

NOTICE  
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2018 IL App (5th) 150340-U

NO. 5-15-0340

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 94-CF-611
	)	
KEITH M. BUCKLES,	)	Honorable
	)	Clarence W. Harrison II,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE MOORE delivered the judgment of the court.  
Justices Welch and Overstreet concurred in the judgment.

**ORDER**

¶ 1 *Held*: Judgment denying the defendant's motion for leave to file successive postconviction petition affirmed where no *Brady* violation occurred because the defendant failed to show prejudice when subject evidence was inadmissible and therefore immaterial.

¶ 2 The defendant, Keith M. Buckles, appeals the June 4, 2015, judgment of the circuit court of Madison County that denied his motion for leave to file a successive postconviction petition. For the following reasons, we affirm.

¶ 3 **FACTS**

¶ 4 Following a jury trial, the defendant was convicted of four counts of armed robbery (720 ILCS 5/18-2(a) (West 1994)). On November 1, 1994, the defendant filed a

posttrial motion which included, *inter alia*, an allegation that the trial court committed error in giving certain jury instructions over the objection of the defendant. This original posttrial motion was amended several times after the defendant dismissed his court-appointed attorney and decided to proceed *pro se*. The defendant filed an appeal from the judgment, and this court affirmed. *People v. Buckles*, No. 5-95-0098 (1998) (unpublished order under Supreme Court Rule 23).

¶ 5 On December 3, 1998, the defendant filed a postconviction petition in the circuit court. The petition was dismissed by the circuit court and the dismissal was affirmed by this court. *People v. Buckles*, No. 5-99-0030 (2000) (unpublished order under Supreme Court Rule 23). The defendant then filed a petition for *habeas corpus*. This petition was also dismissed, and the dismissal was affirmed on appeal. *Buckles v. Cowan*, No. 5-00-0140 (2001) (unpublished order under Supreme Court Rule 23).

¶ 6 Subsequently, the defendant filed a petition for relief from judgment, pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)), which was also dismissed, and the dismissal was affirmed by this court. *People v. Buckles*, No. 5-06-0550 (2007) (unpublished order under Supreme Court Rule 23).

¶ 7 On April 17, 2009, the defendant filed a motion for leave to file a successive postconviction petition. The circuit court denied the motion, which was affirmed by this court. *People v. Buckles*, No. 5-09-0251 (2010) (unpublished order under Supreme Court Rule 23). On May 18, 2015, the defendant filed another motion for leave to file a successive postconviction petition. The circuit court denied the motion in an order

entered on June 4, 2015. The defendant then filed this timely appeal. Additional facts will be set forth throughout the remainder of this order.

¶ 8

#### ANALYSIS

¶ 9 On appeal, the defendant argues that his motion for leave to file a successive postconviction petition should have been granted because there is newly discovered evidence that was not presented at the trial because the State committed a *Brady* violation (*Brady v. Maryland*, 373 U.S. 83 (1963)), which deprived him of the opportunity to present this evidence that is allegedly material because it points to an alternative suspect. "The question of whether to allow leave to file a successive postconviction petition is resolved on the pleadings, so our review of the denial of leave to file is *de novo*." *People v. Diggins*, 2015 IL App (3d) 130315, ¶ 7.

¶ 10 The Post-Conviction Hearing Act (Act) governs the filing of postconviction petitions. Section 122-3 of the Act states: "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2014). Moreover, "a ruling on a post-conviction petition has *res judicata* effect with respect to all claims that were raised or *could have been raised* in the initial petition." (Emphasis added.) *People v. Free*, 122 Ill. 2d 367, 376 (1988). "[T]he General Assembly's purpose in enacting this statute was an attempt to limit a defendant from filing frivolous petitions." *People v. Brockman*, 363 Ill. App. 3d 679, 688 (2006).

¶ 11 *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002), adopted a relaxation of this rule, which is now codified in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2014)). That section denotes a "cause-and-prejudice test" and provides as follows:

"Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his \*\*\* failure to bring the claim in his \*\*\* initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his \*\*\* ability to raise a specific claim during his \*\*\* initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his \*\*\* initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2014).

"It is clear that both elements or prongs of the cause-and-prejudice test must be satisfied in order for the defendant to prevail." *People v. Guerrero*, 2012 IL 112020, ¶ 15.

¶ 12 Here, the defendant argues that the State committed a *Brady* violation when it failed to disclose in pretrial discovery the result of a polygraph test administered to one Everett D. Whittenburg, in which Whittenburg was questioned about the armed robbery for which the defendant was convicted and was found to be "not telling the truth." The defendant argues that the cause-and-prejudice test is satisfied because the result of the polygraph test is newly discovered evidence which was not available to him at the trial and the evidence is material because it reveals an alternative suspect. He further argues that he was prejudiced because he was deprived of the opportunity to use the polygraph result at the trial or for impeachment purposes. The State responds that the polygraph result was immaterial because it was inadmissible and would not have led to any

admissible evidence. Therefore, the State's failure to disclose the result did not constitute a *Brady* violation and the defendant failed to establish the requisite prejudice to warrant leave to file the successive postconviction petition.

¶ 13 In *Brady v. Maryland*, the United States Supreme Court held that due process requires the State to disclose evidence that is favorable to the defendant and material to guilt or punishment. 373 U.S. 83, 87 (1963). "To establish a *Brady* violation, suppressed evidence must be both favorable to the accused and material." *People v. Hopley*, 182 Ill. 2d 404, 432 (1998). "Favorable evidence is material in this context 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). "A 'reasonable probability' of a different result is a 'probability sufficient to undermine confidence in the outcome.' " *Id.* at 433 (quoting *Bagley*, 473 U.S. at 682). "In making a materiality determination, a court considers the cumulative effect of all suppressed evidence favorable to the defense, rather than considering each piece individually." *Id.*

¶ 14 This case is akin to *People v. Pecoraro*, where the defendant argued that a *Brady* violation occurred when the State failed to reveal certain polygraph results to the defense. 175 Ill. 2d 294, 314 (1997). The defendant reasoned that knowing the polygraph results would have helped the defense counsel investigate the case. *Id.* at 315. The Illinois Supreme Court held that polygraph results are inadmissible evidence and the defendant's argument was purely speculative, making it "insufficient to establish a reasonable probability that the outcome of [the] trial would have been different." *Id.* Accordingly,

the defendant in *Pecoraro* failed to show that the polygraph results were material and had to be disclosed for purposes of the *Brady* doctrine. *Id.*

¶ 15 Here, the defendant cites *People v. Beaman*, where the Illinois Supreme Court found that a defendant's behavior during an attempted polygraph examination—along with several other pieces of evidence—were improperly suppressed, thereby resulting in a *Brady* violation. 229 Ill. 2d 56, 78 (2008). We find *Beaman* distinguishable from the instant case in several respects. In *Beaman*, there was no direct evidence, but only circumstantial evidence, linking the defendant to the crime. *Id.* at 66. In our case, testimony from the defendant's son that he committed the crime at the behest and with the assistance of the defendant constitutes direct evidence of the defendant's guilt. In *Beaman*, a police officer testified that he considered John Doe to be a viable suspect at the time of the defendant's trial. *Id.* at 67-68. Here, there was no such testimony that Whittenburg was ever a viable suspect.

¶ 16 In *Beaman*, the court held a *Brady* violation occurred only after considering "the cumulative effect of all the suppressed evidence rather than considering each item of evidence individually." *Id.* at 74. In particular, besides evidence that John Doe failed to complete a polygraph examination, he was charged with domestic battery and possession with intent to deliver marijuana prior to the defendant's trial, he had physically abused his girlfriend several times, and his use of steroids caused him to behave erratically. *Id.* It was the cumulative effect of all of this suppressed evidence that led the *Beaman* court to find that a *Brady* violation had occurred, *not* the effect of the evidence about the polygraph refusal in and of itself (*id.* at 81) unlike this case, where the defendant's "newly

discovered evidence" consists solely of the results of a polygraph that was administered to Whittenburg.

¶ 17 Moreover, the defendant in the instant case argues that suppressing the polygraph results deprives him of the opportunity to present it as evidence of Whittenburg as an alternative suspect in the case. We disagree. The victim testified that she falsely identified Whittenburg as the suspect in a lineup of 400 photographs. Accordingly, Whittenburg had already been identified by the defense prior to discovery of the polygraph evidence. Although we acknowledge that there is not an absolute ban on the introduction of polygraph examination evidence in criminal trials (see *People v. Baynes*, 88 Ill. 2d 225 (1981); see also *People v. Jefferson*, 184 Ill. 2d 486 (1998)), Illinois law establishes that "[e]vidence of an alternative suspect should be excluded as irrelevant \*\*\* if it is too remote or speculative." *Beaman*, 229 Ill. 2d at 75. "Generally, evidence is relevant if it tends to make the existence of any fact in consequence more or less probable than it would be without the evidence." *Id.* at 75-76. That is simply not the case here.

¶ 18 As the circuit court aptly noted, Whittenburg "was more than known at trial." Whittenburg's polygraph results—which are inadmissible as evidence—do not make the existence of any fact in consequence more or less probable than it would be without the polygraph results. See *id.* As noted, the victim testified that she falsely identified Whittenburg in the lineup, and the defendant's son implicated the defendant via testimony at the trial. Accordingly, the polygraph results are inadmissible and therefore immaterial for purposes of *Brady*. See *Pecoraro*, 175 Ill. 2d at 315. Moreover, the defendant's argument is purely speculative, thereby failing to establish a reasonable probability that

the outcome of the trial would have been different had the polygraph results been disclosed. See *id.*

¶ 19 The defendant failed to satisfy the prejudice prong of the cause-and-prejudice test. See 725 ILCS 5/122-1(f) (West 2014). See also *People v. Guerrero*, 2012 IL 112020,

¶ 15. The defendant further failed to show that the State committed a *Brady* violation. Accordingly, the circuit court properly dismissed the defendant's motion for leave to file a successive postconviction petition.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, we affirm the June 4, 2015, judgment of the circuit court of Madison County that dismissed the defendant's second motion for leave to file a successive postconviction petition.

¶ 22 Affirmed.