

2011 IL App (1st) 093426

No. 1-09-3426

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).

FIRST DIVISION
DATE: AUGUST 22, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 92 CR 22645
)	
CURTIS HOLMES,)	Honorable
)	Joseph G. Kazmierski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Hall and Justice Lampkin concurred in the judgment.

ORDER

Held: Circuit court did not err in dismissing the defendant's Post-Conviction petition.

¶ 1 The defendant, Curtis Holmes, appeals from the circuit court's dismissal of his petition filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). On appeal, the defendant argues that (1) the circuit court erred in dismissing his petition as untimely, and (2) that his post-conviction counsel failed to provide him the requisite level of assistance. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 2 In July 1995, the defendant was convicted of two counts of first-degree murder and one count

No. 1-09-3426

of attempted murder, and his convictions and sentences were affirmed on direct appeal in September 1997. See *People v. Holmes*, No. 1-95-2923 (unpublished pursuant to Supreme Court Rule 23). On April 13, 2004, the defendant filed a *pro se* post-conviction petition. In a preface to the substantive points raised in his petition, the defendant explained the delay in filing the petition as follows:

"Petitioner[']s inability to file said petition on time was due to the fact that petitioner had sent his Transcripts to his family members in an attempt to retain counsel to file said Post-Conviction Petition, however not successful, Petitioner had to wait for his Transcripts to be sent back to him in order to get someone in the Institution where he resides to file his Post-Conviction Petition for him . . . "

¶ 3 Post-conviction counsel was appointed for the defendant, and, in March 2009, counsel filed a certificate stating that he had examined the record and consulted with the defendant, as required under Supreme Court Rule 651(c), and had determined that the defendant's *pro se* petition adequately set forth the defendant's claims. The State filed a motion to dismiss the petition, and the circuit court granted that motion on several grounds, including the grounds that the petition was untimely and that its claims were waived or barred by *res judicata*. The defendant filed this timely appeal of the circuit court's decision to dismiss his post-conviction petition.

¶ 4 On appeal, the defendant first argues that the circuit court erred in dismissing his petition on the basis of untimeliness. The Act provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial. *People v. Edwards*, 197 Ill.2d 239, 244, 757 N.E.2d 442 (2001). "Under the Act, a post-conviction proceeding not involving the death penalty contains three stages." *Edwards*, 197 Ill.2d at 244, 757 N.E.2d 442. A petition will survive the first stage if it states the gist of a constitutional claim (*People v. Gaultney*, 174 Ill.2d 410, 418, 675 N.E.2d 102 (1996)) or if the trial court fails to make a finding that it is frivolous within 90 days, as required under section 122-2.1 of the Act (*People v. Vasquez*, 307 Ill.App.3d 670, 672-73, 718 N.E.2d 356 (1999); 725 ILCS 5/122-2.1 (West 2008)). At the second stage of post-conviction proceedings, the defendant may be appointed counsel. *People v. Greer*, 212 Ill.2d 192, 203-04, 817 N.E.2d 511

No. 1-09-3426

(2004). At the second stage, defendant's counsel may file an amended post-conviction petition and the State may file a motion to dismiss or an answer to the petition. *Gaultney*, 174 Ill.2d at 418, 675 N.E.2d 102 (citing 725 ILCS 5/122-5 (West 1992)). If the trial court does not dismiss or deny the petition, the proceeding advances to the third and final stage, at which the trial court conducts an evidentiary hearing on the defendant's petition. *Gaultney*, 174 Ill.2d at 418, 675 N.E.2d 102. The petition here was dismissed at the second stage.

¶ 5 Under the Act, a defendant must file his petition for relief within 6 months of the end of his direct appeals or 3 years of his conviction, unless he can allege facts showing that the delay was not due to his culpable negligence. 725 ILCS 5/122-1(c) (West 2004). If the defendant fails to do so, the circuit court may grant the State's motion to dismiss the petition at the second stage. See *People v. Perkins*, 229 Ill. 2d 34, 43, 890 N.E.2d 398 (2008) ("the Act directs the trial court to dismiss the petition as untimely at the second stage upon the State's motion.") The defendant concedes that his petition, which was filed over 6 years after the exhaustion of his direct appeals, was not timely. He argues, however, that he alleged facts demonstrating that the delay was not due to his culpable negligence.

¶ 6 As our supreme court has explained, the Act's use of the phrase "culpable negligence" invokes a standard of " '[n]e negligent conduct that, while not intentional, involves a disregard of the consequences likely to result from one's actions.' " *People v. Boclair*, 202 Ill. 2d 89, 106, 789 N.E.2d 734 (2002) (quoting Black's Law Dictionary 1056 (7th ed. 1999)). The phrase also denotes " 'something more than negligence' involving 'an indifference to, or disregard of, consequences' " (*Boclair*, 202 Ill. 2d at 106 (quoting 65 C.J.S. Negligence § 19 (2000)), or "something greater than ordinary negligence and *** akin to recklessness" (*Boclair*, 202 Ill. 2d at 108).

¶ 7 Here, the defendant alleged that his petition was delayed because he had sent his transcripts to family members and did not receive them back in a timely fashion. We agree with the State that this explanation does not establish the defendant's freedom from culpable negligence. As the State observes in its brief, "[e]ven taking [the defendant's] statement as true, [he] still failed to establish

No. 1-09-3426

that his failure to obtain the transcripts back from his family," or to review them before sending them, exercise better control over them, or request additional transcripts, "prevented him from filing a petition for over six years."

§ 8 On this point, we agree with the State that our supreme court's opinion in *People v. Diefenbaugh*, 40 Ill. 2d 73, 237 N.E.2d 512 (1968), provides very strong guidance. In *Diefenbaugh*, the defendant argued that his petition, filed 8 ½ years after his sentence and 3 years after the five-year statutory deadline then in place, was not late due to culpable negligence because any delay was caused by difficulties in obtaining trial transcripts. *Diefenbaugh*, 40 Ill. 2d at 74. The supreme court rejected his claim as follows:

"If, as here, a defendant believed that a transcript was essential to the proper presentation of his cause, he had only to assert in his petition that he was unable to pay the cost of the proceeding and the court could order that he be permitted to proceed as a poor person. [Citation.] Thereafter the court could have taken such action as might be required to afford defendant a full hearing.

A mere allegation that he was unable to obtain a second trial-court transcript does not establish his freedom from culpable negligence in failing to file his petition within the required time designated by statute." *Diefenbaugh*, 40 Ill. 2d at 75.

The supreme court also rejected the defendant's argument that the statutory time limit should have been tolled while he was awaiting his transcripts, on the ground that "[s]ince the lack of a transcript does not excuse a defendant from filing his petition *** within the statutory time limit, it would be inconsistent to hold that the time limit is tolled by a request for such a transcript." *Diefenbaugh*, 40 Ill. 2d at 76.

¶ 9 Likewise here, if the defendant believed a transcript to have been vital to his preparation of a petition, he could have taken the steps identified by the State in the many years that passed between the exhaustion of his appeals and his filing a petition. The facts alleged in his petition offer no explanation for why he waited so many years instead of taking any of those steps. We are not

prepared to say that a defendant's delay in filing a post-conviction petition can be excused by an absence of transcripts that he both caused and took no apparent steps to rectify for years after the statutory deadline passed.

¶ 10 In so holding, we reject the defendant's argument that the decision in *People v. Bumpers*, 379 Ill. App. 3d 611, 884 N.E.2d 1197 (2008), should lead us to a different result. The most obvious reason we reject this argument is that, as the defendant acknowledges, our decision in *Bumpers* was subsequently vacated via supervisory order from the supreme court. See *People v. Bumpers*, 229 Ill. 2d 632, 894 N.E.2d 761 (2008). Aside from that, however, the facts of *Bumpers* are distinguishable from ours. In *Bumpers*, the defendant learned of a possible error in his sentence and, three months before the statutory deadline for a post-conviction petition, began pursuing the transcript necessary to prepare a petition. *Bumpers*, 379 Ill. App. 3d at 616-17. The defendant's post-conviction petition detailed his efforts to obtain the transcripts and the official delays and errors that kept the transcripts from him. *Bumpers*, 379 Ill. App. 3d at 617. Approximately 3 months after he received his transcripts, the defendant mailed his post-conviction petition to the circuit court. *Bumpers*, 379 Ill. App. 3d at 617. In light of these alleged facts, this court held that the defendant had demonstrated a lack of culpable negligence causing the delay. *Bumpers*, 379 Ill. App. 3d at 617.

¶ 11 Had *Bumpers* not been vacated, it would, in the defendant's own estimation, stand for the proposition that "dutiful attempts to obtain transcripts in active pursuit of a claim to confirm whether an error occurred on the record can establish a [defendant's] lack of culpable negligence." That is not the situation we face here. As we have said, the defendant's allegations do not describe a dutiful effort to file his petition, or an active pursuit of his claims, and they therefore do not establish his lack of culpable negligence.

¶ 12 The defendant asserts in the alternative that, even if we decline to reverse the circuit court's determination that his petition was barred as untimely, we should vacate that decision and remand the matter for an evidentiary hearing, because the untimeliness dismissal was based on a credibility determination that should not have been made on the pleadings. See *People v. Wheeler*, 392 Ill.

No. 1-09-3426

App. 3d 303, 310 (2009) (explaining that the credibility of a defendant's allegations of lack of culpable negligence should be assessed at an evidentiary hearing, not a dismissal hearing). We disagree. For the reasons stated above, even taking the defendant's factual assertions as true and thus mooted any credibility questions, we conclude that the defendant has failed to demonstrate that the delay in filing his petition was not due to his culpable negligence.

¶ 13 The defendant's second argument on appeal is that the cause should be remanded because post-conviction counsel failed to provide the level of assistance required by Supreme Court Rule 651(c). Rule 651(c) was enacted to assure that post-conviction petitioners receive the reasonable level of assistance guaranteed them by the Act; it requires post-conviction counsel to (1) consult with the defendant to ascertain his contentions of deprivations of constitutional rights, (2) examine the record of the trial court proceedings, and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's contentions. *Perkins*, 229 Ill. 2d at 42. If, as here, a petition is not timely filed under the Act, Rule 651(c) requires post-conviction counsel either to obtain the State's waiver of the timeliness issue or to allege any facts that may establish a lack of culpable negligence in the late filing. *Perkins*, 229 Ill. 2d at 43. Here, however, the defendant's original *pro se* petition contained his factual allegations to explain the delay in his filing a petition. Accordingly, under Rule 651(c), there was no need for post-conviction counsel to amend the petition to assert the defendant's reasons for excusing the Act's time limitations; even without amendment, the defendant's timeliness argument was fully presented. For that reason, we disagree with defendant's argument that counsel violated Rule 651(c) by failing to amend the petition before it was dismissed for untimeliness.

¶ 14 The defendant nonetheless contends that post-conviction counsel should have amended or supplemented the petition with additional facts explaining the delay in filing the petition. We disagree. Compliance with Rule 651(c) is mandatory and may be shown by a certificate filed by post-conviction counsel. *Perkins*, 229 Ill. 2d at 50. If filed, this certificate creates a presumption that the attorney who filed it knew and followed the law, and a court will follow that presumption

No. 1-09-3426

absent contradiction from the record. See *Perkins*, 229 Ill. 2d at 51-52. Here, counsel has indicated via certificate that he consulted with the defendant and that the defendant's contentions were fully presented. With nothing in the record to rebut this certification, "we must give effect to counsel's official representation that he complied with Rule 651(c)." *Perkins*, 229 Ill. 2d at 52.

¶ 15 The defendant further argues that counsel violated Rule 651(c) by failing to more adequately present the substantive claims in the petition. However, "[a] mere failure to amend [a] *pro se* petition is not enough to establish inadequacy of representation in the absence of a showing that the petition could have been successfully amended." *People v. Johnson*, 232 Ill. App. 3d 674, 597 N.E.2d 1258 (1992). For the reasons we have stated, the defendant's petition was properly dismissed as time-barred, regardless of the potential success of any of his underlying claims. Thus, counsel could not have successfully amended the substantive claims of the defendant's petition, and his failure to do so cannot be considered unreasonable.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 17 Affirmed.