2017 IL App (2d) 160861-U
No. 2-16-0861
Order filed July 27, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EDWARD J. BARKES, JR., Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kendall County. No. 04-CF-212 Honorable Robert P. Pilmer, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion for leave to file a successive postconviction petition, which would have alleged that the State presented false testimony to the grand jury: defendant could not show prejudice, as the testimony at issue was not demonstrably false and, in any event, the grand jury would have indicted him even absent that testimony.

¶ 2 Defendant, Edward J. Barkes, Jr., appeals *pro se* from a judgment denying him leave to file his second successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 16, 2004, following a jury trial, defendant was convicted of seven counts of criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2004)) and seven counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2004)). At trial, A.H., the 13-year-old victim, testified that, from February 5 through May 18, 2004, she had sexual intercourse with defendant (who was born on March 15, 1965) approximately two to three times per week. During much of that time, A.H. lived with defendant, and defendant was in a position of trust, authority, or supervision in relation to A.H. Sergeant Jonathan Whowell, a police officer with the City of Plano, testified that, on May 18, 2004, he conducted a search of defendant's residence pursuant to a warrant.[1] During the search, he found pictures inside a stereo speaker in defendant's bedroom. Whowell identified State's exhibit No. 1 as a photograph of defendant and A.H. Renatta Cameron, A.H.'s mother, testified that, prior to May 18, 2004, she did not know that A.H. and defendant had a sexual relationship.

¶ 5 On February 4, 2005, the court merged the abuse charges into the assault charges and sentenced defendant to seven consecutive eight-year terms of incarceration. Defendant moved for reconsideration of his sentence, arguing that it was excessive. The trial court denied the motion.

¶ 6 Defendant appealed, arguing that (1) there was insufficient evidence that he was in a position of trust, authority, or supervision over the victim; (2) there was insufficient evidence to convict him of multiple sex offenses; and (3) his sentence was disproportionate to the nature of

[1] The warrant was issued after a confidential informant made three drug purchases from defendant while inside the residence. During the search, cannabis was found and defendant was arrested.

the offenses. We rejected each argument and affirmed. *People v. Barkes*, No. 2-05-0248 (2006) (unpublished order under Supreme Court Rule 23).

¶ 7 On July 18, 2007, defendant filed a *pro se* postconviction petition, alleging 15 constitutional violations. It was advanced to the second stage, where counsel was appointed. The trial court granted the State's motion to dismiss, and defendant appealed. On appeal, defendant argued that the trial court erred in granting the motion to dismiss as to four ineffective-assistance-of-counsel claims. *People v. Barkes*, 399 Ill. App. 3d 980, 985 (2010). We affirmed in part, reversed in part, and remanded for an evidentiary hearing on defendant's claims that trial counsel was ineffective for refusing to allow him to waive his right to a jury trial and for failing to advise him that his sentences upon conviction were mandatorily consecutive. *Id.* at 992.

¶ 8 On remand, defendant moved *pro se* for leave to file a successive postconviction petition. The trial court denied the motion on September 21, 2010. Defendant appealed, and the trial court appointed the Office of the State Appellate Defender. We granted the appellate defender's motion to withdraw as counsel and affirmed. *People v. Barkes*, 2012 IL App (2d) 101205-U (summary order).

¶ 9 On February 26, 2014, following an evidentiary hearing on defendant's initial petition, the trial court denied the petition. Defendant timely appealed, and the trial court appointed the Office of the State Appellate Defender. We again granted the appellate defender's motion to withdraw as counsel. *People v. Barkes*, 2015 IL App (2d) 140290-U (summary order).

¶ 10 On February 22, 2016, defendant filed a *pro se* petition for relief from judgment (735 ILCS 5/2-1401(f) (West 2014)), arguing that his convictions of criminal sexual assault were void. According to defendant, he was not in a position of trust, authority, or supervision in relation to the victim for purposes of the statute and that the statute, as applied to him, was

unconstitutional. The trial court granted summary judgment in favor of the State. Defendant appealed, and we affirmed. *People v. Barkes*, 2017 IL App (2d) 160621-U (summary order).

¶ 11 On June 27, 2016, defendant moved *pro se* for leave to file a second successive postconviction petition. The proposed petition alleged that defendant was denied due process when Whowell testified falsely before the grand jury. Defendant attached to the petition a portion of Whowell's May 25, 2004, grand jury testimony. Whowell testified that he had been assigned to investigate defendant for possible criminal sexual assault or aggravated criminal sexual abuse of a minor. When asked how he became aware of the allegations, he testified that he had been "notified that the parents had been in contact with the police department, and were concerned about the relationship between [defendant] and A.H." However, according to defendant, A.H.'s parents never contacted the police department. Defendant alleged that he had submitted a request to the City of Plano police department for reports showing that A.H.'s parents had contacted them. The request, which was attached to defendant's motion, asked for:

> "Copy of any and all reports in which shows Ranetta Cameron calling and asking Plano police for assistance in her concerns about the welfare of her minor daughter [A.H.] and [defendant] between 2-1-04 and 5-18-04[,] which authorized [Whowell] to legally start investigating [defendant] for possible criminal sexual assault and/or possible aggravated criminal sexual abuse."

The City of Plano responded: "There are no reports." Thus, according to defendant, "Whowell testified falsely, and inaccurately and deceptively," and "[t]he prosecution allowed the grand jury to be misled."

¶ 12 On August 15, 2016, the State moved to dismiss defendant's motion. On September 27, 2016, the trial court denied defendant's motion. Defendant timely appeals.

¶ 13 II. ANALYSIS

¶ 14 The filing of successive postconviction petitions is governed by section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2016)), which provides:

> "Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial postconviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process."

If we determine that "defendant cannot show prejudice, we need not address defendant's claim of cause." *People v. Smith*, 2014 IL 115946, ¶ 37. We review *de novo* the trial court's denial of leave to file a successive petition under the Act. *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 32.

¶ 15 Defendant argues that his due process rights were violated when Whowell provided false testimony before the grand jury. He maintains that his motion for leave to file a successive postconviction petition established cause for his failure to raise the claim during the initial postconviction proceedings, because he did not know of the facts until receiving the grand jury transcript (which, according to defendant, had not previously been available to him). He maintains that he also established prejudice, because Whowell's "prejudicial" testimony warrants dismissal of the indictment.

¶ 16 We need not consider whether defendant established cause, because it is clear that he did not establish prejudice. A trial court may dismiss an indictment if the defendant establishes that he suffered a prejudicial denial of due process. *People v. Holmes*, 397 Ill. App. 3d 737, 741 (2010). To do so, the defendant must establish that the denial of due process is " 'unequivocally clear' " and that the prejudice is " 'actual and substantial.' " *Id.* A due process violation is actually and substantially prejudicial only if without it the grand jury would not have indicted the defendant. *People v. Oliver*, 368 Ill. App. 3d 690, 696-97 (2006). A defendant's due process rights can be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence. *Holmes*, 397 Ill. App. 3d at 741. A defendant's due process rights can be violated even if the prosecutor's presentation of deceptive evidence was not intentional. *Oliver*, 368 Ill. App. 3d at 696.

¶ 17 Defendant cannot establish that the State presented false testimony, intentionally or otherwise. Defendant argues specifically as follows:

> "Sgt. Whowell testified falsely before the grand jury, and gave inaccurate and deceptive evidence, when he testified that the police department was contacted by A.H.'s parents concerning this defendant's relationship with A.H. The fact that there is [*sic*] no police reports regarding this matter prior to the searching of defendant's mother's residence, establishes Sgt. Whowell testified falsely.
>
> There is no testimony and no police records to support Sgt. Whowell's claims. In[] fact, A.H.'s mother testified contrary to Sgt. Whowell's claims made before the grand jury. A.H.'s mother testified at defendant's trial, she did not learn of any sexual relationship between defendant and her daughter until after the defendant's mother's residence was raided on May 18, 2004.

> So, Sgt. Whowell's testimony before the grand jury that the victim's mother contacted the Plano Police Department prior to the May 18, 2004, raid at defendant's mother's residence was totally false."

¶ 18 Contrary to defendant's assertion, Whowell did not testify that Cameron contacted the police prior to the May 18 search. Although Whowell did testify that he had been "notified that the parents had been in contact with the police department, and were concerned about the relationship between [defendant] and A.H.," he did not indicate when (or how) this occurred. Indeed, his interview with A.H. did not occur until *after* the May 18 search. This, of course, is consistent with Cameron's testimony that she did not learn of A.H.'s relationship with defendant until *after* the search. Further, in his request to the police department for copies of reports initiated by Cameron, defendant asked for reports showing that "Cameron call[ed] and ask[ed] *** for assistance," and he provided a date range of between February 1, 2004, and May 18, 2004. Given that Cameron testified that she was not aware of the sexual relationship until after May 18, the absence of any reports of "call[s]" made prior to that date is expected. In any event, even if defendant's request had not been limited to a specific time period, the absence of a specific police report detailing Cameron's concerns to the police does not conclusively contradict Whowell's testimony that he was notified that Cameron did express her concerns.

¶ 19 Moreover, even if the evidence supported defendant's claim that Whowell testified falsely about how he learned of the sexual conduct between defendant and A.H., he makes no argument that, absent this testimony, the grand jury would not have indicted him. See *id.* at 696-97. Indeed, as the State points out, probable cause for the indictment was established not by Whowell's testimony regarding Cameron's contact with the police but by Whowell's testimony

that A.H., when interviewed, made detailed statements about the sexual relationship between her and defendant.

¶ 20 Based on the foregoing, we find that defendant cannot establish that the alleged error not raised in the original postconviction proceedings "so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2016).

¶ 21 Last, we note that, although defendant's argument is not entirely clear, he seemed to suggest in his motion for leave before the trial court that, absent a pre-May 18, 2004, phone call from A.H.'s parents, there was no probable cause for the taking of the photograph from his residence, which led to the questioning of A.H. and the subsequent indictment. The State responds that the photograph was properly seized under the warrant as "indicia of occupancy." In any event, defendant makes no such argument on appeal and thus has forfeited it. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Kendall County denying defendant's motion for leave to file a second successive postconviction petition. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 24 Affirmed.