2016 IL App (2d) 140844-U
No. 2-14-0844
Order filed November 3, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 03-CF-866
DERRON M. JOHNSON,	)	Honorable James C. Hallock,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed the defendant's postconviction petition at the second stage for failure to make a substantial showing that his trial counsel labored under a conflict of interest or that allegedly false testimony could have affected the judgment of the jury.

¶ 2 In 2004, following a jury trial, the defendant, Derron Johnson, was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2002)) and sentenced to 27 years' imprisonment. The defendant's conviction was affirmed on direct appeal. See *People v. Johnson*, 368 Ill. App. 3d 1073 (2006). On October 9, 2007, the defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2006)). On August 21, 2014, following a second-stage hearing, the trial court denied the

defendant's postconviction petition because the defendant failed to make a substantial showing of a constitutional violation. The defendant appeals from this order. We affirm.

¶ 3 BACKGROUND

¶ 4 The defendant was found guilty of the first-degree murder of John Szilage, based on the theory that he was accountable for the conduct of Andrew Proctor, who committed the acts causing Szilage's death. On April 15, 2003, at the time of the defendant's arrest, Proctor was being represented by the public defender's office so Attorney John Barsanti was appointed as conflict counsel to represent the defendant. On May 20, 2004, following a jury trial, the defendant was convicted and subsequently sentenced to 27 years' imprisonment. On direct appeal, this court affirmed the defendant's conviction. See *People v. Johnson*, 368 Ill. App. 3d 1073 (2006). The evidence presented at the defendant's trial is detailed in this court's opinion on direct appeal. *Id.*

¶ 5 On October 9, 2007, the defendant filed a *pro se* postconviction petition pursuant to the Act (725 ILCS 5/122-1 *et seq*. (West 2006)). On December 11, 2007, the trial court found that the defendant had stated the gist of a constitutional claim and appointed counsel to represent the defendant in second stage proceedings under the Act. On December 3, 2013, the defendant filed an amended postconviction petition raising four claims, only two of which are relevant to this appeal. First, the defendant alleged that he received ineffective assistance of trial counsel because Barsanti labored under a conflict of interest. The defendant alleged two conflicts. Specifically, while representing the defendant, Barsanti was (1) running for Kane County State's Attorney and (2) performing contract work for the Office of the State's Attorney Appellate Prosecutor (SAAP). In support of this allegation, the defendant attached a March 13, 2004, newspaper article concerning Barsanti's run for Kane County State's Attorney. Barsanti was quoted as saying he was a prosecutor at heart and that his real talent and passion was as a

prosecutor. The article also indicated that Barsanti, during the three-and-a-half year period he was in private practice, was also employed on a contract basis by SAAP. The defendant also attached a record of voucher payments from SAAP to Barsanti showing one payment in 2002 and other payments in 2007 and thereafter. The record did not indicate what the payments were for, but, in a letter sent along with the payment record, SAAP's public records compliance officer noted that Barsanti had been a trial advocacy faculty member for a number of years. The defendant also attached his own affidavit, indicating that while Barsanti represented him, Barsanti never disclosed that he was running for Kane County State's Attorney or that he was doing contract work for SAAP.

¶ 6 Second, as relevant to this appeal, the defendant's amended petition stated a claim for prosecutorial misconduct based on the State's alleged failure to disclose that one of their witnesses, Andrew Jackson, was testifying based on an agreement with the State to recall an arrest warrant and to dismiss pending juvenile charges in exchange for Jackson's testimony. At trial, Jackson testified that Proctor and the defendant had told him that they murdered the victim. In support of his claim for prosecutorial misconduct, the defendant attached transcripts from Jackson's juvenile court proceedings. The first transcript (the defendant's Exhibit 5) was not dated, but in his amended postconviction petition the defendant alleged that it was from a May 20, 2004, detention hearing in juvenile court. In that transcript, Jackson's mother testified that she had conversations with the prosecutor in the defendant's case, Ronald Power. She knew that her son had been subpoenaed to testify in the defendant's case. She informed Powers that her son might not testify because there were outstanding arrest warrants for him. Powers told her he would talk to the juvenile court judge and ask the judge to dismiss the warrants and give Jackson a new court date.

¶ 7 In a second transcript from juvenile court proceedings involving Jackson, dated April 29, 2005 (the defendant's Exhibit 6), Jackson's mother testified that, after her son was subpoenaed, she started to receive calls from Powers. Powers told her that if her son came to testify in the defendant's case, he would have the warrants against Jackson quashed and the charges against him dismissed. She told Powers that she did not believe him. She spoke with Powers five to seven times before the defendant's trial and Powers repeatedly told her that he would have Jackson's warrants quashed and the charges dismissed if he came to testify at the defendant's trial.

¶ 8 In another transcript (the defendant's Exhibit 7), alleged to be from an April 29, 2005 juvenile hearing, Jackson acknowledged that he testified in the defendant's trial in May 2004. Jackson testified that Powers told him that, after he testified, the charges against him would be dismissed. Powers also told him to keep the deal to dismiss his case between them. Jackson further testified that, at the defendant's trial, he denied there was any deal in exchange for his testimony because Powers told him to keep the deal between them. In the defendant's Exhibit 8, also allegedly from the April 29, 2005 juvenile hearing, Jackson's mother testified that, during the course of the defendant's trial, Powers told her he was revoking the offer because Jackson "took too long to get there."

¶ 9 On April 23, 2014, the State filed an answer to the defendant's petition, asking that it be denied without an evidentiary hearing. The State argued that there was no *per se* conflict of interest because Barsanti's role as the Kane County State's Attorney was neither prior to nor contemporaneous with his role as defense counsel. Rather, Barsanti did not become state's attorney until after he concluded his representation of the defendant. The State also argued that there was no *per se* conflict of interest as a result of Barsanti's work with SAAP because Barsanti did not represent the State at any time in the defendant's particular proceeding. The

State further argued that the defendant failed to allege the existence of any actual conflict and that, therefore, any such claim was waived. Finally, the State argued that the defendant failed to file affidavits in support of his claim that Jackson testified in exchange for the dismissal of his juvenile charges. The State pointed out that the defendant failed to procure affidavits from Jackson or his mother that they had believed such an agreement had been reached. The defendant also failed to procure an affidavit from Powers or Barsanti addressing whether any such agreement had been disclosed. In the absence of such affidavits, the State argued that the defendant failed to provide the legally required evidentiary basis to support his claim.

¶ 10 On August 21, 2014, following a hearing, the trial court denied the defendant's petition at the second stage. The trial court found that there was neither a *per se* nor an actual conflict of interest "where the defense attorney was running a campaign for the position of elected State's Attorney, teaching trial advocacy to young lawyers or was doing legal work for [SAAP]." The trial court found that the claim regarding the alleged agreement with Jackson failed because there were no affidavits from the prosecutors in Jackson's juvenile proceedings or affidavits from Barsanti or the prosecutor in the defendant's case regarding whether an agreement was or was not disclosed. Thereafter, the defendant filed a timely notice of appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, the defendant argues that the trial court erred in dismissing his petition at the second stage because he made a substantial showing of constitutional violations. The Act (725 ILCS 5/125-1 *et seq*. (West 2012)) establishes a three-stage procedure pursuant to which a criminal defendant may seek redress for violations of his constitutional rights at trial. *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). At the first stage of postconviction proceedings, the circuit court must determine whether the petition is "frivolous and patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). The trial court

may summarily dismiss a petition as "frivolous and patently without merit" only where the petition "has no arguable basis either in law or in fact," *i.e.*, "is based on an indisputably meritless legal theory or a fanciful legal allegation." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 13 Where, as here, a petition advances to the second stage of the postconviction process, the defendant's counsel may file an amended postconviction petition and the State may file a motion to dismiss or an answer to the petition. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true (*People v. Pendleton*, 223 Ill. 2d 458, 473 (2006)) and the defendant must make a substantial showing of a constitutional violation (*People v. Cotto*, 2016 IL 119006, ¶ 28)). The Act specifically authorizes the trial court to receive proof by affidavits, depositions, oral testimony or other evidence. See 725 ILCS 5/122-6 (West 2012). If the trial court does not dismiss or deny the petition, the proceeding advances to the third and final stage, at which the trial court conducts an evidentiary hearing on the defendant's petition. *Id.* The petition here was denied at the second stage. A trial court's denial of a postconviction petition at the second stage, without an evidentiary hearing, is reviewed *de novo*. *People v. Elken*, 2014 IL App (3d) 120580, ¶ 29.

¶ 14 The defendant's first contention on appeal is that he made a substantial showing of ineffective assistance of counsel because his defense counsel, Barsanti, labored under a conflict of interest. Specifically, the defendant argues that a *per se* conflict of interest existed because Barsanti was employed by SAAP while he was representing the defendant. The defendant further argues that there was a potential conflict of interest because Barsanti was seeking election as Kane County State's Attorney while he was representing the defendant.

¶ 15 A criminal defendant's right to effective assistance of counsel under the sixth amendment (U.S. Const., amend. VI) includes the right to conflict-free representation. *People v.*

Washington, 101 Ill. 2d 104, 110 (1984). In *People v. Spreitzer*, 123 Ill. 2d 1, 14-19 (1988), our supreme court set forth the framework for deciding whether a defense counsel's conflict of interest violates the sixth amendment. Under *Spreitzer*, we must first decide whether there was a *per se* conflict of interest. A *per se* conflict of interest arises "[w]hen a defendant's attorney has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant." *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). If there was a *per se* conflict, "there is no need to show that the attorney's actual performance was in any way affected by the existence of the conflict." *Spreitzer*, 123 Ill. 2d at 15. There are three situations where a *per se* conflict of interest exists: (1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved with the prosecution of defendant. *People v. Fields*, 2012 IL 112438, ¶ 18. Whether a *per se* conflict exists is dependent on the particular facts of each case. *People v. Hernandez*, 246 Ill. App. 3d 243, 249 (1993).

¶ 16 The defendant argues that there was a *per se* conflict of interest because Barsanti had a prior or contemporaneous association with SAAP. The defendant attached voucher payments, which showed that Barsanti received a payment from SAAP in 2002 and then a number of payments in 2007 and thereafter. As Barsanti's representation of the defendant commenced in April 2003 and lasted until about October 2004, the 2002 voucher payment is the only payment that shows a prior association with SAAP. However, what the defendant failed to show was that SAAP, or any attorney employed by SAAP, or Barsanti on behalf of SAAP, was either prosecuting the defendant's case or assisting in its prosecution. See, *e.g.*, *People v. Washington*, 101 Ill. 2d 104, 112-13 (1984) (*per se* conflict where defense counsel served as part-time prosecutor for the municipality where the defendant was being prosecuted; the municipality's

police officers had to testify against defendant; and defense counsel had to cross-examine officers whom he normally relied on in his capacity as a prosecutor); *People v. Kester*, 66 Ill. 2d 162, 167 (1977) (*per se* conflict of interest where defense counsel had previously served as assistant State's Attorney and, while in that capacity, had assisted in the prosecution of the defendant in the same proceeding). Moreover, the defendant has not alleged any facts which would show that SAAP would have benefitted in any way from an unfavorable verdict for the defendant. *Hernandez*, 231 Ill. 2d at 142. As such, the defendant failed to make a substantial showing of a *per se* conflict of interest.

¶ 17 In support of his contention of a *per se* conflict of interest, the defendant relies on *People v. Fife*, 76 Ill. 2d 418 (1979). In *Fife*, the defendant was found guilty of the unlawful delivery of cannabis. *Id.* at 420. At the time court-appointed defense counsel was representing the defendant, she was also, by appointment of the Attorney General, serving as a special Assistant Attorney General in workmen's compensation cases. *Id.* Our supreme court reversed the defendant's conviction because of the possible "subliminal pressure" that defense counsel could have felt from the Attorney General's office. *Id.* at 424-25.

¶ 18 We find *Fife* to be distinguishable from the present case. In *Fife*, defense counsel was simultaneously working for the Attorney General and the court noted, consequently, that defense counsel may have been influenced by subliminal pressure from the Attorney General's office. *Id.* at 424-25. In this case, the vouchers attached to the defendant's petition show that Barsanti's work for SAAP was not simultaneous with his representation of the defendant. Rather, it was prior to and after his representation of the defendant. Accordingly, there was no potential subliminal pressure from SAAP that would have influenced defense's counsel performance.

¶ 19 In contrast to *Fife*, we find *People v. Franklin*, 75 Ill. 2d 173 (1979), to be instructive. In *Franklin*, the defendant argued a conflict of interest because his defense attorney had prosecuted

him four-and-a-half years earlier in an unrelated burglary offense. *Id.* at 178-79. Our supreme court refused to find a *per se* conflict of interest because defense counsel had not recollected the prior prosecution until after the defendant's trial had concluded and because defense counsel's previous work in the State's Attorney's office did not include the defendant's current case. *Id.* at 179-80. The court concluded, therefore, that any "subliminal effects" would not be present. *Id.* at 179. Accordingly, in *Franklin*, our supreme court refused to find a *per se* conflict of interest based on defense counsel's previous work as a prosecutor for the State, even when the attorney had previously prosecuted the defendant in another case. Similarly, in this case, we cannot say that Barsanti's prior work for SAAP, with no evidence that it was related in any way to the defendant's current prosecution, establishes a substantial showing of a conflict of interest.

¶ 20 The defendant's next contention on appeal is that there was a potential conflict of interest because Barsanti was running for Kane County State's Attorney while he was representing the defendant. Any conflict of interest that could arise in this situation would only have occurred if Barsanti had been elected while he was representing the defendant. *People v. Doggett*, 255 Ill. App. 3d 180, 186 (1993) (fact that defense counsel was seeking employment with the state's attorney's office while he was representing the defendant presented only a "potential or possible" conflict of interest). Barsanti's run for state's attorney thus presented only a "potential or possible" conflict of interest. *Id.* Under *Spreitzer*, if defense counsel brings a potential conflict of interest to the attention of the trial court at an early stage, the trial court has a duty to take adequate steps to ascertain whether new counsel is required. *Spreitzer*, 123 Ill. 2d at 18. However, if the potential conflict is not brought to the trial court's attention, or the trial court fails to alleviate the potential conflict, then reversal of the defendant's conviction is warranted only if the defendant has shown that an actual conflict of interest adversely affected counsel's

performance. *Id.* "[T]he defendant must point to some specific defect in his counsel's strategy, tactics, or decision making attributable to the conflict." *Id.*

¶ 21 In the present case, defense counsel did not bring the potential conflict of interest to the attention of the trial court. Thus, the defendant is entitled to relief only if he can show that an actual conflict of interest adversely affected counsel's performance. *Id.* The defendant has not alleged, either in his petition or in his appellant brief, any defect in his trial counsel's performance related to the potential conflict of interest. In fact, on direct appeal, this court found that defense counsel provided adequate representation, filed numerous pretrial motions seeking to suppress evidence, and was well-prepared for trial, "as demonstrated by his meaningful cross-examination of the State's most important witnesses." *Johnson*, 368 Ill. App. 3d at 1087.

¶ 22 In his reply brief, the defendant argues that he is not required to make a showing of an actual conflict of interest. However, this claim is belied by the holding in *Spreitzer*. *Spreitzer*, 123 Ill. 2d at 18. The defendant also argues in his reply brief that the framework in *Spreitzer* only applies to conflicts involving joint or multiple representation of codefendants. This contention is without merit, as the *Spreitzer* court itself applied the framework to determine whether there was a conflict of interest when the assistant state's attorney who charged the *Spreitzer* defendant later became a public defender while the defendant was being represented by a different attorney from the public defender's office. *Id.* at 19-20; see also *People v. Morales*, 209 Ill. 2d 340, 348-349 (2004) (applying *Spreitzer* framework to determine whether there was a conflict of interest when defense counsel was simultaneously representing a potential witness) and *People v. Hardin*, 353 Ill. App. 3d 522, 527-28 (2004) (applying *Spreitzer* framework to determine whether a conflict of interest existed when the public defender in postconviction proceedings had to attack the effectiveness of the public defender who represented the defendant at trial). Accordingly, because the defendant has not made a substantial showing of a *per se*

conflict of interest, or a substantial showing that his trial counsel labored under an actual conflict of interest that adversely affected his performance, the trial court properly denied the defendant's petition at the second-stage with respect to these claims.

¶ 23 The defendant's next contention on appeal is that he was denied due process when the State failed to inform him that a key witness at trial was testifying in exchange for leniency on unrelated charges. Specifically, Anthony Jackson testified at trial that both Proctor and the defendant told him that they had killed the victim. On both direct examination and cross-examination, Jackson acknowledged that he had charges pending against him in juvenile court for possession of crack cocaine and battery, and that warrants had been issued for him on those charges. On cross-examination, Jackson testified that the State had not offered him any deal and that he was not testifying in exchange for anything. However, attached to the defendant's postconviction petition were transcripts from the juvenile hearings on the charges against Jackson. The transcripts show that both Jackson and his mother testified at the juvenile hearings that the state's attorney had offered to have Jackson's warrants quashed and the charges dismissed if Jackson agreed to testify against the defendant in this case. At the juvenile hearings, Jackson also testified that he denied there was any deal when he testified at the defendant's trial because the state's attorney had told him to keep the deal between the two of them.

¶ 24 It is well settled that "the deprivation of an individual's liberty based upon false testimony is contrary to fundamental principles of fairness in a civilized society." *People v. Cihlar*, 111 Ill. 2d 212, 216-17 (1986). As such, the State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process of law. *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). "A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *Id.* This standard is equivalent to the harmless error standard. *Id.* at 348; see

also *People v. Patterson*, 152 Ill. 2d 414, 466 (1992) (an error that implicates due process may be considered harmless in certain circumstances).

¶ 25 In the present case, the defendant's claim that Jackson testified at the defendant's trial in exchange for leniency in Jackson's juvenile cases is supported by the transcript of the proceedings in Jackson's juvenile case. According to the transcripts, Jackson and his mother both testified that the state's attorney had promised to have Jackson's juvenile warrants quashed and the charges dismissed if Jackson testified at the defendant's trial. Jackson testified that shortly before he testified at the defendant's trial, the state's attorney told him that they had a deal, that Jackson's juvenile charges would be dismissed, and that Jackson should not tell anyone about the deal. The transcripts containing the foregoing testimony were sufficient to make a substantial showing that the defendant's due process rights were violated by Jackson's testimony, at the defendant's trial, that he was not testifying in exchange for anything.

¶ 26 The State argues that the defendant's claim fails because he did not obtain affidavits from Jackson or his mother. However, allegations in a petition can be supported by affidavits, records, or "other evidence." 725 ILCS 5/122-2 (West 2012); *People v. Hall*, 217 Ill. 2d 324, 332 (2005). Further, the Act specifically authorizes the trial court to receive proof by affidavits, depositions, oral testimony or "other evidence." See 725 ILCS 5/122-6 (West 2012). Accordingly, while the defendant could have obtained affidavits from Jackson and his mother, he also could establish his claims through other evidence. The transcripts of the testimony from Jackson's juvenile proceedings constituted such other evidence. See *People v. Sanders*, 2016 IL 118123, ¶ 45 (the defendant could have established a witness' recantation through an affidavit from the witness or through a transcript of the witness' recantation testimony in codefendant's case). The State cites *People v. Allen*, 2015 IL 113135, ¶ 36, for the proposition that the defendant can only provide "other evidence" to withstand a first-stage dismissal of a

postconviction petition. This interpretation of *Allen* is improper. The *Allen* court found that an unnotarized evidentiary affidavit qualified as "other evidence" within section 122-6 of the Act, and that the failure to notarize the affidavit did not render the petition frivolous or patently without merit. *Id.* ¶ 34. However, there is no language in *Allen* limiting the consideration of "other evidence" to the first-stage of postconviction proceedings and adopting such a limit would run contrary to the plain language of the statute. See 725 ILCS 5/122-6 (West 2012).

¶ 27 The State also argues that the defendant's claim must fail because he did not obtain an affidavit from the state's attorney who allegedly made the deal with Jackson. However, the difficulty in obtaining such an affidavit from a state's attorney, indicating that he had failed to disclose a deal with a witness, is self-apparent. *People v. Hall*, 217 Ill. 2d 324, 333-34 (2005). Accordingly, we decline to hold that, on this basis, the defendant's claim fails.

¶ 28 Finally, the State argues that the dismissal of the defendant's claim should be affirmed because the defendant failed to attach an affidavit from Barsanti indicating that Barsanti was not aware of any deal. However, the record indicates that Barsanti did not know of any deal. Barsanti questioned Jackson at trial as to whether he was testifying as a result of any offers by the State. When Jackson denied that there was any deal, Barsanti did not ask any further questions as to that issue. Further, during closing argument, Barsanti stated that while he was not questioning Jackson's denial of any deal, Barsanti noted that Jackson had pending charges and asked the jurors:

> "Who do you think he wants to help? Do you think [the defendant] can do something for Anthony Jackson, or do you think the government can?"

It would be absurd to think that Barsanti would insinuate that Jackson had reason to testify in favor of the State if Barsanti knew that there was an actual deal between Jackson and the State. Accordingly, the failure to attach an affidavit from Barsanti is not fatal to the defendant's claim.

¶ 29 Nonetheless, the defendant is only entitled to an evidentiary hearing if there is a substantial showing of a reasonable likelihood that Jackson's allegedly false testimony affected the jury's verdict. *Olinger*, 176 Ill. 2d at 345. In light of all the evidence presented at trial, we find that the defendant has failed to make the requisite substantial showing. The critical evidence at the defendant's trial was his own statement given to the police following his arrest for the charged crime. On direct appeal, this court found that the defendant's statement was given voluntarily and was properly admitted. *Johnson*, 368 Ill. App. 3d at 1088-91. In his statement, the defendant admitted that he and Proctor had come up with a plan to kill the victim and that he in fact assisted in that plan. *Id.* at 1079-80. At trial, another witness, Carlos Soto, testified that the defendant told him (1) about hearing the victim's screams when Proctor killed the victim and (2) where the defendant and Proctor had hidden the victim's body. *Id.* at 1080. While two defense witnesses testified that Proctor admitted to killing the victim (*id.* at 1081), this testimony did not necessarily indicate that Proctor acted alone or that there was no accomplice. Finally, the defendant testified at trial that he had never made a plan with Proctor and did not know that Proctor was going to kill the victim. *Id.* However, this testimony directly contradicted his earlier statement to the police. Accordingly, because of the overwhelming evidence of guilt, we cannot say that there is a reasonable likelihood that Jackson's allegedly false testimony affected the judgment against the defendant. As we may affirm on any basis appearing in the record (*People v. Jones*, 2015 IL App (1st) 133123, ¶ 33), the trial court correctly dismissed defendant's claim without an evidentiary hearing.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 32 Affirmed.