

No. 1-09-3114

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FIFTH DIVISION  
June 30, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
	)	
v.	)	No. 01 cr 11493 (01),
	)	01 cr 11495 (01)
	)	
ANDRE KEYS,	)	Honorable
	)	Michele M. Simmons,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices HOWSE and EPSTEIN concurred in the judgment.

*HELD:* The circuit court erred in dismissing the defendant's postconviction petition at the second stage of postconviction proceedings on the basis of the defendant's culpable negligence in untimely filing his petition. The defendant should have been afforded an opportunity to substantiate his well-pleaded allegations regarding his lack of culpable negligence at an evidentiary hearing, since there was nothing in the record that positively rebutted them.

**ORDER**

Defendant, Andre Keys, appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq* (West 2002). He contends that

the circuit court erred in dismissing his petition without an evidentiary hearing on timeliness grounds pursuant to section 122-1 of the Act (725 ILCS 5/122-1 (West 2000)) where he attested to the fact that the delay in filing his petition was not due to his culpable negligence. The defendant further contends that his petition should have proceeded to an evidentiary hearing because he made a substantial showing that his constitutional rights were violated where: (1) he made an involuntary and unknowing guilty plea while under the influence of psychotropic medication, which prevented him from understanding the proceedings against him; and (2) he received ineffective assistance of counsel because counsel failed to request a fitness hearing to determine whether the defendant could make a knowing and voluntary guilty plea under the influence of such medication. The defendant further argues that his *mittimus* should be corrected to reflect the accurate number of days he served in presentence custody. For the reasons that follow, we reverse and remand for further proceedings.

## I. BACKGROUND

The defendant was arrested on April 14, 2001. After making inculpatory statements to police, the defendant was charged in seven different cases with: (1) four counts of arson (in indictment Nos. 01 CR 11489 through 01 CR 11492); (2) two counts of aggravated arson (in indictment Nos. 01 CR 11493 and 01 CR11494); and (3) one count of possession of a controlled substance with intent to deliver (in indictment No. 01 CR 11495).

On December 30, 2002, the circuit court denied the defendant's motion to suppress the statements he had made to police while in custody. On October 31, 2003, the defendant was found guilty of aggravated arson in case No. 01 CR 11494 and sentenced to 16 years' in prison. On July 22, 2004, pursuant to a negotiated plea agreement, the defendant pleaded guilty to the

remaining six cases. This appeal pertains solely to the defendant's guilty pleas in case Nos. 01 CR 11493 (aggravated arson) and 01 CR 11495 (possession of a controlled substance with intent to deliver).

In return for his guilty plea in these two cases, the defendant was sentenced to concurrent terms of 21 years' imprisonment.<sup>1</sup> During the defendant's guilty plea hearing, the State presented the following factual basis for the two guilty pleas. In case No. 01 CR 11493, wherein the defendant was charged with aggravated arson, the parties stipulated that the State's evidence would show that on April 1, 2001, the defendant hired two men, Carl Pate and Daloco Bevel, to burn the residence of the victim Annie Garner, located at 12524 South Loomis Street in Harvey, Illinois, in exchange for 5 grams of cocaine. The parties further stipulated that the two men went to that residence, where Annie lived with her 65 year-old mother, and set it on fire, causing property damage.

With respect to case No. 01 CR 11495, wherein the defendant was charged with possession of a controlled substance with the intent to deliver, the parties stipulated that the State's evidence would show that when the police arrested the defendant on April 14, 2001, at 15748 South Woodlawn Avenue in South Holland, Illinois, they found in his possession 60 grams of what was tested and found to be a bag containing cocaine, as well as six cell phones, a scale, and \$1,100 in United States currency.

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<sup>1</sup>These terms were to be served concurrently with the defendant's 2003 aggravated arson conviction and sentence of 16 year's imprisonment and with concurrent sentences of 14 years' imprisonment imposed in the four remaining cases to which the defendant pleaded guilty on July 22, 2004 (in indictment Nos. 01 CR 11489, 11490, 11491, 11492, 11494).

The defendant never filed a motion to withdraw his guilty plea, nor appealed his conviction. Instead, on November 15, 2007, the defendant filed<sup>2</sup> a *pro se* postconviction petition to the circuit court with respect to his pleas in case Nos. 01 CR 11493 and 01 CR11495. In that petition, the defendant alleged, *inter alia*, that: (1) the statements he made to police should have been suppressed as a result of physical coercion; (2) his plea was involuntarily made as he was under the influence of psychotropic medication at the time and did not “know what was going on;” and (3) he received ineffective assistance of counsel.

On February 15, 2008, the circuit court advanced the petition to the second stage of postconviction proceedings and appointed counsel to represent the defendant.

On August 22, 2008, the State filed a motion to dismiss the defendant’s *pro se* petition. In that motion, the State argued that the defendant’s petition was untimely filed and that the defendant had failed to allege a lack of culpable negligence so as to excuse his late filing. The State also argued that the defendant had failed to attach any documentation supporting his allegations of an involuntary guilty plea and ineffective assistance of counsel. Specifically, the State pointed out that the defendant had failed to attach any documentation supporting his claim that he was under the influence of psychotropic medication during the plea hearing. The State finally argued that the defendant’s plea of guilty waived any errors regarding his custodial statements to police.

On August 28, 2009, the defendant’s appointed counsel filed an amended postconviction petition. That amended petition alleged that the defendant’s plea was not made knowingly,

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<sup>2</sup>The record reflects, and the parties agree that the defendant mailed his petition on November 2, 2007.

voluntarily or intelligently because before and during the plea hearing, the defendant was taking 100 mg of Trazodone. The petition further alleged that defense counsel was ineffective for failing to request a fitness hearing to determine the effects of Trazodone on the defendant. In support of these allegations, the petition attached psychological evaluations of the defendant conducted at the Stateville Correctional Center where the defendant was held in custody prior to his guilty plea hearing<sup>3</sup> as well as documentation regarding the different types of medication the defendant was prescribed while in custody, including a daily dose of 100 mg of Trazodone, beginning on May 22, 2004, and continuing through the defendant's plea hearing on July 22, 2004. The petition also attached information about the side effects of Trazodone, including "confusion" and a "decreased ability to concentrate or remember things."

The amended petition also alleged that the defendant was not culpably negligent in failing to file his *pro se* postconviction petition in a timely manner within three years of his guilty plea because he had relied on assurances by his counsel that counsel would draft and file the petition for him. According to the amended complaint, the plaintiff filed the petition four months after the statutory deadline. In support of this allegation, the amended petition included an attached affidavit by the defendant. In that affidavit, the defendant averred that after he pleaded guilty to aggravated arson and possession of a controlled substance with intent to deliver in case Nos. 01 CR 11493 and 01 CR 11495, he told his attorney that he wanted to "take back the guilty plea on [those] two cases." The defendant's attorney told the defendant that he could file a postconviction petition to ask the court to allow the defendant to withdraw his guilty plea, but

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<sup>3</sup>The record reveals that the attached medical records date from January 2004 to July 2004.

that “it could take some time.” The defendant told his attorney that he wanted him to file the petition. The defendant averred that over the course of the next few years, he wrote to his attorney several times to ask him “what was going on with his postconviction petition,” but the attorney never answered his letters. The defendant averred that he finally decided to write the postconviction petition on his own and he mailed the petition on November 2, 2008. In his affidavit, the defendant further stated that he relied on his counsel to prepare his postconviction petition, and that had he known that counsel was not going to prepare it, he would have prepared it himself much earlier and within the required time frame.

On November 6, 2009, the circuit court heard arguments on the State’s motion to dismiss the defendant’s petition. After hearing arguments by both parties, the circuit court dismissed the petition, finding that it was untimely filed and that the delay was due to the defendant’s culpable negligence. The trial court did not address the merits of the defendant’s petition. The defendant now appeals.

## II. ANALYSIS

We begin first by noting the familiar principles regarding postconviction proceedings. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2000)) provides a means by which a defendant may challenge his conviction for “substantial deprivation of federal or state constitutional rights.” *People v. Tenner*, 175 Ill. 2d 372, 378 (1997). A postconviction action is a collateral attack on a prior conviction and sentence, and “is not a substitute for, or an addendum to, direct appeal.” *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994).

In a noncapital case, the Act creates a three-stage procedure of postconviction relief. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). At the second stage of postconviction

proceedings, such as here, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a violation of constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). A postconviction petitioner is not entitled to an evidentiary hearing as a matter of right. *People v. Coleman*, 183 Ill. 2d 366, 381(1998). Instead, in order to mandate an evidentiary hearing, the allegations in the petition must be supported by the record in the case or by accompanying affidavits. *Coleman*, 183 Ill. 2d at 381. Nonspecific and nonfactual assertions which merely amount to conclusions are not sufficient to require a hearing under the Act. *Coleman*, 183 Ill. 2d at 381, 701 N.E.2d at 1072-73. “In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits are taken as true.” *People v. Towns*, 182 Ill. 2d 491, 501(1998). We review the second-stage dismissal of a post-conviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

In the present case, before addressing the merits of the defendant’s second postconviction petition, we must first resolve the important threshold matter of whether the circuit court erred in dismissing the defendant’s petition on timeliness grounds pursuant to section 122-1 of the Act (725 ILCS 5/122-1 (West 2000)). Under section 122-1 of the Act, a postconviction proceeding may not be commenced outside the time limitation period stated in the Act unless defendant alleges sufficient facts to show that the delay in filing his initial petition was not due to his culpable negligence. 725 ILCS 5/122-1(c) (West 2000); *People v. Rissley*, 206 Ill. 2d 403, 420-21 (2003). Section 122-1(c) of the Act provides in pertinent part:

“\*\*\* no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner

alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.” 725 ILCS 5/122-1(c) (West 2000).

Our supreme court has defined culpable negligence as “contemplat[ing] something greater than ordinary negligence and is akin to recklessness.” *People v. Boclair*, 202 Ill. 2d 89, 106, 108 (2002) (“Culpable negligence has been defined as ‘[n]egligent conduct that, while not intentional, involves a disregard of the consequences likely to result from one’s actions.’ Black’s Law Dictionary 1056 (7th ed. 1999). Culpable negligence has also been defined as ‘something more than negligence’ involving ‘an indifference to, or disregard of, consequences.’ 65 C.J.S. *Negligence* §19 (2000)”). Our supreme court has made clear that it is imperative to construe “culpable negligence” broadly so as to ensure that defendants will not be unfairly deprived of the opportunity to have their constitutional claims adjudicated. *Rissley*, 206 Ill. 2d at 421. As the supreme court in *Rissley* stated:

“We continue to adhere to the definition enunciated in *Boclair*. This definition more than adequately ensures that the portion of the statute permitting a petitioner to file an untimely petition so long as he ‘alleges facts showing that the delay was not due to his culpable negligence’ [citation] does not stand as empty rhetoric. Rather, the definition

gives heft to the exception contained in section 122-1, an exception which this court has historically viewed as the ‘ special “safety valve” ’ in the Act. *People v. Bates*, 124 Ill. 2d 81, 88 (1988); see also *People v. Wright*, 189 Ill. 2d 1, 8 (1999). Finally, this definition comports with our long-held view that the Act in general must be ‘liberally construed to afford a convicted person an opportunity to present questions of deprivation of constitutional rights.’ *People v. Correa*, 108 Ill. 2d 541, 546 (1985). See also *People v. Kitchen*, 189 Ill. 2d 424, 435 (1999), citing *People v. Pier*, 51 Ill. 2d 96, 98 (1972) (acknowledging that ‘the Act should not be so strictly construed that a fair hearing be denied and the purpose of the Act, *i.e.*, the vindication of constitutional rights, be defeated’).” *Rissley*, 206 Ill 2d at 420-21, 795 N.E.2d at 183-84.

As the law stands today, a defendant asserting that he was not culpably negligent for the tardiness of his petition must support his assertion with allegations of specific facts showing why his tardiness should be excused. *People v. Walker*, 331 Ill. App. 3d 335, 339-40 (2002) (noting that the relevant inquiry becomes whether, after accepting all well-pleaded factual allegations of defendant’s petition regarding culpable negligence as true, those assertions are sufficient as a matter of law to demonstrate an absence of culpable negligence on defendant’s part); see also *People v. Van Hee*, 305 Ill. App. 3d 333, 336 (1999) (“[t]o show the absence of culpable negligence, a petitioner must allege facts justifying the delay”); *People v. McClain*, 292 Ill. App. 3d 185, 188 (1997) (to warrant an evidentiary hearing on the issue of whether the delay in filing postconviction relief was occasioned by culpable negligence, the defendant “must make a ‘substantial showing’ by alleging facts demonstrating that to be the case”), *overruled in part and on different grounds* by *People v. Woods*, 193 Ill. 2d 483 (2000).

In the present case, the defendant contends that the circuit court erred in dismissing his petition on timeliness grounds for two reasons. First, the defendant contends that he made a substantial showing that his late filing of the petition was not due to his culpable negligence, since he included an affidavit, explaining, in detail, that he failed to file the petition in a timely manner only because he reasonably believed that trial counsel would file the petition on his behalf. The defendant therefore contends that taking the well-pleaded allegations in his petition and accompanying affidavit as true, the circuit court could not have properly found that he was culpably negligent.

Moreover, the defendant argues that the circuit court's decision to disregard the statements in his affidavit amounted to an improper credibility determination, which he contends should not be made prior to an evidentiary hearing. Citing to our appellate court decisions in *People v. Wheeler*, 392 Ill. App. 3d 303 (2009), and *People v. Marino*, 397 Ill. App. 3d 1030 (2010), the defendant contends that, if we do not find that he alleged sufficient facts to establish that he was not culpably negligent, we should remand for an evidentiary hearing on this issue.

The State, on the other hand, contends the circuit court properly dismissed the petition as untimely. The State asserts that the circuit court did not make any credibility determinations but, rather, found, as a matter of law, that the defendant failed to plead sufficient facts so as to establish that he was not culpably negligent in filing his petition. In that respect, the State argues that the defendant was charged with knowledge of the law<sup>4</sup> and that his alleged reliance on the

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<sup>4</sup>See *Bocclair*, 202 Ill. 2d at 104, quoting *Atkins v. Parker*, 472 U.S. 115 (1985) (noting that ignorance of the law will not legally excuse an untimely petition since “[a]ll citizens are

assurances of trial counsel was “completely refuted by the record.” The State points out that the defendant admits in his affidavit that he never received any responses to the letters he sent to his trial counsel inquiring as to the status of his postconviction petition. The State asserts that this fact, in and of itself, in the very least, establishes that the defendant was on notice that counsel was not representing him in this matter. The State further points out that the defendant nowhere alleges, when exactly, he became aware that counsel was not going to file the petition on his behalf, but merely states that after not receiving responses from his attorney regarding his petition, the defendant “finally \*\*\* decided to write the petition on [his] own.”

In addition, the State points to two documents in the common-law record, which it contends support the notion that the defendant knew that counsel was not representing him in the postconviction matter, and that he therefore should have timely filed his own petition: (1) the defendant’s *pro se* motion to correct his *mittimus* filed on November 10, 2004, less than four months after his guilty plea, and (2) trial counsel’s petition to the circuit court to obtain fees arising from his representation of the defendant, filed on April 28, 2005, nine months after the defendant’s guilty plea, which did not request any fees for postconviction work. For the reasons that follow, we disagree with the State.

Although we certainly agree with the State that questions of culpable negligence may be decided at the second stage of postconviction proceedings (see *Perkins*, 229 Ill. 2d 34, 48 (2007)), several of our recent appellate court decisions have held that where the determination of culpable negligence rests on credibility determinations, the better method is to remand for an

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presumptively charged with knowledge of the law.”)

evidentiary hearing to permit both parties to present evidence on the issue. See *People v. Marino*, 397 Ill. App. 3d 1030 (2010); see also *People v. Wheeler*, 392 Ill. App. 3d 303 (2009), *People v. Bumpers*, 397 Ill. App. 3d 611 (2008), *vacated*, 229 Ill. 2d 632 (2008) (supervisory order).

In *People v. Wheeler*, 392 Ill. App. 3d 303, 311 (2009), this appellate court discussed the ability of a defendant to produce evidence concerning a lack of culpable negligence in the late discovery and filing of a claim, clarifying that such matters are best addressed at the third stage of postconviction proceedings. In *Wheeler*, the defendant filed a late postconviction petition and presented affidavits stating that he discovered his claim late because of transfers between prisons, a period of isolated confinement, and a period of prison lockdown that severely limited his access to legal materials. He also averred that the clerk of the trial court did not respond to his request for a transcript of a trial court proceeding. *Wheeler*, 392 Ill. App. 3d at 304-05. The trial court granted the petition at the second stage of the postconviction proceedings, and the State appealed. *Wheeler*, 392 Ill. App. 3d at 305.

The appellate court reversed, observing that “when a trial court determines whether or not a defendant was culpably negligent, the trial court must assess the defendant's credibility.” *Wheeler*, 392 Ill. App. 3d at 310, citing *Boclair*, 202 Ill.2d at 102. As a result, the court held that “[s]uch an assessment is not intended for a second-stage dismissal hearing, where a trial court is foreclosed from fact-finding and all well-pleaded facts are taken as true.” *Wheeler*, 392 Ill. App. 3d at 310, citing *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). Instead, the court found that “[a]ssessments of credibility are better suited to a third-stage evidentiary hearing \*\*\*\*” where both parties are given an opportunity to present evidence on the issue. *Wheeler*, 392 Ill. App. 3d at 310.

Following *Wheeler*, in *Marino*, the appellate court again addressed whether the late discovery of claim would necessarily preclude a defendant from filing a petition after the statutory deadline. *Marino*, 397 Ill. App. 3d at 1031-36. There, the defendant was charged and pleaded guilty to two counts of armed robbery and was sentenced to two concurrent 20 year prison terms. *Marino*, 397 Ill. App. 3d at 1031. Eight years after his plea of guilty, the defendant filed a *pro se* postconviction petition alleging that under the one-act one-crime rule he should have been sentenced for only one offense of armed robbery. *Marino*, 397 Ill. App. 3d at 1031. After the petition proceeded to the second stage and counsel was appointed to help the defendant, counsel amended the defendant's petition to allege that trial counsel was ineffective for, among other things, failing to object to the factual basis at the plea hearing and to raise the one-act one-crime issue. *Marino*, 397 Ill. App. 3d at 1031. The defendant alleged that he discovered the one-act, one crime issue for the first time while he was researching the denial of his request for mandamus. *Marino*, 397 Ill. App. 3d at 1031. He immediately retained counsel to assist him with filing a postconviction petition but became dissatisfied with the delays in the case. *Marino*, 397 Ill. App. 3d at 1031. He therefore filed his own *pro se* petition, outside of the statutory period. *Marino*, 397 Ill. App. 3d at 1031. The defendant alleged that he was not culpably negligent because he acted promptly after discovering his claim. *Marino*, 397 Ill. App. 3d at 1031.

In support of these allegations, the defendant submitted an affidavit stating that he entered the plea in reliance on the advice of counsel and that he was represented by counsel in his appeals. *Marino*, 397 Ill. App. 3d at 1032. He pointed to his lack of legal education and lack of legal resources available to him, stating that his research opportunities were limited to one hour

per week. *Marino*, 397 Ill. App. 3d at 1032. He described the circumstances of how he came across the one-act one-crime doctrine seven years after his plea of guilty, and his difficulties in obtaining materials relevant to his case. *Marino*, 397 Ill. App. 3d at 1032.

The State moved to dismiss the petition on the basis of untimeliness. *Marino*, 397 Ill. App. 3d at 1032. The trial court found that the petition was not timely filed and that the defendant was culpably negligent because generally lay persons are charged with knowledge of the law, and the late discovery of a claim, does not excuse a late filing unless there was a change of law preventing the defendant from discovering the claim. *Marino*, 397 Ill. App. 3d at 1032. *Marino*, 397 Ill. App. 3d at 1034. The appellate court disagreed and reversed the case for an evidentiary hearing. *Marino*, 397 Ill. App. 3d at 1036. In doing so, the court noted that it would treat “ignorance of the law” as only one factor to be considered in determining whether a defendant was culpably negligent, and that the relevant inquiry required analyzing the totality of circumstances surrounding the discovery of a claim and the actions taken by the defendant to preserve it. *Marino*, 397 Ill. App. 3d at 1036. Relying on *Wheeler* the court further held that since the defendant had alleged facts to support his contention that his late filing should be excused because he was not culpably negligent and because these allegations were backed up with an affidavit, the question of culpable negligence rested on credibility determinations, and the proceedings should “have moved to the third stage to allow both parties to present evidence on the matter.” *Marino*, 397 Ill. App. 3d at 1036.

See also *Bumpers*, 379 Ill. App.3d at 619 (while recognizing that generally, citizens are presumptively charged with knowledge of the law, holding that taking, as it was required, the defendant’s allegations, supported by affidavits as true, that the defendant did not know of the

legal issue at the time of his plea, as well as that once he became aware of the claim he actively pursued it, it was compelled to find that the defendant was not culpably negligent); see also *People v. Bumpers*, 229 Ill.2d 632 (2008) (denying the State's petition for leave to appeal, but in a supervisory order directing the appellate court to vacate its order and remand to the trial court *for an evidentiary hearing* to allow the State an opportunity to rebut the defendant's allegations denying culpable negligence).

Although we recognize that the issue here is not whether the defendant discovered his claim within the statutory period and whether he then acted promptly so as to excuse his untimely filing of the postconviction petition, the resolution of whether he was culpably negligent just as well centers on credibility determinations. For example, we must weigh the defendant's credibility in determining: (1) whether counsel, in fact, told him that he would file a petition on his behalf; (2) whether, if counsel did inform the defendant that he would file the petition on his behalf, it was nonetheless reasonable for the defendant to rely on counsel to do so, even after he did not hear from counsel in the next several years; (3) when, in fact the defendant discovered that counsel would not file the petition on his behalf and how long after that he waited to file his petition on his own. As shall be demonstrated in detail below, our review of the record reveals that, taking as we must, the well-pleaded allegations in the defendant's petition and affidavit as true, there appears to be, in the very least, a question of fact as to whether the defendant could have reasonably relied on counsel to file his petition, and whether when he finally discovered that counsel would not file the petition, he acted promptly in filing it himself. See *Marino*, 397 Ill. App. 3d 1030; see also *Wheeler*, 392 Ill. App. 3d 303, *Bumpers*, 397 Ill. App. 3d 611, *vacated*, 229 Ill. 2d 632 (supervisory order).

The record below reveals that the defendant's petition alleged that the reason for the defendant's four-month delay in filing his initial *pro se* postconviction petition was the defendant's reliance on the assurances of his trial counsel that he would file the postconviction petition on the defendant's behalf. In his sworn affidavit, attached to the postconviction petition, the defendant explained that after he pleaded guilty, he informed his counsel that he wanted to withdraw his guilty pleas, and that counsel informed him that to do so he could file a postconviction petition on the defendant's behalf. The defendant further averred that he directed his counsel to file the postconviction petition on his behalf, and that over the next few years, he continued to write letters to his attorney to inquire about the status of his petition. The defendant further attested that when he failed to hear from his attorney, he finally wrote and filed his own *pro se* postconviction petition. In addition, in his affidavit, the defendant specifically averred that he relied on his trial counsel to prepare his postconviction petition, and that had he known that counsel was not going to prepare it, he would have filed the petition on his own much earlier and within the required time period.

We find the decisions in *Rissley*, 206 Ill. 2d at 417-18 and *People v. Hobson*, 386 Ill. App. 3d 221 (2008) instructive. In *Rissley*, the defendant filed a *pro se* postconviction petition six days after the statutory period expired. *Rissley*, 206 Ill. 2d at 417-18. The defendant's amended petition alleged in part that the attorney who represented him on his direct appeal told him that he had three years from the date of sentencing to file a postconviction petition. *Rissley*, 206 Ill. 2d at 417-18. In an attached affidavit, the defendant's direct appeal counsel confirmed

that he gave the defendant this advice.<sup>5</sup> *Rissley*, 206 Ill. 2d at 418. The supreme court found that defendant had no reason to question the advice he received from his direct appeal counsel and that based on this advice he would have reasonably believed that he had timely filed his petition. *Rissley*, 206 Ill. 2d at 421. Applying the “culpable negligence” standard articulated in *Boclair*, the supreme court found that defendant’s conduct could not fairly be viewed as blameable and did not evidence an indifference to the likely consequences. *Rissley*, 206 Ill. 2d at 421. Accordingly, the supreme court held that defendant had established that the delay in filing his petition was not due to his culpable negligence. *Rissley*, 206 Ill. 2d at 421.

Similarly, in *Hobson*, in his initial sworn and verified *pro se* postconviction petition, defendant asserted that his petition was tardily filed because of the “ineffectiveness [of counsel at] both the appellate and trial court levels” because “the defendant was either told incorrectly that he had (3) three years to file a petition for Post-Conviction [relief], and (or) misinterpreted the statute, in his layman effort to understand such complexities.” *Hobson*, 386 Ill. App. 3d at 234. In his supplemental postconviction petition, defendant’s appointed counsel clarified this assertion, contending that defendant was not culpably negligent for tardily filing his petition, because he was “misadvised by his appellate lawyer as to the correct date for filing the petition,” and filed the petition within the amount of time he was mistakenly advised would be appropriate, but outside the three years statute of limitations. *Hobson*, 386 Ill. App. 3d at 234. The appellate

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<sup>5</sup>In *Rissley*, it appears that in advising his client, the attorney may have relied on a prior version of section 122-1(c), effective until July 1, 1995, under which the defendant would indeed have had three years from sentencing to file his petition. See *Rissley*, 206 Ill. 2d at 414-15.

court, applying *Rissley*, found that since the reason for the delay in filing the postconviction petition was defendant's reliance on incorrect advice from appellate counsel the delay was not due to defendant's culpable negligence, and therefore would be excused. *Hobson*, 386 Ill. App. 3d at 234.

In the present case, just as in *Rissley* and *Hobson*, the defendant alleged that the reason for his delay in filing his petition was that he relied on advice made to him by his counsel, albeit trial, rather than appellate counsel. More importantly, the advice here appears to have been more egregious than in *Rissley* and *Hobson*, as it did not merely include assurances regarding the incorrect filing deadline. Rather, here the defendant alleged that after counsel told him that he could file a postconviction petition on the defendant's behalf, the defendant instructed him to do so, and then relied on counsel to file the petition. Accordingly, applying *Rissley* and *Hobson* to the facts of this case, and taking, as we must, the well-pleaded allegations in the defendant's petition, supported by his affidavit, as true (see *People v. Lander*, 215 Ill. 2d 577, 586 (2005), citing *People v. Childress*, 191 Ill. 2d 168, 174 (2000) (Emphasis added.) ("When reviewing a motion to dismiss at the second stage of the proceedings, we accept as true all factual allegations that are not *positively* rebutted by the record"); see *People v. Molina*, 379 Ill. App. 3d 91, 93-94 (2008) ("As the State in this case moved for dismissal, the trial court was required to rule on the legal sufficiency of the allegations contained in the petition, taking all well-pleaded facts as true"); see also *Bocclair*, 202 Ill. 2d at 108; see also *Rissley*, 206 Ill. 2d at 421)), we are at a loss to understand how, without making a determination as to the credibility of the defendant's affidavit, the circuit court could have found that the defendant failed to sufficiently allege facts showing that the delay was not due to his own culpable negligence, *i.e.*, an indifference or disregard to the

consequences likely to result from his actions.

Contrary to the State's assertion, nothing in the record positively rebuts the defendant's allegations. See *Lander*, 215 Ill. 2d at 586, citing *Childress*, 191 Ill. 2d at 174 (Emphasis added.) (“When reviewing a motion to dismiss at the second stage of the proceedings, we accept as true all factual allegations that are not *positively* rebutted by the record”).

Although it is true that the defendant here did not attach an affidavit from his counsel admitting that he agreed to represent the defendant in his postconviction petition, our appellate courts have repeatedly found that the failure of the defendant to attach such an affidavit by his attorney is not a prerequisite for establishing a lack of culpable negligence. See *Hobson*, 386 Ill. App. 3d at 234 (holding that the determinating factor “was not the presence of [a] corroborating affidavit [by the defendant's attorney], but rather the reasonableness of the defendant's reliance on the advice of counsel”); see also *People v. Stoecker*, 384 Ill. App. 3d 289, 293 (2008) (recognizing that “the absence of an affidavit [by counsel] supporting the defendant's contentions [that counsel was retained and promised to timely file the defendant's postconviction petition] does not require the automatic dismissal of the defendant's petition” on timeliness grounds); see also *People v. Usher*, 397 Ill. App. 3d 276, 283 (2009) (holding that lack of affidavit was not fatal where court could easily infer that only affidavit defendant could provide, other than his own, was that of his attorney); see also *People v. Smith*, 268 Ill. App. 3d 574, 581 (1994) (absence of affidavits is not necessarily fatal to postconviction relief if allegations stand uncontradicted and are clearly supported by the record); *People v. McGinnis*, 51 Ill. App. 3d 273, 275 (1977) (noting that the absence of affidavits is not necessarily fatal to a petition for postconviction relief if the petitioner's allegations stand uncontradicted or are clearly supported

by the record); *People v. Robinson*, 5 Ill. App. 3d 1065 (1972) (abstract of op.) (absence of affidavits and other supporting documents can be excused where the violation of constitutional rights is raised by petitioner's sworn statements and is borne out by the record).

In addition, despite the State's assertion to the contrary, counsel's failure to respond to the defendant's inquiries as to the status of his petition, does not affirmatively establish that the defendant was placed on notice that counsel was not representing him in the matter. The defendant's affidavit specifically alleged that when the defendant initially told his counsel that he wanted to withdraw his guilty pleas, counsel told him that filing the postconviction petition "could take some time." The defendant's affidavit, therefore, taken as true, explains why, in light of counsel's statement that the petition could "take some time," the defendant would have waited for counsel to file his petition, even though he did not receive responses to his inquiries. Moreover, the fact that counsel did not respond to the defendant's inquiries could equally well have led the defendant to conclude that counsel was representing him in the matter, since counsel did not write back to the defendant to inform him that he was no longer representing him.

We also find little merit in the State's contention that counsel's petition for fees and the defendant's *pro se* motion to correct his *mittimus*, belie the defendant's allegation that he relied on counsel to file his postconviction petition. First, as to defense counsel's petition for fees, which the State claims should have put the defendant on notice that counsel was not representing him in postconviction matters because it contained no request for fees for postconviction work, there is absolutely nothing in the record to even suggest that the defendant was aware of this request, which was made by counsel directly to the circuit court. Since counsel was appointed by the circuit court, there would be no reason for the court to send a copy of the fees request to the

defendant for approval.

Similarly, with respect to the defendant's *pro se* motion to correct his *mittimus*, we reject the State's assertion that it affirmatively establishes that the defendant did not expect counsel to represent him in postconviction matters. The defendant's affidavit nowhere averred that he instructed counsel to represent him in *all* matters following his conviction, nor that he relied on counsel to do so. Rather, the defendant swore only that he told his counsel that he wanted him to file a postconviction petition to withdraw his guilty pleas, and that he subsequently relied on counsel to do so. Moreover, a review of the record reveals that the *pro se* motion to correct the *mittimus* is a standard form (with a notation at the bottom indicating that the form was "Revised in 2002"), so that there is no reason to conclude that defendant would have needed counsel's assistance in filing it.

Since we are unable to find anything in the record that would affirmatively belie the defendant's allegations, we hold that the defendant should have been afforded an opportunity to address the credibility of his well-pleaded allegations at an evidentiary hearing. See *Marino*, 397 Ill. App. 3d 1030; see also *Wheeler*, 392 Ill. App. 3d 303, *Bumpers*, 397 Ill. App. 3d 611, *vacated*, 229 Ill. 2d 632 (supervisory order).

In coming to this conclusion, we have reviewed the cases of *Lander*, 215 Ill. 2d at 586-87, *Stoecker* 384 Ill. App. 3d at 292-93, and *People v. Hampton*, 349 Ill. App. 3d 824, 825-29 (2004), cited to by the State and find them inapposite.

In *Lander*, our supreme court found that the defendant failed to establish that he was not culpably negligent in untimely filing his petition, because after receiving advice regarding the

deadline for filing his petition from “jailhouse lawyers” and a law clerk, the defendant then also sought the advice of a librarian. *Lander*, 215 Ill. 2d at 588. The court found that this fact belied the defendant’s contention that he had relied on advice from the jailhouse lawyers and the law clerk in filing his petition, as it affirmatively established that the defendant did not trust or rely on their advice, but rather sought additional advice prior to filing his claim. *Lander*, 215 Ill. 2d at 588. As already elaborated above, unlike in *Lander*, here there is nothing in the record that would indicate that the defendant should not have reasonably relied on counsel to file the petition after he instructed counsel to do so.

*Stoecker* and *Hampton* are similarly distinguishable. Unlike here, where the defendant filed his petition only four months after the statutory deadline, in *Stoecker* and *Hampton*, the defendants filed their petitions five years late. *Stoecker*, 384 Ill. App. 3d at 293; see also *Hampton*, 349 Ill. App. 3d at 826. Although the length of the delay, alone, does not establish culpable negligence, “it stands to reason that a defendant who waits nearly five years beyond the statutory deadline to file a petition has more explaining to do than one who is late by less than a week.” *People v. Hernandez*, 249 Ill. App. 3d 824, 828 (2004).

What’s more, in *Stoecker*, the defendant filed his petition three years after his counsel affirmatively told him that he would not represent him. *Stoecker*, 384 Ill. App. 3d at 293. In *Hampton*, the crux of the defendant’s argument was that the attorney never gave him any advice regarding the deadline for postconviction petitions. *Hampton*, 249 Ill. App. 3d at 828-29. Unlike in those two cases, here, there is nothing in the record that affirmatively establishes that counsel either failed to advise the defendant, or told the defendant that he would not represent him. On the contrary, as already shown above, the defendant alleged that after counsel indicated

to him that in order to challenge his guilty plea he could file a postconviction petition on the defendant's behalf, the defendant instructed him to do so. The defendant further alleged that thereafter he continued to inquire as to the status of his petition, relying on counsel to file it on his behalf. The defendant specifically alleged that had he known that counsel would not file the petition, he would have done it himself, much earlier. Taking, as we must, the defendant's allegations as true, we cannot determine without an evidentiary hearing whether the defendant could have reasonably relied on counsel to file the petition on his behalf, nor whether, when the defendant finally discovered that counsel would not file the petition, he acted promptly in filing it himself. See *Marino*, 397 Ill. App. 3d 1030; see also *Wheeler*, 392 Ill. App. 3d 303, *Bumpers*, 397 Ill. App. 3d 611, *vacated*, 229 Ill. 2d 632 (supervisory order).

For the aforementioned reasons we find the circuit court erred in dismissing the petition for untimeliness without an evidentiary hearing. We therefore reverse and remand for further proceedings.

Reversed and remanded.

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