2016 IL App (1st) 141796-U

No. 1-14-1796

Fifth Division
December 30, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	No. 89 CR 06690
	)	
ALNORAINDUS BURTON,	)	The Honorable
	)	Thomas J. Kazmierski,
Defendant-Appellant.	)	Judge Presiding.
	)	

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order denying defendant's motion for leave to file a fifth successive postconviction petition is affirmed, where defendant failed to establish cause for bringing forward claims he could have presented in his previous petitions and where he failed to establish prejudice because the evidence was not material to his conviction or sentencing.

¶ 2 After a jury trial, defendant Alnoraindus Burton was convicted of first-degree murder and aggravated kidnapping in 1989, and sentenced to natural life in the Illinois Department of Corrections (IDOC). Since his conviction in 1989, he has submitted seven appeals: one

appeal immediately after his conviction, one initial postconviction petition, and five successive postconviction petitions, including the postconviction petition at bar.

¶ 3 In the postconviction petition at bar, defendant makes two claims: (1) that the admission of testimony by Marcus Shaw at trial violated defendant's right to due process and a fair trial, and (2) that the State violated its *Brady* obligations by (a) failing to correct the perjured testimony of Doris Reese and (b) failing to disclose medical records which defendant discovered in 2013, which he alleges were not disclosed to him before his 1989 trial. The trial court denied defendant leave to file this petition. For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 I. Pretrial Proceedings

¶ 6 Defendant filed a pretrial motion to suppress custodial statements on September 13, 1989. Defendant then amended the motion on December 29, 1989, to allege: "That the statements sought to be suppressed were obtained as a result of physical coercion illegally directed against defendant and that such statements were, therefore involuntary in violation of the Fifth and Fourteenth Amendments to the United States Constitution; specifically, defendant was beaten with a steel stick, as well as with hands, and was kicked and otherwise beaten up by the police."

¶ 7 At the hearing on his suppression motion on October 26, 1990, defendant testified that he was slapped by Detective Michael Kill and hit with a steel rod by an unidentified officer at the police station after his arrest. He was not given anything to eat or drink or allowed to use the restroom during the interrogation.

¶ 8 Defendant further testified that he was not read his *Miranda* rights, and that he told his appointed lawyer that he was injured by police during the interrogation. During cross-

examination by the assistant State's Attorney (ASA), defendant testified that he did sign a custodial statement after it was read to him by the ASA.

¶ 9 ASA Timothy Frenzer testified that he and Detective Michael Kill met with defendant on January 31, 1989. Frenzer read defendant his *Miranda* rights and asked defendant if he understood those rights. Defendant informed the ASA that he understood those rights. He was then asked if wanted to give a statement to the police and he agreed to do so. He then was asked if he wanted his statement handwritten by Frenzer or taken by a court reporter. Defendant chose to have the ASA handwrite the statement. After completing the handwritten statement, Frenzer made sure that defendant could read, write, and understand it by asking defendant, who then acknowledged that he could read, write and understand what he had said. Frenzer then left defendant in the room with Detective Kill.

¶ 10 Detective Michael Kill testified that, after his arrest, defendant was not injured or abused while being processed at the police station. Detective Louis Caesar testified that he also read and advised defendant of his *Miranda* rights after his arrest and defendant replied that he did.

¶ 11 Mary Dahany, defendant's assistant public defender (APD) at the time of arrest, testified that on February 1, 1989, defendant informed her that he had been beaten by the police. She indicated on her own bruise sheet, which is used by the public defender's office, that defendant had been injured on both wrists. She testified that both of defendant's hands appeared swollen. The following exchange occurred:

"DEFENSE COUNSEL: On the outline of the male body there are two places where injuries were marked as having been complained of, correct?

DAHANY: Right, [defendant] told me that he had been injured by the police and he had pointed to each of his hands and on each of his hands I noted some slight swelling

between the knuckles. I would call it the first and second finger. It would be the finger just next to the thumb, so the index finger, I guess, and the middle finger, between those two knuckles on the back of the hand I saw some slight swelling on each hand."

Dahany then testified that defendant informed her that his injuries occurred at the police station, but that she could not recall "exactly how he said he was injured."

¶ 12 Doris Reese, an emergency medical technician employed at Cermak Health Services, testified at the suppression hearing that she examined defendant during her shift on February 1, 1989, and that she did not note any bruising or swelling of defendant's right hand. At the hearing, she testified as follows:

"ASA: And in your examination of the inmate [defendant], did you, yourself, see any bruises about his body?

REESE: No.

ASA: Did you notice any cuts on his body?

REESE: No.

ASA: Did you notice any swelling on his body?

REESE: No.

* * *

ASA: Now, did the individual [defendant] have any complaints to you?

REESE: Yes.

ASA: What complaint did he have to you?

REESE: He had the swollen right hand.

ASA: Did you notice any swelling in his right hand?

REESE: No."

Reese further testified that she completed a bruise sheet on defendant, where she noted that she did not observe any bruising or swelling on defendant.

¶ 13 At the conclusion of the hearing, the trial court denied defendant's motion to suppress, finding that defendant "was not beaten by the police" and that his statements were "freely and voluntarily made." Defendant's custodial statements were not used during his trial.

¶ 14 II. Evidence at Trial

¶ 15 When we affirmed the trial court's denial of defendant's first postconviction petition *(People v. Burton*, No. 1-97-4134 (2000) (unpublished order under Illinois Supreme Court Rule 23)), this court described the facts in detail, which we now quote:

"The following facts were deduced at trial. On January 29, 1989, at about 10 a.m., Marcus Shaw went to the home of defendant to use his iron. In the gangway leading to the basement, Shaw saw Mackel Washington pointing a gun at Anthony Watkins. Shaw noted that Watkins was not wearing a coat, shoes or a hat. Defendant entered the gangway and told Washington to give Watkins back his clothes. Washington returned Watkins' clothing and allowed him to get dressed. All of the men went into the basement. Defendant and Watkins spoke briefly, but Shaw could not hear the conversation.

The four men left defendant's home through the basement and drove to defendant's grandmother's apartment. Washington drove, Shaw was in the passenger seat, and defendant rode in the back seat with Watkins. At the apartment, Shaw and Washington stayed in the front room while defendant and Watkins engaged in a discussion in another room. Defendant asked Watkins to get some cocaine for him and Watkins told defendant

that he could not do that. Defendant left the room, went to the back part of the apartment and when he returned, he had some cord or wire. Defendant told Shaw and Washington that they were going to tie Watkins up. Defendant proceeded to bind Watkins' hands. When defendant attempted to bind Watkins' feet, Watkins freed his hands, jumped up from a chair and hit Shaw in the mouth with his fist. Defendant and Washington forced Watkins back into the chair, tied his hands behind him and tied his feet. Shaw then retrieved a crowbar from the rear of the apartment and hit Watkins on the back of the head. Watkins 'bounced' against the window. Then Washington pushed him out the window.

Watkins fell two floors onto concrete. Shaw, defendant, and Washington ran downstairs, found Watkins lying on the ground and defendant put him in the back seat of the car. As Washington drove down the alley, Shaw heard a gunshot and turned around to see defendant pointing a gun at Watkins. Defendant was holding Watkins down towards the floor of the car. Watkins was bleeding from the top of the lip. Washington stopped the car and defendant pushed Watkins out onto the ground. Washington drove 10 to 15 feet and defendant told him to stop. Defendant and Shaw [exited] and went back to Watkins while Washington stayed by the car. Defendant then dragged Watkins into a random garage that was left open, while Watkins begged for his life. Defendant shot Watkins in the head. Defendant and Shaw ran back to the car. Defendant jumped into the driver's seat, Washington sat in the passenger seat and Shaw was in the back seat. They drove to defendant's cousin's house and defendant changed his coat or shirt. Afterwards, defendant, two of his cousins, Washington, and Shaw went to McDonald's and then they dropped Shaw off at his home.

Watkins' body was found by the garage owner on January 29, 1989. Defendant was arrested on January 30, 1989, at his mother's home. ***

[On] February [16,] 1989, Shaw was arrested. He gave a statement [claiming] the above stated events to the police and the State's attorney. During an investigation of defendant's grandmother's apartment, police detectives found bloodstains, overturned chairs, a crowbar and wires on the floor. One of the chairs was near a 'busted out' window.

Prior to trial, Shaw filed a motion to suppress statements alleging that his statement was made after the police beat and threatened him. At trial, Shaw was called as a witness against defendant. Shaw testified that he was charged with the same crime as defendant but secured a plea agreement in exchange for his truthful testimony. Shaw then explained that, in an attempt to [have] his original statement to the police suppressed, he falsely claimed that the police beat and threatened him into making his statement. He testified that he was actually treated well by the police." *Burton*, No. 1-97-4134, at 4-6.

¶ 16 After a jury trial, defendant was convicted of first-degree murder, aggravated kidnapping, and unlawful restraint. On July 31, 1991, the trial court sentenced him to natural life in IDOC for first-degree murder and 15 years for aggravated kidnapping,[1] to be served consecutively.

¶ 17 III. Postconviction Affidavit of Marcus Shaw

¶ 18 After sentencing, Shaw filed an affidavit stating that his testimony was coerced by the police. His affidavit stated in full:

"I, Marcus Shaw was a witness to a murder that I didn't know nothing about. I was a witness against [defendant] and [codefendant] because the state's attorney threatened

[1] The trial court merged the unlawful restraint count into the aggravated kidnapping count at sentencing.

> and promised me some things [*sic*] that they never followed through with. I, Marcus Shaw[,] was on the case with [defendant] and [codefendant] because the state's attorney told me if I didn't take the witness stand against them, that they [the State] was going to give me natural life or the death penalty if I didn't help them. At this time they showed me [defendant's and codefendant's] statements and told me what to say on the witness stand. I mad [*sic*] a statement to the police because they was going to kill me if I didn't make no statement. I had no knowledge about what happened that day when the murders and the aggravated kidnappings occurred because I went skating that night and didn't know who or what happened. Furthermore, I had to make a statement because it was best for the health and well being of myself. I didn't want to make no statement, but the police beat me up and made me make a statement, and the state's attorney threatened to give me natural life or the death penalty if I didn't do what they said, and that's the reason why I'm writing and signing this statement, so that you all [the State] can have e [*sic*] positive out look [*sic*] from my point of view."

¶ 19 IV. Postconviction Appeals

¶ 20 Defendant's conviction was affirmed in 1994. *People v. Burton*, 1-91-2811 (1994) (unpublished order under Illinois Supreme Court Rule 23). While his appeal was pending, defendant filed his initial *pro se* postconviction petition, followed by numerous supplemental petitions. The initial petition was ultimately dismissed at the second stage in 1997, and this court affirmed that decision. *People v. Burton*, No. 1–97–4134 (2000) (unpublished order under Illinois Supreme Court Rule 23). On August 31, 2006, defendant filed a motion for leave to file his first successive *pro se* postconviction petition, which the trial court denied. This court affirmed that decision after granting counsel's motion to withdraw pursuant to

Pennsylvania v. Finley, 481 U.S. 551 (1987). *People v. Burton*, No. 1–07–0012 (2008) (unpublished order under Illinois Supreme Court Rule 23).

¶ 21 On May 5, 2008, defendant moved for leave to file a second successive *pro se* postconviction petition, which the trial court denied, and this court affirmed. *People v. Burton*, No. 1-08-2816 (2011) (unpublished order under Illinois Supreme Court Rule 23). Defendant then filed a third successive *pro se* postconviction petition on April 16, 2010. The trial court denied him leave to file and, on appeal, his appellate counsel again moved to withdraw pursuant to *Finley*. *People v. Burton* 2012 IL App (1st) 102263-U. Defendant filed his fourth successive *pro se* postconviction petition on April 4, 2012. The trial court again denied him leave to file it. On appeal, appellate counsel again moved to withdraw as counsel pursuant to *Finley*, and this court granted the motion. *People v. Burton*, 2013 IL App (1st) 122638-U.

¶ 22 Defendant filed a motion for leave to file his fifth successive postconviction petition on September 12, 2013. The trial court denied him leave to file this petition on April 29, 2014. On March 12, 2014, the trial court appointed David N. Yellen as a Special Master for identifying the names of individuals with a "valid claim" of torture. Defendant's name was brought to the attention of the court by Yellen, and on June 26, 2015, defendant was granted private counsel to represent him in this appeal. Additionally, the trial court assigned a special prosecutor to represent the interests of the State.

¶ 23 Defendant attached copies of the medical records that he discovered in October 2013 to the postconviction petition. The first record, "Exhibit A," is dated February 1, 1989, and entitled "History and Physical Examination." The report includes a handwritten note but, because the record is a copy, the note is illegible. The second document, "Exhibit B," is an

"Emergency Room Record," dated February 28, 1989, and it outlines the injuries reported by defendant. A section entitled "History/Complaint" states: "[t]rauma to [left] hand 2/27/89 fight with another inmate." Under "Physical Findings," the report states that his wrist was "tender" and "swollen." The report also indicates that his hand and wrist were x-rayed and showed an "old deformity." Other parts of the document are illegible. The next document, "Exhibit C," is a radiology report, entitled "X-Ray Request and Report," and it shows a request to x-ray defendant's right hand. The radiologist reported: "[right hand and wrist]: [b]ones and joints are intact with no recent fracture or dislocation. There is slight deformity of the distal part of the 5th metacarpal bone, could be from old trauma."

¶ 24 Next, defendant includes "Exhibit D," which is a referral form dated March 8, 1989. In a handwritten note on the report, the words "trauma," "pain," and "dislocation" are legible, but the surrounding words are illegible. Lastly, defendant attached "Exhibit E," which was entitled a "History and Physical Examination," dated February 1, 1989, and signed by Reese. The report includes a section entitled "Injuries and Identification Marks on Admission," where the technician may mark injuries on a diagram of the human body. There are no visible marks on the diagrams indicating injuries. However, the document is copied, and the diagrams are difficult to read.

¶ 25 ANALYSIS

¶ 26 Defendant raises two claims in this postconviction petition: (1) that the admission of allegedly physically-coerced testimony by Marcus Shaw at trial violated defendant's right to due process and a fair trial, and (2) that the State violated its *Brady* obligations by (a) failing to correct the perjured testimony of Doris Reese and (b) failing to disclose medical records which he discovered in 2013 that he alleges were not disclosed to him before his 1989 trial.

¶ 27 Specifically, with respect to his first claim, defendant argues that, although he raised the issue of Shaw's testimony in his initial postconviction petition, he did not have the 2006 Special State's Attorney's Report at that time to support his allegation of abuse or the supreme court's decision in *People v. Wrice*, 2012 IL 111860, ¶ 41. Secondly, defendant alleges that he discovered medical records in 2013 that would impeach the testimony of Doris Reese, the emergency medical technician who did not observe any cuts, bruises, or swelling on his body. He claims that he requested the documents during discovery, but they were withheld by the State, and that these medical records corroborate his allegations of torture by the police. Because he lacked these records during his previous postconviction petitions, he argues that their discovery establishes the cause needed to file a postconviction petition. For the following reasons, we affirm the trial court's denial.

¶ 28 I. Stages of a Postconviction Petition

¶ 29 Although the issue before us is the very preliminary question of whether the petition can even be filed, we provide here a summary of the stages to show how the subsequent process sheds light on this preliminary step.

¶ 30 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)) provides a statutory remedy for criminal defendants who claim their constitutional rights were violated at trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. The Act is not intended to be a substitute for a direct appeal; instead, it is a collateral proceeding which attacks a final judgment. *Edwards*, 2012 IL 111711, ¶ 21.

¶ 31 The Act provides for three stages of review by the trial court. *People v. Domagala*, 2013 IL 113688, ¶ 32. At the first stage, the trial court may summarily dismiss a petition that is

frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014); *Domagala*, 2013 IL 113688, ¶ 32.

¶ 32 However, for a successive petition to even be filed, the trial court must first determine whether the petition (1) states a colorable claim of actual innocence (*Edwards*, 2012 IL 111711, ¶ 28) or (2) establishes cause and prejudice (*People v. Smith*, 2014 IL 115946, ¶ 34). This standard is higher than the normal first-stage "frivolous or patently without merit" standard applied to initial petitions. *Edwards*, 2012 IL 111711, ¶¶ 25-29; *Smith*, 2014 IL 115946, ¶ 34 ("the cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard that is set forth in section 122-2.1(a)(2) of the Act").

¶ 33 Since a filed successive petition has already satisfied a higher standard, the first stage is rendered unnecessary and the successive petition is docketed directly for second-stage proceedings. See *People v. Sanders*, 2016 IL 118123, ¶¶ 25-28 (with a successive petition, the initial issue before the trial court is whether it "should be docketed for second-stage proceedings"); *People v. Wrice*, 2012 IL 111860, ¶ 90 ("reversing the trial court's order denying defendant leave to file his second successive postconviction petition and remand[ing] to the trial court for *** second-stage postconviction proceedings"); *People v. Jackson*, 2015 IL App (3d) 130575, ¶ 14 ("When a defendant is granted leave to file a successive postconviction petition, the petition is effectively advanced to the second stage of postconviction proccedings."); *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 1 (reversing the trial court's denial of the defendant's motion for leave to file a successive petition and remanding for second-stage proceedings).

¶ 34 If a trial court permits a successive petition to be filed or does not dismiss an initial petition at the first stage, the petition then advances to the second stage, where counsel is appointed if a defendant is indigent. 725 ILCS 5/122-4 (West 2014); *Domagala*, 2013 IL 113688, ¶ 33; *Wrice*, 2012 IL 111860, ¶ 90 (after reversing the trial court's denial of leave to file a successive petition, the supreme court remanded "for appointment of postconviction counsel and second-stage postconviction proceedings"). After counsel determines whether to amend the petition, the State may file either a motion to dismiss or an answer to the petition. 725 ILCS 5/122-5 (West 2014); *Domagala*, 2013 IL 113688, ¶ 33. At the second stage, the trial court must determine "whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 35 "The second stage of postconviction review tests the legal sufficiency of the petition. Unless the petitioner's allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or 'show' a constitutional violation. In other words, the 'substantial showing' of a constitutional violation that must be made at the second stage [citation] is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief." (Emphasis in original.) *Domagala*, 2013 IL 113688, ¶ 35.

¶ 36 Both the second stage and a motion for leave to file a successive petition require a review of "the petition and any accompanying documentation." *Edwards*, 197 Ill. 2d at 246 (second-stage review); *Edwards*, 2012 IL 111711, ¶ 24 (motion for leave to file a successive petition). For the second stage to not be superfluous for a successive petition, it must be that the "substantial showing" required at the second stage is greater than the "probability" required

for a successive petition to receive leave for filing. *Smith*, 2014 IL 115946, ¶ 29 (expressing a desire not to "render the entire three-stage postconviction process superfluous").

¶ 37 If the defendant makes a "substantial showing" at the second stage, then the petition advances to a third-stage evidentiary hearing. *Domagala*, 2013 IL 113688, ¶ 34. At a third-stage evidentiary hearing, the trial court acts as factfinder, determining witness credibility and the weight to be given particular testimony and evidence, and resolving any evidentiary conflicts. *Domagala*, 2013 IL 113688, ¶ 34. This third stage is the same for both initial and successive petitions. *Cf. Smith*, 2014 IL 115946, ¶ 29 ("The legislature clearly intended for further proceedings on successive postconviction petitions.").

¶ 38 II. Successive Petition

¶ 39 Although our supreme court has made clear that the Act contemplates only one postconviction proceeding, "[n]evertheless, [the supreme] court has, in its case law provided two bases upon which the bar against successive proceedings will be relaxed" (*Edwards*, 2012 IL 111711, ¶ 22). Those two bases are: (1) a showing of cause and prejudice; or (2) a claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 22. In the case at bar, defendant alleges only cause and prejudice, so we discuss only this basis below.

¶ 40 Under the cause-and-prejudice test, a defendant must establish both: (1) cause for his or her failure to raise the claim earlier; and (2) prejudice stemming from his or her failure to do so. *Edwards*, 2012 IL 111711, ¶ 22 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002)).

¶ 41 Our supreme court has held that "a defendant's *pro se* motion for leave to file a successive postconviction petition will meet the section 122-1(f) cause and prejudice requirement if the motion adequately alleges facts demonstrating cause and prejudice."

Smith, 2014 IL 115946, ¶ 34. "[L]eave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the [defendant], that the claims alleged by the [defendant] fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Smith*, 2014 IL 115946, ¶ 35.

¶ 42 "As both prongs of the cause and prejudice test must be satisfied," we may uphold the denial of leave to file the claim if defendant has failed to establish either prong. *People v. Davis*, 2014 IL 115595, ¶ 56 (affirming the denial of leave to file where the defendant failed to establish cause for failing to raise this claim earlier since the evidence was "not of such character that it could not have been discovered earlier by the exercise of due diligence").

¶ 43 III. Standard of Review

¶ 44 Next, we discuss the appropriate standard of review for defendant's claim of cause and prejudice.

¶ 45 In *Smith*, the issue was whether the Act prohibited the denial of leave when the pleadings of the petition made an " 'arguable' " showing of cause and prejudice. *Smith*, 2014 IL 115946, ¶ 25 (quoting the defendant's petition). The *Smith* court observed that the standard of review for "this issue of statutory construction" was *de novo*. *Smith*, 2014 IL 115946, ¶ 21. The *Smith* court, however, did not explicitly state, after resolving this issue of statutory construction, whether the standard of review for a trial court's grant or denial of leave to file a successive petition was then also *de novo*.

¶ 46 Since cause-and-prejudice claims may fail either as a matter of law or due to an insufficiency of the petition and supporting documents, we conclude, as have other appellate courts, that a *de novo* standard of review also applies. *People v. Diggins*, 2015 IL App (3d)

130315, ¶ 7 (applying a *de novo* standard of review to the trial court's denial of the defendant's motion to file a successive petition alleging cause and prejudice, because this issue is "resolved on the pleadings" alone); *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 38 (applying a *de novo* standard of review to the trial court's denial of the defendant's motion to file a successive petition alleging cause and prejudice). See also *People v. Wrice*, 2012 IL 111860, ¶ 50 (applying a *de novo* standard of review to the State's arguments concerning lack of prejudice to the defendant, since these "arguments raise purely legal issues").

¶ 47 When our review is limited to documentary materials, as it is here, then our review is generally *de novo*. *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 154 (2007) ("Where the circuit court does not hear testimony and bases its decision on documentary evidence, the rationale underlying a deferential standard of review is inapplicable and review is *de novo*."); *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007) (where the trial court did not conduct an evidentiary hearing or make any findings of fact, and relied on the parties' oral argument and the record, "we review the court's ruling on this issue *de novo*").

¶ 48 Thus, we will apply a *de novo* review to defendant's claims. *De novo* consideration means that we perform the same analysis that a trial judge would perform. *In re N.H.*, 2016 IL App (1st) 152504, ¶ 50 (citing *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011)).

¶ 49 IV. The Record

¶ 50 The next question is what we are permitted to review. In *Smith*, our supreme court held that "leave of court to file a successive postconviction petition should be denied when it is clear, from a review of *the successive petition and the documentation submitted by the*

petitioner, that the claims alleged by the petitioner fail as a matter of law or where *the successive petition with supporting documentation* is insufficient to justify further proceedings." (Emphasis added.) *Smith*, 2014 IL 115946, ¶ 35.

¶ 51 Thus, we must certainly consider the *pro se* petition itself and any supporting documentation that defendant provided. *Edwards*, 2012 IL 111711, ¶ 24. However, the *Smith* court left open the question of whether we and the trial court may consider the underlying record on leave to file a successive postconviction petition. The *Smith* court stated: "The parties have not argued or briefed whether the trial court may consider the record in ruling on a petition brought under section 122-1(f) of the Act. Accordingly, we do not address that issue." *Smith*, 2014 IL 115946, ¶ 35 n.3.[2]

¶ 52 After making this observation, the *Smith* court then proceeded to discuss what happened at trial. *Smith*, 2014 IL 115946, ¶ 37. However, before discussing the evidence at trial, the court established that these facts were "undisputed." *Smith*, 2014 IL 115946, ¶ 37. Based on the prior footnote and the court's statement that these facts were undisputed, it is unclear whether these facts were in the petition and supporting documentation before the court.

¶ 53 As in *Smith*, the *Edwards* court relied primarily on the failings on the face of the petition and supporting documentation when it affirmed the trial court's denial of leave. In *Edwards*, the supreme court found no indication that the defendant had tried to subpoena his alibi witnesses, who were both known to defendant at the time of trial, and thus their affidavits did not qualify as "newly discovered" evidence. *Edwards*, 2012 IL 111711, ¶¶ 35-37. The supreme court found that "there was no attempt to subpoena" and "no explanation as to why."

[2] Section 122-2.1 provides that, "after the filing" of the petition, "the court may examine the court file of the proceeding in which the petitioner was convicted." 725 ILCS 5/122-2.1 (West 2014). However, in the instant appeal, we are considering a petition that has not yet been filed, which explains why the *Smith* court observed that this was an open issue.

Edwards, 2012 IL 111711, ¶ 37. If the petition had alleged an attempt and offered an explanation, then there would have been some "indication" that the defendant attempted to subpoena the witnesses. *Edwards*, 2012 IL 111711, ¶¶ 36-37. Thus, the failing was apparent on the face of the petition itself.

¶ 54 In addition, the *Edwards* court found that the codefendant's affidavit did not raise a colorable claim of actual innocence when the defendant was convicted under a theory of accountability and the affidavit did "not assert that petitioner was not *present* when the shooting took place." (Emphasis in original.) *Edwards*, 2012 IL 111711, ¶¶ 38-39. Again, the failing was apparent on the face of the documentation itself.

¶ 55 Until our supreme court resolves this issue, we will rely primarily on the petition and its supporting documentation in deciding this preliminary question of whether the petition may even be filed. In addition, we will take judicial notice of our prior opinions and orders. *Shotts*, 2015 IL App (4th) 130695, ¶¶ 7, 71. See also *Village of Riverwoods v. BG Ltd. Partnership*, 276 Ill. App. 3d 720, 724 (1995) (a court may properly take judicial notice of publicly available records "where such notice will aid in the efficient disposition of a case" (cited with approval by *Wackrow v. Niemi*, 231 Ill. 2d 418, 421 n.1 (2008))); *In re McDonald*, 144 Ill. App. 3d 1082, 1084 (1986) (a court may take judicial notice of matters of record in other cases in the same court).

¶ 56 From the perspective of the orderly administration of justice, it makes sense to review primarily at this very preliminary stage the documents filed by defendant rather than the entire trial court record in determining whether a successive postconviction should be filed.

¶ 57 Both *Edwards* and *Smith* discussed the amount of documentation which the defendant must submit at this preliminary stage. In *Edwards*, the supreme court stated: "Defendant not

only has the burden to obtain leave of court, but also 'must submit enough in the way of documentation to allow a circuit court to make that determination.' " *Edwards*, 2012 IL 111711, ¶ 24 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010)). In *Smith*, the supreme court observed that "the legislature intended that the cause-and-prejudice determination be made on the pleadings prior to the first stage" (*Smith*, 2014 IL 115946, ¶ 33), that a defendant must "allege[] facts demonstrating cause and prejudice" (*Smith*, 2014 IL 115946, ¶ 34), and that a defendant must " 'submit enough in the way of documentation to allow a circuit court to make that determination.' " *Smith*, 2014 IL 115946, ¶ 35 (quoting *Tidwell*, 236 Ill. 2d at 161).

¶ 58 Thus, we will now review defendant's two claims primarily in light of the documentation he submitted.

¶ 59 V. Cause

¶ 60 As we noted above, under the cause-and-prejudice test a defendant must establish cause for his or her failure to raise the claim earlier. *Edwards*, 2012 IL 111711, ¶ 22 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002)).

¶ 61 A. Shaw's Testimony at Trial

¶ 62 With respect to his first claim, defendant argues that he established cause because, although he raised the issue of Shaw's testimony in his initial postconviction petition filed in 1991, the 2006 Special State's Attorney's Report and the 2012 supreme court decision in *People v. Wrice*, 2012 IL 111860, were not yet available, and that they constitute cause allowing him to raise the issue again.

¶ 63 1. The 2006 Special State's Attorney's Report

¶ 64 Defendant did not raise the issue of Shaw's testimony in any of his four prior successive postconviction petitions, all of which he sought to file after the publication of the 2006 report. However, defendant *did* use the 2006 Report in all four prior petitions to corroborate his allegations of police abuse.

¶ 65 Defendant seeks to distinguish his four prior petitions by arguing that, in those petitions, he used the 2006 report to corroborate only *his* allegations of police torture of himself, *not* Marcus Shaw. However, he could have raised the issue regarding Shaw's testimony, with the 2006 report in support. So the question then becomes: is cause measured against only the initial filed postconviction petition, as defendant suggests, or against the multiple successive postconviction petitions which he moved for leave to file?

¶ 66 The supreme court's decision in *People v. Davis*, 2014 IL 115595, is instructive. In *Davis*, the defendant filed[3] five successive postconviction petitions, with his fifth petition containing new evidence that his counsel was ineffective under *Strickland*. *Davis*, 2014 IL 115595, ¶ 54. However, the supreme court found that the evidence he presented to satisfy cause could have been brought in any of his earlier petitions, finding that the evidence he presented in his fifth petition was "not of such character that it could not have been discovered earlier by the exercise of due diligence." *Davis*, 2014 IL 115595, ¶ 55.

¶ 67 Further, the supreme court found: "A defendant is not permitted to develop the evidentiary basis for a claim in a piecemeal fashion in successive postconviction petitions." *Davis*, 2014 IL 115595, ¶ 55. Therefore, cause is measured against each successive postconviction petition, not just the initial postconviction petition.

[3] Defendant does not ask this court to draw a distinction between petitions that were filed and dismissed and petitions where the trial court reviewed them and denied leave to file.

¶ 68 Defendant could have used the 2006 report in all four of his successive postconviction petitions to support a claim that Shaw's testimony was physically coerced. Because he failed to do so, the 2006 report does not constitute cause for leave to file his claim now.

¶ 69 2. The 2012 *Wrice* Decision

¶ 70 Defendant also relies on a 2012 case, *People v. Wrice*, 2012 IL 111860, in support of his claim that he has cause to now file a claim about Shaw's testimony. In *Wrice*, the defendant filed his second successive postconviction petition alleging that his testimony was physically coerced by the police and corroborated by the 2006 report. *Wrice*, 2012 IL 111860, ¶ 41. The supreme court found that the defendant established cause for leave to file because the 2006 report did not exist before his 2007 petition was filed; therefore, he was unable to raise the issue in his original postconviction petition. *Wrice*, 2012 IL 111860, ¶ 43. The supreme court found that the defendant also established prejudice because "use of a defendant's physically coerced confession as substantive evidence of his guilt is never harmless error." *Wrice*, 2012 IL 111860, ¶ 84.

¶ 71 Defendant argues that his case and *Wrice* are "identical." Although the supreme court's finding in *Wrice* has been instructive for cases involving allegations of systemic police abuse,[4] *Wrice* is not instructive in the case at bar. In *Wrice*, the defendant filed his second postconviction petition in 2007, the year after the 2006 report was released (*Wrice*, 2012 IL 111860, ¶ 1), and he did not file any other petitions between the release of the report and his second petition. *Wrice*, 2012 IL 111860, ¶ 41. By contrast, in the case at bar, defendant moved for leave to file four successive postconviction petitions since the release of the 2006

[4] See, e.g., *People v. Weathers*, 2015 IL App (1st) 133264, ¶ 36 (finding that the Illinois Torture and Relief Commission Report corroborated defendant's police torture allegations); *People v. Nicholas*, 2013 IL App (1st) 103202, ¶ 40 (finding that the 2006 Report corroborated defendant's police torture allegations).

report, and he raised issues regarding the report in all four of them.[5] Therefore, his case is not supported by *Wrice,* nor is it similar to cases that were successful. *E.g., People v. Weathers,* 2015 IL App (1st) 133264; *People v. Nicholas,* 2013 IL App (1st) 103202.

¶ 72 Further, defendant argues that *Wrice* established that cause, in the cause and prejudice test, is only weighed against the initial postconviction petition, not any successive postconviction petitions. In *Wrice*, the supreme court noted that the appellate court correctly found that *Wrice* had cause for leave to file because he could not have used the 2006 report in his 1991 initial postconviction *and* his 2000 successive postconviction petition. *Wrice*, 2012 IL 111860, ¶¶ 39-40. The supreme court weighed cause against both the initial postconviction petition and the first successive postconviction petition. *Wrice* is further distinguishable from the case at bar because the "State concede[d] that defendant ha[d] satisfied the cause prong, challenging only the appellate court's determination that defendant also satisfied the prejudice prong." *Wrice*, 2012 IL 111860, ¶ 49. Therefore, defendant's claim that *Wrice* established that cause is weighed against the initial postconviction petition is not persuasive.

¶ 73 Defendant could have used the 2006 report with respect to Shaw in any of his four successive petitions. As a result, defendant has not established cause for his Shaw claim.

¶ 74 We affirm the trial court's dismissal of defendant's Shaw claim due to lack of cause. Since defendant has failed to demonstrate cause for his claim relating to Shaw's testimony, we do not reach the issue of prejudice regarding this claim. As our supreme court explained in *People v. Brown*, 225 Ill. 2d 188, 207 (2007), since the *Pitsonbarger* test requires a

[5] In addition, defendant moved to file one petition even after *Wrice* was decided. *Wrice* was decided on February 2, 2012 (*Wrice*, 2012 IL 111860), and defendant sought to file his fourth successive petition on April 4, 2012.

defendant to show both cause and prejudice, "it is not necessary" for a court to consider one if the court has already found the other lacking.

¶ 75 B. Medical Records

¶ 76 With respect to his second claim, defendant argues that the State withheld medical records that would have corroborated his allegations of police abuse and would have impeached the testimony of Doris Reese at the suppression hearing. Defendant alleges that he discovered the medical records on October 13, 2013. Because he did not discover the records until 2013, defendant argues he has established cause since he could not have included them in his previous petitions. However, defendant offers no explanation[6] as to why he was unable to obtain his medical records between 1989 and 2013.

¶ 77 In *People v. Anderson*, 375 Ill. App. 3d 990, 1002 (2007), this court found the defendant "failed to satisfy the 'cause' prong *** so as to be granted leave to proceed with his successive postconviction petition, because he ha[d] failed to point to an objective factor that impeded him from raising this claim in an earlier proceeding." Additionally, this court found that "the majority of the exhibits that defendant attache[d] to his successive postconviction petition are not 'new,' as they were in existence at the time he filed his original postconviction petition." *Anderson*, 375 Ill. App. 3d at 1003.

¶ 78 Like the evidence in *Anderson*, defendant's medical records are not "new": we know they existed in 1989 because they are dated February 1, February 28, and March 8, 1989. See *Anderson*, 375 Ill. App. 3d at 1003. Although the State failed to provide the records during discovery in 1989, defendant knew of his own medical history, and if there was police abuse he knew the records could contain information to corroborate his allegations of police abuse.

[6] Defendant originally argued in his petition that he did not have the records because of ineffective counsel, but he has not argued that in this appeal.

Additionally, defendant does not provide any reasons as to why he was unable to obtain his own medical records through due diligence prior to 2013.

¶ 79 *Davis* is instructive here as well: defendant cannot circumvent cause requirements by "piecemeal[ing]" evidence into successive postconviction petitions. *Davis*, 2014 IL 115595, ¶ 55. Defendant has argued that he was abused by the police in all four of his successive postconviction petitions. He could have, through due diligence, obtained his own medical records to corroborate the claims used in any of the previous four petitions. In fact, defendant filed a *pro se* motion to supplement his petition for postconviction relief on December 8, 2013, in which he wrote: "[p]etitioner's medical records were readily available by subpoena."[7] Without adequate explanation as to why he was unable to obtain these records prior to 2013, defendant has failed to show cause.

¶ 80 In addition, and most importantly, the medical records attached to defendant's postconviction petition prove only that, on February 28, 1989, defendant had an old "slight deformity of the distal part of 5th metacarpal bone" that "could be from old trauma." The attached medical records are largely illegible, and do not confirm that he had a swollen wrist on February 1, 1989. Except for arguing that the "old trauma" observed on February 28, 1989, could be from his arrest a month earlier on January 31, 1989, defendant fails to show any evidence that the deformity in the bony pathology of his finger was a result of police brutality in 1989.

¶ 81 VI. Prejudice

¶ 82 Next, defendant argues that the State violated its *Brady* obligation by withholding his medical records during discovery, where the State knew about the medical records, and thus

[7] Defendant was arguing for inadequate counsel, a claim he did not raise on appeal to this court.

knew that Reese's testimony was perjured. Defendant argues that the medical records could have been used to impeach Reese's testimony, and were, therefore, material evidence. He alleges that the records show that his hand was swollen on February 1, 1989, and that there was an old trauma to his wrist on February 28, 1989. For the following reasons, we affirm the trial court's finding that the State's action did not constitute a *Brady* violation.

¶ 83 The United States Supreme Court held in *Brady v. Maryland* that the prosecution violates an accused's constitutional right to due process by failing to disclose evidence that is both: (1) favorable to the accused; and (2) material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); see also *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). Our supreme court found:

> "To comply with *Brady*, the prosecutor has a duty to learn of favorable evidence known to other government actors, including the police. [Citation.] The Supreme Court has, therefore, noted the special role played by the American prosecutor in the search for truth in criminal trials. [Citation.] The prosecutor's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. [Citation.]" (Internal quotation marks omitted.) *Beaman*, 229 Ill. 2d at 73.

¶ 84 The *Brady* rule has since been codified in Supreme Court Rule 412(c) which provides that the State must "disclose any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment." Ill. S. Ct. R. 412(c) (eff. Mar. 1, 2001); *People v. Rincon*, 387 Ill. App. 3d 708, 726–27 (2008).

¶ 85 In *Beaman*, the supreme court outlined the requirements for a *Brady* claim, which we repeat in full:

> "A *Brady* claim requires a showing that: (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. [Citation.] Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. [Citations.] To establish materiality, an accused must show the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. [Citation.]" (Internal quotation marks omitted.) *Beaman*, 387 Ill.2d at 73-74.

¶ 86 The State does not offer any explanation why it did not disclose the medical records during discovery. However, defendant offers no explanation as to why he was unable to discover his medical records until 2013, nor do his records corroborate his allegations of police abuse. He avers in the petition that the records were "readily available by subpoena."[8] Therefore, this information was not dependent on the State, and there is no evidence that the State knowingly or inadvertently withheld the information from defendant. Additionally, the records are illegible and do not confirm that he had a swollen wrist on February 1, 1989. Further, defendant has not established that the "old trauma" to his wrist indicated in the records on February 28, 1989, was a result of police abuse on January 31, 1989.

¶ 87 Finally, the testimony provided by Reese at the pretrial hearing is only relevant to whether or not the police abused defendant during custody and coerced his statements. Defendant fails to establish that the medical records were material to either his trial or

[8] Defendant used the medical records to support his claim for ineffective assistance of counsel in the petition at bar, stating that the records were easily recoverable by subpoena. However, he has not raised that claim on this appeal.

sentencing, and he concedes that the State did not use his custodial statements during trial. Therefore, defendant fails to establish that the State violated its *Brady* obligation, and fails to establish prejudice.

¶ 88 Defendant fails to establish prejudice as a result of the State's alleged *Brady* violation. He has not established that the results of his trial would have been different if it had been revealed that Reese's testimony was perjured since his statement was not used at trial. Thus, we also affirm the trial court's denial of this claim on the ground that defendant failed to establish prejudice.

CONCLUSION

¶ 89 We affirm the trial court's decision denying defendant leave to file his fifth successive postconviction petition.

¶ 90 Affirmed.