

NOTICE
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2012 IL App (4th) 110993-U

Filed 7/30/12

NO. 4-11-0993

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
YURI A. ERMAKOV,)	No. 06CF425
Defendant-Appellant.)	
)	Honorable
)	Jeffrey B. Ford,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The reluctance or refusal of witnesses to provide affidavits was no "cause" for the defendant's omission of a claim from his initial postconviction petition, because he could have explained in his petition why affidavits by these witnesses were not attached; hence, the trial court was correct to deny his motion to file a second petition for postconviction relief. 725 ILCS 5/122-1(f) (West 2010).

¶ 2 Defendant, Yuri A. Ermakov, who is serving a 12-year prison term for criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2004); 720 ILCS 5/12-13(a)(4) (West 2006)), appeals the denial of his motion for leave to file a second postconviction petition. We conclude the trial court was correct to deny the motion, because defendant failed to show "cause" for omitting his present claim from the initial postconviction proceeding. 725 ILCS 5/122-1(f) (West 2010). Therefore, we affirm the trial court's judgment.

¶ 3

I. BACKGROUND

¶ 4 On March 23, 2006, a grand jury returned an indictment against defendant, and on June 14, 2007, a grand jury returned a second indictment against him. All together, these indictments consisted of eight counts, but the State dismissed the first two counts, leaving counts III through VIII.

¶ 5 Count III charged defendant with contributing to the delinquency of a child, a Class A misdemeanor (720 ILCS 130/2a (West 2006)), in that on February 26, 2006, he provided an alcoholic beverage to A.D.

¶ 6 Count IV charged him with contributing to the delinquency of a child (720 ILCS 130/2a (West 2006)) in that in February 2006, he provided an alcoholic beverage to E.A.

¶ 7 Count V charged him with contributing to the delinquency of a child (720 ILCS 130/2a (West 2006)) in that during the period of January to February 2006, he provided an alcoholic beverage to A.G.

¶ 8 Count VI charged him with criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2004); 720 ILCS 5/12-13(a)(4) (West 2006)), a Class 1 felony (720 ILCS 5/12-13(b)(1) (West 2004); 720 ILCS 5/12-13(b)(1) (West 2006)), in that during the period of September 2005 to January 2006, he placed his finger in the sex organ of S.G., in relation to whom he held a position of trust, supervision, or authority. (Defendant was an assistant track coach at a high school, and the alleged victims in the various counts of the indictments were female students.)

¶ 9 Count VII charged him with attempt (aggravated criminal sexual abuse) (720 ILCS 5/8-4(a), 12-16(f) (West 2006)), a Class 3 felony (720 ILCS 5/8-4(c)(4) (West 2006)), in that he performed a substantial step toward the commission of aggravated criminal sexual abuse by kissing

A.D. and by fondling the buttocks of A.D., in relation to whom he held a position of trust, supervision, or authority.

¶ 10 Count VIII charged him with attempt (aggravated criminal sexual abuse) (720 ILCS 5/8-4(a), 12-16(f) (West 2006)), a Class 3 felony (720 ILCS 5/8-4(c)(4) (West 2006)), in that in March 2006, he performed a substantial step toward the commission of aggravated criminal sexual abuse by kissing A.J. and by fondling the buttocks of A.J., in relation to whom he held a position of trust, authority, or supervision.

¶ 11 Trial counsel did not move to sever any of these counts of the indictments.

¶ 12 The jury trial occurred on July 10, 11, and 12, 2007. Defendant attended the trial until the jury went into deliberation. When the jury returned to the courtroom to deliver its verdicts, he was nowhere to be found. The jury found him guilty of count III (contributing to the delinquency of A.D.), count IV (contributing to the delinquency of E.A.), and count VI (criminal sexual assault of S.G.), acquitting him of the remaining three counts.

¶ 13 On August 20, 2007, the trial court sentenced defendant, *in absentia*, to 12 years' imprisonment for count VI. The court imposed no sentence for counts III and IV. No direct appeal was filed.

¶ 14 Defendant was a fugitive in Russia until August 18, 2010. On August 19, 2010, he appeared in trial court, in custody, and filed his initial petition for postconviction relief. In his initial petition, he alleged his trial counsel had rendered ineffective assistance by failing to move for a severance of the counts of the indictment.

¶ 15 On October 25, 2010, the trial court summarily dismissed the initial petition as "frivolous or *** patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). On July 15, 2011,

we affirmed the trial court's judgment. *People v. Ermakov*, No. 4-10-0931 (July 15, 2011) (unpublished order under Supreme Court Rule 23).

¶ 16 On August 5, 2011, defendant filed a motion for leave to file a second petition for postconviction relief. The proposed second petition claimed a violation of due process in that the State had failed to disclose exculpatory evidence to the defense. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). The allegedly exculpatory evidence came from Dekota Gates and, ultimately, from one of the State's witnesses, A.G., who was a sister of S.G. Gates was A.G.'s boyfriend, and in August 2010, when he and defendant were confined in the Champaign County jail, he recounted to defendant what he had learned from conversations with A.G.: a police officer, Jodi Huffman, had told A.G. that unless she and the other girls cooperated with the State and testified against defendant, they would be treated as accomplices rather than as victims, and they would be criminally charged. Also, the police had warned the parents of S.G. and A.G. that if their daughters refused to talk, they, the parents, could get in trouble. See *United States v. Bagley*, 473 U.S. 667, 676 (1985) (the duty to disclose includes impeachment evidence as well as exculpatory evidence); *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (*Brady* applies to information known to the police, even if the information is unknown to the prosecutor).

¶ 17 Again, it was in August 2010 that Gates passed along this information to defendant, and August 2010 also was the month when defendant filed his first postconviction petition. According to his motion to file a second postconviction petition, defendant had essentially four reasons for not including the *Brady* claim in his first petition. First, Gates told defendant in August

2010 that he would not sign an affidavit while charges were pending against him and he was incarcerated. Second, all the female witnesses refused to speak with investigators for the defense. Third, Huffman likewise refused to discuss the case. Fourth, after Gates was released from jail, investigators were unable to locate him for several weeks, and when they finally did locate him, he gave an affidavit that was incomplete. It was not until March 31, 2011, that he gave a complete affidavit, containing all the relevant details of his conversations with A.G.

¶ 18

II. ANALYSIS

¶ 19 According to section 122-1(f) of the Post-Conviction Hearing Act (725 ILCS 5/122-1(f) (West 2010)), a court may grant a prisoner leave to file a successive petition only if he or she shows (1) "cause" for failing to raise the claim in the initial postconviction proceeding and (2) "prejudice" resulting from that failure. Section 122-1(f) explains that "cause" is "an objective factor that impeded [the prisoner's] ability to raise [the] specific claim during his or her initial post-conviction proceedings." *Id.* "[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." *Id.*

¶ 20 In our *de novo* review (*People v. Wrice*, 2012 IL 111860, ¶ 50), we find no "cause"—no "objective factor" that "impeded" defendant from "rais[ing]" the *Brady* claim in his first postconviction petition (725 ILCS 5/122-1(f) (West 2010)). Gates divulged the information to defendant in August 2010, and it was not until October 25, 2010, that the trial court summarily dismissed the initial petition. If defendant had not yet spoken with Gates at the time he filed his petition on August 19, 2010, he spoke with Gates sometime thereafter in August 2010, and he could have amended his petition before October 25, 2010. See 725 ILCS 5/122-3 (West 2010).

¶ 21 The lack of affidavits by Gates and other witnesses was no impediment to defendant's raising the *Brady* claim in his first postconviction petition. All he had to do was explain in his petition why the affidavits were not attached, *e.g.*, Gates's reluctance to sign an affidavit, difficulty locating him, and the refusal of the other witnesses to talk with investigators. As section 122-2 (725 ILCS 5/122-2 (West 2010)) says, "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations *or shall state why the same are not attached.*" (Emphasis added.) Thus, the reluctance or recalcitrance of witnesses should not prevent one from "rais[ing]" a claim in a postconviction petition. 725 ILCS 5/122-1(f) (West 2010). If the petition advances to a third-stage evidentiary hearing, these witnesses can be subpoenaed. See 725 ILCS 5/115-7a (West 2010).

¶ 22

III. CONCLUSION

¶ 23 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 24

Affirmed.