

NO. 2-16-0825

IN THE

APPELLATE COURT OF THE STATE OF ILLINOIS

SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 19th Judicial Circuit,
Plaintiff-Appellee,)	Lake County, Illinois.
)	
-vs-)	No. 09 CF 252
)	
MELISSA CALUSINSKI,)	Honorable
)	Daniel Shanes,
Defendant-Appellant.)	Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE

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NATURE OF THE CASE

The defendant, Melissa Calusinski, challenges the denial of her post-conviction petition following a third stage evidentiary hearing before the Honorable Daniel B. Shanes. (C. 1534). (The court's written order appears at C. 1485-1534).

The defendant had been found guilty following a jury trial of the first degree murder of 16-month-old Ben Kingan, who had attended the day care center where the defendant worked as a teacher's assistant. The defendant was sentenced to a term of 31 years in the Department of Corrections.. This Court affirmed the defendant's conviction, and the Supreme Court of Illinois denied her petition for leave to appeal on September 24, 2015. *People v. Calusinski*, 2014 ILApp (2d) 120383-U; *People v. Calusinski*, No. 117725.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court's denial of the defendant's claim under *Brady v. Maryland*, is supported by the manifest weight of the evidence.
2. Whether the trial court's denial of the defendant's claim that her conviction was based on perjured testimony is supported by the manifest weight of the evidence.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT’S CLAIM UNDER *BRADY V. MARYLAND* BECAUSE THE X-RAYS THAT FORM THE BASIS OF THE CLAIM WERE TENDERED TO THE DEFENSE BEFORE TRIAL.

The defendant argues that she suffered a “textbook *Brady* violation” when the State failed to disclose “readable x-rays” to the defense. Appellant’s brief at 41. The trial court quite properly rejected the claim, however, finding the “the State did not fail to disclose evidence to the defense” as the defendant alleged. (C. 1528).

Introduction

The Post-Conviction Hearing Act sets out a way for the defendant to challenge her conviction or sentence for violations of her federal or state constitutional rights. *People v. Pendleton*, 223 Ill.2d 458, 471 (2006), citing *People v. Whitfield*, 217 Ill.2d 177, 183 (2005); 725 ILCS 5/122-1 *et seq.* In order to receive relief under the Act, a defendant must show that she suffered a substantial deprivation of her constitutional rights in the trial that resulted in the conviction she challenges. *Pendleton*, 223 Ill.2d at 471; *Whitfield*, 217 Ill.2d at 183.

The Act provides a framework that may include three stages. As here, at the third stage the defendant may present evidence to support her claims. *Pendleton*, 223 Ill.2d at 472-473; 725 ILCS 5/122-6. At this stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill.2d at 473, citing *People v. Coleman*, 206 Ill.2d 261, 277 (2002). “When a petition is advanced to a third-stage, evidentiary hearing, where fact-finding and credibility determinations are involved,” a reviewing court will not

reverse the circuit court's decision unless it is manifestly erroneous. *Pendleton*, 223 Ill.2d at 473, citing *People v. Childress*, 191 Ill.2d 168, 174 (2000).

The defendant argues that the State failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, the prosecution violates the defendant's right to due process of law by failing to disclose favorable evidence which is material to her guilt or punishment. *People v. Beaman*, 229 Ill.2d 56, 73 (2008); *Brady*; 373 U.S. at 87.

To prevail on a *Brady* claim, a defendant must show that (1) the undisclosed evidence is favorable to her because it is either exculpatory or impeaching; (2) the evidence was suppressed by the prosecution, either wilfully or inadvertently; and (3) the defendant suffered prejudice because the evidence is material to guilt or punishment. *Beaman*, 229 Ill.2d at 73-74. "Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *Id.* At 74, citing *People v. Harris*, 206 Ill.2d 293, 311 (2002); *United States v. Bagley*, 473 U.S. 667, 682 (1985). To establish materiality, the defendant must show that the favorable evidence could place the case in so different a light as to undermine confidence in the conviction. *Beaman*, 229 Ill.2d at 74, citing *Coleman*, 183 Ill.2d at 393.

Again, however, the basic foundation for the claim is that the prosecution suppressed favorable material evidence.

THE TRIAL COURT PROPERLY FOUND THAT THE STATE HAD DISCLOSED THE X-RAYS AT ISSUE PRIOR TO TRIAL.

"In *Brady*, the Supreme Court determined that the State violates a defendant's right

to due process if it fails to disclose evidence favorable to the defendant and material to guilt or punishment.” *People v Cielak*, 2016 Il App (2d) 150944, ¶ 22, citing *Brady*, 373 U.S. at 87. However, the trial court specifically found that the State had not failed to disclose evidence to the defense. (C. 1528). The State found no case involving a *Brady* claim that did not also involve a failure to disclose. Where it is undisputed that an assistant State’s Attorney gave the defense “a compact disk with three x-rays”, (C. 1496, 1527), that should be the end of the inquiry.

The trial court explained its determination, noting that the defendant’s theory had “evolved over the course” of the post-conviction proceedings. (C. 1525). Initially the defense had argued that a second set of x-rays of the child’s autopsy existed, but had been withheld by the State. (C. 1520). Later, the court found that the defense seemed to argue that the compressed images tendered to the defense “lacked the detail required to determine that no fracture existed in [the child’s] skull’. (C. 1525). The trial court rejected this theory:

The testimony and evidence provided by Tigerview engineer Stauffacher conclusively refute Defendant’s claim. During his in-court demonstration, the court observed Stauffacher use the same Tigerview software [defense counsel] possessed from the September 2011 disk to adjust the variables and the jpg images to brighten and display more bone detail. Indeed, Stauffacher did this so quickly and easily as to make it seem like child’s play. In addition, as Stauffacher testified, every particular computer monitor will show an x-ray image differently based on the monitor’s manufacturer and individual screen settings. This is consistent with common experience; pictures may often appear with variations in color, tint, and brightness depending upon the individual and particular settings on a computer and its monitor screen. Adjusting those types of settings-which is essentially what the Tigerview software does-simply does not constitute a *Brady* issue on the facts of this case. (C. 1525).

The court further found that this adjustment was available with the software tendered to defendant's trial counsel. (C. 1526).

In addition, the trial court found that the defense software engineer failed to use "basic forensic procedures regarding preserving original evidence when he examined the coroner's computer and files." (C. 1527). In questioning the defense engineer's credibility, the court wrote:

In a case such as this, where the primary issue is whether Defendant received all the x-ray images from the coroner, Mueller inexplicably and inexcusably trampled on the evidence by exposing the coroner's computer to potential contamination from the internet, accessing the county network, and ultimately saving another modified x-ray image in the Kingan folder, all after the computer itself had been admitted into evidence during the hearing. The court has no confidence in the forensic integrity of the computer following its withdrawal from evidence on August 19, 2016. (C. 1517).

After those comments, the court concluded that the prosecution had tendered the three x-rays, along with the Tigerview program to view and adjust them, to defendant's trial attorney on the September 2011 disk. Once counsel had that disk, the defense had all the x-rays taken at the autopsy of Ben Kingan. No other x-ray images were taken of the child after his death. (C. 1527-1528). Thus, once he had reviewed the September 2011 disk, defense counsel had the means to adjust the images as the Deputy Coroner had done in 2015, and as the Tigerview engineer had done for the court. (C. 1528).

The court further recalled that in September of 2011, it had invited the parties to further address the issue if they deemed it necessary, and in October of 2011, it had granted the parties access to the coroner's office exhibits, including the files on the coroner's office computer. (C. 1528, citing Trial Record at 1812-1814, 1982-1983). The fact that the

defendant's trial counsel had not pursued the matter did "not transform this into a *Brady* violation". (C. 1528). Instead, the court found that the State had not failed to disclose evidence to the defense. (C. 1528, citing *Beaman*, 229 Ill.2d at 73-74). (The court's discussion on this point appears at C. 1520-1528).

THE TRIAL COURT PROPERLY FOUND THAT THE DISK IMAGES DID NOT CONSTITUTE MATERIAL EVIDENCE UNDER *BRADY*.

As argued above, the People submit that the fact that the x-ray images were disclosed to the defense before trial should answer the inquiry, because *Brady* claims are based on the State's failure to disclose favorable evidence. *Cielak*, 2016 IL App (2d) 150944 at ¶ 22. However, the trial court went on to consider the materiality of the evidence in the context of the defendant's *Brady* claim, and in the context of her claim of actual innocence. (See C. 1528-1534).

Again, to show that the x-ray evidence was material, the defendant had to show that x-ray images "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (C. 1528, citing *Beaman*, 229 Ill. 2d at 73-74). Weighing the potential impact of x-ray images on the jury's verdict, the trial court found that the defense claim failed. (C. 1528, citing *Harris*, 206 Ill. 2d at 311.).

The trial court relied on trial testimony in explaining its decision:

Defendant's post-conviction theory is that the June 2015 x-ray images show that Ben's skull was not fractured. At trial, Dr. Choi testified that he observed, with his naked eye, a fracture that went completely through the skull, and identified that fracture to the jury on autopsy photographs. Dr. Greenbaum similarly identified a fracture on the autopsy photographs of both inside and outside the skull, describing it as a through-and-through fracture. Dr. Montez also showed the jury a fracture on autopsy photographs of both inside the outside the skull. Dr. Montez further testified that he physically touched and

manipulated a through-and-through fracture with his hands. Even defense expert Dr. Leestma presumed the existence of a fracture in his testimony.

That said, the jury also heard testimony suggesting that a fracture did not exist. Dr. Choi himself admitted he could not see a fracture in the x-ray image. And Dr. Teas could not definitively say whether a fracture existed; confronted with autopsy photographs, she indicated that additional testing (which Dr. Choi did not perform) would be needed to determine whether the described defect was a fracture or a suture. (C. 1529).

The court further noted that the defense argued that the x-ray images, combined with Dr. Zimmerman's testimony at the post-conviction hearing that no fracture could have existed because he did not see one on the x-ray, refuted the evidence of the existence of a fracture. (C. 1529). The court disagreed, find that the evidence from the hearing showed that various factors, including the object's density, the amount of radiation used, the quality of the x-ray machine, the position of the body, and the ability of the technician, can affect the quality of an x-ray image. (C. 1529). After expressing frustration with the deputy coroner's lack of training in this regard, the court rejected Dr. Zimmermann's testimony that the x-ray showed that no fracture existed: "As so many factors can effect whether a fracture would be visible on an x-ray, it does ot necessarily follow that it is impossible for an x-ray *not* to show a fracture". (C. 1529-1530). The court thus concluded that Dr. Zimmerman's testimony failed to demonstrate that the x-rays "could reasonably be taken to put the whole case in a different light." (C. 1530).

The court further noted that the defense trial experts showed the lack of the x-rays' materiality. In placing its focus on Dr. Teas, the court noted her testimony that she could not tell if a fracture existed, but when asked, she did not suggest that a clearer x-ray image would affect her opinion. (C. 1530).

The court noted that defense counsel took no steps to obtain clearer x-ray images after receiving Dr. Teas' report. (C. 1530):

Further, he made no effort to observe the original x-rays at the coroner's office, despite the court granting him a specific order to do so. The court finds that [defense counsel's] course of action was consistent with his trial strategy-which did not depend upon the presence or absence of a fracture. (C.. 1530).

In finding that the x-ray images were not material under *Brady*, the court considered the opinion of Dr. Jones:

Dr. Jones along with Dr. Zimmerman, is the medical premise of Defendant's post-conviction claims. But like Dr. Teas, she opined that no skull fracture existed based upon her examination of the autopsy photograph and other records-without mention of the June 2015 x-ray images. See *Jones 2015 Affidavit* ¶¶ 17-19. Because Dr. Jones did not rely upon the images from the June 2015 disk to reach the central assertion of Defendant's post-conviction claims-that no skull fracture existed-they were clearly not significant as a basis of her opinion. The images simply do not constitute material evidence for *Brady* purposes. (C. 1530-1531, citing *Beaman*, 229 Ill.2d as 73-74).

The court also addressed the x-ray images in evaluating the defendant's actual innocence claim:

Illinois law also allows relief under the Act on a claim of actual innocence based upon newly discovered evidence. *People v. Washington*, 171 Ill.2d 475 (1996); *People v. Coleman*, 2013 IL 133307. To support an actual innocence claim, the law provides that the newly discovered evidence must be "new, material, noncumulative and, most importantly, of *such conclusive character as would probably change the result on retrial.*" *Washington*, 171 Ill.2d at 489 (internal quotations omitted); *Coleman*, 2013 IL 113307, ¶ 96. (C. 1531) (emphasis added).

The actual innocence standard is thus similar to the materiality standard under *Brady*, which requires "a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *Beaman*, 229 Ill.2d at 74. Also, as a *Brady* claim has a

threshold, the lack of disclosure, the actual innocence claim first requires that the evidence at issue be actually new. See *Coleman*, 2013 IL 113307, ¶ 97.

The trial court found that the x-ray images were not new, because, as it noted in its *Brady* analysis, “the defense had copies of the x-rays and the means to view and modify them before trial.” (C. 1532). Similarly, Dr. Zimmerman’s testimony was found to provide no meaningful support for the defendant’s claim: “An expert’s conclusion fails to constitute new evidence when that conclusion is based upon evidence that was available prior to trial.” (C. 1532, citing *People v. Patterson*, 192 Ill2d 93, 140 (2000)).

As in its assessment of the defendant’s *Brady* claim, the court evaluated the actual innocence claim in the context of the evidence presented at trial:

Dr. Jones’s conclusions are based upon adjustments to the January 15, 2009, x-rays reflected on the June 2015 disk (which the court has repeatedly found to have been available with the exercise of due diligence) and evidence utilized at trial. Like Dr. Zimmerman’s, her conclusions therefore fail to constitute new evidence. *Patterson*, 192 Ill.2d at 140. Moreover, although Dr. Jones’s opinion that Ben suffered from a cerebral edema differs from the conclusions of Defendant’s experts at trial, the underlying reasons for that opinion are mere repetitions of what the jury heard at trial. Her conclusion that the defect in the skull is a suture rather than a fracture echoes Dr. Teas’s testimony. Likewise, her conclusions regarding evidence of healing in Ben’s skull mirrors both Dr. Teas and Dr. Leestma. Similarly, Dr. Leestma (like Dr. Jones) referred to signs of more recent hemorrhaging. Finally, Dr. Jones herself indicated that BenKingan3.tiff (from the June 2015 disk) merely reinforces the testimony the jury heard at trial about Ben’s head growth. Dr. Jones’s cumulative testimony does not meaningfully add to what the jury heard and therefore does not support Defendant’s claim of actual innocence. *Coleman*, 2013 IL 113307, ¶ 96. (C. 1533).

The court noted that those findings may not have been sufficient to undermine the defendant’s claim, but even if the x-ray images had constituted newly discovered evidence, the images and the medical conclusions that stemmed from them were not of so conclusive

a character as would probably change the result on retrial. (C. 1533, citing *Coleman*, 2013 IL 113307 at ¶ 96).

As in the main *Brady* argument, the defendant's actual innocence claim was based on the view that the June 2015 images show that the child's skull was not fractured. The court rejected the claim:

A trial court must consider all the evidence, both old and new together, to in effect predict what another jury would likely do if it also heard the new evidence. *Coleman*, 2013 IL 113307, ¶ 97. Evidence that merely contradicts or impeaches a witness is typically not of such a conclusive nature so as to justify post-conviction relief. *People v. Montes*, 2015 IL App (2d) 140485, ¶ 25. At best, that is all Defendant could hope for here.

As discussed in detail above, the June 2015 x-rays images, Dr. Zimmerman's testimony, and Dr. Jones's affidavits fail to convince that the jury's verdict would probably be different. Suffice it to say that considering all the evidence, old and new together, this evidence is hardly of such conclusive character as to change the result on retrial. See *Coleman*, 2013 IL 113307, ¶ 96. (C. 1533-1534).

As noted above, a court of review will not reverse the circuit court's post-conviction decision unless it is manifestly erroneous. *Pendeleton*, 223 Ill.2d at 473. Because the trial court's judgment is based on the evidence presented at trial and at the third stage hearing, it is supported by the manifest weight of the evidence, and should be affirmed.

II.

THE TRIAL COURT PROPERLY REJECTED THE DEFENDANT'S CLAIM THAT HER CONVICTION RESTED ON PERJURED TESTIMONY FROM DR. MONTEZ.

In her second argument, the defendant claims that “her conviction resulted from the presentation of perjured evidence”. Appellant’s brief at 60. The trial court quite properly rejected the claim, finding no credible evidence to support it. (C. 1520).

Introduction

As noted in point I, *supra*, the defendant appeals the third stage denial of her post-conviction petition. At this stage, “where fact-finding and credibility determinations are involved,” the trial court’s judgment will not be reversed “unless it is manifestly erroneous.” *People v. Childress*, 191 Ill.2d 168, 174 (2000).

The defendant argues on post-conviction review that her conviction stemmed from perjured testimony. Our state supreme court has stated that “the State’s knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process of law.” *People v. Olinger*, 176 Ill.2d 326, 345 (1997), citing *People v. Jimerson*, 166 Ill.2d 211, 223 (1995). Therefore, “a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury’s verdict.” *Olinger*, 176 Ill.2d at 345, citing *United States v. Bagley*, 473 U.S. 667, 678-680 (1985).

Like the *Brady* claim discussed in point I, *supra*, this claim also has a threshold requirement: perjured testimony. But the trial court found no credible evidence to support the defendant’s claim, and its determination is supported by the manifest weight of the evidence.

THE TRIAL COURT PROPERLY FOUND THAT THE EVIDENCE FAILED TO SUPPORT THE DEFENDANT'S PERJURY CLAIM.

During its discussion of this claim, (C. 1516-1520), the court first explained its decision to allow the defense to add the claim late in the proceedings. The court relied on the Act's grant of discretion to the trial court to accept amendment to petitions, and on the Code of Civil Procedure's similar grant of discretion. (See C. 1516-1518, discussing 725 ILCS 5/122-5 and 735 ILCS 5/2-616(c)).

In reaching the merits of the perjury claim, the court found that it was solely based on Deputy Coroner Forman's hearing testimony that he had stitched the child's skull together at the first autopsy on January 15, 2009. Forman had further testified that Dr. Montez had not physically touched or examined the child's body when he went to the coroner's office the next day. Forman also testified that, when Dr. Choi started his second examination that afternoon, the child's skull was still stitched together. (C. 1518). "From this testimony-and this alone-Defendant concludes that Dr. Montez must have falsely testified at trial that he physically examined the body and actually touched a fracture in Ben's skull." (C. 1518).

In continuing its discussion of the evidence, the court relied on its role as finder of fact to weigh the testimony and to resolve any conflicts, and on its opportunity to "observe and evaluate Dr. Montez's testimony during trial, similar to its opportunity to evaluate Foreman's testimony at the hearing." (See C. 1518, 1519, citing *People v. Carter*, 2013 ILApp(2d) 110703, ¶ 74, and *People v. Pendleton*, 223 Ill.2d 458, 473 (2006)).

In that light, the trial court noted that Formans' testimony had been "directly refuted":

It is undisputed that Officer Thomas attended the second examination with Forman and Dr. Choi on January 16, 2009. When Thomas first saw the body

that day, the skull cap was not stitched to the head. In addition, the series of photographs from that examination clearly support Thomas' testimony. The first photographs show the head with the skull cap removed. No stitches are present, and there are no stitch marks or holes that would suggest that stitches had been removed. The photographs taken at the conclusion depict stitches of large white twine holding the skull cap to the head. The twine created visible holes in the skin on the head that would be noticeable had the twine been removed. It is clear to the court that Ben's skull cap was not stitched to his head after the autopsy on January 15, 2009, as Forman testified. (C. 1519).

The court also found the deputy coroner's credibility undermined by his testimony that he had taken five x-rays of the child's body on January 15, 2009, despite his earlier statements to Investigator Biang at two separate meetings where Forman had stated that he had taken two x-rays. More important, the court found both versions to be "contradicted by the evidence from the coroner's computer showing three x-rays of Ben's body were taken on January 15, 2009." (C. 1519).

Because the trial court scrupulously considered both the evidence at trial and at the third stage hearing, the defendant's argument about the "materiality" of Dr. Montez's testimony has no relevance here. See appellant's brief at 67-68, citing *People v. Smith*, 352 Ill.App.3d 1095, 1102 (1st Dist. 2004). Further, *Smith* has no relevance, since it follows a dismissal, not a denied on the merits following a third stage hearing.

In denying the defendant's perjury claim, the trial court concluded: "Having considered all the evidence, the court finds that defendant has failed to present credible evidence showing a constitutional deprivation based upon perjured testimony." (C. 1520).

Because the court's conclusion is not manifestly erroneous, it should be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing, the People of the State of Illinois respectfully request that this Honorable Court affirm the trial court's judgment denying post-conviction relief and assess statutory State's Attorney's fees pursuant to 55 ILCS 5/4-2002(a)(West 1994) and *People v. Nicholls*, 71 Ill. 2d 166, 174 (1978).

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341 cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14 pages.

Respectfully submitted,

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MELISSA CALUSINSKI,)	Honorable
)	Daniel Shanes,
Defendant-Appellant.)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under the penalties provided in law pursuant to Section 1-109 of the Code of Civil Procedure, I hereby certify that appellee's brief and argument in the above-entitled cause are being electronically filed with the Clerk of the Appellate Court, Second District, and that opposing counsel is being electronically served at the email address shown above from a computer at the office of the State's Attorneys Appellate Prosecutor in Elgin, Illinois, on November 27, 2017.

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