2015 IL App (1st) 122305-U

No. 12-2305

Fourth Division
April 9, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF	)	Circuit Court of
ILLINOIS,	)	Cook County.
Plaintiff-Appellee,	)	
	)	No. 98 CR 14769
	)	
v.	)	Honorable
	)	Kenneth J. Wadas,
JOSEPH DOLE,	)	Judge, presiding.
Defendant-Appellant.	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court properly denied defendant leave to file a successive postconviction petition because he failed to satisfy the cause and prejudice test or establish a viable claim of actual innocence, and properly dismissed defendant's 2-1401 petition as it was untimely filed and failed to present a meritorious claim.

¶ 2 Defendant Joseph Dole appeals from the denial of his motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act ("the Act") (725 ILCS 5/122-1 *et seq*. (West 2012)). On appeal, defendant contends that the trial court erred by: (1) both

ruling that his successive postconviction petition was frivolous and patently without merit, and denying him leave to file the petition; (2) ruling that the evidence would not afford him relief under the framework of actual innocence; (3) ignoring issues that can be raised at any time, where fundamental fairness requires a different sentence, and where a trial judge may not summarily dismiss a postconviction petition as frivolous if it alleges even a single non-frivolous issue; and (4) dismissing defendant's petition where it raised issues under both the Act and section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2012)). Finally, defendant requests that this court assign a different judge on remand so as to prevent defendant from being substantially prejudiced.

¶ 3 BACKGROUND

¶ 4 In 1998, defendant was a member of the Pimptown Latin Kings street gang, which operated in Palatine, Illinois. Defendant, along with Noel DeLeon, Roberto Hurtado, George Hernandez, and Raul Dorado, was charged with the kidnapping and murders of Jose Romero and Jose Segura. Following a jury trial, defendant was convicted of two counts of first degree murder under section 9-1(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(a)(1) (West 2000)) and two counts of aggravated kidnapping under section 10-2(a)(3) of the Code (720 ILCS 5/10-2(a)(3) (West 2000)). The trial court sentenced defendant to two concurrent terms of natural life in prison and two sentences of 30 years for each of the aggravated kidnapping convictions. The following facts were adduced from defendant's trial.

¶ 5 Lorena Bueno, co-defendant Hurtado’s girlfriend at the time of the murders, was called to testify on behalf of the State. As she proceeded to take the witness oath, she fainted. The jury was excused and paramedics were called. Defendant moved for a mistrial, which the trial court

denied. The court admonished the jury not to draw any conclusions or inferences from the fact that Bueno fainted. Bueno later retook the stand and testified as follows.

¶ 6 In April 1998, Bueno lived with Hurtado in a one-bedroom apartment in Cicero, Illinois. She knew that DeLeon, Hurtado, Hernandez, Dorado, and defendant were members of the Pimptown Latin Kings. On April 2, 1998, after 10:30 p.m., Bueno was home with Hurtado and their children. She heard defendant call on their speaker telephone and tell Hurtado to "stay up." When the two finished talking, Hurtado told Bueno to take their children and go into the bedroom and to remain there. A few minutes later, Dorado also called Hurtado. Once Bueno was in the bedroom, she heard a knock at the apartment door and the voices of DeLeon, Dorado, Hurtado and another man whose voice she did not recognize. DeLeon came into the bedroom to talk to her. As DeLeon was leaving the room, Bueno heard him tell Hurtado that "he just wanted to get it over and done with." Bueno remained in the bedroom, at times with a blanket and pillow over her head and the radio playing. However, she heard someone in the living room say "shut up" in Spanish, and then heard the sounds of someone being hit. About a half hour later, she heard defendant's voice, and the beating sounds continued. She also heard the sound of duct tape being pulled off its roll and the sound of something heavy being carried toward the bathroom. Soon after, Hurtado came into the bedroom and gave Bueno $500. Defendant told her to get her children ready, because he was taking her and her children to a motel. She walked out of the bedroom and saw a roll of duct tape and a gun on the living room table. She saw a large object on the floor that had not been on the floor at 10:30 p.m.

¶ 7 Bueno and her children got into defendant’s red Dodge Durango, and he took them to a Motel 6 in suburban Rolling Meadows. He told her he would pick her up later and if anyone asked, she was to tell them that neither she nor Hurtado left the apartment that night. On the

morning of April 4, 1998, DeLeon, Dorado and Hurtado came to the motel, picked her up and drove her back to the Cicero apartment. On April 6, 1998, Bueno learned that Romero and Segura had been killed. On April 10, 1998, defendant came to Bueno's apartment and told Hurtado that he knew that Chicago police were looking for him. Bueno never saw defendant again until his trial. On April 11, 1998, Chicago Police Department (CPD) detectives came to the apartment and took Hurtado out in handcuffs. [1]

¶ 8 George Hernandez testified that he was involved in concealing the bodies of Romero and Segura. At the time of trial, Hernandez had pled guilty and was serving a five-year term for two counts of concealment of a homicide, possession of a stolen motor vehicle, burglary of an automobile, and arson. He further testified that in early 1998, the members of the Pimptown Latin Kings were looking for Steven Venegas. Venegas was a member of the Palatine Latin Kings, a separate faction from the Pimptown Latin Kings. Venegas had agreed to testify for the State about a murder that occurred in 1997 in which several Pimptown Latin Kings had been arrested. After that murder, defendant became the leader of the Pimptown Latin Kings. Hernandez stated that on March 29, 1998, the Pimptown gang had a meeting at a Red Roof Inn hotel room in Arlington Heights. During that meeting, defendant expressed the need to find Venegas and to prevent him from testifying. On April 3, 1998, following another gang meeting, defendant called Hernandez and told him that he needed his help to steal a car. Defendant, accompanied by fellow gang members Hurtado, DeLeon, and Dorado, came to pick up Hernandez in a 1998 red Dodge Durango. When Hernandez got into the truck, Dorado informed him that they had the bodies of Romero and Segura and needed a van. Hernandez stated that

[1] Defendant contends that the State falsely presents Bueno's testimony; however, our review of the record indicates that the State presented an accurate statement of the facts regarding Bueno's testimony.

defendant had a .9 millimeter gun in his shoulder holster. The men stole a van and headed to Hurtado's apartment in Cicero.

¶ 9 Once at Hurtado's apartment, Hernandez saw the victims' bodies wrapped in plastic, covered in duct tape and lying in the closet. Defendant told Hernandez that they choked the victims and Hurtado and DeLeon admitted that they had punched and kicked them. The men dragged the bodies out to the minivan, and then drove to a location on Western Avenue on the west side of Chicago. Dorado ripped the plastic off the bodies, poured gasoline on the bodies and in the van, and set the van on fire. On the drive to Hernandez's house, defendant told him that if anyone asked, Hernandez was "never with them."

¶ 10 When Hernandez was arrested, he initially told police that he did not know anything, but agreed to take a polygraph exam. He started to take the exam, but stopped because "[he] knew that [he] was lying." After further questioning, Hernandez told the officers that he did not want to tell them anything because defendant and the other co-defendants had not yet been arrested. Eventually, Hernandez told them what he knew about the murders, but did not tell them everything about his involvement in concealing the bodies. The police then scheduled another polygraph exam. Hernandez took the exam, and the police told him that "[he] was mostly telling the truth but *** there was some indication that [he] was lying." Later that same day, Hernandez told an assistant State's Attorney that he had driven the van with the two dead bodies and that he had tried to light the matches to set the van on fire.

¶ 11 Nathan Steffen testified that he was a member of the Pimptown Latin Kings, but moved to Florida in August 1997. On April 8, 1998, Steffen received a telephone call from defendant. Steffen mentioned his hope of moving back to Chicago. Defendant told Steffen not to come to Chicago because the "hood was hot," meaning that the police were highly active in the

neighborhood because Romero and Segura had been killed. Around April 20, 1998, defendant came to Florida to hide out. Steffen helped defendant hide out at a friend's house in Bonita Springs. Defendant told Steffen that he, Hurtado, DeLeon, and Dorado should not have been caught for the murders of Romero and Segura because they "did it so slick" by luring Romero and Segura to Hurtado's apartment under the guise of a drug deal. Defendant revealed that once they got the men to Hurtado's house, they tied the men up, and then beat and strangled them in an effort to find out where Venegas could be located. Defendant told Steffen that Bueno was also in the apartment, but did not take part in the beatings. Defendant also told Steffen that they put the bodies in a bathtub, cleaned up the place, "got stoned," and stole a van. The men then put the bodies in the van and burned them. Defendant said that he was planning to either go to Mexico and get plastic surgery or go back to Chicago and kill the rest of the witnesses. Steffen stated that he had not received a "deal" for his testimony in defendant's case. On cross-examination, defense counsel asked Steffen a number of questions regarding the terms of his federal plea agreement, and Steffen maintained that he had not been offered anything in exchange for his testimony in the instant case.

¶ 12 Shauna Boliker, an assistant State's Attorney, testified that in May 1999, she prosecuted a member of the Pimptown Latin Kings named Frankie Hernandez[2] for a murder that occurred in April 1997. During that trial, Boliker called Steven Venegas as a witness. Venegas was a member of the Palatine Latin Kings Street gang. Venegas had previously been tried for the 1997 murder and was found not guilty. Boliker testified that Venegas was the only gang member that gave a handwritten statement to the police in the Hernandez case. She also stated that Venegas was not provided a deal from her office in exchange for his testimony against Hernandez.

[2] Frankie Hernandez did not testify at defendant's trial.

¶ 13 The jury found defendant guilty of the aggravated kidnappings and first-degree murders of Romero and Segura. Defendant waived his right to be sentenced by a jury. Following a death penalty hearing, defendant was sentenced to two concurrent terms of natural life in prison and two sentences of 30 years for each of the aggravated kidnapping convictions, which were to be served consecutively to the two terms of natural life.

¶ 14 PROCEDURAL HISTORY

¶ 15 On direct appeal, defendant raised several issues: (1) the State failed to disclose his prior statement to law enforcement officials in Florida; (2) the trial court erred in denying his motion for a continuance to investigate whether Steven Venegas had an agreement with the prosecution and he was denied a fair trial because the prosecution relied on perjured testimony; (3) the State was allowed to present evidence of other crimes; (4) the evidence was insufficient to prove defendant's guilt for first degree murder and aggravated kidnapping beyond a reasonable doubt; (5) improper gang evidence was presented to the jury; (6) improper hearsay evidence was admitted; (7) the discovery of new evidence by the State had a chilling effect on his decision not to testify; and (8) the trial court erred in denying his motion for a mistrial because a prosecution witness fainted in front of the jury. In November 2002, this court affirmed defendant's convictions and sentences. *People v. Dole*, No. 1-01-0296 (November 26, 2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 16 On May 4, 2005, defendant filed his first *pro se* postconviction petition, alleging: (1) ineffective assistance of trial counsel; (2) ineffective assistance of appellate counsel; (3) prosecutorial misconduct; and (4) that the trial court erred by permitting the State to repeatedly inform the jury regarding accountability and by incorporating accountability into the jury instructions. On June 24, 2005, the trial court dismissed defendant's postconviction petition as

"frivolous and patently without merit." On appeal, defendant argued that the trial court erred in dismissing his petition because he stated the gist of a constitutional claim and that his consecutive sentences of two 30-year terms for aggravated kidnapping were void and should be modified to run concurrent to his two concurrent sentences of natural life. This court affirmed the dismissal of the petition, but modified defendant's sentence to provide that his two terms of 30 years would be served concurrent with his two terms of natural life. *People v. Dole*, No. 1-05-2495 (May 21, 2007) (unpublished order pursuant to Supreme Court Rule 23).

¶ 17 Both the State and defendant filed petitions for leave to appeal. The Illinois Supreme Court ordered the appellate court to reconsider in light of *People v. Hodges*, 234 Ill. 2d 1 (2009). This court issued an order affirming the dismissal of defendant's postconviction petition but modifying defendant's sentence. *People v. Dole*, No. 1-05-2495 (March 26, 2010) (unpublished order pursuant to Supreme Court Rule 23). Pursuant to a subsequent supervisory order from the Illinois Supreme Court, this court vacated its previous order and reconsidered its decision in light of *People v. Petrenko*, 237 Ill. 2d 490 (2010). Ultimately, this court issued an order affirming the dismissal of defendant's entire postconviction petition and affirming the trial court's imposition of consecutive sentences. *People v. Dole*, No. 1-05-2495 (December 23, 2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 18 On June 6, 2012, defendant filed a successive postconviction petition and a motion for leave to file a successive postconviction petition. In his petition, defendant alleged: (1) prosecutorial misconduct, including *Brady* violations; (2) perjured witness testimony; (3) ineffective assistance of trial and appellate counsel; and (4) that the trial court denied him presentence credit for time spent in custody in Florida. On June 30, 2012, the trial court denied defendant leave to file the petition. The trial court found that defendant did not satisfy the cause

and prejudice standard and did not present a colorable claim of actual innocence. Defendant filed the instant appeal. For the reasons that follow, we affirm the judgment of the trial court.

¶ 19 ANALYSIS

¶ 20 The Act provides a mechanism by which a defendant may collaterally challenge their convictions and/or sentences for substantial violations of their federal or state constitutional rights that occurred at their trial and that were not and could not have been previously adjudicated. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). The Act contemplates the filing of only one postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002); 725 ILCS 5/122-1(f) (West 2012). Consequently, where a defendant has previously appealed his judgment of conviction, the doctrine of *res judicata* will bar postconviction review of all issues decided by the reviewing court, and waiver will bar any other claims that could have been presented to the reviewing court. *People v. Edwards*, 2012 IL App (1st) 111711, ¶ 21; 725 ILCS 5/122-3 (West 2012) (specifically stating that "[a]ny claim *** not raised in the original or an amended petition is waived"). The bar against successive proceedings will be relaxed in cases where the defendant can satisfy: (1) the cause and prejudice test of the Act; or (2) the "fundamental miscarriage of justice" exception, set forth as a claim of actual innocence. 725 ILCS 5/122-1(f) (West 2012); *Edwards*, 2012 IL App (1st) 111711, ¶ ¶ 22, 23.

¶ 21 "While the test for initial petitions to survive summary dismissal is that the petition states the gist of a meritorious claim—that is, a claim of arguable merit—the cause and prejudice test for successive petitions is more exacting than the gist or arguable merit standard." *People v. Miller*, 2013 IL App (1st) 111147, ¶ 26. Moreover, in a petition alleging actual innocence, contrary to defendant's contention, a "gist of an actual innocence claim" is insufficient to relax the bar on successive petition. Instead, defendant must present a "colorable claim" of actual

innocence. *Edwards*, 2012 IL 111711, ¶ 25, 29. "We review the denial of leave to file a successive petition *de novo*." *People v. Adams,* 2013 IL App (1st) 111081, ¶ 30.

¶ 22 Cause and Prejudice

¶ 23 Defendant first contends that the trial court erred in denying him leave to file a successive postconviction petition. In support, he raises six claims, each of which he maintains satisfies the cause and prejudice test as set forth in section 122-1(f) of the Act. See 725 ILCS 5/122-1(f) (West 2012). We review each of defendant's claims with the following general principles in mind.

¶ 24 A successive petition for postconviction relief can be considered on its merits if it meets the cause and prejudice test set forth in section 122-1(f) of the Act. See 725 ILCS 5/122-1(f) (West 2012). To satisfy the Act's cause and prejudice requirements, a petitioner must show good cause for failing to raise the claimed error in a prior proceeding and that actual prejudice resulted from the error. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004)."Cause" is defined as an objective factor external to the defense that impeded counsel’s efforts to raise the claim in an earlier proceeding and "prejudice" exists where the petitioner can show that the alleged constitutional error so infected his trial that the resulting conviction violated due process. *Id.* at 153-54. The failure to establish either prong of the cause and prejudice test is a statutory bar to the filing of a successive postconviction petition. *People v. Lee,* 207 Ill. 2d. 1, 5 (2003).

¶ 25 Defendant first claims that his due process rights were violated because the State failed to disclose Hernandez's polygraph examiner's worksheet, which allowed Hernandez to present perjured testimony at trial. Specifically, defendant asserts that he was not able to obtain the worksheet prior to filing his initial petition because the State, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), withheld the worksheet, and that his counsel "abandoned him without

notice." It is defendant's contention that had the worksheet been made available, Hernandez's credibility could have been impeached, yielding a different result at trial. In support of his claim, defendant attached a redacted worksheet to his petition which he obtained from the CPD in response to a Freedom of Information Act (FOIA) request on January 4, 2012. Defendant also attached to his reply brief a judicial order dated December 9, 2014, which includes an un-redacted version of the worksheet. The State denies that it withheld the polygraph worksheet.

¶ 26 To succeed on a claimed *Brady* violation, a defendant must demonstrate: (1) the undisclosed evidence is favorable because it is either exculpatory or impeaching; (2) the evidence was either willfully or inadvertently suppressed by the State; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). The cause and prejudice test "parallel[s] two of the three components of the alleged *Brady* violation itself." *Banks v. Dretke*, 540 U.S. 668, 691 (2004). "Corresponding with the second *Brady* component (evidence suppressed by the State), a [defendant] shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence. Coincident with the third *Brady* component (prejudice), prejudice within the compass of the 'cause and prejudice' requirement exists when the suppressed evidence is 'material' for *Brady* purposes." *Id.* at 691 Evidence is material " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *People v. Barrow*, 195 Ill. 2d 506, 534 (2001) (quoting *People v. Coleman*, 183 Ill. 2d 366, 393 (1998), quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

¶ 27 First, defendant fails to show that the State willfully or inadvertently suppressed Hernandez's worksheet in violation of *Brady*. Our review of the record reveals that prior to trial,

defense counsel requested the worksheet and discussed admitting the worksheet into evidence. The State responded that it had yet to receive the worksheet. The parties then agreed to discuss the issue prior to Hernandez's testimony; however, there is no indication in the record that the issue was again addressed at trial. The record clearly shows that both parties were aware of the polygraph worksheet. Defendant's claim of a *Brady* violation is not supported by the fact that the State never pursued the material. Because the worksheet was never again referenced by either party, it is reasonable to assume that defense counsel abandoned pursuit of the document. Even so, there was nothing to prevent defendant from raising the issue either on direct appeal or in his initial postconviction petition. Therefore, defendant's contention fails the second prong of the *Brady* test. Accordingly, because we find no *Brady* violation, defendant has failed to show cause.

¶ 28 Even assuming that defendant could show cause, defendant cannot demonstrate that he was prejudiced as a result of the unavailability of the worksheet. A review of the worksheet indicates that Hernandez was deceptive during the polygraph exam, and had the worksheet been made available, defense counsel may have attempted to use it to impeach Hernandez by contradicting his testimony that he was "mostly telling the truth" during the exam. However, we do not find that the omission of evidence that merely impeaches a witness rises to the level of an error that so infected defendant's trial that the resulting conviction violated due process. See *Pitsonbarger*, 205 Ill. 2d at 464. While defendant is correct that Hernandez's testimony was essential to the State's case; both Steffen and Bueno also provided credible testimony that established that defendant participated in the murders.

¶ 29 Steffen testified that defendant admitted to him that he, Hurtado, DeLeon, and Dorado lured Romero and Segura to Hurtado's apartment under the guise of a drug deal. Once at Hurtado's apartment, they tied the men up and then beat and strangled them in an effort to locate

Venegas. Defendant admitted to putting the bodies of Romero and Segura in a bathtub and eventually burning the bodies in a stolen van. Defendant also told Steffen that Bueno was in the apartment during the beatings. Additionally, Bueno testified that she was in her bedroom when she heard defendant's voice in her living room and the sounds of someone being hit. She also heard the sound of duct tape being pulled off of its roll, and the sound of something heavy being carried toward the bathroom. As she exited her bedroom, she saw a roll of duct tape, a gun on the living room table, and a heavy object on the floor that had not been there earlier. Following the beatings, defendant took Bueno and her children to a motel and told her that if anyone asked she was to tell them that neither she nor Hurtado left the apartment that night. The presence of the worksheet at trial would not have contradicted either the testimony of Steffen or Bueno. Additionally, none of the questions asked during the polygraph exam were material to defendant's guilt or punishment. In fact, Hernandez never mentioned defendant's role in the murders during the exam. Because there is no reasonable probability that the availability of the worksheet at trial would have resulted in a different outcome, defendant fails to show prejudice.

¶ 30 Defendant's second claim is that the State committed a *Brady* violation when it failed to disclose a "plethora of impeachment evidence" concerning Nathan Steffen. Defendant claims that, if admitted, the evidence would show that Steffen had a strong motive to provide false testimony at his trial. Specifically, defendant contends that the State withheld information concerning Steffen's mental health issues, drug addiction, and benefit he received in exchange for his testimony in defendant's case. He further avers that the State's suppression of these documents denied him the ability to impeach Steffen's credibility. The State argues that these documents were available prior to defendant's trial and there is no evidence that the documents were suppressed.

¶ 31 In support of his assertion, defendant attached to his petition a copy of Steffen's federal plea agreement and a motion for "downward departure." The plea agreement states that "defendant agrees to cooperate fully with the United States in the investigation and prosecution of other persons, and to testify, *** fully and truthfully before any federal court proceedings or federal grand jury in connection with the charges in this case." According to the terms of the document, Steffen pled guilty to harboring a fugitive in exchange for his cooperation with the federal government and was sentenced to 16 months in federal prison. Upon release, he was required to participate in substance abuse and mental health programs. The motion for "downward departure" reads "Steffen has cooperated with the government. In furtherance of his cooperation, Steffen has provided information to the United States Attorney's Office in Illinois regarding gang activity, and has had occasion to testify in front of the Grand Jury there."

¶ 32 First, we agree with the State that there is no evidence that it willfully or inadvertently suppressed Steffen's plea agreement documents in violation of *Brady*. There is nothing in the record that supports defendant's contention that this information was not available to defense counsel or otherwise available to defendant himself upon request before filing his initial postconviction petition. Defendant's plea agreement is dated October 21, 1998, and the United States Attorney's Office filed the motion for "downward departure" on January 21, 1999. Because there is no evidence that the State suppressed these documents in violation of *Brady*, we find that defendant cannot show cause for failing to bring this claim earlier.

¶ 33 Defendant further argues that he could not bring this claim earlier because trial and appellate counsel failed to investigate Steffen's plea agreement and failed to obtain plea documents prior to trial or on direct appeal. Defendant essentially presents a claim of ineffective assistance of counsel. The ineffective assistance of counsel test, like the test for cause and

prejudice, is comprised of two elements. Both of these elements must be met in order for the petitioner to prevail. Specifically, defendant is required to show both (1) that his attorney's performance was deficient, and (2) that, but for counsel's unprofessional errors, there is a reasonable probability that the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). Furthermore, "[a]ttorneys have an obligation to explore all readily available sources of evidence that might benefit their clients." *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005). "Where circumstances known to counsel at the time of his investigation do not reveal a sound basis for further inquiry in a particular area, it is not ineffective for the attorney to forego additional investigation." *People v. Pecoraro*, 175 Ill. 2d 294, 324 (1997).

¶ 34 In this case, we do not find that the performance of either trial or appellate counsel was deficient. First, we note that defendant does not provide any evidence to support his claim that trial or appellate counsel never obtained the documents relating to Steffen's guilty plea. Moreover, a review of the record reveals that trial counsel asked Steffen a number of questions regarding the terms of his federal plea agreement, and Steffen maintained that he had not been offered anything in exchange for his testimony in the instant case. Thus, we believe that counsel made a reasonable investigation into whether Steffen had received a benefit for testifying, and there is nothing in the record to support defendant's assertion that Steffen lied about this fact at trial. Furthermore, because the record reveals that trial counsel thoroughly questioned Steffen regarding his plea agreement and we find no indication that such a deal existed, appellate counsel's decision not to pursue the issue was also reasonable. Thus, defendant fails to establish his claim that trial and appellate counsel failed to investigate Steffen's plea agreement, and cannot show cause.

¶ 35 Even if defendant could show cause for this claim, we find that the unavailability of these documents from trial did not prejudice defendant's case. Steffen's plea agreement documents in no way impeach him; the documents merely confirm that Steffen pled guilty to a federal charge of harboring a fugitive in exchange for an agreed upon sentence. The motion for "downward departure" merely indicates that Steffen received a reduced sentence for providing information to the United States Attorney's Office in Illinois regarding gang-related activity. Although these documents reveal that Steffen received a lower sentence for his cooperation with the federal government in a related case, in no way do these documents indicate that Steffen received a reduced sentence or any other benefit in exchange for his testimony in the instant case. Likewise, Steffen's required participation in mental health and substance abuse treatment as part of the terms of his probation does not indicate that he provided false testimony during defendant's trial. Because we find that there is no reasonable probability that the results would have been different had counsel presented this evidence for impeachment purpose, defendant fails to show prejudice.

¶ 36 Defendant's third claim is that the State committed a *Brady* violation in that it suppressed "a plethora of statements" from the 1997 murder case that formed the basis of the State's theory of his case. He also contends that assistant State's Attorney Boliker testified falsely in regards to the 1997 case. In support, defendant attached a number of documents from the 1997 murder case to his petition, including police reports and witness statements. The State responds that it had no duty to provide defendant with information that was irrelevant to his case and defendant fails to show that Boliker committed perjury.

¶ 37 Defendant argues that he can show cause for not raising this issue sooner because the State suppressed the statements from the 1997 murder case. However, we find no evidence in the record to support a finding that the State committed a *Brady* violation in suppressing this

evidence. Additionally, our review of these statements reveals that they are in no way favorable to defendant as they are not exculpatory, impeaching, or in any way material to defendant's case. Thus, we agree with the State that it had no duty to provide defendant with irrelevant documents from the 1997 murder case. See *People v. Coleman*, 206 Ill. 2d 261, 288 (2002) (holding that the State had no duty to reveal information that was irrelevant to any issue involved in defendant's case). Accordingly, defendant's claim that the State committed a *Brady* violation fails, and defendant cannot show cause.

¶ 38 Also, defendant alleges that he can show cause because his trial counsel failed to obtain these documents from the Palatine Police Department (PPD). In *Strickland*, the Court makes it clear that "[c]ounsel has only a duty to make reasonable investigations or to make a reasonable decision which makes particular investigations unnecessary," and the reasonableness of a decision not to investigate is assessed applying "a heavy measure of deference to counsel's judgment." *Strickland*, 466 U.S. at 691. As mentioned above, a review of the statements from the 1997 murder case indicates that they are irrelevant to defendant's case. Thus, we defer to counsel's judgment and do not find that counsel's failure to obtain these irrelevant documents meets either the performance or prejudice prong of the *Strickland* test.

¶ 39 Additionally, defendant asserts that he can show cause because the PPD refused to give him the statements from the 1997 murder case. We acknowledge that defendant demonstrated diligence in obtaining the case file from the 1997 murder and expressed some hardship in obtaining the documents from the PPD; however, we nonetheless find that defendant cannot not show cause for having failed to bring this claim in an earlier proceeding because the documents were available prior to his trial.

¶ 40 Even if defendant could show cause, defendant fails to show that he was prejudiced by the absence of these statements at his trial. First, defendant argues that the existence of other witness statements shows that "if he had a motive to kill Steven Venegas, he also had motive to kill all the other people who gave statements to the police in the 1997 murder." However, we find that argument unavailing. The existence of other oral statements from other gang members does not discredit the State's theory that preventing Venegas from testifying at trial provided the motive for the murders of Romero and Segura. More importantly, none of the oral statements provided evidence that defendant was not involved in the murders. In fact, the statements are wholly immaterial to defendant's guilt or punishment; therefore, there is no reasonable probability that the outcome of defendant's case would have been different if they had been presented at trial. Thus, defendant cannot show prejudice by the absence of these particular statements at his trial.

¶ 41 Defendant further argues that the witness statements show that assistant State's Attorney Boliker committed perjury when she testified that Venegas was the only Latin King to make a statement. However, a review of the record reveals that Boliker testified that Venegas was the only gang member to give a *handwritten* statement in that case. The only other handwritten statement that defendant includes in his petition is from Mandy Folkes, but there is no indication that Folkes was a Latin King member. In fact, in the appendix of defendant's petition, he lists Folkes as an "associate" of the Latin Kings, not a member. Thus, defendant cannot show prejudice because the record rebuts defendant's contention that Boliker committed perjury.

¶ 42 Defendant's fourth claim is that his due process rights were violated when Hernandez gave perjured testimony regarding a meeting that occurred prior to the murders. As support for his claim, defendant attached to his petition affidavits that were included in co-defendant

Dorado's postconviction petition. In his August 19, 2003 affidavit, Hernandez denied that there was ever a March 29, 1998, meeting at Red Roof Inn and that Dorado participated in the kidnapping and murders of Romero and Segura. Defendant's second affidavit, by former Pimptown Latin King Greg Salgado, dated December 11, 2002, similarly denied that there was ever a meeting held on March 29, 1998, during which defendant told fellow gang members that they had to find Venegas and try to stop him from testifying. Salgado also stated that he was never contacted by Dorado's lawyers and would be willing to testify on Dorado's behalf. The State maintains that defendant cannot establish cause because the information that the meeting never took place would have been known to defendant prior to trial, and he cannot demonstrate prejudice because Hernandez's affidavit, which exculpates Dorado, does not mention defendant.

¶ 43 Defendant maintains that his earlier request to obtain these affidavits had been denied, and therefore, defendant claims that he was not able to bring this claim earlier. However, defendant does not state why he could not have obtained similar affidavits from Hernandez, Salgado, or any other Pimptown Latin King member for his own purposes that attested that the meeting never occurred. Furthermore, we agree with the State that if the meeting never took place defendant would have had personal knowledge of this fact. Accordingly, defendant should have raised the issue during trial, on direct appeal, or in his initial postconviction proceeding. Therefore, defendant cannot demonstrate cause for failing to bring this claim in a previous proceeding.

¶ 44 Similarly, defendant cannot show prejudice based on this claim. Both Hernandez and Salgado stated in their affidavits that the March 29, 1998, meeting at Red Roof Inn never took place. However, neither affidavit rebuts any of the testimony presented at trial that defendant participated in the murders of Romero and Segura and the disposal of the victims' bodies. Both

affidavits were written in support of Dorado, and in no way imply that defendant is innocent. Furthermore, Steffen testified that defendant told him that he murdered Romero and Segura in an attempt to find out where Venegas was located. Therefore, even if no meeting occurred on March 29, 1998, at which Hernandez and Salgado heard defendant give orders to find Venegas and prevent him from testifying, there is other evidence to support this fact. Furthermore, defendant asserts that Hernandez's affidavit could have also been used to impeach Hernandez as a credible witness; however, we have already noted that evidence that merely impeaches a witness does not rise to the level of an error that so infected defendant's trial that the resulting conviction violated due process. See *Pitsonbarger*, 205 Ill. 2d at 464. Thus, the affidavits would not have changed the outcome of the case. Consequently, defendant cannot establish prejudice as a result of this claim.

¶ 45 Cumulative Effect of Alleged Errors

¶ 46 In his fifth and sixth claims, defendant asserts that he has demonstrated cause and prejudice for each issue and that the cumulative effect of these errors violated his constitutional rights, thus, the trial court should have granted his motion for leave to file a successive petition. However, we have rejected each claim for failure to satisfy the cause and prejudice test; therefore, there can be no cumulative effect. See *People v. Evans*, 186 Ill. 2d 83, 103 (1999). Accordingly, we find that the court did not err when it denied him relief under the Act for failure to meet the cause and prejudice test.

¶ 47 Actual Innocence

¶ 48 Defendant next claims that the trial court erroneously denied him leave to file his successive postconviction petition because the "cumulative effect" of his newly discovered

evidence established a colorable claim of actual innocence. The State responds that none of defendant's alleged newly discovered evidence presented a colorable claim of actual innocence.

¶ 49 To assert a claim of actual innocence a defendant must show that the evidence was: (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). A claim of actual innocence does not involve an analysis of whether the evidence at trial was sufficient to establish defendant's guilt beyond a reasonable doubt; the hallmark of such a claim means exoneration, or total vindication. *People v. Anderson*, 401 Ill. App. 3d 134, 141 (2010). Successive postconviction petitions raising actual innocence "should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petition cannot set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶ 24. A colorable claim of actual innocence raises the probability that it is more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence. *Id.* ¶¶ 31, 33.

¶ 50 We find that defendant's claim fails under the actual innocence framework. First, defendant fails to show that the evidence he presents is newly discovered. This court has held that evidence is not "newly discovered" when it presents facts already known to the defendant at or prior to trial, though the course of those facts may have been unknown, unavailable, or uncooperative. *People v. Moleterno*, 254 Ill. App 3d 615, 625 (1993). Defendant's purported newly discovered evidence consists of: (1) Hernandez's polygraph examiner's worksheet; (2) Steffen's federal plea agreement documents; (3) written and oral statements from the 1997 murder case; and (4) two affidavits submitted in support of co-defendant Dorado's postconviction petition. As discussed above, although defendant expressed hardship in obtaining

some of these documents prior to filing his initial postconviction petition, defendant either knew of the existence of each of these documents or had personal knowledge of the information contained in the documents at or prior to his trial. Thus, the information does not meet the requirements of newly-discovered evidence. See *Edwards*, 2012 IL 111711, ¶ 34 (holding that newly discovered evidence is evidence that was unavailable at trial and could not have been discovered sooner through due diligence).

¶ 51 Furthermore, none of these documents are of such a conclusive character that it would have changed the result of defendant's trial because the information contained in these documents is largely irrelevant to defendant's case. Hernandez's polygraph worksheet, Steffen's plea agreement, and the statements from the 1997 murder case do not exonerate defendant. The only document that explicitly mentions defendant is Salgado's affidavit in which he denied that a meeting ever occurred where defendant gave orders to find Venegas and keep him from testifying. However, this information does not vindicate defendant. Moreover, although defendant is correct that Hernandez's affidavit does contradict his trial testimony that a meeting took place on March 29, 1998, at the Red Roof Inn where defendant gave orders to find Venegas, he never denied defendant's involvement in the murders. Thus, we do not find that the evidence that defendant presented in his petition raises a probability that it is more likely than not that no reasonable juror would have convicted him.

¶ 52 Sentencing Issues

¶ 53 Defendant raises two separate claims of error regarding his sentencing. Defendant first argues that the trial court erred in denying him presentence incarceration credit for 15 days that he spent in custody in Florida and two days he spent in custody in CPD's Area 4 facility. The

State responds that defendant failed to meet his burden of establishing how many days he was entitled to and how many days he did not receive.

¶ 54 Section 5-8-7(b) of the Unified Code of Corrections (Code) provides for a defendant to receive credit for time spent in custody as a result of the offense for which the sentence was imposed. 730 ILCS 5/5-8-7(b) (West 2008). Defendant was arrested in Florida on May 1, 1998, and was sentenced on September 11, 2000. Thus, defendant is entitled to presentence credit from May 1, 1998, to September 10, 2000. See *People v. Williams,* 239 Ill. 2d 503, 510 (holding that the date of a defendant's sentencing is not to be included in calculating presentence credit). However, we agree with the State that defendant has failed to demonstrate that he did not receive the correct amount of presentence credit. Defendant attached to his petition a document from Lee County Florida Sheriff's Office showing that he was arrested on May 1, 1998, and released on May 15, 1998, a supplemental report indicating that detectives from CPD transported defendant from Florida to CPD's Area 4 facility on May 15, 1998. He additionally cited the Illinois Department of Correction's website which shows his custody date as May 17, 1998. However, none of these documents demonstrate that defendant did not receive credit for the days that he spent in presentence custody. Moreover, a review of the record reveals that there is no mention of defendant's presentence credit at sentencing, and it is not included on his mittimus. Thus, because defendant has failed to establish that he did not receive the correct amount of presentence credit, his claim must fail.

¶ 55 Defendant next argues that his sentence is inappropriately disparate to that of his codefendants. The State argues that defendant has forfeited review of his disparate sentence claim, and maintains that there is not an arbitrary and unreasonable disparity between the sentences because defendant is more culpable than his codefendants.

¶ 56 Initially, we note that defendant forfeited review of his sentence by failing to raise it at sentencing, in a post-trial motion, on direct appeal, or in his first postconviction petition. *People v. Lewis*, 234 Ill. 2d 32, 42 (2009). Nonetheless, we do not find that there was a disparity in sentencing in this case. In general, an arbitrary and unreasonable disparity between the sentences of codefendants who are similarly situated is impermissible. *People v. Caballero*, 179 Ill. 2d 205, 216 (1997). However, by itself, a mere disparity in sentences does not establish a violation of fundamental fairness. *Id.* at 216. A difference in sentences may be justified by the relative character and history of the codefendants, the degree of culpability, rehabilitative potential, or a more serious criminal record. *People v. Martinez*, 372 Ill. App. 3d 750, 760 (2007). A trial court has broad discretion to determine an appropriate sentence, and a reviewing court may reverse only where the trial court has abused that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). Based upon the evidence, the trial court apparently found that defendant's degree of culpability was greater than the other defendants. Specifically, the evidence presented at trial reasonably indicated that defendant was the leader of the Pimptown Latin Kings and ordered the murders of Romero and Segura. We will not substitute our judgment on this issue. Thus, defendant cannot demonstrate that the trial court abused its discretion and that the sentencing disparity was unjustified. See *id.*

¶ 57 Section 2-1401 Claim

¶ 58 Next, defendant argues that the trial court erred in dismissing his petition under section 2-1401 of the Civil Code (735 ILCS 5/2-1401(West 2012)). The State responds that defendant cannot overcome the two-year statute of limitations under section 2-1401, and he never argued which claims should be considered or why they should be considered under section 2-1401.

¶ 59 Section 2-1401 of the Civil Code provides relief in the form of a collateral attack from final orders and judgments more than 30 days after their entry. *People v. Mathis*, 357 Ill. App. 3d 45, 49 (2005). Further, section 2-1401 provides a civil remedy that extends to criminal cases. *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, 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.* A section 2-1401 petition must be filed not later than two years after the entry of the order or judgment unless the defendant can make a clear showing that he was under legal disability or duress or that the grounds for relief had been fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2012). We review a trial court's dismissal of a section 2-1401 petition *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 60 We find that the trial court did not err by dismissing defendant's petition under section 2-1401. Initially, we note that although defendant stated in his petition that he was filing the petition "pursuant to 725 ILCS 5/122-1 and 735 ILCS 5/2-1401, and any other remedy that may be available under Illinois and Federal law," he does not include any arguments or support for his 2-1401 claim. Furthermore, we find that defendant has filed this claim outside of the permissible two-year limitation period under section 2-1401. Defendant was sentenced on September 12, 2000; however, he first raised this issue almost 12 years later in the instant successive postconviction petition. Although defendant argues that his claims should be considered because the evidence he now submits to the court was "fraudulently concealed," we reject this argument. As discussed above, defendant has failed to show how any of the evidence he presented in his petition was suppressed or otherwise fraudulently concealed from him as the evidence was available to him at or during trial.

¶ 61 Substitution of Trial Court Judge

¶ 62 Finally, defendant contends that we should assign this matter to a different judge on remand and cites both *People v. Vance*, 76 Ill. 2d 171, 178 (1979) and *People v. McAndrew*, 96 Ill. App. 2d 441 (1998) in support of his contention. However, because we affirm the trial court's decision to deny defendant leave to file a successive postconviction petition, we do not remand. See *People v. Lynch*, 151 Ill. App. 3d 987, 997 (1987).

¶ 63 CONCLUSION

¶ 64 For the foregoing reasons, we affirm the order of the circuit court of Cook County.

¶ 65 Affirmed.