

2018 IL App (1st) 171994-U
No. 1-17-1994
Order filed September 26, 2018

Third 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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 00 CR 18941
)	
DAMIAN JEZUIT,)	Honorable
)	Ursula Walowski,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The summary dismissal of the defendant's postconviction petition is affirmed where the defendant was not serving any part of his sentence at the time he filed the petition and therefore lacked standing to file it.

¶ 2 Defendant Damian Jezuit appeals the circuit court's summary dismissal of his petition seeking relief under the Postconviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, defendant contends the circuit court erred in dismissing his petition without any input from the State. We affirm.

¶ 3 On May 11, 2001, defendant pled guilty to possession of a controlled substance and was sentenced to two years of probation. On February 27, 2003, defendant pled guilty to violating that probation, and his probation was terminated unsatisfactorily. Defendant did not move to withdraw his plea or file an appeal.

¶ 4 On March 14, 2017, defendant filed a postconviction petition asserting that the judgment against him should be vacated and treated as void because he did not understand the proceedings against him. In the petition, defendant argued that, pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010), his plea counsel provided ineffective assistance in failing to advise him that a guilty plea could subject him to deportation proceedings. He asserted that, if his counsel or the court had informed him of the consequences of his plea, he would not have pled guilty.

¶ 5 On June 1, 2017, the circuit court summarily dismissed defendant's petition, finding that defendant lacked standing to file a petition under the Act because he had not been imprisoned "for well over a decade." Defendant filed a timely notice of appeal from that ruling.

¶ 6 On appeal, defendant asks this court to remand for further proceedings on his petition, contending the circuit court erred in dismissing his petition as untimely at this first stage of postconviction review. Relying on *People v. Boclair*, 202 Ill. 2d 89 (2002), defendant asserts the timeliness of a petition is to be considered at the next stage of postconviction proceedings.

¶ 7 At this first stage of postconviction review, a defendant must set forth an arguable constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The circuit court may dismiss the petition if the allegations therein, taken as true, render the petition "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). If a petition is not dismissed at the first stage of review, it advances to the second stage, where counsel may be appointed to represent defendant,

and the State must move to dismiss or file an answer to the petition. 725 ILCS 5/122-2.1(b), 122-5 (West 2016). This court reviews *de novo* the circuit court's dismissal of a postconviction petition at the first stage. *Hodges*, 234 Ill. 2d at 9.

¶ 8 The Act itself states that relief is offered to those “imprisoned in the penitentiary.” 725 ILCS 5/122-1(a) (West 2016). A defendant may seek relief under the Act if he is incarcerated or on mandatory supervised release or probation at the time his petition is filed. *Steward*, 406 Ill. App. 3d at 92-93. However, a defendant only has standing to obtain postconviction relief if he is serving some part of his sentence when his petition is filed. *People v. Carrera*, 239 Ill. 2d 241, 253 (2010). A defendant's lack of standing to file a postconviction petition is a proper basis for summary dismissal under the Act. *People v. Steward*, 406 Ill. App. 3d 82, 90-91 (2010) (citing *Boclair*, 202 Ill. 2d at 101). In comparison, “time is not an inherent element of the right” to file a petition under the Act and it cannot be the basis of a first-stage dismissal; rather, timeliness of a petition's filing is an affirmative defense that can be raised, waived or forfeited by the State. *Boclair*, 202 Ill. 2d at 101.

¶ 9 In this court, defendant conflates his standing to file a petition under the Act and the timeliness of the petition itself by claiming that the circuit court erred in summarily dismissing his petition as untimely, where the timeliness of a petition is reserved for second-stage proceedings. As mentioned, standing and timeliness are separate concepts to be reviewed at different stages of postconviction review. In this case, the court expressly found that defendant lacked standing to file a petition under the Act because he had not been imprisoned “for well over a decade.” This is not surprising given that defendant completed his probation in 2003 and filed a petition seeking relief under the Act 14 years later. Because defendant was no longer

serving any portion of his sentence, he had no standing to seek postconviction relief. Accordingly, the circuit court did not err in summarily dismissing defendant's petition for lack of standing. See *Steward*, 406 Ill. App. 3d at 90-91 (a defendant's lack of standing to file a postconviction petition is a proper basis for summary dismissal under the Act).

¶ 10 In reaching this conclusion, we briefly note that even if defendant had filed a petition under the Act while he was serving part of his sentence, he would not be entitled to any relief under *Padilla* which was decided in 2010 and does not apply retroactively to defendant's case. See *Chaidez v. United States*, 568 U.S. 342, 358 (2013).

¶ 11 For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

¶ 12 Affirmed.