2017 IL App (1st) 142830-U

No. 1-14-2830

Order filed March 31, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 92 CR 26531
	)	
JOHN PARSONS,	)	Honorable
	)	William O'Brien,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Pursuant to the doctrine of *res judicata*, defendant cannot raise the same claim in a postconviction proceeding that he previously raised in an unsuccessful petition for relief from judgment. Even if the doctrine of *res judicata* was relaxed, defendant failed to make a substantial showing of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), because there is not a reasonable probability that the undisclosed evidence would have altered the outcome at trial.

¶ 2 Defendant John Parsons appeals from the circuit court's dismissal, upon the State's motion, of his supplemental petition for relief pursuant to the Post-Conviction Hearing Act (the

Act) (725 ILCS 5/122-1 *et seq*. (West 1996)). On appeal, defendant contends that the court erred in dismissing the petition because it made a substantial showing that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and that the undisclosed evidence would have supported the defense theory at trial that defendant was framed. We affirm.

¶ 3 Following a jury trial, defendant was found guilty of aggravated arson and sentenced to 15 years in the Illinois Department of Corrections. The evidence established that on October 25, 1992, a bathroom exploded several minutes after defendant exited.

¶ 4 At trial, Margaret Summit testified that in October 1992, she owned His and Hers Bar on North Broadway in Chicago. Around 1:30 a.m. on October 25, 1992, defendant came into the bar with another man. Summit knew defendant because defendant had an affair with her daughter, Susan Sacowicz.[1] To Summit's knowledge, the affair lasted 10 years. Following the pair's break-up in August 1992, defendant would phone Summit at home and at the bar asking if Susan was there. Summit would tell defendant where Susan was or that she did not know where Susan was; however, "these phone calls kept on." She would receive four to five calls a day and it was "still going on" at the time of trial.

¶ 5 When defendant came into the bar, Summit watched him. She did not speak to defendant, but asked her friend Tim Janes to watch defendant because defendant made her nervous. Summit observed defendant consume a "couple" of drinks and then walk over to the pool table. Defendant ultimately went into the men's bathroom. After five minutes, defendant left the bathroom, stopped by the pool table, shot one ball and "started out the front door." Janes then went into the bathroom. After "[m]aybe minutes," he exited the bathroom and walked to

[1] The record reveals that Susan also used the name Susan Hanson and Susan Wordelman.

Summit. She asked him if he found anything. Then "the bathroom blew up." The bathroom door blew open, water gushed out and portions of the ceiling collapsed. When Summit tried to use the phone, it did not work, so Janes ran to a public phone and called the police and fire departments.

¶ 6 At one point, the phone rang and she answered. Defendant then said, "Hi, Margaret, how are you doing, ha, ha, ha. Your bar is out of business like mine." She handed the phone to a police officer. She did not observe anyone, other than Janes, go into the bathroom after defendant.

¶ 7 During cross-examination, Summit testified that Susan was her "foster" daughter and lived with her between the ages of 19 and 21. The explosion occurred two to three minutes after defendant left the bar. Summit did not know of any enemies she had made during her time in the "bar business."

¶ 8 Tim Janes, a friend of Summit's, testified that he was a security manager. After Summit called his attention to defendant, he watched defendant. Defendant went to the back of the bar, played pool and then went to the bathroom. Defendant was in the bathroom for four to five minutes. Janes then went into the bathroom and looked around "for any kind of explosive device" or other things that would be unsual. He did not look into the toilet tank. Janes left the bathroom and went to tell Summit that he did not find anything. At that point, defendant was "just exiting the bar." Then, there was an explosion.

¶ 9 Police officer Laurie Haughey and her partner responded to a call of an "explosion." After Summit directed them to the bathroom, Haughey observed that the "toilet was pretty much destroyed," that there were holes in the wall and that ceiling tiles had fallen. She also smelled something "like" gunpowder. Within 10 minutes of their arrival, the bar's phone rang and

Summit answered. Summit then handed the phone to Haughey. Haughey asked whether this "was John," that is, defendant. Defendant answered yes and Haughey identified herself. She asked if defendant had anything to do with what happened at the bar and if he would like to talk to her. Defendant indicated that he did not know what she was talking about and did not come to the bar to speak to her. The phone rang a second time and "the exact same type of conversation" took place.

¶ 10 Explosive technician Anthony Rohl testified that his observation of the bathroom led him to conclude that the origin of the explosion was in the toilet tank and that the cause was a large pyrotechnic. He explained that a pyrotechnic is a "device made of cardboard and flash powder" and that a "large one, an M-80 or better" caused the explosion.

¶ 11 The defense then presented the testimony of defendant's friend Robert Cunningham, who was with defendant at the bar on October 25, 1992. They stayed about 25 to 30 minutes and shot pool. He did not observe defendant go into the bathroom. During cross-examination, Cunningham testified that they went to the bar because they were "out riding around" and defendant stated that he wanted to locate someone who frequented that bar. Defendant identified the person as Susan Hanson "or something like" that and wanted to find her for "personal reasons." After the men left the bar, defendant used Cunningham's car phone to call the bar and ask for Susan. He also heard defendant decline to go back to the bar and speak to a police officer.

¶ 12 Defendant testified that he went to the bar with Cunningham, had two drinks and played pool. He had never been to the bar before. Summit did not like him because Susan was "with" him. Susan had originally been "with" Summit, then Susan came to work for defendant, then Susan disappeared. He went to the bar to try to locate Susan.

¶ 13 During cross-examination, defendant testified that prior to October 25, he had spoken to Summit maybe half a dozen times. He dated Susan for 14 years. Defendant would call for Susan and ask whoever answered the phone whether Susan was there. He called the bar "[q]uite a few times." Defendant and Susan broke up six days before the explosion. Defendant went to the bar to look for Susan and wanted to talk to her. He did not ask Summit where Susan was.

¶ 14 The jury ultimately found defendant guilty of aggravated arson. He was sentenced to 15 years in prison. On November 21, 1994, the trial court denied defendant's motion to reduce sentence, and motion for a new trial. Defendant's conviction and sentence were affirmed on direct appeal. See *People v. Parsons*, 284 Ill. App. 3d 1049 (1996).

¶ 15 In February 1997, 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 1996)), alleging that the State had wrongfully withheld evidence of fireworks which were in Summit's possession and which were turned over to the police by Summit after the explosion. Specifically, the petition alleged that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to inform defendant prior to or during trial that Summit gave a bag containing explosives to Detective James Hennelly and that defendant only later learned of the bag during discovery in a civil lawsuit that Summit filed against defendant.

¶ 16 Attached to the petition in support was, *inter alia*, "Plaintiff's Supplemental Responses to Parsons' Discovery Requests," filed in May 1996 in Summit v. Parsons, No. 94 L 13354 (Cir. Ct. Cook Co.). The supplemental answer to defendant's interrogatory no. 17 stated:

> "Items from Susan Wordelman's apartment stored by Plaintiff were: Clothes, bedroom set, kitchen set, dishes, silverware, TV, VCR and a bag of explosives belonging to

Parsons (subsequently given by Plaintiff to Detective Hennelly, Chicago Police Department, Area 6 Violent Crimes (now renamed Area 3)).”[2]

¶ 17 The trial court characterized this document as a petition for postconviction relief, determined that it failed to assert a substantial denial of defendant’s constitutional rights, and denied postconviction relief. Defendant filed an appeal from the denial.

¶ 18 On appeal, appellate counsel filed a motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), alleging that defendant filed a petition for relief from judgment, which was denied as a postconviction petition. The motion concluded that the “petition failed to state grounds for relief from judgment,” and, therefore, “there are no appealable issues in the case.” The court “carefully reviewed the record in this case” and appellate counsel’s brief, and found “no issues of arguable merit.” *People v. Parsons*, No. 1-97-1642, at 2 (1997) (unpublished order under Supreme Court Rule 23). Therefore, the court granted the motion of the public defender for leave to withdraw as counsel and affirmed the judgment of the circuit court. *Parsons*, No. 1-97-1642, at 2.

¶ 19 During the pendency of that appeal, on June 3, 1997, defendant filed a *pro se* petition for postconviction relief alleging, in pertinent part, that the State had violated defendant’s right to due process by failing to disclose evidence about the fireworks given to police by Summit.

¶ 20 In denying defendant relief, the circuit court noted that it had interpreted defendant’s prior filing as a postconviction petition when it was actually a petition for relief from judgment. The court then stated that “so there’s no confusion” the court was “denying defendant’s petition

[2] The record reveals that Detective Hennelly arrested defendant on October 27, 1992, pursuant to a warrant for telephone harassment, and was listed as a potential trial witness in the State’s December 1992 answer to discovery.

for relief from judgment." Defendant filed an appeal from this judgment and that appeal was subsequently consolidated with the appeal from the earlier dismissal of defendant's section 2-1401 petition.

¶ 21 In October 2000, the State filed a motion in the appellate court seeking a limited remand so that the circuit court could properly rule on defendant's *pro se* postconviction petition. The motion alleged that there was a possibility that the circuit court never considered and ruled upon the postconviction petition and that the dismissal was related to the denial of relief under section 2-1401. In November 2000, the court granted the State's request for a limited remand to consider the postconviction petition and remanded the cause for further proceedings under the Act.

¶ 22 On remand, the petition was docketed and postconviction counsel was appointed. On May 13, 2011, postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating that he had reviewed the *pro se* petition; the police reports and other discovery materials produced at trial; the trial transcript and common law record; and the opinion issued on direct appeal. The certificate also stated that postconviction counsel had spoken with defendant in person and over the phone, had interviewed or investigated "a number of witnesses," researched the relevant caselaw and filed a supplemental petition.

¶ 23 The supplemental petition alleged, in pertinent part, that defendant was denied his due process rights when the State withheld material impeachment evidence of explosives that were turned over to the police by Summit. The supplemental petition further alleged that given Summit's "obvious hatred" of defendant, "the fact that Summit came forward with fireworks in her possession that she claimed belonged to [defendant] is far too coincidental." The petition also

alleged that had this information been "brought out" at trial, defense counsel could have argued that "it shows nothing more than Summit's strong desire to frame or retaliate" against defendant.

¶ 24 Attached to the petition in support was, *inter alia*, "Plaintiff's Supplemental Responses to Parsons' Discovery Requests," filed in May 1996 in Summit v. Parsons, No. 94 L 13354 (Cir. Ct. Cook Co.), *i.e.*, the same document that was attached to defendant's *pro se* petition for relief from judgment. The supplemental answer to defendant's interrogatory no. 17 stated:

> "Items from Susan Wordelman's apartment stored by Plaintiff were: Clothes, bedroom set, kitchen set, dishes, silverware, TV, VCR and a bag of explosives belonging to Parsons (subsequently given by Plaintiff to Detective Hennelly, Chicago Police Department, Area 6 Violent Crimes (now renamed Area 3))."

¶ 25 The State filed a motion to dismiss, alleging that defendant's claims were barred by *res judicata* and waiver, and that defendant failed to properly support the claims. At the hearing on the motion to dismiss, the circuit court asked postconviction counsel whether Summit's statement that she turned over explosives to the police "could be made up" and inquired whether the detective had been "nail[ed] down" as to whether he actually received the explosives because no one knew what Summit's "reliability was." Postconviction counsel stated that he had not spoken to the detective. Although postconviction counsel argued that the matter should proceed to an evidentiary hearing in order to determine Summit's reliability, the circuit court granted the State's motion to dismiss on July 11, 2014. Defendant now appeals.

¶ 26 On appeal, defendant contends that the circuit court erred by granting the State's motion to dismiss because defendant's supplemental postconviction petition made a substantial showing of the *Brady* violation when the State failed to disclose evidence that Summit turned over a bag

of explosives allegedly belonging to defendant to police prior to trial. Defendant argues that this evidence would have supported the defense theory at trial that Summit framed him.

¶ 27 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 1996); *People v. Davis*, 2014 IL 115595, ¶ 13. If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage, where counsel is appointed to represent the defendant, if requested (725 ILCS 5/122-4 (West 1996)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 1996)).

¶ 28 At the second stage of proceedings under the Act, it is the defendant's burden to make a "substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A "substantial showing" of a constitutional violation is a measure of the legal sufficiency of a defendant's well-pled allegations of a constitutional violation which, if proved at an evidentiary hearing, would entitle him to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. Therefore, all well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true. *Pendleton*, 223 Ill. 2d at 473. If a defendant makes a substantial showing that his constitutional rights were violated, the matter proceeds to a third-stage evidentiary hearing where the circuit court serves as a factfinder and resolves evidentiary conflicts, weighs credibility, and determines the weight to be given testimony and evidence. *Domagala*, 2013 IL 113688, ¶¶ 34, 46. We review the circuit court's dismissal of a postconviction petition at the second stage of proceedings under the Act *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 29 Before reaching the merits, we must address the State's argument that defendant's claim is barred by *res judicata* in that it is the same claim supported by the same evidence that defendant raised in his unsuccessful 2-1401 petition.

¶ 30 In a postconviction proceeding, any issue previously decided by a reviewing court is barred by *res judicata. People v. Harris*, 224 Ill. 2d 115, 124-25 (2007). Under the principles of *res judicata*, " 'a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.' " *People v. Creek*, 94 Ill. 2d 526, 533 (1983) (quoting *People v. Kidd*, 398 Ill. 405, 408 (1947)). In other words, *res judicata* applies where three requirements are met: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of the cause of action; and (3) an identity of parties or their privies. *People v. Carroccia*, 352 Ill. App. 3d 1114, 1123 (2004). However, *res judicata* and forfeiture do not apply where fundamental fairness so requires, where the alleged forfeiture stems from the incompetence of appellate counsel, or where facts relating to the claim do not appear on the face of the original appellate record. *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005). See also *People v. English*, 2013 IL 112890, ¶ 22 (in a postconviction setting, "the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires").

¶ 31 Defendant admits that this claim was raised in his section 2-1401 petition, but argues that fundamental fairness requires the relaxation of the doctrine of *res judicata* in this case because the proceedings related to his section 2-1401 petition were "fundamentally flawed." He argues that the circuit court improperly recharacterized his petition for relief from judgment without

first admonishing him in violation of *People v. Shellstrom,* 216 Ill. 2d 45 (2005), that appellate counsel's brief filed in support of the motion to withdraw was "utterly inadequate," and the appellate court's grant of counsel's motion was consequently improper.

¶ 32 The record reveals that the circuit court recharacterized defendant's petition for relief from judgment in 1997, eight years before our supreme court decided *Shellstrom* in 2005. Based upon *Shellstrom*'s express language, its holding applies prospectively only. See *Shellstrom,* 216 Ill. 2d at 57 ("[I]n the future, when a circuit court is recharacterizing as a first postconviction petition a pleading that a *pro se* litigant has labeled as a different action cognizable under Illinois law, the circuit court must (1) notify the *pro se* litigant that the court intends to recharacterize the pleading, (2) warn the litigant that this recharacterization means that any subsequent postconviction petition will be subject to the restrictions on successive postconviction petitions, and (3) provide the litigant an opportunity to withdraw the pleading or to amend it so that it contains all the claims appropriate to a postconviction petition that the litigant believes he or she has."). Therefore, *Shellstrom*'s holding does not apply to this case.

¶ 33 To the extent that defendant argues that *res judicata* should be relaxed because appellate counsel's *Finley* brief was so "utterly inadequate" that the court erred when it granted counsel's motion to withdraw, we disagree. Although defendant is correct that appellate counsel did not specifically discuss defendant's *Brady* claim in the motion to withdraw, counsel's motion stated that the "petition failed to state grounds for relief from judgment," and, therefore, "there are no appealable issues in the case." In granting appellate counsel's motion to withdraw, the court stated that it had "carefully reviewed the record in this case" and found "no issues of arguable merit." *Parsons,* No. 1-97-1642, at 2. If the court had found otherwise, it would have denied

appellate counsel's motion to withdraw. Defendant has failed to point to anything in the record which indicates that the court did not, in fact, carefully review the record on appeal, and therefore his argument must fail.

¶ 34 Accordingly, as the instant postconviction petition raises the same claim that was raised in defendant's unsuccessful petition for relief from judgment, the doctrine of *res judicata* bars defendant from raising that claim in the instant proceeding. See *Harris*, 224 Ill. 2d at 124-25. Moreover, even if the doctrine of *res judicata* were to be relaxed in order to permit consideration of defendant's claim, defendant has failed to make a substantial showing of a *Brady* violation.

¶ 35 Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the State is required to disclose exculpatory evidence to the defendant. To establish a *Brady* violation, a defendant must show that: "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008). If the defendant cannot establish that the improperly withheld evidence was both favorable to the defense and material, then the defendant cannot prevail under *Brady*. *People v. Simpson*, 204 Ill. 2d 536, 555 (2001). Evidence is material when " 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Simpson*, 204 Ill. 2d at 555-56 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). "A reasonable probability that the result of a proceeding would have been different is a 'probability sufficient to undermine confidence in the outcome' " of the proceeding. *Simpson*, 204 Ill. 2d at 556 (quoting *Bagley*, 473 U.S. at 682).

¶ 36 Initially, we note that defendant argues that the circuit court made an improper reliability determination as to Summit at the second stage of postconviction proceedings rather than waiting to make that determination following an evidentiary hearing. However, the record reveals that the court was attempting to determine whether any other evidence supported Summit's statement, made in a civil proceeding, that she had given explosives belonging to defendant to the police. The court noted that it had no idea of Summit's credibility and inquired whether the detective who allegedly received the explosives had been "nail[ed] down." In other words, the court wanted to know if postconviction counsel had contacted the detective or been able to obtain any additional documentation in support of the claim; postconviction counsel answered in the negative. See *Pendleton*, 223 Ill. 2d at 473 (all well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true).

¶ 37 Here, defendant's claim rests upon the answer to an interrogatory filed in 1996 in a civil lawsuit Summit filed against defendant. The interrogatory stated, *inter alia*, that Summit gave a bag of explosives belonging to defendant to Detective Hennelly. Although defendant argues that the fact that Summit turned over a bag of explosives that she claimed belonged to defendant to police "would have been favorable to the defense" because it "gives rise to an inference that Summit was actively trying to frame defendant," we question defendant's conclusion that this evidence would have been favorable to him.

¶ 38 At trial, the evidence established that defendant and Summit's foster daughter Susan had ended their relationship, that Summit and defendant did not get along, and that shortly after defendant left the bar's restroom, there was an explosion. The addition of evidence that Summit removed a bag of explosives belonging to defendant from property that she was storing for Susan

and gave that bag to Detective Hennelly would not have "put the whole case in such a different light as to undermine confidence in the verdict" (*Kyles v. Whitley*, 514 U.S. 419, 435 (1995)), considering there is no indication when Summit turned over the explosives, *i.e.*, prior to, during, or after trial.

¶ 39 In any event, defendant's speculative argument that the fact that Summit turned over explosives belonging to defendant to the police was evidence that she framed him for the explosion is not enough to undermine confidence in the outcome of defendant's trial when it was undisputed that defendant was in the bar that night and Summit and Janes testified that defendant was in the bathroom immediately before the explosion. At best, this additional evidence might have gone to Summit's general credibility, but the fact that Summit and defendant did not like each other was already before the jury. See *People v. Harris*, 206 Ill. 2d 293, 312-13 (2002) (defendant failed to make a substantial showing of a constitutional violation under *Brady* where the undisclosed evidence of the witness's substance abuse was cumulative to other evidence challenging his credibility).

¶ 40 Ultimately, however, we cannot conclude that there is any reasonable probability that the outcome of defendant's trial would have been different had information that he allegedly possessed explosives been disclosed. See *People v. Sanchez*, 169 Ill. 2d 472, 486 (1996) ("the standard for materiality under *Brady* is whether there is a reasonable probability that disclosure of the evidence to the defense would have altered the outcome of the proceeding"). Therefore, defendant has failed to make a substantial showing of a *Brady* violation (see *Domagala*, 2013 IL 113688, ¶ 35), and the circuit court properly denied him postconviction relief.

¶ 41 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 42 Affirmed.