

2020 IL App (1st) 162285-U
No. 1-16-2285
Order filed November 4, 2020

Second Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	Nos. 00 CR 0217
)	00 CR 4985
)	
SPANISH BROWN,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justice Cobbs concurred in the judgment.
Justice Pucinski dissents.

ORDER

- ¶ 1 *Held:* The circuit court's second-stage dismissal of defendant's postconviction petition as untimely is affirmed where defendant does not challenge the court's finding of untimeliness on appeal and does not claim a lack of culpable negligence.
- ¶ 2 Defendant Spanish Brown appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his postconviction petition as being untimely filed. On appeal, defendant does not challenge the untimeliness of his petition, but instead, contends that the

court erred in dismissing his petition without an evidentiary hearing because his allegations, taken as true, establish a claim of ineffective assistance of trial counsel. We affirm.

¶ 3 On April 16, 2001, defendant pled guilty to the first degree murder of Barreto Williams in case number 00 CR 4985, and the attempted murder of Chicago police officer Ronald Watts in case number 00 CR 0217. The trial court sentenced defendant to concurrent prison terms of 40 years for the murder and 20 years for the attempted murder. Defendant did not file a motion to withdraw his guilty plea, nor did he attempt to perfect a direct appeal from that judgment.

¶ 4 On October 23, 2006, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)), alleging, *inter alia*, that his trial counsel was ineffective for failing to file a motion to withdraw his guilty plea or a postconviction petition. Defendant stated that he contacted his trial counsel within 30 days of his guilty plea to withdraw the plea. Defendant claimed that counsel told him that he would file a motion to withdraw the plea, but never did. Defendant stated that counsel also led him to believe that he would file a postconviction petition on his behalf to “over turn” his guilty plea, but never did. Defendant stated that after many unanswered letters, counsel finally sent him a letter stating that he no longer represented defendant, that defendant owed him “back pay,” and wishing defendant good luck. Defendant alleged that he missed the three-year deadline to file his postconviction petition because he was under the belief that counsel was filing it on his behalf.

¶ 5 Attached to defendant’s *pro se* petition was his own affidavit averring that he would have filed a timely postconviction petition if counsel had not misled him into believing for years that counsel was going to file the petition. Defendant also attached an affidavit from Michael Key, one of his codefendants in the murder case, averring that on the day of defendant’s guilty plea, Key

heard counsel tell defendant to plead guilty that day, and that counsel would file a motion to withdraw the guilty plea in no less than 30 days.

¶ 6 On December 18, 2006, the circuit court summarily dismissed defendant's postconviction petition as frivolous and patently without merit. On appeal, this court found that, taking the allegation in defendant's petition as true, defendant stated the gist of a constitutional claim of ineffective assistance of counsel. Accordingly, we vacated the circuit court's summary dismissal of defendant's petition and remanded the case for second-stage proceedings under the Act. *People v. Brown*, No. 1-07-0256 (2010) (unpublished order under Supreme Court Rule 23).

¶ 7 On December 3, 2014, defendant, through appointed counsel, filed a supplemental postconviction petition alleging ineffective assistance of trial counsel. Defendant again alleged that his trial counsel was ineffective because counsel told defendant that he would file a motion to withdraw his guilty plea but failed to do so. Defendant also alleged that counsel told him that he would file a postconviction petition on his behalf, but failed to do so and ignored defendant's letters. In addition, defendant alleged that counsel was ineffective because he failed to contact or investigate alibi witnesses, and did not allow defendant to testify on his own behalf, which led him to plead guilty. Consequently, defendant claimed that he "did not knowingly plead guilty."

¶ 8 Defendant further alleged that the delay in filing his *pro se* postconviction petition was not due to his culpable negligence because he relied on trial counsel's promise to withdraw his guilty plea and file a postconviction petition. Defendant again noted that Key had heard counsel say that he would file a motion to withdraw the guilty plea in no less than 30 days. Defendant stated that counsel did not inform him that he was no longer his attorney until December 20, 2004, when counsel sent him the letter stating that defendant owed him money and wishing him good luck.

Defendant stated that he started working on his *pro se* postconviction petition when he realized counsel would not be doing so. Defendant further stated that because he had not completed high school and had no legal training, he was unable to finish his *pro se* petition on his own, and only completed it with the help of other inmates. Defendant noted that while working on his *pro se* petition he was prescribed Prozac. Defendant argued that the allegations in his petition made a substantial showing that he acted in reliance on counsel's representations, and that he was prejudiced by counsel's failure to fulfill his obligations to defendant.

¶ 9 Defendant attached to his supplemental petition his own affidavit averring to the facts in his petition. Defendant stated that he no longer had the letter counsel sent him, but attached a copy of the envelope from counsel postmarked December 20, 2004. Defendant further stated that due to depression brought on by the realization that counsel had led him astray, he had trouble concentrating and comprehending the work that needed to be done on his petition. Defendant stated that he eventually prepared his *pro se* petition with assistance from other inmates who were certified to help in the law library.

¶ 10 The State moved to dismiss defendant's postconviction petition arguing that defendant's petition was untimely filed nearly two and a half years after the deadline for filing his petition had expired. The State further argued that defendant failed to adequately explain why he was not culpably negligent for the late filing. The State asserted that it was hard to believe that defendant waited two years for a response from trial counsel before filing his petition. The State also argued that defendant's claims that trial counsel was ineffective for failing to investigate his alleged alibi witnesses and not allowing him to testify were waived because he did not raise those issues on appeal. The State pointed out that defendant pled guilty which waived all non-jurisdictional errors.

¶ 11 In his response to the State’s motion to dismiss, defendant repeated his arguments that counsel was ineffective for failing to withdraw his plea and failing to file a postconviction petition after telling defendant that he would do so. He argued again that he was not culpably negligent for the untimely filing because he believed his trial counsel was pursuing postconviction relief on his behalf. Defendant also argued that he felt he had no choice but to plead guilty because counsel failed to investigate his alibi witnesses and told defendant that he would not allow him to testify on his own behalf. Defendant asserted that his guilty plea, therefore, was not knowing or voluntary.

¶ 12 At a hearing on the State’s motion to dismiss, the parties briefly summarized the arguments in their written motions. The trial court ruled as follows:

“Mr. Brown has been incarcerated for 16 years and the idea that he entered into a voluntary plea many years ago at this late stage articulates this idea for the first time that his counsel was ineffective and that he made a request of motion to withdraw his plea is not taken seriously or filed by his trial attorney [*sic*]. It’s frivolous and patently without merit. It’s unsupported and it’s very very late in the game to raise it for the first time.

Therefore Defendant’s petition under these circumstances in light of the statute of limitations and all the facts and evidence allowing me to move this case forward, therefore, the motion to dismiss by the State is granted.”

¶ 13 On appeal, defendant does not challenge or address the untimeliness of his petition, nor does he assert that he was not culpably negligent for the untimely filing. Instead, defendant contends that the circuit court erred in dismissing his petition without an evidentiary hearing because his allegations, taken as true, establish a claim of ineffective assistance of trial counsel. Defendant maintains that counsel rendered ineffective assistance when he failed to file a motion

to withdraw the guilty plea after telling him that he would do so. Defendant states, without further argument, that the motion to withdraw his plea “would have some merit.” Defendant also states that counsel advised him to file a postconviction petition. Defendant asserts that, because his allegation, which must be taken as true, involves facts outside the record, the circuit court should have granted him an evidentiary hearing. Defendant asks this court to reverse the dismissal of his petition and remand his case for a third stage evidentiary hearing.

¶ 14 The State responds that the circuit court correctly dismissed defendant’s postconviction petition as untimely where it was filed more than two years after the limitations period expired. The State argues that because defendant has not challenged the finding of untimeliness on appeal, he has forfeited the issue and no further analysis is needed. The State further argues that defendant failed to allege facts showing that he was not culpably negligent for the untimely filing. The State points out that defendant had until April 16, 2004, three years from the date of his conviction, to file a postconviction petition. It asserts that his *pro se* petition, filed October 23, 2006, was more than two and a half years late. The State further notes that after counsel informed defendant in December 2004 that he no longer represented him, defendant waited two years to file his petition.

¶ 15 Defendant did not file a reply brief. Thus, he has not responded to the State’s argument regarding the untimeliness of his petition.

¶ 16 We review the circuit court’s dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). A postconviction proceeding is not a substitute for a direct appeal, but instead, is a collateral attack upon the conviction that allows only limited review of constitutional claims that could not be raised on direct appeal. *People v. Harris*, 224 Ill. 2d 115, 124 (2007). To obtain postconviction relief, defendant must demonstrate

that he suffered a substantial deprivation of a constitutional right in the proceeding that produced his conviction. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006).

¶ 17 During second-stage proceedings, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation, and if no such showing is made, the petition is dismissed. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). The burden of making a substantial showing is on defendant. *Pendleton*, 223 Ill. 2d at 473. At this stage, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *People v. Johnson*, 2017 IL 120310, ¶ 14.

¶ 18 Postconviction proceedings must be initiated within the time limitations specified in section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2006)), unless defendant shows that the delay in filing his petition was not due to his culpable negligence. *People v. Lander*, 215 Ill. 2d 577, 586 (2005). Section 122-1(c) provides, in relevant part: “If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.” 725 ILCS 5/122-1(c) (West 2006).

¶ 19 Our supreme court defined “culpable negligence” as conduct greater than ordinary negligence and akin to recklessness. *People v. Bocclair*, 202 Ill. 2d 89, 108 (2002). It is solely defendant’s obligation to know the time limitations for filing his postconviction petition, and his ignorance of the law or his legal rights will not excuse a delay in filing. *Lander*, 215 Ill. 2d at 588-89. Furthermore, defendant’s reliance on the advice of other inmates or jailhouse lawyers is not reasonable when there are no facts alleged to show that they had specialized knowledge in postconviction matters. *Johnson*, 2017 IL 120310, ¶ 26, citing *Lander*, 215 Ill. 2d at 588.

Defendant's reliance on such advice is insufficient to establish that the delay in filing was not due to his culpable negligence. *Lander*, 215 Ill. 2d at 589. Where defendant does not allege facts showing a lack of culpable negligence, the Act directs the circuit court to grant the State's motion to dismiss the petition as untimely during the second stage of postconviction proceedings. *People v. Perkins*, 229 Ill. 2d 34, 43 (2007).

¶ 20 Here, the record shows that defendant untimely filed his *pro se* postconviction petition. Defendant pled guilty on April 16, 2001. He never filed a direct appeal. Pursuant to section 122-1(c) of the Act, defendant had until April 16, 2004, three years from the date of his conviction, to file a petition. Consequently, defendant's filing on October 23, 2006, was more than two and a half years after his deadline for filing had expired. Moreover, defendant filed his petition nearly two years after he claimed his trial counsel informed him that he was no longer representing him in December 2004. Based on this record, we find that the trial court properly granted the State's motion to dismiss defendant's petition as being untimely filed.

¶ 21 On appeal, defendant has not challenged or addressed the trial court's finding that his petition was untimely, nor does he argue that he alleged facts showing that he was not culpably negligent for the delay in filing. Accordingly, any contention that the trial court erred in dismissing his petition as untimely, or that he established that he was not culpably negligent, is forfeited. See *People v. Cotto*, 2016 IL 119006, ¶ 49 (issues not raised by a postconviction petitioner in the appellate court are forfeited on appeal); Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued are forfeited.")

¶ 22 Where, as here, a postconviction petition is dismissed as untimely on the State's motion, a defendant cannot present any constitutional claim. *Perkins*, 229 Ill. 2d at 43. We, therefore, give

no consideration to defendant's argument on appeal that his trial counsel rendered ineffective assistance.

¶ 23 For these reasons, we affirm the judgment of the circuit court of Cook County dismissing defendant's postconviction petition during second-stage proceedings.

¶ 24 Affirmed.

¶ 25 JUSTICE PUCINSKI, dissenting:

¶ 26 With the greatest respect for my colleagues, I write specifically out of frustration that this case, like so many others, has taken so long in the system.

¶ 27 I find no fault with the hard-working attorneys and support staffs in the Office of the Public Defender, the State's Attorney, the Office of the State Appellate Attorney or the Appellate Court. Those staffs are already overworked and underpaid.

¶ 28 The problem is the budget makers: the Governor, the President of the County Board, the Legislature and the County Board members who seem to think that these cases can be wished to completion.

¶ 29 It takes research, analysis and writing to get a case ready for appeal and all of those tasks require intelligent, focused and critical human resources. No machine can put an appeal together. It must be done with the human brain working at full tilt.

¶ 30 If the budgeteers do not recognize that when a liberty interest is at stake the whole of society suffers by staff-shortage delays, then they have sadly and completely missed the point of a democracy.

¶ 31 On April, 16, 2001, defendant pleaded guilty. He claims his attorney told him he would file a motion to withdraw that plea within 30 days. That did not happen.

¶ 32 Defendant had until April 16, 2004 to file a Post Conviction Petition. At the time he avers that he was still relying on his attorney to do that. It did not happen.

¶ 33 He did not learn until December 20, 2004 that his attorney was withdrawing his representation.

¶ 34 Clearly, Petitioner could not have filed a *pro se* Post Conviction Petition before he knew his attorney had withdrawn.

¶ 35 On October 23, 2006 Defendant filed a *pro se* Post Conviction Petition. Our court today argues, as did the trial court, that the delay from April 16, 2004 to October 23, 2006 was too long, and that the defendant has not argued why this was not his culpable negligence. There is no argument about the culpable negligence problem in the brief submitted by the Public Defender, and no explanation for it being ignored in there either.

¶ 36 I can see all sorts of reasons why it would take an inmate on depression medications, with a low reading level, and probable limited access to the law library to get a *pro se* petition together, but that is not my point here.

¶ 37 On October 18, 2006, the trial court dismissed the Post Conviction Petition as frivolous and without merit.

¶ 38 On October 17, 2008, our court reversed the trial court and remanded the Post Conviction Petition back for the second stage, finding the gist of a Constitutional violation.

¶ 39 On December 3, 2014, the Defendant filed a supplemental Post Conviction Petition through appointed counsel, based on ineffective assistance of counsel.

¶ 40 On July 28, 2016, the trial court dismissed the Post Conviction Petition as frivolous and filed very late.

¶ 41 On July 28, 2016, the Defendant filed a Notice of Appeal.

¶ 42 On July 11, 2018, two years later, the Office of the State Appellate Defender filed its brief.

¶ 43 On February 6, 2020, close to two years later, the States Attorney filed its brief.

¶ 44 Since the Pubic Defender chose not to argue the issues of lack of culpable negligence and untimeliness, we cannot put those in for the defendant. We found once before that the attorney may have provided ineffective assistance of counsel, when we remanded it back the first time.

¶ 45 It is frustrating that understaffing essential services in our criminal justice process means that our “wheels of justice” turn so slowly that even when we think there might have been a good argument for ineffective assistance it took from 2008 to 2020 to get to us.

¶ 46 I would not hold the delays against this defendant. I would remand for a third stage evidentiary hearing.