaned his van to Austin and defendant on the day in question. According to Glover, defendant returned the keys to the van on the night of the shooting and said the van was at a car wash. Glover testified that he retrieved the van with his brother, girlfriend, and a third person. The van was covered in blood. Defendant explained to Glover that the blood originated from a friend who had been shot in the leg. Glover found a blood-covered receipt in

the van, which he kept and gave to the police. Glover's brother and girlfriend confirmed Glover's testimony regarding the condition of the van and the receipt.

¶11 Cornell Cardine's trial testimony denying that he saw defendant during the shooting was impeached with Cardine's prior handwritten statement and grand jury testimony. In his prior statements, Cardine attested that he and his brother followed the van defendant was driving on the date in question. The vehicles continued to drive until the van stopped near railroad tracks close to Kenton Avenue. Lydelle and his brother waited in their car. Shortly thereafter, Cardine heard three or four gunshots. Slaughter then entered Cardine's car and instructed him to follow the van to a designated carwash. Cardine complied.

¶12 On January 4, 2002, the bodies of Flores and Tapia were found, deceased, near a railroad trestle. A medical examiner testified that both Flores and Tapia had been shot in the head and suffered bruises, scrapes, cuts, and stab wounds. Forensics testing revealed that DNA from the blood in the van matched Tapia, DNA from the bloody receipt found in the van matched Flores, and DNA from a cigarette butt found on the scene at Kenton Avenue matched Tapia. In addition, Slaughter could not be excluded from the DNA found on the cigarette.

¶13 The parties stipulated that, on January 24, 2008, while defendant was in custody, jail personnel intercepted a letter he wrote to his sister, Jeanetta Melton, instructing her to offer money to Cardine and Glover in exchange for their favorable testimony. The jury also heard a portion of an audiotape between defendant and Melton during which they spoke about the letter.

¶14 Defendant's two witnesses, Randy and Pamela Underwood, testified that they were with defendant the morning of January 3, 2002, from approximately 9 a.m. until sometime after noon. Defendant was present at a court appearance and then the group went to a restaurant near the courthouse. The parties stipulated that, if called, a court reporter would testify that defendant

appeared before the court located at Harrison and Kedzie on January 3, 2002, from 9:24 a.m. to 9:47 a.m.

¶15 After the jury retired to deliberate, the jurors sent three notes to the trial judge asking questions related to accountability. The jury sent another note stating that one of the jurors had difficulty understanding the law, had a "strong feeling" that the law was unjust, and was "incompetent." The court decided to sequester the jurors over night. Before the jurors began deliberating the next day, the court instructed them that they may not substitute their beliefs about the law for the actual law. The jury requested transcripts of Cardine's testimony and then ultimately delivered its verdict.

¶16 After he was unsuccessful in his direct appeal, defendant filed his *pro se* postconviction petition alleging, *inter alia*, that "monies and gratuities" were provided to Scott in violation of *Brady*. To his petition, defendant attached a "Victim/Witness Relocation Request Approval" form, a memorandum regarding the relocation of a witness, and his own affidavit. The "Victim/Witness Relocation Request Approval" form was dated December 2, 2002, and requested relocation assistance in the form of first month's rent, security deposit, and moving expenses for Scott, who was Austin's girlfriend and had been contacted by Austin's family to change her testimony. The form was submitted by Assistant State's Attorney (ASA) Brian Holmes and was signed in the "required authorizations" section by the ASA floor supervisor Brian Sexton and "Bureau Chief or Chief Deputy" Anita Alvarez. In the memorandum, also dated December 2, 2002, the requesting ASA, Brian Holmes, detailed that Scott provided a handwritten statement and grand jury testimony regarding Austin's participation in the shootings and Austin's family contacted Scott regarding her cooperation with the police. The memorandum also stated that Austin attempted to contact Scott. The memorandum further

provided that Scott was fearful that Austin or his family would take action against her. In his affidavit, defendant averred that he "had no knowledge before or during trial of the [S]tate's suppression/with-holding of information pertinent to monies provided to Inesha Scott, thus being newly discovered since being sentenced in this matter." Defendant further averred that "the precise proviso of Glover's promises/considerations, from the [S]tate were unknown to me until well after being sentence[d], and could not be raised on direct appeal as it is outside of the record on appeal."

¶17 On December 11, 2012, the trial court summarily dismissed defendant's postconviction petition, finding his claims were barred by the doctrine of forfeiture because he failed to raise any of the claims on direct appeal. Defendant's late notice of appeal was granted.

¶18 ANALYSIS

¶19 Defendant contends the trial court erred in summarily dismissing his *Brady* claim where he presented an arguable claim that the State failed to disclose evidence that it paid Scott for her efforts as a witness.

¶20 The Act provides a convicted defendant with a means to raise a constitutional challenge to the proceedings underlying his conviction and sentence. 725 ILCS 5/122-1(a) (West 2002). A postconviction petition may be summarily dismissed by a trial court if the court determines the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2002). A postconviction petition is considered frivolous or patently without merit when the petition contains no "arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an

indisputably meritless legal theory is one which is completely contradicted by the record." *Id*. We review the summary dismissal of a postconviction petition *de novo*. *Id*. at 9.

¶21 " 'The scope of the [postconviction] proceeding is limited to constitutional matters that have not been, nor could have been, previously adjudicated.' " *People v. Brown*¸ 2014 IL App (1st) 122549, ¶ 41 (quoting *People v. Harris*, 224 Ill. 2d 115, 124 (2007). As a result, issues that could have been raised on direct appeal, but were not, are considered forfeited and are barred from consideration in a postconviction proceeding. *Brown*, 2014 IL App (1st) 122549, ¶ 41. Claims that are barred by the doctrine of forfeiture are necessarily frivolous and patently without merit. *Blair*, 215 Ill. 2d at 445.

¶22 The forfeiture doctrine, however, will be relaxed when the postconviction claim depends on matters outside the original appellate record because such matters may not be raised on direct appeal. *Brown*, 2014 IL App (1st) 122549, ¶ 41.[2] Where new evidence is relied upon, the evidence must be (1) of such a conclusive character that it will probably change the result upon retrial; (2) material and not merely cumulative; (3) discovered since trial; and (4) of such character that it could not have been discovered prior to trial by the exercise of due diligence. See *People v. Patterson*, 192 Ill. 2d 93, 139 (2000) (similarly considering whether evidence was newly discovered in order to relax the doctrine of *res judicata*).

¶23 In his initial appellate brief, defendant failed to address the fact that his postconviction petition was dismissed based on the doctrine of forfeiture. Defendant, therefore, has forfeited his right to do so. IL. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[p]oints not argued are waived and shall not be raised in the reply brief"). Despite this forfeiture on appeal, in his reply brief, defendant contends that the trial court should have relaxed the rules of forfeiture because his

[2] The rules of forfeiture also are relaxed where a defendant alleges ineffective assistance of appellate counsel or where fundamental fairness so requires (*People v. English*, 2013 IL 112890, ¶22); however, defendant did not advance either of these bases here.

Brady claim was supported by evidence that did not appear in the original appellate record. Forfeiture is a limitation on the parties and not on this court, which has the responsibility to achieve a just result and to maintain a sound and uniform body of precedent. *Pedersen v. Village of Hoffman Estates*, 2014 IL App (1st) 123402, ¶ 44. We, therefore, will consider whether the trial court should have relaxed the rules of forfeiture to consider defendant's postconviction *Brady* claim.

¶24 We conclude that it would not have been appropriate for the trial court to relax the forfeiture doctrine where defendant failed to present a sufficient *Brady* claim to survive first-stage postconviction dismissal. The new evidence defendant discovered after trial included a "Victim/Witness Relocation Request Approval" form and a memorandum regarding the relocation of a witness. As described, the "Victim/Witness Relocation Request Approval" form requested relocation assistance in the form of first month's rent, security deposit, and moving expenses for Scott. The form was signed in the "required authorizations" section by the ASA floor supervisor and the "Bureau Chief or Chief Deputy" Anita Alvarez. In the memorandum, ASA Holmes stated that Scott, whom had provided a handwritten statement and grand jury testimony regarding Austin's participation in the shootings, was fearful that Austin or and his family would take action against her because of her cooperation with the police. In his affidavit, defendant averred that he "had no knowledge before or during trial of the [S]tate's suppression/with-holding of information pertinent to monies provided to Inesha Scott, thus being newly discovered since being sentenced in this matter." Taking all of this evidence as true, which we must at the first-stage of postconviction review, and drawing the inference that Scott did in fact receive witness relocation assistance, which was not confirmed by defendant’s newly discovered evidence, we find defendant did not present a sufficient *Brady* claim. In other words,

defendant failed to establish that the newly-discovered evidence was material and not merely cumulative and was of such conclusive character that it would probably change the result upon retrial. See *Patterson*, 192 Ill. 2d at 139.

¶25 Scott's testimony provided that, during the morning on the date of the shootings, she observed Austin and Slaughter with ski masks, gloves, and a handgun. Scott further testified that, later on the night in question, defendant, Austin, Slaughter, and Lydell Cardine were at Austin's apartment. Scott observed money on top of the television and overheard defendant tell Austin that he took the van to the car wash to get the blood cleaned from it. This testimony was not material, but merely cumulative in light of defendant's police statements, which we found were admissible on direct appeal, and other testimony at trial. More specifically, in his police statement, defendant confessed to agreeing to rob the auto repair shop with Austin and Slaughter. Defendant stated that Austin retrieved a bag containing masks and guns before defendant drove Glover's van to the repair shop. Defendant detailed the events of the robbery, including threatening Palencia at gunpoint while wearing a mask and hitting her repeatedly with the handgun, which she confirmed. Palencia was able to identify defendant later in a lineup. In his statement, defendant also provided that he split the proceeds of the robbery, *i.e.*, the money observed by Scott in Austin's apartment, with Austin, Slaughter, and Harrison. Moreover, defendant admitted that he dropped Glover's van at a car wash to be cleaned, which Glover confirmed in his testimony.

¶26 Furthermore, in light of defendant's police statements, again which we found to be admissible on direct appeal, and all of the other witness testimony presented at trial, Scott's testimony was not of such conclusive character that its removal as a violation of *Brady* would probably change the result upon retrial. Rather, the evidence conclusively demonstrated

defendant's involvement in the underlying offenses. Defendant agreed to rob the auto repair shop and was involved in the preparations to carry out the offense. Defendant then entered the repair shop with Austin, both of whom were wearing masks, and demanded drugs and money at gunpoint. After the group battered and restrained a number of the shop employees, they took Flores and Tapia into Glover's van and left. In route to the ultimate destination where Flores and Tapia were killed, defendant drove to a home where either Harrison or defendant retrieved a kitchen knife that was used against Flores and Tapia. Upon their arrival at 358 N. Kenton, defendant was instructed to act as the lookout while Austin, Slaughter, and Harrison shot Flores and Tapia and left their bodies. Defendant then drove the group to a car wash where he left the bloodied van. Smith, Solano, and Palencia confirmed the events that occurred at the auto repair shop, with Palencia providing a positive identification of defendant. Douglas confirmed that defendant showed up at her home and took a kitchen knife from her on the date in question. Glover confirmed that he loaned his van to Austin and defendant on the day in question and that, later on that date, defendant returned the keys and instructed Glover that the van was at a car wash. Glover confirmed that the van was covered in blood. In his handwritten statement and grand jury testimony, Cornell Cardine confirmed that the group drove Glover's van to an area near railroad tracks close to Kenton Avenue. While he and his brother Lydelle waited in their car after having followed the van, Cornell heard three or four gunshots. Slaughter then instructed Cardine to follow the van to a designated carwash.

¶27 In sum, we conclude that defendant failed to sufficiently present a claim for a *Brady* violation in order to survive the first stage of postconviction review.

¶28 To the extent defendant attempts to raise a *Brady* claim in relation to Glover, the claim is forfeited for failing to present a sufficient argument in violation of Supreme Court Rule 341(h)(7).

¶29 CONCLUSION

¶30 We affirm the dismissal of defendant's postconviction petition.