

2017 IL App (1st) 150735-U

No. 1-15-0735

Order filed November 3, 2017

Fifth 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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 4110
	)	
CHARLIE McDONALD,	)	Honorable
	)	Lawrence Edward Flood,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE HALL delivered the judgment of the court.  
Justices Lampkin and Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant suffered no prejudice from the circuit court clerk’s failure to notify him of the dismissal of his postconviction petition within 10 days of entry of judgment, we affirm the dismissal of his *pro se* “Supplemental Post-Conviction: To Add Authority to Original Filing.” The mittimus is corrected to reflect a single conviction for first degree murder.

¶ 2 Defendant Charlie McDonald appeals from the dismissal of a *pro se* pleading he titled “Supplemental Post-Conviction: to Add Authority to Original Filing.” On appeal, defendant contends that the circuit court clerk’s failure to serve him with notice that his postconviction

petition had been dismissed prejudiced his ability to raise potentially meritorious issues for reconsideration in a subsequent filing, and that, therefore, remand is required. Defendant further contends that his mittimus should be corrected to reflect a single conviction for first degree murder.

¶ 3 For the reasons that follow, we affirm the circuit court's dismissal of defendant's pleading and order correction of the mittimus.

¶ 4 Following a 2009 trial, a jury found defendant guilty of the first-degree murder of Isaac Pink and found that defendant personally discharged a firearm that proximately caused Pink's death. The trial court imposed a sentence of 25 years, plus a mandatory 25-year firearm enhancement, for a total of 50 years in prison. On direct appeal, defendant contended that his conviction should be reduced to involuntary manslaughter on the ground that the evidence supported his version of events that the shooting was accidental; that his due process rights were violated when the trial court admitted evidence of an alleged attempted armed robbery of a man who was with Pink, the charges for which had been nol-prossed prior to jury selection; and that the firearm sentencing enhancement was unconstitutional because it violated the proportionate penalties clause of the Illinois Constitution and the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution. We affirmed defendant's conviction and sentence. *People v. McDonald*, 2013 IL App (1st) 100905-U.

¶ 5 On August 22, 2014, defendant filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2014). In the petition, defendant alleged that pursuant to *Alleyne v. United States*, 133 S. Ct. 2151 (2013), the trial court's imposition of the firearm enhancement was unconstitutional because the jury was not presented with the factual

question of whether he discharged a firearm causing death. Defendant further alleged that appellate counsel was ineffective for not raising this issue on direct appeal. As relief, defendant asked the court to vacate the 25-year enhancement and “leave petitioner with the twenty-five years for murder.”

¶ 6 On November 7, 2014, the circuit court summarily dismissed defendant’s petition. The court noted that the record clearly indicated, contrary to defendant’s allegations, that the factual issue of whether defendant personally discharged a firearm that proximately caused Pink’s death was submitted to the jury and proven beyond a reasonable doubt, and determined that appellate counsel was not ineffective for deciding not to raise this non-meritorious issue on appeal. Accordingly, the circuit court dismissed the petition as frivolous and patently without merit.

¶ 7 According to defendant, the circuit court clerk failed to provide him notice of the circuit court’s dismissal. The State does not contest this assertion and nothing in the record indicates otherwise.

¶ 8 On November 21, 2014, defendant mailed three *pro se* documents to the circuit court. The first, titled “Motion for Discovery and Inspection of Discovery Record(s)/Documentation (Pursuant) to Supreme Court Rule 412-471.605 and 608,” consisted of a request for several documents defendant indicated he needed for an “ongoing” postconviction proceeding, including all written and/or recorded statements made by witnesses and all documents and objects used by the prosecution. The second document was an application to sue or defend as a poor person. The third document, titled “Supplemental Post-Conviction: To Add Authority to Original Filing,” raised numerous arguments, including the following: (1) that he was a juvenile at the time of the incident, was being attacked by Pink, had no intent to kill, and brandished the gun in an attempt

to dissuade Pink; (2) that the incident was a reckless fight between two youths that accelerated accidentally, and thus constituted only involuntary manslaughter; (3) that he has rehabilitative potential that was not considered at sentencing; (4) that the autopsy report's indication that Pink had no head or facial wounds showed key witnesses gave false testimony that defendant "pistol whipped" Pink in the head and face; (5) that his sentence violated the prohibition against cruel and unusual punishment; (6) that witnesses gave inconsistent statements in general and, in particular, regarding whether defendant attempted to rob them; (7) that the State's use of false testimony constituted prosecutorial misconduct; (8) that trial counsel was ineffective for failing "to object to (any) trial court procedural violation(s)"; (9) that the State violated Supreme Court Rules by failing to disclose the autopsy report; (10) that trial counsel failed to challenge the credibility of the witnesses and failed "to use an outside investigator to ensure clear facts and information surrounding the crime"; (11) that the prosecutor made prejudicial and inflammatory remarks during closing arguments; (12) that his sentence violates the one-act, one-crime rule and the proportionate penalties clause of the Illinois Constitution; (13) that his juvenile status at the time of the commission of the crime precluded the mandatory sentencing enhancement of 25 years to life imprisonment; and (14) that the autopsy report shows that the wound sustained by Pink was consistent with a struggle and accidental shooting.

¶ 9 On January 22, 2015, the circuit court dismissed defendant's *pro se* "Supplemental Post-Conviction: To Add Authority to Original Filing." In a written decision, the circuit court explained that it had dismissed defendant's original *pro se* postconviction petition on November 7, 2014, and that, therefore, there was no pending petition to be supplemented at the time defendant mailed the instant pleading on November 21, 2014. The court further wrote that it was

declining to recharacterize the pleading as a successive postconviction petition. In announcing its decision orally, the court also stated it was denying defendant's request for discovery and his motion for leave to proceed *in forma pauperis*.

¶ 10 Defendant appealed.

¶ 11 On appeal, defendant contends that the circuit court clerk's failure to serve him with notice that his postconviction petition had been dismissed prejudiced his ability to raise "potentially meritorious" issues for reconsideration in a subsequent filing, and that, therefore, remand for second-stage postconviction proceedings is required. Specifically, defendant argues that he was precluded from raising arguments "that would lead the circuit court to reconsider his claim that his sentence was unconstitutional given his youth at the time of the offense." He asserts that he was prejudiced because, absent the clerk's failure, he could have raised this argument in a timely motion to reconsider. Defendant notes that his supplemental petition cited *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), to support an argument that imposition of the mandatory firearm enhancement failed to allow for individualized consideration of his status as a juvenile at the time of the offense. He also observes that under section 5-4.5-105 of the Illinois Code of Corrections, which became effective January 1, 2016, trial courts are now required to consider additional enumerated mitigating factors when sentencing defendants who were under 18 at the time of the offense and may decline to impose firearm enhancements on those defendants (730 ILCS 5/5-4.5-105 (West 2016)). He also notes that "several defendants are actively litigating the retroactive application of that legislation" in consolidated appeals in the Illinois Supreme Court (*People v. Hunter*, 2016 IL App (1st) 141904, *appeal allowed*, No. 121306 (Nov. 23, 2016); *People v. Wilson*, 2016 IL App

(1st) 141500, *appeal allowed*, No. 121345 (Nov. 23, 2016)). Defendant argues that had he not been precluded from seeking reconsideration by the clerk's failure to provide notice, he could have brought this violation of his constitutional rights to the circuit court's attention before dismissal of his original petition became final.

¶ 12 In a postconviction petition, a defendant requests that the court decide whether his constitutional rights were violated at trial. *People v. Pinkonsly*, 207 Ill. 2d 555, 566 (2003); 725 ILCS 5/122-1(a) (West 2014). Through a motion to reconsider, which a defendant may file from the dismissal of his postconviction petition (*People v. Blair*, 215 Ill.2d 427, 451 (2005)), a defendant requests that the court modify or vacate the judgment entered (735 ILCS 5/2-1203 (West 2010)). The purpose of a motion to reconsider is to provide the court with newly discovered evidence, changes in the law, or errors in the court's previous application of existing law. *People v. Teran*, 376 Ill. App. 3d 1, 4-5 (2007). It is improper for a defendant to raise new postconviction issues in a motion to reconsider. *People v. Johnson*, 2017 IL App (4th) 160449, ¶ 31.

¶ 13 The Act directs the clerk of the circuit court to serve notice of dismissal of a petition upon the defendant within 10 days of entry of judgment. 725 ILCS 5/122-2.1(a)(2) (West 2014). Where notice is not served within 10 days but the defendant suffers no prejudice from the failure, there is no remedy. *People v. Robinson*, 217 Ill. 2d 43, 60 (2005). Here, defendant argues he was prejudiced because he was denied the opportunity to file a timely motion to reconsider raising the issue regarding his youth. Defendant's argument is misguided. The sentencing issue concerning defendant's youth was not included in the original petition. Therefore, even if defendant had been notified of the dismissal of his petition and filed a timely motion to

reconsider that raised the issue, the trial court would have had to deny the motion. Defendant has identified nothing that could have been properly included in a motion to reconsider: no newly discovered evidence, no changes in the law in the 30 days following dismissal, and no errors in the circuit court's application of the law as it existed at the time of dismissal. Instead, he has only identified a new postconviction issue. Because new issues may not be raised in a motion to reconsider (see *Johnson*, 2017 IL App (4th) 160449, ¶ 31), his argument that he was prejudiced fails and we can provide no remedy.

¶ 14 We are mindful of defendant's assertion in his reply brief that the issue of his youth is not a new postconviction issue, but rather, simply the expansion of a postconviction issue he raised in his original petition. We reject this argument. In his original petition, defendant claimed that imposition of the firearm enhancement in his case was unconstitutional because the jury was not presented with the factual question of whether he discharged a firearm causing death. Defendant now wishes to present a claim that mandatory imposition of the firearm enhancement in his case was unconstitutional because it failed to allow individualized consideration of his age and characteristics as a 17-year-old juvenile at the time of the offense. These claims involve factual and legal issues that are fundamentally different. The circumstance that they both challenge the constitutionality of the trial court's imposition of the firearm enhancement does not mean the issue involving defendant's youth merely "expanded upon [the] very issue raised in his original postconviction petition."

¶ 15 Defendant's second contention on appeal is that the mittimus, which reflects two murder convictions, should be corrected to reflect a single conviction for first degree murder. He makes two arguments in support of this contention: first, that the "dual convictions" must be merged

under the one-act, one-crime doctrine, and second, that where the trial court indicated orally that it was sentencing him to a singular term of 25 years' imprisonment with a 25-year firearm enhancement, the mittimus does not conform to the judgment of the court. The State concedes that the mittimus should be corrected.

¶ 16 At sentencing in the instant case, the trial court stated, "I'll sentence you on the first degree to 25 years in the Illinois Department of Corrections. Now, the enhancement is a mandatory 25 years so that's a total of 50 years." We agree with defendant that this statement indicates the trial court's judgment was on a single count of murder. The mittimus, in contrast, reflects a conviction for one count of intentional murder and a conviction for one count of knowing murder. Where a mittimus is not in conformity with the judgment, the mittimus should be corrected to conform to the judgment, and a corrected mittimus can be issued at any time. *People v. Miles*, 117 Ill. App. 3d 257, 260 (1983). A request for a correction of the mittimus may be considered in a postconviction appeal even if it was not made in the trial court. *People v. Wren*, 223 Ill. App. 3d 722, 731 (1992).

¶ 17 Here, given the clear conflict between the judgment and the mittimus, we elect to consider defendant's request. Because intentional murder involves a more culpable mental state than knowing murder (see *People v. Fuller*, 205 Ill. 2d 308, 346-47 (2002)), we order the mittimus corrected to reflect a single conviction for intentional murder.

¶ 18 For the reasons explained above, we affirm the judgment of the circuit court. Pursuant to Supreme Court Rule 615(b) (eff. April 1, 2015), we order the mittimus modified to reflect one murder conviction.

¶ 19 Affirmed; mittimus corrected.