2016 IL App (4th) 131113-U

NOS. 4-13-1113, 4-14-0014, 4-14-0488 cons.

FILED
November 8, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Sangamon County |
| MARK A. WINGER, | ) | No. 01CF798 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Leo J. Zappa, Jr., |
| | ) | Peter C. Cavanagh, |
| | ) | Judges Presiding. |

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed the trial court's judgment in these consolidated cases relating to defendant's motion for forensic testing and his petitions for relief from judgment.

¶ 2 In June 2002, a jury found defendant, Mark A. Winger, guilty of first degree murder in connection with the deaths of Donnah Winger and Roger Harrington. In August 2002, the trial court sentenced defendant to a term of natural life in prison. In May 2004, this court affirmed his conviction and sentence. In March 2005, defendant filed a petition for postconviction relief. In November 2007, the trial court granted the State's motion to dismiss the postconviction petition. This court affirmed. Also in March 2005, defendant filed a motion for deoxyribonucleic acid (DNA) testing, which the trial court denied. This court affirmed. In December 2008, defendant filed a *pro se* motion to permit the release of evidence for low copy

number "touch DNA" testing and, in December 2009, he filed a *pro se* petition for relief from judgment. In November 2013, the trial court denied both motions. In March 2014, defendant filed a *pro se* petition for relief from judgment. In April 2014, the trial court ruled it lacked jurisdiction to take any action on the petition.

¶ 3 In these consolidated appeals, defendant argues the trial court erred in (1) denying his motion for DNA testing, (2) dismissing his petition for relief from judgment, and (3) finding it lacked jurisdiction to consider his successive petition for relief from judgment. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In August 2001, a grand jury returned a six-count indictment against defendant for the first degree murders (720 ILCS 5/9-1(a)(1), (a)(2) (West 2000)) of his wife, Donnah Winger, and Roger Harrington. Defendant pleaded not guilty.

¶ 6 A. Jury Trial

¶ 7 In May 2002, defendant's jury trial commenced. As the parties are familiar with the testimony and evidence presented at trial, we will only set forth the relevant facts pertinent to this appeal. On August 29, 1995, defendant reported to police that he shot an intruder in his home after seeing the intruder hit his wife in the head with a hammer. After seeing the intruder attempt to get up, defendant shot him again in the forehead. Defendant called 9-1-1 and then attempted to help his wife. When defendant became annoyed at the intruder's "moaning and groaning," defendant struck him in the chest with a hammer several times "to shut him up."

¶ 8 The alleged intruder was Roger Harrington, a shuttle-service driver who had recently driven Donnah to Springfield from St. Louis. Donnah had indicated the trip made her uneasy as Harrington talked about a spirit named Dahm that would appear to him. On the date of the murders, a note in Harrington's vehicle read "Mark Winger, [2305 Westview Drive],

Springfield, 4:30."

¶ 9 When police told defendant that Harrington was the intruder, he stated Harrington had been harassing them recently. Defendant had complained to the shuttle service, obtained Harrington's phone number, and told him that if he left them alone defendant would not file a police report.

¶ 10 Dr. Travis Hindman, a forensic pathologist, testified the cause of Harrington's death was "brain trauma due to the passage of bullets through the brain due to gunshot wounds to the left side of the head." He concluded Donnah's death was caused by "brain trauma due to multiple narrow[-]surface blunt[-]force injuries to the head, compatible with a hammer." Hindman also noted contusions on Harrington's chest caused by hammer strikes.

¶ 11 At trial, the State postulated defendant killed his wife and attempted to frame Harrington by claiming he found him beating his wife in the head with a hammer. Defendant, on the other hand, claimed he saw Harrington beating his wife, shot him twice in the head, and hit him in the chest with a bloody hammer out of anger. The State and defendant both presented a great deal of expert testimony regarding bloodstain patterns and blood-spatter analysis.

¶ 12 Tom Bevel, president of TBI, a consulting company, testified as the State's expert in bloodstain-pattern analysis. He identified two different pools of blood that were not connected in the area where Harrington's body was found. Bevel found this to mean independent events created the smaller and larger stains and noted a two-foot distance between the centers of the stains. He opined the stains and the distance between them were consistent with "Harrington being on his face with the left side of his head down toward the carpet and then at some juncture he is rolled from the smaller bloodstain" and "moved to a faceup direction in th[e] larger stain."

¶ 13 Bevel agreed Harrington's initial entry wound was in the top of his head and the

second gunshot wound was to the forehead. He stated "the bullet path from the second bullet is traveling in a fairly close proximity to the first wound track that is filled with blood, and that will force the blood that is in the first wound track out." In addition, blood would be mixed with brain tissue "because the brain has been disrupted from the first bullet."

¶ 14 Bevel agreed that Donnah was found in a facedown position. Examining her shorts, Bevel did not find any high-velocity-impact bloodstaining pattern consistent with someone being shot in the head while directly over her body. On a picture of the south wall of the residence, Bevel found both blood "spatter," consistent from impact, and "cast off," that being blood flung off a bludgeoning-type object. Bevel opined that if the killer was wielding a hammer in an east-west fashion, the cast-off patterns would be found in an east-west direction. Bevel was not aware of any cast off consistent with the killer facing an east-west direction, but the evidence pointed to the killer facing the north-south direction. Bevel found the spatter and the cast off were "consistent with the person facing the wall at the time that they're actually swinging the hammer" and inconsistent with the attacker facing down the hallway. Bevel identified a blood-spatter pattern and cast-off stain on defendant's T-shirt consistent with Donnah's blood type. He found no evidence of any cast-off patterns on the shoulder areas of Harrington's shirt.

¶ 15 Terry Laber, a forensic scientist, testified for the defense as an expert in bloodstain-pattern analysis, DNA analysis, and serology. Based on his bloodstain-pattern analysis, Laber believed the bloodstains on Harrington's clothing could not have resulted from his gunshot wounds and the bloodstains on Donnah's jean shorts were believed to be "blood from probably two different individuals." As to the blood on the south wall, Laber opined the stains were caused by impact and not cast off. In looking at a line of stains in an east-west

direction on the ceiling, Laber stated such a pattern of blood "would be consistent with a weapon being swung in an east-west direction." As to "a large piece of solid material consistent with tissue" on the south wall, Laber indicated it could have been cast off from a person swinging a hammer in an east-west direction. In his opinion, the assailant would have been "swinging the weapon in an east-west direction at the time he was striking Donnah Winger."

¶ 16 Laber testified "several possibilities" existed for the two pools of blood where Harrington was found, including him being rolled over, moving on his own, or being moved by medical personnel. A DNA test of a stain on the inside of Harrington's left sleeve revealed a mixture of DNA belonging to Harrington and Donnah. A stain on the back-right shoulder of Harrington's T-shirt revealed Donnah's DNA. Laber opined that a hammer strike to Harrington's chest "could not deposit stains on his back" and would be "very difficult for a stain to get on the inside of the left sleeve." A "large tissue contact stain" on the front of Harrington's shorts "above the right pocket" matched Donnah's DNA. As to stains on Donnah's shorts, a DNA test matched one stain on the back left pocket with Harrington's blood. Laber opined the size of the stains on the back of Donnah's shorts were "consistent with back spatter from a gunshot *** to Roger Harrington." Laber's examination of the blood and tissue deposited on Harrington and his blood on Donnah led him to conclude it was consistent with defendant's version of the events given to Detective Charles Cox on August 29, 1995.

¶ 17 Evidence at trial also consisted of testimony from Deann Schultz. She worked with Donnah, and they became close friends. Over time, Schultz began having an affair with defendant. In August 1995, Schultz and defendant were talking in his driveway, and she testified defendant told her "it would be easier if Donnah just died." Defendant had thought about it for a while and told Schultz that "all you have to do is come in and find the body." Schultz found the

idea "crazy" and did not agree to participate. Defendant and Schultz later had a conversation, wherein he told her he did not want his daughter "to grow up in hot, humid Florida" with Donnah's family and mentioned it would be easier if Donnah died. Schultz did not agree to participate and stated she was going to get a divorce and defendant would have to do the same.

¶ 18 On August 28, 1995, defendant spoke with Schultz about getting the shuttle-bus driver into his house. On the day of the murders, defendant asked Schultz "if [she] would love him no matter what." After the murders, Schultz spent the night with Mike and Jo Datz along with defendant. In the "early morning," defendant woke Schultz up and told her "to stay as far away from the police as possible" and not to say anything about their affair. Schultz believed defendant "seemed to be more concerned with the [police] investigation" and "thought that Detective Cox believed him."

¶ 19 Schultz and defendant continued their relationship, but she became suspicious of defendant's involvement in Donnah's death. Defendant told Schultz that "dead men don't talk," referring to Harrington. Another time, defendant told Schultz the murder "didn't happen the way the paper said it did" and he did not want her "to know what happened at the house because ignorance is bliss."

¶ 20 After Donnah's death, Schultz's psychological health "spiraled down." She attempted suicide, received counseling, took medication, and underwent electroconvulsive therapy treatment. In March 1999, Schultz gave a formal statement to the police, and she received a grant of immunity for her testimony.

¶ 21 Dr. John Lauer, Schultz's psychiatrist, testified he began treating her in January 1998. In September 1998, she told him about her severe migraine headaches, depression, and suicidal thoughts. When asked about a possible cause, Schultz mentioned the affair with

defendant and his alleged involvement in Donnah's death. Dr. Lauer told Schultz that it was key to battling her depression that she go to the authorities with the information. He told her she would not get better and would continue to have suicidal thoughts until she rid herself of the guilt.

¶ 22 Defendant did not testify. Following closing arguments, the jury found defendant guilty of the first degree murders of Donnah and Harrington. In August 2002, the trial court sentenced defendant to a term of natural life in prison.

¶ 23 B. Direct Appeal

¶ 24 On direct appeal, defendant argued (1) the State failed to prove him guilty beyond a reasonable doubt and (2) the failure to record the *voir dire* proceedings denied him a fair trial. In May 2004, this court affirmed defendant's conviction and sentence. *People v. Winger*, No. 4-02-0631 (May 14, 2004) (unpublished order under Supreme Court Rule 23). In October 2004, the supreme court denied defendant's petition for leave to appeal. *People v. Winger*, 211 Ill. 2d 613, 823 N.E.2d 978 (2004).

¶ 25 C. Postconviction Proceedings

¶ 26 In March 2005, defendant, through his counsel, filed a petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2004)). Among his claims, defendant alleged his trial counsel was ineffective for failing to (1) request a *Frye* hearing (see *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)) as to Bevel's bloodstain-pattern analysis, (2) impeach Bevel, and (3) impeach and cross-examine Schultz about her motivation for making disclosures to the police and her attempted suicide prior to Donnah's death. Defendant also alleged appellate counsel was ineffective for failing to raise these issues on direct appeal.

¶ 27 In August 2005, the State filed a motion to dismiss, arguing defendant's petition failed to state grounds constituting a substantial denial of his constitutional rights and his claims of ineffective assistance of counsel were not supported by the record. In September 2007, the trial court held a hearing on the State's motion to dismiss. In November 2007, the court dismissed the petition. On appeal, this court affirmed the trial court's dismissal. *People v. Winger*, No. 4-07-1026 (Aug. 7, 2009) (unpublished order under Supreme Court Rule 23).

¶ 28 D. First Motion for DNA Testing

¶ 29 In March 2005, defendant filed a *pro se* motion to permit the release of evidence for DNA testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/116-3 (West 2004)), claiming most of the blood and tissue stains at the crime scene were never subjected to DNA testing. Defendant contended the results of the DNA tests were not available at trial and a favorable result of the tests would significantly advance his claim that he did not murder Donnah. Further, defendant claimed the results had the potential to provide new and noncumulative evidence materially relevant to his claim of actual innocence. Defendant asked that certain evidence be tested, including Harrington's bloodstained pants, shirt, and shoes; Donnah's bloodstained blouse, pants, and shoes; the hammer; and a bloody towel. In April 2005, the State filed a response, stating defendant failed to allege the technology for the requested DNA testing was not available at the time of trial.

¶ 30 In May 2005, defendant's appointed counsel filed an amended motion to permit the release of evidence for DNA testing. The motion alleged identity was an issue at trial and the technology was not available because there was insufficient time to test the stains between the time the defense requested testing and the time of trial. In response, the State alleged defense counsel "waited until the eve of trial to request DNA testing" and the State "facilitated the

acceleration of testing" so the results were available at trial. The State also alleged defense counsel objected to the State's request for a continuance for additional DNA testing since the late submission of defendant's expert's report "generated a hole in the People's case by asserting that reasonable doubt existed because the People failed to conduct certain testing."

¶ 31 In July 2005, the trial court issued a written order denying defendant's motion. The court found defendant failed to meet the criteria set forth in section 116-3 of the Criminal Procedure Code. The court found the technology used at trial was "state of the art," and any further testing would be cumulative and not materially relevant. Defendant filed a motion to reconsider, which the court denied.

¶ 32 On appeal, the office of the State Appellate Defender (OSAD) moved to withdraw its representation under *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court granted OSAD's motion and affirmed the trial court's dismissal of defendant's motion. *People v. Winger*, No. 4-05-0968 (Aug. 28, 2007) (unpublished order under Supreme Court Rule 23).

¶ 33 E. Present Motion for DNA Testing and Petition for Relief From Judgment

¶ 34 In December 2008, defendant filed a *pro se* motion to permit the release of evidence for low copy number "touch DNA" testing pursuant to section 116-3 of the Criminal Procedure Code (725 ILCS 5/116-3 (West 2008)). "Touch DNA" results from skin touching a surface and leaving DNA behind. In his motion, defendant asserted "touch DNA" testing was not available at the time of his 2002 trial, he has maintained his innocence, and identity was at issue. He asserted "touch DNA" testing would show Harrington's DNA was on the hammer and/or defendant's DNA was not on Harrington's clothes, which would support his claim of actual innocence.

¶ 35 In December 2009, defendant filed a *pro se* petition for relief from judgment

pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). Defendant alleged he had learned since the conclusion of his trial that the State fraudulently concealed that Schultz was an accomplice to the murders. Defendant alleged he was prevented from legitimately requesting a jury instruction on accomplice testimony. Defendant also alleged he learned two jurors lied during *voir dire*, including one with the last name Ray, who was allegedly related to one of the State's witnesses, as well as another juror who had prior knowledge and bias about the facts of the case. Defendant asserted newly discovered evidence showed the State concealed evidence that "Sergeant Williamson" lied about why the case was reopened.

¶ 36 In February 2010, the trial court appointed counsel to assist defendant on both pending motions. In December 2012, the State filed a motion to dismiss the section 2-1401 petition. In September 2013, the State filed a response to defendant's motion for "touch DNA" testing. In November 2013, the court denied defendant's motion for "touch DNA" testing, stating it had previously ruled on the issue in July 2005. In a separate order, the court found defendant had not alleged errors of fact that were unknown, which would have prevented judgment from being entered against him. As no void judgment existed, the court granted the State's motion to dismiss defendant's section 2-1401 petition.

¶ 37 In December 2013, defense counsel filed a motion to reconsider the trial court's decision regarding "touch DNA" testing. Defendant filed a *pro se* motion to reconsider the court's dismissal of his petition for relief from judgment. Judge Leo J. Zappa, Jr., denied both motions. Defendant appealed the decisions regarding "touch DNA" testing (No. 4-12-1113) and regarding the petition for relief from judgment (No. 4-14-0014).

¶ 38 F. Successive Petition for Relief From Judgment

¶ 39 In March 2014, defendant filed a successive *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure. Defendant alleged new evidence came to light in July 2012 that the State concealed fraudulent evidence and the jury would have reached a different verdict as a result. Defendant alleged he immediately asked his appointed counsel to amend his original section 2-1401 petition that was pending to include claims that Bevel gave fraudulent expert testimony and Detective James Graham, who had a history of misconduct, colluded and conspired with Bevel to obtain defendant's conviction. Defendant also alleged counsel failed to amend his petition to include these claims, and the trial court would not consider his *pro se* motion to reconsider, in which he asserted the claim, because he was represented by counsel.

¶ 40 In April 2014, the trial court entered a docket entry, stating defendant's cause was then on appeal and the court lacked jurisdiction to take any further action. In May 2014, defendant filed a motion to reconsider. A docket entry indicates Judge Peter C. Cavanagh reviewed the pleadings and case law and found no legal basis to grant the motion to reconsider. Defendant appealed this decision (No. 4-14-0488). This court consolidated the three appeals.

¶ 41 II. ANALYSIS

¶ 42 A. "Touch DNA" Testing

¶ 43 Defendant argues the trial court erred in denying his motion for "touch DNA" testing, claiming testing of the murder weapon and Harrington's clothing has the potential to produce new, noncumulative evidence, which could materially advance his long-standing claim of actual innocence. We disagree.

¶ 44 Section 116-3 of the Criminal Procedure Code provides:

"(a) A defendant may make a motion before the trial court

that entered the judgment of conviction in his or her case for the performance of fingerprint, Integrated Ballistic Identification System, or forensic DNA testing, including comparison analysis of genetic marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5-4-3 of the Unified Code of Corrections, on evidence that was secured in relation to the trial which resulted in his or her conviction, and:

(1) was not subject to the testing which is now requested at the time of trial; or

(2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. Reasonable notice of the motion shall be served upon the State.

(b) The defendant must present a prima facie case that:

(1) identity was the issue in the trial which resulted in his or her conviction; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with,

replaced, or altered in any material aspect.

(c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant;

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3 (West 2008).

The trial court's denial of a request for forensic testing pursuant to section 116-3 of the Criminal Procedure Code is reviewed *de novo*. *People v. Brooks*, 221 Ill. 2d 381, 393, 851 N.E.2d 59, 65 (2006).

¶ 45 In this case, both parties stipulated "touch DNA" testing was unavailable at the time of defendant's 2002 trial. We also note both defendant and the State dispute the issues of identity and chain of custody set forth in section 116-3(b) (725 ILCS 5/116-3(b) (West 2008)). Defendant argues identity was at issue in his trial, while the State contends identity was not at issue because it was undisputed three people were present at the crime scene and defendant admitted killing Harrington. Moreover, defendant argues a *prima facie* case exists to show the hammer and Harrington's clothing were subject to a proper chain of custody, while the State

contends "the record refutes that the physical evidence remained in an unaltered state."

¶ 46 We need not resolve these contested issues. Even assuming the issues of identity and chain of custody are in defendant's favor, we disagree with his claim that "touch DNA" testing "has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant." 725 ILCS 5/116-3(c)(1) (West 2008).

> "The question of whether forensic testing has the potential to produce evidence materially relevant to a defendant's claim of actual innocence cannot be answered in the abstract; it requires consideration of the evidence adduced at trial, as well as the evidence a defendant seeks to test. [Citation.] Evidence is 'materially relevant' if it will significantly advance defendant's claim of actual innocence. [Citations.]" *People v. Grant*, 2016 IL App (3d) 140211, ¶ 25, 48 N.E.3d 802.

See also *People v. Stoecker*, 2014 IL 115756, ¶ 33, 10 N.E.3d 843. "DNA evidence that plays a minor role and is a collateral issue is not materially relevant because it does not significantly advance a claim of actual innocence." *People v. Gecht*, 386 Ill. App. 3d 578, 582, 899 N.E.2d 448, 452 (2008).

¶ 47 The evidence introduced at trial linked defendant to his wife's murder. If the "touch DNA" on the hammer matched Harrington, then it would only be part of the multitude of Harrington's DNA in the room, including his DNA already on the hammer as a result of defendant hitting him with the hammer in the chest. Thus, even if the "touch DNA" sample from the hammer would show Harrington's DNA, such a result would not significantly advance

defendant's claim of innocence. Moreover, if defendant's DNA was not found on Harrington's clothing, it would not necessarily mean he did not roll Harrington over before shooting him in the forehead. "[O]ur legislature wanted new forensic tests to occur only in those cases where such testing could discover new evidence at sharp odds with a previously rendered guilty verdict based upon criminal acts that the defendant denied having engaged in." *People v. Urioste*, 316 Ill. App. 3d 307, 313, 736 N.E.2d 706, 712 (2000). Here, testing of additional stains or samples would be cumulative of the considerable bloodstain and DNA evidence presented at trial.

¶ 48 It should also be noted the State's case consisted of more than DNA evidence. Evidence included defendant's statements to Schultz prior to and after the murders, the position of the bodies and blood spatter as compared to defendant's version of the crime, and the note found in Harrington's vehicle indicating he had a prearranged meeting with defendant. As defendant has not shown the desired testing would significantly advance his claim of actual innocence, we find the trial court did not err in denying defendant's section 116-3 motion for "touch DNA" testing.

¶ 49 B. Initial Petition for Relief From Judgment

¶ 50 Defendant argues the trial court erred in dismissing his 2009 petition for relief from judgment because he raised a cognizable claim that one of his jurors answered falsely on *voir dire* about a matter of potential bias or prejudice. We disagree.

¶ 51 Section 2-1401 of the Code of Civil Procedure sets forth a statutory procedure by which final orders and judgments may be challenged more than 30 days after entry. 735 ILCS 5/2-1401 (West 2008).

> "Section 2-1401 requires that the petition be filed in the same proceeding in which the order or judgment was entered, but it is

> not a continuation of the original action. [Citation.] The statute further requires that the petition be supported by affidavit or other appropriate showing as to matters not of record. [Citation.] The statute provides that petitions must be filed not later than two years after the entry of the order or judgment. [Citation.] The statute further provides for an exception to the time limitation for legal disability and duress or if the ground for relief is fraudulently concealed. [Citation.] Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition. [Citation.]" *People v. Vincent*, 226 Ill. 2d 1, 7-8, 871 N.E.2d 17, 22 (2007).

On appeal from the dismissal of a section 2-1401 petition, our review is *de novo*. *In re M.P.*, 401 Ill. App. 3d 742, 745, 928 N.E.2d 1287, 1291 (2010).

¶ 52 In December 2009, defendant filed a *pro se* petition for relief from judgment. He asserted that after his conviction he learned one of the jurors lied during *voir dire* regarding her relationship to Shane Ray, one of the State's witnesses. Defendant claimed the juror's false statements during *voir dire*, defendant's conviction, and the juror's appearance on the television program *48 Hours* sufficiently demonstrated the likelihood of bias, thereby causing a structural defect in his trial. In addition to the State's fraudulent concealment of the grounds for which he sought relief, defendant alleged he was under "severe duress due to a year-long total isolation in segregation," followed by his transfer to Tamms Correctional Center. Thus, defendant argued

his claim should be excluded from the two-year time limit. Moreover, he argued the structural defect in his trial caused by juror bias could not be procedurally time-barred.

¶ 53 In his attached affidavit, defendant stated no court reporter was present during *voir dire*. He claimed one of the jurors with the last name of Ray was asked by defense counsel if she recognized the State's witness, Shane Ray, and if she was related to him. She answered she saw the name on the list but was not related. Defendant claimed he found out following his trial that juror Ray lied during *voir dire* and was a cousin of Shane Ray. Defendant stated he learned this information from the producers of *48 Hours*, on which juror Ray appeared in an episode featuring defendant's case, others who had heard the information from the producers, and his attorneys. Defendant asserted the false statements and concealment of the significant relationship, along with the appearance on national television, demonstrated dishonest motives and the likelihood of bias. He also asserted that, had he known juror Ray was related to the State's witness, he would have excluded her from the jury.

¶ 54 In December 2012, the State filed a motion to dismiss defendant's section 2-1401 petition. The State argued defendant presented insufficient evidence of juror bias that would have prevented the trial court from rendering a judgment of conviction against him. In November 2013, the court found defendant had not alleged errors of fact that were unknown, which would have prevented judgment from being entered against him.

¶ 55 Here, defendant's claim is barred by the two-year statute of limitations contained in section 2-1401. The trial court sentenced defendant in August 2002, and defendant did not file his petition for relief from judgment until December 2009. Defendant contends the petition is timely because the claim was fraudulently concealed, and he did not become aware of the alleged juror lying during *voir dire* until the *48 Hours* television program highlighted the case.

However, defendant does not state when the television show aired in his section 2-1401 petition. Thus, defendant has failed to establish diligence in discovering his claim or timeliness in presenting his petition.

¶ 56 Moreover, even if it could be said that defendant satisfied the timeliness requirements of section 2-1401, his petition fails to establish the validity of his claim. Section 2-1401(b) requires the petition be "supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b) (West 2008). Defendant supplied his own affidavit and therein mentioned he learned of his juror claim from producers of the television show, which was corroborated by others who had been told the same information by those producers, as well as from his attorneys, who verified the juror was related to Shane Ray. Defendant failed to attach any affidavits from his attorneys, others, or the producers of *48 Hours* attesting to the relationship between the juror and the State's witness. Defendant does not even name these people. "[A] petition supported by an affidavit based only on hearsay or mere conclusions is insufficient to warrant relief under section 2-1401." *People v. Cole*, 215 Ill. App. 3d 585, 587, 575 N.E.2d 10, 11 (1991). Defendant's affidavit was insufficient to support his petition, and the trial court did not err in granting the State's motion to dismiss.

¶ 57 C. Successive Petition for Relief From Judgment

¶ 58 Defendant argues the trial court erred in finding it lacked jurisdiction to consider his successive petition for relief from judgment filed in March 2014, claiming the petition was a new cause of action which the court could hear while his appeal was pending in the appellate court. We find defendant's claim barred by the doctrine of *res judicata*.

¶ 59 In the case *sub judice*, defendant filed his successive *pro se* petition for relief from judgment in March 2014, alleging that, on or about July 2012, new evidence came to light.

Specifically, defendant alleged he saw Bevel state his opinion on television that defendant forced Harrington to his knees at gunpoint and then fired the first shot, which differed from his trial testimony that Harrington was shot standing up, fell forward, and defendant rolled him over and shot him again. Defendant alleged he made numerous requests to his counsel to amend his pending section 2-1401 petition to include this issue.

¶ 60 In April 2014, the trial court entered a docket entry, finding defendant's case was then on appeal. The court concluded it lacked jurisdiction to take further action at that time. In May 2014, defendant filed a *pro se* motion for reconsideration, which the court denied.

¶ 61 "[T]he filing of a petition under section 2-1401 is 'the filing of a new action,' not the continuation of a previous action." *People v. Jernigan*, 2014 IL App (4th) 130524, ¶ 18, 23 N.E.3d 650. Thus, "a successive petition under section 2-1401 creates a new action, which can go forward despite the appeal of a judgment on an earlier petition." *Jernigan*, 2014 IL App (4th) 130524, ¶ 18, 23 N.E.3d 650; see also *People v. Walker*, 395 Ill. App. 3d 860, 867, 918 N.E.2d 1260, 1266 (2009) (stating "our supreme court has held that the pendency of a direct appeal does not affect the trial court's jurisdiction to entertain collateral attacks, including petitions under the Act and section 2-1401").

¶ 62 Here, the trial court erred in finding it lacked jurisdiction to consider defendant's successive petition for relief from judgment. Notwithstanding the error, this court may affirm on any basis supported by the record, regardless of the reasoning or the grounds relied on by the trial court. *People v. Harvey*, 379 Ill. App. 3d 518, 521, 884 N.E.2d 724, 728 (2008).

¶ 63 "[T]here is no bar to the filing of successive section 2-1401 petitions, aside from the doctrine of *res judicata*." *People v. Vari*, 2016 IL App (3d) 140278, ¶ 18, 48 N.E.3d 265. A successive section 2-1401 petition cannot be used to assert issues that could have been raised in

the original petition. *In re J.D.*, 317 Ill. App. 3d 445, 449, 739 N.E.2d 1043, 1047 (2000).

¶ 64 In this case, defendant raised the identical issue in his motion to reconsider the dismissal of his 2009 petition. As the issue could have been raised in the earlier petition, *res judicata* applies. As such, defendant's successive petition for relief from judgment was subject to dismissal.

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated, we affirm the trial court's judgment in these consolidated appeals. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 67 Affirmed.