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No. 3-09-0758

Order filed March 29, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Twelfth Judicial Circuit Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	No. 90-CF-1940
MICHAEL SMITH a/k/a LARRY BROWN,	)	The Honorable Robert Livas,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Presiding Justice Carter and Justice Schmidt concurred in the judgment.

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**ORDER**

*Held:* Where defendant filed petition for postconviction relief 13 months after learning of possible grounds for relief, and failed to amend petition to reflect that ground for relief for almost six years, without explanation for either delay, the trial court's order dismissing petition as untimely was affirmed.

In October 1997 defendant, Michael Smith, a/k/a Larry Brown, entered a fully negotiated guilty plea to unlawful possession with intent to deliver in exchange for a term of 24 years' imprisonment to run concurrently with his term of natural life imprisonment for a separate

conviction. In December 2006, in response to defendant's petition for postconviction relief, the circuit court of Will County entered an order *nunc pro tunc* to correct defendant's sentence in this case to run concurrently with his sentence of natural life imprisonment. In August 2007, defendant filed a *pro se* amended petition for postconviction relief on the grounds the State failed to disclose potentially exculpatory evidence prior to his entering his guilty plea in this case. The court dismissed the amended petition as untimely. For the following reasons, we affirm.

### **BACKGROUND**

In October 1997, seven years after the State charged defendant with unlawful possession of more than 900 grams of cocaine with the intent to deliver, defendant entered a fully negotiated guilty plea to the Class 1 felony of unlawful possession with intent to deliver. The delay between the charge and guilty plea resulted from the State's prosecution of defendant for conspiracy to commit and the attempted murder of codefendant Stephanie Powe. Defendant's alleged motive was that Powe intended to testify against him in the prosecution for unlawful possession. The trial court convicted defendant of the conspiracy and attempted murder and sentenced him to natural life imprisonment. The trial court sentenced defendant to 24 years' imprisonment for unlawful possession pursuant to the plea agreement but mistakenly ordered the 24-year sentence to run consecutive to the sentence of natural life.

In September 2002 defendant filed a motion for an order *nunc pro tunc* that his 24-year sentence is concurrent with his sentence of natural life. The circuit court recharacterized defendant's motion as a petition for postconviction relief and appointed counsel. In December 2006, the court granted appointed counsel's motion to correct the sentencing order *nunc pro tunc* to sentence defendant to 24 years' imprisonment to run concurrently with his sentence of natural

life imprisonment. The court continued the hearing on the postconviction petition with leave to appointed counsel to file a motion to withdraw.

In August 2007, defendant filed a *pro se* amended postconviction petition claiming that the State failed to provide impeachment materials against Powe, whom defendant claimed was the sole witness against him in the prosecution for unlawful possession. Defendant alleged that the State obtained evidence he could have used to impeach Powe from interviews an investigator conducted of Powe in connection with a separate case. Powe allegedly spoke about defendant's case during those interviews. Defendant's appointed counsel filed a motion for leave to subpoena the investigator on the grounds defendant had reason to believe that the investigator had exculpatory evidence in the State's case against defendant for unlawful possession.

Defendant's appointed counsel interviewed the investigator and learned that she did interview Powe, Powe did mention defendant during those interviews, and that the investigator reduced all of her conversations with Powe to reports she provided to the Cook County State's Attorney's Office. The investigator had no independent recollection of what Powe said. Defense counsel moved for a discovery order to permit him to view the reports to determine whether they contained exculpatory evidence and whether the State had violated defendant's rights by failing to turn over that evidence before defendant pleaded guilty. The trial court denied the request for a discovery order.

In March 2010, defense counsel amended defendant's *pro se* amended postconviction petition to seek relief on the grounds the State violated defendant's constitutional rights by failing to disclose the content of the investigator's interviews of Powe because those interviews contained exculpatory evidence in defendant's case, by failing to disclose any deals between the

State and Powe in exchange for her testimony against defendant in the prosecution for unlawful possession, that defendant's guilty plea was involuntary because he was told a conviction would result in a consecutive sentence when in fact it would be concurrent, and on the grounds the trial court violated defendant's due process rights in denying postconviction counsel's motion for a discovery order to obtain reports of interviews of Powe which might contain exculpatory evidence in this case. The amended petition alleged, for the first time, that defendant did not learn of the State's interviews of Powe until 2001.

The State filed a motion to dismiss on the grounds the August 2007 petition for postconviction relief was untimely, defendant was not entitled to the evidence in question prior to pleading guilty, defendant failed to provide any evidence that the State withheld the material, and that defendant's guilty plea was not involuntary. The State also argued that defendant's discovery request is not cognizable in postconviction proceedings.

The circuit court held a hearing on the State's motion to dismiss. Following the hearing, the court found that the August 2007 petition was untimely and that the allegations did not support finding a lack of culpable negligence in the late filing.

This appeal followed.

### **ANALYSIS**

Defendant concedes that he must demonstrate that the delay in filing his postconviction petition was not due to his culpable negligence because the time for filing a petition for postconviction relief expired in October 2000. Defendant offers no argument that the petition demonstrates a lack of culpable negligence in failing to raise in a timely manner the claims that the State failed to disclose any deals between it and Powe in exchange for her testimony or that

his guilty plea was involuntary because he was told his sentence would be consecutive. We conclude that these contentions have been waived on appeal as a result of defendant's failure to support them with coherent argument and authority. *People v. Fikara*, 345 Ill. App. 3d 144, 163 (2003) (citing 177 Ill.2d R. 341(e)(7)).

Defendant argues that the late filing of his claim that the State failed to provide potentially exculpatory evidence prior to his guilty plea was not due to his culpable negligence because he filed the petition 13 months after learning of the interviews between the State and Powe. Defendant asserts that when he learned of the interviews he discovered that they may have generated exculpatory evidence in the State's case against him for unlawful possession.

The State responds the trial court correctly dismissed defendant's petition as untimely. The State argues that no reason appears in the petition for the delay between August 2001 when defendant learned of the statements about him in the interviews, and his filing of the September 2002 motion, other than defendant's own culpable negligence. But the State also notes that defendant actually delayed in raising this particular ground for relief until August 2007, without explanation. Regardless, the State argues the delay of more than a year, without facts to explain or excuse the delay, is sufficient to find that defendant was culpably negligent in failing to raise the claim sooner after learning of the potential basis for relief. In fact, the State argues, defendant has never asserted, either in his pleadings or on appeal, any facts to establish that the delay was not due to his culpable negligence.

“[T]he trial court's ultimate conclusion as to whether the established facts demonstrate culpable negligence is reviewed *de novo*. [Citation.]” *People v. Gerow*, 388 Ill. App. 3d 524, 527

(2009).

The PostConviction Hearing Act (Act) (725 ILCS 5/122-1 through 5/122-8 (West 2008)) contemplates the filing of only one petition for relief (725 ILCS 5/122-1(f) (West 2008)), and provides that “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 2009)). The court has held that Supreme Court Rule 651(c) (134 Ill. 2d R. 651(c)) requires counsel appointed under the Act to “make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's contentions.” *People v. Perkins*, 229 Ill. 2d 34, 42 (2008). If the initial petition was untimely, appointed counsel’s duty “includes alleging any facts that may establish a lack of culpable negligence in the late filing.” *Perkins*, 229 Ill. 2d at 43. Moreover, as in this case where the court has recharacterized defendant’s motion to amend his sentence *nunc pro tunc* as a petition for postconviction relief, the court is “required to ‘provide the litigant an opportunity to amend it so that it contains all the claims appropriate to a postconviction petition that the litigant believes he or she has.’ [Citation.]” *People v. Swamynathan*, 236 Ill. 2d 103, 112 (2010).

The law is clear that, “[t]he burden rests with the defendant to prove a lack of culpable negligence.” *People v. Stoecker*, 384 Ill. App.3d 289, 292 (2008). The petition must allege facts and circumstances to show that the delay was not due to defendant’s culpable negligence. Under the plain language of the Act, all of the allegations in a petition filed after the three year limitations period has expired are judged under the culpable negligence standard. *People v. Lander*, 215 Ill. 2d 577, 586 (2005) (“Postconviction proceedings may not be commenced outside the time limitation period in the Act unless the defendant alleges sufficient facts to show

the delay in filing was not due to the defendant's culpable negligence”).

For guidance on the question at issue in this appeal, we turn to the meaning of “culpable negligence” in the context of the Act.

“The Illinois Supreme Court has recognized that culpable negligence contemplates more than ordinary negligence.

[Citation.] Rather, culpable negligence, while not intentional, involves a disregard of the consequences likely to flow from one's actions. [Citation.]” *Stoecker*, 384 Ill. App. 3d at 292.

Our supreme court has “examined the meaning of the term ‘culpable negligence’ in the Act. [Citation.]” *Lander*, 215 Ill. 2 at 586. The court “reviewed definitions of this term from several sources. These definitions generally showed culpable negligence entails blameable neglect involving ‘a disregard of the consequences likely to result from one's actions.’” [Citations.]” *Lander*, 215 Ill. 2d at 586. We also note that, although defense counsel is obligated to amend the *pro se* petition to adequately present the petitioner's contentions, counsel is not required to “comb the trial record to find new issues the petitioner did not raise in his *pro se* postconviction petition” (*People v. Moore*, 338 Ill. App. 3d 11, 18 (2003)), or to “search outside the record for evidence that might support claims contained in a petition” (*People v. Vasquez*, 356 Ill. App. 3d 420, 425 (2005)). See also *People v. Ramey*, 393 Ill. App. 3d 661, 667 (2009).

Under the foregoing authorities, we find that to determine whether a late filing is not due to culpable negligence, the question is whether the defendant acted promptly upon the discovery of his claim to bring it to the court’s attention. See *People v. Marino*, 397 Ill. App. 3d 1030, 1034 (2010) (“to determine the issue, we look at both the circumstances surrounding the

discovery of the claim and how promptly the defendant took action after that discovery”). This court has recognized that “the length of the delay, alone, does not establish culpable negligence \*\*\*.” *Stoecker*, 384 Ill. App. 3d at 292. The court has found that

“a relatively short amount of time, such as the 2-, 11-, and 16-month delays in *People v. Lee*, 326 Ill. App. 3d 882 (2001), *People v. Hernandez*, 296 Ill. App. 3d 349 (1998), and *People v. Wilburn*, 338 Ill. App.3d 1075 (2003), respectively, can lead to the conclusion that a defendant was not culpably negligent in filing his postconviction petition.” *People v. Ramirez*, 361 Ill. App. 3d 450, 454 (2005).

In *Lee*, 326 Ill. App. 3d at 886, the defendant filed a successive postconviction petition within two months of a court decision which the defendant argued rendered his extended term sentence unconstitutional. Similarly, in *Hernandez*, 296 Ill. App. 3d at 352, the allegations showed that the defendant sought relief based on a new supreme court decision by contacting his attorney within nine months of its issuance, and that counsel filed the petition within two months thereafter. In *Wilburn*, 338 Ill. App. 3d at 1078, the delay was 16 months, but the court simply relied on *Lee* and *Hernandez*, without further discussion of the allegations in the defendant’s petition, to hold that the “defendant was not culpably negligent in filing his petition \*\*\* after his claim was established.”

Here, the delay in filing the earliest motion for postconviction relief was 13 months. Defendant has not alleged what, if anything, he did with regard to his claims in that time. The court has held that the “defendant must allege facts that show the late filing is not due to his

culpable negligence. [Citation.] If the defendant fails to properly allege such facts and the State moves to dismiss the postconviction petition at the second stage, the trial court is directed to dismiss the petition as untimely.” *Gerow*, 388 Ill. App. 3d at 527. Moreover, defendant failed to raise the basis for relief at issue in this appeal for almost 6 years. Despite having received appointed counsel much sooner, “a defendant is not entitled to the advocacy of postconviction counsel for purposes of ‘exploration, investigation[,] and formulation of potential claims.’ [Citation.]” *People v. Jennings*, 345 Ill. App. 3d 265, 274 (2003) (quoting *People v. Davis*, 156 Ill. 2d 149, 163 (1993)).

Defendant failed to bring his knowledge of facts based on his conversation with the investigator, which may lead to a claim of a constitutional violation, to anyone’s attention, with no explanation for the delay. See *Ramirez*, 361 Ill. App. 3d at 454 (“[T]he \*\*\* delay, for which defendant offers no explanation, must be attributed to defendant's culpable negligence”). The court has refused to find a lack of culpable negligence based on even “ambiguous excuse[s], without verification or \*\*\* factual support” (*Gerow*, 388 Ill. App. 3d at 531), such as “‘hindrances presented by \*\*\* incarceration’ and \*\*\* delay in receiving required information’ ” (*Gerow*, 388 Ill. App. 3d at 531). In this case, defendant has not presented even a vague, unsupported, excuse for the delay. *Cf. Marino*, 397 Ill. App. 3d at 1036 (“Marino alleged facts to support his contention that his late filing should be excused because he was not culpably negligent. He then backed up his allegations with an affidavit”).

We find that defendant failed to act promptly to alert the court or court appointed counsel to the alleged violation of his rights, and that his inaction constitutes culpable negligence. In light of the burden on defendant to prove a lack of culpable negligence, and the lack of evidence

to meet that burden, we must hold that the trial court properly dismissed defendant's postconviction petition as untimely.

Defendant's amended petition also alleged that the trial court violated his due process rights in the postconviction proceedings by denying his discovery request.

“A trial court has inherent discretionary authority to order discovery in post-conviction proceedings. [Citations.] \*\*\* [T]he trial court should allow discovery only if the defendant has shown ‘good cause,’ considering the issues presented in the petition, the scope of the requested discovery, the length of time between the conviction and the post-conviction proceeding, the burden of discovery on the State and on any witnesses, and the availability of the evidence through other sources. [Citation.] We will reverse a trial court's denial of a post-conviction discovery request only for an abuse of discretion. [Citation.] A trial court does not abuse its discretion in denying a discovery request which ranges beyond the limited scope of a post-conviction proceeding and amounts to a ‘fishing expedition.’ [Citation.]” *People v. Johnson*, 205 Ill. 2d 381, 408 (2002).

The scope of the requested discovery extended to documentation of interviews of Powe to determine whether the State failed to disclose exculpatory material. In light of our holding that the trial court properly dismissed defendant's petition for postconviction relief on those grounds as untimely, we find that the trial court did not abuse its discretion in denying this discovery

request.

### **CONCLUSION**

The judgment of the circuit court of Will County is affirmed.

Affirmed.