

No. 1-09-0942

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(3)(1).

Third Division
May 4, 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. 94 CR 29200
)
HAROLD SHIELDS,) Honorable
) Henry R. Simmons, Jr.,
Defendant-Appellant.) Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Steele concurred in the judgment.

ORDER

Held: Defendant failed to allege facts which show a lack of culpable negligence that would justify his noncompliance with the statute of limitations. Therefore, the trial court's dismissal of his petition was not manifestly erroneous, and we affirm the decision of the trial court.

Harold Shields appeals from the order dismissing his postconviction petition. Shields contends that he was not culpably negligent in filing his untimely postconviction petition, therefore,

the merits of the petition should be considered. He contends that his petition established that his 33 year sentence was unconstitutionally disparate from codefendant Howard Copeland's 25 year sentence. We find that Shields' postconviction petition was properly dismissed because he failed to sustain his burden of showing a lack of culpable negligence when he filed his untimely petition. Therefore, we affirm the decision of the trial court.

BACKGROUND

On May 28, 1997, Shields pled guilty to two counts of first degree murder and four counts of attempted first degree murder. He was sentenced to an aggregate prison term of 33 years. He did not file a direct appeal. Copeland, his codefendant, pled not guilty, was tried and found guilty by a jury of one count of first degree murder and four counts of attempted first degree murder. Copeland was sentenced to 25 years in prison. John Boyd, another codefendant, also pled guilty and was sentenced to 38 years in prison.

On January 31, 2002, Shields filed a *pro se* motion to reconsider his sentence. There is no order in the record which indicates that the trial court ruled on this motion.

On April 30, 2003, Shields filed a *pro se* postconviction petition. The trial court summarily dismissed that petition as frivolous and patently without merit. The appellate court reversed and remanded and held that Shields presented the gist of a constitutional claim: whether his 33-year sentence was unconstitutionally disparate to codefendant Copeland's 25-year sentence. *People v. Shields*, No. 1-03-1965 (February 10, 2005) (unpublished order under Supreme Court Rule 23). The appellate court expressed no opinion as to whether the claim would ultimately succeed.

On remand, Shields was appointed an attorney. On January 10, 2008, he filed an amended postconviction petition and a 651(c) certificate, requesting that the court either reduce his sentence or grant him a resentencing hearing. The record indicates that on March 26, 2008, Shields and his sister, Terra Jude, filed affidavits in support of Shields' amended postconviction petition. In the affidavits, they aver that Shields' postconviction petition was untimely because he did not learn of the disparity in his sentence until January of 2002. On August 7, 2008, the State filed a motion to dismiss Shields' postconviction petition. The State argued that Shields' petition should be dismissed because it was untimely filed and Shields failed to establish that the late filing was not due to his culpable negligence. The State also argued that Shields failed to establish that his sentence was unconstitutionally disparate to that of Copeland, his codefendant.

The trial court held a hearing on the State's motion to dismiss, made factual findings and granted the motion. The trial court stated, "I agree that the petitioner is unable to meet it's (sic) burden of establishing a lack of culpable negligence on his own part for the extraordinarily late filing of the petition." The court also stated that Shields was aware of Copeland's 1997 jury trial because he "was brought in as a witness." Therefore, since 1997, Shields was "aware one of two things [had] occurred; Mr. Copeland has either been found not guilty and/or that Mr. Copeland was found guilty by a jury and that obviously would have ultimately been sentenced." The court noted that Shields was not provided with access to the internet, but reasoned that "[i]t just is impossible for me to accept that he could not have done something in making a very, very simple request to learn what the outcome of Mr. Copeland's trial was. And to only wait until he is told this, according to the affidavit from his sister, and then waiting another year before he filed his post conviction petition

does not relieve him from his burden.” The court also found that Shields failed to establish that his sentence was unconstitutionally disparate to that of Copeland. Therefore, Shields appeals from the trial court’s order dismissing his postconviction petition.

ANALYSIS

On appeal, Shields argues that the trial court erred when it dismissed his petition. The Post-Conviction Hearing Act (Act) enables imprisoned individuals to collaterally attack a conviction or sentence based on constitutional grounds. 725 ILCS 5/122-1, *et seq.* (West 2002). Under the Act, a postconviction proceeding not involving the death penalty, contains three stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether “the petition is frivolous or is patently without merit” i.e., the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12; 725 ILCS 5/122-2.1(a)(2) (West 2002).

At the second stage, counsel may be appointed to represent the defendant and the State may file a motion to dismiss the petition. *People v. Harris*, 224 Ill 2d 115, 126 (2007), citing *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001); 725 ILCS 5/122-5 (West 2002). During the second stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *Harris*, 224 Ill. 2d at 126. The trial court may dismiss the petition as untimely at the second stage if (1) the petition fails to contain allegations of a lack of culpable negligence, and (2) the State moves to dismiss on this ground. *People v. Wheeler*, 392 Ill. App. 3d 303, 308-09 (2009), *appeal denied* 233 Ill. 2d 595 (2009), citing *People v. Perkins*, 229 Ill. 2d 34, 43 (2007).

The phrase “culpable negligence” contemplates something greater than ordinary negligence and is akin to recklessness. *People v. Ramirez*, 361 Ill. App. 3d 450, 452 (2005), citing *People v. Rissley*, 206 Ill. 2d 403, 420 (2003), quoting *People v. Boclair*, 202 Ill. 2d 89, 106-08 (2002). A trial court's findings of fact regarding whether a petition's untimeliness was due to culpable negligence will not be reversed unless manifestly erroneous (*Ramirez*, 361 Ill. App. 3d at 452), but the trial court's ultimate conclusion as to whether the established facts demonstrate culpable negligence is reviewed *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182 (2005).

A petition is advanced to the third stage if a substantial showing of a constitutional violation is set forth, and the circuit court conducts an evidentiary hearing. *Edwards*, 197 Ill. 2d at 245-46; *Gaultney*, 174 Ill. 2d at 418; 725 ILCS 5/122-6 (West 2002). The circuit court did not reach the third stage in this case.

On remand, Shields’ postconviction petition was at the second stage. As such, we must first determine whether Shields’ petition was untimely filed. The applicable statute of limitations for a postconviction petition is the one in effect when the defendant filed the petition. *People v. Harris*, 224 Ill. 2d at 125 n. 1. The Act's statute of limitations is an affirmative defense and not a jurisdictional bar, therefore, it can be raised, waived, or forfeited by the State. *People v. Stoecker*, 384 Ill. App. 3d 289, 291 (2008).

In this case, Shields’ postconviction petition was filed on April 30, 2003. According to the Act, “[n]o proceedings under this Article shall be commenced more 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 2002). The date of conviction is calculated as the

day of final judgment including the sentence. *People v. Woods*, 193 Ill. 2d 483, 485 (2000).

The record establishes that Shields pled guilty and was sentenced on May 28, 1997. He did not file a direct appeal. Pursuant to the Act, Shields had three years, or until May 28, 2000, to file a timely postconviction petition. 725 ILCS 5/122-1(c) (West 2002). Shields concedes, that his initial petition was filed on April 30, 2003, almost *six years after* the final judgment and sentence. Therefore, Shields' petition was untimely and warranted dismissal unless he alleged facts showing that the delay in filing was not due to his culpable negligence. *People v. Jones*, 191 Ill. 2d 194, 197 (2000); 725 ILCS 5/122-1(c) (West 2002).

Next, we must determine whether the trial court's finding that Shields' untimeliness was due to his own culpable negligence was manifestly erroneous. *Ramirez*, 361 Ill. App. 3d at 452. Shields argues that although his petition was untimely, the exception to the Act's limitations period should apply because he was not culpably negligent for failing to file his *pro se* petition. Shields maintains that his affidavit and the affidavit of his sister, which were filed on March 26, 2008, as supplements to his January 10, 2008, amended postconviction petition, supported his contention that he was not culpably negligent. Shields averred in his affidavit that he did not become aware of his constitutional claim until January of 2002, when his sister informed him that Copeland, his codefendant, had received a sentence eight years shorter than his. He then filed a motion to reconsider his sentence on January 31, 2002. When the court did not rule on his motion to reconsider, he filed his untimely postconviction petition on April 30, 2003, almost six years after his sentence. The Act is clear that if the petition is filed later than three years after the date of conviction, as Shields did in this case, Shields has the burden of alleging facts showing a lack of

culpable negligence, and it is the defendant's obligation to file a timely postconviction petition. *People v. Stoecker*, 384 Ill. App. 3d at 292 (defendant did not show a lack of culpable negligence when he filed his petition seven years after he was sentenced where he claimed that his attorney failed to file the petition timely), citing *People v. Lander*, 215 Ill. 2d 577, 587-588 (2005) (defendant's reliance on information concerning the time requirements for filing a postconviction petition that was obtained from jailhouse lawyers, a prison law clerk, and a prison librarian, who had no proven specialized knowledge of postconviction matters, was culpably negligent). A lack of culpable negligence is a difficult standard for a petitioner to overcome. *People v. Turner*, 337 Ill. App. 3d 80, 86 (2003), citing *People v. Burris*, 315 Ill. App. 3d 615, 617 (2000); see also *People v. Montgomery*, 45 Ill. 2d 94, 96 (1970) (petitioner culpably negligent even where court found that his psychiatric reports "generally indicate a condition of mental disturbance").

Here, the trial court found that Shields was "extraordinarily late" in filing his petition. Although Shields explains that he was not aware that Copeland's sentence was eight years shorter than his, he fails to allege any facts which explain the steps he took to determine the outcome of Copeland's trial prior to filing his January 31, 2002, motion to reconsider his sentence or his April 30, 2003, postconviction petition.

The trial court noted that Shields waited another 13 months after he found out about Copeland's sentence to file his petition. His only explanation for his delay is that he had improperly filed a motion to reconsider on January 31, 2002, and was waiting for the court to rule on the motion to reconsider his sentence. We note that Shields' January 31, 2002, motion to reconsider was

1-09-0942

untimely because Rule 604(d) required the motion to be filed 30 days after Shields' May 23, 1997, judgment and sentence were imposed by the court. See *People v. Flowers*, 208 Ill. 2d 291, 307 (2003). Shields' decision to file his motion to reconsider five years late and his decision to wait for the court to rule on his untimely motion are not excuses for filing his postconviction petition almost six years after the trial court's judgment and sentence. Therefore, we hold that the trial court's finding that Shields' extraordinarily late filing of his postconviction petition was due to his own culpable negligence was not manifestly erroneous. *Ramirez*, 361 Ill. App. 3d at 452.

We find that *People v. Gunartt*, 327 Ill. App. 3d 550 (2002), a case cited by the State, has facts similar to the facts in the instant case. In *Gunartt*, the defendant claimed that he was not culpably negligent for filing an untimely petition because his attorney was negligent for failing to discover two witnesses who provided affidavits, and for not conducting a reasonable investigation into defendant's mental history to be used at sentencing. *Gunartt*, 327 Ill. App. 3d at 552. The *Gunartt* court explained that the defendant could not "merely make vague or conclusory assertions, but must 'show clearly through factual allegations that he previously made diligent attempts to uncover matters he now purports entitle him to judicial relief or otherwise demonstrate in significant detail how he could not have obtained such information before the limitations period expired.' " *Gunartt*, 327 Ill. App. 3d at 552. The *Gunartt* court held that defendant "did not allege sufficient facts in his petition or his response to the State's motion to dismiss which show a lack of culpable negligence to justify the late filing." *Gunartt*, 327 Ill. App. 3d at 552.

Like the defendant in *Gunartt*, Shields never alleged any facts concerning the late filing in his amended postconviction petition, but he supplemented the petition with his affidavit which states

1-09-0942

that “prior to [January of 2002] he had no knowledge as to the sentence my co-defendant received.” Shields provides no facts which establish that he made a diligent attempt to determine his codefendant’s sentence prior to the date he filed his petition. Instead, Shields argues on appeal that he was not culpably negligent “because he did not discover the basis for his sentencing claim before May 2000.” These conclusory assertions are not facts that show a lack of culpable negligence. Shields’ failure to provide an explanation for the late filing is evidence of a lack of culpable negligence because it shows an indifference to the consequences of filing an untimely petition. *Boclair*, 202 Ill. 2d at 106.

Finally, Shields’ relies on *People v. Boclair*, 202 Ill. 2d 89, 94 (2002), where the supreme court held that the circuit court could not summarily dismiss a defendant's postconviction petition at the first stage of postconviction proceedings. *Boclair*, 202 Ill. 2d at 94. In this case, the trial court dismissed Shields’ complaint as untimely at the second stage of the proceedings. *Wheeler*, 392 Ill. App. 3d at 308. Therefore, because *Boclair* involves a first and not a second stage postconviction proceeding, Shields’ reliance on *Boclair* is misplaced.

CONCLUSION

Shields failed to allege facts which show a lack of culpable negligence that would justify his noncompliance with the limitations period in the Act. We find the trial court’s dismissal of Shields’ petition was not manifestly erroneous. Accordingly, we affirm the decision of the trial court.

Affirmed.