2017 IL App (1st) 153202-U

No. 1-15-3202

Order filed August 2, 2017

Third 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. 11 MC1 247182
	)	
WILLIAM VIRAMONTES,	)	Honorable
	)	Peggy Chiampas,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's denial of defendant's section 2-1401 petition for relief from judgment is affirmed where defendant failed to set forth newly discovered, material, noncumulative and conclusive evidence to support his claim of actual innocence.

¶ 2 Defendant William Viramontes appeals from the trial court's denial of his petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). On appeal, defendant contends that the court erred in denying his

petition because he set forth a meritorious claim of actual innocence based on newly discovered evidence. For the following reasons, we affirm.

¶ 3 Following a 2012 bench trial, defendant William Viramontes was found guilty of resisting a peace officer and aggravated assault of a peace officer. On July 30, 2012, he was sentenced to 100 days' in the Cook County Department of Corrections. We affirmed defendant's convictions on direct appeal over his contention that the State failed to prove him guilty beyond a reasonable doubt because a video taken by an unknown bystander impeached the police officers' testimony, rendering their testimony incredible. See *People v. Viramontes*, 2013 IL App (1st) 123014-U.

¶ 4 The events giving rise to the misdemeanor charges against defendant occurred on September 4, 2011, during the Fiesta Borinquen festival on Division Street. Defendant was arrested on that date and subsequently charged, in relevant part, with resisting a peace officer, aggravated assault of a peace officer, and mob action. On November 30, 2011, the State filed answers to discovery disclosing that it "may or may not call" Chicago police officers Lapadula, Brady, and Bragiel as witnesses at trial. In addition, the State indicated that "the People are unaware of any evidence or witnesses which may be favorable to the Defense of the Cause." Because we set forth the facts in detail in defendant's direct appeal, we recount them here to the extent necessary to resolve the issue raised in this appeal.

¶ 5 At trial, Chicago police officer Marc Lapadula testified that, about 8:40 p.m. on September 4, 2011, he was on patrol at the Fiesta Borinquen festival on Division Street with his partner, Officer Brady. Both officers were in full uniform. The festival was to end at 9 p.m., and as people were leaving, multiple fights occurred on the street. Officer Lapadula saw defendant

engaged in a fist fight, scuffling and fighting with five or six other men. As the officer approached, all of the men scattered except for defendant and one other man. Defendant pounded his chest with his fist and adopted an aggressive fighting stance. Officer Lapadula grabbed defendant's left wrist in an attempt to take him into custody for mob action. Defendant immediately pulled away from the officer and knocked a female officer to the ground in the process. Defendant then pulled back his right arm, made a fist, and attempted to punch Officer Lapadula. In response, Officer Lapadula struck defendant in the face with the open palm of his hand three times to quickly incapacitate him. Officer Lapadula acknowledged that defendant's nose may have been bleeding. The officer then tackled defendant and brought him down to the ground. Defendant continued moving on the ground and pulled away his arms from the officer. After a few seconds, Officers Lapadula and Brady gained control of defendant's arms and handcuffed him while other officers assisted. See *Viramontes*, 2013 IL App (1st) 123014-U, ¶ 3.

¶ 6 Chicago police officer Jessica Brady testified to substantially the same sequence of events as Officer Lapadula. Officer Brady stated that she saw defendant push and strike several people, and pound his chest with his fist. About 6 to 12 people were standing around defendant. Officer Brady saw defendant take an aggressive stance towards other people on the street and determined that he was the primary aggressor, who was initiating altercations with several people. In addition to beating his chest, defendant yelled and screamed obscenities, and pushed people with his hands. When Officer Brady approached defendant with Officer Lapadula, defendant faced the officers and took an aggressive stance. The officers attempted to place defendant in custody, but he pulled away from them. Defendant then pulled back his right arm and attempted to punch Officer Lapadula. Officer Lapadula struck defendant in the chest with his

open hand a couple times. The officers then took defendant down to the ground. Defendant tried to struggle away from the officers, but they were able to handcuff him. See *Id.* ¶ 4

¶ 7 After the State rested, defendant moved for a directed finding on all the charges, which the trial court granted as to the charge of mob action.

¶ 8 Defendant testified that some time after the events in question he found a video on YouTube that accurately depicted his arrest. The video was admitted into evidence and played in open court. Defendant identified himself 44 seconds into the video as a man holding a cellular phone. Defense counsel stopped the video at 1 minute and 10 seconds, and defendant testified that the video showed a police officer grabbing his cell phone. Defendant denied that he resisted arrest or attempted to strike a police officer. He testified that the officer struck him in the face, which caused him to bleed.

¶ 9 Defendant acknowledged that he did not record the video or post it on YouTube, did not know who did, and did not know if the video had been edited before being posted. Defendant stated that he attended the festival with his girlfriend and her aunt. As his girlfriend was walking ahead of her aunt and defendant, a commotion arose in the area where she had walked. Defendant walked towards the commotion to look for his girlfriend. As he did so, defendant was holding his cell phone in his hand. A large number of people and police officers were in the area, but he did not see any fighting. Defendant tried to record the commotion on his cell phone and denied participating in it. A police officer told defendant to stop recording and put away his cell phone. The officer then grabbed defendant's hand and tried to take his phone. Six or seven police officers grabbed defendant, threw him to the ground, stomped on his back, and handcuffed him.

One officer asked "should I hit him?" and punched defendant in the nose. Other officers hit defendant's back with a stick and put their feet and knees into his back.

¶ 10 After the defense rested, the trial court viewed the video a second time. The State then presented certified copies of defendant's prior convictions for burglary, possession of a controlled substance and criminal trespass to a vehicle.

¶ 11 The trial court found that the video "completely" corroborated the testimony of Officers Lapadula and Brady. The court found that the video clearly showed that the officers credibly testified that there were numerous altercations on the street and that they observed defendant engaged in a commotion. It further found that the video did not show defendant pounding his chest because that portion of the incident was not recorded. The court stated that defendant was "not truthful" and "[h]e did not testify credibly and was very evasive." The video further corroborated Officer Lapadula's testimony in that, about 22 seconds after the video showed defendant holding a phone and speaking with a police officer, it depicted him in an aggressive stance, actively resisting arrest. The video did not show defendant swinging at the officer. The court stated that it was clear that the person who recorded the video tried to record as much as possible, and continuously recorded the entire street, which was very crowded and had a heavy police presence. The court noted that Officer Lapadula honestly testified that he struck defendant and possibly caused him to bleed. Based on this evidence, the trial court found defendant guilty of resisting a peace officer and aggravated assault of a peace officer.

¶ 12 On July 30, 2012, the court sentenced defendant to 100 days in the Cook County Department of Corrections.

¶ 13 Defendant filed a motion for a new trial on August 17, 2012, arguing the State failed to prove him guilty beyond a reasonable doubt because the video impeached the police officers' testimony. In denying defendant's motion, the trial court noted that the video was not continuously focused on the scene involving defendant, and then reiterated its credibility determinations and that the video corroborated the testimony of Officer Lapadula.

¶ 14 On direct appeal, defendant contended that the State failed to prove him guilty beyond a reasonable doubt because the video impeached the police officers' testimony. After reviewing the video, this court "completely agreed" with the trial court's assessment of the video and found "absolutely no merit" in defendant's claim that, because specific acts did not appear on the video, the video impeached or contradicted the police officers' testimony. See *Viramontes*, 2013 IL App (1st) 123014-U, ¶¶ 18-19.

¶ 15 Defendant then filed a complaint in federal court alleging that Officers Lapadula and Brady used excessive force during his arrest and malicious prosecution for mob action in violation of 42 U.S.C. § 1983 and the fourth amendment. *Viramontes v. City of Chicago*, No. 13 C 6251, 2015 WL 4637958 (N.D. Ill. Aug. 4, 2015). During discovery, Chicago police officer Laura Bragiel was deposed. Officer Bragiel testified that prior to defendant's arrest, she noticed defendant "because he was very loud, screaming obscenities [and] flailing his arms." She recalled that of the people in the crowd, defendant was the loudest and "most disruptive." In her deposition testimony, Officer Bragiel described the events surrounding defendant's arrest as follows:

> "A: But I was in close proximity. Eventually it got to the point he was not responding to any officers' verbal commands. And I'm not quite certain how it

> actually progressed. Like I said, I was in the middle kind of telling people to back off and then kind of going back and forth with him. There were other people trying to get in the middle of the officers trying to get him to leave and himself, so I was trying to, you know, kind of get people out of the way. At some point officers attempted to handcuff him and everyone fell down to the ground, pushing me down." [C231: 18-19].
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> * * *
>
> Q: Was he more or less in your field of view the entire time that you were on the 2600 block of Division?
>
> A: On — he was in close proximity, yes, but as I said, I was, you know, turning my back here and there to kind of get other people out of the way, so, no, I would not say that I was looking at him the entire time, no." [C231: p. 19].

¶ 16 Officer Bragiel clarified that "in close proximity" meant defendant was no more than two car lengths away. She further testified that she did not have any involvement in defendant's criminal case, and that she never spoke about defendant's arrest with Officers Lapadula and Brady. Officer Bragiel explained that "right after the arrest occurred, that day, [she] gave Officers Lapadula and Brady [her] information following a small injury [she] had. Besides that, no, [she] never spoke with anyone about it again."

¶ 17 Following a jury verdict in favor of the officers, defendant filed a motion for a new trial, which the court denied. Defendant appealed and the federal court of appeals affirmed the trial court's denial of his motion for a new trial. See *Viramontes v. City of Chicago*, 840 F.3d 423, 426 (7th Cir. 2016).

¶ 18 On July 10, 2015, defendant filed a "Motion For Relief From Judgment And To Vacate His Conviction" pursuant to section 2-1401 of the Code. In his section 2-1401 petition, defendant sought relief based on newly discovered evidence of his actual innocence. He alleged that, before his 2012 trial, the State fraudulently concealed evidence of his innocence by failing to disclose Officer Bragiel's exculpatory testimony in violation of their discovery obligations as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). Defendant asserted that his counsel discovered that Officer Bragiel's testimony would have exculpated him when counsel deposed the officer in his federal case. In support of his petition, defendant attached Officer Bragiel's deposition testimony taken during his federal case and portions of her trial testimony. Defendant maintained that "the newly discovered exculpatory testimony of Chicago Police Officer Laura Bragiel, as well as, the blatantly contradictory testimony of the two complaining witnesses against Petitioner warrants the granting of Plaintiff's motion."

¶ 19 The State filed a response to defendant's petition, arguing that it was essentially a motion for a new trial, which was untimely and improper because defendant filed it almost three years after the court denied his initial motion for a new trial. Regarding the merits of defendant's claim, the State pointed out that it disclosed Officer Bragiel as a potential witness nearly one year prior to defendant's 2012 criminal trial. The State argued that the fact that defendant did not "do his own due diligence and trial preparations" did not constitute "fraudulent concealment" by the State. The State also argued that Officer Bragiel's testimony was not exculpatory where she admitted in her deposition testimony that she was not observing defendant the entire time during his arrest.

¶ 20 After argument, the circuit court denied defendant's petition and this appeal followed.

¶ 21 On appeal, defendant contends that the trial court abused its discretion in denying his section 2-1401 petition because a preponderance of the evidence showed that the State withheld new and material exculpatory evidence, which, if considered with the evidence at trial, would probably have lead to a different result. Specifically, defendant argues that Officer Bragiel's account of defendant's arrest provided in her deposition testimony during his federal civil lawsuit offered a version of events completely different from the officers who testified at his criminal trial.

¶ 22 The State initially responds that the trial court properly denied defendant's petition because it was untimely. Specifically, the State argues that defendant failed to file his petition within two years after the entry of his convictions on July 30, 2012.

¶ 23 Section 2-1401 "establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Although a section 2-1401 petition is usually characterized as a civil matter, relief under section 2-1401 extends to criminal cases. *Vincent*, 226 Ill. 2d at 6. However, pursuant to section 2-1401(c) defendant must file his petition within two years after the entry of the judgment being challenged. 735 ILCS 5/2-1401(c) (West 2014)). Generally, petitions filed beyond the two-year period will not be considered. *People v. Gosier*, 205 Ill. 2d 198, 206 (2001). Our supreme court has emphasized that: "[T]he two year limitation mandated by section 2-1401 and its predecessor, section 72 [citation], must be adhered to in the absence of a clear showing that the person seeking relief is under legal disability or duress or the grounds for relief are fraudulently concealed." *Gosier*, 205 Ill. 2d at 206 (quoting *People v. Caballero*, 179 Ill. 2d 205, 210 (1997)). A petitioner may also seek relief beyond the two-year limitation period where the judgment

being challenged is void or where the opposing party has waived the limitation period. *Gosier*, 205 Ill. 2d at 206-07.

¶ 24 Here, defendant's section 2-1401 petition was filed on July 10, 2015, almost three years after the judgment of conviction was entered and his sentence was imposed. Defendant does not argue that his convictions are void. Rather, he argues that the two-year limitation period should be tolled because the State fraudulently concealed Officer Bragiel's testimony.

¶ 25 After examining the record, we find that we need not consider defendant's fraudulent concealment argument where the State waived the timeliness issue by not raising it before the trial court. See *People v. Pinkonsly*, 207 Ill. 2d 555, 562 (2003) ("If the party opposing the section 2-1401 petition does not raise the limitations period as a defense, it may be waived"). Although in its response to defendant's petition the State argued that defendant's petition was untimely, it did so in the context of characterizing defendant's petition as, essentially, a motion for a new trial. As such, the State did not rely on the two-year limitation period in section 2-1401(c) or, for that matter, make any reference to section 2-1401. We note that, had the State done so, defendant could have amended his petition accordingly and any factual disputes could have been resolved for this court's consideration. See *Pinkonsly*, 207 Ill. 2d at 564. Accordingly, the State waived its timeliness argument and we turn to the merits of defendant's petition.

¶ 26 The standard of review for a section 2-1401 petition depends on whether it presents a factual or legal challenge to a final judgment or order. *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31. Where the petition raises a purely legal challenge to a final order, the standard of review is *de novo*. *Id.* ¶ 47; see also *People v. Vincent*, 226 Ill. 2d 1, 18 (2007) (*de novo* review applied to trial court's *sua sponte* dismissal of a section

2-1401 petition on the face of the pleading, which asserted that the defendant's sentence was void). However, as our supreme court in *Walters* explained, "a section 2-1401 petition that raises a fact-dependent challenge to a final judgment or order must be resolved by considering the particular facts, circumstances, and equities of the underlying case." *Walters*, 2015 IL 117783, ¶ 50. In such instances, as is the case here, we review the trial court's order for an abuse of discretion under the standards set forth by in *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986). See *id.* ¶¶ 51. "A trial court abuses its discretion when it acts arbitrarily or where no reasonable person would take its view." *People v. Stoffel*, 389 Ill. App. 3d 238, 244 (2009).

¶ 27 In order to obtain relief under section 2-1401, defendant's petition must set forth specific factual allegations to support: (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. *Airoom*, 114 Ill. 2d at 220-21. A section 2-1401 petition requires proof by a preponderance of the evidence (*Walters*, 2015 IL 117783, ¶ 51) and "must be supported by affidavit or other appropriate showing as to matters not of record" (735 ILCS 5/2-1401(b) (West 2014)).

¶ 28 In his petition, defendant raised a claim of actual innocence. See *People v. Boclair*, 202 Ill. 2d 89, 102 (2002) (claims of actual innocence may be raised in a section 2-1401 petition). In order to succeed on a claim of actual innocence, a defendant must present evidence that is: (1) newly discovered; (2) material; (3) not merely cumulative; and (4) of such conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. In *Coleman*, our supreme court clarified that "[n]ew means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.]

Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. [Citation.]" *Id.*

¶ 29 Here, the trial court did not abuse its discretion in denying defendant's petition where Officer Bragiel's testimony was not newly discovered, material, noncumulative or of such conclusive character that it would probably change the result on retrial. The record shows that almost eight months prior to defendant's 2012 trial, the State disclosed three potential trial witnesses: Chicago police officers LaPadula, Brady, and Bragiel. Thus, through the exercise of due diligence, defendant could have discovered Officer Bragiel's allegedly exculpatory version of events before trial. As such, the trial court could readily have concluded that defendant's section 2-1401 petition did not set forth any new evidence in support of his actual-innocence claim.

¶ 30 Defendant nevertheless argues that his failure to discover this evidence prior to trial was based on the State's indication that it was "unaware of any evidence or witnesses which may be favorable to the Defense of the Cause." Defendant maintains that the State affirmatively misrepresented that it did not possess any exculpatory or impeachment information and that this statement "misled the defense into a belief that the State expected Officer Bragiel to testify in conformity with the false narratives of Officers Brady and Lapadula." Regardless of whether defendant believed that Officer Bragiel's testimony would have been unfavorable or "in conformity with" that of the other two potential witnesses, we fail to see how the State's representation excused defendant's failure to exercise due diligence in discovering the nature of

a potential witness's testimony. Accordingly, we are not persuaded by defendant's argument that Officer Bragiel's testimony constitutes new evidence where it could have been readily discovered earlier through the exercise of due diligence.

¶ 31 This aside, even if Officer Bragiel's testimony could be considered newly discovered, it is not material, noncumulative or of such conclusive character that it would probably change the result on retrial. Rather, Officer Bragiel's testimony regarding the events she witnessed was generally corroborative of the testimony provided by Officers Lapadula and Brady.

¶ 32 In her deposition testimony, Officer Bragiel stated that, on the date in question, she noticed defendant "because he was very loud, screaming obscenities [and] flailing his arms." According to Officer Bragiel, defendant was the loudest and "most disruptive" member of the crowd. She stated, on more than one occasion, that she was not looking at defendant during the entire encounter. She explained that, although defendant "was in close proximity," she was "turning [her] back here and there to kind of get other people out of the way" and was not "looking at [defendant] the entire time[.]" As such, although Officer Bragiel stated that she did not see defendant attempt to punch Officer Lapadula or "take a fighting stance," this does not meant that defendant did not try to punch Officer Lapadula or that defendant did not take a "fighting stance." Importantly, Officer Bragiel never stated that defendant did not try to punch Officer Lapadula or that defendant did not take a "fighting stance." Rather, she testified that she did not see defendant engage in such acts because her attention was not focused solely on defendant during the encounter. Accordingly, Officer Bragiel's testimony is not relevant or probative of defendant's innocence, nor does it add to what the trier of fact heard from Officers Lapadula and Brady. Therefore, her testimony is not of such conclusive character that it would

probably change the result on retrial and the trial court did not abuse its discretion in denying defendant's petition based on actual innocence.

¶ 33 In reaching this conclusion, we are not persuaded by defendant's reliance on *People v. Cotell*, 298 Ill. 207 (1921). Here, unlike in *Cotell*, defendant was not convicted on "dubious evidence" and, as mentioned, the allegedly newly discovered evidence does not go "to the very foundation of the People's case" such that reversal is warranted. See *Cotell*, 298 Ill. at 216-18.

¶ 34 Lastly, we briefly note that we are mindful of defendant's contention that pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution had a duty to produce exculpatory or impeaching evidence in its possession. The State argues that, to the extent defendant raises a due-process based *Brady* violation, section 2-1401 does not provide an avenue of redress for defendant's allegations of constitutional violations. Even if section 2-1401 did provide defendant a means to assert this claim, the record does not support that a *Brady* violation occurred. As mentioned, the record shows that the State disclosed Officer Bragiel as a potential witness about eight months before defendant's 2012 trial. Moreover, Officer Bragiel testified that she did not have any involvement in defendant's criminal case, and that she never spoke about defendant's arrest with Officers Lapadula and Brady.

¶ 35 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.