2013 IL App (2d) 120700-U
No. 2-12-0700
Order filed November 19, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-393
RONALD BOSLEY,	)	Honorable John J. Kinsella,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's section 2-1401 petition, which alleged that his conviction was based on perjury: the petition was not supported by a valid affidavit, and in any event the witness's truthfulness was litigated at trial and the proposed new evidence of perjury was not new or so conclusive that it would likely change the result.

¶ 2 Defendant, Ronald Bosley, was convicted of home invasion (720 ILCS 5/12-11(a)(3) (West 2008)). He appeals from the dismissal of his petition, filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). He contends that he should have received an evidentiary hearing, because of newly discovered evidence of perjury by the complaining witness.

Because defendant's petition and supporting documents failed to show that he was entitled to any relief, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted in the circuit court of Du Page County on various counts, including home invasion (720 ILCS 5/12-11(a)(3) (West 2008)), arising out of his entry into his girlfriend's apartment on February 14, 2009. The evidence at his jury trial consisted, in part, of the testimony of his girlfriend, Turkessa Peters. According to Peters, she lived in an apartment that was leased in her name only. Although defendant stayed with her on a regular basis, he lived with his mother. He kept some clothes and items at Peters's apartment, but he did not receive his mail there. On cross-examination, Peters testified that defendant had a key to the apartment, that he had permission to be there, and that "he [was] there quite, you know, often, so."

¶ 5 Peters testified on cross-examination that the door to the apartment had two locks, a regular lock and a dead bolt. There was a key for each lock, but defendant had a key only for the regular lock. According to Peters, both locks worked, and she occasionally used the dead bolt. She denied telling a defense investigator that one key operated both locks.

¶ 6 Peters did not recall telling defendant that he could not come over on the day of the incident. She also denied that defendant had forcibly entered the apartment and threatened her with a gun. She claimed to have no recollection of having given to the police on the date of the incident a written statement that incriminated defendant, or to having testified at the grand jury proceeding. Peters's recalcitrance as a witness was so apparent that the trial court discussed with her the possibility of being charged with perjury and appointed counsel to advise her in that regard.

¶ 7 The State used Peters's grand jury testimony and her written statement to the police to impeach her. She testified before the grand jury that defendant did not live at her apartment. She testified that she and defendant had attended a party on February 13, 2009, but that, due to his behavior, she went home without him. The next day, after defendant had telephoned her several times and she refused to answer, she heard someone "jiggling" the door knob and trying to open the door. She then heard the door being kicked in. Defendant entered her bedroom and threatened her with a gun. He also pulled a telephone cord from its outlet. He eventually left, and Peters called her parents. Her father, in turn, called the police. Peters's written statement to the police essentially mirrored her grand jury testimony.

¶ 8 Officer Eric Gouty responded to the scene and inspected the apartment. He discovered wood and paint chips on the floor near the door, a large crack next to the dead bolt, and damage to the dead-bolt plate. He opined that the damage to the door and dead bolt was fresh and was consistent with a forced entry. Peters showed Gouty that a telephone cord had been unplugged from the wall.

¶ 9 The police began looking for defendant, and they encountered him as he walked in a nearby residential area. Defendant fled but was captured after a brief chase. A gun was found discarded along the route he had taken during the chase.

¶ 10 Defendant told the police that he had gone to see Peters after she refused to answer his phone calls. According to defendant, he let himself in with a key, and he denied damaging the door. He admitted that he had a gun with him when he went to the apartment.

¶ 11 The jury found defendant guilty of home invasion, along with other charges that merged with the home-invasion conviction. He was sentenced to 6 years' imprisonment on the home-invasion

conviction, and he received an additional 15 years, because he was armed during the commission of the home invasion.

¶ 12 He appealed, raising the sole contention that there was insufficient evidence to convict him of home invasion. He contended that he actually lived at Peters's apartment and was thus authorized to enter it. This court, concluding that the evidence supported the jury's finding that defendant made an unauthorized entry into Peters's apartment, affirmed. See *People v. Bosley*, 2011 IL App (2d) 091222-U.

¶ 13 Defendant filed a section 2-1401 petition, in which he raised two claims: that his 15-year sentencing enhancement violated the Illinois Constitution, and that the State knowingly offered perjured testimony when Peters testified that he did not have a key to the dead bolt. In support of the petition, defendant included his own affidavit, in which he stated that Peters "[could] testify that the key [he] had fit both the main key lock to her front door as well as the dead bolt lock." Defendant did not include with his petition an affidavit from Peters.

¶ 14 After defendant filed his response to the State's motion to dismiss his petition, Peters sent the court a letter, which included her notarized signature. In the letter she discussed defendant's character and asked for leniency. She also stated that defendant "stayed with [her] at [her] residence" and that "he had keys to [her] apartment and vehicle." Several of defendant's other acquaintances sent letters that essentially stated, among other things, that defendant resided with Peters at her apartment.

¶ 15 In dismissing the section 2-1401 petition, the trial court initially noted that it received the "affidavits or letters" on behalf of defendant, but described them as "really not matters before the Court for the Court to address in any response to any sort of a motion." The court further stated that

the issue of whether defendant had authority to enter the apartment was a "factual question that was litigated at the trial." The court added that the issue was "properly before the trier of fact and resolved contrary to [defendant's] interest" and that "[a]ll of these facts were well known and litigated at the time of trial." Thus, the court dismissed the petition. Defendant, in turn, filed this timely appeal.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant contends that he was entitled to an evidentiary hearing on his petition. He maintains that his petition, and the letters supporting it, "presented a substantial question of fact deserving of further hearings" on the issue of whether Peters perjured herself when she testified that the dead-bolt lock worked and that defendant did not have a key.

¶ 18 The purpose of a section 2-1401 petition is to bring to the attention of the trial court facts that, if known at the time of judgment, would have precluded its entry. *People v. Waters*, 328 Ill. App. 3d 117, 126 (2002) (citing *People v. Haynes*, 192 Ill. 2d 437, 463 (2000)). A section 2-1401 petition, however, is not designed to allow general review of all trial errors or to substitute for a direct appeal. *Haynes*, 192 Ill. 2d at 461. Points previously raised at trial cannot form the basis of relief under section 2-1401. *Haynes*, 192 Ill. 2d at 461.

¶ 19 To obtain relief under section 2-1401, a petitioner must set forth specific factual allegations that demonstrate the existence of a meritorious defense or claim, due diligence in presenting the defense or claim, and due diligence in filing the petition. *Waters*, 328 Ill. App. 3d at 127. In order to justify setting aside a judgment on the basis of newly discovered evidence, the petition must show that the new evidence was not known to the petitioner at the time of trial and could not have been discovered with the exercise of reasonable diligence. *Waters*, 328 Ill. App. 3d at 127. Additionally,

the new evidence must be so conclusive that it would probably change the result if a new trial were granted, must be material to the issue, and must be more than merely cumulative of the trial evidence. *Waters*, 328 Ill. App. 3d at 127.

¶ 20 The petition's allegations must be proved by a preponderance of the evidence. *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). When a trial court denies relief based on the pleadings alone, we apply a *de novo* review. *Vincent*, 226 Ill. 2d at 16.

¶ 21 Section 2-1401 provides a basis for relief from a judgment based on false testimony. *People v. Brown*, 169 Ill. 2d 94, 107 (1996). To obtain such relief, a defendant does not have to establish that the false testimony was knowingly used by the prosecution. *Brown*, 169 Ill. 2d at 107-08. However, he must not merely allege perjury by the State's witnesses, but must present clear, factual allegations of perjury and not mere conclusions or opinions. *People v. Thomas*, 364 Ill. App. 3d 91, 104 (2006). He must show the perjury by clear and convincing evidence, and the trial court must determine whether his evidence warrants a new trial. *Thomas*, 364 Ill. App. 3d at 104 (citing *People v. Burrows*, 172 Ill. 2d 169, 180 (1996)).

¶ 22 In our case, the State initially contends that we should affirm the dismissal of the section 2-1401 petition, because the only affidavit included with the petition was that of defendant, whose assertions therein, regarding what Peters would testify to, constituted hearsay.

¶ 23 An affidavit submitted in support of a section 2-1401 petition must be made by a person who has first-hand knowledge of the factual allegations. *People v. Perkins*, 260 Ill. App. 3d 516, 518 (1994). A supporting affidavit that is based on hearsay is insufficient to warrant relief under section 2-1401. *People v. Sanchez*, 115 Ill. 2d 238, 284 (1986). There is an exception, however, where the

material facts are known only to a person from whom the petitioner is unable to obtain an affidavit, because of hostility or otherwise. *Sanchez*, 115 Ill. 2d at 285.

¶ 24 We agree with the State that defendant's affidavit was insufficient to support his section 2-1401 petition. To the extent that it referred to what Peters would testify to, it constituted hearsay. Further, defendant did not offer any reason why he could not have obtained Peters's affidavit and included it with his petition. Thus, defendant's affidavit was insufficient to support his petition.

¶ 25 Having said that, we recognize that Peters sent a letter to the court in support of defendant, which included a statement that defendant stayed at her residence and that he had keys to the apartment and her vehicle. The letter, however, fell short of being a sworn affidavit that would subject Peters to sanctions if it proved to be false. Although Peters's signature was notarized, and the letter indicated that Peters was qualified to testify (see *Rinchich v. Village of Bridgeview*, 235 Ill. App. 3d 614, 623-24 (1992) (contents of an affidavit determine whether the affiant is qualified to testify)), there was no indication that the statement was given under oath or otherwise sworn (see *Storcz v. O'Donnell*, 256 Ill. App. 3d 1064, 1069 (1993) (section 2-1401 petition must be supported by sworn allegations or affidavit); see also *Stallworth v. Thomas*, 83 Ill. App. 3d 747, 751 (1980) (unsworn affidavit insufficient as a matter of law to support a section 72 petition)). The same can be said of the other supporting letters. Thus, we do not consider Peters's letter, or any of the other letters, to be an adequate substitute for a properly sworn supporting affidavit.

¶ 26 Were we to consider the letters, however, we would still affirm the dismissal of the petition. As the trial court pointed out, the issue of Peters's credibility was squarely before the jury, including specifically whether she was being truthful when she testified that the dead bolt worked and that defendant did not have a key for that lock. The jury was free to assess her credibility and accept or

reject her testimony. See *People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 32 (jury is ultimate arbiter of witness credibility). Because the issue of whether she lied about the dead bolt and defendant not having a key has been already litigated, defendant cannot now obtain section 2-1401 relief on that basis. See *Haynes*, 192 Ill. 2d at 460-61.

¶ 27 Moreover, defendant has not shown that any of his proposed evidence was "new" in the sense that he did not know about it at the time of trial. See *Waters*, 328 Ill. App. 3d at 127. He was certainly aware of the importance of the issue of whether he resided at Peters's apartment and of the various potential witnesses who might testify to that effect. Additionally, he has not asserted that, if he did not know about the potential witnesses' testimony, such evidence could not have been discovered with the exercise of reasonable diligence. Finally, the proposed evidence was merely cumulative of that presented at trial. See *Waters*, 328 Ill. App. 3d at 127.

¶ 28 Not only was the proposed evidence not new, it was not so conclusive that it would probably have changed the result had a new trial been granted. Even if Peters and the other witnesses were to testify that defendant resided at Peters's apartment, that would not likely change the result in light of the contrary evidence that defendant did not reside at Peters's apartment. There was evidence that showed that defendant did not receive mail at Peters's apartment and that he resided at his mother's home. As for whether defendant had a key for the dead bolt, the evidence was clearly sufficient for the jury to find that he did not. Also, the jury reasonably could have concluded that, even if defendant had keys to both locks, he was merely a regular guest as opposed to a resident. Thus, there was an ample basis for the jury to find that defendant did not reside at Peters's apartment.

¶ 29 In addition to the foregoing evidence that defendant did not reside at the apartment, there was evidence that defendant entered the apartment without permission. The evidence established that

the door had been recently damaged and that defendant forcibly entered the apartment. Peters called her parents, and her father, in turn, called the police and reported the incident. On top of that, when the police encountered defendant, he attempted to escape, and discarded a gun while doing so. There was sufficient evidence that defendant did not reside at the apartment and that he entered the apartment without lawful authority. See *People v. Hicks*, 181 Ill. 2d 541, 545 (1998) (unauthorized entry into the dwelling of another is an essential element of home invasion). It is not likely that defendant's proposed new evidence would have altered the jury's finding in that regard.

¶ 30 Finally, we note that defendant's reliance on *People v. Cheeks*, 318 Ill. App. 3d 919 (2001), is misplaced. In that case, the court held that the defendant could properly maintain a perjury claim under section 2-1401. *Cheeks*, 318 Ill. App. 3d at 922. It did not hold that the claim was valid under section 2-1401, but merely remanded for initial consideration under that provision. The *Cheeks* decision, being distinguishable from our case, offers no support to defendant.

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 33 Affirmed.