2015 IL App (1st) 151239-U

No. 1-15-1239

Third Division
June 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff- Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 07 CR 13092
UNDRELL PAYNE Defendant-Appellant	)	Honorable William Timothy O'Brien, Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was culpably negligent when he failed to file his post-conviction petition within the statutory period. We modify the *mittimus* to reflect the correct offense for which defendant was convicted.

¶ 2 Defendant, Undrell Payne, appeals from the second-stage dismissal of his post conviction petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2006)). He contends that the circuit court violated his due process rights and deprived him of the benefit of his negotiated plea bargain by failing to advise him that the terms of his plea bargain included a three-year mandatory supervised release (MSR) term. Defendant

further argues that the *mittimus* issued by the court should be amended to reflect the correct name of the offense. We affirm and correct the *mittimus* accordingly.

¶ 3 BACKGROUND

¶ 4 On December 21, 2006, defendant pled guilty to one count of possession of a controlled substance with intent to deliver and was sentenced to two years of probation. While on probation, on June 9, 2007, defendant was charged with two counts of attempted first degree murder and two counts of aggravated battery with great bodily harm.

¶ 5 On December 19, 2007, defendant entered into a negotiated plea deal to one count of attempted first degree murder, and one count of possession of a controlled substance with intent to deliver, in exchange for consecutive 8-year and 4-year sentences, respectively. During defendant's plea hearing, the trial court informed him of the nature of his charges and the rights he was waiving by pleading guilty. In relevant part, the trial court admonished:

"The Court: Knowing what the offer is, do you wish to proceed with a plea of guilty?

The Defendant: Yes.

The Court: Do you understand, sir, that you are charged with the Case no. 07 CR 13092 –

The Defendant: Yes, Your Honor.

The Court: – with the offense of attempted first degree murder in that you – I'm sorry – that on or about June 9th, 2007, in Chicago, Cook County, Illinois, you without lawful justification with the intent to kill did an act, being you shot Erica Williams about the body with a firearm which constituted a substantial step towards the commission of first degree murder. Do you understand the nature of the charge placed against you?

The Defendant: Yes, Honor.

The Court: How do you plead to that, sir, guilty or not guilty?

The Defendant: Guilty

The Court: Do you understand, sir, that this charge carries with it a possible sentence of 6 to 30 years in the Illinois Department of Corrections with a period of mandatory supervised release of up to three years. Because it is a class x sentence, you are ineligible for probation. I also could fine you up to $25,000. Do you understand that?

The Defendant: Yes, Your Honor.

The Court: Also as a result of your plea of guilty to this charge as to the probation case in which you are on Class 1 – or while this occurred, you were on probation for a Class 1 possession of controlled substance with the intent to deliver.

As a result of your plea of guilty to the new charge, your probation can be revoked, and I can resentence you from 14 to 15 years in the Illinois Department of Corrections with a period of mandatory supervised release of up to two years; that I could run those sentences consecutive, meaning you would first serve the sentence on the attempt murder. And once that is completed, you would then begin to serve the sentence on – the resentencing on the Class 1 narcotics case. Do you understand that?

The Defendant: Yes, sir."

¶ 6 Following the State's recitation of a stipulated factual basis, the court accepted defendant's guilty plea and sentenced him to the agreed upon concurrent sentences. During sentencing, the court did not discuss defendant's MSR and did not include the MSR term in the *mittimus.* The issued *mittimus* reflected defendant's prison terms, described his conviction of possession of a controlled substance with intent to deliver as "MFG/DEL 10-15

GR COCAINE/ANLG," and described his conviction of attempted first degree murder as "(ATT) ATTEMPT FIRST DEGREE MURD." Defendant did not file a direct appeal.

¶ 7 On June 30, 2008, defendant filed a motion requesting the transcripts of his sentencing proceedings. In his motion, defendant asserted that he sought the transcripts so that he could challenge the prison record office's refusal to give him the jail credit previously ordered by the circuit court. On July 7, 2008, the circuit court denied defendant's motion. Subsequently, on October 17, 2011, the circuit denied defendant's second motion for trial transcripts and the common law record. Defendant obtained a copy of the transcript from trial counsel on April 4, 2012.

¶ 8 On November 28, 2012, defendant filed a *pro se* post-conviction petition, claiming that his constitutional rights were violated. In his petition, defendant asserted that neither the court nor the prosecutor advised him of the required 3-year MSR term. Thus, he sought a modification of his 12 year sentence to 5 years.

¶ 9 After first-stage review of the petition, the trial court appointed an assistant public defender to represent defendant. On March 28, 2014, appointed counsel filed a Rule 615(c) certificate and amended defendant's post-conviction petition arguing that the trial court only admonished defendant concerning the possibility that an MSR term could be added to his sentence, not that it would be. Defendant alleged that MSR was not part of the bargain because he entered a fully negotiated guilty plea in exchange for a sentence of 12 years. As such, he requested that the court reduce the 12-year sentence by three years to provide for the required MSR term.

¶ 10 On September 23, 2014, the State filed its motion to dismiss. In its motion, the State argued that defendant's post conviction petition was untimely filed and that defendant failed

to allege facts that his delay was not due to his own culpable negligence. Additionally, the State contended that the admonishments given to defendant at the time of the plea hearing advised him of the MSR term. In response to the motion, defense counsel asserted that defendant was not culpably negligent because he made diligent efforts during the statutory period to obtain the sentencing transcripts, but was unsuccessful.

¶ 11 Following the hearing on the petition, the circuit court granted the State's motion to dismiss, holding that the admonishments given to defendant were sufficient. The record reflects that during the hearing on the State's motion, defense counsel sought clarification on whether or not defendant would have prevailed on the timeliness issue. The court commented that it was "just mechanics that [defendant] wasn't able to do that stuff, but I don't know what the prejudicial effect of it is."

¶ 12 Defendant appeals.

¶ 13 ANALYSIS

¶ 14 Defendant contends that the trial court erred in dismissing his second-stage post-conviction petition because it sets forth a substantial showing of a constitutional violation. Specifically, defendant alleges that the circuit court deprived him of the benefit of his negotiated plea bargain by failing to link the mandatory three-year MSR term to his negotiated sentence. Secondly, defendant asserts, and the State agrees, that the *mittimus* should be amended to correctly reflect defendant's conviction for possession of a controlled substance with intent to deliver.

¶ 15 The State initially responds that defendant was properly admonished. In the alternative, the State argues that defendant is not entitled to post-conviction relief because he has

completed serving his prison service and further, that his petition is time barred. The State agrees that the *mittmus* should be corrected.

¶ 16 The Act provides a remedy for a defendant whose federal or state constitutional rights were substantially violated during trial or the sentencing hearing. *People v. Williams*, 209 Ill. 2d 227, 232 (2004). In a non-capital case, the Act provides a three-stage process for the adjudication of post-conviction petitions. *People v. Boclair,* 202 Ill. 2d 89, 99 (2002). At the first-stage, the defendant must clearly set forth the manner in which his constitutional rights were violated, and the trial court determines whether the petition is frivolous or patently without merit. *People v. Tyler,* 2015 Ill App (1st) 123470 ¶ 144. Once a petition advances to the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation (*People v. Pendleton,* 233 Ill. 2d 458,473 (2006)), and the State may either answer or move to dismiss the petition (725 ILCS 5/122-5 (West 2006)). If the State moves to dismiss the petition, the circuit court must examine and rule on the legal sufficiency of each of the defendant's claims, taking all well-pleaded facts as true. *People v. Ward,* 187 Ill. 2d 249, 255 (1999). If the State's motion is denied, the petition proceeds to the third stage where an evidentiary hearing is held. A post-conviction petitioner is not entitled to an evidentiary hearing as a matter of right; he or she must make substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Here, the State's motion was granted; thus we review the dismissal of defendant's second-stage post-conviction petition *de novo*. *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

¶ 17 Timeliness of Filing

¶ 18 Prior to addressing defendant's claims on appeal, we must determine whether his petition was timely filed. The State argues that the circuit court properly dismissed defendant's post-

conviction petition where it was untimely filed and he failed to show that the late filing was not due to his culpable negligence. Specifically, the State contends that defendant's claim that he was not aware that he had to serve a period of MSR until 2012 when he obtained the transcripts from the plea proceedings should be rejected because a lack of transcripts does not establish culpable negligence. Defendant responds that he was not culpably negligent when he failed to timely file his petition because the delay was of the circuit court's own making in denying his requests for a copy of his plea hearing transcripts.

¶ 19 In cases where no direct appeal has been filed, post-conviction proceedings may not be commenced later than three-years from the date of conviction. 725 ILCS 5/122–1(c) (West 2006); *People v. Lander*, 215 Ill. 2d 577, 586 (2005). The time limitation in the Act is an affirmative defense that may be raised, waived, or forfeited by the State at the second stage of the proceedings. *People v. Perkins*, 229 Ill. 2d 34, 43 (2007) (citing *Boclair*, 202 Ill.2d at 101). The State may move to dismiss after petitioner's counsel has made any necessary amendments. *Perkins*, 229 Ill. 2d at 43.

¶ 20 To avoid dismissal of an untimely filed post conviction petition, the petitioner must demonstrate that the delay in filing his petition was not due to his or her culpable negligence. *People v. Ramirez*, 361 Ill. App. 3d 450, 453 (2005). Culpable negligence has been defined by our supreme court as "negligent conduct that, while not intentional, involves a disregard of the consequences likely to result from one's actions." *Boclair*, 202 Ill.2d at 106 (quoting Black's Law Dictionary 1056 (7th ed.1999)). The phrase contemplates something greater than ordinary negligence and is akin to recklessness. *People v. Rissley*, 206 Ill.2d 403, 420 (2003).

¶ 21 A trial court's findings of fact as to whether a delay was a result of the defendant's culpable negligence will not be reversed unless that determination is manifestly erroneous. *Ramirez,* 361 Ill. App. 3d at 452 (citing *People v. Caballero,* 179 Ill. 2d 205, 214 (1997)). The trial court's ultimate conclusion as to whether the established facts demonstrate culpable negligence, however, is reviewed *de novo*. *People v. Wilburn*, 338 Ill. App. 3d 1075, 1077 (2003). Here, after ruling on the merits, the trial court characterized defendant's claims regarding the delay "as mechanics" and further stated that it did not know the "prejudicial effects of it." The record does not reflect that the court conducted a hearing or made any findings of fact on the timeliness issue. Thus, our review is *de novo*. *People v. Gerow*, 388 Ill. App. 3d 524, 527 (2009), citing *Ramirez,* 361 Ill. App. 3d at 452. Accordingly, we will accept all well-pleaded factual allegations of defendant's petition as true and determine whether those assertions are sufficient to demonstrate an absence of culpable negligence on defendant's part. [1] See *People v. Walker*, 331 Ill. App. 3d 335, 340 (2002). We may affirm the trial court's dismissal of a petition on any basis shown by the record, even if that basis was rejected by the trial court. *Ramirez,* 361 Ill. App.3d at 452, citing *People v. Johnson*, 208 Ill. 2d 118, 128-38 (2003).

¶ 22 In his brief here on appeal, defendant urges that any delay in filing was occasioned by the trial court which twice denied his motion for copies of his sentencing transcripts. The transcripts, however, record the very proceedings which defendant offers as evidencing the absence of an admonishment regarding the MSR. Thus, we find it ironic that defendant now asserts the unavailability of those same transcripts as the basis upon which we might excuse

[1]At the second stage of defendant's post-conviction proceedings, appointed post conviction counsel filed a 651(c) certificate of compliance and an amended post conviction petition on defendant's behalf. The amended petition addressed only claims regarding the absence of notice of the MSR and the mittimus. Facts regarding the delay in filing the petition were addressed, without objection, in defendant's response to the State's motion to dismiss.

his delay. Defendant cannot reasonably rely on the transcripts to show that he was not admonished about the MSR and also to show that had those same transcripts been available he would have known that he was required to serve MSR. Moreover, the transcripts provided no greater information than defendant was privy to at the time of the sentencing proceedings, during which he was present.

¶ 23 The State offers *People v. Diefenbaugh*, 40 Ill. 2d 73 (1968), a case factually similar to our case, as dispositive. In *Diefenbaugh*, the defendant filed his *pro se* petition eight and a half years after he pled guilty and was sentenced in the circuit court. *Id*. at 74. On the State's motion, the petition was dismissed as time barred and that the defendant was not free from culpable negligence in the untimely filing. *Id*. On appeal, the defendant argued that his delay was due to the trial court's failure to respond to repeated requests for a transcript of the proceedings and therefore, he was not guilty of culpable negligence. *Id*.

¶ 24 In rejecting the defendant's argument, the supreme court held that the lack of transcripts does not excuse a defendant from filing his petition for post-conviction relief within the statutory limit. *Id*. at 76. The court reasoned that in order to invoke proceedings under the Act, it is only necessary that a defendant file a petition verified by an affidavit asserting that a substantial denial of constitutional rights had occurred. *Id*. at 75.

¶ 25 Here, like in *Diefenbaugh*, defendant argues that his failure to timely file the petition was due to the circuit court's own making by denying his requests for the transcripts. However, as the record reveals, defendant's purpose for requesting the transcripts is inconsistent with his claim on appeal that he sought the transcripts necessary to draft a post-conviction petition from as early as June 24, 2008. On December 19, 2007, defendant was sentenced to serve consecutive 8-year and 4-year sentences. On June 24, 2008, he filed the first of two motions

requesting transcripts of his plea proceedings. In the first motion, defendant asserted that the purpose for the request was to "challenge the Prison Record Office refusal to give [him] the Jail Credit's previously ordered by this Honorable Court at the time of sentencing." Although the second motion, filed in 2011, does not identify a purpose for the request, given his argument that he was not aware that he had a cognizable claim until after he received the transcripts, the request could not have been for the purpose of filing a post-conviction petition.

¶ 26 Additionally, we disagree with defendant's argument that he did not recklessly disregard the limitations period because he "assiduously filed [his] claim at the earliest possible time after learning of its existence." At sentencing, the court admonished defendant twice in regards to the MSR term associated with his guilty plea. Defendant acknowledged each time that he understood the court's admonishments. Consequently, these facts provide this court with sufficient evidence to indicate that defendant was aware of his MSR term prior to receiving the transcripts.

¶ 27 In his response to the State's motion to dismiss the petition, defendant asserted that his untimeliness in filing was due to a lack of legal counseling and training. In sworn affidavits attached to the response, defendant asserted that after he received the transcripts, he learned from a "student of the law" that he would be required to serve three years MSR upon release from prison. He had no knowledge of any statutory constraints on filing post conviction petitions and further, he does not understand legal jargon when he reads it on his own.

¶ 28 We note in passing that in the initial post conviction petition, accompanied by a "Memorandum of Law and Finding of Facts," defendant, proceeding *pro se*, not only cites to the Act, but also to case law offered as supportive of his claims and the relief being sought.

Thus, we are not persuaded by the lack of comprehension argument. But even if we were, such argument could not justify the delay in filing. The argument is similar to one urged and rejected by the court in *People v. Evans*, 2013 IL 113471. There, the petitioner asserted that his failure to include a claim in his initial post conviction petition regarding the absence of notice regarding MSR was due to his ignorance of the law. In rejecting the argument, the court made clear that "all citizens are charged with knowledge of the law" and that "[i]gnorance of the law or legal rights will not excuse a delay in filing a lawsuit." *Id.* at ¶ 13 (citing *People v. Lander*, 215 Ill. 2d 577, 588 (2005), and also *Boclair*, 202 Ill. 2d at 104-105); See also *Diefenbaugh*, 40 Ill. 2d at 74 (the defendant's unawareness of the law regarding post-conviction proceedings was inadequate to explain delay in filing under the Act); *People v. Huffman*, 315 Ill. App. 3d 611, 614 (2000) (defendant's allegation of unfamiliarity with the controlling limitations period insufficient to defeat finding of culpable negligence).

¶ 29 *Lander* is helpful to our analysis for yet another reason. There, the defendant offered as the reason for his delay in commencing his post conviction proceedings that he had relied upon the advice of "jailhouse lawyers," a prison law clerk, and a prison librarian. 215 Ill. 2d at 588-89. The court rejected the reason as valid, noting that it was the defendant's sole responsibility to know the time requirements of the Act. *Id.* Additionally, the court noted, the defendant did not show that the individuals upon whom he relied had any specialized knowledge in post-conviction matters. *Id.* Neither had the defendant alleged in his pleadings that those individuals had been retained to assist inmates with post conviction matters. *Id*; but cf. *People v. Rissley*, 206 Ill. 2d 403, 596 (2003) (holding that petitioner was reasonable

in relying on advice of his direct counsel because he had no reason to question the advice from counsel on the Act's filing deadline).

¶ 30 We believe that the reasoning in *Lander* applies with equal force to the case at bar. Defendant here makes no assertion that the "student of the law" had any specialized knowledge concerning post-conviction matters. Further, there is no suggestion that the student bore any relationship to the inmates, professional or otherwise. Thus, defendant's reliance on the student is insufficient to defeat a finding of culpable negligence.

¶ 31 On this record, we are unable to conclude that defendant was not culpably negligent in the delay in filing his post-conviction petition. Therefore, his amended post-conviction petition should have been dismissed as time barred. See *Perkins*, 229 Ill. 2d at 43; 725 ILCS 5/122-1(c) (West 2006).

¶ 32 Having concluded that defendant's post-conviction petition is time barred, we need not address his claimed error regarding notice of the MSR. Neither do we address the State's argument regarding the unavailability of relief. As a final matter, however, defendant contends, and the State agrees, that the *mittimus* incorrectly reflects the offense for which he was convicted. He urges our correction of the same.

¶ 33 The *mittimus* describes defendant's conviction as "MFG/DEL 01-15 GR COCAINE/ANLG," (manufacture of cocaine or an analog thereof). However, defendant was convicted of possession of a controlled substance with intent to deliver. Under Supreme Court Rule 615(b), this court has the authority to "reverse, affirm, or modify the judgment or order from which [this] appeal is taken." Ill. S. Ct. Rule 615(b)(1) (eff. Aug. 27, 1999). Accordingly, we direct the clerk of the circuit court to correct the *mittimus* to properly reflect a conviction of possession of a controlled substance with the intent to deliver.

¶ 34 CONCLUSION

¶ 35 Defendant was culpably negligent in the untimely filing of his post-conviction petition, thus the petition was time barred. Accordingly, and for the foregoing reasons, we affirm the judgment of the circuit court. The *mittimus* is corrected to reflect the correct offense for which petitioner was convicted.

¶ 36 Affirmed; *mittimus* corrected.