2021 IL App (1st) 163006-U

No. 1-16-3006

Order filed March 4, 2021

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois
Respondent-Appellee,	)	
	)	
v.	)	No. 86 CR 10084
	)	
DONCHII MALONE	)	
	)	Honorable Rickey Jones
Petitioner-Appellant.	)	Judge presiding

JUSTICE MARTIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Petitioner failed to establish cause and prejudice to file successive, third postconviction petition when he could have raised the claims in his initial petition and the claims lacked merit.

¶ 2 Petitioner Donchii Malone appeals the denial of his motion for leave to file a successive, third postconviction petition. For the reasons set forth in this order, we affirm.[1]

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

¶ 3 BACKGROUND

¶ 4 We summarized the trial evidence in prior orders and recount only what is necessary to resolve the issues in this appeal.

¶ 5 a. Trial and direct appeal

¶ 6 After a jury trial, Malone was convicted of the first degree murders of 15-year-olds Larry Lane and LaRoyce Kendle who were fatally shot on July 22, 1986. Malone's two codefendants, Michelle Davis and Phillip Taylor, were acquitted after their bench trials held simultaneous with Malone's jury trial.

¶ 7 The primary witnesses who testified for the State were Antonio Stewart and Oneida Tate. Stewart, who was 14 years old at the time of the murders, testified he and victims Lane and Kendle had an altercation with Davis and Taylor the day before. The two groups were affiliated with rival gangs. Lane grabbed Taylor's hat from his head and set it on fire. Lane gave the hat to Stewart who threw it into a crowd hitting Davis in the face. Davis told Stewart she was going to get him.

¶ 8 Stewart testified Lane, Kendle, and he were sitting in a parked car on East End Avenue early the next morning when Davis and Taylor approached them, now joined by Malone. After the groups exchanged some words, Malone pulled a gun from his waistband and fired two shots hitting Lane in the head and chest. Malone then fired two additional shots at Kendle hitting him in the back. Taylor pulled a gun from his waistband and pointed it at Stewart. Taylor fired two shots as Stewart ran away. Stewart ran to a pay phone and started to call the police but returned to check on his friends after he noticed Malone, Taylor, and Davis flee the scene. Kendle said "that bitch" just before he died. Stewart ran to a nearby building for help while yelling, "that bitch popped 'em," referring to Davis.

¶ 9 When police interviewed Stewart at the scene later that morning, he identified Davis and Taylor as being present. He did not identify Malone as being present even though Stewart knew him from the neighborhood. Several hours later, Stewart identified Malone in a photo array and then a physical lineup.

¶ 10 Oneida Tate testified she lived in a second-floor apartment at 7038 South East End Avenue overlooking the scene of the shootings. On the morning of July 22, 1986, she saw Kendle, Lane, and Stewart talking to Davis and two men. She later identified one of them as Malone. She left the window but returned moments later after hearing shots outside. She saw people running in different directions, including Davis, who Tate observed holding a handgun.

¶ 11 Malone rested without presenting evidence. Outside the presence of Malone's jury, Taylor presented officer Teddy Williams who testified Stewart described the shooter as having a light complexion when Williams interviewed him at the scene. Taylor also presented Anthony Villanueva who testified that he observed the shootings from his basement apartment. According to Villanueva, two men accompanying Davis that he did not know shot Lane and Kendle. He knew Taylor, but said Taylor was not one of them. Villanueva did not know a person named Donchii Malone and would not know if one of the shooters was a person named Donchii Malone. Villanueva was asked if he recognized anyone from the scene in the courtroom. He only identified Davis.

¶ 12 The jury found Malone guilty of two counts of first degree murder. The trial court acquitted both Davis and Taylor. Malone was sentenced to a mandatory term of natural life imprisonment.

¶ 13 In his direct appeal, Malone argued, among other issues, the evidence was insufficient to prove him guilty because he was merely present and not accountable and that his guilty verdict

was inconsistent with the acquittals of his codefendants. We affirmed. *People v. Malone*, No. 1-88-2424 (1995) (unpublished order under Illinois Supreme Court Rule 23).

¶ 14 b. Initial postconviction petition

¶ 15 In 1995, Malone filed a *pro se* postconviction petition asserting numerous bases of ineffective assistance of trial and appellate counsel. He also alleged Antonio Stewart testified falsely and attached an affidavit from Stewart recanting his trial testimony. The petition was docketed for further proceedings and the court appointed counsel to assist. Postconviction counsel filed a supplemental petition adding a claim that trial counsel was ineffective for failing to investigate and impeach Oneida Tate. That claim was supported by affidavits from Patrice Sanford and Darryl Kelley.

¶ 16 Sanford's 1997 affidavit stated she was the common law wife of Tate's brother Joseph West. Sometime in 1988, Sanford overheard Tate and West talking about her testifying in Malone's trial. Sanford relates that "it sounded to [Sanford] like Oneida was saying that she had been paid for testifying at Donchii Malone's trial." She also says Tate used marijuana, cocaine, and heroin in the 1980s and Sanford considered Tate a drug addict.

¶ 17 Kelley's affidavit, also signed in 1997, states he spoke with Tate in 1987. According to Kelley, Tate said the police and State's Attorney were making her testify against Malone by threatening to take her kids away. Kelley relates that Tate was reputed to be a drug addict. Kelley understood Tate to mean she would testify falsely.

¶ 18 The trial court dismissed all claims on the State's motion but advanced the claim related to Stewart's purported recantation for an evidentiary hearing. Stewart testified consistent with his affidavit recanting his trial testimony. However, other evidence showed Stewart had been threatened and abused at Malone's direction while they were housed in the same prison, Malone

had Stewart's affidavit prepared for him, and Stewart later signed an affidavit reaffirming his trial testimony. After the hearing, the trial court found Stewart's recantation incredible and filled with "outright lies" because Stewart was afraid of Malone. Malone's petition was denied.

¶ 19 On appeal, Malone argued he should have been afforded a hearing on his claims that trial counsel was ineffective for failing to present Officer Williams and Villanueva as witnesses and refusing to let Malone testify on his own behalf. We affirmed the trial court's dismissal of those claims without a hearing. *People v. Malone*, No. 1-99-2707 (2002) (unpublished order under Illinois Supreme Court Rule 23).

¶ 20 c. Second Postconviction Petition

¶ 21 In 2003, Malone filed a *pro se* "Amended Second Petition for Post-Conviction Relief." The petition claimed Malone's initial postconviction proceedings were "contaminated" by misconduct on the part of prosecutors and the judge, he was actually innocent based on Stewart's recantation, and fundamental fairness demands he be allowed another hearing. The trial court summarily dismissed the petition by written order.

¶ 22 Malone elected to proceed *pro se* on appeal and argued his second petition merited further proceedings. We disagreed and found the petition neither satisfied the cause and prejudice test nor made a colorable claim of actual innocence as required to permit a successive petition. *People v. Malone*, No. 1-03-1932 (2004) (unpublished order under Illinois Supreme Court Rule 23).

¶ 23 d. Other collateral actions

¶ 24 Apart from actions under the Postconviction Hearing Act, Malone filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002)) and a motion requesting free copies of trial and grand jury transcripts. The trial court denied

both and we affirmed. *People v. Malone*, No. 1-12-1780 (2013) (unpublished summary order under Illinois Supreme Court Rule 23); *People v. Malone*, 2016 IL App (1st) 151833-U.

¶ 25 Malone also filed a petition for writ of *habeas corpus* in federal court. Ultimately, the U.S. District Court denied the petition after an evidentiary hearing finding that Malone failed to show his trial counsel was ineffective for not calling Anthony Villanueva as a witness or cross-examining Stewart about his initial description of the shooter as having a light complexion. *Malone v. Walls*, 2009 WL 3460233 (N.D. Ill.).

¶ 26 e. Third postconviction petition

¶ 27 In 2016, Malone filed a *pro se* motion for leave to file a successive petition along with the proposed postconviction petition. Malone asserts that he received a letter in 2012 informing him that Oneida Tate admitted she testified falsely against him. The five-page handwritten letter is attached as an exhibit. Its author does not identify themselves. The letter does not bear a printed name or signature. Instead, the text of the letter states it is "from the family of Oneida Tate." The letter relates that Tate was crying at the family's 2012 Fourth of July party and told them she is cursed and going to hell because she lied and could not tell the truth now or she would go to jail.

¶ 28 The family listened to her "crazy story" that she was caught buying drugs at 70th and East End in 1986 and told she would go to jail and lose custody of her kids unless she helped police. She was instructed to say she lived on East End Avenue, saw people on the street before and after the shootings, and pick Malone out of a lineup. She was arrested later for failing to appear when subpoenaed and held in jail for four days. In a meeting with a detective, an Assistant State's Attorney, and Malone's lawyer, Tate was told to "stick to the story." She replied that she did not remember what she said before and they gave her a copy of the police report to study. Tate was also told Malone's lawyer was "helping them set [Malone] up." Tate testified but did not say

Malone had a gun as she had been instructed. At some point, the Assistant State's Attorney called her a "stupid junkie" and said she would go to prison if he lost the case. The Assistant State's Attorney agreed to let Tate go after some of her family members asked to speak to the judge and threatened to go to the media.

¶ 29 In addition to the 2012 Tate family letter, Malone attached a criminal history report for Oneida Tate from the Chicago Police Department. The report indicates Tate was arrested three times: in 1981 for aggravated battery; in 1991 for misdemeanor battery; and in 2001 for possession of a controlled substance. Malone also attached the same 1997 affidavits from Patrice Sanford and Darryl Kelley that were attached to his original supplemental petition.

¶ 30 In addition, Malone attached several letters from various Cook County government offices responding to his requests for information related to 7038 South East End Avenue. One such letter from the Cook County Recorder of Deeds dated in 2012 explained Malone's request for the owner of record amounted to a title search, which it could not perform for him. The letter also informed Malone there was no property tax property index number (PIN) for 7038 South East End Avenue according to the Cook County Assessor's website. A 2014 letter from the Recorder of Deeds informed Malone "the Recorders office database does not index property by address" and the information he was seeking would more likely be available from the Tax Assessor or City of Chicago Building Department. The Cook County Clerk's Office Department of Real Estate and Tax Services sent Malone a letter in 2013 stating it could not provide him information because "there is no such address at 7038 South East End, Chicago, IL 60649." A month later, that office sent Malone a letter that read: "to clarify my previous letter, per our Map records, there has **never** been such an address at '7038 S. East End, Chicago, IL 60649.' " (Emphasis in original).

¶ 31 Based on his attachments, Malone asserted six claims including three separate bases of actual innocence, the State suppressed exculpatory evidence, the State knowingly used perjured testimony, and ineffective assistance of trial counsel. The trial court denied Malone's motion finding he had not established cause and prejudice to file a successive petition. Malone filed a motion to reconsider repeating the arguments in his motion for leave. The trial court denied the motion to reconsider and Malone filed a notice of appeal.

¶ 32 On appeal, Malone argues he established cause and prejudice to file a successive petition because his petition attached newly discovered evidence showing the State failed to disclose Oneida Tate's arrest record or true address as required under *Brady v. Maryland*, 373 U.S. 83 (1963). Further, he contends this evidence also shows his trial counsel was ineffective for failing to investigate and use this information to impeach Tate's testimony. Regarding the address, Malone argues the non-existence of 7038 South East End would have impeached Tate because she testified she lived at that address and viewed Malone at the scene of the shootings from her second-story apartment there. Malone does not dispute that Lane and Kendle were shot in front of *a* building on the 7000 block of South East End. Rather, the fact that Tate claimed to live at and view the scene from an address that did not exist, as he claims, would impeach her credibility.

¶ 33 ANALYSIS

¶ 34 The Postconviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) enables a defendant to challenge their conviction or sentence based on a substantial deprivation of rights afforded by the federal or state constitutions. A proceeding under the Act is a collateral action, not a continuation of or addendum to direct appeal. *People v. Flowers*, 208 Ill. 2d 291, 303 (2003). Rather, it affords an opportunity to raise constitutional issues that escaped earlier review and could

not have been raised on direct appeal. *People v. Johnson*, 205 Ill. 2d 381, 388 (2002); *People v. Harris*, 224 Ill. 2d 115, 124 (2007).

¶ 35 The Act contemplates the filing of only one petition. *People v. Coleman*, 2013 IL 113307, ¶ 81. Issues not raised in an original petition are deemed waived. 725 ILCS 5/122-3 (West 2016); *People v. Holman*, 191 Ill. 2d 204, 209 (2000). Successive petitions are disfavored and a petitioner seeking to file a successive petition must first obtain leave of court. *People v. Edwards*, 2012 IL 111711, ¶ 29; 725 ILCS 5/122-1(f) (West 2016). Successive petitions are permitted under only two exceptions: (1) where the petitioner satisfies the cause-and-prejudice test or (2) demonstrates a colorable claim of actual innocence. *People v. Sanders*, 2016 IL 118123, ¶ 24. "[T]he cause-and-prejudice test is the analytical tool that is to be used to determine whether fundamental fairness requires that an exception be made" to the bar of waiver. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Under the cause and prejudice test, leave should be granted when the petitioner shows cause—an objective factor, external to the defense, impeded the petitioner from raising the issue in an initial petition—and prejudice—that the claimed constitutional error "so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f); *People v. Smith*, 2014 IL 115946, ¶ 23. A petitioner must establish both cause *and* prejudice to be entitled to leave. *People v. Gurrero*, 2012 IL 112020, ¶ 15.

¶ 36 We review a circuit court's denial of a motion for leave to file a successive petition *de novo*. *People v. Morrow*, 2019 IL App (1st) 161208, ¶ 59. *De novo* review means we consider the motion anew and perform the same analysis that a trial court would. *Id.* ¶ 61.

¶ 37 Malone asserts cause for both of his claims is the same. He argues he has shown cause for not including his current claims in his initial petition because he discovered evidence bearing on Tate's credibility only after receiving the 2012 letter informing him Tate was a drug addict with

arrests and pending warrants in 1986 and she did not live at 7038 South East End Avenue. The letter prompted him to investigate Tate's arrest record and information about 7038 South East End Avenue. In turn, these inquiries led him to discover a record of Tate's 1981 aggravated battery arrest and evidence suggesting there may not have been a building at 7038 South East End Avenue in 1986. Malone contends that because the State did not disclose this evidence and it was favorable to him, he has sufficiently pled the elements of a *Brady* claim, which he further contends, also establish cause for purposes of the cause-and-prejudice test.

¶ 38 Under *Brady*, the State must disclose evidence favorable to the accused and material to guilt or punishment. *People v. Jarrett*, 399 Ill. App. 3d 715, 727 (2010). The elements for establishing a *Brady* claim include showing: (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 willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *Id.* at 728.

¶ 39 In some cases, cause and prejudice may parallel two of the three *Brady* elements. *Strickler v. Greene*, 527 U.S. 263, 282 (1999). That is, the State's suppression of the relevant evidence may have been the reason a petitioner failed to assert their *Brady* claim earlier; and prejudice may be shown when the suppressed evidence is material for *Brady* purposes. *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

¶ 40 But the State's failure to disclose *Brady* material prior to trial does not necessarily indicate a fundamental deficiency in a petitioner's original postconviction proceedings. *Pitsonbarger*, 205 Ill. 2d at 461. For example, in *Banks v. Dretke*, the U.S. Supreme Court found a federal *habeas corpus* petitioner showed cause for failing to investigate and assert his *Brady* claim in state postconviction proceedings *both* because the State withheld evidence that a witness was a paid

informant before trial *and* because the State persisted in hiding that evidence and misleadingly represented it had complied with its *Brady* obligations in state postconviction proceedings. *Banks*, 540 U.S. at 693. (The cause-and-prejudice test applies to successive federal *habeas corpus* petitions and whether the federal courts can adjudicate *habeas corpus* petitions asserting claims procedurally defaulted in state court.) *Pitsonbarger*, 205 Ill. 2d at 459. Similarly, the petitioner in *Strickler v. Greene* relied on the State's misrepresentation that it had fully disclosed everything in state postconviction proceedings and, therefore, showed cause for his federal *habeas corpus Brady* claim. *Strickler*, 527 U.S. at 289.

¶ 41 In contrast, the record in this case belies that Malone was impeded from raising his current claims in his original petition or that Malone relied on any representation from the State regarding evidence bearing on Tate's credibility. Indeed, Malone's suspicion and investigation of Tate did not begin upon his receipt of the 2012 letter. Rather, Malone affirmatively demonstrated that he investigated and discovered evidence that could impeach Tate's credibility by attaching affidavits from Patrice Sanford and Darryl Kelley to his supplemental petition in 1997. While the 2012 letter offers a bit more detail, its salience is the same as the affidavits from 15 years before—that Tate told others she testified as she did under threat of being jailed and losing custody of her children. The evidence Malone now presents—the 1981 aggravated battery arrest and county records related to 7038 South East End—is cumulative and offered for the same purpose—to show that Tate's testimony was not credible. Malone has made no showing that the evidence he discovered later could not have been discovered through due diligence before or during his initial postconviction proceedings. To the contrary, the very nature of the evidence shows it could have been.

¶ 42 In Malone's original postconviction proceedings, he offered the Sanford and Kelley affidavits to argue his counsel was ineffective for failing to impeach Tate. Based on those same

affidavits, Malone could have alleged the State did not disclose Tate had been threatened and thereby assert a *Brady* claim in addition to or in the alternative of an ineffectiveness claim. Either claim would go to the same ultimate issue—whether the outcome of Malone's trial would have been different had Tate's credibility been impeached. Malone's postconviction counsel chose to pursue this issue under ineffective assistance instead of *Brady*. His counsel also relied on the Sanford and Kelley affidavits instead of other evidence like Malone offers now to attack Tate's credibility. Those choices do not enable Malone to try again later with the opposite after the first proved unsuccessful. Cause requires showing the failure to raise a claim is attributable to an objective factor *external* to the defense. "[A]n intentional decision by counsel made in pursuit of his client's interests" is, by definition, not external to the defense. *Pitsonbarger*, 205 Ill. 2d at 461, quoting *Reed v. Ross*, 468 U.S. 1, 14 (1984). Instead, "a defendant is bound by the tactical decisions of competent counsel." *Pitsonbarger*, 205 Ill. 2d at 461, quoting *Reed*, 468 U.S. at 13. Accordingly, we find Malone has failed to show cause for not including the *Brady* and ineffective assistance claims asserted in his third petition in his initial petition.

¶ 43 Notwithstanding our finding on cause, Malone does not establish prejudice on his claims. We agree with the District Court's observation that "much of Tate's testimony was helpful to [Malone's] defense." *Malone*, 2009 WL 3460233, at *7. "Tate implicated Davis as the shooter when Tate testified that immediately after the shooting she observed a gun in Michelle Davis's hand and heard Antonio Stewart yell 'the bitch popped 'em.' " *Id*. Malone's trial counsel, Michael Morrissey, advanced a theory that depended on the credibility of Tate's testimony. He argued the State's evidence showed Malone was merely present and Davis was the probable shooter. Tate's testimony was consistent with that theory.

¶ 44 Even if Morrissey had pursued a different strategy, the evidence attached to Malone's third petition would not have likely led to a different result. Evidence of Tate's arrest for aggravated battery from 1981 would not have been admissible. "[T]he fact that a witness has been arrested or charged with a crime may be shown or inquired into where it would reasonably tend to show that his or her testimony might be influenced by interest, bias or a motive to testify falsely." *People v. Myles*, 2020 IL App (1st) 171964, ¶ 21 (Internal quotation marks omitted). More specifically, "[t]he fact that a witness is under investigation or has pending charges may be used to impeach the witness by showing that he or she is motivated to assist the prosecution in order to receive leniency in his or her own case." *Id*. But "[t]o impeach a witness by showing bias, interest, or motive, the evidence used must not be remote or uncertain and must give rise to the inference that the witness has something to gain or lose by his or her testimony." *Id.* (Internal quotation marks omitted).

¶ 45 The Chicago Police Department record Malone attached to his petition merely shows Tate was arrested for aggravated battery in 1981. The record was printed in 2012 and does not indicate a case number or disposition associated with the 1981 arrest. Therefore, Malone has not shown any charges stemming from the arrest were pending at any time Tate was cooperating with the prosecution of this case (1986-1988). Thus, evidence of the arrest was remote and would not give rise to the inference that Tate had something to gain or lose by testifying at Malone's trial.

¶ 46 Yet Malone posits that if the State had disclosed the 1981 arrest, his counsel could have investigated whether there were any active cases or warrants against Tate and impeached her with evidence of such. This argument is speculative and belied by the same police record showing no other arrests for the relevant time period. In the absence of evidence showing such cases or warrants, Malone has not demonstrated this allegation is capable of objective or independent corroboration. *People v. Delton*, 227 Ill. 2d 247, 254 (2008) (noting that the Act requires attaching

affidavits, records, or other evidence to show allegations are capable of objective or independent corroboration).

¶ 47 Further, we do not believe the documents Malone attached regarding 7038 South East End prove there was no building with that address in 1986. Most of the responses Malone received from Cook County offices merely indicated there was no current information for that address at the time of their response decades later. Even Malone asserts the location of the shooting has become a vacant lot. The only document appearing to comment on the historical status of that property is a 2013 letter from the Cook County Clerk's Office of Real Estate and Tax Services stating "per our Map records, there has **never** been such an address at '7038 S. East End, Chicago, IL 60649.' " (Emphasis in original). But Malone does not supply any evidence explaining what information is contained in the Clerk's Office Map records. We cannot assume this is an exhaustive and authoritative record of all historical street addresses in Cook County (back to 1986 at least).

¶ 48 Indeed, the Clerk's Office tax map records likely do not provide a conclusive answer to the question. We may take judicial notice of information on a government office's website. *Leach v. Department of Employment Security*, 2020 IL App (1st) 190299, ¶ 44. The Clerk's Office website states: "The Map Department draws the official tax maps for Cook County. This includes using the legal description of the properties throughout the county to establish the Property Index Number (PIN) for each parcel for taxation purposes." Tax Map Department, https://www.cookcountyclerkil.gov/service/tax-map-department (last visited Feb. 23, 2021). Thus, the Clerk's Office maintains real property records for purposes of taxation and identifies parcels by PIN or legal description. This does not indicate that the Clerk's Office necessarily maintains information for all common street addresses. To the contrary, the Clerk's Office website indicates otherwise: "[m]atches are not guaranteed, and there may be some addresses that are not

available." About Property Index Number (PIN), https://www.cookcountyclerkil.gov/service/about-property-index-number-pin (last visited Feb. 23, 2021). Thus, it is entirely possible that a building bore the number 7038 on South East End Avenue, but the PIN or legal description simply did not identify the relevant parcel by that address in tax records maintained by the Clerk's Office. The fact that several witnesses other than Tate referred to 7038 South East End as the location of the shootings makes that possibility more probable. Therefore, without more, the statement from the Clerk's Office letter does not necessarily prove there was no building with the common street address of 7038 South East End in 1986.

¶ 49 CONCLUSION

¶ 50 Based on the foregoing, we find Malone failed to show necessary cause and prejudice to permit the filing of a successive postconviction petition.

¶ 51 Affirmed.