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2019 IL App (3d) 170149-U

Order filed May 20, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-17-0149
)	Circuit No. 10-CF-318
TIMOTHY L. WASHINGTON,)	Honorable
Defendant-Appellant.)	Kathy S. Bradshaw-Elliott, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* The court erroneously dismissed defendant’s motion to reconsider the summary dismissal of his postconviction petition.
- ¶ 2 Defendant, Timothy L. Washington, appeals from the Kankakee County circuit court’s denial of his motion to reconsider the summary dismissal of his postconviction petition. Defendant argues the court erred in finding defendant’s motion untimely. We reverse and remand with directions.

¶ 3

I. BACKGROUND

¶ 4

A jury found defendant guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)), attempted first degree murder (*id.* §§ 9-1(a)(1), 8-4(a)), and unlawful use of a weapon by a felon (UUWF) (*id.* § 24-1.1(a)). On the first degree murder conviction, the court sentenced defendant to 50 years' imprisonment, plus a natural life sentence enhancement due to defendant's use of a firearm. On the attempted first degree murder conviction, the court sentenced defendant to a consecutive term of 25 years' imprisonment, plus a 20-year firearm enhancement. On the UUWF conviction, the court sentenced defendant to a concurrent term of 25 years' imprisonment.

¶ 5

On direct appeal, we affirmed defendant's convictions and sentences and remanded the cause with directions for the circuit court to vacate defendant's DNA analysis fee and apply the \$5-per-day credit to defendant's fines. *People v. Washington*, 2015 IL App (3d) 130158-U.

¶ 6

Following the proceedings on remand, defendant filed a *pro se* postconviction petition alleging in part that he had received ineffective assistance of trial and appellate counsel and that the circuit court judge was biased against him.

¶ 7

On December 16, 2016, the court summarily dismissed defendant's petition. In its ruling, the court said "[t]o succeed on a claim of ineffective assistance of appellate counsel, petitioner must show that the failure to raise a particular issue was objectively unreasonable and that his appeal was prejudiced by the omission." Defendant filed a motion to reconsider. While the motion was stamped "filed" on January 27, 2017, the certificate of service attested that defendant had placed the motion in the mail on January 13, 2017. The envelope that contained the motion was postmarked January 25, 2017.

¶ 8 In the motion, defendant argued that the court: (1) was biased against him; (2) did not explain why each of defendant’s claims of ineffective assistance of counsel were meritless; and (3) erroneously required the first-stage petition to conclusively prove the ineffective assistance of counsel claims.

¶ 9 The court entered the following docket entry.

“Court notes that the defendant has filed a motion to reconsider the denial of his post-conviction petition. This court denied his post conviction petition on 12/16/16. A motion to reconsider must be filed within 30 days. The defendant’s motion to reconsider was postmark [sic] 1/25/17, and filed stamped 1/27/17. The petition is untimely. Further, as to this court being bias and that she should have recused herself as Harriett Hawkins who is the aunt of the victim was a former friend and colleague. ‘It is well established that the mere fact that the judge has some kind of relationship with someone involved in the case, without more, is insufficient to establish judicial bias or to warrant a judge’s removal from a case.’ See *People v. Wright*, 189 Ill. 2d 1, *People v. Steidl*, 177 Ill. 2d 239 at 264. As to this court recusing herself from *People v. Watford*, this court recused herself based on the fact that her former deceased husband’s law partner Thomas McClure represented the defendant. Based oin [sic] all the above, the defendant’s motion to reconsider is denied.”

¶ 10 II. ANALYSIS

¶ 11 In this appeal, defendant challenges the circuit court’s finding that his motion to reconsider was untimely. We review the court’s ruling *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 12 In its ruling, the court observed that defendant’s motion was postmarked on January 25, 2017, (40 days after the dismissal order) and file-stamped January 27, 2017 (42 days after the dismissal order). However, the mailbox rule provides that an incarcerated defendant’s pleading is considered filed on the day that he places it in the prison mail system. *People v. Jennings*, 279 Ill. App. 3d 406, 413 (1996). To establish the time of mailing, a defendant must file a certificate “as provided in section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2012)) ***, stating the time and place of deposit and the complete address to which the document was to be delivered.” Ill. S. Ct. R. 12(b)(4) (eff. Nov. 1, 2016)). In compliance with Rule 12(b)(4), defendant’s certificate attests that he mailed the motion on January 13, 2017; 28 days after the court entered its dismissal order. Therefore, under the mailbox rule, defendant’s motion was timely filed.

¶ 13 The State argues that despite the court’s error, reversal is not required because the docket entry indicates that the court ruled on the merits of defendant’s arguments. In the alternative, the State asks that we exercise our power to affirm for any reason in the record, and affirm the summary dismissal on the ground that it was procedurally proper. We reject the State’s arguments.

¶ 14 First, the docket entry establishes that the court’s timeliness ruling was dispositive of the motion, and its subsequent discussion of the merits of defendant’s arguments was an advisory ruling. *People v. Reed*, 302 Ill. App. 3d 1007, 1010 (1999). As the circuit court was not empowered to make an advisory ruling, the additional comments cannot be considered in this appeal. See *id.* (circuit court’s ruling on the merits of defendant’s postconviction petition was an impermissible advisory ruling where it had previously found the petition to be untimely).

Accordingly, remand is required to permit the court to rule on the substantive merit of defendant's timely-filed motion to reconsider.

¶ 15 Second, the State has not provided a substantive alternative basis to affirm the summary dismissal. Instead, the State more broadly argues, with citations to *People v. Dominguez*, 366 Ill. App. 3d 468, 473 (2006) and *People v. Quigley*, 365 Ill. App. 3d 617, 619 (2006), that we may affirm the court's summary dismissal because the court's decision was procedurally proper. However, unlike the cases cited by the State, neither the State nor defendant has contested the substantive merits of the underlying postconviction petition, and defendant has not conceded that his petition fails to meet the "gist" standard. See *Dominguez*, 366 Ill. App. 3d at 474-76 (analyzing defendant's arguments that fundamental fairness permits the court to consider his postconviction claim of ineffective assistance of counsel that would otherwise be barred by *res judicata* and forfeiture); see also *Quigley*, 365 Ill. App. 3d at 619 (finding that although the court applied the wrong standard to defendant's first-stage postconviction claim, the dismissal will be affirmed because defendant conceded that his petition did not present the gist of claim). As explained in *Quigley*,

"when a summary dismissal is substantively erroneous, it is merely erroneous; thus, we may affirm it on a different substantive ground. However, when a summary dismissal is procedurally erroneous, *** it is not merely erroneous but rather is void. As a void judgment is one that the trial court has no power to enter [citations], we see no way that such a judgment could be one that the appellate court has the power to affirm." *Quigley*, 365 Ill. App. 3d at 620.

The State mistakenly contends that a procedural basis is, by itself, sufficient to affirm the circuit court's decision. However, *Quigley* delineates that substantive and procedural bases are distinct

for purposes of affirming on other grounds. In other words, application of the correct procedure does not provide a ground to affirm an otherwise incorrect substantive ruling. Because neither of the parties argues the substance of the petition, we do not possess an alternative substantive basis to affirm the summary dismissal. Moreover, if we conducted an independent review of the merits of defendant's underlying petition, without briefing, we would infringe on our duty to refrain from raising an issue *sua sponte* and unfairly deprive the parties of an opportunity to argue a potentially dispositive issue. See *People v. Givens*, 237 Ill. 2d 311, 324 (2010). Accordingly, we reverse the denial of defendant's motion, and remand the cause with directions for the court to consider the merits of defendant's arguments.

¶ 16

III. CONCLUSION

¶ 17

The judgment of the circuit court of Kankakee County is reversed and remanded with directions.

¶ 18

Reversed and remanded with directions.