

No. 1-08-3504

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: January 18, 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.)	Nos. 01 CR 12836
)	01 CR 12837
)	01 CR 12838
)	
HIMANSHU PAREKH,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

HELD: Where the record showed that the circuit court erred when it summarily dismissed defendant's postconviction petition as untimely, the circuit court's judgment was reversed and the case remanded for second-stage postconviction proceedings.

Defendant Himanshu Parekh appeals from an order of the circuit court summarily dismissing his second *pro se* postconviction petition. On appeal, defendant contends that the

court erred when it dismissed his petition as untimely because it was timely filed and because a petition cannot be dismissed as untimely during the first stage of postconviction proceedings. Defendant also contends the circuit court failed to conduct a meaningful review of the allegations raised in his petition. Finally, defendant contends that his petition contained a meritorious claim that counsel rendered ineffective assistance. We find that the circuit court's summary dismissal of defendant's petition as untimely was improper. Accordingly, we reverse that judgment and remand this case to the circuit court for second-stage postconviction proceedings.

On June 26, 2002, defendant pleaded guilty to charges of theft by deception in three separate cases. In each case, the victim gave defendant, who owned a jewelry store, money to purchase gold bars. Defendant never provided the gold bars and kept the money. At the plea hearing, the trial court withheld sentencing to give defendant an opportunity to make restitution to the victims. The court promised defendant that, if he paid back all the money, approximately \$246,000, within a year, it would sentence him to probation. The court further advised defendant that if he did not pay back the money, he would be sentenced to a term of between 4 and 15 years in prison. Over the next eight months, defendant paid \$175,000 in restitution.

In June 2003, defendant failed to appear in court because he

had been taken into custody on new allegations of theft by deception for selling airline tickets for travel to India that were never delivered to the passengers. Defendant bonded out of jail and fled the country. On August 20, 2003, the trial court sentenced defendant *in absentia* in the gold-bar cases to concurrent prison terms of 15 years, 7 years and 5 years. Defendant's trial counsel filed a timely motion to reconsider those sentences, which was denied. Counsel did not attempt to perfect an appeal from that judgment.

In April 2005, defendant was arrested in Canada and returned to Illinois. On October 5, 2005, defendant pled guilty to four counts of theft by deception in the airline-ticket cases and was sentenced to concurrent terms of three years' imprisonment, running consecutive to the sentences in the gold-bar cases.

On December 15, 2005, defendant's newly retained postconviction counsel filed defendant's initial petition for relief in the gold-bar cases under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). In that pleading, postconviction counsel moved to withdraw defendant's guilty pleas in those cases pursuant to section 115-4.1 of the Code of Criminal Procedure (725 ILCS 5/115-4.1 (West 2004)). In both sections of the pleading, counsel alleged that the court erred when it sentenced defendant *in absentia* because defendant had never been admonished of that possibility. The petition

further alleged that defendant's trial attorney rendered ineffective assistance by failing to object to the court sentencing defendant *in absentia* and failing to raise that issue in his motion to reconsider the sentences. The petition further alleged that trial counsel was ineffective because he failed to file a notice of appeal after the court denied the motion to reconsider the sentences, failed to file a motion to withdraw the guilty pleas, and failed to ensure that defendant's pleas were entered voluntarily and intelligently.

On March 14, 2006, the trial court found that defendant had not been admonished about sentencing *in absentia*. Consequently, the court vacated the sentences in the gold-bar cases and ordered a new sentencing hearing. The hearing was held on January 22, 2008, at which time the court reduced defendant's sentence by two years, imposing concurrent prison terms of 13 years, 7 years and 5 years.

On August 27, 2008, defendant filed the instant *pro se* postconviction petition, his second, alleging, *inter alia*, that his guilty pleas in the gold-bar cases were void and that his sentences should be vacated because the trial court failed to admonish him that he could be sentenced *in absentia*. Defendant also alleged that his trial attorney rendered ineffective assistance of counsel because he failed to file a notice of appeal. In addition, defendant claimed that his postconviction

counsel was ineffective because he refused to file an appeal unless defendant paid him more money.

The circuit court noted that defendant had raised "some *pro se* claims" seeking to withdraw his guilty pleas, and stated that defendant was claiming "in essence" that he was not advised about being sentenced *in absentia*. The court summarized what had occurred in defendant's case and noted that a new sentencing hearing had been conducted at which defendant was present. Consequently, the court concluded that defendant ultimately was not sentenced *in absentia*. The court then stated "[a]ccordingly, I find his claim to be totally untimely. He entered these pleas years ago." The court then summarily dismissed defendant's postconviction petition "under those circumstances."

On appeal, defendant contends, *inter alia*, that his petition was improperly dismissed as untimely during first-stage proceedings. The State responds that the court did not rely solely on timeliness to dismiss the petition, and that, even if it did, dismissal was proper, because defendant's petition was a successive postconviction petition that failed to meet the cause and prejudice test.

In considering defendant's claims on appeal, we must first determine at which stage defendant's postconviction petition was disposed. We cannot ascertain the appropriate standards to apply until we have resolved what type of postconviction proceeding is

before us. Accordingly, we begin our analysis with an examination of the type of postconviction petition at issue.

The Act provides a remedy for a defendant who can successfully assert that his *conviction* was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2008). The Act, however, does not serve as a vehicle to bring generalized grievances about a criminal proceeding without limitation. For example, no remedy is available under the Act for a defendant who has completed his sentence and is therefore no longer "imprisoned in the penitentiary" (*People v. Carrera*, No. 109294, slip op. at 14 (Ill. November 18, 2010)) nor is there a remedy for a statutory error which does not rise to the level of a constitutional violation (*People v. Mitchell*, 189 Ill. 2d 312, 329 (2000)).

Here, we are faced with yet another limitation on the scope of the Act, *i.e.*, the need for a conviction. The case of *People v. Hager*, 202 Ill. 2d 143 (2002) is illustrative. In *Hager*, the question before our supreme court was when the six-month limitation period for filing a postconviction petition began to run when the defendant's sentence had been vacated on appeal and the matter remanded for resentencing. The court held that for purposes of the Act, there is no "conviction" for a defendant to challenge through the Act until he has been resentenced. *Hager*, 202 Ill. 2d at 149.

In the case before us, defendant was "convicted" after he was sentenced *in absentia*. When that sentence was vacated in response to defendant's postconviction petition, the conviction, for purposes of the Act, ceased to exist. See *Hager*, 202 Ill. 2d at 149. Accordingly, defendant's second postconviction petition was not a successive challenge to his first conviction--it could not be as that conviction ceased to exist. Rather, it was defendant's initial challenge to his new conviction--the conviction entered when he was resentenced, and the only conviction that exists for the purposes of the Act. Because this was defendant's first postconviction challenge to the new conviction created following resentencing, it should have been treated as an initial postconviction petition.

It is well established that a trial court may not consider timeliness when determining whether to dismiss an initial postconviction petition during first-stage proceedings. See *People v. Bocclair*, 202 Ill. 2d 89, 102 (2002). Because this was defendant's initial postconviction challenge to his new conviction, and because the trial court expressly ruled that it was untimely, we find that the trial court erred. Therefore, we must remand this cause to the trial court for second-stage proceedings.

For these reasons, we reverse the circuit court's judgment and remand this case with instructions to docket the petition for

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second-stage postconviction proceedings pursuant to the Act. Based on our holding, we need not consider defendant's contentions that the circuit court failed to conduct a meaningful review of his allegations and that his petition contained a meritorious claim that counsel rendered ineffective assistance.

Reversed and remanded with directions.