2019 IL App (1st) 161541-U

No. 1-16-1541

Order filed January 17, 2019

Fourth 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.13 CR 14455
	)	
BLAIR AIKENS,	)	Honorable
	)	Jeffrey L. Warnick,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's *sua sponte* dismissal of defendant's petition for relief from judgment is affirmed.

¶ 2 Defendant Blair Aikens appeals from the dismissal of his *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2014)). On appeal, defendant contends that the trial court erred by *sua sponte*

dismissing his petition when the indictment in the instant case was secured through perjured testimony before the grand jury. We affirm.

¶ 3 Following a jury trial, defendant was found guilty of two counts of unlawful use of a weapon by a felon and one count of armed habitual criminal.[1] He was sentenced to three concurrent 12-year prison terms. We affirmed on direct appeal. See *People v. Aikens*, 2017 IL App (1st) 143182-U. The recitation of the evidence presented at trial is taken from our disposition of that appeal.

¶ 4 The evidence at defendant's trial established that, on July 16, 2013, Evanston police officers Kyle Wideman and Corey McCray were traveling southbound on the 1800 block of Hovland Court when they observed two individuals walking eastbound through a vacant lot. Wideman and McCray later identified these men as defendant and Antoine Hill. Wideman testified he knew defendant and was aware that there was an outstanding warrant for defendant's arrest. Defendant and Hill ran, and Wideman pursued defendant on foot. During the chase, Wideman observed defendant toss an object over a fence and into the yard of a residence located on Hovland Court. Wideman ultimately took defendant into custody in a yard which was across the alley behind Hovland Court.

¶ 5 McCray, who followed Wideman during the chase, testified that he observed Wideman place defendant in custody, but did not observe defendant discard anything during the chase.

[1] In his brief, defendant states that appellate counsel has the record on appeal from defendant's direct appeal as a scanned electronic copy that has been copied onto a disk, and that a copy of that file was supplied to the State. Defendant further states that when the hard copy of the record from his direct appeal is obtained from the circuit court, the record on appeal in the instant case would be supplemented with that record. On February 2, 2018, this court allowed defendant's motion to consider the record filed in his direct appeal as part of the record in the instant appeal. However, that record had already been returned to the circuit court. As of December 12, 2018, the record on the instant case does not include the record from defendant's direct appeal.

Wideman and McCray also testified that, shortly after defendant was detained, they retraced defendant's steps. The officers gained access to the backyard on Hovland Court and there, on the northeast side of the yard, discovered a Ruger SR9.9 mm handgun with a chambered round. The northeast side of the yard was adjacent to the vacant lot through which defendant fled. A second handgun, bearing Hill's fingerprints, was subsequently recovered by a canine officer from a pile of yard waste. The two handguns were discovered approximately five feet away from each other in the same yard located at 1811 Hovland Court.

¶ 6 The jury found defendant guilty of two counts of unlawful use of a weapon by a felon and one count of armed habitual criminal. The trial court sentenced defendant to three concurrent 12-year prison terms. Defendant's convictions and sentences were affirmed on direct appeal. *People v. Aikens*, 2017 IL App (1st) 143182-U.

¶ 7 On October 1, 2015, defendant filed the instant *pro se* petition for relief from judgment alleging, in pertinent part, that the "judgment" in the instant case was void and should be set aside because it was based upon perjured testimony before the grand jury. Specifically, the petition alleged that McCray perjured himself before the grand jury by testifying that he observed defendant throw a black object while running and that his investigation revealed that the object was a handgun. The petition further alleged that McCray's grand jury testimony was contradicted by a police report authored by McCray stating that Wideman observed defendant " 'toss' " an object shaped like a handgun and by McCray's trial testimony that he lost sight of the suspects and that it was Wideman who told him that defendant threw something. The petition concluded by asking that the "judgment/decision for probable cause handed down by the grand jury" be vacated.

¶ 8 Attached to the petition in support were a transcript of the grand jury proceedings on July 23, 2013, an Evanston police department incident report dated July 16, 2013, that was authored by McCray, and a transcript of McCray's trial testimony.

¶ 9 The grand jury transcript reflects the following exchange:

"[State's Attorney]: Did you observe [defendant and Hill] on the sidewalk at the 1800 block of Hovland"

[McCray]: Yes, ma'am.

[State's Attorney]: Did your investigation reveal that Defendant Aikens had an active warrant for his arrest"

[McCray]: Yes, ma'am.

***

[State's Attorney]: Did [defendant and Hill] run away when they saw you?

[McCray]: Yes, ma'am.

[State's Attorney]: Did you announce your office and command [defendant and Hill] to stop?

[McCray]: Yes, ma'am.

[State's Attorney]: Did you chase the Defendants?

[McCray] Yes, ma'am.

[State's Attorney]: Did you observe Defendant Aikens throw a black object while he ran from the 1800 block of Howland to 1810 Brown?

[McCray]: Yes, ma'am.

[State's Attorney]: Did your investigation reveal that the object was recovered on the land to the rear of 1811 Hovland?

[McCray]: Yes, ma'am.

[State's Attorney]: Did your investigation reveal that the black object was an uncased Ruger 9 mm semi-automatic?

[McCray]: Yes, ma'am.

[State's Attorney]: Did your investigation reveal that the Ruger was loaded with 17 live 9 mm rounds?

[McCray]: Yes ma'am.

[State's Attorney]: Did you apprehend Defendant Aikens on the land to the rear of 1810 Brown?

[McCray]: Yes ma'am."

¶ 10 The incident report, authored by McCray, stated that, after defendant was taken into custody, McCray and his partner retraced the path of the chase because his partner observed defendant "toss an object similar in shape to a black hand gun" during the chase. The trial transcript reflects that McCray testified that he was told by Wideman that Wideman observed defendant throw something during the chase.

¶ 11 On December 23, 2015, the circuit court *sua sponte* dismissed defendant's petition. In May 2016, defendant filed a *pro se* motion for leave to file a late notice of appeal, which this court granted on June 15, 2016.

¶ 12 Pursuant to section 2-1401 of the Code, "[r]elief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section." 735 ILCS

5/2-1401 (West 2014). "The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof *** [and] must be supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b) (West 2014). Section 2-1401 may provide relief in criminal as well as civil cases. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). To obtain relief under section 2-1401, a defendant must prove, by a preponderance of evidence, the existence of a defense or claim that would have precluded "entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Id.* at 7-8. This court reviews the dismissal of a petition for relief from judgment under section 2-1401 *de novo. Id.*

¶ 13 Here, defendant contends that the trial court erred when it *sua sponte* dismissed his petition which set forth a meritorious claim that the indictment was secured through the use of false testimony before the grand jury by the State's sole witness. Defendant argues that McCray's grand jury testimony that he observed defendant throw an object is contradicted by the incident report stating that it was Wideman who observed the object thrown, and McCray's trial testimony that he did not observe defendant throw anything. Defendant therefore concludes that the State knowingly used false testimony before the grand jury to secure the indictment in the instant case and violated his due process rights.

¶ 14 Generally, indictments returned by legally constituted grand juries are not subject to challenge. *People v. Wright*, 2017 IL 119561, ¶ 61. One exception to this rule is that a defendant may challenge an indictment that is obtained through prosecutorial misconduct that is so severe that it deprives the defendant of due process or constitutes a miscarriage of justice. *Id.* "The due process rights of a defendant may be violated if the State deliberately or intentionally misleads

the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence." *Id.* ¶ 62. To warrant dismissal of the indictment, the due process violation must cause prejudice that is "actual and substantial." *People v. Fassler*, 153 Ill. 2d 49, 58 (1992). The defendant bears the burden of proving this prejudice, and the trial court should only dismiss the indictment when a due process violation is "clear and can be ascertained with certainty." *People v. Torres*, 245 Ill. App. 3d 297, 300 (1993). Where, as here, there are no disputes on any issues of fact, our review is *de novo* on the issue of whether the defendant suffered a prejudicial denial of due process. *People v. Oliver*, 368 Ill. App. 3d 690, 695 (2006).

¶ 15 Here, defendant takes issue with the fact that McCray testified before the grand jury that he observed defendant throw an object but the incident report he authored and his testimony at trial indicated that it was in fact Wideman who observed defendant throw the object. Although defendant argues that such testimony is perjury, the State responds that McCray's testimony was "a summary of what occurred, based on concealed hearsay" and was therefore admissible in the grand jury proceedings. We agree with the State.

¶ 16 Here, the record reflects that McCray was examined regarding the details of the encounter with defendant and the results of the investigation. Although defendant is correct that the incident report McCray authored stated that it was Wideman that observed defendant throw the object, an indictment may be based upon hearsay. See *Fassler*, 153 Ill. 2d at 60 ("a valid indictment may be based entirely on hearsay"). Our supreme court has held that grand jury proceedings are not intended to be the same as a trial on the merits and a grand jury may act on tips, rumors, the State's evidence, or even the jurors' personal knowledge. *Id.* at 59-60. Here, it is clear from the totality of McCray's testimony before the grand jury that he was testifying to the

course of conduct undertaken by him and his partner beginning with their encounter with defendant, of which he had personal knowledge.

¶ 17 However, even if we accept defendant's argument that McCray's testimony that he observed defendant throw the object was improper, defendant's claim must still fail as he cannot show that the alleged error caused "actual and substantial" prejudice. *Id.* at 58. Even without McCray's testimony to the grand jury that he observed defendant throw a black object while defendant ran from the 1800 block of Hovland to 1810 Brown, the grand jury heard sufficient evidence to support the indictment.

¶ 18 McCray told the grand jury that he observed defendant on the 1800 block of Hovland, that defendant ran away, and that McCray chased defendant, ultimately taking him into custody on land to the rear of 1810 Brown. McCray further testified that an object that was later determined to be a semi-automatic handgun was recovered from land to the rear to 1811 Hovland. Thus, McCray's testimony indicated that defendant ran from the 1800 block of Howland to 1810 Brown, and that a handgun was recovered from the route which defendant ran. McCray's testimony regarding the geographic path of the chase and the fact that a handgun was recovered from that path provided "some evidence" of defendant's connection to the charged offenses of which he was convicted, and thus supported a finding of probable cause by the grand jury. See *People v. Rodgers*, 92 Ill. 2d 283, 292 (1982) (concluding trial court erred in dismissing a count where there was "some evidence" presented to the grand jury in support); *People v. Williams*, 383 Ill. App. 3d 596, 631 (2008) (quoting *People v. Edwards*, 243 Ill. App. 3d 280, 285 (1985) (finding that the State need only present some evidence to the grand jury " 'from which an inference of criminal conduct can be derived' ")); *People v. White*, 180 Ill. App. 3d

781, 786 (1989) (concluding that "other evidence before the grand jury here was clearly more than sufficient to meet the 'some evidence relative to the charge' standard of *Rogers* which we deem to be sufficient to cure any alleged knowing use of perjury in obtaining the indictment").

¶ 19 We are unpersuaded by defendant's reliance on *People v. Oliver*, 368 Ill. App. 3d 690 (2006). In that case, the defendant was indicted on two counts of unlawful possession of a controlled substance with the intent to deliver and one count of unlawful possession of a controlled substance. *Id*. at 690. There, an officer was the sole witness to testify during two grand jury proceedings. During the first grand jury proceeding, on two of the counts, the officer stated that he observed the events, which were hand-to-hand transactions between the defendant and other individuals, at an apartment that was under police surveillance because of prior drug activity. *Id.* at 691, 695. However, he had not observed the events; rather, he relied on the report of the police officer who did observe the events. *Id*. at 694. During the second grand jury proceeding, on an additional charge, the officer again testified as if he were conveying his own personal observations rather than those of the actual eyewitness. *Id*. at 693, 695.

¶ 20 Defendant later moved to dismiss certain counts of the indictment, arguing that the officer's testimony was based upon his examination of a report. *Id*. at 694. The trial court dismissed two counts of the indictment as the officer testified that hand-to-hand transactions led him to believe that cocaine was being delivered, yet the person who observed the hand-to-hand transactions and prepared the report did not observe what was passed. *Id.* The State appealed.

¶ 21 On appeal, this court concluded that the State presented the grand juries with deceptive or inaccurate evidence and, as a result, denied the defendant due process. *Id*. at 695-96. This court then focused on the issue of prejudice, noting that a due process violation was actually and

substantially prejudicial only if without it the grand jury would not have indicted the defendant. *Id.* at 696-97. The court noted that if the only defect in the officer's testimony was that its hearsay nature was concealed, the defendant would not be able to show actual and substantial prejudice. *Id*. at 697. The court however found that the officer's testimony was "doubly" deceptive, because it went beyond the hearsay issue in that it mischaracterized the observations of the person who actually observed the hand-to-hand transactions so as to establish probable cause where none existed. *Id*.

¶ 22 This court explained that the officer testified that the defendant's hand-to-hand transactions would lead him to believe that the defendant intended to deliver the cocaine that he was found later to possess, despite the fact that the actual eyewitness "never saw what was exchanged in those transactions and thus had no basis to draw that inference." *Id*. In other words, because the eyewitness did not see who gave what to whom, defendant could have been buying the cocaine. Moreover, the officer's testimony that the defendant engaged in several transactions was misleading, when the defendant only engaged in two transactions. *Id.* Finally, we noted that the amount of cocaine found on the defendant did not support a reasonable inference that he had the intent to deliver, despite the officer's testimony that the amount of cocaine recovered would lead him to believe that the defendant intended to deliver the cocaine. *Id.* at 698. We therefore determined that, but for the officer's mischaracterization of his colleague's observations, the grand juries could not have found probable cause to indict the defendant for unlawful possession of a controlled substance with the intent to deliver. *Id.* at 698-99. Therefore, the due process violation was actually and substantially prejudicial. *Id*. at 699.

¶ 23 Defendant's reliance on *Oliver* is misplaced for two reasons. First, in *Oliver* the court found that the complained-of testimony was prejudicial because it "establish[ed] probable cause where none existed." *Id.* at 697. Here, as discussed above, absent the complained-of testimony, there was still some evidence of defendant's connection to the charged offenses which supported a finding of probable cause by the grand jury. Second, although defendant argues McCray committed perjury before the grand jury, his essential argument is that McCray testified to what his partner observed without disclosing the source of the information. In other words, the defect in McCray's testimony was that its hearsay nature was concealed. Pursuant to *Oliver*, if the only defect in McCray's testimony was that its hearsay nature was concealed, defendant cannot show actual and substantial prejudice. See *Id*.

¶ 24 Accordingly, because defendant has failed to demonstrate that the grand jury would not have indicted him absent the complained-of testimony, he cannot establish prejudice and his claim must fail. *Fassler*, 153 Ill. 2d at 58. Consequently, defendant has failed to establish the existence of a claim that would have precluded "entry of the judgment in the original action" under section 2-1401. *Vincent*, 226 Ill. 2d at 7-8. We therefore affirm the dismissal of defendant's petition for relief from judgment.[2]

¶ 25 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 26 Affirmed.

[2] In a footnote, the State requests that this court correct defendant's mittimus to reflect that defendant was convicted under counts 19 and 20, rather than 13 and 14 as the mittimus states. We note, however, that the State raised the same argument on direct appeal, and that this court ordered that the mittimus be corrected. See *People v. Aikens*, 2017 IL App (1st) 143182-U, ¶ 67.