

No. 1-12-1438

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|----------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 04 CR 18171 |
| |) | |
| SENECA SMITH, |) | Honorable |
| |) | Joseph G. Kazmierski, Jr., |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly dismissed defendant's *pro se* section 2-1401 petition where the petition failed to raise a meritorious claim that a witness' alleged perjured testimony at trial resulted in the jury finding defendant guilty of the charged offenses.

¶ 2 Defendant Seneca Smith appeals from the denial of his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant contends that his section 2-1401 petition stated a meritorious claim that the newly discovered deposition testimony of witness Katrina Robinson revealed that she

perjured herself at trial, resulting in his convictions of attempted first degree murder and aggravated discharge of a firearm. He thus contends that his cause should be remanded for further proceedings where this new evidence could have changed the outcome at trial. We affirm.

¶ 3 The State arrested and charged defendant with attempted first degree murder of Chicago police officers Calvin Chatman and Dwayne Collier, aggravated discharge of a firearm, aggravated unlawful use of a weapon, and unlawful use of a weapon by a felon, alleging that, at about 10:30 p.m. on June 27, 2004, defendant shot at the officers with a handgun near the 5300 block of West Congress Parkway in Chicago. Although a gun was later recovered near the scene of the crime, no gun was recovered on or near defendant, who was shot by police, when he was arrested. The facts of the offenses are fully set out in our prior opinion on direct appeal, and we therefore restate only those facts necessary to understand defendant's current appeal.

¶ 4 At defendant's jury trial, Assistant State's Attorney (ASA) Catherine Gregorovic testified that a day after the shooting, Robinson agreed to provide a handwritten statement. The statement indicated that Robinson was going to the store at about 3 p.m. on June 27, 2004, but she stopped at Van Buren Street and Central Avenue to listen to what her friend and defendant were saying. At that time, defendant lifted up his shirt revealing a gun. Furthermore, during the shooting, Robinson was in the vestibule at 5331 West Congress Parkway when defendant pushed his way into the hallway, and she could not see what was happening because she was pushed up against a wall. Robinson gave her statement voluntarily, she had no complaints about her treatment, and her mother was present the entire time.

¶ 5 ASA Karin Swanson testified that she presented Robinson to the grand jury on July 7, 2004, and Robinson's testimony was consistent with the handwritten statement she provided ASA Gregorovic.

¶ 6 Robinson testified that she was 15 years old at the time in question and knew defendant from the neighborhood. She did not remember seeing him lift his shirt or whether he was alone or with somebody else. Although she initially said she did not remember speaking to an ASA on June 28, 2004, she later admitted that she read over her statement and signed it. Robinson did not remember telling the ASA the information in her statement, but even if she had said those things, she "was trying to get them out of [her] face." When she was asked if she had said in her handwritten statement that no threats or promises were made to her, she said, "I probably did, but that don't [*sic*] mean it was true." Moreover, when Robinson was asked specific questions about her grand jury testimony, she responded either, "I don't remember," "I guess," or "Lie."

¶ 7 On cross-examination, Robinson said she was outside of 5331 West Congress Parkway when the police were there and defendant was shot. After the shooting, she gave a statement at the police station but was very tired. She asserted that, contrary to her written statement, she did see what was happening in the hallway at 5331 West Congress Parkway and defendant did not have a gun when the police were shooting at him.

¶ 8 During closing arguments, the State commented that:

"[Robinson] didn't want to be here. She had selective amnesia. Did you notice that she couldn't remember anything we asked her, but when the defense asked her a question, her memory cleared up? It was only after she was impeached with her handwritten and her grand jury testimony that you get to hear the truth."

¶ 9 Following closing arguments, the jury convicted defendant of two counts of attempted first degree murder of a peace officer and two counts of aggravated discharge of a firearm. At

sentencing, the trial court merged the aggravated discharge of a firearm counts into the attempted murder counts, and sentenced defendant to two concurrent 35-year terms with two additional concurrent 20-year terms for the discharge of a firearm for a total of 55 years' imprisonment. On direct appeal, this court corrected the mittimus to reflect five more days of presentence custody credit, and affirmed the trial court's judgment in all other respects. *People v. Smith*, 2012 IL App (1st) 102354.

¶ 10 While his direct appeal was pending, defendant filed a *pro se* petition pursuant to section 2-1401 of the Code on January 23, 2012, based on the newly discovered evidence of Robinson's 2008 deposition. Defendant asserted in his petition that Robinson admitted in her deposition that she was lying at trial and did not see him with a gun on the day of the shooting. Defendant further maintained that because his case was closely balanced, he would not have been found guilty had Robinson's false testimony not been a part of his trial. Robinson's deposition, which was related to the case at bar and was taken after the jury convicted defendant in 2007 but before he was sentenced in 2010,¹ was attached to his petition. In it, Robinson stated, "Now here's the part where it's time to tell the truth. *** I just told them anything so they can let me go because I was scared. *** I told them that I seen [*sic*] [defendant] with a gun, and *** I didn't." After being asked why she told the police that she saw defendant with a gun, she continued, "I was scared. I told them what I thought they wanted to hear so they can let me go. And once I told them what I thought they wanted to hear, that's what they did. They let me go."

¶ 11 On April 5, 2012, the circuit court dismissed defendant's petition. In doing so, the court found that Robinson's deposition testimony would not likely have changed the outcome of the trial where defendant inferred that Robinson's memory of the events was better when she gave

¹ After trial, defendant had to secure new counsel for post-trial and sentencing matters when trial counsel became seriously ill.

her deposition testimony on September 24, 2008, than when she testified at trial on October 3, 2007. The court further held that although Robinson testified in her deposition that she did not see defendant with a gun at 3 p.m., the incident did not occur until 10:30 p.m., leaving defendant plenty of time to obtain a firearm. Finally, the court noted that Robinson's deposition testimony did not refute the testimony of the police officers that they observed defendant discharge a firearm at them. This appeal follows.

¶ 12 On appeal, defendant contends that we should reverse the circuit court's dismissal of his petition for relief from judgment because its finding that Robinson's deposition testimony would not have changed the outcome at trial was erroneous. Defendant specifically maintains that Robinson's testimony at trial was a significant piece of the State's case, and this new evidence that Robinson lied would have changed the outcome at trial.

¶ 13 When a court dismisses a defendant's section 2-1401 petition based on the pleadings and with no responsive pleadings filed, this court applies a *de novo* standard of review. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). Under this standard, we review the disposition rather than the reasoning of the circuit court and the review is "completely independent of the trial court's decision." *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 34.

¶ 14 Section 2-1401 of the Code provides a comprehensive statutory procedure by which final orders and judgments may be vacated after 30 days from their entry, where the defendant presents new facts that would have prevented the entry of the judgment. 735 ILCS 5/2-1401 (West 2012); *People v. Haynes*, 192 Ill. 2d 437, 460-61 (2000). "To obtain relief under section 2-1401, the defendant 'must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in

filing the section 2-1401 petition for relief." *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003), quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986).

¶ 15 The Illinois Supreme Court has held that "perjured testimony may form the basis for a new trial if raised in a motion for post-judgment relief under section 2-1401 of the Code ***." *People v. Burrows*, 172 Ill. 2d 169, 180 (1996). To be entitled to relief on the basis of perjured testimony, the defendant must show that: (1) the false testimony was willfully and purposefully given; (2) it was material and not merely cumulative; and (3) it probably controlled the determination. *People v. Sanchez*, 115 Ill. 2d 238, 286 (1984).

¶ 16 Even assuming, *arguendo*, that defendant diligently presented his claim and timely filed his petition, we find that he has failed to establish a meritorious claim based on perjured testimony. Robinson's purported perjured testimony did not control the determination at trial, and her deposition testimony was cumulative to her testimony at defendant's original trial.

¶ 17 The handwritten statement Robinson provided ASA Gregorovic, and her grand jury testimony, established that defendant was in possession of a gun on the day of the shooting. However, she disavowed those statements at trial, and then again during her deposition testimony. Robinson testified at trial that she did not remember seeing defendant lift his shirt to show a gun in his waistband, or whether he was alone or with somebody else. She also testified that she did not see defendant with a gun when police were shooting at him. Robinson did not remember telling the ASA the things that were in her handwritten statement, but even if she had said those things, she "was trying to get them out of [her] face" because she was scared. During the deposition, Robinson said that her pretrial statements that defendant had a gun at 3 p.m. on the day of the shooting were false, and that she made these statements because she was only 15 years old, scared, and thought she was under arrest. She stated in her deposition that when she

told the police what she thought they wanted to hear, *i.e.*, that defendant was carrying a gun, she was released after receiving food and water. Moreover, when Robinson was asked specific questions about her grand jury testimony at trial, she responded either, "I don't remember," "I guess," or "Lie." This was also consistent with her deposition testimony that she lied to the police so they would release her. Based on the fact that Robinson's trial testimony and deposition testimony were consistent with each other, we agree with the State that the deposition does not establish perjury here. Instead, Robinson's deposition testimony was cumulative to her testimony at trial in that both disavowed her handwritten statement and grand jury testimony.

¶ 18 Furthermore, Robinson's trial testimony did not control the determination of the trial. If anything, her testimony assisted defendant where she retracted her previous statements that hours before the shooting in question she saw defendant in possession of a gun. Instead, as the State points out in its brief, the case hinged on the credible and consistent testimony of the two police officers, which was corroborated by other evidence.

¶ 19 In reaching this conclusion, we find unpersuasive defendant's arguments that his cause should be remanded because the circuit court's dismissal of his section 2-1401 petition was based on a faulty and incomplete analysis. Defendant specifically argues that the court ignored the State's heavy reliance on Robinson's prior handwritten statement and grand jury testimony, incorrectly determined that he was inferring that Robinson's memory of the events was better during the 2008 deposition testimony than when she testified at the 2007 trial, and engaged in improper fact-finding where it determined that although Robinson said that she did not see defendant with a gun at 3 p.m., the incident in question did not happen until 10:30 p.m., leaving defendant with several hours to obtain a gun. Defendant also argues that the circuit court failed to consider the totality of the evidence and relied on the fact that the officers' testimonies were

1-12-1438

inherently credible and true, without considering whether they were biased. The question before the reviewing court is the correctness of the result reached by the lower court and not the correctness of the reasoning upon which that result was reached. *People v. Johnson*, 208 Ill. 2d 118, 128 (2003). Therefore, a reviewing court can affirm a lower court decision on any basis in the record, even if the lower court's reasoning was erroneous. Based on the record, we affirm the trial court's decision because defendant's claim in his 2-1401 petition was without merit.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 21 Affirmed.