SIXTH DIVISION
March 4, 2011

No. 1-09-0728

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).

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. 91 CR 20433
	)	91 CR 20439
	)	
ROBERT WEST,	)	The Honorables
	)	Bertina E. Lampkin and
	)	John J. Moran, Jr.,
Defendant-Appellant.	)	Judges Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Justices McBride and R.E. Gordon concurred in the judgment.

O R D E R

Held: Where the trial court never received defendant's alleged motion to reconsider, and the record failed to show that it was filed, the trial court's judgment is affirmed.

Defendant Robert West appeals from a February 2009 order of the circuit court denying his motion entitled "Request for Ruling on Pending Motion to Reconsider Denial of Leave to File Post-Conviction Petition" (request for ruling), referring to defendant's third successive postconviction petition, which the trial court denied in September 2008. On appeal, defendant contends that the trial court improperly denied him leave to file a successive postconviction

petition without considering his alleged motion to reconsider. We affirm.

In 1993, defendant was convicted of armed robbery in case number 91 CR 20439 and sentenced to a prison term of 20 years, to run consecutively with his 12-year prison term for a second 1993 armed robbery conviction in case number 91 CR 20433. These sentences also ran consecutively to a 1992 robbery conviction imposed in case number 91 CR 20440. Only the 1993 convictions are before this court on appeal. *People v. West*, Nos. 1-93-2892 (1996); 1-93-3965 (1995) (unpublished orders under Supreme Court Rule 23).

In 1996, defendant filed two unsuccessful postconviction petitions under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)), the first in July 1996, which the trial court summarily dismissed. We affirmed the dismissal in *People v. West*, No. 1-96-3408 (1996) (unpublished order under Supreme Court Rule 23). In October 1996, defendant *pro se* filed a second postconviction petition. The trial court also summarily dismissed this petition, and defendant did not appeal.

In October 2005, defendant filed a *habeas corpus* petition. The trial court denied the petition and we affirmed that judgment. *People v. West*, No. 1-06-0832 (2007) (unpublished order under Supreme Court Rule 23).

On July 9, 2008, defendant filed a motion for leave to file a successive petition, along with his third successive *pro se* petition, alleging ineffective assistance of trial counsel for failing to request a fitness hearing, and ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness on direct appeal.

On September 8, 2008, the trial court denied defendant leave to file his third successive petition. In doing so, the court found that defendant failed to show cause for not raising the claims earlier. The court also found that defendant failed to show prejudice because he never supplied the trial court with evidence of his mental history, nor did he raise a *bona fide* doubt of his mental fitness.

On January 28, 2009, defendant mailed a motion entitled "Request for Judicial Notice and for Final Appealable Order," alleging that his motion to reconsider the denial of his motion for leave to file a successive petition was ignored. This motion was stamped "Received" by the court on February 4, 2009. Attached as an exhibit was a notice of filing of a motion for reconsideration, as well as the motion. The notice of filing shows that defendant mailed the motion for reconsideration on October 7, 2008. But, both the notice of filing and the motion itself are stamped "Received" on February 4, 2009. The motion specifically asked the trial court to reconsider and vacate its order denying defendant's motion for leave to file a successive petition for postconviction relief. Attached to the motion is an affidavit by Michael Gilyard, which attests that Gilyard prepared defendant's successive petition. The back of Gilyard's affidavit is stamped "Received" on October 14, 2008, and "Filed" on October 15, 2008.

The record also contains defendant's motion entitled "Request for Ruling" which is not file stamped, although the notice of filing shows that the motion was mailed on December 20, 2008. In this motion, defendant submits that he was unable to file a notice of appeal from the September 8, 2008, judgment because his motion to reconsider, which tolled the time for taking an appeal in this matter, was still pending before the court. Defendant requested that the trial court enter a judgment on his pending motion for reconsideration.

On February 4, 2009, the trial court entered an order denying defendant's request for ruling. The trial court stated that it never received a motion to reconsider and there is no record of the receipt of such motion in the court file. The court further explained that even if the court were in receipt of a motion to reconsider the denial of defendant's third successive postconviction petition, the motion would be denied. The court stated that defendant failed to satisfy the cause and prejudice test and had ample time to allege the claims contained in his third successive petition in an earlier filing. Also, defendant's claim of a recent diagnosis of a mental illness had no bearing on his fitness before and during his trial and guilty pleas. The trial court found that

the order dismissing his third successive postconviction petition would stand. Defendant filed a notice of appeal from the February 4, 2009, judgment on March 3, 2009.

Defendant contends on appeal that the trial court improperly denied him leave to file a successive postconviction petition without first considering his motion to reconsider, thereby denying him due process and a fair hearing. As relief, defendant requests that we reverse the trial court's order and remand for further proceedings.

As a threshold matter, the State asserts that this court does not have jurisdiction because defendant failed to file a timely notice of appeal from the September 2008 order or from the February 2009 order.

The only notice of appeal filed by defendant expressly references the order of February 4, 2009, and bears two file stamps by the circuit court. One stamp dated March 10, 2009, states "Received" and one stamp dated March 11, 2009, states "Filed."

To perfect an appeal, a notice of appeal must be filed within 30 days from the entry of the judgment on appeal. Ill. S. Ct. R. 606(b) (eff. Sept. 1, 2006). A notice of appeal is considered to be filed on the date it was actually received by the circuit court. Ill. S. Ct. R. 373 (eff. Feb. 1, 1994). Where a notice of appeal is received after the due date, the mailbox rule provides that the time of mailing will be deemed the time of filing. Ill. S. Ct. R. 373 (eff. Feb. 1, 1994); *People v. Blanchette*, 182 Ill. App. 3d 396, 399 (1989).

Here, defendant's notice of appeal from the February 4, 2009, order would be considered timely under the mailbox rule. Defendant accompanied his notice of appeal with a notarized "Notice of Filing," stating that he filed the notice of appeal by placing it in the mail on March 3, 2009. This was within the 30-day deadline. Notably, defendant's notice of filing also bears the identical two file stamps from the circuit court (March 10 "Received" and March 11 "Filed") as his notice of appeal.

Having found that defendant's notice of appeal was timely filed, we may consider the

February 4, 2009, order. In that order, the trial court specifically found that it had never received defendant's purported motion to reconsider the September 2008 court order denying defendant leave to file his third successive postconviction petition. This finding is supported by the record and defendant has not established otherwise.

For a motion to be considered filed by the circuit court, the document must pass into the exclusive custody and control of the clerk to be made part of the court records. *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1027, 911 N.E.2d 541 (2009); citing *Cruz v. Columubs-Cuneo-Cabrini Medical Center*, 194 Ill. App. 3d 1037, 1041, 551 N.E.2d 1345 (1990). "The uniform practice in the trial court has been to require actual receipt by the circuit court, as evidenced by the file stamp, before a paper is considered filed." *Knapp*, 392 Ill. App. 3d at 1027, quoting *Wilkens v. Dellenback*, 149 Ill. App. 3d 549, 553, 500 N.E.2d 692 (1986). A document not properly a part of the trial court record may not be considered by a court of review. *People v. Hermann*, 150 Ill. App. 3d 224, 227, 501 N.E.2d 842 (1986).

Regarding defendant's alleged motion to reconsider, the court stated in its February 2009 order that it "never received such motion and there is no record of the receipt of such motion in the clerk's office nor is there such motion in the court file." The record fails to show that the motion was filed. The half-sheets are devoid of reference to such a motion, and, while the motion is present in the record as defendant contends, it is only present as an exhibit to his "Request for Judicial Notice and for Final Appealable Order." Also, this exhibit is stamped as received on February 4, 2009, when the court ruled on defendant's request for ruling.

We reject defendant's argument that his motion to reconsider was filed because his notice of mailing shows that he mailed the motion on October 7, 2008, and because the back of an affidavit attached to his motion to reconsider is stamped "Received" on October 14, 2008, and "Filed" on October 15, 2008. But, as stated above, the motion itself was stamped "Received" when the court ruled on his request for ruling, so it was not a proper filing where it never passed

into the exclusive custody and control of the clerk before February 4, 2009. *Knapp*, 392 Ill. App. 3d at 1027.

Finally, the trial court ruled that even

> "if the court was in receipt of a motion to reconsider the denial of petitioner's third successive post-conviction petition, the motion would be denied. Petitioner failed to satisfy the cause and prejudice test set forth by the legislature for successive post-conviction petitions. As noted, petitioner's *** third successive post-conviction petition was his sixth attempt in seeking collateral review of his convictions and sentences. Petitioner had ample time to allege the claims contained in his third successive petition in an earlier filing."

In light of this record, we affirm the February 4, 2009, judgment of the trial court. Affirmed.