

2016 IL App (1st) 133824-U

SIXTH DIVISION
March 31, 2016

No. 1-13-3824

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	No. 02 CR 01833
v.)	
)	
JOHN SHORES,)	
)	Honorable
Defendant-Appellant.)	Michele Simmons,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Second-stage dismissal of the defendant's supplemental postconviction petition and section 2-1401 petition was affirmed. The defendant failed to make a substantial showing that the State violated the disclosure rule set forth in *Brady v. Maryland*, which denied him his constitutional right to due process of law. This court ordered the mittimus modified to reflect 1,079 days, the amount of custodial credit the defendant was entitled to against his prison sentence. The defendant's *pro se* motion on appeal to add additional *Brady* violations was denied.

¶ 2 The defendant, John Shores, appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his supplementary petition for relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, the defendant contends that: (1) he was entitled to an evidentiary hearing on his claim that the State violated the disclosure rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963); and (2) the mittimus must be corrected to reflect the number of days of custodial credit the defendant was entitled to against his prison sentence.

¶ 3 After the briefs were filed, the defendant filed a *pro se* motion requesting this court to consider additional violations of *Brady* not previously raised by defense or appellate counsel. We ordered the motion taken with the case.

¶ 4 The defendant and codefendants, Deria Gaitors and Ramone Samuels, were charged with multiple counts of first degree murder, home invasion, conspiracy to commit home invasion, residential burglary and conspiracy to commit residential burglary, all in connection with the death of Ian Thorne (the victim). Ms. Gaitors and Mr. Samuels entered into plea agreements in exchange for their testimony against the defendant. The terms of the plea agreement provided that the murder charges against them would be dismissed, Ms. Gaitors would plead guilty to conspiracy to commit home invasion, Mr. Samuels would plead guilty to home invasion, and the State would recommend a sentence of 10 years' imprisonment for each co-defendant.

¶ 5 The pertinent trial testimony is taken from the trial record and this court's Rule 23 order disposing of the defendant's direct appeal (*People v. Shores*, 366 Ill. App. 3d 1224 (2006) (table) (unpublished order under Supreme Court Rule 23)). The testimony is summarized below.

¶ 6 Renetta Fonville testified that on the morning of December 13, 2001, she was sitting in a car parked on South Wallace Street in Riverdale, Illinois when she saw three men arrive at the victim's residence at 14523 South Wallace Street. As she watched, one of the men rang the doorbell. When the door opened, one of the men stepped into the doorway but quickly stepped back out. Ms. Fonville then heard a "pop." The three men fled the scene. She located a police officer and reported what she had seen.

¶ 7 Ms. Gaitors testified that she told the defendant and Mr. Samuels that the victim kept between \$50,000 and \$100,000 inside his residence. The three devised a plan to steal the money from the victim's residence. On December 12, 2001, Ms. Gaitors saw the defendant and Mr. Samuels; they were dressed in black in preparation for the burglary of the victim's residence. On the afternoon of December 13, 2001, Ms. Gaitors saw the defendant and Mr. Samuels, at which time the defendant told her he had shot the victim.

¶ 8 Ms. Gaitors acknowledged that she agreed to testify for the State so she would not have to face murder charges. She pleaded guilty to conspiracy to commit home invasion, and she expected to be sentenced to 10 years' imprisonment.

¶ 9 Mr. Samuels testified that on the night of December 12, 2001, the defendant, Glen Fortier¹ and he were each armed with .38-caliber handguns. As they approached the victim's residence, they discovered that the victim was home and aborted the burglary plan. The next

¹Mr. Fortier was not charged in this case.

morning, the trio returned to the victim's residence, and the defendant knocked on the door. When the victim answered the door, the defendant asked to see a woman staying at the victim's residence. When the victim turned to summon the woman, the defendant drew his weapon and pushed the victim. As the victim turned back to him, the defendant shot the victim with the .38-caliber handgun which he was carrying. The trio then fled the scene. Mr. Samuels and Mr. Fortier disposed of the murder weapon. The defendant left for Atlanta, Georgia to visit his mother. The trio later agreed to a "story," that they had gone to the victim's residence to visit three females staying there. The victim pulled out a gun, and in a struggle with the defendant, the gun discharged, killing the victim.

¶ 10 Mr. Samuels acknowledged that he was in the witness protection division of the Cook County jail. In exchange for his testimony, Mr. Samuels pleaded guilty to home invasion and expected to receive a sentence of 10 years' imprisonment.

¶ 11 The evidence at trial included the defendant's videotaped statement. Following his apprehension in Cobb County, Georgia, the defendant gave a videotaped statement to Cook County assistant state's attorneys. The defendant stated that he participated with Ms. Gaitors and Messrs. Samuels and Fortier in a plan to steal the victim's money. On December 13, 2001, the defendant rang the victim's doorbell. When the victim answered the door, the defendant stepped inside at which point the victim produced a gun. A struggle ensued during which the gun discharged. The defendant fled the scene taking the gun, which he disposed of later. During closing argument, the prosecutor argued to the jury that while Ms. Gaitors and Mr. Samuels were no longer charged with murder, they were still going to prison.

¶ 12 The jury found the defendant guilty of first degree murder, and the trial court imposed a sentence of 55 years' imprisonment. On direct appeal, this court affirmed the defendant's

conviction. *Shores*, 366 Ill. App. 3d 1224 (2006) (table) (unpublished order under Supreme Court Rule 23).

¶ 13 The defendant filed a *pro se* postconviction petition, and the circuit court appointed the public defender to represent the defendant. Subsequently private counsel was retained, and he filed a supplemental postconviction petition and a petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)).² In the supplemental petition, the defendant claimed that the State violated the defendant's constitutional right to due process under *Brady* by failing to disclose to the defendant that Mr. Samuels received benefits and was given expectations of leniency beyond what was contained in his plea agreement with the State.

¶ 14 In support of the claim, the defendant alleged that after the plea agreement was reached, Mr. Samuels was placed in the witness protection division of the Cook County jail. In violation of the trial court's order that Mr. Samuels remain in witness protection division, on two occasions prior to the defendant's trial, he was permitted to leave the jail to participate in the Cook County sheriff's "Scared Straight" program in which he addressed high school students on the subject of the high price of a life of crime. After his testimony at the defendant's trial, Mr. Samuels was given an 8-year sentence rather than the 10-year sentence set forth in the plea agreement.

¶ 15 The defendant asserted that the State knew Mr. Samuels was released to participate in the Scared Straight program but failed to disclose this additional benefit to defense counsel. The defendant maintained that Mr. Samuels's participation in the Scared Straight program was

² The defendant does not raise any issues on appeal with respect to the dismissal of the section 2-1401 petition.

material to the issue of the defendant's guilt and that the State's failure to disclose it violated *Brady*.

¶ 16 The circuit court granted the State's motion to dismiss the supplemental postconviction petition and the section 2-1401 petition. The defendant filed a timely notice of appeal.

¶ 17 ANALYSIS

¶ 18 I. Defendant's *Pro Se* Motion

¶ 19 In his *pro se* motion before this court, the defendant argues that the State had a duty to disclose the contents of the speeches the defendant made on June 5, 2003, and October 23, 2003, in connection with the Scared Straight program. The defendant alleges that these speeches contain incriminating statements related to Mr. Samuels's "active" role in the murder of the victim. Because these speeches contain statements capable of impeaching Mr. Samuels's testimony at the defendant's trial, the defendant maintains that they were subject to disclosure pursuant to Illinois Supreme Court Rule 412 (a)(i)(ii) (eff. March 1, 2001). The defendant further alleges that the State deliberately failed to record or reduce to writing the contents of the speeches. Acknowledging that these violations are raised for the first time, the defendant requests that this court consider them under the plain-error doctrine. See Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999).

¶ 20 The State Appellate Defender was appointed to represent the defendant in this appeal. Appointed counsel has submitted opening and reply briefs on the defendant's behalf raising assertions of error that counsel alleges entitle the defendant to postconviction relief.

¶ 21 A defendant has no right to both self-representation and the assistance of counsel. *People v. Thompson*, 331 Ill. App. 3d 948, 951 (2002); *People v. Lighthall*, 175 Ill. App. 3d 700, 704-05 (1988). "If a defendant is represented by appellate counsel, whether appointed or

privately retained, he has no right to a 'hybrid appeal' in which he alternates between being represented by counsel and proceeding *pro se* through the filing of a supplemental *pro se* brief." *Thompson*, 331 Ill. App. 3d at 951-52.

¶ 22 The defendant has no right to present his *pro se* arguments to this court. *Thompson*, 331 Ill. App. 3d at 952 (striking the defendant's *pro se* supplemental brief). Therefore, we deny the defendant's *pro se* motion to consider his additional allegations of violations of *Brady* and Rule 412(a)(i)(ii).

¶ 23 **II. *Brady* Violation**

¶ 24 The defendant contends that he made a substantial showing that his right to due process under *Brady* was violated when the State withheld information about the additional benefits Mr. Samuels received that were not set forth in the plea agreement with the State. The defendant alleged that the State failed to inform defense counsel that, escorted by personnel from the state's attorney's office, Mr. Samuels participated in the Scared Straight program and then was given an 8-year prison sentence rather than the 10-year sentence set forth in the plea agreement.

¶ 25 **A. Standard of Review**

¶ 26 Dismissal of a postconviction petition at the second stage of postconviction proceedings is reviewed *de novo*. *People v. Flowers*, 2015 IL App (1st) 113259, ¶ 31.

¶ 27 **B. Discussion**

¶ 28 At the second stage of postconviction proceedings, "the relevant inquiry is whether the petition sets forth facts that, if true, make a substantial showing of a constitutional violation." *People v. Harris*, 2013 IL App (1st) 111351, ¶ 46. It is the defendant's burden to make a substantial showing of a constitutional violation. *Harris*, 2013 IL App (1st) 111351, ¶ 47.

The allegations in the petition must be supported by the record in the case or by accompanying affidavits. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). All well-pleaded facts are taken as true unless they are positively rebutted by the trial record. *Harris*, 2013 IL App (1st) 111351, ¶ 47. The circuit court makes no credibility determinations and does not engage in fact-finding at the second stage. *Harris*, 2013 IL App (1st) 111351, ¶ 47. Where, as in the present case, the State seeks dismissal of the petition instead of filing an answer, the motion to dismiss assumes the truth of the allegations to which it is directed and questions only their legal sufficiency. *People v. Miller*, 203 Ill. 2d 433, 437 (2002).

¶ 29 Under *Brady*, the State is required to disclose evidence that is favorable to the defendant and " 'material either to guilt or to punishment.' " *People v. Harris*, 206 Ill. 2d 293, 311 (2002) (quoting *Brady*, 373 U.S. at 87). "Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Harris*, 206 Ill. 2d at 311; see *People v. Sanchez*, 169 Ill. 2d 472, 486 (1996) ("[t]he standard for materiality under *Brady* is whether there is a reasonable probability that disclosure of the evidence to the defense would have altered the outcome of the proceeding"). Under this standard, the reviewing court does not consider the sufficiency of the evidence, but whether the defendant has shown that " 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Harris*, 206 Ill. 2d at 311-12 (quoting *Coleman*, 183 Ill. 2d at 393, quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

¶ 30 The record contradicts the defendant's claim that the State violated *Brady* by not disclosing to defense counsel that it promised Mr. Samuels or otherwise encouraged him to expect that his participation in the Scared Straight program would result in a reduction in the

recommended 10-year sentence set forth in the plea agreement. At Mr. Samuels's sentencing hearing on his plea of guilty to home invasion, his attorney argued for a sentence less than the 10 years agreed upon, citing Mr. Samuels' participation in the Scared Straight program. While commending Mr. Samuels's participation in the program, the assistant State's Attorney responded as follows:

"However, my response is, Judge, he got his break. He was charged with murder. He was looking at a minimum of 20 at 100 percent. He got 10 years on home invasion at 50 percent.

I just stand on the plea agreement."

¶ 31 The trial court explained to Mr. Samuels that it did not have to go along with the State's recommendation of a ten-year sentence and that his plea of guilty to home invasion was a blind plea for which he could be sentenced to between 6 and 30 years' imprisonment. In imposing the eight-year sentence, the court found that Mr. Samuels was a credible witness and reminded Mr. Samuels that his plea agreement required him to testify at any future proceeding involving the shooting of the victim.

¶ 32 Even if we assumed, *arguendo*, that *Brady* required the State to make the disclosure before or during trial, we would still have to determine that there was a reasonable probability that disclosure of Mr. Samuels's participation in the Scared Straight program would have produced a different result at the defendant's trial.

¶ 33 The defendant argues that the undisclosed information would have impeached Mr. Samuels's testimony, which he maintains was critical to the State's case. See *Harris*, 206 Ill. 2d at 312 (impeachment evidence may be considered material to guilt). The defendant points out that Mr. Samuels was the only witness to testify that the defendant was in possession of a

weapon at the time the victim was killed. He argues that, had the State disclosed that Mr. Samuels was allowed to leave the jail to participate in the Scared Straight program, the jury would have concluded that he would do anything to curry favor with the State and cause the jury to doubt his credibility as a witness. The defendant concludes that there was a reasonable probability that disclosure of that information would have produced a different result at his trial.

¶ 34 The defendant relies on *Banks v. Dretke*, 540 U.S. 668 (2004), *Kyles* and *Giglio v. United States*, 405 U.S. 150 (1972). In those cases, the United States Supreme Court ordered new trials for the defendants, finding that the failure to disclose the material undermined the court's confidence in the result in each case. See *Banks*, 540 U.S. at 703 (the State's suppression of the witness's status as a paid informant and its bearing on the penalty phase of the trial satisfied the elements of a *Brady* claim); *Kyles*, 514 U.S. at 454 (where the State failed to disclose eyewitness statements that undermined their trial testimony, failed to disclose the inconsistent statements of its key witness against the defendant, and failed to disclose certain physical evidence favorable to the defendant, confidence in the verdict could not survive); *Giglio*, 405 U.S. at 151, 154-55 (the failure to disclose that the key government witness had been promised he would not be prosecuted required that the defendant received a new trial where the witness testified that no such promise had been made to him in exchange for his testimony).

¶ 35 In the present case, the defendant cannot show a reasonable probability that the result would have been different had this information been disclosed to defense counsel and brought to the jury's attention. Before the jury, Mr. Samuel acknowledged that he participated in the incident which resulted in the victim's death. He further acknowledged

that his testimony against the defendant was obtained by the State's agreement not to pursue the murder charges against him and instead, allowed him to plead guilty to home invasion for a recommended sentence of 10 years. We cannot conclude that there was a reasonable probability that this additional impeachment evidence would have altered the outcome of the proceedings. See *Harris*, 206 Ill. 2d at 312-13 (the defendant failed to make a substantial showing of a constitutional violation under *Brady* where the undisclosed evidence of the witness's substance abuse was cumulative to other evidence challenging his credibility).

¶ 36 The defendant relies heavily on *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004). In that case, the government disclosed that its witnesses had been given permission to remain and work in the United States pending the trial but represented that they received no other benefits. Following trial, the defendant learned that, contrary to the government's representation, the witnesses received other benefits such as: social security cards, witness and travel fees; the witnesses were allowed to travel to Mexico to visit families and to North Carolina to work; and were given the use of government phones to contact relatives in Mexico. *Sipe*, 388 F.3d at 476. Based on the government's failure to disclose this information to the defendant, the district court ordered a new trial.

¶ 37 In affirming the order for a new trial, the court of appeals determined that the government's failure to disclosure those additional benefits deprived the defendant of powerful evidence with which to expose the witnesses's bias. *Sipe*, 388 F.3d at 490. The court identified five separate *Brady* violations that, cumulatively considered, raised a reasonable probability that disclosure would have produced a different result at the defendant's trial. *Sipe*, 388 F.3d at 491-92.

¶ 38 *Sipe* is distinguishable on its facts from the present case. Only one *Brady* violation is before us in this case, while in *Sipe*, the court considered the cumulative effect of five violations. In *Sipe*, the court found that the government's withholdings prevented the defendant from exposing significant weaknesses in the government's case. *Sipe*, 388 F.3d at 477. In the present case, defense counsel was furnished with a copy of the plea agreement, which disclosed the most powerful evidence of Mr. Samuels's bias against the defendant, namely, that in exchange for his truthful testimony and his plea of guilty to home invasion, he would be sentenced for that offense, and the murder and other charges against him would then be dismissed. The significance that the defendant attributes to Mr. Samuels's testimony that the defendant possessed a weapon when they arrived at the victim's residence fades in light of Ms. Gaitors' testimony that the defendant admitted shooting the victim.

¶ 39 Although relied on by the defendant, *Wisehart v. Davis*, 408 F.3d 321 (7th Cir. 2005) supports the dismissal of the defendant's petitions. In *Wisehart*, the court of appeals held that a witness's expectation of leniency because he was cooperating with the government in the prosecution of the defendant was not the same as an agreement for leniency, which must be disclosed to the defense. Absent an agreement, *Brady* did not require disclosure of the State's decision not to charge the witness with two burglaries. *Wisehart*, 407 F.3d at 324-26. Similarly, Mr. Samuels may have hoped that his participation in the Scared Straight program would work to his advantage in sentencing, but there is no evidence of an agreement to that effect. Even after giving the two speeches, Mr. Samuels testified at the defendant's trial that he expected to be sentenced to 10 years' imprisonment.

¶ 40 We conclude that the defendant failed to show a substantial violation of his constitutional rights. The circuit court did not err in granting the State's motion and dismissing the defendant's supplementary postconviction petition and section 2-1401 petition.

¶ 41 II. Correction of the Mittimus

¶ 42 The mittimus reflects that the defendant received a presentence credit of 1,020 days against his prison sentence. The State and the defendant agree that the correct amount of credit is 1,079 days and that the mittimus should be modified to reflect a presentence credit of 1,079 days against the defendant's prison sentence.

¶ 43 CONCLUSION

¶ 44 The order of the circuit court dismissing the defendant's supplemental postconviction petition and section 2-1401 petition is affirmed. Pursuant to Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999), we modify the mittimus to reflect 1,079 days of presentence custodial credit. The defendant's *pro se* motion is denied.

¶ 45 Affirmed; mittimus modified; *pro se* motion denied.