2019 IL App (1st) 161115-U

Nos. 1-16-1115 & 1-16-1373 (Consolidated)

Order filed February 15, 2019

Fifth Division

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. 09 CR 4844
	)	
OMAR SALCEDO,	)	Honorable
	)	Geary W. Kull,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *HELD*: Defendant is entitled to second-stage review of his *pro se* postconviction petition.

¶ 2 Defendant, Omar Salcedo, appeals the summary dismissal of his petition seeking relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant contends his *pro se* postconviction petition must proceed to second-stage review where the trial court failed to enter a written order with specific findings dismissing his petition within the

requisite 90-day time period in violation of the Act, and defendant did not receive requisite notice. Based on the following, we reverse and remand.[1]

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of two counts of armed robbery and two counts of attempted murder of a peace officer. Defendant was sentenced to concurrent 50-year terms for the armed robbery convictions to be served consecutively to concurrent 40-year terms for the attempted murder convictions. On direct appeal, this court vacated one of the armed robbery convictions pursuant to the one-act, one-crime rule and credited defendant for the time he spent in custody. Defendant's remaining convictions and sentences were affirmed. *People v. Salcedo*, 2013 IL App (1st) 120468-U.

¶ 5 On December 2, 2013, defendant filed a *pro se* postconviction petition, alleging ineffective assistance of appellate counsel for failing to raise a reasonable doubt claim on direct appeal. The record contains a hand-written entry by the clerk on the trial court's half-sheet dated December 2, 2013, confirming that the petition was filed. The half-sheet reveals another entry dated December 13, 2013, providing that the matter was continued by agreement to January 24, 2014. The record additionally contains a criminal disposition sheet file-stamped on December 13, 2013, confirming that the matter was continued for a ruling on January 24, 2014.

¶ 6 On January 24, 2014, the trial court made an oral ruling that "there was no arguable basis in fact or law for [defendant's] particular claim. It is frivolous. And I am going to dismiss the petition. He needs to be notified within ten days, so if we can send him a transcript, please." The

[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.

half-sheet contains an undated entry providing: "Ruling. Dismiss pet[ition]. Notify defendant in 10 days. Transcript ordered. No arguable basis in fact or law for [the] claim." The record also contains a criminal disposition sheet dated January 24, 2014, providing the same information. There is no file-stamp on the criminal disposition sheet. There is nothing in the record establishing that defendant was notified of the trial court's January 24, 2014, ruling.

¶ 7 Meanwhile, the record contains a letter dated January 11, 2014, written by defendant and addressed to the circuit court clerk requesting that his *pro se* postconviction petition be withdrawn and returned to him. The parties agree that the letter was mailed on January 11, 2014. There is nothing in the record confirming the date it was mailed, *i.e.*, a postmarked envelope. The letter, however, was file-stamped on January 31, 2014--seven days after the court made its ruling dismissing the petition as frivolous. The half-sheet contains an entry dated January 31, 2014, confirming that defendant filed a motion to withdraw his *pro se* postconviction petition. Defendant subsequently sent two additional letters to the court clerk: one undated, but file-stamped February 4, 2014; and one dated February 16, 2014, but filed-stamped April 10, 2014. In both letters, defendant requested that the clerk withdraw his December 2013 *pro se* postconviction petition, and instead replace the initial petition with the attached *pro se* postconviction petition (February petition). The trial court's half-sheet contains two entries, one on February 7, 2014, and the second on March 7, 2014, noting that the matter was off-call and set for a subsequent ruling. A criminal disposition sheet dated February 7, 2014, provides "o/c. 3-7-14. Court's ruling." The criminal disposition sheet is not file-stamped.

¶ 8 On March 7, 2014, the trial court dismissed defendant's February postconviction petition "as successive." The trial court found that defendant's February *pro se* petition was successive,

that it did not satisfy the cause-and-prejudice test, and that it had no arguable basis in fact or in law. The trial court, therefore, denied defendant's request for leave to file the petition. The trial court's half-sheet contains an entry dated March 7, 2014, confirming that defendant's postconviction petition was dismissed as a successive petition and that leave to file the petition was denied. A March 7, 2014, criminal disposition sheet additionally provides the same. The criminal disposition sheet is not file-stamped. The record contains a notice dated March 19, 2014, addressed to defendant at Menard Correctional Center, notifying him of the trial court's March 7, 2014, ruling. A half-sheet entry also dated March 19, 2014, provides that a notice and transcript were sent to defendant in prison.

¶ 9 On April 4, 2014, defendant filed a *pro se* "petition for rehearing." The half-sheet contains an April 4, 2014, entry confirming that defendant filed a petition for rehearing and providing that the matter was off call until April 25, 2014. The next half-sheet entry dated April 25, 2014, provides that the matter was off call until June 6, 2014. A criminal disposition sheet file-stamped April 25, 2014, confirms the matter was off call until June 6, 2014. Defendant, however, filed a notice of appeal on April 28, 2014, appealing the trial court's March 7, 2014, dismissal of his February postconviction petition (appeal number 1-16-1115).

¶ 10 Then, on May 12, 2014, defendant filed a *pro se* "motion to withdraw filed documents and to file amended petition for post conviction relief," requesting to withdraw his February postconviction petition, his petition for rehearing, and his notice of appeal, and to file an amended petition. In his motion, defendant alleged his initial postconviction petition and his February postconviction petition lacked merit and his other filings were filed in error; therefore, he requested leave to file an amended postconviction petition. The half-sheet contains a June 6,

2014, entry providing that defendant's motion to withdraw was "dismissed;" that he was denied leave to file an amended postconviction petition; and that his petition for rehearing was denied. A June 10, 2014, half sheet entry states that defendant's motion was denied and "cert. mailed to" defendant.

¶ 11 A criminal disposition sheet filed-stamped June 11, 2014, reveals the State Appellate Defender (SAD) was appointed to represent defendant. According to defendant, the SAD advised him that the trial court lacked jurisdiction to consider his *pro se* petition for rehearing because, prior to ruling on that petition, he had filed his notice of appeal of the court's March 7, 2014, dismissal of his February *pro se* postconviction petition. Defendant alleged the SAD, therefore, moved to dismiss the petition for rehearing. Then, on June 16, 2014, defendant filed a *pro se* amended petition for postconviction relief. A July 11, 2014, half sheet entry provides that the trial court denied defendant's request for leave to file his *pro se* amended postconviction petition. A file-stamped July 11, 2014, criminal disposition sheet confirms leave to file the amended petition was denied and provides that defendant was to be given notice within 10 days. A July 25, 2014, half sheet entry provides "notice sent to" defendant.

¶ 12 On June 11, 2015, defendant filed a *pro se* "motion for injunctive relief and to dismiss indictment," alleging his indictments were void on their face. On August 7, 2015, the trial court found that "as a practical matter *** [defendant] is not entitled to relief as a matter of law on this petition. I am going to have him sent a ten day notice indicating to him that I am dismissing this petition in that he is not entitled to relief as a matter of law. So his petition is denied." An August 7, 2015, half sheet entry and criminal disposition sheet with that date confirm the same. The record contains a notice addressed to defendant at Menard Correctional Center advising him of

the August 7, 2015, ruling. No substantive order appears in the record. Defendant responded by filing a *pro se* motion to reconsider the denial of his "motion for injunctive relief and to dismiss indictment," which was denied on September 18, 2015, according to the half sheet and a criminal disposition sheet.

¶ 13 Then, on October 13, 2015, defendant filed a *pro se* motion to redocket his initial postconviction petition for second-stage proceedings, the subject of which underlies this appeal. In his motion, defendant alleged his initial *pro se* postconviction petition filed in December 2013 was entitled to second-stage review because the trial court never entered the requisite order dismissing it in violation of the Act. Defendant cited *People v. Perez*, 2014 IL 115927, for support. Defendant acknowledged that his initial *pro se* postconviction petition was dismissed orally in court, but alleged that the trial court never entered an order dismissing the petition because there was no file-stamped dismissal order. Defendant additionally noted that he never received notice of the dismissal.

¶ 14 On October 23, 2015, the trial court denied defendant's *pro se* motion to redocket his initial postconviction petition for second-stage review. In so doing, the trial court stated:

> "I feel *** his request is inappropriate; secondly, the title of the document is inappropriate; however, he does allege in his petition procedural things that took place that have denied him the right to an appeal simply by timing of various things that were filed. He should have had, my belief is, the right for an appellate review of [the] initial denial of his post-conviction petition.
>
> For that, he was appointed the Illinois Appellate Defender. The Illinois Appellate Defender then *** feels that they lost jurisdiction in the Appellate Court or the Appellate

> Court denied hearing because of some secondary petition that was *** called a successive petition by [the trial court] but was really an attempt to amend the initial petition, and as a consequence of all of this, nothing's ever been litigated in the Appellate Court.
>
> *** My belief here is that [defendant] should file a late notice of appeal with the appellate court. I will reappoint, if that's possible, and I think it is possible, the Illinois Appellate Defender to process whatever appeal is appropriate under the circumstances and hopefully the procedural aspects of this can be ironed out. My belief, so everybody's record is clear, is that [defendant] is entitled to an appellate determination as the denial of his initial first [*sic*] petition for post-conviction.
>
> So I'm going to order that this transcript be sent to [defendant]. I'm going to *** direct the clerk to enter an order reappointing, if such a phrase exists, the Illinois Appellate Defender, and hopefully, rather than looking for ways to avoid making a determination, we can all find a way to have some final determination as to the validity of this initial post-conviction hearing."

The half sheet entry dated October 23, 2015, and the criminal disposition sheet provide that defendant's motion to redocket was denied, that the Illinois Appellate Defender was reappointed, and that defendant was directed to file a late notice of appeal "if he so desires."

¶ 15 This court subsequently granted defendant leave to file a late notice of appeal from the October 23, 2015, denial of his motion to redocket the initial postconviction petition (appeal

number 1-16-1373). Defendant's appeals were consolidated.[2]

¶ 16 II. ANALYSIS

¶ 17 Defendant contends the trial court erred in denying his motion to redocket his December 2, 2013, *pro se* postconviction petition for second-stage proceedings where it violated the Act by failing to enter a written order dismissing his initial petition within 90 days of the petition being filed and docketed.

¶ 18 Under the Act, a criminal defendant may challenge his conviction and sentence based on a substantial violation of his constitutional rights. *People v. Allen,* 2015 IL 113135, ¶ 20. The Act provides three stages of postconviction review. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the initial stage, "[w]ithin 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 2012); *Edwards*, 197 Ill. 2d at 244. The 90-day period is mandatory, not directory. *People v. Brooks*, 221 Ill. 2d 381, 389 (2006). If "the court determines that the petition is either frivolous or 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." 725 ILCS 5/122-2.1(a)(2) (West 2012). "Such order of dismissal is a final judgment and shall be served upon the petitioner by certified mail within 10 days of its entry." *Id.* If the petition is not dismissed within 90 days, the court must advance it to second-stage proceedings. 725 ILCS 5/122-2.1(b) (West 2012). We review *de novo* the dismissal of a postconviction petition. *Edwards*, 197 Ill. 2d at 247. Additionally, the questions of statutory construction at issue here are

[2]Although the appeals were consolidated, defendant does not present an argument related to the trial court's March 7, 2014, dismissal of his February postconviction petition, which was dismissed as successive (appeal number 1-16-1115).

reviewed *de novo*. *People v. Shief*, 2016 IL App (1st) 141022, ¶ 23. The well-established goal of statutory construction is to determine and give effect to the legislature's intent. *People v. Alcozer*, 241 Ill. 2d 248, 254 (2011).

¶ 19 Defendant argues that the trial court's oral pronouncement dismissing his December 2, 2013, *pro se* postconviction petition was not enough to satisfy section 122-2.1(a) of the Act. Defendant continues that the trial court failed to enter a written order dismissing the petition as required by the statute; therefore, the petition must proceed to second-stage review. Defendant adds that he was never notified that his petition was "dismissed." The State responds that the record contains a written disposition indicating defendant's petition was dismissed within the requisite 90-day period.

¶ 20 In *People v. Porter*, 122 Ill. 2d 64 (1988), the supreme court clarified that the language of section 122-2.1(a)(2) requiring the court to dismiss a petition with written findings is directory and not mandatory. *Id.* at 81-82. Acknowledging that the statute used the word "shall," the supreme court reasoned that the language was directory because: (1) the legislature did not provide that the summary dismissal is void for lack of findings; (2) a lack of findings does not prejudice a defendant's rights on appeal; and (3) interpreting the provision as mandatory would violate the separation of powers. *Id*. The *Porter* court, however, advised "that the trial court state its reasons for dismissal" because the purpose for requiring a written order with findings is to facilitate appellate review of summary dismissals. *Id*.

¶ 21 In *Perez*, the case primarily relied upon by defendant, the supreme court addressed "whether the circuit court complies with the 90-day requirement of section 122-2.1(a) *** 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." *Perez,* 2014 IL 115927, ¶ 1. In answering the question, the supreme court focused on when the order was considered "entered" within the meaning of section 122-2.1(a) of the Act. *Id.* ¶ 13. The supreme court examined the statutory language and concluded that a court's decision is "entered" "when the judgment is placed of record." *Id.* ¶ 25. After applying the facts of the case before it, the supreme court concluded that the dismissal order in that case was not entered when the judge signed it, but rather on the next day when the clerk stamped the order. Because the order was stamped 91 days after the petition was filed, the supreme court remanded the postconviction petition for second-stage proceedings. *Id.* ¶ 29.

¶ 22 Following both *Porter* and *Perez,* this court in *People v. Cooper,* 2015 IL App (1st) 132971, held that a dismissal order is "entered" for purposes of the Act when it has been recorded on a half-sheet and a criminal disposition sheet. This court instructed:

> "[A] written order of summary dismissal is not required. Instead, a court summarily dismisses a postconviction petition when its decision is entered of record. [Citation.] Here, the court reached a decision on July 24 to dismiss [petitioner's] petition, and that decision was clearly communicated to the clerk of the court and spread of record, as documented by the July 24 docket or 'half-sheet' entry of dismissal. The order is further evidenced by the certified report of disposition, referring to a July 24 dismissal, sent to [petitioner] on August 5 ***. The entry of a dismissal order on July 24 does not depend on the record containing a transcript for that day or an order signed by the judge himself." *Id.* ¶ 14 (citing *Perez*, 2014 IL 115927).

¶ 23 We additionally find the supreme court's decision in *People v. Robinson*, 217 Ill. 2d 43 (2005), to be instructive for defendant's allegation related to his lack of notice of the trial court's January 24, 2014, ruling. In *Robinson*, the supreme court addressed the 10-day notice requirement following the dismissal of a postconviction petition. In that case, the defendant's *pro se* postconviction petition was summarily dismissed, but notice of the dismissal was not sent until 12 days after entry of the judgment. *Id.* at 47. Notwithstanding, the defendant filed a timely notice of appeal. *Id*. In analyzing the language of the statute, the supreme court found the language was ambiguous as to whether a clerk's failure to effect service within the requisite 10 days triggered section 122-2.1(b), such that the petition must be docketed for further consideration. *Id.* at 56. The *Robinson* court considered the purpose of the 10-day requirement, *i.e.*, that it was meant to protect a petitioner's right to appeal. *Id.* at 57. The court further noted that the 10-day requirement was a procedural command to a government official and, therefore, it was presumptively directory. *Id.* The supreme court, however, advised that a directory command will be considered mandatory "if the right it is designed to protect would generally be injured under a directory reading, or if there is negative language prohibiting further action in case of noncompliance." *Id.* at 58. Ultimately, the supreme court concluded that neither exception applied because: (1) "[w]hile the right to appeal might be injured by untimely service in a given case, there [wa]s no reason to believe that it generally would be;" (*id.* at 57) and (2) the statute did not "include negative words indicating that no dismissal shall occur or become effective unless the petitioner is timely served (*id.* at 58)." Accordingly, the *Robinson* court held that a clerk's duty to effect service within 10 days is directory, and, therefore, a clerk's tardiness in doing so does not invalidate a trial court's judgment dismissing a postconviction petition. *Id.* at 58-59.

¶ 24 With the controlling law in mind, we address the facts before us. Here, the record reveals that, on January 24, 2014, the trial court reviewed defendant's December 2, 2013, *pro se* postconviction petition in open court in the presence of a court reporter. Without explanation or elaboration, the trial court found that defendant's petition was frivolous and had no arguable basis in fact or law. The petition was dismissed. The dismissal was recorded in an undated entry on the trial court's half sheet and in a criminal disposition sheet dated, but not file-stamped, January 24, 2014.

¶ 25 "A half-sheet is a sheet on which the clerk's office enters chronological notations indicating the procedural events of a case." *People v. Jones*, 2015 IL App (1st) 122123, ¶ 8 n.3. A half sheet may be relied on as some evidence of certain legal events. *People v. Liekis*, 2012 IL App (2d) 100774, ¶ 33 (despite the lack of a written jury waiver in the record, the half sheet established that the defendant had waived a jury trial). The half-sheet entry just prior to the undated entry memorializing the dismissal of defendant's petition is dated December 13, 2013, and the half-sheet entry just after the one in question is dated January 31, 2014. Based on the purpose and definition of a half sheet, the entry in question spreading the summary dismissal of record occurred between December 13, 2013, and January 31, 2014, which falls squarely within the requisite 90-day time period. See 725 ILCS 5/122-2.1(a) (West 2012). In addition, although not file-stamped, the criminal disposition sheet, dated January 24, 2014, contained defendant's name, the case number, and the charges against him. It was signed by the trial judge and indicated that defendant's *pro se* postconviction petition was dismissed on that date where there was no arguable basis in fact or law for the claim. The criminal disposition sheet instructed that defendant be notified in 10 days. *Cooper* would suggest that the trial court's January 24, 2014,

dismissal of defendant's December 2013 postconviction petition was placed of record and entered pursuant to the Act. *Cooper*, 2015 IL App (1st) 132971, ¶¶ 14-15 (a postconviction petition is summarily dismissed when it is entered of record; a written order is not required). Moreover, unlike as cautioned in *Perez*, the trial court in this case did not merely announce the dismissal in open court within the 90 days required under section 122-2.1(a) of the Act. *Cf. Perez*, 2014 IL 115927, ¶ 23 (suggesting, in response to a hypothetical argument, that a simple announcement of dismissal would not qualify as having "entered" the dismissal order under the statute, thereby discounting the public expression doctrine).

¶ 26 That, however, does not end our inquiry under the unique and complex postconviction procedural history before us. Defendant does not challenge the trial court's January 24, 2014, ruling.[3] The record, however, is devoid of the trial court's specific findings of fact and conclusions of law, either orally or written, the purpose of which is to facilitate appellate review of the court's dismissal. *Porter*, 122 Ill. 2d at 81-82; *Cooper*, 2015 IL App (1st) 132971, ¶ 10 ("if a court determines that a postconviction petition is frivolous and patently without merit, the petitioner is entitled to know the reasons for that determination so that they can be meaningfully addressed on appeal"). In addition, it is undisputed that defendant never received notice of the trial court's January 24, 2014, ruling. In fact, the parties agree that defendant mailed a letter on January 11, 2014, requesting that his December 2013 postconviction petition be withdrawn. When defendant failed to receive a response, he sent two additional letters in February requesting that the December petition be withdrawn and that an attached petition be considered instead. Notwithstanding, the February petition was treated and dismissed as a successive

[3] Because defendant has not challenged the merits of his petition, he has forfeited review of that issue. *People v. Skaterfield*, 2015 IL App (1st) 132355, ¶ 11.

postconviction petition despite defendant never being notified that his December petition had been considered. Accordingly, unlike in *Robinson*, the clerk was not tardy in providing notice to defendant of the trial court's dismissal; instead, notice was never provided. *Cf. Robinson*, 217 Ill. 2d at 47. Without notice, defendant lacked the ability to comply, if possible, with the requirements for the filing of a successive postconviction petition.

¶ 27 We acknowledge that typically the absence of a written order setting out findings of fact and conclusions of law would not invalidate a petition's dismissal (*Porter*, 122 Ill. 2d at 82), nor would the failure to serve defendant with notice of the dismissal within 10 days (*Robinson*, 217 Ill. 2d at 58-59). However, where defendant received no notice of the dismissal and there is no record of the trial court's specific findings of fact and conclusions of law to assist in appellate review, defendant has demonstrated he suffered prejudice for failure to comply with section 122-2.1(a)(2) of the Act. See *People v. Geiler*, 2016 IL 119095, ¶ 24 (even where a provision is directory, "a defendant may still be entitled to relief if he can demonstrate he was prejudiced by the violation"). We, therefore, conclude defendant's petition must proceed to second-stage review.

¶ 28 Based on our finding, we need not address defendant's arguments related to the trial court's alleged misunderstanding of the relief sought herein. See *Benson v. Stafford*, 407 Ill. App. 3d 902, 912 (2010) ("we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct").

¶ 29 III. CONCLUSION

¶ 30 We reverse the denial of defendant's motion to docket his December 2, 2013, *pro se* postconviction petition for second stage proceedings, vacate the summary dismissal of that petition, and remand this cause for further proceedings consistent with the Act.

¶ 31 Reversed and remanded.