

No. 1-09-3183

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).

SIXTH DIVISION
MARCH 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.)	No. 02 CR 8460
)	
MARLON McCRAY,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice R.E. Gordon concurred
in the judgment.

O R D E R

Held: Circuit court's order assessing defendant costs and fees of \$105 for filing frivolous post-conviction petition affirmed.

Defendant Marlon McCray¹ appeals from an order of the circuit court of Cook County assessing him costs and fees of \$105

¹ Defendant's name also appears in the record as Marlin McCray.

for filing a frivolous petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). He contends that the statute authorizing the assessment of those costs and fees (735 ILCS 5/22-105 (West 2008)) violates the due process and equal protection clauses of the Illinois and federal constitutions.

The record shows that defendant was found guilty of first degree murder after a jury trial, then sentenced to 60 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. McCray*, No. 1-06-1762 (2008) (unpublished order under Supreme Court Rule 23).

On July 28, 2009, defendant filed a *pro se* petition for post-conviction relief alleging ineffective assistance of appellate counsel, prosecutorial misconduct, and ineffective assistance of trial counsel. On October 9, 2009, the post-conviction court summarily dismissed that petition as frivolous and patently without merit. The court also assessed costs and fees of \$105 for the frivolous filing pursuant to 735 ILCS 5/22-105.

In this appeal, defendant has abandoned his substantive claims and solely contests the order assessing him costs and fees for filing a frivolous petition as a prisoner under section 22-105. Our review of the constitutionality of a statute is *de novo*. *People v. Carpenter*, 228 Ill. 2d 250, 267 (2008).

Defendant specifically contends that section 22-105 violates the due process clauses of the United States and Illinois constitutions because it "uniquely burdens" indigent prisoners for exercising a state-granted post-conviction remedy, and deprives them of meaningful access to the courts.

Although this argument has been considered and repeatedly rejected by this court (see *e.g.*, *People v. Jarrett*, 399 Ill. App. 3d 715, 729 (2010); *People v. Smith*, 383 Ill. App. 3d 1078, 1095-96 (2008); *People v. Carter*, 377 Ill. App. 3d 91, 104-06 (2007); *People v. Hunter*, 376 Ill. App. 3d 639, 647-48 (2007); *People v. Gale*, 376 Ill. App. 3d 344, 363 (2007)), defendant maintains that these cases were wrongly decided. We disagree.

The purpose of section 22-105 is to decrease the number of frivolous post-conviction petitions filed by prisoners. *People v. Conick*, 232 Ill. 2d 132, 141 (2008). The section applies to any prisoner who files a frivolous petition, regardless of his or her financial status. *Carter*, 377 Ill. App. 3d at 101; *Gale*, 376 Ill. App. 3d at 361. Costs are only assessed after the filing is found to be frivolous, and thus no financial consideration is interposed between a prisoner and the courts. *Hunter*, 376 Ill. App. 3d at 646-47. In addition, the statute specifically provides that no prisoner is prohibited from filing a petition based on an inability to pay court costs (735 ILCS 5/22-105(a)). *Carter*, 377 Ill. App. 3d at 102; *Gale*, 376 Ill. App. 3d at 361.

We have thus found that section 22-105 does not violate due process, and we continue to do so here.

Defendant also claims that section 22-105 violates the equal protection clauses of the United States and Illinois constitutions because it applies only to prisoners in custody, and not to those on probation or mandatory supervised release. This court has previously found that section 22-105 does not involve a suspect classification or a fundamental right, and thus rational basis review should apply (*Carter*, 377 Ill. App. 3d at 106; *Hunter*, 376 Ill. App. 3d at 647; *Gale*, 376 Ill. App. 3d at 362-63), as opposed to the strict scrutiny standard maintained by defendant.

In applying such review to the same equal protection argument advanced by defendant in this case, we have found that distinguishing between prisoners in section 22-105 is reasonable considering the legislature's concern with the amount of post-conviction petitions that may be filed, and the fact that prisoners tend to file more petitions for post-conviction relief and, consequently, more frivolous petitions as well. *Smith*, 383 Ill. App. 3d at 1096; *Carter*, 377 Ill. App. 3d at 105-06; *Hunter*, 376 Ill. App. 3d at 648; *Gale*, 376 Ill. App. 3d at 362.

Defendant takes issue with these holdings, citing *Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966), where the Supreme Court held that a statute violated the equal protection clause by

assessing the cost of transcripts in an unsuccessful appeal only to prisoners, and noted that there was no legislative history that identified the purpose of the statute. This case is unlike *Rinaldi*, however, because it involves the assessment of fees and costs for filing frivolous petitions, and the legislative history clearly indicates that the statute was meant to deter such filings, which impede access to the courts by those with meritorious claims. *Jarrett*, 399 Ill. App. 3d at 729. Since *Rinaldi* is not factually analogous to this case, we find that it has no bearing on our prior holdings (*Jarrett*, 399 Ill. App. 3d at 729), and conclude that section 22-105 does not violate equal protection.

Accordingly, we affirm the order of the circuit court of Cook County assessing defendant \$105 in costs and fees for a frivolous filing.

Affirmed.