2012 IL App (1st) 093218-U

SECOND DIVISION
JULY 31, 2012

No. 1-09-3218

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.	)	No. 99 CR 17370
	)	
EARL JOHNSON,	)	Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Quinn and Justice Connors concurred in the judgment.

ORDER

¶ *1* *Held*: Where dates of prison lockdown did not account for entire period during which the defendant's post-conviction petition was untimely, the defendant did not show the delay in filing the petition was not due to his own culpable negligence, and trial counsel did not render deficient representation on underlying claim; the circuit court's dismissal of the petition at the second stage of proceedings was affirmed.

¶ 2 The defendant Earl Johnson appeals the circuit court's dismissal of his amended petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2006)) without an evidentiary hearing. On appeal, the defendant contends the delay in filing his admittedly untimely initial *pro se* petition was not due to his own culpable negligence. He further

argues his amended petition makes a substantial showing of a constitutional violation based on the ineffectiveness of his trial counsel and therefore should proceed to the third stage of post-conviction review. We affirm.

¶ 3 Following a bench trial in 2002, the defendant was convicted of two counts of first-degree murder and was sentenced to two consecutive terms of 22 years in prison. The evidence at trial established that on June 2, 1999, the defendant waited in a vehicle outside a bank in Worth, Illinois, while the defendant's co-offender attempted to withdraw funds from the bank using another person's credit card and identification.

¶ 4 Among the State's witnesses at trial was Worth police detective Martin Knolmayer, who left the bank and pursued the vehicle driven by the defendant. Two people died when the defendant's vehicle collided with another car at an intersection in Oak Lawn, Illinois. At trial, Detective Knolmayer described the defendant's driving maneuvers and the speed at which the defendant drove before the collision. Six additional witnesses testified about their observations of the defendant's driving and the collision.

¶ 5 On direct appeal, the defendant asserted his convictions should be reduced to reckless homicide because the State did not present sufficient evidence that he knew his acts created a strong probability of causing death or great bodily harm to the victims. This court rejected that contention and affirmed the defendant's convictions and sentence. *People v. Johnson*, No. 1-04-0127 (2005) (unpublished order under Supreme Court Rule 23), *appeal denied*, No. 103388 (Nov. 29, 2006).

¶ 6 On October 22, 2007, the defendant filed a *pro se* post-conviction petition asserting various claims of the ineffectiveness of his trial and appellate counsels. The defendant attached to the

petition his own affidavit in which he attested to the facts therein and acknowledged the petition's late filing. In December 2007, the circuit court appointed counsel to represent the defendant and docketed the petition for second-stage proceedings under the Act.

¶ 7 In January 2009, post-conviction counsel filed an amended petition asserting that the defendant's trial counsel was ineffective in failing to investigate testimony that Detective Knolmayer gave at a July 2000 deposition for a civil lawsuit arising from the events described above. The amended petition asserted that inconsistencies between the detective's deposition statements and his trial testimony cast doubt on the detective's credibility, and that counsel was ineffective in failing to investigate and cross-examine the detective and impeach his testimony. In a separate filing prepared by counsel, the defendant asserted the prison in which he was incarcerated was on "institutional lockdown" for 99 various days between December 2006 and July 2007, thus depriving him of the use of a law library or the prison mail system during that time. Attached to that filing were several exhibits, including a record of the prison lockdowns from 2004 to September 2007.

¶ 8 On April 24, 2009, the State moved to dismiss the defendant's amended petition as untimely and otherwise lacking in merit. A hearing was held on the motion, and on November 20, 2009, the circuit court dismissed the defendant's petition.

¶ 9 On appeal, we first consider whether the defendant's delay in filing was due to his culpable negligence. Our review of the dismissal of a post-conviction petition without an evidentiary hearing is *de novo*. See *People v. Lander*, 215 Ill. 2d 577, 586 (2005).

¶ 10 The defendant acknowledges his initial petition, which he submitted *pro se* on October 22,

2007, was untimely filed.[1] He argues, however, that the delay in filing his petition should be excused because it was not due to his own culpable negligence. Section 122-1(c) of the Act excuses a late filing on that basis. 725 ILCS 5/122-1(c) (West 2006). "Culpable negligence" has been defined as "blameable neglect involving 'a disregard of the consequences likely to result from one's actions.' " *People v. Boclair*, 202 Ill. 2d 89, 106 (2002) (quoting Black's Law Dictionary 1056 (7th ed. 1999)). A defendant who asserts he was not culpably negligent for the tardiness of his post-conviction petition must support his assertion with allegations of specific fact showing why his tardiness should be excused. *People v. Hobson*, 386 Ill. App. 3d 221, 233 (2008). The key inquiry is whether, accepting as true all well-pleaded factual allegations of the defendant's petition that pertain to culpable negligence, the assertions are sufficient as a matter of law to demonstrate an absence of culpable negligence on the defendant's part. *People v. Walker*, 331 Ill. App. 3d 335, 339-40 (2002).

¶ 11 Here, the defendant contends he lacked culpable negligence because he did not know until "late 2008" of the substance of the testimony given by Detective Knolmayer in his 2000 deposition. He argues that the detective's account would have established that the defendant did not lead police on a high-speed chase. The defendant further contends the extended lockdown periods at his prison prevented him from preparing a timely post-conviction petition.

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[1]Under the Act, the defendant was required to file his post-conviction claim within six months of the date for filing a *certiorari* petition in the United States Supreme Court. 725 ILCS 5/122-1(c) (West 2006). The Illinois Supreme Court denied leave to appeal on November 29, 2006. Because the defendant had 90 days from that date to file a petition for *certiorari* with the United States Supreme Court (though he elected not to do so), the defendant had a total of 6 months and 90 days from November 29, 2006, to file his post-conviction petition. See *People v. Wallace*, 406 Ill. App. 3d 172, 177-78 (2010). Therefore, the defendant's petition was due on August 27, 2007.

¶ 12 We first consider the defendant's explanation of his late filing. The defendant asserts he lacked "meaningful access" to the prison library and mail system for 99 days between December 2006 and July 2007. A prisoner's lack of access to legal materials because of segregation or a prison lockdown may result in a finding of a lack of culpable negligence, thus excusing a petition's late filing. *People v. Marino*, 397 Ill. App. 3d 1030, 1034 (2010).

¶ 13 Here, the seven-month period specified by the defendant encompasses approximately twice the period of time (99 days) that he contends the prison was on "institutional lockdown." Therefore, the defendant had ample access to the prison's facilities during the days it was not on lockdown and he could presumably leave his cell. See *Walker*, 331 Ill. App. 3d at 341-42. The lockdown periods do not demonstrate an absence of culpable negligence on the part of the defendant that would excuse the petition's untimely filing.

¶ 14 The scenario presented by the defendant is similar to the explanation rejected by this court in *People v. Mitchell*, 296 Ill. App. 3d 930 (1998). There, the defendant contended his post-conviction petition was unavoidably late because the prison in which he was detained was on lockdown for a total of 51 days between September 1994 and March 1995. *Id*. at 932. In holding that the defendant had not established the delay in filing his post-conviction claims was not due to his own culpable negligence, this court noted that the claimed period of the institution's lockdown did not encompass the entire period by which the defendant's petition was tardy. *Id.* at 933-34.

¶ 15 Even had the defendant in the instant case timely filed his post-conviction claim that his trial counsel was ineffective, that claim would not have been successful. At the second stage of a post-conviction proceeding, the defendant bears the burden of making a substantial showing of a

constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). The dismissal of a post-conviction petition at the second stage is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make such a showing. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998).

¶ 16 To support an assertion of the ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and, furthermore, that counsel's actions resulted in prejudice to the defendant such that, were it not for counsel's alleged error, the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984) (adopting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In the amended post-conviction petition, the defendant contended Detective Knolmayer made statements during his trial testimony that conflicted with portions of his deposition given in 2000. The defendant asserted his trial counsel was ineffective in failing "to properly investigate, cross-examine and present impeachment evidence."

¶ 17 The minor inconsistencies between the detective's deposition testimony and his statements at trial do not warrant a conclusion that counsel's representation was deficient. The defendant contends the deposition testimony supported a conclusion that he acted with the less culpable mental state of recklessness. When assessing the importance of the failure to impeach for purposes of a claim of ineffective assistance of counsel, the "value of the potentially impeaching material must be placed in perspective." *People v. Bailey*, 374 Ill. App. 3d 1008, 1021 (2007) (quoting *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989)). The defendant's amended petition compared four points of the detective's trial testimony about the defendant's actions during the police chase to the accounts of the

chase given by the detective in his deposition. Apart from Detective Knolmayer's testimony, six other witnesses described the defendant's driving and/or their observations of the collision. The overall testimony established that the defendant acted with the knowledge that his driving created a strong probability of death or great bodily harm, as required to prove first-degree murder under an intentional or knowing theory.

¶ 18 We hold that the defendant's allegations as to the prison lockdown schedule are insufficient to excuse the late filing of his post-conviction petition. Additionally, the petition's underlying claim as to the impeachment value of the deposition of Detective Knolmayer is without merit.

¶ 19 Accordingly, the judgment of the circuit court is affirmed.

¶ 20 Affirmed.