2018 IL App (1st) 161178-U
Order filed: August 3, 2018

FIRST DISTRICT
FIFTH DIVISION

No. 1-16-1178

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 4948
	)	
VINCENT CARTER,	)	Honorable
	)	Anna Helen Demacopoulos,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

Held: Second-stage dismissal of postconviction petition is affirmed, where: (1) petition was not timely filed; and (2) petitioner did not meet his burden of showing either that the untimely filing was not due to his culpable negligence or that postconviction counsel provided unreasonable assistance.

¶ 1 Petitioner-appellant, Vincent Carter, appeals from the second-stage dismissal of his postconviction petition. For the following reasons, we affirm.[1]

¶ 2 I. BACKGROUND

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

¶ 3 Petitioner was charged by indictment with two counts of predatory criminal sexual assault and four counts of criminal sexual assault, which taken together generally alleged that—between November 1, 2000, and January 28, 2002—petitioner sexually assaulted his minor stepdaughter. This matter proceeded to a bench trial in October of 2002.

¶ 4 At the conclusion of the trial, petitioner was found guilty on all six counts. Petitioner's motion to reconsider was subsequently granted in part, however, and the trial court ultimately found petitioner not guilty on the two counts of predatory criminal sexual assault (counts 1 and 2). Defendant was thereafter sentenced to concurrent 10-year prison terms on counts 3 and 4, which related to a single incident that occurred on February 12, 2001, to be served consecutively to concurrent 10-year prison terms on counts 5 and 6, which related to a single incident that occurred on January 28, 2002.

¶ 5 On direct appeal, appellate counsel argued that two of petitioner's convictions must be vacated under the "one-act, one-crime" doctrine. In an order entered on September 30, 2004, this court agreed. *People v. Carter*, No. 1-03-1206 (2003) (unpublished order under Supreme Court Rule 23). We therefore affirmed petitioner's convictions and consecutive sentences on counts 3 and 5, and vacated petitioner's convictions and consecutive sentences on counts 4 and 6. *Id*. No petition for leave to appeal to our supreme court was filed following the direct appeal.

¶ 6 Thereafter, petitioner filed a motion for an extension of time in which to file a petition for relief pursuant to the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq*. (West 2016)). The motion—mailed on March 8, 2006, and file-stamped March 15, 2006—alleged that a postconviction petition was due to be filed by March 31, 2006. Further asserting only that he did "not have all my needed court transcripts and I have been trying to get them," petitioner asked the trial court for a 180-day extension of time in which to file a postconviction petition. In

a second, similar motion—mailed on September 6, 2006, and file-stamped September 15, 2006—petitioner alleged that his postconviction petition was now due to be filed by September 31, 2006. Further asserting only that he needed "additional time to prepare my post-conviction," petitioner asked for another 180-day extension of time in which to file a postconviction petition. The record does not reflect that either motion was ever considered or ruled upon by the trial court.

¶ 7 It was not until March 28, 2007, that petitioner mailed a *pro se* postconviction petition to the trial court (file-stamped April 2, 2007), contending that his trial and appellate counsel provided ineffective assistance. The petition included, *inter alia*, assertions that petitioner's trial counsel improperly failed to raise the issue of petitioner's competency to stand trial and improperly failed to present exculpatory DNA evidence at trial. Petitioner also contended that he was not proven guilty beyond a reasonable doubt. In explaining why affidavits, records, or other documents were not attached to the petition, petitioner stated: "I was never given any discovery of anything, my court transcripts [were] lost while I was in [a] psychiatric holding cell, I never receive[d] the D.N.A. test results, I believe these documents are all a matter of record." Counsel was appointed to represent petitioner on his postconviction petition in August 2007.

¶ 8 Thereafter, following numerous continuances, postconviction counsel filed a supplemental postconviction petition on February 13, 2015. Therein, counsel provided additional argument solely with respect to the contention that trial counsel was ineffective for failing to request a fitness evaluation despite evidence purportedly raising a *bona fide* doubt regarding petitioner's fitness at the time of trial. The supplemental petition was supported by reference to petitioner's purportedly erratic behavior at trial—including petitioner's insistence on rejecting his trial counsel's advice and thus proceeding with the trial without seeking to utilize exculpatory

DNA evidence—as well as medical records detailing petitioner's history of psychiatric treatment. The petition also relied upon a written report prepared by a forensic psychologist, Dr. Michael Kovar. In that report, Dr. Kovar diagnosed petitioner with use disorders related to alcohol and cocaine that were in remission due to petitioner being in a controlled environment, as well as unspecified depressive and personality disorders. While Dr. Kovar could not say that petitioner would have been found unfit if he had undergone a fitness evaluation at the time of trial, Dr. Kovar opined "with reasonable psychological certainty that there are numerous factors which create a *bona fide* doubt as to whether he was indeed fit to stand trial."

¶ 9 The State filed a motion to dismiss both the *pro se* and supplemental petitions on May 15, 2015. Therein, the State argued that the original *pro se* petition was not timely filed and, even if it was, the substantive issues raised in both petitions lacked merit. On July 15, 2015, postconviction counsel filed a written response to the State's motion to dismiss. As to the timeliness issue, counsel acknowledged that the *pro se* petition was not timely filed but argued that the limitations period contained in the Act should be relaxed in light of the questions regarding petitioner's fitness at trial. With respect to the merits, postconviction counsel asserted various arguments to support the contention that trial counsel was ineffective for failing to request a fitness evaluation.

¶ 10 On the same day, postconviction counsel also filed a Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)) certificate of compliance, which in pertinent part stated that counsel had consulted with petitioner by phone, mail and in person to ascertain his contentions of deprivation of his constitutional rights, examined the record and the report of proceedings with respect to the trial and direct appeal, conducted interviews and worked with Dr. Kovar, and filed both a supplemental petition and response to the State's motion to dismiss as was necessary for an

adequate presentation of petitioner's contentions. With respect to the issue of timeliness, postconviction counsel's Rule 651(c) certificate specifically indicated: "I have discussed with Petitioner the timeliness of his post-conviction petition, and have attempted to ascertain any facts which could establish a lack of culpable negligence. I have included a legal argument regarding this issue in Petitioner's Response to Motion to Dismiss."

¶ 11 Following a hearing held on October 30, 2015, the trial court granted the State's motion to dismiss. In its ruling, the trial court first concluded that petitioner's *pro se* petition was not timely filed. The trial court also went on to reject the issues raised in the *pro se* and supplemental petitions on the merits. Petitioner timely appealed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, petitioner challenges the dismissal of his postconviction petition at the second-stage. Because we conclude that the petition was untimely filed, we affirm.

¶ 14 The Act provides a procedural mechanism through which a petitioner may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2016). At the first stage of a postconviction proceeding, the circuit court independently reviews the petitioner's petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the postconviction petition is not summarily dismissed, as here, it advances to the second stage where the State may file a motion to dismiss the petition and the postconviction court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *Id.* at 10–11 n. 3. At the second stage of proceedings, the postconviction court takes "all well-pleaded facts that are not positively rebutted by the trial record" as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the petition fails to make a

substantial showing of a constitutional violation, it is dismissed; if such a showing is made, the postconviction petition advances to the third stage where the court conducts an evidentiary hearing. 725 ILCS 5/122–6 (West 2016). A second-stage dismissal of a postconviction petition is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 15 At the second stage the State may also, as it did here, move to dismiss a petition as being untimely. *People v. Perkins*, 229 Ill. 2d 34, 48 (2007), as modified on denial of reh'g (May 27, 2008). "If a postconviction petition is not filed within the limitations period, the Act requires the petitioner to allege facts showing the delay was not due to his or her culpable negligence. [Citation.] Absent allegations of lack of culpable negligence, the Act directs the trial court to dismiss the petition as untimely at the second stage upon the State's motion. [Citations.] The State may move to dismiss after petitioner's counsel has made any necessary amendments. [Citation.]" *Id*. at 43. The trial court's dismissal of a petition at the second-stage due to a petitioner's failure to sufficiently allege a lack of culpable negligence is reviewed *de novo*. *People v. Wilburn*, 338 Ill. App. 3d 1075, 1077 (2003).

¶ 16 It is undisputed that petitioner's postconviction petition was not timely filed. Where—as is the case here—a direct criminal appeal is filed but no petition for leave to appeal to our supreme court is filed following the resolution of that direct appeal, the Act establishes that any postconviction petition must be filed within six months of the date for filing a petition for leave to appeal. 725 ILCS 5/122-1(c) (West 2008); *People v. Johnson*, 2017 IL 120310, ¶ 24. Thus, the six-month time period for filing a postconviction petition started to run in this case after the expiration of the 35-day period following our resolution of petitioner's direct appeal in which he had to file a petition for leave to appeal to our supreme court. Ill. S. Ct. R. 612(b)(2) (eff. Jan. 1, 1998); Ill. S. Ct. R. 315(b) (eff. Dec. 5, 2003).

¶ 17 Our Rule 23 order resolving the direct appeal was issued on September 30, 2004. Any petition for leave to appeal to our supreme court from that decision was due 35 days later, on November 4, 2004, and any postconviction petition was therefore due six months thereafter, on May 4, 2005. Petitioner's *pro se* postconviction petition, mailed on March 28, 2007, and file-stamped April 2, 2007, was therefore clearly untimely. Thus, the relevant question is whether petitioner alleged sufficient facts showing the delay was not due to his culpable negligence, such that the trial court improperly granted the State's motion to dismiss at the second stage. *Perkins*, 229 Ill. 2d at 48. We conclude that he did not.

¶ 18 Defendant bears the "heavy burden" to affirmatively show why the tardiness of the petition was not due to his culpable negligence. *People v. Gunartt*, 327 Ill. App. 3d 550, 552 (2002). The phrase "culpable negligence" contemplates "something greater than ordinary negligence and is akin to recklessness." *People v. Boclair*, 202 Ill. 2d 89, 108 (2002). While not intentional conduct, culpable negligence involves a disregard of the consequences likely to flow from one's actions. *People v. Lander*, 215 Ill. 2d 577, 586 (2005). "Lack of culpable negligence is very difficult to establish." *Gunartt*, 327 Ill. App. 3d at 552; *People v. Turner*, 337 Ill. App. 3d 80, 86 (2003).

¶ 19 "[A] a defendant asserting that he was not culpably negligent for the tardiness of his petition must support his assertion with allegations of specific fact showing why his tardiness should be excused." *People v. Hobson*, 386 Ill. App. 3d 221, 233 (2008); See also *People v. Walker*, 331 Ill. App. 3d 335, 339–40 (2002) (noting that the relevant inquiry becomes whether, after accepting all well-pleaded factual allegations of defendant's petition regarding culpable negligence as true, those assertions are sufficient as a matter of law to demonstrate an absence of culpable negligence on defendant's part); *People v. Van Hee*, 305 Ill. App. 3d 333, 336 (1999)

("[t]o show the absence of culpable negligence, a petitioner must allege facts justifying the delay"); *People v. McClain*, 292 Ill. App. 3d 185, 188 (1997) (to warrant an evidentiary hearing on the issue of whether the delay in filing postconviction relief was not occasioned by culpable negligence, the defendant "must make a 'substantial showing' by alleging facts demonstrating that to be the case"), overruled in part and on different grounds by *People v. Woods*, 193 Ill.2d 483 (2000).

¶ 20 Petitioner contends on appeal that he met his burden to allege sufficient facts showing the delay in filing his petition was not due to his culpable negligence, specifically relying upon: (1) the fact that he filed two *pro se* motions for extension, the first of which asserted that petitioner did "not have all my needed court transcripts and I have been trying to get them;" and (2) the allegations contained in his *pro se* petition specifically asserting that he was never given any discovery and lost his trial transcripts while he was detained in a psychiatric holding cell. We disagree.

¶ 21 First, both of petitioner's motions for extension—filed in March and September, 2006, were filed *well after* his petition was actually due on May 4, 2005. We fail to see how petitioner should be credited for his efforts to seek extensions, when even his motions for extension were untimely. Indeed, by filing a second motion for extension well after even petitioner believed his petition was due and then waiting months more to actually file his petition, petitioner clearly displayed a "disregard of the consequences likely to flow from one's actions." *Lander*, 215 Ill. 2d at 586. Nor do we agree with the argument that petitioner's *pro se* status should be considered with respect to his efforts to seek an extension, as a petitioner's *pro se* status is not an excuse for the failure to comply with the requirements of the Act. *People v. Vilces*, 321 Ill. App. 3d 937, 939-40 (2001); *Lander*, 215 Ill. 2d at 588–89 (noting that "all citizens are charged with

knowledge of the law" and that "the sole obligation of knowing the time requirements for filing a postconviction petition remains with the defendant").

¶ 22 Second, the factual allegations made below upon which petitioner relies on appeal—that he was never given any discovery and lost his trial transcripts while he was detained in a psychiatric holding cell—were actually made in the context of requesting an (untimely) extension and in explaining why affidavits, records, or other documents were not attached to the untimely *pro se* petition he ultimately filed. These factual allegations were never employed below—as is required by the Act—in an attempt to show that the delay in filing his petition was not due to his culpable negligence. A petitioner "may not raise claims for the first time on appeal from the trial court's dismissal of his postconviction petition." *People v. Shief*, 2016 IL App (1st) 141022, ¶ 49. We also reiterate that "absent allegations of lack of culpable negligence, the Act directs the trial court to dismiss the petition as untimely at the second stage upon the State's motion." *Perkins*, 229 Ill. 2d at 48.

¶ 23 Even considering these factual allegations and accepting them as true, we do not find them sufficient to meet petitioner's "heavy burden" to make a substantial showing that his delay in filing for postconviction relief was not occasioned by culpable negligence. *Supra* ¶¶ 18-19. Generally speaking, "[n]onfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act" (*Coleman*, 183 Ill. 2d at 381), and more specifically, petitioner may "not merely make vague or conclusory assertions" with respect to his lack of culpable negligence (*Gunartt*, 327 Ill. App. 3d at 552).

¶ 24 Petitioner's contention that he could not timely file his petition because he was never given any discovery and lost his trial transcripts while he was detained in a psychiatric holding cell are no more than the type of vague or conclusory assertions that are insufficient to show a

lack of culpable negligence. Petitioner has never provided any detailed factual assertions as to why the lack of these documents prevented the filing of a timely petition. Moreover, petitioner has never made any specific contention that he lost access to these documents *prior* to the time his petition was due. Our supreme court has recognized such a failure to be fatal, as any circumstances that occurred *after* the petition was due simply could not have caused the delay. *Johnson*, 2017 IL 120310, ¶ 27.

¶ 25 Third, we reject petitioner's claim that a latent ambiguity in the limitations period specified in section 122-1(c) of the Act, as recognized by our supreme court in *Johnson*, 2017 IL 120310, ¶ 20, supports his claim that he was not culpably negligent because he *may have* misunderstood the statute in light of that ambiguity. Petitioner never raised this argument below, and he therefore may not rely upon it on appeal. *Shief*, 2016 IL App (1st) 141022, ¶ 49. Indeed, our supreme court specifically rejected a similar argument raised for the first time on appeal in *Johnson*, 2017 IL 120310, ¶ 27, because the petitioner in that case "never alleged in the petition or during his testimony before the trial court that confusion over the proper deadline for filing a petition caused him to file the petition late." We come to a similar conclusion here, where petitioner did not rely on this claim below and does no more than speculate regarding the impact of the ambiguity on appeal.

¶ 26 Because we conclude that the trial court properly found the petition to be untimely and the failure to file a timely petition was not excused by petitioner's lack of culpable negligence, we now turn to petitioner's alternative argument that this matter should be remanded for further second-stage proceedings because his postconviction counsel provided unreasonable assistance in failing to allege facts that would have excused the untimely filing.

¶ 27 Under the Act, counsel appointed at the second stage must provide a reasonable level of assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). To provide a reasonable level of assistance, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013)), provides that postconviction counsel: (1) consult with defendant—either by mail or in person—to ascertain his claims of deprivation of constitutional rights; (2) examine the trial record; and (3) amend the *pro se* petition where necessary for an adequate presentation of defendant's contentions. *Suarez*, 224 Ill. 2d at 42. Our supreme court has specifically recognized that "Rule 651(c) requires counsel to amend an untimely *pro se* petition to allege any available facts necessary to establish that the delay was not due to the petitioner's culpable negligence. In discharging this duty, counsel must inquire of the petitioner whether there is any excuse for the delay in filing. As a practical matter, any potential excuse for the late filing will often be discovered by speaking with the petitioner. Counsel must also allege any excuse for the delay in filing apparent from the pleadings and the portions of the record counsel must review to present petitioner's claims." *Perkins*, 229 Ill. 2d at 49-50. Postconviction counsel's compliance with Supreme Court Rule 615(c) is mandatory and generally shown by the filing of a certificate. *Id*. at 50.

¶ 28 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance during second-stage proceedings under the Act. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. The burden is on the defendant to overcome this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties imposed by Rule 651(c). *Id.* The presumption of compliance may be rebutted by the record. *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007). Our review of postconviction counsel's compliance with Rule 651(c) is *de novo*. Jones, 2011 IL App (1st) 092529, ¶ 19.

¶ 29 Here, the record reflects that postconviction counsel filed a supplemental petition and a response to the State's motion to dismiss that specifically addressed the issue of timeliness. Postconviction counsel also filed a Rule 651(c) certificate of compliance, in which counsel stated that he had consulted with petitioner by phone, mail and in person, examined the record and the report of proceedings with respect to the trial and direct appeal, "discussed with Petitioner the timeliness of his post-conviction petition, and *** attempted to ascertain any facts which could establish a lack of culpable negligence. I have included a legal argument regarding this issue in Petitioner's Response to Motion to Dismiss." On this record, we conclude that a rebuttable presumption exists that postconviction counsel provided reasonable assistance during second-stage proceedings with respect to the issue of timeliness. *Jones*, 2011 IL App (1st) 092529, ¶ 23. As such, "it falls on [petitioner] to overcome that presumption by demonstrating counsel's failure to substantially comply with the duties mandated by Rule 651(c)." *Id*.

¶ 30 On appeal, petitioner contends that this presumption is rebutted by the record, as postconviction counsel's unreasonable level of assistance is demonstrated by his: (1) failure to investigate the allegations contained in the *pro se* petition discussed above, and to amend the *pro se* petition to "more properly assert and frame" those allegations so as to "fill in the details and establish that [petitioner] was not culpably negligent;" and (2) filing a response to the motion to dismiss that contained nothing more than a "frivolous argument." We disagree.

¶ 31 First, while petitioner generally faults postconviction counsel's failure to investigate, he never specifically disputes the contention contained in the Rule 651(c) certificate that postconviction counsel "discussed with Petitioner the timeliness of his post-conviction petition, and *** attempted to ascertain any facts which could establish a lack of culpable negligence." Nor is there anything else in the record to rebut this contention.

¶ 32 Second, on appeal petitioner does nothing more than speculate that some further investigation "could" fill in details omitted from the *pro se* postconviction petition and that the unspecified results of that investigation "could easily have been provided by post-conviction counsel in an amended petition." Such speculation is insufficient to meet petitioner's burden to demonstrate that postconviction counsel failed to substantially comply with the duties imposed by Rule 651(c). *People v. Profit*, 2012 IL App (1st) 101307, ¶ 29 (noting that "defendant has not identified what arguments in particular counsel could have made in such a response. In these circumstances, we will not find that postconviction counsel provided unreasonable assistance in failing to make unspecified arguments.").

¶ 33 Third, we reject petitioner's claim that postconviction counsel's purportedly meritless legal argument in response to the motion to dismiss demonstrates unreasonable assistance. As our supreme court stated in *Perkins*, 229 Ill. 2d at 51:

> "Counsel's argument may not have been particularly compelling and his other arguments may have been legally without merit. Those factors, however, do not demonstrate that there was some other excuse counsel could have raised for the delay in filing. There is nothing in the record to indicate that petitioner had any other excuse showing the delay in filing was not due to his culpable negligence. We cannot assume there was some other excuse counsel failed to raise for the delay in filing. Counsel's argument was apparently the best option available based on the facts."

¶ 34 Finally, we note that in his opening brief, petitioner contended that the corrected mittimus entered following the direct appeal did not properly reflect petitioner's term of mandatory supervised release. In subsequent briefing, both petitioner and the State have agreed that this

issue is now moot in light of a corrected mittimus entered by the circuit court. We therefore need not address this issue further.

¶ 35 III. CONCLUSION

¶ 36 For the foregoing reasons, we affirm the dismissal of petitioner's postconviction petition.

¶ 37 Affirmed.