

No. 1-12-2931

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 96 CR 123
	)	
TYWON KNIGHT,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Justices Cunningham and Harris concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* The defendant met his burden of making a substantial showing of a constitutional claim that his sentence was unreasonably disparate from that of his co-defendant, thus warranting remand for an evidentiary hearing.
- ¶ 2 This appeal involves a successive post-conviction petition filed by defendant Tywon Knight. In that petition, defendant asserts his consecutive prison sentences totaling 145 years are unconstitutionally disparate from the sentences totaling 105 years that his co-defendant, Richard Morris, received upon retrial. After post-conviction counsel was appointed for defendant and the

State filed a motion to dismiss, the circuit court heard arguments and dismissed the petition. We reverse and remand for an evidentiary hearing on defendant's disparate sentencing claim.

¶ 3 Defendant's sentence was imposed for the December 2, 1995, murder of Ervin Shorter in Chicago. Defendant and Morris were tried simultaneously by separate juries in December 1998. The State presented evidence that defendant and Morris, along with Brian Hoover and Morris's wife, Lyda, carjacked Shorter at gunpoint in his 1995 blue-green Chevrolet Impala. The foursome got into Shorter's car and drove with Shorter in the front seat before stopping the car, ordering Shorter into the trunk and driving into an alley. A woman driving behind the Impala saw Shorter's fingers protruding from the car's trunk and reported that incident to police.

¶ 4 Assistant State's Attorney Steve DiNolfo testified that defendant and Morris made statements within 24 hours of the crime. Defendant admitted knowing that Morris had a gun and planned to shoot Shorter. According to defendant's statement, Morris ordered Shorter out of the trunk, told him to get on the ground, and shot him twice in the head as Shorter pleaded for his life. Morris and defendant then got back in the car.

¶ 5 Morris confessed to ASA DiNolfo that he was the shooter. In Morris's statement, he said he, Hoover and Knight discussed robbing a bank the night before to obtain money for Morris to leave the area and live with his uncle in Atlanta. He said he targeted Shorter because he mistook him for a drug dealer.

¶ 6 However, Morris recanted that statement at trial, testifying that Hoover shot the victim. Morris testified that when they parked in the alley and got out of the car, Hoover ordered Shorter out of the trunk and demanded Morris's gun. Morris said he knew Hoover was going to shoot Shorter. Morris testified that after he went to the front of the car to wait for Hoover, he heard

two gunshots. Hoover returned to the passenger seat, and he and Morris drove away and picked up defendant, with whom he and Hoover had been earlier in the day.

¶ 7 When Morris was asked at trial why he confessed to ASA DiNolfo that he fired the shots, he replied he was trying to secure a deal for his wife. Morris also explained that two days before Shorter's death, he, his wife and Hoover were at Morris's apartment in Kenosha, Wisconsin, when Hoover killed a man named Fred Jones who had sold them drugs. Morris testified that it was Hoover who suggested they rob a bank and that they kill Shorter because it would be easier than robbing a bank.

¶ 8 Two police officers responding to the driver's sighting of Shorter in the trunk observed defendant and Morris getting out of a new blue-green Impala. Defendant and Morris fled upon seeing the officers, and they were apprehended after a short chase. Among the items that police recovered along the path of the pursuit were two pistols; one of those weapons fired the bullets that were extracted from Shorter's body.

¶ 9 Both juries were instructed on an accountability theory. Defendant and Morris were each found guilty of first degree murder, aggravated vehicular hijacking and aggravated kidnapping.

¶ 10 At defendant's sentencing, the State argued the court should impose a natural life sentence. Defense counsel argued that defendant's criminal record, which consisted mostly of juvenile offenses, was minimal and that Morris was more culpable in Shorter's death. The court imposed an extended term of 100 years in prison for murder based on the court's finding of exceptionally brutal and heinous behavior indicative of wanton cruelty. The court also sentenced defendant to 30 years in prison for aggravated vehicular hijacking and 15 years for aggravated kidnapping, with all sentences to run consecutively, for a total prison term of 145 years.

¶ 11 As to Morris, the jury in his case found him eligible for the death penalty based on his commission of murder in the course of another felony. The jury also found that no mitigating factor existed sufficient to preclude the imposition of the death penalty. Like defendant, Morris received 30- and 15-year respective sentences for aggravated vehicular hijacking and aggravated kidnapping.

¶ 12 In defendant's direct appeal, he argued, *inter alia*, that his extended-term and consecutive sentences violated the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This court issued an order affirming defendant's convictions but vacating his sentences and remanding for resentencing. *People v. Knight*, No. 1-99-0532 (2002) (unpublished order under Supreme Court Rule 23). On June 6, 2003, the Illinois Supreme Court issued a supervisory order directing this court to reconsider its ruling in light of *People v. Crespo*, 203 Ill. 2d 335 (2001), and *People v. Thurow*, 203 Ill. 2d 352 (2003), which address the application of harmless error and plain error to *Apprendi* claims.

¶ 13 In response to that supervisory order, this court affirmed the imposition of a 100-year extended-term sentence for defendant, finding that no plain error occurred in the finding of exceptionally brutal and heinous conduct by the trial court, as opposed to a jury. *People v. Knight*, No. 1-99-0532 (October 3, 2003) (unpublished amended order under Supreme Court Rule 23). However, this court vacated the portion of the sentencing order requiring defendant to serve his sentences consecutively because it was unclear on what basis those sentences were imposed. The order directed the trial court to determine "whether defendant's sentences should be served consecutively or concurrently," and noted that consecutive sentences were allowed under *Apprendi*. *Id.* at 21-22, citing *People v. Wagener*, 196 Ill. 2d 269 (2001).

¶ 14 On December 18, 2003, the same judge who presided over the trials of defendant and Morris considered defendant's sentences on remand. After hearing argument, the court stated that "for the record it was and is the intention of the court that the defendant serve consecutive sentences." The court stated the mittimus should indicate that defendant was sentenced to 100 years for first degree murder, 30 years for aggravated vehicular hijacking and 15 years for aggravated kidnapping, with those sentences to be served consecutively.

¶ 15 The court also noted that during the proceedings on direct appeal, defendant had filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2002)), which the court had summarily dismissed in April 2002. This court subsequently dismissed defendant's appeal of that ruling without prejudice because defendant was in the process of challenging his convictions and sentence and therefore could not yet seek relief under the Act. *People v. Knight*, No. 1-02-1551 (2003) (unpublished order under Supreme Court Rule 23).

¶ 16 In November 2006, defendant filed a *pro se* post-conviction petition asserting his counsel on direct appeal was ineffective for not challenging the trial court's ruling on his motions to quash his arrest and suppress statements. On February 1, 2007, the trial court summarily dismissed defendant's petition. On appeal, this court affirmed. *People v. Knight*, No. 1-07-0578 (2009) (unpublished order under Supreme Court Rule 23). However, that order stated defendant had been sentenced to "concurrent prison terms of 100, 30 and 15 years" for his three convictions. *Id.* at 1.

¶ 17 While defendant's case was proceeding, Morris's direct appeal was taken to the Illinois Supreme Court due to the imposition of the death sentence in his case. The supreme court

reversed Morris's convictions and remanded for a new trial because his trial counsel provided ineffective assistance by referring to Morris's role in the murder of Jones, which was unrelated to the instant crimes and by admitting Morris's participation in the instant crimes. *People v. Morris*, 209 Ill. 2d 137, 183 (2004). During the pendency of that appeal, Morris's death sentence was commuted to life imprisonment without the possibility of parole or mandatory supervised release. *Id.* at 139 n.1. Upon retrial in 2007, a jury found Morris guilty of the murder of Shorter on an accountability theory. Morris was sentenced to 60 years in prison for first degree murder, 30 years for aggravated vehicular hijacking and 15 years for aggravated kidnapping, to be served consecutively. On appeal, this court affirmed. *People v. Morris*, No. 1-06-3474 (2009) (unpublished order under Supreme Court Rule 23).

¶ 18 In May 2009, defendant filed his third post-conviction petition, which is the subject of this appeal. In the petition, defendant asserted he could not have raised his claim earlier because the appeal of his second petition was pending when Morris's retrial took place in 2007.

¶ 19 Defendant argued his consecutive sentences of 100, 30 and 15 years are unconstitutionally disparate from Morris's sentences on retrial. Defendant asserted Morris was the "leader, instigator, planner and more active participant in the crime" and Morris admitted as such in his statement after his arrest. Defendant stated in the petition that after Morris shot the victim, he ordered defendant to also shoot the victim, but defendant did not. Defendant argued he was the less culpable person and "played a very minimum role in the crime" as compared to Morris. In addition, defendant asserted he and Morris had "similar" criminal records and that he had no involvement in the separate murder of Jones.

¶ 20 Post-conviction counsel was appointed to represent defendant, and defendant amended his petition *pro se* to raise additional issues. In January 2012, defendant's post-conviction counsel filed a certificate in compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating that he had communicated with defendant and would not be supplementing defendant's *pro se* claims.

¶ 21 On April 17, 2012, the State filed a motion to dismiss defendant's petition, arguing that defendant had not met the cause and prejudice requirements for such a filing. The State also asserted that defendant's disparate sentencing claim could not succeed because defendant had been resentenced after his direct appeal to concurrent terms of 100 years, 30 years and 15 years, for a total sentence of 100 years, while Morris had been resentenced to consecutive terms of 60 years, 30 years and 15 years, for a total sentence of 105 years.

¶ 22 On June 19, 2012, the circuit court heard arguments on defendant's petition:

MR. DRIZIN [assistant public defender]: "Your Honor, in this case my client found out that his co-defendant, Mr. Morris, who was the most culpable person in this murder case [] received a reduced sentence of 60 years. My client got 100 years. And he found this out after he had filed his first petition. That is the prejudice. Mainly, that the more culpable defendant received a higher sentence later [*sic*]. It was an extreme sentence disparity. He couldn't have learned these matters while the first petition was pending. He dutifully filed his petition. So we think you should consider the merits. And in terms of the merits, your Honor, it is not fair that my client should get – have to spend 100 years – 60 years sentence – 100 years, when the co-defendant, who was much more culpable, got 60 years.

MR. ABRAHAM [assistant State's Attorney]: Judge, that's simply not true. The codefendant in this case, Richard Morris, was sentenced initially to death. After multiple appeals, he was granted a new trial. And after remand for a new trial, he was sentenced to 60 years on the murder consecutive to 30 years on the armed robbery consecutive to 15 -- I am sorry, 30 years on the aggravated kidnapping consecutive to 15 years on the armed robbery, for a composite sentence of 105 years.

The petitioner in this case was sentenced to 60 years on the murder, 30 years on the armed robbery, and 15 years on the aggravated kidnapping, all to be served concurrently.

By my calculation, Judge, co-defendant has a sentence that's five years higher –

THE COURT: Longer than the other one, right.

MR. ABRAHAM: It is, Judge."

¶ 23 In dismissing the petition, the court stated those facts "were known to the defendant prior to the filing of his first petition." The court further stated: "I don't find the disparity adequate to the task of allowing me to grant his post-conviction petition."

¶ 24 On July 5, 2012, defendant filed a *pro se* motion for extension of time to file a motion for reconsideration of the court's ruling. On July 8, 2012, defendant mailed a *pro se* motion to reconsider to the circuit court. In that motion, defendant argued, *inter alia*, that his post-conviction counsel provided unreasonable assistance and the trial court was required to compare his 100-year sentence for murder to Morris's 60-year sentence for that offense. On August 20, 2012, the circuit court denied defendant's motion for an extension of time to file his motion to reconsider.

¶ 25 On appeal, defendant seeks an evidentiary hearing on his post-conviction petition. He contends the circuit court operated under the incorrect factual conclusion that defendant's sentences were concurrent and defendant's total sentence therefore was five years shorter than Morris's consecutive sentences. Defendant further asserts the circuit court erred in finding he could have raised this assertion in his initial petition. In addition, defendant argues his post-conviction counsel failed to provide reasonable assistance by providing the court with accurate sentencing information as to defendant and Morris. We agree.

¶ 26 Under the Act, a defendant may attack his conviction and sentence based upon a denial of his constitutional rights in his original trial or sentencing hearing. 725 ILCS 5/122-1(a) (West 2008). "The purpose of the post-conviction proceeding is to allow inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal." *People v. Davis*, 2014 IL 115595, ¶ 13, quoting *People v. Towns*, 182 Ill. 2d 491, 502 (1998). For a petitioner to be entitled to an evidentiary hearing on a successive petition, the petitioner must make a substantial showing of a constitutional violation. *People v. Sanders*, 2014 IL App (1st) 111783, ¶ 18. Our review of the dismissal of a petition without an evidentiary hearing is de novo. *Id.*

¶ 27 A disparity between non-capital sentences presents a cognizable claim under the Act. *People v. Rodriguez*, 402 Ill. App. 3d 932, 940 (2010), citing *People v. Caballero*, 179 Ill. 2d 205, 215 (1997); see also *People v. Wren*, 223 Ill. App. 3d 722, 729 (1992). It is impermissible to have an arbitrary and unreasonable disparity between sentences imposed on co-defendants who are similarly situated. *Caballero*, 179 Ill. 2d at 216. However, a mere disparity in sentences alone is not a violation of fundamental fairness because it can be warranted by differences in the

nature and extent of the defendants' participation in the offense. *Rodriguez*, 402 Ill. App. 3d at 939 (noting, however, that it is "not the disparity that counts, but the reason for the disparity").

A difference in sentences between or among co-defendants may be justified by the relative character and history of the co-defendants, the degree of culpability, rehabilitative potential, or a more serious criminal record. *People v. Spriggle*, 358 Ill. App. 3d 447, 455 (2005).

¶ 28 A review of the record establishes that in these proceedings, the circuit court was not correctly informed of the details of the sentences of defendant and Morris. Defendant was sentenced to consecutive terms totaling 145 years, and the consecutive nature of defendant's sentences was affirmed on remand by the original trial judge in his ruling on December 18, 2003. Despite that clarification, however, the nature of defendant's sentences apparently remained at issue. For example, this court erroneously noted in its 2009 order in defendant's appeal from the dismissal of his second post-conviction petition in case No. 1-07-0578 that defendant's sentences were concurrent. The State's motion to dismiss defendant's petition incorrectly represented that defendant's sentences were concurrent.

¶ 29 The details of defendant's sentences were not clarified in the hearing before the circuit court. Defendant's post-conviction counsel, apparently referring only to the murder sentences, argued that a sentencing disparity existed because defendant was serving his original 100-year sentence, while Morris received a 60-year sentence on remand. However, the State responded by stating that Morris's sentences on remand were to be served consecutively, for a total sentence of 105 years and then stated, incorrectly, that defendant received the same sentences and was serving them concurrently. The State then made an incongruous argument, which did not follow from its representations about the sentences, that Morris's sentence was five years longer than

defendant's sentence. The court's dismissal of the petition was expressly based in part on its finding that the disparity between the two sentences was not "adequate" enough to grant defendant's petition. In addition, the court denied defendant's request to file a motion asking the court to reconsider its ruling.

¶ 30 Based on this record, the circuit court was incorrectly informed that defendant's sentences were to be served concurrently and that only a five-year difference existed between the sentences of defendant and Morris. Therefore, the court was unable to conduct an accurate assessment of defendant's disparate sentencing claim, which was based on a 40-year gap between their respective terms. Accordingly, this case should be remanded for an evidentiary hearing on the disparity between defendant's 145-year sentence and Morris's 105-year sentence.

¶ 31 The State concedes on appeal that defendant's sentences were ordered to be served consecutively. However, the State argues the dismissal of defendant's post-conviction petition should be affirmed because defendant and Morris were not similarly situated. The State points out that the trial court found defendant subject to an extended-term sentence based on its finding of exceptionally brutal and heinous conduct indicative of wanton cruelty. In contrast, Morris was not found eligible for extended-term sentencing by the jury that convicted Morris upon his retrial and received the maximum sentence of 60 years allowable on remand.

¶ 32 While the State contends that Morris's 60-year sentence on remand suggests he was less culpable than defendant, we note that Morris was originally sentenced to death in this case, in contrast to defendant's 100-year original term. The evidence at trial suggested Morris was the shooter and defendant was a willing participant, and defendant was found guilty for the acts of

1-12-2931

Morris based on an accountability theory. Morris recanted his confession that he shot the victim and instead testified that Hoover was the gunman.

¶ 33 It appears that on retrial, Morris was found guilty for the murder of Shorter based on an accountability theory, most likely for the act of Hoover. The determination of Morris's culpability and the basis for his reduced sentence lies in the record of Morris's retrial and re-sentencing. Those records have not been provided to this court on appeal. Those facts should be presented to the circuit court on remand so it may fully consider defendant's disparate sentencing claim in an evidentiary hearing.

¶ 34 Reversed and remanded.