2012 IL App (4th) 100784-U Filed 8/13/12

NOS. 4-10-0784, 4-11-0530 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
JAMES C. HARRIS,	)	No. 98CF724
Defendant-Appellant.	)	
	)	Honorable
	)	John W. Belz,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: Because defendant's appeal presents no meritorious issues that can be raised, the motion of the office of the State Appellate Defender to withdraw as counsel on appeal is granted and the judgment of the trial court is affirmed.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised. For the reasons that follow, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Defendant's Guilty Plea

¶ 5 In August 1998, defendant was charged with three counts of first degree murder of Cory Miller (720 ILCS 5/9-1(a)(1), (a)(2) (West 1998)). Later, defendant was charged with three more counts of first degree murder, one count of aggravated battery (720 ILCS 5/12-4(a) (West

1998)), and one count of soliciting arson (720 ILCS 5/8-1(a), 20-1(a) (West 1998)). In January 1999, pursuant to a negotiated plea agreement, defendant pleaded guilty to one count of first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)). In exchange for his plea, all other charges were dismissed and the State agreed to a maximum prison term of 30 years.

¶ 6 The State provided the following factual basis for defendant's plea: On August 6, 1998, around 5:15 a.m., a woman noticed a body and flagged down Tim Cunningham, a detective with the Springfield police department. Detective Cunningham identified the body as Cory Miller. Detectives Cunningham and Pat Ross interviewed witnesses, including defendant and Robert Davis. Defendant and Davis told the officers they had been riding in a vehicle with Cory. At some point, defendant and Davis noticed two masked and armed men approaching their vehicle. They tried to wake Cory, but he would not awaken. Defendant and Davis fled, leaving Cory behind. Davis later changed his story to one that is consistent with statements made by Jerrod Hammonds and Ronald McClain. These individuals stated defendant, who was armed, had earlier gone looking for Cory at two households, one belonging to Lukisha McClain and the other belonging to Laquana Miller, Cory's niece. Laquana allowed defendant and Davis into her home. These men woke Cory, who left willingly with them. The five of them drove around. Defendant sat in the front passenger seat. Shortly after picking up Cory, defendant turned and, without provocation, shot Cory multiple times. Defendant and Ronald dragged the body from the vehicle and left it in the roadway, where it was found. Defendant instructed Davis and Ronald to burn the vehicle, and they did. Defendant disposed of the gun in a sewer.

¶ 7 Defendant disagreed with the State's version of events but agreed the factual basis conformed to the evidence the State would submit. The trial court accepted defendant's plea and

later sentenced him to 27 years' imprisonment. The record does not show a direct appeal was filed.

¶ 8 B. First Postconviction Petition

¶ 9 In April 2002, four years later, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2002)). In this postconviction petition, defendant raised issues regarding his fitness, the sufficiency of the charging instrument, and the quality of his representation. Defendant maintained his counsel failed to conduct meaningful adversarial testing of the indictment and proceedings.

¶ 10 In June 2002, the trial court dismissed defendant's *pro se* petition as frivolous and patently without merit. The court held, in part, defendant's petition contained matters that could have been raised on direct appeal and defendant failed to file any postplea proceedings. Defendant did not appeal the dismissal of this petition.

¶ 11 C. Successive Postconviction Petition

¶ 12 In May 2006, four years after the dismissal of his first postconviction petition, defendant filed a second *pro se* postconviction petition under the Act. In August 2006, the State moved to dismiss the petition. The State argued, in part, defendant failed to seek leave to file his successive petition as required by section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2006)). In August 2008, the trial court agreed with the State and dismissed defendant's petition. The court found defendant failed to seek leave of court before filing his successive postconviction petition.

¶ 13 In September 2008, defendant appealed the trial court's dismissal of his second postconviction petition. In August 2009, this court granted defendant's voluntary motion to

dismiss that appeal.

¶ 14 While the State's August 2006 motion to dismiss was pending, defendant, in May 2008, moved for leave of court to file a successive postconviction petition. In June 2010, the State filed a response to defendant's motion for leave, arguing defendant had not demonstrated cause and prejudice and, therefore, had not met the section 122-1(f) requirements for a successive postconviction petition.

¶ 15 In September 2010, the trial court denied defendant's motion for leave. The court concluded defendant had not established cause for the failure to bring the postconviction claims or prejudice by such failure. In October 2010, defendant appealed the dismissal of the court's order denying leave to file his successive postconviction petition. This case was docketed as No. 4-10-0784.

¶ 16 D. Section 2-1401 Petition for Relief From Judgment

¶ 17 In April 2011, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Civil Practice Act (735 ILCS 5/2-1401 (West 2010)). Defendant argued this motion should be granted because the State fraudulently concealed evidence that "could've" demonstrated his actual innocence.

¶ 18 The State moved to dismiss defendant's section 2-1401 petition. The State argued, in part, defendant's petition was inappropriate because he pleaded guilty and admitted guilt.

¶ 19 In June 2011, the trial court dismissed defendant's section 2-1401 petition. The court held the petition was not timely filed and defendant alleged no grounds that would be a basis for relief in the case.

¶ 20 Defendant filed timely notice of appeal. This case was docketed as No. 4-11-0530.

¶ 21 E. Consolidated Appeals

¶ 22 The trial court appointed OSAD to represent defendant. In November 2011, OSAD moved to consolidate the appeals in Nos. 4-10-0784 and 4-11-0530. This court granted OSAD's motion.

¶ 23 OSAD later moved to withdraw as counsel under *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Notice of OSAD's motion was sent to defendant. This court gave defendant time to file additional points and authorities, which defendant did. The State filed briefs in response to defendant's filings.

¶ 24 II. ANALYSIS

¶ 25 A. No. 4-10-0784

¶ 26 1. *Successive Postconviction Proceedings Under the Act*

¶ 27 The Act affords "a remedy whereby defendants may challenge their convictions or sentences for violations of federal or state constitutional law." *People v. Coleman*, 206 Ill. 2d 261, 277, 794 N.E.2d 275, 286 (2002). It mandates "[o]nly one petition may be filed by a petitioner under this Article without leave of the court." 725 ILCS 5/122-1(f) (West 2010). Leave of court to file a second or successive petition may be granted by a circuit court "*only* if [that] 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." 725 ILCS 5/122-1(f) (West 2010) (emphasis added). Cause may be demonstrated "by identifying an objective factor that impeded [the prisoner's] ability to raise a specific claim during his or her initial post-conviction

proceedings." 725 ILCS 5/122-1(f) (West 2010). For purposes of section 122-1(f), "cause" is "an objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding." *People v. Morgan*, 212 Ill. 2d 148, 153-54, 817 N.E.2d 524, 527 (2004). Prejudice may be proved "by demonstrating that the claim not raised during [the prisoner's] initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010).

¶ 28 Leave to file a successive petition should also be granted when a colorable claim of actual innocence has been asserted. *People v. Edwards*, 2012 IL 111711, ¶ 30, 969 N.E.2d 829. Our review of the denial of a motion for leave to file a successive postconviction petition is *de novo*. See *People v. McDonald*, 405 Ill. App. 3d 131, 135, 937 N.E.2d 778, 783 (2010).

¶ 29 2. *Defendant Cannot, in General, Show Cause or Prejudice*

¶ 30 OSAD argues there are no grounds to justify relaxing the standards applicable to successive postconviction petitions. OSAD identifies defendant's three general reasons he should be allowed leave to file such petition: (1) his 2002 postconviction petition was improperly dismissed, (2) he failed to file notice of appeal in the proper court after the dismissal of his 2002 postconviction petition, and (3) he was not provided copies of his transcripts. OSAD maintains each of these arguments lack merit.

¶ 31 We agree no colorable argument can be made defendant can establish the requisite cause and prejudice standard based on his contention his 2002 postconviction petition was improperly dismissed. To establish "cause," defendant must identify "an objective factor external to the defense that impeded" the effort "to raise the claim in an earlier proceeding." *Morgan*, 212 Ill. 2d at 153-54, 817 N.E.2d at 527. Postconviction proceedings under the Act include appeals.

See 725 ILCS 5/122-7 (West 2002). The failure to raise this argument on direct appeal of the June 2002 dismissal of the initial petition until the May 2008 filing of leave, when he could have appealed the earlier dismissal within 30 days, is not "an objective factor *external* to the defense that impeded" defendant's effort to raise the issue earlier. (Emphasis added.) *Morgan*, 212 Ill. 2d at 153-54, 817 N.E.2d at 527.

¶ 32 Defendant asserted he filed a notice of appeal of the dismissal of his first post-conviction petition with the clerk of this court rather than the Sangamon County circuit clerk. That defendant may have filed his appeal in the wrong court does not aid defendant. If, indeed, defendant failed to file the appeal in the proper court, this is not a factor that is *external* to the defense. Defendant argues this court, under Illinois Supreme Court Rule 365 (eff. Feb. 1, 1994), should have forwarded his notice of appeal to the proper court. This argument fails to establish cause. Even if defendant's version of the events is true, though the record does not contain proof under Illinois Supreme Court Rule 12(b)(3) (eff. Nov. 15, 1992) such notice was filed, there is no colorable argument defendant can show cause. Defendant's appeal of the dismissal of his first postconviction petition would have had to have been filed in June or July 2002. Defendant's first attempt at a successive postconviction petition did not occur until nearly four years later. Defendant has not given a plausible explanation why he did not become earlier aware of the alleged improperly filed notice of appeal and act sooner, such as within the six-month window for late notices of appeal (see Ill. S. Ct. R. 606(c) (eff. Dec. 1, 1999)).

¶ 33 OSAD further argues no colorable argument can be made a successive postconviction petition should be filed because Harris was not provided a copy of his transcripts. We agree. The Act contemplates the summary dismissal of postconviction petitions *before*

transcripts are provided to prisoners. See 725 ILCS 5/122-4 (West 2002) ("If the petition is not dismissed pursuant to Section 122-2.1, and alleges that the petitioner is unable to pay the costs of the proceeding, the court may order that the petitioner be permitted to proceed as a poor person and order a transcript of the proceedings delivered to petitioner."). In addition, the docket sheets do not show defendant requested transcripts until the day he filed his original postconviction petition. Defendant cannot argue he was denied anything he was entitled to before the filing of his initial postconviction petition.

¶ 34 The cases cited by defendant are not persuasive. For example, defendant relies on several cases in which Illinois courts find improper summary dismissals of only a portion of the postconviction claims. See, e.g. *People v. Rivera*, 198 Ill. 2d 364, 365, 763 N.E.2d 306, 307 (2001); *People v. Brown*, 336 Ill. App. 3d 711, 721, 784 N.E.2d 296, 304 (2002). These are not applicable here. In addition, *People v. Miner*, 4 Ill. App. 3d 409, 410, 280 N.E.2d 469, 470 (1972), at best stands for the proposition that a mere letter may be sufficient for notifying a trial court the defendant intends to appeal.

¶ 35 3. *Defendant's Successive Petition Does Not Establish Actual Innocence*

¶ 36 OSAD next contends no colorable argument can be made Ronald McClain's or Jerrod Hammonds' affidavits constitute newly discovered evidence of defendant's actual innocence. The elements of an actual-innocence claim must be newly discovered, material and not cumulative, and of such conclusive character it will probably change the outcome on retrial. *Edwards*, 2012 IL 111711, ¶ 32, 969 N.E.2d 829.

¶ 37 a. Ronald's Affidavit

¶ 38 In an affidavit, Ronald McClain averred he "had been riding around with" his

cousins, Davis and defendant. While doing so, they "ran into" his cousin Hammonds at his mother's house. Hammonds joined them and they continued driving around until nightfall. At that time, they ended up at Ronald's sister's house. According to Ronald, while at his sister's house, they asked her if they could "bag up some work." They did and then left. Ronald and Hammonds "were dropped off." Ronald went home. On August 10, 1998, Ronald learned detectives "had been pursuing" him about a murder involving Cory. Ronald called the police to inform them he would cooperate. Detective Ross arrived at Ronald's residence. Ronald told Ross he had no knowledge of Cory's death. Ronald further averred Ross told him he would be charged with murder if he did not cooperate. Ronald complied to avoid prison and because he believed his sister was in danger. Ronald further averred he "made up the story how [defendant] murdered Cory." Ronald stated he "just lied so my sister wouldn't get hurt by James's brother."

¶ 39 OSAD maintains no colorable argument can be made this was newly discovered evidence. OSAD emphasizes defendant's motion for leave to file a successive postconviction petition, in which defendant stated he heard rumors about how detectives had coerced Ronald into lying *before* defendant pled guilty to Cory's murder. OSAD also maintains this evidence does not establish defendant's innocence, but merely shows, at best, Ronald was not present when Cory was shot.

¶ 40 We agree with OSAD. No colorable argument can be made Ronald's affidavit establishes an actual-innocence claim. As OSAD points out, defendant states he was aware of Ronald's lie before he agreed to plead guilty—it was not newly discovered. Even if this was, as defendant states, a rumor and not a statement of fact, if Ronald was dropped off at some point in the evening, defendant would have known about it and thus would know his statement to the

police was untruthful. In addition, the evidence is not of such conclusive character it would probably change the outcome on retrial. In his affidavit, Ronald, defendant's cousin, merely testified he was not present when Cory was shot. There remained considerable evidence against defendant, including his admission of guilt at the plea hearing and at sentencing. In addition, Davis's testimony defendant shot Cory remains. Davis informed the police defendant tossed the murder weapon into the sewer. The police recovered the same caliber weapon used to murder Cory in a storm sewer.

¶ 41 b. Hammonds' Affidavit

¶ 42 In his April 2009 affidavit, Hammonds averred, on the date of Cory's murder, Davis, Ronald, and defendant drove by and invited Hammonds to join them. The four drove around until night. According to Hammonds, the four went to Ronald's sister's house, where they "bagged up some work." A little later, Ronald and Hammonds were dropped off. Hammonds went to his mother's house and went to sleep. Hammonds learned on August 6, 1998, the police wanted to talk to him about his possible involvement in Cory's murder. Hammonds contacted the police. Hammonds denied ever telling anyone defendant murdered Cory. Hammonds only stated he was dropped off after spending time earlier with defendant. Hammonds averred he attempted to reveal this information for some time, but had been in and out of federal prison.

¶ 43 No colorable argument can be made Hammonds' affidavit establishes an actual-innocence claim. As OSAD points out, if Hammonds was dropped off as he states, defendant would have known about it. Defendant would have known Hammonds would not have testified for the State in this manner or was lying. It was not newly discovered. Also, the evidence is not of such conclusive character it would probably change the outcome at a trial. Hammonds, in his

affidavit, stated he was not present when Cory was shot. As we stated above, considerable evidence remained against defendant, including his admission of guilt at the plea hearing and at sentencing and Davis's testimony.

¶ 44 4. *The State's Alleged Brady Violation*

¶ 45 OSAD next argues no colorable argument can be made Hammond's affidavit justifies the allowance of a successive postconviction petition based on an alleged violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the State's "suppression *** of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." We note the duty of the State extends to situations where the accused has not requested such information and where such evidence was known by police but not the prosecutor. See *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). To succeed on a *Brady* claim, a defendant must show: (1) the evidence was favorable to the accused because it is exculpatory or impeaching, (2) the evidence was suppressed by the State, and (3) the suppression prejudiced the accused. *Strickler*, 527 U.S. at 281-82. Claims of *Brady* violations can be forfeited if not timely raised. See *People v. Anderson*, 375 Ill. App. 3d 121, 147, 872 N.E.2d 581, 604 (2007).

¶ 46 We agree defendant cannot establish the "cause" prerequisite to justify leave to file a successive postconviction petition. If Hammonds' affidavit is true, defendant knew Hammonds had left the vehicle. Despite this knowledge, defendant agreed the State could show Hammonds would testify to having seen defendant shoot Cory. Defendant then pleaded guilty and did not raise the issue in a postplea motion, on direct appeal, or in his original postconviction petition. Defendant cannot establish cause, and the issue is forfeited.

¶ 47 5. *The State's Alleged Franks Violation*

¶ 48 OSAD next maintains no colorable argument can be made the circuit court should grant leave to file a successive postconviction petition based on the police officers' alleged violation of *Franks v. Delaware*, 438 U.S. 154, 171 (1978), by knowingly using false information to secure an arrest warrant. To obtain an evidentiary hearing on whether an affidavit supports a warrant, a defendant must make a preliminary showing false statements were made knowingly and intentionally, or with reckless disregard for the truth. *People v. Eyler*, 133 Ill. 2d 173, 201-02, 549 N.E.2d 268 (1989); *People v. Bryant*, 389 Ill. App. 3d 500, 530, 906 N.E.2d 129, 153 (2009). We agree with OSAD.

¶ 49 Defendant attached to his motion for leave two reports, one authored by Detective D. Williamson and another prepared by Detective Tim Young. In his report, Detective Williamson stated he had been advised by two detectives, "Ross" and Young, "a female *** had told them several subjects had come to [Cory's] residence and removed him." According to the report, Detective Williamson stated "one of the individuals was armed" and defendant, Davis, Ronald, and "possibly" Hammonds were present. According to Detective Young's report, "Laquana L. Miller," presumably the "female" in Williamson's report, testified two men arrived at her residence looking for her uncle Cory. In Detective Young's report, there was no indication Laquana identified the men or stated one was armed.

¶ 50 OSAD argues, and the State agrees, defendant has not shown the misstatements were made knowingly and intentionally or with reckless disregard for the truth. Both also argue probable cause for the arrest was also found in Hammonds' statement to the police shortly after the shooting. Defendant contends the leap between Young's report and Williamson's report indicates at a minimum reckless disregard for the truth. Defendant further maintains Hammonds'

affidavit establishes Hammonds denies telling anyone defendant killed Cory and, thus, Hammonds' alleged statement to the police cannot serve as the basis for the arrest warrant.

¶ 51 The question before this court is not whether a *Franks* violation occurred, but whether defendant has demonstrated "cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice result[ing] from that failure." 725 ILCS 5/122-1(f) (West 2010). Cause may be demonstrated "by identifying an objective factor that impeded [the prisoner's] ability to raise a specific claim during his or her initial post-conviction proceedings." 725 ILCS 5/122-1(f) (West 2010). A court need not accept a defendant's explanation for cause, but may find such explanations not plausible when information supporting the claim was available before the initial postconviction proceedings. See *People v. Anderson*, 375 Ill. App. 3d 990, 1002-03, 874 N.E.2d 277, 289 (2007).

¶ 52 Defendant has not sufficiently demonstrated "cause" for his failure to bring the claim in his April 2002 postconviction proceedings. From defendant's motion for leave, there seems to be only one explanation for his failure to raise this issue now—he did not have access to his transcripts or the common-law record. Defendant maintains in his motion he had been denied his request for his transcripts and the record 11 times. The docket sheets show, however, his first request for transcripts and the record did not occur until the date he filed his postconviction petition. This argument thus cannot serve as his excuse for not investigating or raising the issue before he filed his initial postconviction petition when he knew "[a]ny claim of substantial denial of constitutional rights not raised in the original or amended petition is waived." 725 ILCS 5/122-3 (West 2000).

¶ 53 6. *Ballistics Report and Fingerprint Analysis*

¶ 54 OSAD next contends no colorable argument can be made the ballistics report or fingerprint analysis are evidence of actual innocence. We agree.

¶ 55 In defendant's motion for leave, defendant argues the ballistics report supports his theory that two masked men were responsible for Cory's death. Defendant contends the report indicates two guns were used to kill Cory. As OSAD maintains, the ballistics report indicates four bullets, two bullet fragments, and a weapon were recovered after Cory's death. The report indicates the fragments were unsuitable for forensic testing and testing of the bullets and gun were inconclusive: "The four remaining jacketed bullets and bullet jacket, Exhibit #1, are of 25[-]caliber ***[.] Exhibit #1 were fired from the same firearm. Exhibit #1 could not be identified or eliminated as having been fired from Exhibit #2," the recovered semiautomatic pistol.

¶ 56 As for the fingerprint analysis, defendant maintains the analysis indicates his palm prints did not match the prints found on the recovered weapon. The report itself indicates, however, no prints on the gun were suitable for comparison.

¶ 57 7. *Effectiveness of Counsel*

¶ 58 OSAD maintains no colorable argument can be made defendant was denied the effective assistance of counsel. In his motion for leave, defendant argues the strategy used by his counsel "was so unfounded that he failed to conduct any meaningful adversarial testing of the sufficiency of the indictment, proceedings[,] or timely filed motions." Defendant maintains, more specifically, his counsel failed (1) to investigate the authenticity of Hammonds' statement; (2) to note detective Williamson misstated Laquana identified defendant as the individual looking for Cory; (3) to seek independent testing of the alleged murder weapon; (4) to investigate the bullet projectiles; (5) to "call" Michael Davis; and (6) to talk to Ronald.

¶ 59 We find defendant cannot make a colorable argument leave should have been granted for him to file a successive postconviction petition on ineffective-assistance grounds. Defendant has provided no plausible cause to justify his failure to raise these arguments when he filed his original 2002 postconviction petition. Because defendant cannot meet the threshold requirements of section 122-1(f), we need not address the sufficiency of the allegations.

¶ 60 8. *Defendant's Plea*

¶ 61 OSAD maintains defendant cannot make a colorable argument his plea was not knowing and voluntary. OSAD points to the colloquy from the plea hearing, in which the trial court asked defendant if he agreed the factual basis would be what the State would introduce and if defendant had been promised anything or threatened in order to secure his plea. Defendant's answers, according to OSAD, belie any argument his plea was not knowing and voluntary.

¶ 62 We find defendant cannot make a colorable argument leave should have been granted for him to file a successive postconviction petition on grounds his plea was involuntary and unknowing. Defendant has provided no plausible cause to justify his failure to raise these arguments when he filed his 2002 petition. Defendant cannot meet the threshold requirements of section 122-1(f). We, therefore, need not address the sufficiency of the allegations.

¶ 63 B. No. 4-11-0530

¶ 64 OSAD states it considered and rejected three issues for the appeal of the dismissal of defendant's section 2-1401 petition: (1) whether defendant's petition was timely filed and, if not, whether the untimely filing can be excused; (2) whether the State fraudulently concealed evidence; and (3) whether there is newly discovered evidence of actual innocence. OSAD maintains no colorable argument can be made the trial court erred in dismissing defendant's

section 2-1401 petition.

¶ 65 In criminal proceedings, a section 2-1401 petition is the means to correct factual errors, not known to the petitioner or the court, that occurred during the prosecution of the case and that, if known, would have prevented the entered judgment. *People v. Thomas*, 364 Ill. App. 3d 91, 98, 845 N.E.2d 842, 850 (2006). To obtain relief under section 2-1401, a petitioner must prove by a preponderance of the evidence both a defense or claim would have precluded the judgment and the petitioner used diligence in discovering the claim and filing the petition. *People v. Vincent*, 226 Ill. 2d 1, 7-8, 871 N.E.2d 17, 22 (2007). We review the dismissal of a section 2-1401 petition when the court weighs evidence presented at trial in light of newly discovered evidence using the abuse-of-discretion standard. See *People v. Davis*, 2012 IL App (4th) 110305, ¶ 12, 966 N.E.2d 570.

¶ 66 1. *Timeliness*

¶ 67 A section 2-1401 petition must be brought within two years of the challenged order or judgment. 735 ILCS 5/2-1401(c) (West 1998). This limitation must be enforced absent "a clear showing that the person seeking relief is under legal disability or duress or the grounds for relief are fraudulently concealed." *People v. Caballero*, 179 Ill. 2d 205, 210-11, 688 N.E.2d 658, 660-61 (1997).

¶ 68 Defendant pleaded guilty in January 1999 and was sentenced in March 1999. Defendant did not file his section 2-1401 petition until April 5, 2011, long after the two-year limitations period expired. Defendant may avoid the dismissal for timeliness if he is successful in proving the State fraudulently concealed evidence of the grounds of relief. In his section 2-1401 petition, defendant argued the State fraudulently concealed evidence that "could've

demonstrated" his actual innocence. Defendant maintained the State concealed the fact that Arthur McClain, Hammonds' brother and guardian, was present when Hammonds, then 17 years old, talked to detectives on August 6, 1998. Defendant attached an affidavit signed by Arthur attesting Hammonds did not say defendant killed Cory.

¶ 69 We agree with OSAD there is no colorable argument of fraudulent concealment sufficient to toll section 2-1401's limitations period. To succeed on this claim, defendant must prove the ground for relief was fraudulently concealed. See *Caballero*, 179 Ill. 2d at 210-11, 688 N.E.2d at 660-61. A ground for relief, a claim that would have precluded judgment, must be proved by a preponderance of the evidence. See *Vincent*, 226 Ill. 2d at 7-8, 871 N.E.2d at 22. There is no colorable argument defendant can establish the alleged concealed fact would have precluded judgment by a preponderance of the evidence. Even if we assume defendant's version of the events is true, *i.e.*, Hammonds did not identify defendant as the shooter because Hammonds was dropped off before Cory died *and* Arthur could verify Hammonds did not identify Cory's killer, defendant should have known the key fact (either the State or Hammonds was lying) when he pleaded guilty. Despite the alleged knowledge of this fact, defendant still pleaded guilty. Defendant's section 2-1401 petition was untimely.

¶ 70 2. *Ballistics Report*

¶ 71 OSAD next maintains there is no colorable argument there is newly discovered evidence showing two weapons were used to kill Cory. We agree. Even assuming this evidence was found in a timely manner, the evidence does not show what defendant argues it does. Defendant identifies the ballistics report as proof two guns were used. As we found above, the ballistics report does not support defendant's conclusion.

¶ 72 3. *Ronald's Affidavit*

¶ 73 OSAD next argues there is no colorable argument Ronald's affidavit constitutes newly discovered evidence of his actual innocence. We rejected this argument above. The same reasons apply here.

¶ 74 III. CONCLUSION

¶ 75 We grant OSAD's motion to withdraw as counsel and affirm the trial court's judgment.

¶ 76 Affirmed.