2019 IL App (4th) 160447-U

NO. 4-16-0447

Rule 23 filed January 28, 2019

Modified upon denial of Rehearing filed March 1, 2019

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KENNE Y. DYE, Defendant-Appellant.	))))))))	Appeal from the Circuit Court of Vermilion County No. 10CF326 Honorable Craig H. DeArmond, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's denial of defendant's postconviction claim raising a due process violation was not manifestly erroneous.

¶ 2 In June 2010, the State charged defendant, Kenne Y. Dye, with two counts of home invasion (720 ILCS 5/12-11(a)(1), (a)(2) (West 2008)). After a July 2011 trial, a jury found defendant guilty of both charges. At a September 2011 hearing, the Vermilion County circuit court found the two counts merged and sentenced defendant to 20 years' imprisonment. Defendant appealed, and this court vacated defendant's home-invasion conviction on count I and affirmed the circuit court's judgment in all other respects. *People v. Dye*, 2013 IL App (4th) 111091-U, ¶ 37.

¶ 3 After the conclusion of defendant's direct appeal, he filed a *pro se* postconviction petition, asserting numerous claims of ineffective assistance of counsel. The circuit court

advanced defendant's petition to the second stage and appointed defendant counsel. Postconviction counsel filed an amended postconviction petition, asserting (1) actual innocence, (2) a violation of defendant's due process rights, and (3) ineffective assistance of trial counsel. The State filed a motion to dismiss defendant's amended postconviction petition, which the court denied after a June 2015 hearing. In September 2015, the court held an evidentiary hearing on defendant's amended postconviction petition and took the matter under advisement. On June 1, 2016, the court filed a written order denying defendant's postconviction petition.

¶ 4 Defendant appeals the denial of his amended postconviction petition, contending the circuit court erred by not granting him a new trial because the State failed to disclose the criminal histories of two identification witnesses. We affirm.

¶ 5 I. BACKGROUND

¶ 6 The charges in this case arose from a June 17, 2010, incident at the Danville, Illinois, residence of Terry Evans and Lucy Casey. In the early morning hours, a man wearing a bandana over part of his face broke into Terry and Lucy's residence and demanded money. The man was armed with a gun and struck Terry in the back of the head with the gun. The man left with around $1000 in cash, a cellular telephone, and a Visa card. Terry and Lucy later identified defendant as the man who broke into their home. They also later married, and at the time of defendant's trial, Lucy was known as Lucy Evans.

¶ 7 At the July 2011 jury trial, the State presented the testimony of Terry and Lucy, as well as Danville police officers Phillip Wilson and Travis Spain. Defendant testified on his own behalf.

¶ 8 Terry testified he was getting ready for bed in the bedroom he shared with Lucy when someone kicked down the front door to their residence and entered. The person rushed

into the bedroom and turned on the light. Terry described the person as a male dressed in all black with a bandana around his mouth and face. Terry could see the man's face from the nose up. The man was holding a "big rusty gun" and demanded money. Terry gave the man the money from the pockets of his pants, but the man demanded more. Terry then handed over his wallet and Lucy's purse. The man demanded Terry crawl into the kitchen. Once in the kitchen, the man ransacked drawers and demanded to know where the rest of the money was. Throughout the incident, the man told Terry to quit looking at him. After ransacking the kitchen, the man forced Terry to crawl back to the bedroom. Terry told the man he had already given him all of the money in the house. The man again yelled at Terry to stop looking at him and struck Terry in the back of his head with the gun. The man then backed out of the bedroom, turned around, and ran out of the house. Terry immediately called the police, who responded quickly to Terry and Lucy's residence.

¶ 9 When the police arrived, Terry described the suspect as follows:

> "I knew the person—as I was looking at the person and I glance up, I noticed that the person had eyes that was [*sic*] real-messed-up eyes, like a lazy eye or a sleepy eye, you know. And I noticed that the frame of—I had a good look at this person, you know, and I knew who the person was, but I just didn't know his name at that moment of time.
>
> You know, I could have picked him out through a lineup. I could have picked him through anything. I just couldn't put a name. I knew who this person was, and I knew if I seen this person again I would know exactly who it was."

Terry knew the suspect's face but could not put a name to it. Terry also testified the suspect was wearing dark clothes but did not wear glasses during the incident.

¶ 10 Terry further testified that, during the next day, he was explaining the incident to his family members when his cousin said the description sounded like "Such-and-Such." Terry said he knew that was the name. He called Lucy and asked her to search the Internet for the name given. An Illinois Department of Corrections (DOC) photograph appeared. When Terry saw the photograph, he recognized the person as being the man who entered his home. The State introduced the DOC photograph of defendant as People's exhibit No. 6. Terry identified defendant in the courtroom as being the person who entered his residence. Terry further testified he was "a hundred percent sure" defendant was the person who "ran in [his] house and robbed [him]." Terry noted the man had very distinctive eyes. Terry also emphasized the shape of the man's head. Terry did not know defendant but had "seen him around" previously. Terry explained he was born and raised in Danville and so was defendant. Terry had seen defendant at gas stations and a basketball game. However, he was not acquainted with defendant. Finally, Terry admitted he had a 2006 conviction for possession of drugs as well as a conviction for obstruction of justice for giving a false name to the police.

¶ 11 Lucy testified as to her version of the incident. She said she had gone to bed earlier in the night, but when her husband came to bed, she awoke. It was around that time she heard someone kicking at their front door. Terry stood up and looked around the corner. A man went through their house, came into their bedroom, and turned on the light. Lucy described the events that ensued similar to Terry's testimony.

¶ 12 Lucy described the suspect as a dark-skinned, black male wearing dark clothing and a bandana around his face. The bandana only covered his mouth. Lucy testified she could see the man's nose and eyes. She noted the suspect had "lazy" or "low" eyes. Lucy explained she meant his eyes were not normal.

¶ 13 Sometime after the incident, Terry called Lucy and asked her to look up the name "Kenne Dye" on the Internet. Terry had mentioned he had information defendant was the person who committed the crime. His picture appeared, and Lucy said her "stomach dropped." She said she "knew exactly who it was." It was the man who broke into their home. Lucy identified defendant in court as that man. Lucy further testified, "His facial features (witness indicating) are very clear to my—you know—it's something that you don't really forget. I've had nightmares about that face. I'll never forget that face." She clarified her testimony, indicating she meant "mostly, his eyes." Lucy testified she observed defendant in the courtroom to have lazy eyes. Additionally, Lucy testified she had never seen him before the night of the incident.

¶ 14 Officer Wilson testified he met with Terry and Lucy on June 21, 2010. They came to him with an identification of the man who committed the offense and gave him the photograph of defendant that they had found on the Internet. Terry said he was familiar with defendant. Officer Wilson began trying to locate defendant, but the police did not apprehend defendant until July 1, 2010.

¶ 15 Regarding defendant's distinctive eye features in the courtroom, Officer Wilson gave the following testimony:

> "Q. Now, even as we sit here today,—And I apologize if I asked this already—have you ever mentioned the distinction about his eyes or the distinctive features of his eyes; are you able to see them even as you sit here today?
>
> A. It looks like he's got his eyes wide open right now. But, yes, normally.
>
> Q. Normally?
>
> A. Yes, they would be half—like he's almost asleep.
>
> * * *
>
> Q. Now, you said that just now when you looked at him they appear

different?

A. It appeared like he had his eyes wide open, paying attention to me."

Additionally, Officer Wilson testified he tried to match the shoes defendant was wearing at the time of his arrest to the photograph of the shoe print found at the scene, but they did not match.

¶ 16 Officer Spain testified three police officers responded to the call from Terry and Lucy's residence. He testified Terry and Lucy both reported something was wrong with the suspect's right eye.

¶ 17 Defendant testified he was released from prison in April 2010 and denied committing the charged offense. Defendant said he was at his mother's house on the night of the incident with his mother, his brother, and his fiancée. He had known Terry since he was seven years old, as Terry was the same age as defendant's oldest sister. According to defendant, he and Terry were also on the same recreational basketball team in 2007. In defendant's opinion, they seemed to get along with each other. Additionally, defendant said he was wearing the only pair of shoes he owned at the time of his arrest. For purposes of impeachment, the State presented certified copies of defendant's convictions for a 2008 residential burglary and a 2006 attempt (burglary).

¶ 18 Two hours into the jury's deliberations, defendant moved for a mistrial after the jury foreman submitted a note claiming the jury was unable to reach a unanimous verdict. The circuit court denied defendant's motion and ordered the jury to continue deliberations. An hour later, the foreman submitted a second note claiming again the jury was deadlocked and it needed more evidence. Defendant again moved for a mistrial. The court denied defendant's motion and again ordered the jury to continue to deliberate. A short time later, the foreman submitted a third note asking that one juror be removed so the jury could come to a unanimous verdict. As the

court was deciding how to address the third note, a fourth note was submitted claiming there was "no deliberating going on" and the jury could not reach a verdict. The court issued a *Prim* instruction (*People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972)). Later, the jury found defendant guilty of both counts.

¶ 19 Defendant filed a posttrial motion, which the circuit court denied. The court sentenced defendant to 20 years in prison, merging the two counts. Defendant filed a motion to reconsider his sentence, claiming it was "harsh and excessive." The court denied defendant's motion, and defendant filed a direct appeal. On appeal, this court vacated defendant's home-invasion conviction on count I and affirmed the circuit court's judgment in all other respects. *People v. Dye*, 2013 IL App (4th) 111091-U, ¶ 37.

¶ 20 On December 27, 2013, defendant filed a postconviction petition, asserting 15 separate claims of ineffective assistance of counsel. In March 2014, the circuit court advanced defendant's petition to the second stage of the proceedings and appointed defendant postconviction counsel. Postconviction counsel filed an amended postconviction petition, asserting (1) actual innocence; (2) a violation of defendant's due process rights based on a violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) ineffective assistance of trial counsel. One of the documents attached to the amended postconviction petition was an affidavit by Terry, in which he stated he was uncertain defendant was the person who committed the crime. The State filed a motion to dismiss defendant's amended postconviction petition, which the court denied after a June 2015 hearing.

¶ 21 In September 2015, the court held an evidentiary hearing on defendant's amended postconviction petition. Defendant presented the testimony of (1) Breonna Williams, defendant's wife; (2) Robert McIntire, defendant's trial counsel; and (3) Jeff Palmer, a private

investigator. Defendant subpoenaed Terry, but he did not appear at the hearing. The evidence relevant to the sole issue on appeal is set forth below. McIntire testified a general motion for discovery was filed in defendant's case requesting a list of any prior criminal convictions that may be used for impeachment of people the State intends to call as witnesses. McIntire did not recall receiving that list or any information about Terry's or Lucy's criminal history. McIntire said he did his own search and found Terry had more than one felony conviction. McIntire was aware of Terry's 2002 conviction. McIntire did not recall finding a felony conviction for Lucy.

¶ 22 McIntire examined a certified copy of Lucy's conviction in Vermilion County case No. 07-CF-493. He noted Lucy pleaded guilty and received first-offender probation. First-offender probation cannot be used for impeachment purposes. In August 2010, the State filed a petition to revoke Lucy's probation. McIntire testified he believed the revocation petition was based on Lucy's failure to pay fines and costs because she paid the amount in full on November 30, 2010, and the State withdrew the revocation petition on December 1, 2010. McIntire explained the information about Lucy's petition for revocation would have been available on "judici." While he felt such information could be used to show bias or motive, McIntire felt such questioning would open the door for the State to introduce prior consistent statements made before the revocation petition. Additionally, he found such a line of cross-examination of Lucy would not be fruitful given her demeanor on the witness stand. McIntire found Lucy to be an extremely impressive witness. He explained she did not come off as someone who was likely to help the State out. McIntire felt the best defense was to suggest Lucy was misled into thinking defendant was the perpetrator. He also noted the prosecution's case rested on Terry's and Lucy's testimony.

¶ 23 On June 1, 2016, the circuit court filed a written order denying defendant's

postconviction petition. As to defendant's due process claim based on a *Brady* violation, the court found the State failed to disclose Terry's convictions and Lucy's probation status before trial. However, it found defendant suffered no prejudice regarding Terry's convictions because two of the convictions were presented to the jury by the State and defense counsel acknowledged he was aware of the convictions before trial. Regarding Lucy's pending probation violation, the court found questioning Lucy with her probation status to show possible bias or a motive to lie was not consistent with the defense theory that Terry and Lucy were mistaken about the identity of the man who entered their home. The court concluded the strength of undisclosed evidence was minimal. It also found earlier disclosure of the information would not have materially aided the defense in discrediting the witnesses.

¶ 24 On June 13, 2016, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014). See Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013) (providing the procedure for appeals in postconviction proceedings is in accordance with the rules governing criminal appeals). Thus, we have jurisdiction of defendant's appeal under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 25 II. ANALYSIS

¶ 26 Defendant's sole contention on appeal is the circuit court erred by denying his postconviction petition and thereby not granting him a new trial based on the alleged *Brady* violation.

¶ 27 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). The Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at

471-72, 861 N.E.2d at 1007. At the first stage, the circuit court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the court does not dismiss the petition, it proceeds to the second stage, where the court may appoint counsel for an indigent defendant. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure the defendant's contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. At both the second and third stages of the postconviction proceedings, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. When a petition advances to an evidentiary hearing and fact-finding and credibility determinations are involved, this court will not reverse the circuit court's decision unless it is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. A "manifest error" is one that "is clearly evident, plain, and indisputable." *People v. Ruiz*, 177 Ill. 2d 368, 384-85, 686 N.E.2d 574, 582 (1997).

¶ 28 In *Brady*, 373 U.S. at 87, the United States Supreme Court held the prosecution violates a defendant's constitutional right to due process of law by failing to disclose upon request evidence favorable to the defendant and material to guilt or punishment. The

aforementioned rule encompasses evidence known to the police but not to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). For a defendant to establish a claim under *Brady*, he or she must show the following: "(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 wilfully 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, 890 N.E.2d 500, 510 (2008). At issue in this case is the third element for establishing a *Brady* violation.

¶ 29 For purposes of a *Brady* claim, evidence is considered material if a reasonable probability exists the result of the proceeding would have been different had the evidence been disclosed. *Beaman*, 229 Ill. 2d at 74, 890 N.E.2d at 510. To establish materiality, the defendant "must show the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (Internal quotation marks omitted.) *Beaman*, 229 Ill. 2d at 74, 890 N.E.2d at 510 (quoting *People v. Coleman*, 183 Ill. 2d 366, 393, 701 N.E.2d 1063, 1077 (1998). "In making the materiality determination, courts must consider the cumulative effect of all the suppressed evidence rather than considering each item of evidence individually." *Beaman*, 229 Ill. 2d at 74, 890 N.E.2d at 510.

¶ 30 Defendant insists that, if the State had disclosed Terry's and Lucy's criminal histories, the State's case against defendant would have fundamentally changed. He claims that, without the criminal histories, defense counsel had no grounds to impeach Terry and Lucy. We disagree. We also disagree with the State's suggestion defendant forfeited this argument because he could have raised it on direct appeal. The significant information that the State failed to disclose before trial to defense counsel was outside the record on direct appeal. See *People v. Youngblood*, 389 Ill. App. 3d 209, 214, 906 N.E.2d 720, 725 (2009) (noting "a postconviction

claim that depends on matters outside the record is not ordinarily forfeited, because matters outside the record may not be raised on direct appeal").

¶ 31 The State introduced to the jury Terry's two 2006 felony convictions for possession of a controlled substance and obstructing justice. Terry's 2002 conviction was also for possession of a controlled substance. Thus, Terry's undisclosed conviction added little to nothing to any credibility determination. The mere existence of Lucy's prior crime was not available for impeachment purposes. However, defense counsel could have questioned her about her probation status at the time she identified defendant as the assailant and the State's petition to revoke her probation to show motive or bias. The weakness with the line of questioning about the petition to revoke is Lucy named defendant as the perpetrator in June 2010, which was before the State's August 2010 petition to revoke her probation. Also, the petition to revoke had been withdrawn before she testified in July 2011. Thus, potential revocation of her probation is little to no evidence of a motivation for her to name defendant as the perpetrator to obtain favor from the State because she had already named defendant and did not have a pending revocation petition when she testified. Moreover, no evidence was presented Lucy ever wavered in her identification of defendant after the initial identification. Accordingly, even taken together, the witnesses' prior criminal histories do not put the case in a different light as to undermine the guilty verdict.

¶ 32 Additionally, McIntire testified he did his own research into the criminal history of the State's witnesses. McIntire consistently testified he was aware of all of Terry's prior convictions before trial. As to Lucy, McIntire initially testified he did not recall finding any convictions for her and could not remember if he found a felony charge. McIntire later testified he would not have used the motive or bias line of questioning with Lucy. He felt the better

defense was that Terry and Lucy were simply mistaken in their identification. When asked by postconviction counsel how McIntire would have been aware of Lucy's first-offender probation and petition to revoke, McIntire stated it would have been on "judici." McIntire did note he did not print out information about Lucy's probation and keep it in his file. Even if McIntire had not known about Lucy's probation and the revocation petition, McIntire explained at the evidentiary hearing why a defense the witnesses made a mistake with their identification was a better strategy than a defense the two witnesses were lying about their identification of defendant. McIntire's strategy assessment is supported by the evidence at trial that defendant's name was suggested to Terry and Lucy by others.

¶ 33 Defendant argues McIntire's testimony about trial strategy is irrelevant to the *Brady* claim analysis and the circuit court erred by considering it. We disagree. As stated, to establish materiality, defendant must show one could reasonably find the favorable evidence puts the whole case in such a different light that confidence in the guilty verdict is undermined. *Beaman*, 229 Ill. 2d at 74, 890 N.E.2d at 510. If the favorable evidence presents a new trial strategy that is weaker than the one utilized by trial counsel at defendant's trial, then the confidence in the guilty verdict is not undermined. The circuit court believed McIntire's testimony the mistaken identification defense was the stronger defense. The court's conclusion is supported by the record because any evidence of motivation to lie or of bias by Lucy to gain favorable treatment by the State was very weak and the State fronted the most recent two convictions for Terry.

¶ 34 Last, we note that, in the circuit court, defendant presented Terry's affidavit in support of his actual innocence claim. He did not mention the affidavit in arguing his *Brady* claim, and the circuit court did not discuss it in analyzing defendant's *Brady* claim. Since

defendant did not raise it in the circuit court as part of his *Brady* claim, we do not address it on appeal.

¶ 35 Accordingly, we find the circuit court's conclusion the undisclosed evidence was immaterial to defendant's defense and ultimate guilt was not manifestly erroneous.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the Vermilion County circuit court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 38 Affirmed.