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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 05 CR 18295
)	
JOHN BROWN,)	
)	The Honorable
Defendant-Appellant.)	Diane Gordon Cannon,
)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s denial of the defendant’s motion for leave to file a successive postconviction petition affirmed where the defendant failed to establish prejudice in not having previously raised the claims that the State failed to disclose the complete details of a plea agreement with a State’s witness and failed to make clear to the jury that the witness had yet to be sentenced and that the trial court was not bound by the plea deal.

¶ 2 The defendant, John Brown, appeals from the trial court’s denial of his motion for leave to file a successive postconviction petition (“motion for leave”) pursuant to section 122-1(f) of the Post-Conviction Hearing Act (“Act”) (725 ILCS 5/122-1(f) (2014)). On appeal, the

defendant argues that the trial court erred in denying him leave to file a successive postconviction petition, because he was prejudiced by the State's alleged failure to fully disclose the plea deal given to one of its witnesses and the State's alleged misrepresentations of that witness's plea deal status at the time of the defendant's trial. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4

The evidence presented against the defendant at trial and the procedural history of this case were recounted in detail in this court's orders on the defendant's direct appeal (*People v. Brown*, 1-07-3493 (2011) (unpublished order under Supreme Court Rule 23)) and the defendant's appeal from the first-stage dismissal of his initial postconviction petition (*People v. Brown*, 2015 IL App (1st) 131752-U). Accordingly, we restate only those facts necessary to the disposition of the matter before us.

¶ 5

The defendant was charged with and convicted of first degree murder in connection with the February 3, 2004, shooting death of Fred Hamilton, and he was sentenced to 50 years' imprisonment. The defendant's conviction was affirmed on direct appeal. *People v. Brown*, 1-07-3493 (2011) (unpublished order under Supreme Court Rule 23). On appeal from the first-stage dismissal of the defendant's initial postconviction petition, however, we reversed the trial court's decision and remanded the matter for second-stage proceedings. *People v. Brown*, 2015 IL App (1st) 131752-U. The current status of those proceedings is not apparent from the record currently before us.

¶ 6

On April 10, 2014, prior to our reversal of the trial court's dismissal of the defendant's initial postconviction petition, the defendant filed a *pro se* motion for leave to file a successive postconviction petition. In that motion and the attached proposed petition, the defendant alleges

that Alfred Marley, a co-defendant in the murder of Hamilton and one of the State's witnesses against the defendant, testified at trial that in exchange for his testimony against the defendant, the State had agreed to recommend a sentence of 27 years' imprisonment on Marley's guilty plea. In particular, Marley testified on direct examination:

“Q. You pled guilty in this case, did you not?

A. Yes, I did.

Q. And when you pled guilty in return for a recommendation by the State's Attorney's office in this case, correct?

A. Yes.

Q. What do you expect that recommendation to be?

A. 27 years.

Q. That's 27 years. And that's 100 percent time, correct?

A. Yeah.

MS. WALOWSKI: Q. 27 years, do you expect to serve the full 27 years?

THE WITNESS: A. Yeah.

MS. WALOWSKI: Q. Besides the recommendation from the State for that amount of time, have there been any other promises made to you in return for you being here to testify?

THE WITNESS: A. No.

Q. And your understanding is that the state's attorneys will recommend to Judge Cannon 27 years in exchange for your truthful testimony in front of this jury, isn't that right?

A. Yeah."

On cross-examination, defense counsel further focused attention on Marley's plea deal by eliciting the following testimony:

"Q. Today you know the assistant state's attorneys—today as you sit there you know that the assistant state's attorneys have agreed to recommend a sentence of 27 years?

A. Yeah.

Q. And the truth is you want as little time as you can get?

A. Anybody would.

Q. What you want to 27 or less?

A. Yeah, you could say that, yeah.

Q. And at some point that you have been negotiating you were hoping to get something about 27?

A. Mm-hmm.

Q. Also what you would like to do is to see if you can get your time at a place called Illinois River?

A. It's a penitentiary. Anyone of them.

Q. It's not a maximum security penitentiary, right?

A. Not that—I don't know.

Q. Well, you've been there before?

A. Yeah, but things change too.

Q. Once you left there on the time you were before you went to a work camp?

A. Right.

Q. And you are hoping that's what will happen for you this time?

A. No.

Q. You are hoping to do your time at Illinois River?

A. I want to go there. But if not, I'll be locked up regardless. So what you getting' at?"

¶ 7 Marley's plea deal was also a focus of the parties during closing arguments. The State, in its initial closing arguments, argued:

"You know what, when you look at Al Marley and you remember his demeanor and what he told you, and he's pled guilty in this case for his participation in the murder. He's pled guilty. He's going to serve 27 years in the Illinois Department of Corrections and he's in his 40s. He's not getting out until his late 60s."

In response, counsel for the defendant argued:

"And, ladies and gentlemen, [Marley's] still negotiating. Remember he was asked, you know you're going to get 27, but then it showed up that all through this process during the statement that he gave to the Assistant State's Attorney, during the deposition that Mr. Tuite did, during the deposition that I did, as less as I can get, 27 or less, about 27. Ladies and gentlemen, he's still negotiating and he's negotiating to do his time at a place where he knows he can do it, a place where he has been. He wants to go to the Illinois River. And, ladies and gentlemen, to do all of that, he has to put John Brown in this case. And to do all of that, a guy like Marley will."

The State replied in rebuttal:

“A deal, yeah, he made a deal for as little time as possible, sure he did. But as Ursula told you, he’s going to jail for 27 years for first degree murder that he pled guilty to. Pled guilty to murder. He didn’t catch a break. He caught a break on his sentencing maybe, but he’s going to jail as a murderer and he’s going to serve time as a murder[er] until he’s almost 70 years old. 27 years.”

¶ 8 In his motion for leave to file a successive postconviction petition, the defendant further claimed that in late 2013 or early 2014, he subsequently learned through his sister that Marley was later sentenced to only 20 years’ imprisonment. Based on that, the defendant alleged that Marley lied about the terms of his agreement with the State and that the prosecution and the trial court confirmed this inaccurate information to the jury. According to the defendant, this perjured testimony and the State’s permitting Marley to testify falsely constituted a *Brady* violation, a denial of the defendant’s due process rights, and prosecutorial misconduct. The defendant argued that because Marley’s testimony was the only evidence linking him to Hamilton’s murder, had the jury heard the actual terms of the agreement between Marley and the State, there was a likelihood that the defendant would not have been found guilty.

¶ 9 In a written opinion dated February 25, 2015, the trial court denied the defendant’s motion for leave to file a successive postconviction petition. In the opinion, the trial court found that, accepting the defendant’s allegations as true, there existed cause for the defendant not having previously raised the issue. Specifically, the trial court found that the defendant, having been incarcerated without internet access, was unable to access the website for the Illinois Department of Corrections, which would have revealed that Marley received a 20-year sentence

instead of 27 years. This lack of internet access and the “sluggishness” of the defendant’s sister in discovering Marley’s true sentence constituted cause according to the trial court.

¶ 10 Despite finding cause, the trial court concluded that defendant was not entitled to file a successive postconviction petition because he failed to demonstrate that he was prejudiced by the alleged errors. Specifically, the trial court found that Marley did not commit perjury as alleged by the defendant, because Marley never testified that he had received a 27-year sentence, but instead merely testified that the State agreed to recommend a 27-year sentence. In addition, the trial court concluded that even if Marley had perjured himself regarding the length of his sentence, Marley’s otherwise detailed and incriminating testimony would not have been diminished by whether he received 20 or 27 years in exchange for his testimony.

¶ 11 With respect to the defendant’s claim that State violated the strictures of *Brady v. Maryland*, 373 U.S. 83 (1963), by allowing Marley to testify falsely, the trial court found that the defendant’s claim was less of a *Brady* claim for withholding information and more of a claim of misconduct by allowing Marley to falsely testify. In that sense, the defendant’s claim necessarily failed based on the trial court’s conclusion that Marley did not testify falsely. The trial court further found, however, that even when considered in the context of *Brady*, the defendant’s claim failed because the alleged perjury was not sufficient to undermine the confidence in the outcome of the defendant’s trial, based on the overwhelming evidence of the defendant’s guilt.

¶ 12 The defendant then brought this timely appeal.

¶ 13 ANALYSIS

¶ 14 On appeal, the defendant argues that the trial court erred in denying him leave to file a successive petition, because he was prejudiced by the State’s failure to fully disclose the plea

deal given to Marley and the State's misrepresentations in closing arguments of Marley's plea deal status at the time of the defendant's trial. We disagree.

¶ 15 Generally, a defendant is permitted to file only one postconviction proceeding. *People v. Edwards*, 2012 IL 111711, ¶ 22. Section 122-1(f) of the Act, however, permits a defendant to file a successive postconviction petition with leave of court. 735 ILCS 5/122-1(f). To obtain such leave, the defendant must demonstrate cause for failing to raise the claim in his initial postconviction petition and prejudice to him resulting from that failure. *Id.* Section 122-1(f) further explains the cause and prejudice requirements:

“For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) 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.*

¶ 16 The burden to obtain leave to file a successive postconviction petition is on the defendant (*Edwards*, 2012 IL 111711, ¶ 24), and to meet the cause-and-prejudice requirement, a defendant must allege facts demonstrating cause and prejudice and must submit sufficient documentation to allow the trial court to determine that cause and prejudice exist (*People v. Smith*, 2014 IL 115946, ¶ 34-35). In other words:

“leave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings.” *Id.* at ¶ 35.

In determining whether the defendant has met this burden, the court must take all well-pleaded facts and supporting affidavits as true. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25. Our review of the trial court's denial of the defendant's motion for leave to file a successive postconviction petition is *de novo*. *Id.*

¶ 17 The defendant first argues that the trial court erred in denying his motion for leave, because he was prejudiced by the State's failure to disclose the complete deal between Marley and the State. Under *Brady*, 373 U.S. at 87, the State violates a defendant's due process rights when it withholds material evidence favorable to the defendant. This holding has been applied where the State has failed to disclose its leniency agreement with a State's witness and/or has allowed a State's witness to testify falsely regarding the existence of a leniency agreement. See *People v. Diaz*, 297 Ill. App. 3d 362, 370-72 (1998). The defendant's contention in this respect fails on several fronts.

¶ 18 First, the defendant fails to make any allegations or present any documentation evidencing what the State disclosed as the terms of the deal with Marley versus what the deal actually was. This, of course, makes it impossible for us to assess whether any *Brady* violation occurred and, in turn, whether the defendant is prejudiced by his failure to include the claim in his initial postconviction petition.

¶ 19 Second, instead of alleging a specific discrepancy between what was disclosed to him by the State and what the actual deal between the State and Marley was, the defendant simply argues that a *Brady* violation must have occurred because Marley received a sentence other than the 27 years to which he testified. We disagree that such a conclusion is dictated by these facts. Marley testified that he had pled guilty in the case against him and was testifying against the defendant in exchange for the State *recommending* a 27-year sentence in his case. Although he

testified that he expected to serve the full 27 years, he also testified on cross-examination that he hoped to receive a lesser sentence and to be placed at a specific prison. This testimony made abundantly clear that Marley had not yet been sentenced and that although the State had agreed to *recommend* a 27 year sentence, Marley's ultimate sentence had yet to be determined or imposed. Thus, the fact that Marley ultimately received a 20-year sentence does not necessitate a conclusion that the State or Marley lied, because there was never any testimony that the State had guaranteed that Marley would receive a 27-year sentence.

¶ 20 As the defendant repeatedly points out on appeal, the trial court is not bound by the terms of a plea agreement. See *People v. Walker*, 256 Ill. App. 3d 466, 468 (1993); see also Ill. S. Ct. R. 402(d)(3) (eff. July 1, 1997). Accordingly absent allegations or documentation that the State promised Marley something other than a mere recommendation for 27 years or that the State ultimately recommended something other than 27 years during Marley's sentencing, there is nothing to suggest that Marley's testimony was false or that the State hid some terms of the agreement with Marley. Rather, the more likely explanation (given the defendant's failure to provide sufficient allegations or documentation) is that the trial court rejected the 27-year recommendation by the State and imposed a 20-year sentence on its own accord. Accordingly, the defendant has failed to carry his burden of establishing prejudice in this respect.

¶ 21 The defendant next contends that the State misrepresented the plea agreement status of Marley during closing arguments by portraying a high level of certitude that Marley would, in fact, receive and serve a 27-year sentence, suggesting to the jury that the State's agreement with Marley was a "done deal." We initially note that the State contends that the defendant did not raise this issue in his motion for leave and, thus, it is waived. Giving the defendant the benefit of the doubt, we conclude that this contention could arguably be encompassed in the defendant's

contentions that the State made “fraudulent misrepresentations,” “verified” Marley’s false testimony during closing arguments, engaged in prosecutorial misconduct, and allowed Marley’s “false testimony to go forward uncorrected.”

¶ 22 The defendant relies on the State’s closing argument statements that Marley was “going to serve 27 years” and “he’s going to jail for 27 years” to argue that the State represented a level of certitude that misled the jury about the finality of Marley’s plea deal. According to the defendant, the State should have clarified to the jury that the trial court was not bound to accept the terms of the agreement between the State and Marley. Again, we conclude that the defendant has failed to carry his burden of demonstrating prejudice in this respect.

¶ 23 First, the State is entitled to argue reasonable inferences during closing arguments. *People v. Pasch*, 152 Ill. 2d 133, 184 (1992). Given the undisputed testimony that the State agreed to recommend a 27-year sentence and that Marley expected to serve the full 27 years, we hardly think it unreasonable to infer that he would, in all likelihood, serve 27 years. Moreover, absent any allegations or documentation that the deal between the State and Marley was for something other than the 27-year recommendation, there was no way for the State to know that the trial court would reject the recommendation and impose a 20-year sentence in its place.

¶ 24 The defendant’s contention that the State’s failure to clarify for the jury that Marley’s deal was not final and that the trial court was not bound by the terms of the plea deal resulted in misleading the jury on both facts and law is also without merit. The defendant has offered no authority for the proposition that his due process rights are violated if the State fails to explain to the jury that plea deals do not bind the trial court. Moreover, we observe that the lack of finality in Marley’s deal with the State was very readily apparent from both Marley’s testimony and the closing argument of defense counsel. As discussed above, Marley testified that although he

expected to serve the full 27 years, he held out hope of a lesser sentence and being placed at a particular prison. This testimony makes clear that the 27-year sentence was not a “done deal.” Defense counsel apparently agreed with the import of this testimony, as he argued the following in closing:

“And, ladies and gentlemen, [Marley’s] still negotiating. Remember he was asked, you know you’re going to get 27, but then it showed up that all through this process during the statement that he gave to the Assistant State’s Attorney, during the deposition that Mr. Tuite did, during the deposition that I did, as less as I can get, 27 or less, about 27. Ladies and gentlemen, he’s still negotiating and he’s negotiating to do his time at a place where he knows he can do it, a place where he has been. He wants to go to the Illinois River. And, ladies and gentlemen, to do all of that, he has to put John Brown in this case. And to do all of that, a guy like Marley will.”

Based on this argument and Marley’s testimony, we believe that the defendant has failed to carry his burden of establishing prejudice based on the claim that the jury was misled by the State’s closing arguments. To the extent that there existed any chance of the jury being misled despite Marley’s testimony and the defendant’s closing argument, we note that the trial court cured the error by specifically instructing the jury that statements made by the attorneys in closing arguments are not evidence and that any statement made during closing arguments that are not based on the evidence should be disregarded. See *People v. Peeples*, 155 Ill. 2d 422, 482 (1993).

¶ 25 Based on this argument and Marley’s testimony, we believe that the defendant has failed to carry his burden of establishing prejudice based on the claim that the jury was misled by the State’s closing arguments. The jury heard Marley subjected to vigorous cross-examination regarding the fact that his plea deal was not final and that he hoped to receive a sentence less

than 27 years and to be sent to a particular prison. The jury also heard defense counsel explicitly argue that Marley had incentive to incriminate the defendant in return for a better result on his plea deal. Despite hearing all of this, the jury apparently chose to believe Marley and convict the defendant. Accordingly, the defendant has not established that he was prejudiced, *i.e.*, any likelihood that the result would have been different.¹

¶ 26 To the extent that there existed any chance of the jury being misled despite Marley's testimony and the defendant's closing argument, we note that the trial court cured the error by specifically instructing the jury that statements made by the attorneys in closing arguments are not evidence and that any statement made during closing arguments that are not based on the evidence should be disregarded. See *People v. Peeples*, 155 Ill. 2d 422, 482 (1993).

¶ 27 Having concluded that the trial court did not err in determining that the defendant failed to establish prejudice entitling him to file a successive postconviction petition, we need not address the State's alternative ground for affirmance—that the defendant failed to establish cause for failing to bring the present claim in his initial postconviction petition.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 30 Affirmed.

¹ We note that Marley confessed almost three years before the Brown trial began and instead of being sentenced immediately, he was held at the Cook County jail for more than 900 days, allowing him credit for time served. We also note that the sentence he eventually received from the trial court was 20 years, not 27 years. The law in effect at the time required defendants convicted of first-degree murder to serve 100% of their sentence. However, other serious crimes did permit parole at 75% of the sentence, and 27 years at 75% is 20. The defendant has not and most likely cannot show a secret deal between the State and Marley, but the sequence of events is curious at least.