2011 IL App (1st) 093516-U

SIXTH DIVISION
October 14, 2011

No. 1-09-3516

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 93 CR 516
	)	
DARREN WILSON,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. E. Gordon and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of *pro se* post-conviction petition affirmed where defendant failed to satisfy the requirements of section 122-2 of the Act; defendant's claim regarding the trial court's failure to make a record finding of his criminal history as required by section 5-3-1 of the Code rendered sentence voidable and not subject to collateral attack; mittimus corrected to reflect a single conviction for murder.

¶ 2 Defendant Darren Wilson appeals the dismissal of his combined *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) and section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)).

He contends that the circuit court erred in summarily dismissing his post-conviction petition where he set forth the gist of a constitutional claim alleging ineffective assistance of counsel that represented defendant at his guilty plea hearing, but failed to file a motion to withdraw his guilty plea as he requested. He also contends that the cause must be remanded for resentencing because the trial court sentenced him to an agreed term without a presentence investigation report (PSI) or a specific finding on the record of his criminal history, as required by section 5-3-1 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-3-1 (West 2008)). Lastly, he claims that his mittimus should be amended to reflect one conviction for murder where there was only one decedent.

¶ 3 The record shows that on October 4, 1994, defendant entered a fully negotiated plea of guilty to one count each of intentional murder and felony murder in exchange for the State's dismissal of 11 other charges and the recommendation of a sentence of 65 years' imprisonment, concurrent with a sentence previously imposed upon an unrelated armed robbery conviction. After acknowledging the plea agreement between the parties, the trial court admonished defendant of the minimum and maximum sentence for murder, including the possibility of a life sentence or death, and the mandatory supervised release term upon his release from the penitentiary. Defendant stated that he understood the admonitions and the consequences of pleading guilty. In response to the trial court's questions, he persisted in his guilty plea, indicated that his plea was voluntary and that no one had forced him to plead guilty. The defense then stipulated to the factual basis for the murder charges, and the trial court accepted defendant's plea of guilty to two counts of first degree murder. Defendant waived his right to a presentence investigation report and was sentenced in accordance with the negotiated plea agreement. The trial court then admonished defendant of his right to appeal and how to perfect it, but defendant took no action to do so.

¶ 4 Fifteen years later, on September 1, 2009, defendant filed the subject *pro se* petition for relief from judgment pursuant to the Act and section 2-1401 of the Code. In his combined petition, defendant alleged, in pertinent part, that trial counsel promised "he would file a motion for a sentence reduction at minimum before the 30 day limit but would first speak with [defendant] about withdrawing the plea as that is what [defendant] actually wanted to do and told [counsel] to withdraw the plea," but then did not follow through on his promise and avoided defendant. As support for his combined petition, defendant attached his own "affidavit" claiming that he is actually innocent and always wanted to prove his innocence in a trial, and that he would have insisted on going to trial had it not been for trial counsel's threat that he would lose at trial and receive the death penalty. He also attached three pages of the plea hearing transcript.

¶ 5 The circuit court summarily dismissed defendant's post-conviction petition as frivolous and patently without merit; and entered a *sua sponte* dismissal of his section 2-1401 petition based on defendant's failure to advance a claim or defense warranting post-judgment relief. Defendant now appeals from that ruling, and our review is *de novo. People v. Delton,* 227 Ill. 2d 247, 254 (2008).

¶ 6 To survive summary dismissal at the first stage of post-conviction proceedings, a *pro se* defendant need only allege enough facts, with supporting affidavits, records or other evidence, to support the gist of a constitutional claim. *People v. Munoz,* 406 Ill. App. 3d 844, 850 (2010). However, a *pro se* petition may be dismissed as frivolous and patently without merit if it has no arguable basis in law or in fact. *People v. Hodges,* 234 Ill. 2d 1, 16 (2009).

¶ 7 Here, the underlying basis of defendant's claim of ineffective assistance is that trial counsel promised "he would file a motion for a sentence reduction at minimum before the 30 day limit but would first speak with [defendant] about withdrawing the plea as that is what

[defendant] actually wanted to do and told [counsel] to withdraw the plea," but then did not follow through on his promise and avoided defendant. Citing *People v. Collins,* 202 Ill. 2d 59 (2002), the State maintains that these allegations are contradicted by the record and unsupported by affidavits or other evidence. The State also notes that the failure to either attach the necessary supporting documentation or explain their absence is "fatal" to a post-conviction petition and, alone, justifies its summary dismissal. *Collins,* 202 Ill. 2d at 66.

¶ 8 Defendant responds that *Collins*, where no affidavits were filed in compliance with the documentation requirement set forth in section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)), is factually distinguishable and inapplicable to the instant case, where the only affidavit he could furnish, other than his own sworn statement, was that of trial counsel. In his reply brief, defendant further argues that he has satisfied the documentation requirement of section 122-2 based on his "affidavit and excerpts from the trial transcripts to support his claims."

¶ 9 In support, defendant cites *People v. Hall,* 217 Ill. 2d 324 (2005), for the proposition that the failure to attach independent corroborating documentation or explain its absence may be excused where the petition contains sufficient facts to infer that the only affidavit defendant could have furnished, aside from his own, was that of his attorney. We note that the *Hall* court found the documentation requirement in *Collins* inapplicable because, unlike here, the case had proceeded beyond the first stage of post-conviction proceedings; and further observed that the allegations in defendant's petition and detailed affidavit gave rise to the inference that the only other affidavit he could have provided was that of his attorney. *Hall,* 217 Ill. 2d at 332-33.

¶ 10 The supreme court has also made it clear, however, that defendant is not excused from the *evidentiary* and *pleading* requirements of section 122-2. (Emphasis in original.)

Collins, 202 Ill. 2d at 68. In this case, defendant merely set forth a broad conclusory allegation regarding representations made to him by counsel at defendant's guilty plea hearing, who then failed to follow through. Defendant provided no context or detail for his allegation, nor supporting documentation or reason for its absence. *Collins*, 202 Ill. 2d at 68.

¶ 11 The purpose of section 122-2 is to establish that the allegations in the petition are capable of "objective or independent corroboration," and, further, that accompanying affidavits and exhibits identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the allegations in the petition. *Delton*, 227 Ill. 2d at 254. An affidavit has been described as simply a written declaration, under oath, sworn to before a person authorized to administer oaths. *People v. Niezgoda*, 337 Ill. App. 3d 593, 596 (2003) (*quoting Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493 (2002)). The traditional requirements for an affidavit, including notarization, apply unless otherwise provided for by supreme court rule or statute. *Niezgoda*, 337 Ill. App. 3d at 597.

¶ 12 Here, defendant's "affidavit" was filed pursuant to the Act, which sets forth no specific affidavit requirements; thus, under *Niezgoda*, his affidavit had to be notarized to be valid. *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011). Defendant's affidavit was not notarized and his invocation of the verification requirement pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2008)), is not a substitute for the affidavit requirement under the Act (*People v. Tlatenchi*, 391 Ill. App. 3d 705, 715-76 (2009); see *Collins*, 202 Ill. 2d at 67 (purpose of the verification requirement distinct from the documentation requirement under the Act)). As a result, defendant's affidavit had no legal effect. *Niezgoda*, 337 Ill. App. 3d at 597.

¶ 13 What remains are the excerpts from defendant's plea hearing, which contain a portion of the factual basis for the murder charges and defendant's waiver of a presentence investigation. There is nothing in these excerpts or in the report of proceedings that support

defendant's claim that he told trial counsel he wanted to withdraw his guilty plea or that counsel promised that he would take action to accomplish this. *Delton*, 227 Ill. 2d at 256. Under these circumstances, we find that defendant failed to meet the evidentiary and pleading requirements of section 122-2, and we therefore affirm the summary dismissal of defendant's post-conviction petition. *Delton*, 227 Ill. 2d at 258; *Collins*, 202 Ill. 2d at 68.

¶ 14 In reaching that determination, we find defendant's reliance on *People v. Edwards*, 197 Ill. 2d 239 (2001), misplaced. In *Edwards*, the issue was whether the factual allegations stated in the defendant's post-conviction petition stated the gist of a meritorious claim of ineffective assistance of counsel, and, in analyzing that issue, the supreme court "had neither reason nor occasion to assess the sufficiency of the petition's supporting documentation." *Collins*, 202 Ill. 2d at 69. Therefore, *Edwards*, 197 Ill. 2d at 253, which relied on *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), in holding that "a *pro se* defendant, even if he pled guilty, cannot be *required* to demonstrate how his appeal would have been successful in order to establish that he was prejudiced by his attorney's failure to pursue a requested appeal," has no application to this case.

¶ 15 Defendant next contends that his cause must be remanded for resentencing because the trial court sentenced him to an agreed term without a PSI or a specific finding on the record of his criminal history, as required by section 5-3-1 of the Unified Code (730 ILCS 5/5-3-1 (West 2008)). He claims that his sentence, which does not conform to the statutory requirement, is void, and, thus, may be challenged at any time, including for the first time on appeal from the dismissal of his post-conviction petition (*People v. Johnson*, 97 Ill. App. 3d 976, 979 (1981)).

¶ 16 He acknowledges that in *People v. Sims*, 378 Ill. App. 3d 643, 650 (2007), this court held that the failure to state the defendant's criminal background on the record did not

render the sentence void, but merely "voidable." He argues, however, that he is entitled to be sentenced in accordance with the law in effect at the time of the offense and sentencing (*People v. Bosley*, 197 Ill. App. 3d 215, 220 (1990)), and, at the relevant times here, "courts followed the law" in *Johnson,* 97 Ill. App. 3d at 978-79, holding that a trial court is without jurisdiction to impose a sentence in the absence of a PSI, and *People v. Butler*, 186 Ill. App. 3d 510, 518 (1989), wherein the sentence imposed on revocation of probation without an updated PSI was "*per se* invalid." In his reply brief, defendant clarifies that he is not conceding that present-day law dictates that the sentencing order is voidable, but arguing that at the time of his offense and sentencing, courts followed *Johnson* and *Butler*, rather than *Sims,* and "counsel was not aware of this issue and [his] sentence was void and can be attacked for the first time on appeal from the dismissal of a post-conviction petition which did not raise that issue."

¶ 17 We disagree with defendant that this issue is properly before this court. In addition to the absence of any reference in his opening brief (*Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010)), to trial counsel's lack of awareness on this issue, defendant's assertion that at the time of his offense and sentencing, courts followed *Johnson* and *Butler*, rather than *Sims*, is of no mystery as *Sims* was decided in 2008, more than a decade later. Moreover, although it is correct that defendant has a choice under which sentencing scheme he wishes to be sentenced, this principle does not apply here, where "the law" that defendant seeks to avail himself of was not the product of the legislature, but the decisions of our courts. See *People v. Hauschild*, 226 Ill. 2d 63, 79 (2007) ("new rule" announced by the supreme court while defendant's case was pending on direct appeal does not give defendant the same "choice of sentencing law" applicable where a statutory change occurs during the prosecution of his case). The PSI requirement of section 5-3-1 was in effect and unchanged at all relevant times, and we note that the *Johnson* court cited no authority for its holding that a sentence imposed in the absence of a PSI is void

(*Sims*, 378 Ill. App. 3d at 650), and, in *Butler*, the court did not address the trial court's jurisdiction to impose sentence. *Johnson* and *Butler* are inapplicable because they do not answer the question of whether the alleged noncompliance with section 5-3-1 deprived the trial court of jurisdiction and rendered the judgment and sentence against defendant void. *Sims*, 378 Ill. App. 3d at 649.

¶ 18 A judgment may be void where a court exceeded its jurisdiction, but a court will not lose jurisdiction because it makes a mistake in determining either the facts, the law, or both. *Sims*, 378 Ill. App. 3d at 547. Here, the failure to state defendant's criminal history on the record did not divest the trial court of jurisdiction and render defendant's sentence void, but rendered that sentence voidable (*Sims*, 378 Ill. App. 3d at 650), and, thus, not subject to collateral attack (*Beacham v. Walker*, 231 Ill. 2d 51, 60 (2008)).

¶ 19 Lastly, defendant contends, and the State agrees, that the mittimus should be corrected to reflect a single conviction for first degree murder because there was only one victim. We agree with the parties, and therefore order, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), that the mittimus be corrected to reflect defendant's single conviction for knowing and intentional murder (count I), the most serious charge. *People v. Walker*, 403 Ill. App. 3d 68, 80-81 (2010).

¶ 20 For the reasons stated, we affirm the order of the circuit court of Cook County and modify the mittimus.

¶ 21 Affirmed as modified.