2018 IL App (1st) 160292-U

SIXTH DIVISION
December 21, 2018

No. 1-16-0292

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
	)	Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	05 CR 6899
	)	
DARRYL SHANNON,	)	
	)	
	)	Honorable Diane Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court failed to enter an order on defendant's postconviction petition within 90 days of its filing and docketing, and thus defendant's petition must advance to the second stage; reversed and remanded.

¶ 2 Defendant, Darryl Shannon, was convicted of first degree murder and sentenced to natural life imprisonment in 2011. This court affirmed defendant's conviction in *People v. Shannon*, 2014 IL App (1st) 120159-U[1]. On December 17, 2014, defendant filed a *pro se*

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[1] Upon review of this appeal, it came to this court's attention that the public domain citation in our decision addressing defendant's direct appeal was incorrectly listed as "2014 IL App (1st) 0120159-U" when filed.

postconviction petition, which the trial court orally dismissed on January 9, 2015. Defendant did not receive notice that the court had purportedly dismissed his *pro se* petition until November 2015. On appeal, defendant argues that the court below did not enter an order disposing of his postconviction petition within 90 days, and thus his petition must advance to second stage proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122/2.1(a) (West 2014)). We find that the trial court did not enter an order on defendant's postconviction petition within 90 days of its filing and docketing. For the reasons that follow, we reverse the trial court's decision and remand for second stage proceedings.

¶ 3 BACKGROUND

¶ 4 A full recitation of the facts of defendant's direct appeal from his conviction for first degree murder can be found in this court's March 3, 2014, decision, (*Shannon*, 2014 IL App 120159-U[2]), affirming defendant's conviction and sentence. Thus, we set forth only those facts relevant to defendant's postconviction effort.

¶ 5 On December 17, 2014, defendant filed his *pro se* petition for postconviction relief, arguing numerous constitutional violations and dozens of errors by the court during trial. The record on appeal contains a transcript from January 9, 2015, wherein the court stated as follows:

> "Darryl Shannon files petition for post conviction relief. Court has reviewed the petition. Ruled [*sic*] the Appellate Court opinion.

We, therefore, have since filed a corrected copy of our March 3, 2014, decision, with the public domain citation correctly listed as "2014 IL App (1st) 120159-U." As a result, we use the corrected citation in this order.

[2] On direct appeal, defendant argued that, "(1) the trial court abused its discretion by limiting defense counsel's cross-examination of one of the State's witnesses, (2) he was denied a fair trial when the trial court admonished defense counsel in front of the jury, (3) he was denied a fair trial when the trial court acted like a prosecutor in the case, and (4) he was denied a fair trial when the State argued that defendant had fled the state to avoid prosecution in this case." *Shannon*, 2014 IL App (1st) 120159-U, ¶ 1.

> The allegations have been tried and litigated in court and in the Appellate Court they have been *res judicata*. The petition is respectfully denied as patently frivolous, without merit and *res judicata*. Clerk to notify."

¶ 6 The cover page of the transcript reflects that no party was present in court during this hearing. It is undisputed that the clerk did not notify defendant of the court's oral ruling from that date. Further, the record on appeal does not contain a half-sheet or criminal disposition sheet from January 9, 2015[3].

¶ 7 On August 25, 2015, defendant filed a "Motion for Appearance," asserting that he filed a timely postconviction petition, that the court did not address his petition within 90 days as required by the Act, that he tried unsuccessfully to find out the status of his petition, and that he was requesting that the court issue a writ of appearance so that he could begin second stage postconviction proceedings.

¶ 8 On September 14, 2015, at a hearing on defendant's Motion for Appearance, the court stated that the matter was before it, "to set down for second stage hearing." The court subsequently clarified that,

> "The defendant has indicated it was a second stage hearing. That is not an order of this [c]ourt, nor was it an order of this [c]ourt.
>
> [We will] strike that it is set for second stage hearing. [I will] review the defendant's petition. Order of [c]ourt for ruling 10-29. Strike the writ order, State."

¶ 9 The record contains a document titled "Certified Statement of Conviction / Disposition" that was unsigned and dated September 28, 2015 (2015 Certified Statement of Conviction /

[3] We note that the record contains criminal disposition sheets for the following dates: November 13, 2014, December 11, 2014, September 14, 2015, November 13, 2015, and December 11, 2015.

Disposition). The 2015 Certified Statement of Conviction / Disposition contained the following relevant entries:

> "12/30/14 DEFENDANT IN CUSTODY 01/09/15 1708
> GAUGHAN, VINCENT
> 01/09/15 SPECIAL ORDER
> DEFT PETITION DENIED AS PATENTLY FRIVOLOUS AND WITHOUT MERIT
> CANNON, DIANE G.
> 08/25/15 NOTICE OF MOTION/FILING 09/14/15 1708
> APPEARANCE (WRIT IN) 2ND STAGE POST CONVICTION"

¶ 10 At the next hearing, on November 20, 2015, the court stated as follows,

> "Darryl Shannon set down for second stage hearing. Public defender is appointed. 12-9. If you notify your office and state's attorney's office. Darryl Shannon, post conviction. Set down for second stage hearing. Order of court, 12-9."

¶ 11 Thereafter, defendant received a notice from the clerk of the circuit court, dated November 24, 2015, stating that "on November 20, 2015[,] the court entered an order, a copy of which is enclosed herewith." The notice also explained defendant's appellate rights. Included with the notice was a document titled "Certified Report of Disposition," stating:

> "The following disposition was rendered before the Honorable Judge DIANE GORDON CANNON ON NOVEMBER 20, 2015, RULED 'ORDER OF 1-9-15 TO STAND. PETITION FOR POST-CONVICTION RELIEF RESPECFULLY DENIED, AS PATENTLY FRIVOLOUS AND WITHOUT MERIT.' "

¶ 12 On December 30, 2015, defendant's notice of appeal was filed in the circuit court. However, according to the proof of service attached to defendant's notice of appeal, defendant

placed his notice of appeal in the mail on December 14, 2015. The notary's signature on defendant's proof of service was also dated December 14, 2015.

¶ 13 Defendant filed his opening brief on June 20, 2018, which included another Certified Statement of Conviction / Disposition that was dated May 24, 2018, (2018 Certified Statement of Conviction / Disposition) and signed by the clerk of court. The 2018 Certified Statement of Conviction / Disposition contained the following relevant entries:

"12/30/14 DEFENDANT IN CUSTODY 01/09/15 1708

GAUGHAN, VINCENT

08/28/15 NOTICE OF MOTION/FILING 09/14/15 1708

APPEARANCE (WRIT IN) 2ND STAGE POST CONVICTION"

The entry from January 9, 2015, that appeared on the 2015 Certified Statement of Conviction / Disposition does not appear on the 2018 Certified Statement of Conviction / Disposition.

¶ 14 On November 14, 2018, defendant, acting through his appointed appellate counsel, filed a motion with this court, seeking to compel the clerk of the circuit court to produce the half sheet and criminal disposition sheet for January 9, 2015, in this case. Defendant's motion alleged that his counsel had exercised due diligence by checking the court file when attempting to obtain the half sheet and criminal disposition sheet for that date. Attached to the defense's motion was an affidavit from Susan Carr, the director of support services at the Office of the State Appellate Defender (OSAD). Carr's affidavit stated that she had been asked to obtain written confirmation of any orders that were entered by the court in defendant's case on January 9, 2015, and that after specifically requesting a half-sheet and/or criminal disposition sheet for that date, Carr "received confirmation from the clerk's office that they could not locate an imaged daily court sheet for the date of January 9, 2015 re: *People v. Darryl Shannon* by the Honorable Judge Dianne [*sic*]

Cannon." Appended to Carr's affidavit was an email in which an employee of the clerk's office informed Carr that, "There was nothing imaged on 1-9-15." This court granted defendant's motion to compel on November 21, 2018. To date, we have not received any documentation from the circuit court clerk's office.

¶ 15 ANALYSIS

¶ 16 The sole issue before this court is whether the court's oral pronouncement on January 9, 2015, that defendant's postconviction petition was "patently frivolous, without merit[,] and *res judicata*" amounted to the court entering an order on defendant's postconviction petition, even though no half-sheet or other reliable court record exists from that date. Thus, this appeal does not involve the substantive merits of defendant's petition.

¶ 17 The Act provides a postconviction remedy to petitioners who claim that substantial violations of their constitutional rights occurred during trial. *People v. Eddmonds*, 143 Ill. 2d 501, 510 (1991). A postconviction proceeding is a collateral attack upon a final judgment and its purpose is not to determine guilt or innocence, but to inquire into constitutional issues that have not been adjudicated. *Id.* The Act sets out a three-stage process for adjudicating petitions for postconviction relief. At the first stage, the trial court considers the petition without input from the State or further pleadings from the defendant in order to determine if it is frivolous and patently without merit. See 725 ILCS 5/122-2.1 (West 2014). We review a circuit court's dismissal of a postconviction petition *de novo*. *People v. Allen*, 2015 IL 113135, ¶ 19.

¶ 18 Defendant argues that his postconviction petition must advance to the second stage because his petition was dismissed by oral pronouncement within 90 days but an order reflecting that oral ruling was not entered of record until 10 months later. The State responds that the 2015 Certified Statement of Conviction / Disposition demonstrates that on the same day the court

orally dismissed defendant's postconviction petition in open court, the clerk of the court entered an order reflecting the court's dismissal of the petition. After a careful review of the record in this case, we agree with defendant that the court did not enter an order within 90 days of the filing of his postconviction petition, and thus his petition must advance to second stage proceedings.

¶ 19 Section 122-2.1(a) of the Act provides that, "Within 90 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon pursuant to this Section." 725 ILCS 5/122-2.1(a) (West 2014). The 90-day period is mandatory, not directory. *People v. Brooks*, 221 Ill. 2d 381, 389 (2006). Section 122-2.1(b) further states that, "If the petition is not dismissed pursuant to this Section, the court shall order the petition to be docketed for further consideration in accordance with Sections 122-4 through 122-6," *i.e.*, second stage proceedings. 725 ILCS 5/122-2.1(b) (West 2014). Also relevant is section 122-2.1(a)(2) of the Act, which states:

> "If the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. Such order of dismissal is a final judgment and shall be served upon the petitioner by certified mail within 10 days of its entry." 725 ILCS 5/122-2.1(a)(2) (West 2014).

¶ 20 In defendant's reply brief, he makes clear that he is not arguing that the dismissal of his postconviction petition was improper because it was not by a written order with findings. Instead, defendant argues that the court did not "enter an order" on his petition within 90 days as required by section 122-2.1(a) of the Act. 725 ILCS 5/122-2.1(a) (West 2014). Defendant

argues that, in fact, the court did not enter an order on his petition until 10 months later, and thus we must remand for second stage proceedings. This distinction is important because it is well-recognized that section 122-2.1(a)(2) "is merely directory despite its use of 'shall' because it does not provide that the summary dismissal is void for the lack of findings, a lack of findings does not prejudice a defendant's rights on appeal, and a construction that rendered the provision mandatory would violate the separation of powers." *People v. Cooper*, 2015 IL App (1st) 132791, ¶ 9 (citing *People v. Porter*, 122 Ill. 2d 64, 81-82 (1988)). Our supreme court has, nonetheless, cautioned that although not mandatory, "it is advisable that the trial court state its reasons for dismissal." *Porter*, 122 Ill. 2d at 81. Thus, if defendant argued that his petition must advance because the court failed to enter a written order with findings, such a contention would fail.

¶ 21 As a brief aside, we address the State's contention that defendant "has failed to provide this [c]ourt with any of the circuit court's half-sheets or criminal disposition sheets." " 'A half-sheet is a sheet on which the clerk's office enters chronological notations indicating the procedural events of a case.' " *People v. Begay*, 2018 IL App (1st) 150446, ¶ 47 (quoting *People v. Jones*, 2015 IL App (1st) 133123, ¶ 8 n. 3). "A half-sheet entry is also called a 'docket' entry [Citation.], and it may be relied on as some evidence of certain legal events." *Id.* Generally, "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). However, in this case, for reasons that are more fully explored below, it is unclear whether a half-sheet or criminal disposition sheet from January 9, 2015, exists. Additionally, defendant filed a motion to compel the clerk of the circuit

court to produce such documents if they exist, which we granted on November 21, 2018. To date, we have not received any response from the clerk of the circuit court's office. In support of his motion to compel, defendant provided an affidavit from the OSAD's director of support services, averring that another OSAD employee had attempted to locate the half-sheet and/or daily court sheet for January 9, 2015, but was unable. The affidavit also reflected that the clerk's office confirmed that they could not locate an imaged daily court sheet from January 9, 2015. Based on the evidence presented by defendant, it is clear that defendant has exhausted every reasonable attempt to secure any written evidence of the court's oral pronouncements on the date at issue, and thus has satisfied his burden to present a sufficiently complete record, given the circumstances present in this case. Thus, we decline the State's invitation to resolve any doubts in the record against defendant. *Id.* at 392.

¶ 22 Returning to the substantive issue of this appeal, we find that the record, through no fault of defendant, does not contain evidence that the circuit court entered an order dismissing defendant's petition within 90 days. We find support for our decision in the relatively recent decisions of both this court and our supreme court.

¶ 23 For example, in *People v. Perez*, our supreme court addressed the issue of whether the circuit court complies with the 90-day requirement of the Act "when it signs and dates an order of dismissal on the ninetieth day after the petition is filed and docketed, but the order is not filed by the clerk until the ninety-first day." 2014 IL 115927, ¶ 1. The court stated that the primary question that must be answered was when did the trial court " 'enter an order' " for purposes of the Act. *Id.* ¶ 13. The court rejected the State's argument that the order was entered and the clock began to run on the defendant's appellate rights as soon as the judge signed the order because that would mean that "if the judge signed the order, placed it in his outbox, locked his

office door, and went on vacation for a week, the clock would be ticking on defendant's appeal rights, even though no one but the judge would have any idea that an order had been entered." *Id.* ¶ 21. The court also rejected the defendant's argument and the view of the appellate court majority that had the trial judge, within the 90-day limit, announced in open court that he was dismissing the defendant's postconviction petition the Act would have been satisfied because "the statute requires something *more* than public expression," (Emphasis in original.) (*id.* ¶ 23), because section 122-2.1(a) requires that a court "enter an order" within 90 days of the filing of a defendant's petition. 725 ILCS 5/122-2.1(a) (West 2014). The court further recognized that the "90-day period in section 122-2.1(a) is intimately tied together with the notice of appeal period," and thus pursuant to that section of the Act and Rule 272, "the court's decision is 'entered,' and the appeal period commences, when the judgment is placed of record." *Perez*, 2014 IL 115927, ¶ 25.

¶ 24 The issue of when a judgment is placed of record was explored in *People v. Cooper*, where the defendant's *pro se* postconviction petition was summarily dismissed by the circuit court and the dismissal was memorialized in a criminal disposition sheet that was sent to the defendant and on the circuit court's half-sheet. 2015 IL App (1st) 132791, ¶ 7. On appeal, the record did not contain a transcript for the date on which the defendant's petition was denied but the court's denial was "reflected in a written notice and certified report of disposition and in a docket (or 'half-sheet') entry." *Id.* This court, relying on *Perez*'s holding that a court summarily dismisses a postconviction petition when its decision is entered of record, determined that the circuit court reached a decision to dismiss the defendant's petition and that decision was clearly communicated to the clerk of the court and spread of record, as evidenced by the docket or half-sheet entry of dismissal. *Id.* ¶ 14.

¶ 25 The State argues that *Cooper* is instructive in the case at bar because the circuit court did "enter an order" on January 9, 2015, as evidenced by the 2015 Certified Statement of Conviction / Disposition, which included an entry for that date that read:

"01/09/15 SPECIAL ORDER

DEFT PETITION DENIED AS PATENTLY FRIVOLOUS AND WITHOUT MERIT

CANNON, DIANE G."

Defendant responds that the 2015 Certified Statement of Conviction / Disposition is not adequate to show that the court entered an order on January 9, 2015. We agree with defendant.

¶ 26 In this case, the circuit court, in open court before a court reporter, reviewed defendant's postconviction petition and this court's decision from defendant's direct appeal, found the petition frivolous, without merit, and *res judicata*, and dismissed it. It is clear that the court's oral pronouncement on January 9, 2015, taken alone, was not sufficient to show the entry of an order because the Act requires *more* than a public expression. (Emphasis in original.) *Perez*, 2014 IL 115927, ¶ 23. However, we similarly find that the court's oral pronouncement, coupled with the 2015 Certified Statement of Conviction / Disposition, also is not sufficient to show that the court entered an order dismissing defendant's petition on that date. The parties have not cited, and we have not found, a case that mirrors the factual scenario here. The State relies on *Cooper*, where this court found the court below entered an order based on the existence of a docket or half-sheet entry of dismissal. *Cooper*, 2015 IL App (1st) 132791, ¶ 14. However, unlike *Cooper*, no half-sheet from January 9, 2015, exists. See also *People v. Lee*, 2016 IL App (1st) 152425, ¶ 36 (noting that the record did not contain a written order dismissing the defendant's postconviction petition but did contain a criminal disposition sheet and a half-sheet entry for the date at issue). Also unlike in *Cooper*, where the defendant was mailed a written

notice and certified report of disposition from the date of the purported dismissal, in this case, it is uncontested that defendant was not mailed any documents from January 9, 2015, and instead only received the Certified Report of Disposition after a hearing ten months later.

¶ 27 The State is essentially requesting that this court treat the 2015 Certified Statement of Conviction / Disposition in the same manner as this court treated a half-sheet or criminal disposition sheet in *Cooper*. We decline to do so because a half-sheet or criminal disposition sheet and a certified statement of conviction are not the same type of document and are not created in the same manner. " 'A half-sheet is a sheet on which the clerk's office enters chronological notations indicating the procedural events of a case.' " *Begay*, 2018 IL App (1st) 150446, ¶ 47 (quoting *Jones*, 2015 IL App (1st) 133123, ¶ 8 n. 3). A certified statement of conviction, on the other hand, is a compilation of the information taken from half-sheets or criminal disposition sheets. The State recognizes this and argues that because a certified statement of conviction usually reflects what was in the court's half-sheets, then the 2015 Certified Statement of Conviction / Disposition should be sufficient to show that a half-sheet for January 9, 2015 exists (or did exist), and thus should be sufficient to show that the court entered an order on that date. We disagree with this contention for numerous reasons. First, entries on a half-sheet are typically made either by the judge or a clerk of the circuit court at or near the time that the events being reflected on the half-sheet occurred. Conversely, a certified statement of conviction / disposition is a computer-generated document that can be produced at any time, which leads to the second problem.

¶ 28 There are before us two certified statements of conviction / disposition—one dated September 28, 2015 and another dated May 24, 2018. It makes sense that these two documents would not be identical because the 2018 version would have more entries than the 2015 version

since time had elapsed and subsequent court hearings occurred between September 2015 and May 2018. What does not make sense, and what perplexes and concerns this court, is the fact that the 2018 Certified Statement of Conviction / Disposition does not contain an entry for January 9, 2015, but the 2015 Certified Statement of Conviction / Disposition does. Defendant has pointed out that the 2015 Certified Statement of Conviction / Disposition was created approximately one month after his Motion for Appearance was filed and that the filing of his motion "could have alerted the clerk that the oral dismissal had not been entered of record within 90 days, as required by statute." We do not find it prudent to speculate further regarding the cause of the discrepancy. However, the mere existence of the discrepancy, coupled with the fact that the 2015 Certified Statement of Conviction / Disposition is unsigned, results in unreliability in this case. Because the Act requires that the court "enter an order" on defendant's petition within 90 days and there is no reliable evidence that the court's January 9, 2015, oral pronouncement was entered of record, we reverse the circuit court's dismissal of defendant's petition and remand for second stage proceedings.

¶ 29 Although this court's jurisdiction is typically a threshold matter, due to the unique circumstances of this case which required this court to determine if and when the circuit court actually entered an order, we address it at the conclusion of this decision. We have determined that the circuit court did not enter an order on defendant's postconviction petition until November 20, 2015. Thus, defendant's notice of appeal was due within 30 days of the entry of that order. Thirty days from November 20, 2015, was December 20, 2015. December 20, however, was a Sunday, thereby making the notice of appeal actually due by December 21, 2015. See 5 ILCS 70/1.11 (West 2014) (providing that, "The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last,

unless the last day is Saturday or Sunday ***, and then it shall also be excluded.”). Supreme Court Rule 373, a civil appeals rule that is applicable to criminal cases through Rule 612(s), provides:

> “Unless received after the due date, the timing of filing records, briefs or other documents required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court. If received after the due date, the time of mailing by an incarcerated, self-represented litigant shall be deemed the time of filing. Proof of mailing shall be as provided in Rule 12. This rule also applies to a motion against the judgment and to the notice of appeal filed in the trial court.” Ill. S. Ct. R. 313 (eff. Jul. 1, 2017).

¶ 30 Rule 12(b)(6) expressly addresses cases of service by mail by a self-represented litigant residing in a correctional facility, and states that service is proved “by certification under section 1-109 of the Code of Civil Procedure of the person who deposited the document in the institutional mail, stating the time and place of the deposit and the complete address to which the document was to be delivered.” Ill. S. Ct. R. 12(b)(6) (eff. Jul. 1, 2017).

¶ 31 Here, defendant is incarcerated in Stateville Correctional Center and he was self-represented, or acted *pro se*, in filing his notice of appeal. Rule 12(b)(6), therefore, applies to him. Defendant’s notice of appeal was file-stamped on December 30, 2015, which is outside the allotted 30 days. However, the proof of service that defendant certified pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2014)), stated that he deposited the notice of appeal documents in the mail on December 14, 2015, which is within the allotted time. As a result, we find that defendant’s notice of appeal was filed within the allotted 30 days and is,

therefore, timely. See *People v. Lugo*, 391 Ill. App. 3d 995, 997-98 (2009). Thus, we had jurisdiction to review this appeal.

¶ 32 CONCLUSION

¶ 33 Based on the foregoing, we find that the circuit court did not enter an order on defendant's postconviction petition within 90 days of its filing and docketing. We therefore reverse and remand for second stage proceedings.

¶ 34 Reversed and remanded.